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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPORT

**ON PRIVATE MILITARY AND SECURITY FIRMS
AND EROSION OF THE STATE MONOPOLY
ON THE USE OF FORCE**

**Adopted by the Venice Commission
at its 79th Plenary Session
(Venice, 12-13 March 2009)**

on the basis of comments by

Mr Iain CAMERON (Member, Sweden)

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I. Introduction

1. At its 1048th meeting on 11-12 February 2009, the Committee of Ministers of the Council of Europe examined Recommendation 1858(2009) of the Parliamentary Assembly on "Private military and security firms and the erosion of the state monopoly on the use of force". On this occasion, the Ministers' Deputies agreed to transmit this recommendation to the Venice Commission for information and for it to be taken into account in its future work.

2. In view of the growing importance of the topic and following its earlier work on the democratic control of armed forces, the Venice Commission decided to prepare a report on the said Recommendation. This report mainly focuses on the legal implications of the various proposals made by the Parliamentary Assembly and may be helpful to the Committee of Ministers when preparing its reply to the Recommendation. Numerous references are made to the so-called "Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflicts", which can be downloaded from the internet.¹

3. Mr Iain Cameron acted as rapporteur on behalf of the Venice Commission on this matter.² The current report was adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009).

II. The General Approach of the Commission

4. The Commission, in line with its mandate, has focussed upon the legal aspects of the Parliamentary Assembly recommendation. The legal-technical aspects of the elaboration of a treaty however, inevitably also involve commenting on some aspects of the merits of the proposals made in the recommendation and their feasibility. The Commission uses the term Private Military and Security Companies (PMSCs) in this opinion. Attempts have been made in the past to distinguish Private Military Companies (PMC) from Private Security Companies (PSC). The distinction has some relevance for the issue of the existing system of national regulation as the majority of states already regulate the activities of security companies in their territories whereas no European state provides for general regulation of the activities of security/military companies in other states. However, it is not the "character" of the entity but the activities in which the entity engages which are important. Companies engaged in "military" activities may also be engaged in "security" activities. The Commission has already touched upon a number of the issues taken up by the Parliamentary Assembly in its recommendation in its reports on the Democratic Control over the Armed Forces³ and on Democratic oversight of the security services.⁴ The present report can usefully be read together with these earlier reports.

¹ The Montreux Document on "pertinent international legal obligations and good practice for states related to operations of private military and security companies during armed conflicts"
[http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20\(e\).pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20(e).pdf)

² The rapporteur was assisted by Mr Kaarlo Tuori, member of the Venice Commission in respect of Finland.

³ Report on the Democratic Control of the Armed Forces adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008), CDL-AD(2008)004).

⁴ Report on the democratic oversight of the security services adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), CDL-AD(2007)016.

III. The Need for International Regulation of PMSCs

5. The Parliamentary Assembly expresses the view that there is a strong need for improved regulation of PMSCs. States decide freely whether to ratify or not a new treaty, so it must be perceived as filling an important need, and doing so in an appropriate way. PMSCs engage in a wide variety of different services in a wide variety of different contexts.⁵ Many services provided by PMSCs involve day to day support of a state's own military forces serving abroad in providing food, transport, delivery of weapons and ammunition, training in use of sophisticated weapons systems etc. The bulk of the market for PMSCs is in North America and Europe, and the provision of such services are not usually politically controversial.⁶ However, controversy arises in different ways in a variety of different contexts. One of these is where PMSCs are used to replace more combat-oriented or security-enforcement functions which national armed forces perform in peace-enforcement operations abroad. Here, for several reasons, the risk of a lack of accountability is large, and the consequences of abuse of power are particularly severe (loss of life, major injury etc). Another is where multinational corporations operational in another state with "weak" state institutions, or the government of the state in question, contract with PMSCs for different functions which, in a state with "strong" institutions would be performed by the state itself. These may be protection/security functions, but also policy-making functions, where a part of security policy is outsourced, or basic administrative functions, such as the training of its police or armed forces.

6. Public international law is based on the principle of state sovereignty. But the reality is that "weak" states may have little control over all, or parts, of their territories, and the activities of multinational corporations within these territories. For example, a PMSC may make it easier for an unaccountable elite in a weak state to retain power. A PMSC can be employed to weaken or undermine a lawful government. A PMSC may make it easier for a multinational corporation to exploit the natural resources of a weak state.

7. European states regulate the activities of private security companies in their own territories (see below, paragraph 38), but not, generally speaking, the extraterritorial activities of PMSCs. If one takes the approach of recognising the fact that weak state X, for one or other reason, is unable to exercise an adequate level of supervision over the activities of a PMSC incorporated in a European state (Y), then the logical consequence of this, at least from the perspective of the Council of Europe, an organisation based on respect for human rights and the rule of law, is to insist that Y step into the regulation/enforcement gap and take over at least a degree of responsibility for the PMSC.

8. PMSCs are incorporated in one state, but are multinational enterprises in that they may draw their personnel from other states and act in other states. Where one state chooses to regulate their extraterritorial activities, there is an obvious risk that they will re-locate to a state where they are not regulated, or are less regulated. The logical consequence of this is to seek international regulation by means of a treaty, containing minimum common standards of regulation to be applied to PMSCs by the contracting states.

⁵ For background generally see e.g. Singer, P., *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press (2003), Holmqvist, C., *Private Security Companies, the case for regulation*, SIPRI policy paper 9, January 2005, Chesterman S. and Lehnardt, C. *From Mercenaries to Market. The Rise and Regulation of Private Military Companies*, Oxford UP (2007).

⁶ This is not to say that the private *security* industry is unproblematic. Far from it. The symbiosis between private policing and public policing on the one hand and between the private security industry and the insurance industry on the other undoubtedly gives rise to serious accountability issues, and must be taken into account in creating regulatory frameworks. See e.g. O'Reilly C. and Ellison G., *Eye Spy Private High: Re-Conceptualizing High Policing Theory*, 46 *Brit. J. Criminology* 641–660 (2006).

IV. Existing International Legal Regulation of PMSCs and relevant case law

9. The area where the Parliamentary Assembly expresses the desire for a new treaty is already partially regulated by treaties in the area of international humanitarian law, human rights, international criminal law and arms control. The majority of these treaties are of a global character. Otherwise, it is customary international law principles which regulate the responsibility of states for acts and omissions in breach of international law, and the attribution of responsibility for the acts of private actors. It is unnecessary to go into detail here. The Parliamentary Assembly refers in its recommendation to the Montreux document.⁷ This is an initiative of the Swiss government, which has brought together a group of states, NGOs and PMSCs, and produced a final document. The legal status of this at international law is, formally speaking, limited. It is a statement of state practice made by one state (Switzerland) which is supported by the other participating governments.

10. The first part of the Montreux document summarizes in a very useful manner the obligations which exist at the present time on three different groups of states: states which contract PMSCs, the “home” state of the PMSC and the territorial state where the PMSC is operating. These obligations are largely under international humanitarian law, international criminal law and human rights law. PMSCs thus do not operate in a legal vacuum.

11. As regards humanitarian law it can be said that where the threshold for an internal or international conflict is reached, the humanitarian law frameworks for these conflicts begin to apply. However, the security situation in which many PMSCs will be operational will not necessarily be sufficiently serious to be governed by humanitarian law.⁸ As regards human rights law, the extent of “home” state and “contracting” state obligations are not entirely clear. For European states, the extent of a state’s obligations for “extraterritorial” activities has been the object of case law from the European Court of Human Rights (ECtHR) and is still developing.⁹ The Court has stated that where activities are formally under the mandate of the UN Security Council, then the UN bears responsibility for these activities.¹⁰ The same will presumably apply to other international organisations. Under general international law, responsibility exists on the part of the contracting state where the PMSC is a *de facto* organ of the state, or where it exercises elements of governmental authority, or where it is acting on the instructions or under the control of the state, or where the PMSC exercises elements of governmental authority in the absence or default of the official authorities and finally where the PMSC conduct is acknowledged and adopted by a state as its own.¹¹ However, where these conditions are not fulfilled, a contracting state can argue that it has no responsibility for the

⁷ The Montreux Document on “pertinent international legal obligations and good practice for states related to operations of private military and security companies during armed conflicts”, [http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20\(e\).pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20(e).pdf).

⁸ See, e.g. Cameron, L., 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. Further material can be found at

http://www.icrc.org/web/eng/siteeng0.nsf/html/section_review_2006_863?opendocument.

⁹ As regards the situation where a party to the ECHR is the territorial state (A) and a PMSC from another European state is operational within a part of A’s territory not under A’s control see by analogy European Court of Human Rights, *Ilascu and others v. Moldova and Russia* judgment of 8 July 2004.

¹⁰ *Behrami and Behrami v. France*, and *Saramati v. France, Germany and Norway*, judgment of 2 May 2007.

¹¹ The position under the laws of state responsibility is usefully set out in Lehnardt, C. Private Military Companies and State Responsibility, in Chesterman S. and Lehnardt, op. cit. pp 139, 143.

activities of a PMSC.¹² As regards the ECHR, the ECtHR considers that a European state is responsible for the activities of its own agents¹³ – which could include its’ contracted PMSCs under certain circumstances – but is only responsible to take positive measures to control the actions of others – entities or individuals - in territory over which it has “full control”.¹⁴ As legal entities, PMSCs bear no direct responsibility under the ECHR, whether they act in European states or outside of these.

12. It is important to remember the variety of different situations where PMSCs can be active, and the degree of state control in practice applying in these, i.e., the control which is, and can be, exercised by the state which contracts with the PMSC (A), the territorial state (B) and the home state of the PMSC (C). For example, the government of B may have full control over all of its territory or in practice, no control over parts of its territory. It may be seeking to (re)assert control, or it may have abdicated it to A or to a multinational company which has contracted with the PMSC, or with the PMSC itself, in whole or in part. A and B might share control, in practice or on paper. A may have no physical control over parts of the territory, it may have a degree of control, or it may have “full” military control in the legal sense of bearing responsibility, but engaged in fighting an insurgency and so have only limited control in practice. B may have granted, more or less voluntarily, PMSCs full or partial immunity from the jurisdiction of its civil or criminal courts. State C may well have no or only limited diplomatic or other presence in B and so only limited possibilities of finding out what exactly is going on. It is easy to see the accountability problems which can arise, both as regards the variegated framework of applicable law, but above all as regards *enforcing* whatever legal obligations might exist.

V. Generally on the feasibility of a treaty and other ongoing regulatory work in the field

13. That an area is already partially regulated by global treaty obligations does not preclude a new regional treaty binding upon only upon European states, and involving more onerous, or progressive, obligations on these states. A new treaty cannot alter the obligations already undertaken by European states in other treaties. However, the existing network of international law obligations certainly adds to the complexity of the task of drafting a new treaty. The Montreux final document, summarizing the discussions between a relatively small group of states, also indicates how difficult it is to agree new common standards of regulation in the area: the best practices set out in part 2 are expressly stated not to be binding.

14. A Council of Europe treaty in this area could be opened for ratification by non-European states. The Parliamentary Assembly does not take a position on this issue in its recommendation. There are advantages and disadvantages to opening the treaty for ratification by non-European states. One the one hand, it would seem sensible to have as many states as possible bound by certain minimum standards in the field, both states using PMSCs and those where PMSCs are operational. The state which has taken the lead in using PMSCs is the United States. If a serious attempt is to be made to persuade the United States to accede to a future European treaty regulating PMSCs, close account must obviously be taken of United

¹² The position taken by the Montreux document (part 1, para. 7) is that mere contracting with a PMSC does not entail responsibility. However, this does not rule out a state having “due diligence” requirements in certain circumstances to ensure that the PMSC respects human rights. Cockayne J., *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 *Journal of Conflict & Security Law* 401 (2009).

¹³ European Court of Human Rights, *Öcalan v. Turkey* judgment [GC] of 12 May 2005.

¹⁴ European Court of Human Rights, *Issa v. Turkey* judgment of 6 November 2004. For a case in which state responsibility was found for permitting private persons to detain other individuals, see *Riera Blum v. Spain*, Judgment of 14 October 1999. The issue of privately run detention facilities is a large and important topic in its own right. For a summary of the criticism the Committee on the Prevention of Torture (CPT) has made in this area see Born and Caprini, op. cit.

States concerns, practice and experience in the field when drafting the treaty. However, if this involved having to jettison principles regarded as important by a majority of European states, then a choice must be made as to which option is better.

15. Another factor to be taken into account is the on-going work of the United Nations in the field. The UN Working Group on Mercenaries has not yet produced an official draft treaty. At the risk of some simplification, however, the general approach so far of the working group can be said to be much more negatively inclined to PMSCs than the Montreux document. Many African states in particular are, understandably, hostile to the idea of regulating and so legitimizing the activities of PMSCs. If the point of departure for drafting a European treaty is the Montreux document, then it is unlikely that the treaty will attract much in the way of ratifications from outside Europe. A European treaty may even be perceived as negatively, as undermining the work of the UN in the field.

16. On the other hand, it can be argued strongly that waiting for a global consensus to emerge in this area by itself is unrealistic. The Council of Europe has taken the lead before in regulating areas previously thought to be within the domain of national sovereignty, where the very idea of international regulation was thought to be too difficult or too controversial, the most obvious example being the European Convention on Human Rights.

17. However, for European states, the sub-regional – EU – dimension must also be taken into account. If the treaty contains obligations which are not in accordance with basic principles of EC law, or not compatible with the intentions of the EU CFSP, then it will not be possible, or it will, at least, be very much more difficult, for EU states to ratify the treaty. The EU is the largest aid donor in the world. It has staked out a major, and growing, role for itself in the field of development aid, reform of the security sector, strengthening of state institutions etc. A European treaty regulating PMSCs but without the participation of EU states is quite simply not meaningful.

18. At the present time, EC and EU law only partially regulates the area of private security/private military companies.¹⁵ The provision of private security in an EU state is a service, in principle within the internal market.¹⁶ Having said this, private security companies were excluded from the EU Directive for services in internal market. The provision of services outside of the EU by PMSCs registered in an EU state can, depending on the circumstances, fall partially within other EU regulatory regimes, e.g. the EU arms exports regime,¹⁷ dual use exports¹⁸ or arms brokering.¹⁹ When EU restrictive measures have been introduced against a state or territory, either autonomous EU sanctions, or EU implementation of UN Security

¹⁵ Krahmann, E. "Regulating Private Military Companies: What Role for the EU?" 26(1) Contemporary Security Policy, 103-125 (2005), Dekker G., The Regulatory context of private military and security services at the European Union level National Reports Series 04/09 <http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-04-09-eu.pdf>, Buzatu, A., European Practices of Regulation of PMSCs and Recommendations for Regulation of PMSCs through International Legal Instruments, DCAF, 2008.

¹⁶ *Commission v Spain*, Case C-114/97, judgment of 29 October 1998; *Commission v Belgium*, Case C-355/98, judgment of 9 March 2000; *Commission v Italy*, Case C-283/99, judgment of 31 May 2001; *Commission v Portugal*, case C-171/02, judgment of 29 April 2004; *Commission v Netherlands*, Case C-189/03, judgment of 5 May 2003; *Commission v Spain*, Case C-514/03, judgment of 26 January 2006; *Commission v Italy*, Case C-465/05, judgment of 13 December 2007. Cf Decker, 2009, p. 8.

¹⁷ Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment L 335/99 13.12.2008.

¹⁸ Council Regulation (EC) No 1334/2000 of 22 June 2000, setting up a Community regime for the control of exports of dual use items and technology. See generally Wetter, A., Enforcing European Union Law on Exports of Dual Use goods, SIPRI research report 24, Oxford UP, 2009.

¹⁹ Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering L 156/79 25.6.2003.

Council sanctions, PMSCs tend to be covered by the widely formulated restrictions or prohibitions on export of arms/training services.²⁰

19. Again, the mere existence of the EU, the existing only partial system of regulation and its stated intentions as a global actor does not mean that Council of Europe action regulating European states' obligations regarding PMSCs is blocked. Legislative action in the EU which is regarded as desirable even by a majority of EU states can be paralysed by disputes over competence: under which EU pillar should action be taken, which institution has competence to make proposals etc. Council of Europe action can function as a catalyst for those EU states, and EU institutions, wanting progressive action. A treaty emerging from the Council of Europe, or even a recommendation from the Council of Ministers, can encourage a creative dynamic and help break a legislative deadlock in the EU.

20. The Parliamentary Assembly suggests that such an instrument should, as a minimum, include a number of elements. The Commission shall deal with these in turn.

VI. Comments on Specific Elements of the Recommendation - Internal/external security and inherently governmental functions

21. The Parliamentary Assembly expresses the view that the instrument should contain a definition of those areas of internal and external security that must remain a sovereign function of the state and that are "inherently governmental" in character, a standardisation of the principles for the safeguard of the state monopoly on the use of force and a clear affirmation of the dividing line between internal and external security as established by law and the constitution.²¹

22. The issues which lie behind the first two of these points are well known, namely the lack of accountability caused by the use of private contractors in *inter alia* Iraq and Afghanistan to interrogate prisoners, in some cases, leading to the torture of these prisoners, and the alleged use of PMSCs in, *inter alia*, these states to engage in offensive armed (combat) capacities.

23. Some treaty obligations under humanitarian law are non-delegable,²² but beyond this, international law does not give any guidance here.

24. The first problem here is defining what is "inherently governmental". The phrase itself comes from the applicable US policy,²³ but obviously, even where such an express prohibition on delegation of governmental authority exists in law, this has not prevented severe accountability problems. Commentators have considered that the "inherently governmental" test has proven unhelpful in clarifying how to determine whether a particular governmental function is appropriate for outsourcing.²⁴ Everything comes down to who or what has the competence to interpret the phrase. Where a government body is understaffed, but has

²⁰ Krahman, op. cit. For the present list see Sanctions or restrictive measures in force (measures adopted in the framework of the CFSP) Latest update: 10 March 2009

http://ec.europa.eu/external_relations/cfsp/sanctions/measures.htm.

²¹ PACE Recommendation 1858 (2009) on Private military and security firms and erosion on the state monopoly on the use of force, §§ 13.1 – 13.3.

²² E.g. exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians Art. 39 Geneva Convention III and Art. 99 Geneva Convention IV respectively. Part 1, para. 2 of the Montreux document explicitly recognizes these non-delegable duties. See further, Cockayne op. cit.

²³ See, e.g. Chesterman, S. We Can't Spy if We Can't Buy, 19 EJIL 5 (2008).

²⁴ See, e.g. Chesterman, ibid. and Huskey K. A and Sullivan S. M., The American Way: Private Military Contractors & U.S. Law After 9/11 National Reports Series 02/08 <http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-02-08-usa.pdf>.

onerous responsibilities and where it has money to employ outside contractors then there is no conceptual limit to what it will want to contract out. But even where an attempt is made in good faith to identify a core meaning of “inherently governmental” problems arise. For example, is assisting in an interrogation as a translator a governmental function? What if the translator puts questions himself?

25. It is probably safe to say that there is universal agreement among European states that “combat” is an inherently governmental function. Indeed, this is the view even of US government officials.²⁵ However, what about giving security personnel armed with heavy small arms (e.g. machine-guns) patrol functions in relation to oil installations? Such patrol functions are likely to involve them not only in exchanges of fire with armed groups attacking the installations, but also with pursuing these groups. Minelaying is a combat, or at least, combat-related, function, but what about mine-clearing? Clearing mines is a service performed both by PMSCs and humanitarian NGOs.

26. Of course, the issue is not what *is* the reality in failed, failing or dysfunctional states, because what European states would regard as inherently governmental functions, including the *Gewaltmonopol des Staates* are not, in these states in practice, a state monopoly. The issue is rather what *should* the situation be. However, there are obvious problems involved in states B-F trying to *change* reality in state A by listing in a treaty certain functions which are prohibited to be performed by B-F’s PMSCs in A under any circumstances. This prohibition would have to work on two levels. First, there must be a duty on the contracting states not to licence such activities (which in turn, of course, involves a general duty at national law on PMSCs to request licences for all their activities, of which more below). Second, there must be a duty on contracting states where a PMSC has, in fact, breached the terms of the licence not to engage in a prohibited activity, to penalize the PMSC in some way.

27. Penalize here can be in the form of the criminal law, administrative law or civil law. The usual meaning of “prohibited” is that states would accept that, in accordance with their criminal law, a penalty should or must be imposed on a person, or (in states where corporate entities can be fined) for engaging in the prohibited activity, or where applicable, failing to prevent it. European principles require a high level of legal certainty (foreseeability etc) in drafting criminal offences. For states applying the principle of legality (obligatory prosecution) the formulation of the offence is particularly important, as the scope for avoiding inappropriate prosecutions by means of prosecutorial discretion is more limited. In all states, the mental and material elements of such an offence must be proven beyond reasonable doubt. Moreover, without proper investigation, also applying high standards of professionalism, an offence will exist on paper only.

28. Where, on the other hand, what is meant is an administrative or contractual “prohibition” then the formulation of the prohibited conduct does not need to be so precise, and the standards of proof in showing (non-)compliance can be set lower. (Having said this, it is usually easier to provide for contractual liability for engaging in activities *not permitted* by the licence, a point which shall be dealt with below.) Even here, disputes over contracts are disputes which are “civil rights” within the meaning of Article 6 ECHR. A contract can give one party – in this case the contracting state – the power to terminate the contract on notice, without giving reasons. However, basic principles of administrative law require for licence termination a determination that the licence has been breached, which in turn requires that there be some sort of body capable of investigating impartially and fully alleged violations of the licence and/or infringements of administrative law.

²⁵ See comments by W. Hays Parks at

<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0072.File.tmp/Presentation%20The%20Perspective%20of%20Contracting%20and%20Headquarters%20States.pdf>.

29. Lists of “governmental” functions can admittedly be found in the constitutions of some European states, but these are usually in order to delimit federal/central government responsibilities from state/local responsibilities²⁶ or to delimit parliamentary competence from governmental competence.²⁷ Some states regulate the delegation of public power to private authorities in their constitutions, e.g. requiring this to be in the form of a law, at least where it involves decision-making vis a vis individuals who are in a subordinate position to the decision-maker, which is typically the situation in relation to security.²⁸ It is common, explicitly or implicitly to forbid the authorities of other states to exercise public power, particularly in the area of policing, in one’s own territory, except where this is provided for by law (often implementing a treaty obligation, such as the Schengen treaty). But as a matter of constitutional law and practice, the exact functions within the area of security which are seen as “inherently governmental” and within the “state monopoly” on the use of force will presumably vary between European states and from time to time. This of itself indicates that attempting to reach agreement in a treaty listing clearly prohibited areas of delegation apart from “combat” is unlikely to be successful. It can also be unduly inflexible. In some, particularly chaotic, situations, where a group of European states is engaging in peace-promotion activities, it might temporarily be necessary to entrust “border-line” governmental security activities to a PMSC. But the main question-mark about trying to list prohibited activities (beyond combat) in a recommendation or treaty is that this does not seem to be *necessary* in order to reach the goals of avoiding contracting PMSCs for services where the risk of accountability is large and the consequences of abuse of power are severe.

30. As regards the “dividing line” between internal and external security this relates to the desire to distinguish between the activities of “PSCs” in one’s own territory, the regulation of which falls within the jurisdiction of the territorial state (with, for EU states, due allowance for EC law) and PMCs, which operate extraterritorially. Paragraph 13.3 of the PACE Recommendation 1858 (2009) seems to be an attempt to devise an alternative method to defining what is a “PMC”, and so distinguishing it from a “PSC” something which most commentators agree is not a fruitful way forward. As mentioned, it is not the “character” of the entity but the activities in which the entity engages which are important. Some of the companies engaged in “PMC” activities also engage in “PSC” activities. Armaments companies are branching into advisory/technical/training (“PMC”) activities. In a fluid market, one offers the services the client wants.

31. Some European constitutions contain provisions dealing with external and internal security,²⁹ however, these are designed to delimit functional competence between federal and local authorities, or between the organs of central government and parliament. Similar functional divisions can be found in states which have an external and internal security service.³⁰ It is another thing to try exhaustively to define what is, and what is not, a threat to security. There is a substantial level of agreement among academic commentators nowadays that there is no longer (if there ever was) a conceptually satisfactory dividing line between “external” and “internal” *threats* to security. The distinction is blurred nowadays. No treaty can unblur this distinction.

²⁶ See, e.g. Articles 70-75 of the Grundgesetz (Basic Law) for the Federal Republic of Germany.

²⁷ See, e.g. Article 34 of the French Constitution of 4 October 1958.

²⁸ See, e.g. Chapter 11, section 6, para. 3 of the Swedish Instrument of Government 1974.

²⁹ E.g. the Swiss Constitution, Article 57 provides that (1) The Federation and the Cantons provide the security of the country and the protection of the population within the limits of their respective competencies. (2) They coordinate their efforts in the field of inner security. Article 58 provides that ... (3) The use of the army is a federal matter. The Cantons may use their formations for the maintenance of public order on their territory, if the means of the civil authorities are no longer sufficient for the defence against serious threats to inner security.

³⁰ Venice Commission Study no. 388/2006 on the democratic oversight of the security services adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007, CDL-AD(2007)016).

32. What a treaty can provide for is differential *levels of regulation* of transnational private security activities (within European states) and outside of European states. If this is the intention of the Parliamentary Assembly then it is simpler, and better, to proceed more modestly by doing this rather than attempting to lay down a conceptual definition in a treaty. Differential levels of regulation can be achieved in a variety of ways, such as requiring regulation by licence of all extraterritorial activities of a PMSC but distinguishing between the type and extent of licence requirements depending upon where the contract was to be performed, e.g. by dividing states into categories. The licensing government would be responsible for the determining which states fell within which categories of regulation. This adapts the level of regulation, focussing upon the place where the company will be carrying out its activities.

VII. Conflict Prevention

33. The Parliamentary Assembly expresses the view that a recommendation/treaty contain a provision confirming the "priority of conflict prevention to rapid reaction and of the civilian handling of crises instead of the solution of conflicts by use of force."³¹ This is undoubtedly a sensible principle, and one which all states presumably can agree upon as a political goal. However, it is difficult to see how this can be translated into a concrete legal rule.

VIII. Licensing criteria and standards

34. The Parliamentary Assembly expresses the view that a recommendation/treaty attempts to standardise the principles for the use of PMSCs, determine criteria regarding the activities, obligations, duties, responsibilities, including accountability for breaches of international humanitarian law and human rights abuses, and the areas of work and competences of PMSCs, define criteria that must be applied to authorise PMSCs to provide military and security services and introduce a registration and licensing system for PMSCs.³² The Parliamentary Assembly furthermore wants the setting up of a legal and regulatory framework for PMSCs that wish to export their services.³³ The regulatory framework is to include the following elements: an effective vetting and training system for PMSC personnel; an effective oversight and investigatory system; an effective enforcement system, and the protection of social rights of PMSCs' employees.³⁴ These points are at the heart of the Parliamentary Assembly's recommendation and can usefully be treated together.

35. As already mentioned, if one takes the approach of recognising the fact that a state, for one or other reason, is unable to exercise an adequate level of supervision over the activities of a PMSC operating in its territory, then the logical consequence of this, at least from the perspective of the Council of Europe, an organisation based on respect for human rights and the rule of law, is to insist that A and/or C step into the regulation/enforcement gap and take over at least a degree of responsibility for the PMSC.

36. A licensing/registration system would be a vital part of this. Licensing would enable a state to impose, by licence conditions, duties on PMSCs to respect certain minimum standards, including but not necessarily limited to human rights standards (which, as indicated above, would otherwise not apply directly to legal persons). These standards would in turn be imposed by terms of contract on personnel employed by the PMSC. It would be important that licences forbid, or control, sub-contracting, which appears to be a common practice in the field.

³¹ PACE Recommendation 1858 (2009) on Private military and security firms and erosion on the state monopoly on the use of force, § 13.4.

³² Ibidem, § 13.5 - 13.8.

³³ Ibidem, §§ 13.11.

³⁴ Ibidem, § 13.16.

37. Strong arguments can be made for PMSC “home” states requiring registration of, and some form of licensing of, PMSCs services. At the very least, it is advisable that all European states with PMSCs engaged in the export of military-type services as a matter of priority investigate the need for national legislation on the issue. Here it should be noted that international law contains – albeit vague – limits on the extent to which a state may regulate the activities of foreign-registered subsidiaries to a “parent” company registered in that state’s territory. As mentioned, PMSCs are a multinational phenomenon, and so the development of some type of international cooperation undoubtedly appears sensible in order to avoid inconsistent standards being imposed, and to discourage “regulatory flight” of a PMSC from a strong regulatory regime to a weak one.

38. The treaty proposed by the Parliamentary Assembly would seek to impose *harmonized* registration criteria and licensing standards on European states. Good arguments can be made for such harmonized criteria. Accordingly, this would indeed seem to call for some form of treaty provision. Having said this, it would make it easier to draft such provisions if there were tried and tested national models to build upon. A key issue here in treaty negotiations will be reaching agreement not only on the extent of supervision which is *advisable* – this will reasonably vary according to the circumstances (see paragraphs 7 and 12 above) – but also on the extent which is *feasible*. Such a treaty provision will obviously require reasonably staffed and resourced national administrative regulatory bodies, with, moreover, a capacity to supervise extraterritorial activities. Here one can note that while all, or almost all, European states have regulated their PSC industry, the level and type of regulation varies, as does the level and type of supervision of this.³⁵ There appears to be no European state which has regulated the extraterritorial activities of PMSCs as such, although where (as seems common) a company offers security services *within* a European state, as well as export of security/military services, it will already have gone through whatever registration, vetting and licensing formalities which exist in the European state in question. Moreover, certain European states include “military training” under the category of services for which an export control licence is granted³⁶ and so exercise, or at least, have the potential to exercise, a degree of supervision over such extraterritorial activities. The issue of licensing and different options for regulation has been discussed extensively in recent years in the United Kingdom, the European state which, for a variety of reasons, appears to have the largest number of PMSCs engaged in extraterritorial sale of “military” services.³⁷ But no legislation has yet resulted from this process.³⁸ Two states which have specifically regulated extraterritorial PMSC activity are the United States and South Africa. Both states’ systems of regulation have been criticized in doctrine as inadequate.³⁹ In the case of the United States, the criticism appears mainly to have

³⁵ See Born, H., Caparini, M. and Cole E., *Regulating Private Security in Europe: Status and Prospects* Geneva Centre For The Democratic Control Of Armed Forces (DCAF) Policy Paper No. 20, 2007, Panoramic Overview of Security Industry in the 25 Member States of the European Union, *CoESS and UNI-Europa*, available at: www.coess.org and the country reports in the Priv-war projects at http://priv-war.eu/?page_id=49.

³⁶ E.g. Sweden, Lag (1992:1300) om krigsmateriel, section 10 (duty to seek a licence), section 24 (criminal penalties).

³⁷ See Foreign and Commonwealth Office Green [discussion] Paper, *Private Military Companies: Options for Regulation*, HC 577, 2002, Ninth Report of the Foreign Affairs Committee, Session 2001-02, Private Military Companies, HC 922, Response of the Secretary of State to the Ninth Report of the Foreign Affairs Committee (2001-2002), Session 2001-02, Private Military Companies, HC 922.

³⁸ For a summary and analysis of position under British law, see Alexander K. and White N., *The Regulatory Context of Private Military and Security Services in the UK* National Priv-war Report Series 01/09, <http://priv-war.eu/wordpress/wp-content/uploads/2008/10/nr-01-09-uk.pdf>.

³⁹ For criticism of the South African statute see Malan M. and Cilliers J., *Mercenaries and Mischief: The Regulation of Foreign Military Assistance Bill* (Institute for Security Studies, South Africa, Occasional Paper, 1997) and Caprini, M. Domestic regulation: Licencing regimes for the export of military goods and services. For critical analysis of the US system of regulation see Caprini, *ibid.* and Dickinson, L., *Public Values in a Privatized World*, 31 Yale J. Int'l L. 383 2006.

been directed at the adequacy of the procurement process, combined with the large numbers of procurements made in a short time for PMSC services in Iraq in particular, and the grave lack of supervision of the fulfilment of contract terms setting minimum standards of behaviour of PMSC personnel - when these were included at all.⁴⁰ The accountability problems which arose were exacerbated by the immunity which PMSCs had, and continue to have in some situations, from the jurisdiction of the Iraqi courts.

39. The bulk of the criticism thus appears reflect the almost universal criticism of the extreme lack of preparedness which characterized the United States led occupation - rather than of the US legislation as such.

40. As regards criteria to take into account before licensing a PMSC, another, this time European, model to build upon is the EU common position on arms exports.⁴¹ Moreover, the Montreux document provides examples of best practices in this regard.

41. The conclusion thus is that there are *some* models to build upon in discussing appropriate licensing requirements, standards of conduct and degrees of supervision of compliance. However, with any treaty imposing harmonized solutions, states like to know that they are accepting, in particular how these international solutions will work compared to their own existing legal frameworks and how many changes these will involve making in their own legal frameworks. The problem here is that Council of Europe states have relatively little existing law governing extraterritorial application of regulation of PMSCs and so relatively little experience of the how such extraterritorial application will work in practice. The costs involved in establishing national supervisory mechanisms with a degree of capability to supervise the performance of contracts in other states are also very relevant here. These costs will naturally vary depending upon how many and what type of PMSC licences are issued by the home state in question. For some states, this will involve little expense, for others the expense is likely to be considerable. It should also be made clear that the supervision of companies' compliance with contract conditions regarding delivery of services in states undergoing "compound emergencies" situations is not an easy matter. There is, however, considerable experience of the problems involved in supervising both companies' and NGOs' delivery of development and crisis aid services in compound emergencies which can presumably be built upon.

42. One issue here is whether the licensing system should be national or international. As already mentioned, a PMSC can be multinational in the sense of drawing its personnel from, and operating in, different countries. On the other hand, a PMSC has a home state where it has its headquarters. It is also states which have the resources to engage in the necessary investigations of corporations operating from their territory. Moreover, PMSCs will be very reluctant to reveal information which can go to a competitor, or which will damage their relationship with a client (particularly where the client is the territorial state itself). At the present stage of development of international relations, the creation of an international body to engage in licensing thus seems both unnecessary and impracticable.

43. However, as the Parliamentary Assembly recognises, some form of cooperation duty and mechanism for exchange of information between states, regularly, or on demand, will be necessary regarding which licences have been issued and for what. At the same time, it will not be easy to draft such a provision either. As mentioned, PMSCs provide a "discreet" service to their clients and are presumably very reluctant that details of these services are shared between states. However, the information exchange arrangements in certain of the EU norms (already mentioned paragraph 18) can serve as models. These have managed to combine a

⁴⁰ See, e.g. Dickinson, *ibid.*

⁴¹ Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment L 335/99 13.12.2008.

degree of transparency with a degree of confidentiality. Information exchange obligations will also be necessary regarding compliance with licence conditions. If state A with a large embassy presence in state B comes over information indicating that PMSC X licensed by state D is responsible for human rights abuses in B, then an obligation must be created for A to transfer this information to D, and (at a minimum) an obligation on D to investigate the issue and to inform A of the result of its investigation.

44. As regards obliging states to legislate on the rights of PMSC employees performing contracts abroad, this involves examining in detail *inter alia* states' existing employment protection legislation, certain issues of private international law and, for EU states, EC law.

45. A final issue here is that the elaboration of standard conditions in a licence should take into account not simply the best practices identified in the Montreux document but also the ongoing consultations within the PMSC branch itself, with the support of the Swiss government, with the aim of producing a Code of Conduct for PMSCs. This issue is dealt within the next section.

IX. Self-regulation

46. The Parliamentary Assembly expresses the view that the treaty would contain provisions obliging "the PMSC sector to set up a framework for self-regulation, including a binding code of conduct and the establishment of a PMSC Ombudsman and/or a PMSC violations investigation team. It is understood that any such self-regulation merely complements and does not replace the control of legality exercised by the competent state law-enforcement bodies, which shall be seized automatically of any violations encountered by the proposed self-regulation mechanisms."⁴²

47. There are some codes of conduct already in operation.⁴³ The Swiss government, assisted by the International Committee of the Red Cross (ICRC) and The Geneva Centre for the Democratic Control of Armed Forces (DCAF), is leading a series of meetings on developing these further. These ongoing discussions do not mean that the Council of Europe needs to await a result before initiating inter-state discussions with the view to the adoption of a recommendation or a resolution. As with the EU legislative process, inter-state discussions within the framework of the Council of Europe can act as a catalyst for the adoption of a branch Code of Conduct. Besides, as the Parliamentary Assembly correctly notes, an appropriate Code of Conduct does not eliminate the need for national supervision, but simply makes it easier.

48. However, as with the EU dimension, the ongoing branch discussions complicate the task of drafting a Council of Europe treaty.

49. The value of self-regulation in practice will depend upon a number of factors, *inter alia* whether the Code standards are genuinely accepted by the major PMSCs, the stability of the PMSC branch, the integrity and effectiveness of the supervisory mechanisms the branch establishes and the mechanisms which states and other customers for PMSC services have for sanctioning non-compliance with the Code. In particular, will a supervisory mechanism really be in the position to criticise, and demand improvements from, one of its most important members? The main method of informal sanction will be the "market", namely denying future contracts to a PMSC which has a poor record of compliance with the Code. Here there are a

⁴² PACE Recommendation 1858 (2009) on Private military and security firms and erosion on the state monopoly on the use of force, § 13.15.

⁴³ See the IPOA_Code_of_Conduct

http://www.unwg.rapn.ru/en/legislation/IPOA_Code_of_Conduct_and_Enforcement_Mechanism.pdf

and the BAPSC_Charter http://www.unwg.rapn.ru/en/legislation/BAPSC_Charter.pdf.

number of complications. For a state wishing to contract for a particular service, especially if speed is necessary, there may be few alternatives to hiring a particular PMSC at a particular time. It may, in other words, be a “sellers’ market”.

50. A PMSC Code of Conduct obviously entails compliance mechanisms and so some form of “rating” of compliance. A PMSC may consider that a “poor” rating it has received is unfair and react either by leaving the branch organisation or by trying to institute legal proceedings against the branch organisation for action damaging to trade. If one wishes to strengthen the integrity of the compliance mechanism by protecting the branch organisation from legal attack, legislation will likely be necessary. Here too, for EU states, the EC law dimension must be taken into account.

51. The Parliamentary Assembly wishes a “binding” Code of Conduct. By this it is meant that the Code should be binding on PMSCs which adhere to it. However, what is to happen if a state authority, or corporation, or NGO contracts with a PMSC which does not adhere to the Code, or formally speaking adheres to it, but has a poor record of compliance with it? In order to prevent this, the treaty would have to impose a duty on states either to legislate to require PMSCs to comply with the Code or to forbid contracting with PMSCs which do not adhere to, and comply with, the Code. What of non-European PMSCs. Would European NGOs and multinationals be prohibited from contracting with local or regional PMSCs? States are not the only contractors of PMSCs. A multinational company or NGO decides for itself whether it wishes to contract with a PMSC. Unless constrained by a duty in legislation not to do so, it will be free to contract with a PMSC which does not adhere to the Code, or has a poor record of complying with it. The “penalty” for this on the NGO or multinational corporation is poor publicity – assuming its contract becomes known. This poor publicity will presumably be sufficient disincentive for a humanitarian NGO, but not necessarily for a corporation. Thus, it will in any event be necessary for the Code to be “binding” on corporations that contracting states have to undertake to legislate to limit corporations’ freedom of contract in this respect. Also relevant in this respect is the call the Parliamentary Assembly makes for the introduction of rules and regulations (for example, a code of conduct and the requirement to register with the foreign ministry) for businesses, non-governmental or humanitarian organisations, etc., that wish to contract PMSCs for their security purposes abroad.⁴⁴ However, an administrative duty of registration will, for reasons set out above, not be likely to be sufficient if the Code is to be “binding”.

X. Criminal law and Criminal Procedure

52. The Parliamentary Assembly expresses the view that a recommendation/treaty contain a provision on adjustment and harmonisation of national and international criminal law (especially rules of law enforcement) regarding criminal acts committed by PMSCs and their personnel⁴⁵ and applying laws and rules governing deployment of national military and police forces abroad to PMSCs as well.⁴⁶

53. National rules on jurisdiction are complicated and there are considerable variations among European states. Some – probably the majority of – European states already have criminal jurisdiction over all or most of the crimes of their nationals employed in foreign states. At least some states provide for criminal jurisdiction over all crimes, or at least certain serious offenses, of foreign nationals in foreign states, but conditioning jurisdiction on double criminality (subject to certain exceptions). A network of multilateral treaties, global and regional, provide for

⁴⁴ PACE Recommendation 1858 (2009) on Private military and security firms and erosion on the state monopoly on the use of force, § 13.14.

⁴⁵ Ibidem, § 13.9.

⁴⁶ Ibidem, § 13.13.

extensions of jurisdiction. For example, all states party to the Statute to the International Criminal Court (ICC) have to extend their jurisdiction, at least over nationals, for war crimes in international and internal conflicts and crimes against humanity. Some states have offences criminalizing mercenaries. However, the definition of “mercenary”, at least where the national offence is based upon the six cumulative conditions in Article 47 of Additional Protocol 1 1977 to the Geneva Conventions, makes such an offence extremely difficult to prove.⁴⁷ Other states may have offences concerning recruitment in the state to fight in conflicts in other states,⁴⁸ however, such offences can easily be circumvented by the “recruitment” occurring outside of the state in question.

54. The differences in national “ideologies” of jurisdiction makes harmonisation difficult. If the Parliamentary Assembly is expressing the view that jurisdiction be taken over all criminal acts committed by personnel of PMSCs *irrespective of their nationality*, European states are likely to take different approaches to the advisability, or even legitimacy, of this, making such a provision problematic to draft. Nonetheless, it is undoubtedly a very undesirable situation if strong grounds exist for suspecting that PMSC personnel have committed serious crimes of violence in other countries, but for one or other reason, the home state of the PMSC does not have jurisdiction to try them. A PMSC may easily be incorporated in one state, but the alleged perpetrators are nationals of another state. The option of extradition of an alleged offender may not be practicable: his home state may lack jurisdiction or be uninterested in prosecution, whereas the human rights situation in the territorial state may be very bad. A general jurisdictional claim over all serious offences irrespective of the nationality of the perpetrator but which is qualified by a double criminality requirement would solve these problems, without violating the international law rule prohibiting non-intervention. As indicated above, many countries already make such a jurisdictional claim. By contrast, the UK has a particularly troublesome combination of a large number of PMSCs incorporated in its territory and very limited extraterritorial claims. In any event, it is strongly advisable that all European states review their systems of criminal law and jurisdiction in order to determine whether there are gaps in their jurisdictional claims, at the very least as far as nationals are concerned, and if so, to correct these and to provide for extradition arrangements where for some reason, jurisdiction is lacking.

55. It is nonetheless likely that most states already providing for jurisdiction over all, or the majority of the serious extraterritorial crimes which can be committed by PMSC personnel, will see the problem as one of *obtaining sufficient evidence* of criminal offences. Investigating alleged criminal offences committed abroad is usually very time and resource-intensive. Where cooperation is lacking from the territorial state, the work is made much more difficult.

56. Where a state has both military forces and contracted PMSC personnel stationed in the territory of another state, one way of dealing with the gap in investigative/enforcement capability is to legislate to bring the PMSC personnel within the jurisdiction of military prosecutors and military courts. However, for European states this will not be possible (or, at the very least, will cause considerable difficulties) because of the case law of the ECtHR which does not permit civilians to be tried by military courts.⁴⁹

⁴⁷ Cameron, *op. cit.*

⁴⁸ For a list of such offences, see FCO Green Paper, *op. cit.*

⁴⁹ See *Ciraklar v. Turkey*, judgment of 28 October 1998, para. 38. *Incal v. Turkey* judgment of 9 June 1998, *Atlay v. Turkey*, No. 22279/93, judgment of 22 May 2001. In *Ergin v. Turkey* (no. 6), No. 47533/99, judgment of 4 May 2006, the Court stated at para. 41: “[O]nly in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6. ... The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case.” See further, Committee of Ministers Recommendation No. R (94) 1 on the independence, efficiency and role of judges.

57. In summary on this point, drafting such provisions will both be technically difficult and time-consuming.

XI. Civil Law

58. The Parliamentary Assembly expresses the view that a recommendation/treaty contain a provision introducing specific rules for PMSCs in civil law, especially as regards conditions of liability.⁵⁰ This proposal appears to be aimed at the difficulties which are caused when PMSC personnel injure or otherwise cause harm to individuals in another country, who, for reasons of practicality or law (e.g. agreements relating to immunity of PMSCs) are unable effectively to sue the PMSC in the courts of that country. In some European states, it will presumably already be possible to sue a company incorporated in the state for damages for acts attributable to the company committed in another state. Other states, applying their own rules of private international law, will make this more difficult, or perhaps impossible. A complicating factor here is the question of civil jurisdiction over foreign-incorporated subsidiaries of a PMSC, sub-contracting being a feature of this branch. Another aspect which must be taken into account here is the complicated question of insurance of the PMSC, and permitting claims against the insurer.

59. In practice, as with criminal jurisdiction, there will be difficulties in obtaining evidence of civil wrongdoing which has occurred in – very possibly –disputed circumstances in another state. Various devices exist to make the burden of proof easier, although the countervailing disadvantages in reducing evidential burdens must also be taken into account. Without some such device, however, this remedy risks being on paper only. Another difficulty is providing for adequate legal representation for civil claimants, bringing their case in another jurisdiction. One way of dealing with the latter difficulty is to extend the rules on standing, to allow NGOs to bring claims on behalf of litigants resident in another state, or alternatively, allowing NGOs to assist these litigants. Caution must naturally be shown in this area. Civil law claims provide the potential for strengthening PMSCs compliance with good practices, especially whatever Code of Conduct which might emerge from the ongoing branch negotiations. However, whatever treaty can be produced under the auspices of the Council of Europe will naturally only bind the parties. Where a PMSC considers the duties it will face of civil claims to be too onerous, it may choose to move its business to, and incorporate in, a non-contracting party. This shows the value in an international solution to the problem. A balance must obviously be sought in negotiations between ensuring that a real remedy exists in practice, at the same time as not creating unrealistic demands on PMSCs, thus “scaring them away” to states which will not ratify the treaty.

60. Nonetheless, as with the criminal law, it is undoubtedly a very undesirable situation if strong grounds exist for suspecting that PMSC personnel have, e.g. killed or severely injured people, but for one or other reason, the home state of the PMSC does not have jurisdiction to entertain civil claims brought by victims or their relatives against the PMSC. Thus, notwithstanding the complexities sketched out above, it is strongly advisable that all European states begin the process of reviewing their civil law systems to determine whether it is possible at all to make such claims, and if not, to consider enacting appropriate legislation on the issue.

61. However, in summary on this point, as with the discussion of the criminal law above, drafting a treaty provision on the subject is likely to be both technically difficult and time-consuming.

⁵⁰ PACE Recommendation 1858 (2009) on Private military and security firms and erosion on the state monopoly on the use of force, § 13.10.

XII. Parliamentary Approval

62. The Parliamentary Assembly expresses the view that a recommendation/treaty contain provisions requiring parliamentary approval for missions of PMSCs outside their national territory.⁵¹ The issue of the democratic control over the armed forces, including parliamentary approval for missions, has been dealt with recently by the Commission.⁵²

63. The Commission divided European states into three groups, depending upon the level of involvement of parliaments with the decision to send military troops abroad: *High*, for Parliaments with the power of prior approval, *medium*, for Parliaments whose power of prior approval is limited by significant exceptions, and *low*, for Parliaments without the power of prior approval. While the Commission expressed a clear preference for a high degree of approval, it is clear that there is considerable variation between European states. From the perspective of democratic legitimacy, when and if the parliament has achieved full control over the use of military forces abroad, there is undoubtedly a democratic deficit if it has no insight into, let alone control over, its government's contracting of PMSCs to engage in peace-promotion and peace-enforcement actions. To the extent that such operations are covert, the Venice Commission has already expressed the view that arrangements must be in place to ensure an adequate level of parliamentary insight into and control over these activities.⁵³ And very good arguments exist for parliaments exerting control over any "large-scale" use of PMSCs, to the extent that their existing budgetary control mechanisms do not already allow this. Having said this, the occasions on which PMSCs are contracted for large scale and high profile missions by European states are presumably very rare. Most PMSCs are engaged in much less politically controversial issues, such as training in weapon systems, supply of services (food, transport, etc.) to national troop contingents or foreign armies. And practicalities must be borne in mind. The value of parliamentary approval mechanisms is not simply that the people's representatives decide, but also that an exhaustive, transparent and informed debate occurs in the most important public forum of the state, the parliament. Such procedures take time, and must take time. This sort of discussion is quite impracticable every time the Foreign Minister travels to a dangerous country where he or she needs an armed escort from and to the airport. Where national law for one or other reason means that one's own police or military cannot be simply ordered to fulfil bodyguard functions for government ministers when they travel abroad, then this function must be performed by contracting with a PMSC.

64. Bearing in mind the fact that the "use" of a PMSC can involve everything from the more or less replacement of a territory's armed forces to the mere provision of bodyguards for visiting statesmen, and bearing in mind the variations in practice identified by the Commission in its report on Democratic control over the armed forces, it seems that this is not yet an appropriate issue for treaty regulation. Within the very broad principles of democracy following from membership of the Council of Europe, states are free to determine the degree of parliamentary insight into and control which is appropriate over government use of PMSCs, depending on their own legal and constitutional practices.

⁵¹ PACE Recommendation 1858 (2009) on Private military and security firms and erosion on the state monopoly on the use of force, § 13.12.

⁵² Report on the Democratic Control of the Armed Forces adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008, CDL-AD(2008)004), particularly pp. 44-48.

⁵³ See Report on the democratic oversight of the security services adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) CDL-AD(2007)016.

XIII. The endorsement of the Montreux Document

65. The Parliamentary Assembly proposes the adoption of a recommendation first, which would at the very least, support the Montreux Document on Private Military and Security Companies which sums up legal obligations under existing international law and best practices related to PMSCs' activities, and call on member states that have not already done so, to endorse it. The second part of the Montreux Document can be seen as both a "check list" and a programme for future work. The endorsement of this document is highly advisable.

XIV. The question of a recommendation before beginning negotiations on a treaty and concluding comments

66. It follows from the above opinion that the Venice Commission considers that some of the issues taken up by the Parliamentary Assembly – while undoubtedly of international concern – are not appropriate for inclusion in a Council of Europe treaty. Other parts of the Parliamentary Assembly recommendation could form the basis of future treaty provisions. In particular, strong arguments can be made for drafting treaty provisions on registration/licencing requirements, that states of PMSC incorporation provide for criminal jurisdiction over serious offences committed by PMSC personnel and on ensuring that states of PMSC incorporation provide civil remedies for victims of alleged PMSC wrongdoing. However, for reasons set out in the present opinion, a Council of Europe treaty on the subject of PMSCs would, at the present time, be time-consuming and problematic to draft. It is however, most important not to lose momentum in this area. The gaps in regulation and enforcement (above paragraphs 11-12) are real and serious. Accordingly, the Venice Commission considers that whether or not the Committee of Ministers chooses to start work on drafting a treaty certain of the issues taken up by the Parliamentary Assembly are suitable subjects for a Committee of Ministers recommendation to Council of Europe states:

1. A first matter is the endorsement of the Montreux Document. As already mentioned, this document itself can be seen as a programme for future legislative action by states, with identifiable goals which the Parliamentary Assembly can follow-up on.
2. A second is that states should review their national laws dealing with registration/licensing of PMSCs, to see if these provide a proper degree of regulation of the extraterritorial activities of PMSCs. The Montreux Document identifies the desirability of doing this, but an express provision in a recommendation would focus states' particular attention on the urgent need to deal with the subject..
3. A third is that states should review their criminal laws/criminal procedure laws, to determine whether there is jurisdiction over serious offences committed by personnel of PMSCs, at least, where these personnel are nationals of the state in question. Again, the Montreux Document identifies the desirability of doing this (see part 2, paras 19, 49 and 71), but an express provision in a recommendation would focus states' particular attention on the subject.
4. A fourth is that states should begin the process of reviewing their civil law systems to determine whether it is possible at all to make claims for damages for extraterritorial civil wrongdoing against PMSCs incorporated in the state, and possibly even their foreign-incorporated subsidiaries, and if not, to consider enacting appropriate legislation on the issue. Again, the Montreux Document identifies the desirability of doing this (see part 2, paras 22, 50 and 72), but an express provision in a recommendation would focus states' particular attention on the subject