Regulating Private Security Companies (PSCs) and Private Military Companies (PMCs) under the Law of Timor-Leste

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Declaration

I hereby declare that the work herein, now submitted as a thesis for the degree of Master of Laws at Charles Darwin University, is the result of my own investigation, and all references to ideas and work of others have been specifically acknowledged. I hereby certify that the material in this thesis has not already been accepted in substance for any degree, and is not being currently submitted in candidature for any other degree.

SALVADOR GEDEON DE JESUS SOARES
Abstract

The use of Private Security Companies (PSC) and Private Military Companies (PMC) for providing security services in conflict and post-conflict situations in many countries has been the subject of ongoing critical discussion among many scholars and media for many years. These companies are also operating in a post-conflict country such as Timor-Leste. However, they are not properly regulated and their number has been increasing since the country’s independence in 1999. The thesis provides an assessment of the legal status and responsibilities of PSCs and PMCs, and their impact on Timor-Leste recovery efforts. In addition, the thesis proposes a proper legal framework to manage and regulate them under Timor-Leste national law.

The methodology of this research is normative legal research, which is based on basic principles, norms, and regulations of legal frameworks. It uses primary and secondary data gathered from the Timor-Leste government, PSC offices in Timor-Leste, and United Nations documents relating to PSCs and PMCs. It also utilises cases and national legislations relating to the use of PSCs and PMCs from other countries, such as the United States, the United Kingdom, South Africa, and Indonesia.

The research examines key legal issues, such as the regulation and monitoring of PSCs and PMCs, based on the principles and regulations of international law and the experiences of other countries relating to the use of PSCs and PMCs. In addition, it examines the impact of PSCs and PMCs on Timor-Leste national law and attempts to provide a possible proper regulation that can be used to manage and regulate these companies in Timor-Leste.

This research focuses primarily on Timor-Leste and the impact of PSC and PMC operation for Timor-Leste society, legal system, and security improvement.
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List of Abbreviations

Associação Popular Democrática Timorense—
(Timorese Popular Democratic Association) ............................................................. APODETI

Associação Social Democrática Timorense—
(Timorese Social Democratic Association) ............................................................... ASDT

Australia Defence Force ............................................................................................ ADF

Australia Security Industry Association Ltd ............................................................. ASIAL

British Association for Private Security Companies ................................................. BASPC

Civilian Extraterritorial Jurisdiction Act ................................................................. CEJA

Dirasaun Nasional Seguransa Publik—
(National Management of Public Buildings) ............................................................ DNSEP

Executive Outcomes ................................................................................................. EO

Falintil-Forças de Defesa de Timor-Leste - (Timor-Leste Defence Force) ............ F-FDTL

Federal Bureau of Investigation ................................................................................ FBI
Frente Revolucionária de Timor-Leste Independente—
(Revolutionary Front of Independent East Timor)................................. Frelelin

International Code of Conduct for Private Security Service Provider....................... ICOC

International Force for East Timor................................................................. INTERFET

International Security Assistance Force......................................................... ISAF

International Stability Operations Association .............................................. ISOA

Military Extraterritorial Jurisdiction Act ......................................................... MEJA

Policía Nacional de Timor-Leste – (Timor-Leste National Police)......................... PNTL

Private Military Company............................................................................... PMC

Private Military and Security Company........................................................ PMSC

Private Security Company ............................................................................. PSC

Satuan Pengamanan – (Security Unit) ............................................................. Satpam
Serviço Nacional de Inteligência – (National Intelligence Services) ................................. SNI

União Democrática Timorense – (Timorese Democratic Union)........................................... UDT

United States Support Group East Timor ................................................................. USGET

United Nations Civil Police ................................................................................. UNCIVPOL

United Nations Commission on Crime Prevention and Criminal Justice ........... UNCCPCJ

United Nations Commissioner for Refugees ..................................................... UNHCR

United Nations Mission in Sierra Leone.............................................................. UNAMSIL

United Nations Mission in Timor ........................................................................ UNMIT

United Nations Transitional Authority in East Timor.......................................... UNTAET
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CHAPTER I

INTRODUCTION

A. Background of PSCs and PMCs

During the Cold War, the stability of many countries, including developing countries, depended on the superpower countries, such as the United States and the Soviet Union, acting as their “allies”. The superpower countries sent all kinds of assistance, including defence and security assistance, to their “allies”, often under the guise of supporting their internal stability.

However, the collapse of the Soviet Union which marked the end of the Cold War has had the consequence of increasing the numbers of armed inter-state conflicts that have occurred in countries that were previously supported by the superpowers during the Cold War. Even though conflicts still occurred during the Cold War period, the superpowers tended to keep them under some control and prevented them from spreading widely.\(^1\) With the absence of established authority in those countries, their stability deteriorated very rapidly, as can be shown with the increases in the number of armed conflicts and civil unrest in the regions over the past decade or so. This deterioration has been exacerbated by the absence of armed forces and law enforcement agencies with adequate capability to maintain order and internal security.\(^2\) Furthermore, these state organs would not reach adequate capacity and capability levels without the support and assistances similar to that received during the Cold War from superpower countries.\(^3\)

Another consequence that has also appeared in the post-Cold War world is the downsizing of the world’s armed forces, in particular the armed forces of the United States

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\(^2\) Ibid 50-51.
\(^3\) Ibid.
and the Soviet Union. The United State reduced its troop strength from about 2.1 million to 1.4 million. The Soviet Union also reduced its armed force, although the precise number is not clear. There have been further numbers of troop reductions in other countries such as the United Kingdom, South Africa, Canada, France, and a number of other countries.

These conditions provide a very suitable environment for the development of PSCs (Private Security Companies) and PMCs (Private Military Companies), since the companies are eager to fill the security void left by the superpowers. Countries that once depended on the United States and the Soviet Union now turn to PSCs and PMCs in order to support and maintain their security. Therefore, there has been created supply and demand for the PSC and PMC market. Furthermore, the Post-Cold War world provides PSCs and PMCs as emerging companies with a workforce supply coming from military personnel who had lost their jobs due to the end of the Cold War. The main reason for them joining PSC and PMC companies is that they are providing jobs based on military and security training and expertise.

Besides PSCs and PMCs, other security and defence companies were also emerging. Some of these companies offer services or products, such as logistic support, technical support, communications support, vehicles, planes, ships, weaponry, or electronic systems, to the military branch or organs of a government. However, they do not participate directly in hostilities. This kind of company could be categorized as a Defence Contractor. Examples of these companies are Boeing, Lockheed Martin, and Northrop Grumman. Additionally, there are companies known as Private Intelligence Companies that provide services in respect of the collection and evaluation of information and data from public sources.

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5 Ibid.
intelligence gathering, possible corporate espionage, for the government or other client with whom they have contracted. Control Risk Group, GK Sierra, and Hakluyt & Company can be included under this category. However, this thesis does not further examine these types of companies.

**B. Definition of a PSC and PMC**

The *International Code of Conduct for Private Security Services Providers*, a joint international initiative sponsored by the International Committee of the Red Cross and the Swiss Government, defines PSCs as ‘companies whose business activities include the provision of security services either on its own behalf or on behalf of another, irrespective of how such a company describes itself.’ They could also be described as registered civilian companies offering specialized services for domestic and international clients in the field of security and protection from criminal activities for clients’ personnel and properties.

In respect of PMCs, the Geneva Centre for the Democratic Control of Armed Forces provides the following description:

Business that offers specialised services related to war and conflict, including combat operations, strategic planning, intelligence collection, operational and logistical support, training, procurement and maintenance.

Peter Singer, a leading scholar in the field of PMCs, divides the PMC industry into three separate groups based on the *tip-of-spear typology* to describe their basic business sector in operational areas. The typology is use to describe the “closeness” of a PMC to the

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actual fighting/front line, and divides companies into those that operate in the front line, those operating in a theatre of war, and those located in the general theatre of operations.\textsuperscript{10} However, the typology can still give a clearer description of a PMC, since some companies can be classified in more than one category.\textsuperscript{11} Furthermore, it seems intended only for PMCs due to these companies conducting operations of a military nature:

- Military provider firms, offering direct and tactical military assistance or services, including services requiring direct participation in hostilities/actual fighting in the frontline. These companies are those classified as the tip of the spear. The typical clients of these companies are governments that have low military capability and are facing an immediate, high threat situation.\textsuperscript{12} An example is the Executive Outcomes (EO) firm, a former South African company which employed ex-apartheid soldiers to carry out operations in Angola, Congo, and Sierra Leone. Singer also points out that the then UN Secretary-General, Kofi Annan, suggested that PMCs be used to support UN peacekeeping missions since they were more efficient and effective than peacekeeping forces from developing countries.\textsuperscript{13}

- Military consulting firms formed from retired senior and non-commissioned military officers to provide strategic advisory and training expertise for clients in order to transform their organizations and enhance their military capabilities. These companies have a presence in the theatre of war and can “reshape the strategic and tactical environment through the re-engineering of a local force”, but are not engaging in direct combat activities, their clients being conducting the operations.\textsuperscript{14} For example, the transformation of the ill-trained Croat militia into a NATO-style army which

\textsuperscript{11} Ibid.
\textsuperscript{12} Ibid 92 & 93.
\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid 95.
successfully conducted “Operation Storm” in 1995 was the result of advice and training provided by the PMC Military Professional Resources Incorporated (MPRI).15

- Military support firms offering logistics, intelligence, supply, transport, and maintenance services to armed forces. These services allow the armed forces to concentrate on combat actions in order to achieve their objectives. Most of these companies’ clients are those engaging in immediate and long-duration operations and need a surge capacity.16 An example is DynCorp International, supporting the international intervention force in Timor-Leste.

However, in a number of areas of operation, such as in Iraq and Afghanistan, it is very difficult to distinguish between PSCs and PMCs in practical terms, since both organisations frequently perform the same type of tasks. This difficulty is exacerbated by the lack of legal instruments to define PSCs and PMCs and their legal status.17 Additionally, some PMCs describe themselves as PSCs because they are performing security services and prefer to be sometimes known as security companies.18 They do so to avoid negative public attention and monitoring by external regulations that could damage their business, so they claim that they are providing “security” and/or “guarding facilities”.19

Still, they are two different organisations, with PMCs having a military nature and most PSCs being more civilian or law enforcement in nature. To distinguish between the types of companies, a case-by-case approach that reviews their activities in the areas of operation is required, taking account of the condition of the states where they conduct their

15 Ibid.
16 Ibid 97.
operations and whether or not they are carried out in peace time or in armed conflict situations. It is very important to distinguish between PSCs and PMCs in order to formulate appropriate legislation and regulation relating to both. The differences between PSCs and PMCs and further efforts to distinguish between them are explored in Chapter II.

In Timor-Leste, the majority of security-related companies that operate in the country are PSCs, since most of the services and day-to-day operations are more in the context of law enforcement than military by nature. However, PMCs also have a record of operation inside the country and might potentially continue to operate in the future. Therefore, this thesis discusses both PSCs and PMCs.

C. PSC and PMC Presence in a Country

PSCs and PMCs have long been involved in many conflicts that have occurred in a number of places, such as in Africa or Latin America countries. Their involvement has ranged from merely providing security details, to supplying weapons to parties in a conflict, to fighting directly on behalf of a party to the conflict.

The presence of these companies in a country can be attributed to several factors, such as economic gain, unstable conditions, and lack of legal instruments to regulate them (legal vacuum).\(^\text{20}\) The economic gain can become the main reason for PSCs to conduct operations in a country. For example, the United States Congressional Budget Office has estimated that the US Government spent between $6 – 10 billion on PSCs and PMCs during the period 2003 – 2007, and specifically allocated funds of between $3 – 4 billion for PSC and PMC operations in Iraq.\(^\text{21}\) In Iraq during 2007, the personnel of the PMC companies Blackwater

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and DynCorp reportedly earned around $1,200 per day or $445,000 per year.\textsuperscript{22} In 1997, the PMC Sandline received contracts worth around $36 million from the Papua New Guinea government for its first three months, and $45 million in its first year of operations, before a new government and Sandline agreed to a much reduced contract of around $13 million.\textsuperscript{23} In Africa, the PMC Executive Outcomes earned $55 million between 1998 and 2002, not including its Sierra Leone contract which was worth an extra $1.8 million per month.\textsuperscript{24}

The pay rates available to PSC and PMC personnel can be so much higher than those in national armed forces, and therefore are one reason why former military personnel join PSC and PMC companies.\textsuperscript{25} For example, in Iraq during 2003 PSC and PMC personnel from the United States, the United Kingdom, and Australia with “Tier One Special Force”\textsuperscript{26} expertise, could expect to receive payments of around US$2000 per day, although this could eventually reduce to $700 per day.\textsuperscript{27} On the other hand, PSC and PMC personnel from non-Western countries in Iraq and Iraqi personnel might be paid around US$50 per day for probably similar tasks.\textsuperscript{28}

However, the huge amount of money circulating within PSC and PMC areas of operations can become a major negative effect for client states. Since PSCs and PMCs are hired to provide security, they may have no interest to end the conflict or improve the

\textsuperscript{22} Ibid 14.
\textsuperscript{24} Ibid.
\textsuperscript{26} The terminology applies to the high secretive elite military force that performs highly classified activities such as unconventional warfare, counter-terrorist activities, direct action, special reconnaissance, and black operations. The military units categorised as Tier One Special Force are the US Army’s 1st Special Force Operational Detachment – Delta (Delta Force), the US Navy’s Naval Special Warfare Development Group (Seal Team Six), the UK’s Special Air Service (SAS), and Australia’s Special Air Service Regiment (SAS).
\textsuperscript{27} Steve Fainaru, Big Boy Rules: America’s Mercenaries Fighting in Iraq (Da Capo Press, 2008) 136.
security situation, as this would cause them to lose their monetary income if the conflict is stopped or the security condition is improved.

Instability conditions caused by civil unrest, internal conflicts, and/or the breakdown of state stability can create a conducive environment for PSCs and PMCs to conduct their operations. This situation usually occurs in conflict or post-conflict countries where governments cannot maintain their own security,²⁹ so PSCs and PMCs fulfil the security requirement. The combination of unstable conditions and economic gain can occur in a country which has vast deposits of natural resources. The existence of natural resources can attract PSCs and PMCs to work with mineral extraction companies to provide security for the operations of those companies.³⁰ For example, in 1992 and 1995, the PMC Executive Outcomes had affiliation with the Branch – Heritage Group and Ranger Oil West Africa Ltd in Angola and Sierra Leone.³¹

The unstable conditions that attracted PSCs and PMCs to operate in a country also were also governed by political factors. For example, the Angola Civil War in 1992 started after Jonas Savimbi’s UNITA refused to accept the result of the UN-brokered elections and resorted to armed conflict to attempt to overturn the election results. In order to defuse the situation, the Angolan Government contracted the PMC Executive Outcomes to fight the UNITA rebels on its behalf, eventually forcing the rebels to cease its armed conflict and accept the Lusaka Protocol in 1994.³²

Furthermore, PSC and PMC presence in a country may result from the political decision of states of these companies, which are often western countries, to enter into...

³¹ Ibid.
contractual relations with the companies. The companies’ presence may be due to an unwillingness of governments, in particular western governments, to expose their armed force personnel the risk of death and injury\textsuperscript{33} in a country perceived publicly as not important for their political and strategic interests. The situation can become more difficult with casualties in theatres of armed conflict causing political difficulties to a government.\textsuperscript{34} Therefore, PSCs and PMCs can become a less political solution to the government as an alternative to deploy national armed forces.

A legal vacuum can also attract PSCs and PMCs to operate inside a country since the lack of legislation or regulation enables them to operate without restraint. The legal vacuum can occur when a country where a PSC or PMC operates does not have any legislation or regulation inside their national law. Where the law or regulation does exist, implementation may be non-existent due to inadequacies in the enforcement regime or the government of the state grants immunities to operate inside the country.

The presence of PSCs and PMCs can sometimes even result in them being accused of having caused a deterioration of an unstable situation, through their economic exploitation and interest.\textsuperscript{35} However, an opposing argument considers that the presence of PSCs and PMCs improves stability since a stable situation is one way which improves their likelihood of payment.\textsuperscript{36}

\textbf{D. Presence of PSCs and PMCs in Timor-Leste}

Timor-Leste, as one of the post-conflict nations of Southeast-Asia, provides a major case-study of the operation of PSCs and PMCs. Its population of some 1.1 million people

\textsuperscript{35} Ibid [40].
\textsuperscript{36} Ibid [41].
have experienced, since as well as before independence in May 2002, major episodes of violence and civil unrest. This required international peace-keeping interventions in 1999 and again in 2006. The state has provided uncertain and limited security and this has created a demand for the services of PSCs and PMCs. Additionally, Timor-Leste has huge deposits of natural resources, especially oil and gas located in areas around the Timor Gap, in particular in the Timor-Leste/Australia Joint Petroleum Development Area (JPDA) and fields such as Bayu Udan, Elang Kakatua, Phoenix, and Sunrise Fields. These huge amounts of natural resources have attracted many international companies to operate in Timor-Leste.

Unstable security conditions in Timor-Leste are caused by the polarisation of political and cultural environments which are splintered by ethnic, religious and fractional enmities and which can lead to open conflict. This situation has been used by certain political actors in local society, for whom the only interest is to gain political favour of, and for, their ethnic or factional social group in Timor-Leste.37

There are a growing number of PSCs operating in Timor-Leste, such as Maubere Security, Gardamor, APAC Security, Gear Defence, Unipessoal Lda, and High Risk Security Group. They provide security services such as protection to various embassies, international agencies’ buildings, government institutions, businesses, and private residences. They also provide secure money movement, security alarm systems and mobile rapid response, private investigation, and supplying various forms of equipment to government institutions, including to the Timor-Leste National Police (Policia Nacional de Timor-Leste - hereafter “PNTL”) and the Timor-Leste Defence Force (Falintil-Forças de Defesa de Timor-Leste - hereafter “F-FDTL”). While PSC personnel do not carry firearms while conducting their operations, on occasion they carry non-lethal equipment, such as pepper spray, tasers and rubber batons.

Furthermore, unstable security conditions are exacerbated by confusion that appears to exist between the proper role of the PNTL and F-FDTL in regard to their respective responsibilities to ensure national security, and past and current antagonism between them. This kind of relationship between national police and defence forces could lead to the further destabilisation of the security condition in Timor-Leste and an increased presence of alternative security institutions.

It is contended that lack of proper and adequate laws to regulate PSCs can be considered as one of the major factors that led PSCs to operate in Timor-Leste. Prior to 2010, Timor-Leste did not have any rules for the regulation of PSCs. On 6 August 2010, the Secretary of State for Security issued Instruction No. 03/OSSS/VII/2010 (Despacho No. 03/GABSES/VII/2010 de 6 de Agosto 2010) (hereinafter, the “2010 Instruction”). However, this regulation does not properly and adequately regulate PSCs since it does not cover several important issues, such as:

- recruitment of personnel;
- accountability and responsibility (including sanctions) for PSCs wrongdoings;
- guidelines for conduct of their operations (including the use of non-lethal equipment and duty restrictions);
- prohibition on PSCs’ affiliation with certain political parties or other certain organisation/group in Timor-Leste society;
- prohibition on PSC participation in mercenary, subversive, or illicit activities; and
- appointment of a regulatory body for PSCs in Timor-Leste.

38 Sarah Parker, ‘Handle with Care: Private Security Companies in Timor-Leste’ (2009) 4, [4].
39 Ibid.
40 Ibid 4, [5].
Additionally, the inadequate capacity of the administration and the judicial system is also related to the lack of proper and adequate regulation of PSCs. The administration seems reluctant to implement and enforce the 2010 Instruction, even though it is not a proper regulation, since the Timor-Leste government itself needs security services from PSCs. It follows that the judicial system capacity to enforce the 2010 Instruction will therefore be difficult. It seems that PSCs are allowed to operate freely and take advantage of a legal vacuum.

PSC presence and business competition in Timor-Leste might be able to produce two different results that can affect the security situation and recovery condition of Timor-Leste. Firstly, their presence may bring conflict with the PNTL or the F-FDTL. This situation could happen where the Timorese population views PSCs or PMCs as providing security more effectively and efficiently than the PNTL or F-FDTL. This in turn could cause the PNTL and F-FDTL to feel threatened by PSCs, which will create friction between them and between PSCs.

Additionally, PSC contracts are far too costly for much of the Timor-Leste population, and those who live near or below the poverty line cannot access to their security services. So, where friction occurs between these population groups, PSCs can become involved in horizontal (class/economic) conflicts when acting on behalf of their rich clients.

The use of PSCs by some parts of Timor-Leste society can make over-dependence on PSCs for security also dangerous, since PSC company’s profits are driven by an unstable situation. Therefore, achieving a secure and stable environment may not be in their interests. However, the opposite result may occur if PSC presence and activities contribute to Timor-

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42 Sarah Parker, ‘Handle with Care: Private Security Companies in Timor-Leste’ (2009) 4, [5].
Leste’s recovery efforts, and if they assist with that improvement of security and stability in cooperation with the PNLT and the F-FDTL.

The presence of PMCs in Timor-Leste does not attract much public attention. However, some PMCs, such as DynCorp International, have an increasing role in Timor-Leste’s post-independence period. For example, the company has provided helicopter and satellite network communications support for the UN peacekeeping forces. However, it is very hard to gain any confirmation on their current operations and activities in Timor-Leste. They might operate inside the country in future as part of visiting international force, as part of foreign diplomatic corps or under contract from the Timor-Leste government itself. PMC presence in Timor-Leste raises an issue relating to the applicability of the Timor-Leste legal system towards PMCs.

E. Important Issues in the Thesis

Providing proper and adequate regulation for PSCs and PMCs wanting to operate in Timor-Leste is very important for the management of the activities of these companies and for ensuring that their operation is beneficial to Timor-Leste. Efforts to provide proper regulation can be crucial to Timor-Leste since PSCs are a growing private sector industry and one of biggest employment providers in Timor-Leste. They reduce Timor-Leste’s high unemployment rate. Therefore, PSC companies can contribute to national economic development. PSCs in Timor-Leste also have more personnel compared to the PNLT and the F-FDTL. According to Fundasaun Mahein’s 2011 report, the PSC APAC Security alone had 2800 official and 450 casual personnel which already outnumbered the PNLT and F-

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44 PMC presence in Timor-Leste is discussed further in Chapter V, Section D.
FDTL. So, if these numbers were combined with other PSCs they would far outnumber the PNTL and the F-FDTL. Therefore it is very important to have a proper and adequate system for their regulation, in order to monitor their activities and ensure that they are not conducting any activities that can destabilise the country.

Therefore, it is necessary to conduct a comprehensive study in order to provide a relevant legal foundation and appropriate measures to deal with PSC and PMC operations in Timor-Leste. This research will hopefully lead to prevention of conflict and bring peace, stability and prosperity to the people of Timor-Leste.

F. Research Objectives and Methodology

The objectives of this research are:

- To assess the activities of PSCs and PMCs in Timor-Leste, and determine whether they comply with Timor-Leste national law and contribute to or impede post-conflict recovery effort;
- To assess current PSC and PMC regulations and their implementation in Timor-Leste and determine whether they contribute to policy options for the Timor-Leste government in dealing with the prevention of conflict and the promotion of peace and stability in re-building the country.

The lack of a proper and adequate legal framework to define PSC companies causes uncertainty relating their legal status and responsibility. It is also one of the main reasons for PSCs being able to operate freely in a country and become involved in internal conflicts without the consent of national law.

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46 Ibid.
This thesis examines whether Timor-Leste has sufficient administration and regulatory capacity and infrastructure to regulate and monitor the enforcement and implementation of a new and effective regulation.

Primary data is acquired through Timor-Leste government legislation and documents, and through Timor-Leste enforcement bodies, such as the PNTL, the F-FDTL and the State Secretariat for Security. It also assesses treaties and other documents from UN bodies operating in Timor-Leste. In addition, annual reports and other documents of PSC companies operating in Timor-Leste are examined. Cases and national laws relating to the use of PSCs from other countries, such as South Africa, the United Kingdom, the United States, and Indonesia are also used in this thesis. South Africa, the United Kingdom, and the United States are the biggest providers and clients of PSCs in the world. Furthermore, these countries have developed specific regulations about PSCs their national legal framework.

The Indonesian national regulation is included because of the historical relations between the two countries. In addition, the Timor-Leste legal system is influenced by, and borrows from, the Indonesian system. International law instruments relating to the operation of PSCs and PMCs are also considered. Secondary data is obtained from sources collected by other parties, such as the non-government organisations (NGO) Lao Hamutuk and Fundasaun Mahein. Further data collection is conducted through books, internet, journal articles, and media reports.

This thesis uses a qualitative methodology to analyse issues relating to PSCs and PMCs in Timor-Leste. The conclusion uses inductive logic, namely drawing conclusions based on sets of empirical data. The use of qualitative analysis provides a view of the

48 Lao Hamutuk is an influential and independent monitoring NGO that provide analyses and reports on the activities of principal organizations in Timor-Leste as related to the physical, economic and social development of Timor-Leste.

49 Fundasaun Mahein is a Timor-Leste NGO that monitors and analyses the Timor-Leste security sector, in order to support and participate in the development of Timor-Leste.
domestic situation from an internal perspective and permits the researcher to develop hypotheses relating to PSCs and PMCs in Timor-Leste.50

One objective of the research is the development of a proposed model law for the regulation of PSCs and PMCs in Timor-Leste, based in part on the United Kingdom’s *Private Security Industry Act 2001* and South Africa’s *Private Security Industry Regulatory Act No. 56 of 2001*.

### G. Structure of the Thesis

The research is structured into seven chapters. The first chapter, *Introduction*, introduces background information about PSCs and PMCs, including their definitions. This chapter also discusses issues on PSC and PMC presence and operation in a country. It suggests some propositions relating to their regulation in Timor-Leste because of reports indicating possible involvement in illicit activities or wrongdoings in other countries.

The second chapter, *Literature Review*, reviews and assesses the literature, previous researches, and findings conducted by other researchers on PSCs and PMCs. It focuses on the issues of the distinction between the concepts of PSCs and PMCs, the impact of their presence in a country, why their clients contracted them, and options for their regulation. The chapter also draws upon the literature that shows some of the difficulties which particularly occur in efforts to distinguish between the concepts of PSCs and PMCs and provision of an appropriate legal framework for them.

The third chapter, *Legal Frameworks for the Regulation of PSCs and PMCs*, assesses PSC and PMC statutes and regulations produced by other countries such as the United States, South Africa, the United Kingdom, Afghanistan, Iraq, and Indonesia, and organs of the United Nations such as the Commission on Crime Prevention and Criminal Justice. The

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legal frameworks of these countries and international organisations are utilised in order to provide some options for regulations and provisions that may be able to be used in the future PSC and PMC statutes in the Timor-Leste legal system.

The fourth chapter, *Timor-Leste and PSCs, and PMCs*, provides background to conflicts that have occurred in Timor-Leste and their impact on the country’s security situation. It also assesses the presence and activities of PSCs and PMCs in Timor-Leste. The chapter further explains how they operate in Timor-Leste because of the situation of Timor-Leste itself that make it a suitable place to operate and the presence of UN and other foreign forces. In addition, it assesses how these companies are regulated under Timor-Leste national law.

The fifth chapter, *Analysis of a Proposed Timor-Leste Statute Governing PSCs and PMCs*, provides options for the Timor-Leste Government to either enact a future statute as one statute covering both types of companies, or two statutes that separately regulate PSCs and PMCs. It suggests that the provisions relating to PSCs and PMCs, including their division, in the future statute can be adopted from PSC and PMC laws and regulations produced by other countries and UN organisations.

Chapter Six, *Conclusion*, being the final chapter, provides conclusions produced by the research. It also provides some discussion on how the future statute might be implemented and the challenges of its implementation.
CHAPTER II
LITERATURE REVIEW

This chapter reviews and assesses the literature, previous researches, and findings on the nature and activities of PSCs and PMCs. It focuses on the issues of the distinction between PSCs and PMCs, the impact of their presence in a country, why their clients contracted them, and options for their regulation. The chapter also draws upon the literature that shows some of the difficulties which particularly occur in efforts to distinguish between PSCs and PMCs and introduces the provision of an appropriate legal framework for them.

There are a significant number of issues relating to PSCs and PMCs and their operation which warrant examination, but there are several key issues which require special attention. These include:

- the distinction between PSCs and PMCs;
- their presence in a country;
- why the governments or companies contract them; and
- ways and means to regulate them.

These issues are examined through an assessment of some of the literature, research, and findings conducted by previous researchers. Some of the studies are very useful and provide important information and data relating the use of PSCs and PMCs and their activities. However, they do not cover all the issues due to the deficiencies of the information/data and the gaps that still exist.
A. Distinction between PSCs and PMCs

At present, there are no legal instruments, either national or international, that clearly distinguish between PSCs and PMCs and the international community and many scholars appear to assume that PSCs and PMCs are essentially the same entity; this assumption is manifest in the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (hereafter the “Montreux Document”). However, Sarah Parker and Joanna Spear argue that PSCs and PMCs, even though they can be very similar, are not the same type of entity.

Parker states that a PSC is a company registered as a civilian company which has a specialization in providing protection for personnel and property from criminal activity and which offers its services at both domestic and foreign level. The services it can provide cover guarding (providing protection for industry and commercial sites, humanitarian aid, embassies, and VIP and close protection); electronic security, sensor and surveillance; investigation and risk management; and private intelligence. A PMC, on the other hand, is a company associated with a military nature that provides services to support or to enhance the effectiveness of an army or other armed group, such as combat operations, strategic planning and force development, operational and logistic support, training, maintenance of weapons system, and technical skills. These services can be provided to legitimate domestic and foreign entities.

3 Ibid.
4 Ibid.
A similar notion is also stated by Spear who asserts that PSCs and PMCs are only similar in certain aspects but they are not synonymous. Spear also points out that the difference between PSCs and PMCs is in their respective investment patterns. PSCs can operate in developed countries, as well as in developing, weak, and fragile countries, especially countries with natural resources that can be exploited. Therefore, this pattern is not similar to that of PMCs, which are typically limited to employment by and with close ties to a government of a state (which occurs in Angola and Uganda); they are more likely to operate only in developing, weak, and fragile countries.

Furthermore, the PMC activity pattern can be very controversial, due to their operation in developing, weak, and fragile countries which may also have vast deposits of natural resources. The governments of such countries also need to fund the operation of PMCs, which generally need to be paid upfront and in cash. In order to deal with this funding issue the government may invite foreign investors to invest in the country but in exchange for natural resource concessions in the country. However, the foreign investors may also be the providers of a PMC for the government of the country. An example of this is the operation of the PMC company Executive Outcomes supported by Tony Buckingham, a British billionaire, under contract with the Sierra Leone government. In return for facilitating Executive Outcomes’ operation in Sierra Leone, Buckingham received the diamond concession in the country. This statement is supported by Singer, who states that PMCs do have close links with the greater financial holdings and conglomerates, due to their providing PMCs with legitimate connections and greater access to financial capital or other corporate

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6 Ibid.
7 Ibid.
9 Ibid 0:04:45 – 0:05:18.
10 Ibid.
resources. Singer’s claim is supported by Juan Carlos Zarate, who states that a relationship between PMCs and mining extraction companies can become one of the ways in which PMCs secure their payment for their services. Besides this close corporate relationship, PMCs also have close ties with the government of a state since it can also give them business advantage.

While the distinction between PSCs and PMCs may at first seem reasonably clear, in practice it is difficult to distinguish between them since some of their operations or services are not particularly well defined or easily observed. Hence it is not always obvious whether the company is conducting ‘offensive’ or ‘defensive’ services, or ‘directly participating in hostilities’. In August 2005, the Geneva-based University Centre for International Humanitarian Law brought together experts in international humanitarian law, human rights law, government officials, political scientists and members of the PSC and PMC industry to discuss how to define and regulate these companies under international law and national laws. During the meeting, some experts argued that some PMCs performing security services prefer to be referred to as PSCs, and many PSCs and PMCs were contracted by states or companies to guard their commercial interests, such as oilfields and pipelines, in armed conflict areas.

Furthermore, PSCs and PMCs are often grouped together under the common name of Private Military and Security Company (PMSC); this same grouping also occurs in the

Montreux Document. Overlapping tasks between PSCs and PMCs also contribute to the distinction difficulties, since a number of PMCs are involved in law enforcement activities and some PSCs operate inside armed conflict areas and even conduct military operations. For example, in the aftermath of Hurricane Katrina in 2005, the US Department of Homeland Security and the Governor of Louisiana hired the PMC Blackwater, to assist the local law enforcement agencies to restore law and order in New Orleans. The overlapping may also occur because PMC personnel, often being former national armed forces personnel, are also trained for law enforcement missions. This proposition is supported by Ian Wing who states that military forces also undertake many non-combatant missions, including law enforcement missions.

Katherine Fallah argues that the difficulties associated with finding an appropriate definition of PSCs and PMCs and the nature of their operations occur due to the lack of adequate and proper legal instruments to provide clear definition and reference of PSCs and PMCs or other similar corporate actors, including those who operate in armed conflict zones. Emanuela-Chiara Gillard states that the difficulty in making a distinction between PSCs and PMCs is due to the lack of an agreed definition as to ‘PSC’ and ‘PMC’ terminology. Therefore, by way of a preliminary conclusion, PSCs and PMCs are different entities, even though they can conduct similar tasks and services. In practice, it is very difficult to distinguish between them due to the overlapping tasks between these entities. For the purposes of this thesis, the research does not focus upon the distinction between PSCs and PMCs, and generally uses the term ‘PSC’ to refer to both types of organisations unless

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distinctions need to be drawn in specific instances. The author contends that, due to the similarities between them, the materials, data and information relating to PSCs can mainly also be used or applied to PMCs.

**B. PSC and PMC Involvement in a Country**

PSCs and PMCs had been involved, and have presence, in many conflicts that have occurred around the world since 1965, such as those in Africa, in Middle East, and South America.\(^{21}\) Their involvement can range from just supplying weapons to the parties in these conflicts, to providing security services, or to fighting directly on behalf of a party to the conflict – the latter, suggests Godfrey Mwakikagile, is often by direct invitation from the country’s government itself.\(^{22}\) He also states that one reason a government of a state (in his example the African state governments) may invite a PSC or PMC to so act is the fact that the governments do not have the ability to ensure and impose peace inside their war-torn countries. However, this practice is causing dependency on the PSCs and PMCs.\(^{23}\)

Alexander Faite suggests that the presence of a PSC or PMC in a country could occur because of several major factors, such as: the economic profit for a PSC or PMC; instability in the security environment of a country; and lack of legal instruments to regulate them (legal vacuum) in the country where they have a presence.\(^{24}\) The economic factor and the unstable security factor are probably closely related as reasons for PSCs and PMCs to operate in a country. The unstable security that occurs in a country can also cause the country’s armed forces to be reluctant to conduct certain minor operations and cause them to

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\(^{21}\) The year 1965 is arguably the first year when the first modern or contemporary style PMC, WatchGuard International formed by the SAS founder, Sir David Stirling, began operations. The company provided security and military services to British Government and Yemen Royalist during North Yemen Civil War. In more recent years, in particular the period immediately after the Cold War between 1993 – 1994, PSCs and PMCs received more international attention after the operation of the PMC company Executive Outcomes in Sierra Leone and other African countries.


\(^{23}\) Ibid.

prefer to outsource such actions to PSCs and PMCs so they can focus more on important operations. Such minor or less important operations might include training the armed forces personnel, providing security details to government officials, escorting supply convoys, or defending key locations or infrastructures.\textsuperscript{25} An example of such so-called minor operations can be seen in Iraq during the United States military occupation.\textsuperscript{26} Faite also suggests that the outsourcing of certain operations can occur because the PSCs and PMCs are capable of conducting the operation and the armed forces are unable or unwilling to do so or wish to relieve the strain that the operation would place upon them.\textsuperscript{27} In respect of multinational companies, Faite further states that many of them, in particular mining and mineral extraction companies, who want to operate in the mining or operational sites that are located inside an armed conflict area, requires services from PSCs and PMCs to provide them with security.\textsuperscript{28} So, for PSCs and PMCs this type of operation can be a lucrative business and they can gain significant income if they have presence in a country in order to provide services to both armed forces and multinational companies.

Faite’s argument of unstable security conditions as a factor that drives PSCs and PMCs to operate in a country is supported by Henry Sanchez, who states that the unstable security conditions that might be caused by civil unrest, internal conflicts, and/or the breakdown of state stability can create conducive environments for PSCs and PMCs to conduct their operations.\textsuperscript{29} This situation usually occurs in conflict and post-conflict countries where the governments cannot adequately maintain their own security.\textsuperscript{30} The third factor Faite identifies is the legal vacuum. Faite argues that many PSCs and PMCs operate in many countries due to a legal vacuum within international law, in particular international humanitarian law, and its application in respect of them; how to distinguish their operations

\textsuperscript{25} Ibid 2.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid 2.
\textsuperscript{28} Ibid.
\textsuperscript{30} Ibid.
whether as defensive and offensive activities or even as direct participation in hostilities; and what the legal status that might be applicable to PSCs and PMCs in armed conflicts.\(^{31}\) Additionally, Faite states that the legal vacuum also occurs in respect of many countries’ national laws. Even the United Nations has considered the creation of treaties, laws or regulation relating to PSCs and PMCs and the conduct of their operations; however no concrete results have been effectively achieved.\(^{32}\) However, due to the expanding of PSCs and PMCs operation and their customer base, many countries are now starting to adopt or enact laws or regulation to control PSCs and PMCs - both inside their territories and abroad.\(^{33}\)

There are many reports of PSCs and PMCs in a country being accused of committing serious violations of laws or even basic human rights during their operations; one example is the United States-based PMC DynCorp International, which has been the subject of a number of serious allegations concerning its conduct in respect of some of its operations, such as:

- uncontrolled aerial spraying of herbicides and fumigants in the border region between Colombia and Ecuador in order to eradicate Colombian cocaine and poppy plantations in Colombia;\(^{34}\)

- direct involvement in military counter-insurgency operations and anti-drug missions in Colombia against Colombian rebel groups and drug cartels, such as special search and rescue operations\(^{35}\) and provision of pilots for helicopter gunships;\(^{36}\)


\(^{32}\) Ibid 12.

\(^{33}\) Ibid.

\(^{34}\) Arias, et al., v DynCorp, et al., 1:01-cv-01908-RWR 2 (D Wash, 2007). This operation allegedly caused severe health problems, and destruction of plants and livestock.
• DynCorp employees and supervisors allegedly involved in child prostitution and slavery, involving children 12 – 15 years of age, in Bosnia in 1999;37

• DynCorp employees in Afghanistan allegedly involved in hiring young ‘dancing boys’, as child prostitutes for entertainment.38

However, a different point of view considers that the presence of PSCs and PMCs also can improve the stability or even bring peace in a failing or lawless state. This point of view is proposed by Don Mayer, who nevertheless adds the qualification that PSCs and PMCs cannot achieve such goals if they are acting solely on commercial grounds. The PSCs and PMCs first need to be authorised forces that are well-defined, well-regulated, and receiving support from the international community.39

In 2006, a UN Working Group on the Use of Mercenaries in Ecuador found that the use of a PSC and/or PMC by a country to maintain its security can be a temporary solution to deal with the lack of law enforcement personnel, until such time as their numbers increase to...
a level sufficient to meet the requirement of adequate law enforcement. Besides operating in conflict, post-conflict, and unstable countries, PSCs and PMCs also conduct their operations in stable and developed countries. In those countries, their operations are more in compliance with authorised activities associated with police work, law enforcement, and crime prevention control, regulation and constraint.

C. Contracting PSCs and PMCs

C.1. National Governments

Deborah Avant suggests that governments hire PSCs and PMCs due to several factors, such as surge and flexibility, specialised skills, and decreased political costs. Avant describes these factors as follows:

- **Surge and flexibility**: PSCs and PMCs have the capability to very quickly recruit their necessary personnel and to deploy them to the area of operation, without any intervention politically or bureaucratically. Additionally, once they complete the operation, the contract can quickly conclude and the personnel extracted. This capacity enables the government of a state to avoid the likely slow and cumbersome processes it would face in deploying its own large military force.

- **Specialised skills**: PSCs and PMCs, through their databases or direct recruitment, can provide the contracting government with specialised personnel with particular skills that match operational requirements or needs. This matching can be much harder and more complex if conducted by the bureaucratic machinery of the government itself.

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42 Ibid.
43 Ibid.
44 Ibid 332.
• **Decreased political factor:** since PSCs and PMCs conduct their operations for profit and on their own choice, there can be less political damage if the government does not appear to be directly conducting an operation.\(^{45}\) Furthermore, the PSCs and PMCs can encourage their client’s long-term commitment inside the operation area.\(^{46}\)

However, Avant also states that the use of PSCs and PMCs has costs and risks for the contracting government; she divides these into the following two categories of practical problems and political risks:

• **Practical problems:**

  *Cost:* the cost of PSCs and PMCs sometimes can become more expensive than national armed forces due to several factors. Firstly, uncertainty and dangerous environments can impact on the cost of PSCs and PMCs, particularly where a government is primarily interested in having appropriate personnel deployed for the operation in question, and less concerned about cost.\(^{47}\) Also, the government sometimes cannot specify what services PSCs and PMCs should perform, so when the situation becomes clear, the costs can dramatically increase and require corresponding contractual increases.\(^{48}\) Secondly, market forces, namely supply and demand, can increase the cost of PSCs and PMCs especially when the need for them is very urgent.\(^{49}\) Thirdly, the insurance rate also affects the PSCs and PMCs’ cost because the companies need to pay premium rates when they will deploy to a dangerous area.\(^{50}\) The insurance rate will increase as the PSCs and PMCs’ areas of operation become

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\(^{45}\) Ibid.  
\(^{46}\) Ibid.  
\(^{47}\) Ibid 332 – 333.  
\(^{48}\) Ibid.  
\(^{49}\) Ibid 333.  
\(^{50}\) Ibid.
increasingly dangerous and the PSC and PMC companies pass on such increases to the contracting government.\textsuperscript{51}

\textit{Reliability:} if the contracting government attempts to minimize costs, the quality of PSC and PMC services will be adversely affected as the contracted PSCs and PMCs endeavour to deploy fewer skilled personnel or otherwise reduce quality of services - exacerbating the reliability which might have already become a significant concern.\textsuperscript{52}

\textit{Integration:} PSCs and PMCs can hinder the unified responses to dangerous conditions which can trouble the military personnel, due to uncertainty of rules of engagement, absence of shared knowledge of armed movements, and lack of knowledge relating to critical matters for safety and success of missions.\textsuperscript{53} Also, such matters as PSCs and PMCs supervising and changing contracts in areas of operation can become problematic issues if the military field commanders do not have direct authority over the PSC and PMC personnel and have to rely on the company’s contracting officers.\textsuperscript{54} Due to various personnel having different skills and responsibilities, it can be very difficult for the field commanders to coordinate and change PSC and PMC personnel services in order to meet the more immediate operation requirements without authorisation from the contracting officers – particularly when they are not present in the area of operation.\textsuperscript{55} These difficulties are exacerbated by poor coordination between the various government departments with separate responsibilities relating to the PSCs and PMCs contracts.\textsuperscript{56} An example of the result of this poor coordination is the action by the PMC Triple Canopy\textsuperscript{57} in Iraq, which allegedly was forced to obtain

\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid 336.
\textsuperscript{53} Ibid 337.
\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{57} A PMC established in 2003 by US Army Special Forces veterans, Matt Mann and Tom Katis, states its objective is to address the threat of international terrorism and to help to train government agencies in counter-terrorism techniques. The company has been involved in Iraq, and also in Haiti
illegal firearms in order to fulfil its contract with the US State Department when the
US Office of Defence Trade Controls (which is also part of the State Department) did
not provide the company with the necessary licence to export from the United States
the firearms that it needed to protect State Department personnel in Iraq.\footnote{Deborah Avant, ‘Privatization of Security: Lesson from Iraq’ (2006) 50 (2) Orbis 337.}

Legal uncertainty: the use of PSCs and PMCs gives rise to an issue relating to their
legal accountability because of the lack of the certain legal status that can be applied
to them.\footnote{Ibid 338.} Additionally, they sometimes cannot be subject to certain national laws or
rules in order to regulate them. This results in less than satisfactory outcomes
regarding to their accountability. PSCs and PMCs contracted to the United States
government and operating in Iraq can enjoy immunity generally under the Status of
Forces Agreement (SOFA) into which the United States and Iraqi governments
entered.\footnote{See further discussion in Chapter IV on the Timor-Leste/United States Status of Forces Agreement (SOFA).} The consequence of this immunity is that PSC and PMC personnel cannot
be prosecuted by the local courts of the country in which they operate, or where the
local government is not functioning effectively, or the law or regulations are new and
untested.\footnote{Ibid 339.} In respect of international law, since PSCs and PMCs do not fit into any
legal status within international humanitarian law, it may be very difficult for them if
they fall into enemy hands since they might be denied prisoner of war status.\footnote{Deborah Avant, ‘Privatization of Security: Lesson from Iraq’ (2006) 50 (2) Orbis 337.}

Furthermore, absence of prisoner of war status for PSC and PMC personnel can also
create a problem for the contracting government, which was demonstrated in 2003
when the United States denied prisoner of war status for DynCorp personnel that had

where they assisted the relief efforts after the 2010 earthquake. See Daniel Bergner, ‘The Other
Army’, \textit{The New York Times} (online), 14 August 2005
\texttt{<http://www.nytimes.com/2005/08/14/magazine/14PRIVATI.html?pagewanted=1\&_r=2\&>}).
\footnote{Deborah Avant, ‘Privatization of Security: Lesson from Iraq’ (2006) 50 (2) Orbis 337.}
\footnote{Ibid 338.}
\footnote{See further discussion in Chapter IV on the Timor-Leste/United States Status of Forces Agreement (SOFA).}
\footnote{Deborah Avant, ‘Privatization of Security: Lesson from Iraq’ (2006) 50 (2) Orbis 337.}
\footnote{Ibid 339.}
been captured by Colombian rebels. The United States government maintained the status of the captured personnel was that of hostages.\textsuperscript{63}

• Political risks:

*Military profession:* the use of military forces can be very costly or even ruinous for a fragile economy, and outsourcing may be seen as a way to avoid such financial burden. However, the use of PSCs and PMCs might undermine the military profession due to blurred distinctions between military activities and PSC and PMC activities.\textsuperscript{64}

Additionally, the use of PSCs and PMCs could undermine and erode the military’s professional capabilities and ethos.\textsuperscript{65} Furthermore, the PSC and PMC sector may create a negative retention impact on the military, creating concerns for the military leadership, namely, that they will be forced to compete with PSCs and PMCs. This may cause the military to lose its unique and important professional qualities that are crucial for its operations.\textsuperscript{66}

*Democratic restraint:* the use of PSCs and PMCs could lead to the reduction of transparency, which could have political impact on government policy and undermine the capacity to hold governments accountable for their decisions and actions.\textsuperscript{67}

Avant’s argument relating to the expense of using PSCs and PMCs is disputed by Wing, who states that the contracting PSCs and PMCs, according to the contract, allows the cost of their activities to be predicted accurately.\textsuperscript{68} Also, their efficient employment may indeed mean substantial savings for the client government.\textsuperscript{69} Furthermore, Wing suggests

\textsuperscript{63} Ibid 339 - 340.
\textsuperscript{64} Ibid 340.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid.
\textsuperscript{69} Ibid.
that these companies can grow and expand their activities due to an unwillingness of governments, in particular western governments, to expose their armed force personnel to the risk of death and injury. The situation can become more difficult, as stated by Edward Luttwak, as families of armed force personnel and the public, even though they approve their family members joining the military, do not want them to be sent to potential combat situations in which deaths and injuries would be viewed as scandals rather than occupational hazards. Furthermore, Wing states that armed force personnel casualties can cause political difficulties to the government. Therefore, PSCs and PMCs can become a solution to the government as an alternative to deploy national armed forces.

C.2. International Organisations and Companies

The use of PSCs and PMCs by international organisations has occurred in armed conflict zones across the world, such as the Sudan, Somalia, Darfur, Iraq, Chechnya, Pakistan, Kenya, and Ingushetia. Stoddard and others argue that international organisations use the PSCs and PMCs to support their humanitarian operations since it is the only possible way to ensure the continuation of humanitarian operation in the high risk areas of those countries. Organisations such as the International Monetary Fund and the United Nations have benefited from the services provided by PSCs and PMCs. UN spokesman, Farhan Haq, reveals that the United Nations used some PSCs and PMCs to provide security services,

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70 Ibid.
71 Edward Luttwak, ‘Where are the Great Powers? At Home with the Kids” (1994) 73 (4) Foreign Affairs 25.
in particular static guards, to UN staff in Afghanistan and Pakistan. The United Nations had considered the use of these companies as part of its international peacekeeping force.

PSCs can operate in terms of law enforcement, such as supporting the United Nations Civil Police (UNCIVPOL) contingents, providing training for local law enforcement agencies, and providing security for UN buildings and compounds; PMCs can operate in a military nature in order to support UN military peacekeeping operations and providing logistic and maintenance support to UN contingents. For example, a report on the UN mission in Sierra Leone (UNAMSIL) showed that it received logistic support provided by PMSCs and PSCs. Furthermore PMCs can conduct direct intervention operations. This was shown in 1998 by the statement of UN Secretary-General, Kofi Annan, that the United Nations had seriously considered the possibility of using PMSCs and/or PSCs in order to separate fighters from refugees in the refugee camps in Goma, Democratic Republic of the Congo.

The use of PSCs and PMCs in UN peacekeeping operations might significantly improve the operations. This suggestion is supported by Scott Fitzsimmons, who argues that PSCs and PMCs can provide personnel manpower smaller in numbers than the UN personnel requirements for the same operation. However, Fitzsimmons also states that PSCs and PMCs personnel are likely to have better qualities and abilities due to their high level training, experience, and overall battlefield skills, compared to UN personnel who come from developing countries with second-rate and third-rate military forces, often without the

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77 Ibid.
78 Ibid.
requisite military skills to perform complex operations.\textsuperscript{81} In addition, he also suggests that some PSCs and PMCs possess modern military hardware and equipment that could be quickly and effectively deployed to the area of peacekeeping operations compared to some of the UN missions, in particular when the contributing nations either do not possess such resources or refuse to risk them in distant and non-strategic conflicts.\textsuperscript{82} He points out that PSCs and PMCs can also provide rapid transport capability for an intervention force to support a peacemaking operation, so that it can make stronger security guarantees in a peace enforcement operation without any dependency on the transportation by the superpower countries in UN operations.\textsuperscript{83}

Furthermore, Fitzsimmons considers that PSCs and PMCs have more commitment to the success of an operation, since failure to end the conflict may mean that they will not receive their payment and their long-term reputation would be tarnished. This would make it difficult for the PSCs and PMCs to secure future contracts.\textsuperscript{84} Some UN member states lack interest or commitment to ending a conflict, or will not send forces since the conflict has little effect to their national interest, or would be a financial burden, or could put their forces in harm’s way.\textsuperscript{85} Even though PSCs and PMCs can be seemingly effective, in the end the decision to use these companies in UN peacekeeping operations depends on the UN Security Council.

For international organisations that are active in humanitarian operations, such as the International Red Cross or the World Food Programme, Abby Stoddard expresses the view that the reason they contract PSCs and PMCs is because the companies’ support is very important. The PSCs and PMCs provide security services which can ensure the continuity of

\textsuperscript{81} Ibid 3-4.
\textsuperscript{82} Ibid 10-11.
\textsuperscript{83} Ibid 13-17. This is demonstrated by the PMC Executive Outcome in Sierra Leone and Angola where the company had large numbers of transport helicopters, gunship helicopters, and jet fighters within its air wing which had been used to transport the troops to critical areas and effectively suppressed the rebel in both countries.
\textsuperscript{84} Ibid 18.
\textsuperscript{85} Ibid 20.
humanitarian operations in those high risk areas.\textsuperscript{86} As stated by Nikolaos Tzifakis, international organisations contract PSCs and PMCs, especially in failed or failing states, because these companies can provide credible security services compared to the local security force which are probably poorly trained or have human rights violation records and might use excessive violence in their operations.\textsuperscript{87}

As suggested by the UK Foreign and Commonwealth Office report on PMCs and their operations, the main purpose for multinational companies contracting PSCs and PMCs is to protect the company interests and business.\textsuperscript{88} Most of the companies contracting PSCs and PMCs are mineral extraction companies with their mineral and mining sites located in areas where the installations or mining sites are threatened by insecurity or conflict. Therefore, they contract PSCs and PMCs to secure their mining and extraction operations, and by doing so the PSCs and PMCs ensure they receive payment.\textsuperscript{89} Relationships between PSCs and PMCs and multinational companies, in particular mining and mineral extraction companies, can be more than just an association between services provider and customer. Many have close corporate links, such as cross shareholdings and joint directorships.\textsuperscript{90} However, there is a possibility that the relationship can be closer and more dangerous, as demonstrated by big multinational companies such as British Petroleum and Shell forming close relationships with members of military and security and privatised security services, and military operations around their mining areas and oil fields.\textsuperscript{91} This practice makes privatised security and military personnel become, in effect, part of the multinational companies. So, PSCs and PMCs are created by the multinational companies in order to serve the corporation’s

\textsuperscript{87} Nikolaos Tzifakis, ‘Contracting Out to Private Military and Security Companies’ (Centre European Studies, 2012) 22.
\textsuperscript{88} Foreign and Commonwealth Office, Private Military Companies: Options of Regulation 2001-02, House of Commons No HC 577, (2002) [41] (see box 4).
\textsuperscript{89} Foreign and Commonwealth Office, Private Military Companies: Options of Regulation 2001-02, House of Commons No HC 577, (2002) [41] (see box 4).
\textsuperscript{90} Ibid.
\textsuperscript{91} The War Business (Directed by Mark Stucke, ZDF and Journeyman Pictures, 1997) 0:43:47 - 0:44:09. The video can be watched at <http://jman.tv/film/1216/TheWarBusiness>. 
objectives. Moreover, the multinational companies’ objectives were in the first place what spurred PSCs and PMCs to operate in armed conflict zones and become involved directly in fighting in conflict areas, in order to secure the multinational companies’ economic interests.\(^92\) For example, the PMC Executive Outcomes was initially involved in Angola in order to secure the Soho diamond fields so that the multinational companies with the concessions could operate there.\(^93\)

**D. Options under International Law for Regulation**

There are a number of options for the regulation for PSCs and PMC that have been recommended by commentators, and which can be useful in this research. Gillard recommends four options, which also include responsibility and accountability. First, the incorporation of PSC and PMC personnel into armed forces can become an approach to clear any doubt as to their legal status, in particular in respect of services that can be categorised as direct participation in hostilities. Such incorporation would make them under the command and control of a military hierarchy, ensure respect for international humanitarian law, entitle them to protection as prisoners of war, and avert them from being categorised as mercenaries or unlawful combatants or unprivileged belligerents.\(^94\) Second, states can expand their courts’ jurisdictions so they can increase possible avenues to proceed against PSCs and PMCs for any international law and international humanitarian law violations. This can also include the civil and criminal liability of a PSC or PMC company for its violations and provide extraterritorial jurisdiction for the courts to deal with the violations.\(^95\)

Third, the contracting states could consider adopting policies or regulations relating to PSCs and PMCs that cover issues such as: types of services or tasks or activities that might be conducted by PSC and PMC personnel; vetting and training requirements for PSC

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\(^92\) Ibid 0:44:10 – 0:44:35.

\(^93\) Ibid.


\(^95\) Ibid.
and PMC personnel; clear allocation of responsibility between state and company relating to PSC and PMC matters; subcontracting regulations; report and investigation mechanisms for allegations of international humanitarian law violations; modification of public procurement that includes the vetting and training of PSC and PMC personnel.\footnote{Ibid.} Fourth, states may provide policies that exercise their control over PSC and PMC operations, in order to prevent PSC and PMC violations and risks to the legal obligation of the state and its foreign policy interests. The states can regulate the type of PSC and PMC activities that may be permitted inside their territory; the compliance of PSCs and PMCs to certain minimum standards including regulation of the use of firearms or weapons; and the obtaining of empirical information about numbers of PSC and PMC personnel inside their territory.\footnote{Ibid 572.}

As part of corporate responsibility, Gillard recommends that PSCs and PMCs be held responsible for the wrongdoings of their personnel.\footnote{Ibid 547.} Therefore, PSCs and PMCs need to take certain measures,\footnote{Ibid 548.} such as: providing training to ensure its personnel do not commit international humanitarian law and human rights violations or associate with clients that have tarnished reputations; generating international humanitarian law awareness; providing personnel with procedures for standard operations and rules of engagement based on international law and applicable national law; and establishing inside the company a mechanism for investigating alleged wrongdoings and to ensure accountability. Lindsey Cameron suggests that the UN Working Group on PSCs and PMCs could create a code of minimum human rights standards that the companies must respect.\footnote{Lindsey Cameron, ‘Private Military Companies and Their Status under International Humanitarian Law’ (2006) 88(863) \textit{International Review of the Red Cross} 597.} The Working Group could also create a code of minimum human rights standards that obligate states to incorporate PSCs and PMCs into their licensing schemes and contracts. Additionally, under the code, states could regulate PSCs and PMCs that are registered and/or headquartered in
their territory or jurisdiction, or contracted by them, or contracted by other companies registered within their jurisdiction. Such regulation might be based on the obligation set under Common Article 1 of the *Geneva Convention 1949* to ensure the respect of international humanitarian law and the Convention itself.\(^{101}\)

Parker also recommends several precautionary actions to regulate PSCs and PMCs.\(^{102}\) First, PSCs and PMCs should register under the relevant authority. Second, licensing of PSCs and PMCs should include the clarification of the kinds and types of services they may offer and an evaluation of the possibility of a PSC or PMC causing instability and endangering public safety. Third, the requirements and internal system of governance, such as employee recruitment policies, training and conduct, should be part of any assessment to ensure transparency and the accountability of PSCs and PMCs. Fourth, PSCs and PMCs must comply with a proper code of conduct. Fifth, PSCs and PMCs should be in good financial condition, without any insolvency conditions. Parker further recommends that PSC and PMC personnel should be licensed to work as security guards and providers, be of a certain age, undergo a background check to ensure no criminal records or mental illness, and complete a proper and adequate training course under the supervision of the state authority.\(^{103}\)

Singer suggests the formation of an international expert body to receive and manage information about PSCs and PMCs from their stakeholders (state governments, the academies, NGOs, and the companies themselves).\(^{104}\) This body can establish issues and parameters, set up internationally recognised databases of the companies, create potential regulation forms, evaluation tools, and codes of conduct that also can be used by public decision makers when they decide on PSC and PMC matters. In addition, this body could

\(^{101}\) Ibid.


\(^{103}\) Ibid 7.

have certain power to suspend payments to PSC and PMC. He suggests that the idea of creating such a body for monitoring PSCs and PMCs could work for the United Nations and win PSCs and PMCs contracts from clients otherwise concerned about their image.\(^{105}\) An option of regulation is suggested by Tim Spicer. As a former employee of the PMCs Aegis Defence Services\(^{106}\) and Sandline International, he provides a perspective on regulation from the PSC/PMC side. He recommends an option to control PSCs and PMCs in their areas of operation through the formation of teams of observers in the field, alongside the PSC and PMC, to monitor their activities. Through this measure, PSCs and PMCs can perform their services more respectfully and meet the conditions of international law since they will be aware that they are being monitored, that they can be banned from future contracts, and that they can even be prosecuted in an international tribunal.\(^{107}\)

Michael Cottier recommends elements for the contracting states, territorial (or area of operation) states, and exporting (the PSC or PMC home state) states for the purposes of contracting and regulating PSCs and PMCs.\(^{108}\) For the contracting states, the contract between the state and the company can become the main tool to regulate PSCs and PMCs if it includes elements that must met by the PSC or PMC awarded the contract, such as: certain information to be submitted by bidding PSCs and PMCs; criteria for selection of PSCs and PMCs; specific contractual obligations for PSC and PMC conduct; PSC and PMC training requirements; monitoring and oversight; and sanctions and criminal jurisdiction for PSC and PMC violations. The territorial state can adopt regulations that include several options, such

\(^{105}\) Ibid.
\(^{106}\) A PMC established by Tim Spicer in 2002. This company operates in war zones such as Iraq, in which the company was contracted by the US Department of Defence to provide services to the Project and Contracting Office, which is responsible for the managing and reconstruction program. The Company’s operations in Iraq have escalated since the US pulled out from Iraq where Aegis and DynCorp International replaced the US forces. Aegis provides troops on the ground and DynCorp is in charge with armed helicopters (see: Tom Bowman, ‘As U.S. Military Exits Iraq, Contractors to Enter’, NPR (online), 17 May 2011 <http://www.npr.org/2011/05/17/136357821/as-u-s-military-exits-iraq-contractors-to-enter>).
as: banning certain activities in the territory or jurisdiction of the state; an operation licence regime for a PSC and PMC for its security or military operations; operating licence for individual personnel of PSCs and PMCs; monitoring and sanctions for PSC and PMC violations; and the establishment of criminal and civil jurisdiction. For exporting states, the regulation options could cover: extension of existing arms export control instruments and mechanisms to private military and security services: PSC and PMC licence requirements; administrative implementation and monitoring of PSCs and PMC; and licensing for individual personnel of PSCs and PMCs for security and military services abroad.

Another means of regulation would be by self-regulation through PSC and PMC industry associations and their own industry code of conduct. Examples of such codes at the international level include the International Code of Conduct for Private Security Service Providers (ICOC)\(^{109}\) and the International Stability Operations Association (ISOA).\(^{110}\) At the national or domestic level, they include the British Association for Private Security Companies (BASPC),\(^{111}\) the Security Association of South Africa (SASA),\(^{112}\) and Australian

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109 The International Code of Conduct for Private Security Service Providers is a Swiss government, International Red Cross and multi-stakeholders initiative that have objective to clarify international standards for private security industries in complex environment and to improve oversight and accountability of these companies. The initiative makes provisions for PSCs based on human rights principles. This initiative has been signed by 58 PSCs from 15 countries in Geneva on 9 November 2010. See International Code of Conduct for Private Security Service Providers (ICOC), About the ICOC (2014) <http://www.icoc-psp.org/About_ICoC.html>.

110 ISOA was established in 2001 as the International Peace Operations Association by Doug Brooks after he returned from Sierra Leone. During his time in Africa, Brooks collaborated with several non-governmental organisations, lawyers, and humanitarian organisations to codify basic principles for PSC and PMC transparency and accountability and how they are to engage in the global-scale humanitarian and peace operations into a document. This document later known as the ISOA Code of Conduct. See International Stability Operations Association (ISOA), History of ISOA <http://www.stability-operations.org/?page=History>.

111 An association for UK-based private security industry whose mission is to “promote, enhance and regulate the interest and activities of UK-based firms and companies that provide armed security services in countries outside UK and to represent the interest and activities of members in matters of proposed or actual legislation”. See Powerbase, British Association of Private Security Companies (5 October 2009) Powerbase <http://www.powerbase.info/index.php/British_Association_of_Private_Security_Companies>.

112 SASA was formed in 1964 as representative of all security aspects in South Africa. It also acts as an advocate and a custodian for the private security industry and professional business practise and ensures that its members are professional institutions that comply and abide with the industry laws and regulations. See Security Association of South Africa (SASA), The Security Association of South Africa: A World Class Professional Body Delivering Exceptional Value through the Excellence of Its Members <http://www.sasecurity.co.za/page.php?id=2>.
Security Industry Association Ltd (ASIAL). These associations provide similar self-regulation mechanism or industry codes of conduct, such as the obligation for their PSC and PMC members and their personnel to respect the principles and standards of international law, in particular international humanitarian law and human rights law. They also provide regulations for their members in terms of the proper selection, recruitment and training for personnel, and PSC and PMC model contracts. They further impose upon member PSCs and PMCs an obligation and responsibility to ensure the safety of their personnel and to operate as according to principles and standards of international law. They provide a mechanism for a report/complaint system for PSCs and PMCs, including their personnel as part of accountability and transparency system.

Gillard states that the self-regulation mechanism and codes of conduct are seen by some scholars as being acceptable as the sole source of obligation for PSCs and PMCs. Moreover, Andrew Bearpark and Sabrina Schulz suggest that the PSC and PMC industry should use the self-regulation and code of conduct mechanism since the industry has a better understanding of themselves than a government, maybe a plan to introduce ‘smart’ regulation, and can apply sanctions more effectively amongst themselves. In addition, self-regulation is necessary because there is no existing law or regulation to be forced upon them. However, there are negative arguments relating to the use of the corporate self-regulation and code of conduct mechanism. Gillard points out that the use of this “voluntary” approach is not legally binding upon signatory companies and cannot be used as a basis for the prosecution of its members. Further, it cannot provide the guarantee that its members will

113 ASIAL was formed in 1969 and has been viewed as the main monitoring body of the Australian security industry. It has represented approximately 85% of the Australia’s security industry. See Australian Security Industry Association Limited (ASIAL), About ASIAL (2013) <http://www.asial.com.au/Header/About-us>.
116 Ibid.
conduct their operations according to the self-regulation and code of conduct mechanism. In addition, non-member PSCs and PMCs will not follow the mechanism since it would apply only to signatory PSCs and PMCs.

Surabhi Ranganathan argues that the effectiveness of PSC and PMC associations and an industry code of conduct to regulate their members depend on the good faith consent of its members. It cannot be effective since PSC and PMC associations are often created as a facade for any regulation constraint and as an attempt to distinguish member PSCs and PMCs from their business rivals. Also, the ineffectiveness can be caused by its members’ interests while they carried out their operations where it potentially could be used by one of its members to achieve its interests to the cost of other members, non-PSC and PMC members, or third parties. In addition, it does not effectively control PSCs and PMCs due to the reliance upon the good will of PSC and PMC members to follow it. Nor is it legally binding. Renée de Nevers proposes that the dependence on self-regulation and an industry code of conduct has often given rise to suspicion that such mechanism is just an effort of government to give a facade of transparency regarding the use of PSCs and PMCs. In addition, the mechanism does not seem to cover PSC and PMC activities which occur in “grey” areas; nor is it an effective and verifiable mechanism because of financial insufficiency, lack of popular support among PSCs and PMCs, and lack of government commitment to expand it. Therefore, it is very important to have mandatory laws or regulations for PSCs and PMCs within industry codes, so their monitoring can be more independent and can be beneficial to every actor involved in the PSC and PMC activities.

119 Ibid.
120 Ibid.
122 Ibid 236.
E. The Legal Status and Accountability of PSCs and PMCs

The legal status of PSCs and PMCs has become the subject of much discussion among scholars. Parker argues that the nature of the services and tasks of PSCs and PMCs determine the classification of their legal status, even when there is no agreed definition for non-state security providers - whether they are PSCs, PMCs, or just mercenary forces. 123 Besides depending on the nature of their activities, Gillard also suggests that the determination of the legal status of PSCs and PMCs providing services to armed forces in conflict situations should also be made on a case-by-case basis and include identification of the client and whether the company should be categorised as a member of an armed force. 124 Determination of the legal status should also include the location of the area of operation, since the activities or tasks or services performed by a PSC or PMC will differ from other PSCs and PMCs in different locations, depending on whether the area of operation is in a conflict zone or in a civil environment. 125 In addition, the nationality of PSC and PMC personnel is also important since legal status in international humanitarian law may depend upon the nationality of the subject.

In respect of the issue of accountability, PSCs and PMCs and their personnel should be subject to prosecution for their wrongdoings, misconduct or crimes, particularly for actions or activities that could be categorised as crimes against humanity or war crimes. Provision should exist for them to be prosecuted in courts of the state where they are registered (the home state), in the contracting state, or in the state where they conducted their operations (the territorial state). However, legal proceedings against PSC or PMC personnel have been rare because of a variety of factors, some legal, and others more practical and

Firstly, the courts, in particular those in territorial states, might give immunity to prosecution to the personnel and their companies. Secondly, the courts might have stopped functioning due to the conflict situation. Thirdly, the contracting and home states, may not be able to exercise extraterritorial jurisdiction over PSCs and PMCs due to the lack of national legislation and because the states may be reluctant to prosecute violations occurring overseas for practical and political reasons. Fourthly, proceedings would be complicated, even if a home or contracting state court is able and willing to do so, because of evidence and witnesses likely to be in another country.

But the prosecution of PSC and PMC companies and personnel, even if they are civilian, can occur if there is a political will, which also will reduce or eliminate the presumption that the prosecution of private actors cannot be conducted due to a legal vacuum. The incorporation of PSCs and PMCs into a state regulatory body, the insertion of human rights obligations into companies’ contracts and a licencing mechanism for PSCs and PMCs are ways to ensure the respect of human rights by these companies.

**F. Concluding Remarks**

In conclusion, this chapter has examined the current literature on PSC and PMC presence in a country and the reason why their clients contract with them. However, the issue relating to their regulation still needs further discussion and assessment, especially taking account of the experiences and regulations of countries that are already established as the biggest customers in this industry – such as the United States, the United Kingdom and South Africa - countries where the companies are registered, and countries of origin of the employees. The experiences and regulations of these countries will be discussed further in Chapter III, following.

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127 Ibid.
128 Ibid.
CHAPTER III

LEGAL FRAMEWORKS FOR THE REGULATION OF PSCs AND PMCs

This chapter reviews and assesses legal frameworks within several countries that regulate the operation of PSCs and PMCs. The legal frameworks selected for review are those of the United States, the United Kingdom, South Africa, Iraq, Afghanistan, and Indonesia. While not having either a national legal framework or even an international treaty, the United Nations’ attempt to regulate the operation of PSCs and PMCs through its Commission on Crime Prevention and Criminal Justice, also receives brief attention. International initiatives, such as 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 and the International Code of Conduct for Private Security Services Providers, are also assessed. Even though neither are treaties or conventions, they have nevertheless been accepted and their provisions followed by some countries and companies. The assessments of the national laws and international instruments regarding PSCs and PMCs are later utilised to improve PSC and PMC regulations within the Timor-Leste legal system.

A. The United States

The United States legal system regulates PSCs and PMCs and their operations through a number of legislative instruments, the three major statutes for the purposes of this thesis being the Military Extraterritorial Jurisdiction Act of 2000 (hereinafter the MEJA), and the Civilian Extraterritorial Jurisdiction Act of 2010 (hereinafter the CEJA), and the Arms Export Act of 1976.

The Preamble to MEJA states that the Act establishes "Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the
Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses…,” Therefore it allows for the criminal prosecution of PSC and PMC personnel who are “employed by or accompanying the US armed force” overseas or outside the United States under US law.1 It covers all PSC and PMC personnel and subcontractors in all tiers employed by the US Department of Defence, other US federal agencies, US provisional authorities, and bodies instrumentally funded by the US Department of Defence, whose purpose is “to support the mission of the US Department of Defence” abroad.2 In addition, the MEJA regulates pre-trial procedure guidelines, such as preventing a person being prosecuted twice for the same (or similar) crime (double jeopardy), occurring in the prosecution of PSC and PMC personnel;3 the prevention of deprivation of the use of the proper form of military tribunals or commissions for offenders and offences within such jurisdiction;4 procedures for arrest and detention;5 extradition to other countries;6 and the rights for counsel representation for defendants.7

However, there are deficiencies within the MEJA that could be used to avoid prosecution, or used as a defence, under the Act. The words “supporting the mission of the US Department of Defence overseas” mentioned in Section 3267 can become a loophole to hinder prosecution based on the Act where the defendant argues that they were not involved in activities that support the mission of US Department of Defence. This line of argument was used in the case of United States of America v. Slough et al. (Blackwater 5), in December 2009.8 The defendants, being former Blackwater guards, endeavoured to have

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2 Ibid § 3267.
3 Ibid § 3261 (b).
4 Ibid § 3261 (c).
5 Ibid § 3262.
6 Ibid § 3264.
7 Ibid § 3265.
their prosecution under the MEJA dismissed on the grounds that they were contracted by the US State Department, whose mission is to “create a more secure, democratic, and prosperous world for the benefit of the American people and international community” and not by the US Department of Defence, whose mission is to “provide the military forces needed to deter war and to protect the security of our country”. The US District Court dismissed all charges against the former Blackwater guards, holding that the case against them “had been improperly built on testimony given in exchange for immunity”. However, as reported by the New York Times on 22 April 2011, the Court of Appeals for the District of Columbia Circuit upheld the Justice Department appeal because of ‘systematic’ errors in the District Court decision to dismiss the charges. On 5 June 2012, the UK’s The Guardian reported that the US Supreme Court had then declined to dismiss the original charges, thereby allowing a Supreme Court appeal by the guards to proceed. At the time of this writing, the case has yet to be heard in the Supreme Court.

Another potential flaw for prosecution under MEJA is that the Act only covers offences with sanctions of more than one year imprisonment. This provision does not cover offences such as simple assault charges, physical assault of detainees or mental abuses because penalties for these offences constitute less than one year’s imprisonment.

The CEJA was enacted in 2010. As stated in the Preamble, its objective is to amend Title 18 of the United States Code to provide accountability for the criminal acts of federal

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9 Ibid.
contractors and employees outside the United States. Accordingly, it is intended to supplement the MEJA, rather than to replace it. The CEJA’s purpose is to deal with the gaps that exist with the MEJA. The CEJA provides new descriptors for PSC and PMC personnel in Section 3272 (d), as persons “who are contracted by the US Government as civilians employed by, or accompanying, any US department or agency other than the Armed Forces”. It thus also includes the sub-contractors, grantees, and sub-grantees at any tier, who support the programs, projects, and activities of a US department or agency.\(^{15}\) With the new descriptors for personnel of PSC and PMC personnel regulated by CEJA, it can provide accountability for PSCs and PMCs that are contracted by other departments and agencies of US Government other than Department of Defence. It overcomes the gap of accountability that exists within the MEJA in respect of the Department of Defence missions.\(^ {16}\)

Under the CEJA, the US Attorney General, as the principal authority to enforce the extraterritorial jurisdiction over the federal contractors and employees, has authority to promulgate the investigation, arrest and detain, establish proper procedures on the prosecution of offences, acquire the assistances of the Secretary of Defence, the Secretary of State, or other heads of executive agencies in relation to the enforcement of the Act.\(^ {17}\) In addition, the Attorney General, after consulting with the Secretary of Defence, the Secretary of State, and other heads of executive agencies, such as the Director of National Intelligence and the Secretary of Homeland Security, in relation to the enforcement of the Act,\(^ {18}\) may establish an investigation unit (namely, the CEJA Investigation Units for Contractors and Employee Oversight). This unit would have responsibility to investigate any incidents involving the unlawful discharge of a weapon, killing, serious injuries, or destruction of

\(^{15}\) Civilian Extraterritorial Jurisdiction Act of 2010, HR 4567, 111\(^{th}\) Congress (2010) § 3272 (d).

\(^{16}\) For example, the MEJA could not be used to prosecute Blackwater personnel involved in the Nisoor Square Incident/Shooting, since the personnel were under contract to, and/or supported the State Department mission. See United States of America v. Slough et al. (Blackwater 5).

\(^{17}\) Ibid § 3271 (b) and § 3273.

\(^{18}\) Civilian Extraterritorial Jurisdiction Act of 2010, HR 4567, 111\(^{th}\) Congress (2010) § 3271 (b) and § 3273.
property valued more than $10,000. This differs from the MEJA, by which the Secretary of Defence enjoys such authority.

The *Arms Export Act of 1976*, enacted in June 1976, provides the President of the United States with authority to control the import, export, and brokering of military and defence services, and to establish procedures for the sale and purchase of such services. The military and defence equipment and services controlled and designated by the Act are regulated in the United States Munitions List. The List provides categories of military and defence equipment and services controlled by the Act, ranging from firearms to submersible vessels. The List also includes the equipment, components, technology, and services that can be used to operate or be part of the designated military and defence equipment and services. This Act provides important regulations and guidelines relating to military and defence services because they reflect the policy of the Government of the United States in respect of the regulation of weapons and services that can be transferred under the authorization of the President. The policy includes consideration given to "whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or non-proliferation agreements or other arrangements". The Act also includes requirements for the registration and licensing of weapons and weapon systems and service manufacturers, exporters, and importers, and brokers. It places restrictions on weapon or service exports to foreign countries, in essence generally limiting them to 'friendly' countries that have satisfied the requirements of bilateral agreement, as stated in Section 2778 (j)(2) of

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19 Ibid § 3271 (a).
21 *Arms Export Control Act of 1976*, 22 USC § 2778
23 Ibid.
25 Ibid § 2778 (b).
the Arms Export Act of 1976, and major ally countries of the United States, such as Canada, the United Kingdom, and Australia. The Act is not targeted specifically at PSCs and PMCs but its provisions can have a regulatory effect on their operations. It can regulate the activities of PSC and PMC companies in respect of exporting, importing, and brokering military and defence services, expertise, and related information to their clients. It can also prevent the import, export, and brokering of military and defence services/expertise to countries that do not enjoy good relations with the United States, and which the United States government considers support, or could potentially support, international terrorism.

In general, the efforts of the US legal system efforts to manage the activities and alleged wrongdoings of PSCs and PMCs are not dependent on, or limited to, just these three Acts. The implementation of each Act can be supplemented by the other acts in order to overcome any deficiencies existing within just one act. For example, the MEJA is supplemented by the CEJA 2010 in order to overcome the gap that exists in respect of the MEJA not being applicable to personnel of PSCs or PMCs not contracted to the United States Department of Defence or the Armed Forces. This shows that control, oversight, and attribution of PSCs or PMCs can also be done through the supplementary function of another act in order to achieve the optimal desired application.

B. The United Kingdom

PSC and PMC regulation in the United Kingdom at the domestic level primarily relies on the Private Security Industry Act 2001. However, the Act appears to focus only on PSCs, and then only in a domestic context. As stated in the Preamble, the Act is intended ‘to make provision for regulation of the private security industry’. The Act establishes a monitoring

27 Ibid § 2778 (j)(1).
body for PSCs, namely, the Security Industry Authority. The monitoring body’s functions include registration and licensing; review of PSCs and their activities and services; oversight of PSC activity and effectiveness of PSCs in order to ensure public protection; inspection of persons within the private security industry; setting up or approving conduct standards, training, and supervision levels; provision of recommendations and proposals for maintenance and improvement of standards of the private security industry; and review of the Act’s operation. The Security Industry Authority, while carrying out its functions, is required to comply with any general and specific direction from the Secretary of State for the Home Department (commonly known and hereafter as the “Home Secretary”), and to provide any information concerning its activities as requested by the Home Secretary.

The Act also regulates the types of persons that can be engaged for any designated activities designated by the Act and their necessary licensing. The Security Industry Authority has responsibility for issuing licences after the applicant meets the criteria of fitness, character, necessary training and skill criteria, or other criteria as the Authority thinks fit. The Authority can also modify the criteria.

The Secretary of State has the authority power to prescribe licence conditions, while the Security Industry Authority, as the monitoring body, has authority to impose additional conditions. The basic licence conditions include: training requirements, insurance;

29 Private Security Industry Act 2001 (UK) c 12, s 1(1).
30 Ibid s 1(2)(a).
31 Ibid s 1(2)(b).
32 Ibid s 1(2)(c).
33 Ibid s 1(2)(d).
34 Ibid s 1(2)(e).
36 Ibid s 1(2)(g).
37 Ibid s 2(1).
38 Ibid s 2(3).
39 Ibid s 3(2).
40 Ibid s 7.
41 Ibid.
42 Ibid s 9(1)(a).
specified approved security service activities; obligations imposed by the licence; obligation for the provision of information time to time to the Security Industry Authority; and other conditions that the Secretary of State and Security Industry Authority think fit.

As part of its authority, the Security Industry Authority may revoke or modify a licence. The Authority may also suspend the licence for a period of time as it determines. However, the Authority’s actions in respect of licence grant, refusal, revocation or modification are subject to judicial review. Any such appeal against a decision of the Authority must be initiated within 21 days from the date the decision was first notified by the Authority to the appellant.

In addition, the Security Industry Authority can authorise local government authorities in England or Wales, to carry out some of the licensing functions. The Act specifically refers to just England and Wales. It does not include Scotland or Northern Ireland, and no alternative provisions exist in respect of these two parts of the United Kingdom.

For registration as an approved contractor, the Authority will record any information of applicant such as: the name of the applicant; the address of the place where the security service will be conducted; the type of approved security service; the duration of the service; and approval conditions. The Authority is required to allow members of the public to inspect the registration and any modification or withdrawal of any approvals.

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43 Ibid s 9(1)(b).
44 Ibid s 9(1)(c).
46 Ibid s 9(1)(e).
48 Ibid ss 10(2) – (3).
49 Ibid s 11(1).
50 Ibid s 11(2).
51 Ibid s 13.
52 Ibid s 14(3).
53 Ibid s 14(4).
Furthermore, in order to ensure the monitoring of PSCs within the United Kingdom territory, the Authority can appoint persons as inspectors with powers to enter any premises which are occupied or owned by licence holders under the Act.54

Schedule Two to the Act defines the activities that may be conducted by PSCs. These activities are divided into two categories. The first category consists of services that are categorised as activities of security operatives, such as: manned guarding; immobilisation of vehicles; private investigations; security consultants; and keyholders.55 The second category consists of activities that are categorised as activities subject to additional controls, such as: door supervisors for public houses, clubs and comparable venues and immobilisation of vehicles.56

The Act lists certain activities that constitute violations of the Act, namely: conduct of security services without a licence;57 use of unlicenced security operative;58 use of unlicenced wheel-clampers to immobilise vehicles;59 non-compliance with licence approval requirements;60 obstructing the inspection process;61 failure to comply with inspection requirements;62 disclose by inspectors of any information without authorisation;63 providing false information.64 Additionally, the Act makes provision for a director, manager, secretary, or person having similar position or acting in such capacity to be subject to criminal liability in certain circumstances,65 such as any violation committed with the consent, connivance or

54 Ibid s 19.
56 Ibid sch 2 pt 2.
57 Ibid s 3(1)
58 Ibid s 5.
59 Ibid s 6.
60 Ibid s 17.
61 Ibid s 19(5)(a).
62 Ibid s 19(5)(b).
63 Ibid s 19(5)(c).
64 Ibid s 22.
65 Ibid s 23.
negligence on the part of these persons. These violations can be punishable by imprisonment, fine, and/or revocation of the licence.

Therefore, it is clear that PSCs that operate within the United Kingdom are subject to the Private Security Industry Act 2001. However for PSCs and PMCs that operate outside United Kingdom territory, a different situation exists. The international activities of UK-based PSCs and PMCs are not formally regulated by UK domestic legislation, and the British Government chooses not to enforce the domestic regulation in those few instances where domestic jurisdiction might be applicable. The Government has preferred to allow PSCs and PMCs to follow a self-regulation approach through the domestic and international code of conduct (such as, the International Code of Conduct for Private Security Service Providers), which is monitored by a third party, or non-governmental organisations or government representative.

C. South Africa

The South African government has enacted an Act to specifically regulate the operation of PSCs inside South Africa, namely, the Private Security Industry Regulatory Act No. 56 of 2001. The Act does not address or include reference to PMCs. Unlike the UK, South Africa has also placed constraints on the extra-jurisdictional operation of PSCs and PMCs outside South Africa’s national boundaries to the extent of prohibiting mercenary activities, with the enactment of the Prohibition of Mercenary Activities Act of 2006. This second Act does address PMCs and their regulation.

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66 Ibid s 23.
67 See, Ibid ss 3(6), 5(4), 6(4), 9(4), 16(3), 17(4), 19(7), and 22(2).
Chapter III – Legal Framework for the Regulation of PSCs and PMCs

The Private Security Industry Regulatory Act replaced an earlier apartheid-era statute, namely the Security Officer Act 1987. The introduction of the Private Security Industry Regulatory Act occurred because of four flaws in the Security Act and because of perceived problems with the regulatory body established under that earlier act, namely, the Security Officer Board. First, the Security Officer Act 1987 had a primary function to provide protection to the public generally, rather than protection of a particular trade, but appears to have failed to do so.70 Second, certain categories of security activities, such as in-house security, were excluded from the Act, which opened the possibility for PSCs to conduct services that might be categorised as of a military nature or as mercenary activities.71 Third, the Security Officer Board created under the Act lacked adequate authority and capacity to enforce its regulations and code of conduct against its PSC members.72 Fourth, concern existed as to the capacity of the Security Officer Board to act as an independent regulatory body due to instances of some Board members also operating PSCs and potentially misusing their positions on the Board.73

The Private Security Industry Regulatory Act establishes the Private Security Industry Regulatory Authority and details its objectives and functions.74 The Authority is managed by a Council75 appointed by the Minister for Safety and Security.76 A member of Council can be disqualified if the person has a direct or indirect financial or personal interest in the private security industry or is associated with a body representing the interest of employers or employees of PSCs.77 This provision is included to prevent any conflicts of interest that

71 Ibid.
72 Ibid.
73 Ibid.
74 Private Security Industry Regulatory Act No. 56 of 2001 (South Africa) ss 3-4.
75 Ibid s 5(1).
76 Ibid.
77 Ibid s 7(b)(i)(ii).
might disrupt the Private Security Industry Regulatory Authority as an independent monitoring body, as occurred with the former Security Officer Board.

Section 1(1) and (2) of the Act requires every person performing functions as a PSC executive or manager or who can be considered as a PSC company director, partner, close corporate member, or trustee of a foundation involved in the private security industry to be registered.\(^78\)

Furthermore the Act requires at least 51% ownership and control of a PSC by South African citizens.\(^79\) This clause can be viewed as an attempt by the South African government through the Act as business protection for South Africans and also protection of their national interests.

Registration as a PSC operative requires an applicant to:

- be at least 18 years of age\(^80\) and a citizen or permanent resident of South Africa\(^81\)
- have completed relevant training;\(^82\)
- have not been found guilty of any offences over the previous ten years\(^83\) or improper conduct over the previous five years\(^84\), as prescribed in the Schedule to the Act;

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\(^78\) Ibid ss 20(1)-(2).

\(^79\) Ibid s 20 (amended by PSIRA Amendment Bill 15 of June 2012, in the addition of section 20 subsection 2(c) in Act 56 of 2001).

\(^80\) Ibid s 23(1)(b).

\(^81\) Ibid s 23(1)(a).

\(^82\) Ibid s 23(1)(c).

\(^83\) Ibid s 23(1)(d).

\(^84\) Ibid s 23(1)(e).
be able to provide the Authority with the prescribed clearance certificate if a former member of the military, security, police, or intelligence services of South Africa.\textsuperscript{85}

- be mentally sound.\textsuperscript{86}

- be neither currently employed by the Public Service\textsuperscript{87} nor a member of the South Africa police force, the Directorate of Special Operations, the National Intelligence Agency, the Secret Service, the National Defence Force, or the Department of Correctional Services.\textsuperscript{88}

Also as part of its powers, the Authority as the monitoring body can prohibit a PSC from operating for a particular period of time as determined by a court if the PSC violates a provision of the Act or performs services that can cause serious harm to the national and public interest or interest of any categories of persons.\textsuperscript{89} This power can be used by the Authority to ensure that PSCs comply with the Act.\textsuperscript{90}

The Act provides for the creation of a code of conduct that must contain rules requiring PSCs to:

- be members of a trustworthy and professional industry that conducts operations according to the applicable law;\textsuperscript{91}

- operate to a minimum standard of conduct in order to support the realisation of the Authority’s objects with which PSCs must comply;\textsuperscript{92}

\textsuperscript{85} Ibid s 23(1)(f).
\textsuperscript{86} Ibid s 23(1)(g).
\textsuperscript{87} Ibid s 23(1)(h).
\textsuperscript{88} Ibid s 23(1)(j).
\textsuperscript{89} Ibid s 27(1)(a).
\textsuperscript{90} Ibid s 27(1)(b).
\textsuperscript{91} Ibid s 28(3)(a)(i).
\textsuperscript{92} Ibid s 28(3)(a)(ii).
- comply with their obligation towards the State, the Authority, their consumers, and the public and the private security industry in general;\(^93\)
- ensure minimum wages for their employees and respect standards that prevent the exploitation or abusive treatment of their employees, including not using employees to protect or safeguard employers’ properties and interests or persons of properties under employers’ control.\(^94\)

Violation or contravention of the code attracts penalties, but the penalties depend on class or categories of PSCs or persons that employed the offending employee. However the class and categories provisions seem to only address the PSC personnel and not specifically the PSC as a company.\(^95\) In addition, PSCs and any persons involved in the private security industry can appeal the Private Security Industry Regulatory Authority decisions to refuse, suspend or withdraw registration,\(^96\) and any finding against them or punishment imposed for improper conduct according to the Act.\(^97\) An appeal against such decisions should be submitted to the Appeal Committee within 60 days after the notification of the Authority’s decision.\(^98\)

In order to carry out its function as a monitoring body, the Authority can appoint inspectors as members of the Authority.\(^100\) Inspectors must also follow the code of conduct

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\(^{93}\) Ibid s 28(3)(a)(iii).
\(^{94}\) Ibid s 28(4).
\(^{95}\) Ibid s 28(5). The Act recognises four categories of PSC personnel, generally based on levels of organisational and supervisory responsibility, from Grade A (monitoring, recruitment, training, financial control, staff supervision) through Grade B (supervision, training), Grade C lower supervision, transportation), Grade D (movement control, general search and security), to Grade E (general guarding and patrol, goods handling, dog handling). See Basic Condition of Employment Act: Sectoral Determination 6: Private Security Sector 2001 (South Africa) ss 41-46.
\(^{96}\) Ibid s 30(1)(a).
\(^{97}\) Ibid s 30(1)(b).
\(^{98}\) Ibid s 30(1)(c).
\(^{99}\) Ibid s 30(1).
\(^{100}\) Ibid s 31(1).
set up by the Council as the governing body of the Authority.\(^{101}\) The code contains penalties that may also be imposed upon inspectors for violations of the code.\(^{102}\)

The Act also provides the Ministry for Security and Safety with authority to make regulations relating to the registration, training, uniform, establishment of complaints office, maintenance and management of information about the industry, use of firearms, marketing and provision of information to consumers about PSCs, use of certain equipment, manufacture, importation, sale, distribution or possession of security equipment, and generally, any matter relating to the functioning of the Authority.\(^{103}\)

The Act provides offences and penalties relating to the violation and contravention of the Act, such as fines and/or imprisonment up to 10 years depending on the offence.\(^{104}\) It also regulates the extra-territorial application and jurisdiction of the Act in respect of offences committed by South Africa-based or registered PSCs outside South Africa, and prohibits involvement in mercenary activities.\(^{105}\) Even though the wrongdoings were committed outside South Africa, Article 39 of the Act deems them to have been committed within the territory of South Africa for the purposes of jurisdiction.\(^{106}\)

The Act also enables delegation of jurisdiction to a court within the country where the wrongdoings actually took place or within the country in which the alleged perpetrator primarily conducted his or her business (which could include South Africa itself).\(^{107}\)

\(^{101}\) Ibid s 32(1).
\(^{102}\) Ibid s 32(3).
\(^{103}\) Ibid s 35.
\(^{104}\) Ibid s 38.
\(^{105}\) Ibid s 39 (amended by PSIRA Amendment Bill 15 of June 2012, by the insertion of s 38A in Act 56 of 2001).
\(^{106}\) Ibid s 39(1).
\(^{107}\) Ibid s 39(2).
However, Anthony Minnaar suggests that, in practical terms, the Act still faces some issues in respect of the requirements to implement the monitoring and oversight of PSCs, such as proper professional training in policing and security for PSC personnel and a formal accountability framework which could make the PSC personnel understand their responsibilities, limitations, and actions when they performed the security services. These issues are very important for regulating and monitoring PSCs in South Africa.

South Africa-based PSCs and PMCs intending to conduct activities or services in armed conflict areas are constrained to some extent in respect of those activities by the Act on the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act No. 27 of 2006. This Act focuses upon the effort to prevent and eliminate mercenary activities which might otherwise have been conducted by South African citizens or permanent residents. In addition, it provides constraints on South African citizens or permanent residents’ enlistment in foreign armed forces and the military/military-related assistances that they can provide.

Section 1 of the Act includes categories of armed conflicts, such as armed conflict existing or imminent in any country proclaimed as a regulated country under Section 6 of the Act; armed conflict in a country not so proclaimed between its armed forces and dissident or rebel forces; armed conflict between states; armed conflict between an occupying force and dissident of rebel armed force or any other armed group; or between any combination of the above. Even though the Act or its Explanatory Memorandum does not explicitly explain or detail the reasoning behind the listing of these categories of armed conflicts, they suggest that such listing provides acknowledgement and understanding of the armed conflicts in which a South African citizen might be involved. It also provides a graduated recognition of

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109 Act on the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Force No. 27 of 2006 (South Africa) s 1(1).
armed conflicts that can lead to an eventual categorisation of a country as a “regulated country” in pursuant of Article 6 of the Act.

The Act provides definitions of military and military-related assistance, services, or activities to a party of a conflict that may be permitted, such as: advice and training; personnel, financial logistic intelligence and operational support; personnel recruitment; medical or paramedical services; and equipment procurement. It also includes categories of security services such as: protection and guarding personnel or property; security advice on personnel, property, and the use of security equipment; reactive/response units; security training and instruction for a security service supplier; security equipment installation, services, or reparation; security equipment signal/transmission monitoring; provision of trained personnel to conduct the above security services; and security services management, control, and supervision.

In addition, the Act defines mercenary activities as those in which participation is prohibited, such as: combat participation in armed conflict for personal profit; direct or indirect combatant recruitment, usage, training, support or financing, for personal profit in an armed conflict; direct or indirect participation; and any manner of direct or indirect participation that could cause or increase an armed conflict or uprising or any act that could overthrow a government or undermine the constitutional sovereignty or territorial integrity of a country. It also prohibits any of the abovementioned forms of assistance or services being provided in certain armed conflicts and to certain “regulated countries” unless the assistance first receives authorization from the National Conventional Arms Control Committee.

Section 3 of the Act prescribes “regulated countries” as those countries in which armed

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110 Ibid.
111 Ibid.
112 Ibid s 2.
113 Ibid ss 3 & 6
conflicts are imminent or occurring as designated by the South African President, as Head of the National Executive on advice by the National Conventional Arms Control Committee.

This Act also prohibits the enlistment of South Africa citizens or permanent residents in foreign armed forces, or participation in humanitarian assistance initiatives that have occurred in armed conflict or regulated countries as part of a humanitarian organisation. However, as stated by David Abrhams, the implementation and application of the Act might be in conflict with the South African Constitution and the government’s foreign policy because the scope of the Act is too broad. The Act and its provisions can contradict the real situation, since there are many South African citizens or permanent residents enlisted in foreign armed forces, in particular the armed forces of Commonwealth countries. In addition, the Act will restrain and restrict South Africa citizens or permanent residents from participation in any humanitarian assistances in armed conflicts and regulated countries, even in UN humanitarian missions since it is not determined clearly which organisations can provide such assistance in a particular situation.

D. Afghanistan

Following the invasion of Afghanistan in October 2001 under the US-led Operation Enduring Freedom, and the subsequent NATO-led occupation, Afghanistan has suffered from a highly unstable and most dangerous internal security situation. This in turn generated a high demand for PSC and PMC services, to the extent that, from early 2002, it had become the region of the greatest operation of PSCs and PMCs. Their services encompassed both security for public and private clients, as well support services for the war efforts of foreign troops in Afghanistan. However, until 2008 and the issuance of the regulation, Procedure for

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114 Ibid s 4.
115 Ibid s 5.
116 David Abrhams, ‘Brief Legal Commentary on PMSCs in South Africa’ (Democratic Control of Armed Forces, November 2008).
117 Ibid.
118 Ibid.
Chapter III – Legal Framework for the Regulation of PSCs and PMCs

Regulating Activities of Private Security Companies in Afghanistan, by the Afghan Interim Government, PSCs and PMCs were not subject to any degree of domestic regulation within Afghanistan.

On the contrary, some PSCs and PMCs operating under contract to foreign government bodies, generally enjoyed general immunity from internal prosecution by the provisions of the Status of Forces Agreement (SOFA) concluded between the NATO International Security Assistance Force (hereinafter “ISAF”) and the Interim Government of Afghanistan.\(^{119}\) In their capacity as “civilian component[s]” of ISAF, PSCs and PMCs working for ISAF received privileges and immunities from Afghan national law for any criminal and disciplinary offences, under the terms of this bilateral agreement.\(^{120}\)

In 2008, the Afghan Interim Government issued a regulation, Procedure for Regulating Activities of Private Security Companies in Afghanistan, to rectify the absence of any regulation of PSCs and PMCs activities. The Regulation declared the Afghan Minister of the Interior as the only authority to regulate and control PSCs and PMCs and their activities throughout Afghanistan,\(^{121}\) and established a High Coordination Board.\(^{122}\) The Regulation also imposed some stringent obligations and restrictions upon PSCs and PMCs and their operations, such as:

\(^{119}\) Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (“Interim Administration”), (signed and entered into force 4 January 2002) Art 1 (4) (b). This Agreement was signed in Bonn, Germany on 5 December 2001 and is also known as the “Bonn Agreement”.

\(^{120}\) Ibid Annex A, Section 1.

\(^{121}\) Procedure for Regulating Activities of Private Security Companies in Afghanistan 2008 (Afghanistan) art 3.

\(^{122}\) Ibid arts 8-9.
- limitations on the number of PSC and PMC personnel that can operate in Afghanistan – the regulation restricts to 500 the maximum number of PSC and PMC personnel operating in the country at the one time;\textsuperscript{123}

- restrictions on operational licences, scope and types of operation, foreign and local PSC and PMC licence conditions, employment terms and conditions, weapons, and ownership/partnership prohibitions;\textsuperscript{124}

- prohibition on PSCs and PMCs undertaking border control and security of holy places;\textsuperscript{125}

- prohibition on PSC and PMC involvement in political activities;

- controls on use of uniforms, equipment and ammunition procurement authorisation, PSC and PMC performance reporting;\textsuperscript{126}

- compensation for PSC and PMC wrongdoings.

The Regulation further provides for a monitoring, reporting, and investigation mechanism for PSC and PMC violations, and licence cancellation and termination of PSC and PMC operations.\textsuperscript{127} It also regulates the use of PSCs and PMCs by non-government bodies inside Afghanistan.\textsuperscript{128} Most of the provisions of the Regulation already exist in many regulations governing PSCs and PMCs already enacted in other countries or by international organisations. However, there are some stipulations for which the Afghan Regulation has become a benchmark, such as the limitation on the number of PSC and PMC personnel inside Afghanistan. This is a useful provision since, by limiting their number, the Afghan government will find it easier to oversight the activities and areas of operation and prevent or punish PSC and PMC personnel for prohibited and illicit activities that can endanger Afghan security. Other provisions, such as Article 26 requiring PSCs and PMCs to report on their

\textsuperscript{123} Ibid art 10. The Regulation permits a maximum of 500 PSC and PMC personnel operating at the one time.

\textsuperscript{124} Ibid arts 11-20.

\textsuperscript{125} Ibid art 6.

\textsuperscript{126} Ibid arts 21-27.

\textsuperscript{127} Ibid arts 28-33.

\textsuperscript{128} Ibid art 34.
operation and performance to the High Coordination Board, promote the principle of monitoring of PSCs and PMCs through their performance. If PSCs or PMCs are not performing according to contract, are conducting their services improperly or below reasonable standards, or are potentially harming Afghans in the process of performing their services, such performance can be viewed as violation or breach of the contract and of Afghan national law. The opportunity thus exists for the government through the Minister of the Interior to impose sanctions on a PSC or PMC depending on its performance report. In contrast, a positive performance report may also lead to extension or further contract and enhancement of reputation.

The Afghan Interim Government, through the Presidential Decree No. 62 of the Islamic Republic of Afghanistan about the Dissolution of Private Security Companies of 2010, ordered the termination of PSCs and PMCs in Afghanistan as its main objective. The Decree transferred to the Afghanistan Minister of the Interior responsibility to fill the security gap left by the departure of the PSCs and PMCs. The termination was promulgated in order to eliminate corruption, improve national internal security, prevent public disorder, and misuse of weapons, uniforms and military equipment by PSCs and PMCs. The Decree also provided instructions for the termination of PSCs and PMCs, such as: incorporation of volunteer from PSCs and PMC personnel into the national police force; purchasing the supplies and equipment of foreign PSCs and PMCs by the Afghan Government; cancellation of foreign PSC and PMC residential visas; deportation of foreign PSC and PMC personnel if necessary; and declaration of unregistered foreign and local PSCs and PMCs as illegal companies. The Minister of the Interior is required to take over the provision of external security for foreign embassies, consulates and international non-government organisations,

130 Ibid art 2.
131 Ibid art 3.
132 Ibid art 4.
133 Ibid art 5.
and provide security for the logistics of the international forces still operating in Afghanistan.  

In order to implement Presidential Decree No. 62, the Afghan Government enacted the Bridging Strategy for Implementation of Presidential Decree 62 (Dissolution of Private Security Companies) (hereafter the ‘Bridging Strategy’) for the for the period March 2011 to March 2012. The Strategy establishes the transitional phase-out for the PSC and PMC operations in Afghanistan and authorizes the Afghan Public Protection Force (hereafter the ‘APFF’) to provide security for all Afghan people. Presidential Decree No. 62 is very important since its objective is to terminate international and domestic PSCs or PMCs inside Afghanistan. This objective is understandable when the many violations and crimes allegedly committed by PSCs and PMCs inside Afghanistan are considered; the Afghan government took this measure in order to prevent more violations. In addition, it might also be viewed as an effort by the government to gain more trust of the Afghan people. The Presidential Decree provides some innovative regulations, such as the incorporation of PSC and PMC volunteer personnel into the Afghan police force and movement restrictions for PSCs and PMCs working for foreign embassies, consulates and international non-government organisations active in Afghanistan. Incorporation of volunteer PSC and PMC personnel, as regulated in Article 2 of the Decree, can be very useful since it can also include incorporation of their equipment, vehicles, and weapons. In addition, this provision opens the possibility that volunteer PSC and PMC personnel with their qualifications may bolster the capability of the national security force, and prevent former PSC and PMC personnel

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134 Ibid art 7.

135 Many PSC and PMC personnel in Afghanistan were alleged to have been involved in abuses and violations of human rights that occurred in Afghanistan, for example the “Dancing Boys” case that involved personnel of DynCorp. Furthermore, some have been accused of “paying off the Taliban in order to drive safely through Afghanistan, mistreating their Afghan colleagues and showing their culture no respect, or even involve in shootings, drug smuggling and illegal gun-running...”. See Nadene Ghouri, ‘How to Make a Killing in Kabul: Western Security and a Crisis in Afghanistan’, Daily Mail (online), 28 February 2011 <http://www.dailymail.co.uk/home/moslive/article-1360216/How-make-killing-Kabul-Western-security-crisis-Afghanistan.html>.
being involved in activities that could harm or deteriorate an already destabilised security environment. The PSC and PMC movement restriction enables the Afghan government to more easily monitor their movements and ensure that their activities and operations are only for official duties for their respective clients.

The primary role of the APFF is meant to address the implementation of the Presidential Decree No. 62. Also within its jurisdiction is the task to provide security and to takeover PSC and PMC roles and activities in Afghanistan. The APFF was initially established in 2009, as an Afghan Government-owned company that ‘intended to protect people, infrastructure, facilities and construction projects’. However, this institution does not have a police mandate to conduct investigations on crimes or to arrest suspects. Besides enacting the Bridging Strategy and forming the APFF, the Afghan Government, as reported by Reuters, have closed eight security companies, including Xe Services (formerly known as PMC Blackwater).

However, implementation of the Presidential Decree in practice is very difficult, since the main apparatus to implement the Decree, namely the APFF and the Afghan national security force, is still undertrained, overstretched, and not properly equipped to provide protection and to take on the role of PSCs and PMCs. In addition, the security situation in Afghanistan will require not only the Afghan government to continue to depend on the services of PSCs and PMCs but also any non-government organisations and foreign forces still operating in Afghanistan. This situation will make it more difficult to terminate the presence of PSCs and PMCs.

137 Ibid.
Moreover, despite the issuing of the Presidential Decree, President Hamid Karzai has still allowed some PSCs and PMCs to be reorganised as training organisations.\footnote{See Nadene Ghouri, ‘How to Make a Killing in Kabul: Western Security and a Crisis in Afghanistan’, \textit{Daily Mail} (online), 28 February 2011 <http://www.dailymail.co.uk/home/moslive/article-1360216/How-make-killing-Kabul-Western-security-crisis-Afghanistan.html>\footnote{Ibid.}} This action means that the President is allowing circumvention of his own decree. For example, the Afghan government seems to be not implementing the decree in respect the local PSC company Watan, which is owned by President’s brother.\footnote{Ibid.} It can be concluded that, in practice, the implementation of any Afghan laws and regulations relating to PSCs and PMCs will be very difficult, in particular the implementation of laws and regulations governing their termination and the elimination of their presence in Afghanistan.

It can be concluded that the Presidential Decree works in order to close the operation of the security companies in Afghanistan because it has closed down some security companies, including foreign security companies such as Xe Services. However, the Presidential Decree seems not apply to the security companies owned by the President’s brother. This raises a question as to whether or not the closing of these security companies may been to help to reduce some ‘competitors’ of the security company owned by President’s brother. Also, with the unstable national security conditions and ill-prepared security provision apparatus, the Afghanistan Government probably will find it very difficult to enforce the Presidential Decree. Therefore, experience from Afghanistan demonstrates that the real challenge is not the enactment of sound and proper laws or regulations, but their implementation into practice.

\textbf{E. Iraq}

PSCs and PMCs have had a presence in Iraq alongside the US armed forces since the start of the Second Iraq War in 2003. PSC and PMC personnel have received immunities and...
have not been subject to Iraqi national laws in respect of their activities, licensing and registration, on the basis of the *Coalition Provision Authority Order No. 17 (Revised)* (hereafter “Order 17”). The Order establishes a mechanism for PSCs and PMCs to be registered and regulated through a licence issued by the Iraqi Ministry of the Interior, but it apparently focuses more on the privileges and immunities from Iraqi national law for the foreign/non-Iraqi military and civilian personnel of the Foreign Occupation Force and all foreign missions in Iraq, which also includes the PSCs and PMCs and their personnel. Therefore, this Order raises issues concerning PSC and PMC accountability, since the Iraqi government still does not have authority and jurisdiction to hold the PSCs and PMCs responsible for their wrongdoings.

In June 2004, the US-formed Coalition Provision Authority enacted *Coalition Provisional Authority Memorandum Number 17: Registration Requirements for Private Security Companies* (PSC) (hereafter “Memorandum 17”), which stipulates the detail and regulation required from PSCs and PMCs intending to operate within Iraq; it also requires them to be registered with, and obtain a permit from, the Iraqi Minister of the Interior. The Memorandum covers provisions such as the types of licences (business licence, operating licence and temporary operating licence), information required to obtain a licence, Ministry vetting standards for PSC and PMC officers and personnel; provision of bonds and insurance; the authority of the Ministry to refuse, suspend, or revoke licences, and the conduct of audits of PSCs and PMCs regarding their activities and operation in Iraq. The Memorandum provides for audits to be conducted by an independent PSC and PMC Oversight Committee established by the Ministry. The Ministry also has authority to issue the weapons licences and to require PSCs and PMCs to provide further information as it may

141 *Coalition Provision Authority Order Number 17 (Revised) (Iraq)* s 4.
142 *Coalition Provisional Authority Memorandum Number 17: Registration Requirements for Private Security Companies (PSC) (Iraq)* s 1.
143 Ibid s 2.
144 Ibid s 3.
145 Ibid s 4.
146 Ibid ss 5 and 8
require (financial and employment records, contract status, weapons data, and any other data).\textsuperscript{147} Finally, the Memorandum sets limits and responsibilities of PSCs and PMCs, such as, the company role being deterrence and not law enforcement functions; company responsibility for the actions of their personnel; companies and their personnel subject to all applicable laws and regulations in Iraq; conduct of operation to be based on all rules on the use of force and codes of conduct applicable in Iraq.\textsuperscript{148}

Despite this Memorandum, PSCs and PMCs still enjoy immunity from the Iraqi national law and legal system. In principle, it is still possible to hold them accountable and to prosecute them for their wrongdoings, since the immunity granted by Section 4 of Order 17 can be waived under the following Section 5. Pursuant to Section 5, prosecution of a PSC or PMC under the Iraqi national law first requires the Iraqi National Authority to submit a formal request for immunity waiver to the PSC or PMC sending or contracting state. However, in practice it seems most unlikely that an immunity waiver request would be successful since the \textit{Coalition Provision Authority Order No. 17 (Revised)} was enacted by the US-formed Authority in Iraq to be more supportive of US and other foreign occupying countries’ interests than Iraqi interests. Also, the foreign powers in Iraq, in particular the United States, would not conceivably ever approve such a request if it involves its own nationals, even though they might be PSC or PMC personnel – as demonstrated by the case of the \textit{Nisoor Square Incident (Blackwater Baghdad Shootings)}, in which Blackwater personnel were involved in mass shootings that killed 17 Iraqi civilians while they were escorting US Department of State convoys. Blackwater claimed that they were ambushed by the civilians and fired back in self-defence.\textsuperscript{149} The United States chose to process and prosecute the Blackwater personnel involved in that incident under US law in the United States, and not under Iraqi law in Iraq.

\textsuperscript{147} Ibid ss 6 and 7.
\textsuperscript{148} Ibid s 9.
In November 2008, the United States and Iraq concluded a new Agreement on the withdrawal of the US forces from Iraq. The *Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of the United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq*, which entered into force in 1 January 2009, allows the Iraqi government to exercise jurisdiction over PSCs and PMCs and their personnel, even though it is with limited authority.  

Iraqi authorities can exercise their jurisdiction as long as the wrongdoings were committed outside the Iraqi-US agreed areas and outside the duty status of PSC and PMC personnel. Even with certain limitations, however, it shows that even PSCs and PMCs contracted as civil components of the US Force in Iraq can still be held accountable and prosecuted by Iraqi authorities if they commit a crime or wrongdoing.

This authority is demonstrated by the Danny Fitzsimmons case, where for the first time a foreign PSC and PMC personnel member was tried by an Iraqi Court under Iraqi national law. On 28 January 2011, Danny Fitzsimons, a British national and employee of the PMC G4S, was sentenced to twenty years’ imprisonment by an Iraqi Court for the murder of two of his colleagues and the attempted murder of an Iraqi man, in August 2011.

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151 “Agreed areas” are areas and facilities owned by the Iraqi Government but used by the US Forces when the SOFA came into the force, See Article 2 (1) of *Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of the United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq*.

152 PSC and PMC personnel are subject to Iraqi national law when they are not on duty or carrying out services contracted to them by the US Government.


154 ArmourGroup was acquired by G4S in 2008. See ‘G4S Completes Acquisition of ArmorGroup International plc’, 7 May 2008, [http://www.g4s.com/en/NewsCentre/News/2008/05/07/G4S%20Completes%20Acquisition%20of%20ArmorGroup%20International%20plc/](http://www.g4s.com/en/NewsCentre/News/2008/05/07/G4S%20Completes%20Acquisition%20of%20ArmorGroup%20International%20plc/).
2009. Fitzsimons, a former British Army serviceman who had reportedly served in Kosovo, Afghanistan, Macedonia and Northern Ireland, according to the UK’s Daily Mail, had previously been diagnosed with post-traumatic stress syndrome, and had a criminal record. The company also allegedly ignored warnings about Fitzsimons that had been sent to them prior to his recruitment. While employed by G4S, he faced assault and firearms charges. In this case, G4S was found to be reckless in recruiting an employee with medical problems directly impacting on his proposed employment and with a criminal record. The Danny Fitzsimons case also raises another related issue, namely, the accountability of PSCs and PMCs as companies for the activities of their personnel. The author contends that, in light of the circumstances surrounding the employment and deeds of Fitzsimons, G4S should be also held accountable for the actions of Fitzsimons as its employee because its recruitment negligence contributed to loss of human lives and wrongful death.

F. Indonesia

Indonesian Government’s Regulation of the National Chief of Police Number 24 of 2007 on Management of Security Organisations, Companies and Government Bodies was created in order to promote the maintenance of law and order in the security industry in Indonesia. Additionally, it enables the security industry to provide assistance to the Indonesian National Police. Reference is made to this regulation in this thesis because the Timor-Leste legal system adopts laws from the Indonesian legal system. This regulation is

159 Ibid 546-547.
160 (Peraturan Kepala Kepolisian Negara Republik Indonesia Nomor 24 Tahun 2007 tentang Sistem Manajemen Pengamanan Organisasi, Perusahaan dan/atau Instansi/Lembaga Pemerintah)
the latest legal framework for PSCs in Indonesia and thus provides more specific provisions relating to the security companies, compare to the other similar regulations.

The Regulation establishes a system for dealing with private security industry activities in Indonesia, namely, the Security Management System. This is an integrated system of planning, responsibility, process, and resources needed for the development, implementation, assessment, maintenance of security policies in risk management for the creation of a safe, efficient, and productive working environment of organisations, companies, and institutional bodies to which the system applies. The system also includes private security personnel – known locally as Satuan Pengamanan or Satpam. Implementation of the system is obligatory for all organisations, companies, and institutional bodies throughout Indonesia. The Security Management System regulates both PSC individuals and companies. It makes provisions for the system standards and elements, the main roles and functions of the Satpam, as well as training and training standards. It includes regulations relating to Satpam uniforms, equipment and use of firearms, registration and identity cards, and Satpam work relationships.

In respect of the security provider companies, the Regulation also encompasses a range of types of security companies and services, such as, security consultancy companies, advisory companies on the use of security devices and technologies, Satpam training and training facility companies, secure cash and valuables transportation companies, Satpam hire

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161 Peraturan Kepala Kepolisian Negara Republik Indonesia Nomor 24 Tahun 2007 Tentang Sistem Manajemen Pengamanan Organisasi, Perusahaan Dan/Atau Instansi/Lembaga Pemerintahan (Regulation of the National Chief of Police Number 24 of 2007 on Management of Security Organisations, Companies and Government Bodies) (Indonesia) art 1 (1) and art 2 [author’s trans].
162 Ibid art 3.
163 Ibid arts 4-5.
164 Ibid arts 6-13.
167 Ibid arts 32-33.
168 Ibid arts 34-46.
169 Ibid arts 47-51.
service companies, and companies specialising in providing K9 security services.\textsuperscript{170} The Regulation also details company duties and responsibilities, such as general compliance with any applicable regulations on PSCs in Indonesian law, client information confidentiality, and regular reports on operations to the Indonesia National Police.\textsuperscript{171} In addition, the Regulation provides for monitoring and control of the companies, conducted by an auditing process performed by the Indonesia National Police.\textsuperscript{172} It also provides for sanctions for violations of the Regulation, which can range from formal warning, orders to replace the security manager, suspension or revocation of the security licence, disciplinary sanctions, to penal sanctions in accordance with the Indonesian Penal Code.\textsuperscript{173}

The Security Management System is very important for the \textit{Satpam} because it emphasises their role in contributing to the development of security and safety of society and the whole domestic security apparatus. Article 13(1)(a) provides the \textit{Satpam} with a limited police auxiliary function as one of its competencies, explained in Article 6(3) as a support element for the head of an organisation, company, institution, or government department which uses the \textit{Satpam} as a security provider. The \textit{Satpam} also functions as a support element of police for the development of societal security and order and law enforcement. The Regulation demonstrates that the \textit{Satpam} have a very close relationship with the Indonesian National Police due to the System. Every provision within the System is managed and controlled by the Indonesian National Police, showing Indonesia’s private security system in terms of a regulatory body under the jurisdiction of the national police. It is therefore different to laws of other countries, such as South Africa and United Kingdom where PSCs are directly under a government ministry or regulatory authority body created or appointed by a particular government ministry.

\textsuperscript{170} Ibid arts 53-60.
\textsuperscript{171} Ibid art 61.
\textsuperscript{172} Ibid arts 67-75.
\textsuperscript{173} Ibid arts 78-82.
Chapter III – Legal Framework for the Regulation of PSCs and PMCs

G. The UN Commission on Crime Prevention and Criminal Justice

The use of private actors to provide security services has become a major issue for member states of the United Nations. In January 2011, the UN Commission on Crime Prevention and Criminal Justice (hereinafter, the ‘UNCCPCJ’) issued a report on PSCs entitled Civilian Private Security Services: Their Role, Oversight and Contribution to Crime Prevention and Community Safety. The purposes of the Commission’s Report and its accompanying Resolution 18/2 is to emphasize with member states the primary responsibility for public order, safety, and security with contribution from civilian PSCs and their submission to municipal legislation. While the UN Report has neither the status of an international treaty nor incorporation into any domestic law specifically in a UN member state, it does provides a further perspective on how the member states are regulating and managing PSCs based on their own legal systems and experiences.

The UNCCPCJ invited member states to assess the roles of civilian PSCs and PMCs in their territories and to advise whether their services were consistent with the domestic legislation and community safety. It further established an ad-hoc intergovernmental Expert Group to assess the activities of civilian PSCs and their contribution to community safety, and the monitoring of civilian PSCs by competent state authorities. In December 2011, Resolution 18/2: Civilian Private Security Services: Their Role, Oversight and Contribution to Crime Prevention and Community Safety was responded to by 43 countries. However, the major actors in the private security sector, namely, the United States, South Africa, and


175 The following countries endorsed the Resolution: Algeria, Argentina, Azerbaijan, Bahrain, Belgium, Bolivia, Bosnia and Herzegovina, Canada, Chile, Colombia, Croatia, Cyprus, Czech Republic, Ecuador, Egypt, El Salvador, Finland, Germany, Guatemala, Hungary, India, Jamaica, Japan, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Liechtenstein, Monaco, Norway, Oman, Paraguay, Philippines, Portugal, Republic of Korea, Russian Federation, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, and the United Arab Emirates.
the United Kingdom, did not respond to the Resolution. The respondent states were joined by experts from academia and private security sector to establish an Expert Group with the objective of studying the roles of PSCs at national level, in community safety and security, and how the governments of the member states regulate them.176

Most of the respondent states reported that PSCs operate inside their countries.177 They also reported that the main tasks and roles were providing physical and electronic surveillance, protection detail to persons, transporting goods, private investigation, securing order and crowd control on public events, public transport and airport security, private entity internal security, property protection, and citizen neighbourhood patrols.178 The reports also showed that public authorities in several respondent states also contracted PSCs in order to maintain public order, security and safety, and even use PSCs to guard against sabotage and terrorism.179 These respondent states reported that the power of PSCs was not greater than the State Police and that they needed authorisation for such tasks as asking persons for identification or conducting personal searches.180 Furthermore, the states also reported that there was steady and even increasing demand for PSCs.181 Even so, and with PSCs’ role in maintaining of security and safety also growing, the states still viewed PSCs as subsidiary to the public security force.182

In respect of community safety and security, most respondent states agreed that PSCs can have a significant role in crime prevention through contributions such as collaboration with state police forces,183 an indirect role in combating crime,184 making crime prevention

177 Ibid, [7].
178 Ibid, [8].
179 Ibid, [9].
180 Ibid, [10].
182 Ibid, [12].
183 Ibid, [14] (a) and (e).
the companies’ main task, and providing security on behalf of police in key national establishments and business locations. However, some states also reported a negative element of PSC activity – some PSCs handled only minor crimes, but when faced with major crime some PSCs become the victims of such crime or even became accomplice to the crime itself. Additionally, since PSCs are profit-making entities, some did not comply with the national regulations and became only half-heartedly involved in crime prevention.

The Report illustrates that some respondent states find it very difficult to determine the quantity and quality of the contribution of PSCs to crime prevention and public safety. Even so, it appears that they consider that PSCs can still contribute to the sense of security of the population. The states also consider that PSCs contribute to crime prevention and public safety through their presence and visibility while performing their tasks and services, which can have a deterrence effect on potential criminal activities. Some among the respondent states consider that PSCs play a significant role in community safety because the companies are part of public safety forces, and even contribute to the economic development and the social services delivery in the community. However, they can sometimes undermine the community if they display their poor professional conduct.

Cooperation between PSCs and State Police is an important element in PSCs’ contribution to crime prevention and public safety. To support the cooperation, a few states have developed special mechanisms or networks, for example the Colombian “network of citizen support and solidarity”, that secures information exchange and

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185Ibid, [14] (c).
189Ibid, [16].
190Ibid, [17].
193Ibid, [21].
194Ibid, [22].
interaction and communication tools between the companies and the state police forces.\textsuperscript{195} Sometimes this is done through specific cooperation agreements, such as the German practice of PSC support for the police through observation and patrol activities, or by some ad-hoc or special cooperation.\textsuperscript{196} The cooperation can be supported through strategies that consider PSCs as part of community policing network.\textsuperscript{197}

In respect of the existence of formal national legislation for the monitoring of PSCs, several respondent states have reported that they already had a law or regulation relating to the companies or have amended their legal regulation on PSCs. Others also have reported that they had new legal projects on PSCs or indicated that they needed a new law or regulation.\textsuperscript{198} The respondent states agree that PSCs need to be licenced and authorised by governments in order to be allowed to conduct their operations and services.\textsuperscript{199} The licencing and authorisation are needed not only by PSC directors or boards, but also by the companies’ personnel and employees.\textsuperscript{200} The respondent states generally agree that the licensing and authorisation of PSC personnel must address or require:\textsuperscript{201}

\begin{itemize}
  \item nationality, minimum age, and full legal capacity; evidence of reliability and personal moral standards;
  \item good physical and psychological condition;
  \item professional experience and educational or training standards;
  \item no criminal record or record of drugs consumption or alcohol abuse;
  \item not active personnel of public security forces;
\end{itemize}

\textsuperscript{195}Ibid, [26].
\textsuperscript{196} Ibid.
\textsuperscript{197} Ibid.
\textsuperscript{198} Ibid, [27].
\textsuperscript{199} Ibid, [29].
\textsuperscript{200} Ibid, [30].
\textsuperscript{201} United Nations Commission on Crime Prevention and Criminal Justice, \textit{Note by the Secretariat: Civilian Private Security Services: Their Oversight and Their Role in and Contribution to Crime Prevention and Community Safety}, UNODC, 20\textsuperscript{th} sess, Agenda Item 6, E/CN.15/2011/14 (20 January 2011), [31].
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- not having been discharged from public security forces for dishonest behaviour;
- no involvement in arms trade or manufacture.

Further additional requirements include PSCs using only licenced personnel, and undertaking civil liability and responsibility for their employees and the company.

Respondent states also generally agree that PSCs should be prohibited from any intervention or involvement in political or labour union conflicts or activities, as well as:

- acquiring communication or information by technical devices or entering facilities beyond their surveillance object;
- concealing information from law enforcement agencies relating to planned or committed offences;
- producing video or audio records of facilities for which they provide security without written permission from the relevant authority or proprietor or legal owner of the facility;
- committing acts which are a violation of rights, freedoms, life, health, reputation, dignity, property or lawful interests of any persons;
- exchanging information on their clients generally or on their political opinions acquired during the conduct of operations;
- wearing uniforms or using other emblems insignia that have not approved.

Generally, all responding states agree that authority for the control and supervision of a PSC should rest with a Minister of the Interior or equivalent, or commercial ministries, or specially established PSC departments, or police authorities. However, ministries or government departments have responsibility for the oversight of PSCs; police, on the other hand,

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202 Ibid, [32]
203 Ibid, [35]
204 Ibid, [37]
hand, have responsibility to enforce regulations, and thus the supervision and control of PSCs. Finally, responding states agree that in order to impose regulation governing PSCs, there must a mechanism to impose and implement sanctions by force for breaches and violations of regulations. The sanctions could include fines or temporary or permanent revocation or suspension of the authorization licence, or even terms of imprisonment.\footnote{Ibid [40]-[41].} 


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 (hereafter ‘the Montreux Document’) is an international agreement jointly produced by the Swiss Government and the International Committee of the Red Cross with the objective ‘to define how international law applies to the activities of private military and security companies when they are operating in an armed conflict zone.’\footnote{Federal Government of Switzerland, \textit{Summary and Explanation of the Montreux Document} (23 February 2013) Switzerland Federal Department of Foreign Affairs \<http://www.eda.admin.ch/psc>.} It also sets some positive practices to be followed by a state in order to deal with the private military and security companies nationally.

However, the Montreux Document has a significant feature that divides the state responsibilities, obligations, and good practices based on the relationship between PSC and PMC companies and the state, depending on the status of the state as a contracting state (being the party to the contract with a PSC or PMC for services), as a Territorial State (being the state in which the PSC or PMC is operating or will operate), and as a Home State (being the state in which the PSC or PMC is registered or incorporated). It is suggested by the Montreux Document that the reason for such divisions in the relationship between PSC and PMC companies and the state is that the divisions make it easier for a state to take more
specific measures in dealing with the PSCs and PMCs according to their relationship status. In practical terms, through these measures, it will be easier to regulate and monitor the PSCs and PMCs. Therefore it will fulfill the main objective of the *Montreux Document* as a “practical instrument that can be used in relatively short period of time.”

The *International Conduct of Conduct for Private Security Service Providers* (hereafter the ‘International Code of Conduct’) is a multi-stakeholder initiative sponsored by the Swiss Government with the purpose of clarifying international standards of conduct for PSCs and PMCs based on human rights and international humanitarian law principles, and improving the monitoring and accountability of these companies. It sets some international industry standards and codes of conduct for PSCs and PMCs that become signatories companies.

Both the *Montreux Document* and the *International Code of Conduct* have been recognised and acceded to by a number of states and companies. However, both instruments are voluntary codes for PSCs and PMCs, since they do not constitute public international law instruments such as treaties or conventions. Hence they are not legally binding upon their signatories.

**I. Preliminary Conclusion**

Even though every country has different methods and experiences regarding the management and regulation of PSCs and PMCs inside their borders, they share similar elements in order to deal with the issue of PSCs and PMCs. The elements are:

- availability of applicable laws and regulation in respect of PSCs and PMCs;

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Chapter III – Legal Framework for the Regulation of PSCs and PMCs

- definition of PSCs and PMCs;
- establishment of monitoring and regulatory body for PSCs and PMCs;
- registration and licensing of both companies and their employees;
- determination of approved services and activities;
- accountability and sanctions for PSCs and PMCs.

The assessment on the national laws and regulations, and experiences relating to the operation of PSCs and PMSCs, will be used to assist the drafting effort of a PSC and PMC statute in the Timor-Leste legal system, in light of the needs and security situation of Timor-Leste and the presence of PSCs and PMCs in the country. Assessment relating to Timor-Leste, including its socio-cultural and political backgrounds which make it a suitable place for PSCs and PMCs to operate, and the presence of PSCs and PMCs in the country are discussed further in Chapter IV, following.
This chapter reviews the history and conflict of Timor-Leste that shapes the nature of the country’s security conditions. It also reviews and assesses the operation, presence, and impact of PSCs and PMCs within the country. Further, it examines some selected regulations within Timor-Leste that can relate to PSCs and PMCs and their management.

A. **The Conflict Background and Patterns in Timor-Leste**

A.1. **Background of Conflicts**

Timor-Leste, a post-conflict nation located in South East Asia, has a population of about 1.1 million people and large deposits of natural resources, particularly oil and gas. However, it also has a long history of conflict, beginning with Portuguese colonisation up until the 2006 Crisis, and which continues with small horizontal and political conflicts. Portuguese explorers first landed on Timor Island in 1515, followed by Dutch explorers in the late sixteenth century. In 1859 under the Treaty of Lisbon, both Portuguese and Dutch formally agreed on the border, which split the island into West Timor under Dutch control, and Timor-Leste governed by the Portuguese. The agreement was finalised by a treaty between the Dutch and Portuguese in 1914.¹

In April 1974 the “Carnation Coup” occurred in Portugal against the Estada Novo regime of Prime Minister António de Oliveira Salazar (Prime Minister 1932 – 1968) and his successor, Marcelo Caetano. The new Portuguese government announced the decolonisation of its colonies in Asia and Africa, including Portuguese Timor. Three main political parties emerged locally as a result: União Democrática Timorense (Timorese Democratic Union, ¹ Adam Schwarz, *A Nation in Waiting: Indonesia in the 1990s* (West view Press, 1994) 199; see also: <http://www.princeton.edu/~achaney/tmve/wiki100k/docs/West_Timor.html>.
UDT);\(^2\) the *Associação Social Democrática Timorense* (Timorese Social Democratic Association, ASDT), later known as *Frente Revolucionária de Timor-Leste Independente* (Revolutionary Front of Independent East Timor, or Fretilin);\(^3\) and the *Associação Popular Democrática Timorense* (Timorese Popular Democratic Association, APODETI).\(^4\)

Widespread speculation touted ASDT/Fretilin as intending to seize power; subsequently the UDT committed a coup in order to assume power from the Portuguese on 11 August 1975. This action prompted civil conflict between the political parties, viewed by many as civil war. In the conflict aftermath, the UDT lost and fled to Indonesia, with Portugal withdrawing its administration from Timor-Leste. The ASDT/Fretilin party claimed victory. On 28 November 1975, ASDT/Fretilin declared Timor-Leste independence unilaterally.\(^5\)

However, two weeks later on 7 December 1975 Indonesia launched a massive air and sea invasion of Timor-Leste under the *Operasi Seroja* (Operation Lotus) and annexed Timor-Leste as Indonesia’s 27th province. Thus began 24 years of Indonesian occupation and guerrilla warfare committed by Falintil, the military wing of Fretilin. With the fall of the Suharto regime in 1998, Indonesia, Portugal, and the UN agreed to let the people of Timor-Leste decide whether to become independent, or to remain as part of Indonesia under an autonomy status, through a referendum process conducted on 30 August 1999. In order to support the implementation of the referendum, the UN established the UN Mission in East Timor (UNAMET) under UN Security Council Resolution No. 1246 on 11 July 1999. An overwhelming 78.5 percent (from 98 percent of the Timor-Leste population) voted for independence. However, the result was overshadowed by a total breakdown of law and order due to pro-Indonesia militias backed by Indonesia military. Massive attacks and widespread

\(^2\) Jose Ramos Horta, *Funu: The Unfinished Saga of East Timor* (Red Sea Press, 1987) 30. UDT, as a conservative political party, wanted to continue allegiance to Portugal.

\(^3\) James Dunn, *Timor: A People Betrayed* (Australian Broadcasting Corporation Books, 1996) 53, 54, and 56; Fretilin was a leftist party which embraced universal socialism doctrines and right to independence. It viewed itself as only legitimate Timorese people representative.

\(^4\) APODETI’s objective was to support the integration of Timor-Leste into Indonesia as an autonomous province.

destruction followed, leaving over a thousand people dead or missing, 500,000 people displaced, and 90 percent of Timor-Leste infrastructure destroyed.

In order to restore the security condition in Timor-Leste, the UN Security Council under Resolution No. 1264 authorised an Australian-led peacekeeping force, the International Force for East Timor (INTERFET) to intervene on behalf of Timor-Leste. The presence of INTERFET provided a stable condition for the subsequent establishment of the UN Transitional Authority in East Timor (UNTAET) in October 1999 to govern Timor-Leste until its independence on 20 May 2002. The arrival of INTERFET marked the end of 24 years of Indonesian occupation in Timor-Leste, the death toll during which is estimated to have reached between 60,000 – 200,000 people. However, the Commission for Reception, Truth and Reconciliation in Timor-Leste has reported 102,800 conflict-related deaths, 18,600 killings and 84,200 deaths from hunger and illness. The violence that occurred in Timor-Leste following independence from Indonesia can potentially be related to the effects of prior Indonesian occupation on the Timorese population. The undercurrent of Timorese emotions regarding Indonesian occupation, such as hatred and revenge, could emerge as a conflict source in the future similar to the events of 2006.

After independence and several years of peace, Timor-Leste again experienced a major crisis in 2006 (the 2006 Crisis), caused by conflicting elements and discrimination occurring within the Timor-Leste Defence Force (Falintil-Forças de Defesa de Timor-Leste - hereafter, the “F-FDTL”). The 2006 Crisis arose from the mismanagement of a dispute within the F-FDTL between soldiers from eastern part of Timor-Leste (Lorosae) and soldiers from the western part of the country (Loromonu). The Lorosae group considered themselves to be the major contributors in the resistance against Indonesian occupation, and that therefore they should form the largest component of the F-FDTL. The Loromonu group on

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the other hand were viewed as less prominent in the resistance, resulting in a less favoured position within the military.\(^7\) This division led to allegations of discrimination and acts of nepotism from within the F-FDTL.\(^8\)

Aside from the disputatation within the F-FDTL, the rivalry between the Timor-Leste National Police (Polícia Nacional de Timor-Leste — hereafter, the “PNTL”) and the F-FDTL, composed primarily of the Loromonu people and former members of Indonesian military, also contributed to the exacerbation of the security conditions from 2004 until 2006.\(^9\) In addition, the issue of Lorosae-Loromonu also affected the general population of Timor-Leste, where prejudice and discrimination towards each other grew strong, dividing the society and becoming a major issue in the 2006 Crisis.

It has been suggested by some that the creation of the Lorosae-Loromonu issue is a new phenomenon within Timor-Leste society; however some regard the issue as having existed since the Portuguese era.\(^10\) Regardless of when it was created, it would seem the issue was manipulated to fulfil the specific political interest of some groups during the 2006 Crisis.\(^11\) It also influenced many other issues, such as: the politicisation of the military and

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\(^8\) Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste (Geneva, 2 October 2006) 20 [32] <http://www.ohchr.org/Documents/Countries/COITimorLeste.pdf>; The division issue inside the F-FDTL can be traced back to the early days of its formation by UNTAET in 2001. First Battalion of the F-FDTL consisted of 650 soldiers that were recruited from former resistance guerrillas and mostly came from the eastern districts and were known as “Firaku Force”. Second Battalion was established with 850 soldiers who were generally young and came from western districts and dubbed as “Kaladi Force”. This disproportionate military situation/spending caused a fault line between the forces; the Kaladi Force become the victim of discrimination in the military institution. So, the east-west division explains why rebellion and fighting occurred in 2006 and drove the disproportionate military situation/spending to become one of the high political risk indicators (see Dennis Shoesmith, The Crisis in Timor-Leste: Understanding the Past, Imagining the Future, Charles Darwin University, 2007, 25-26).


\(^11\) Ibid.
police by some senior government officials, illegal weapons and firearms distribution to civilians, and the irregular movement of weapons and firearms within the PNTL and F-FDTL. These issues have contributed to the exacerbation of an already fragile security condition.

Rebel forces were formed out of the crisis, led by Lieutenant Gastão Salsinha and Major Alfredo Reinaldo and consisting of deserting members of the PNTL and F-FDTL. Their main objective was to bring down the then Prime Minister, Mari Alkatiri. The rebel forces clashed with the soldiers from the F-FDTL for several weeks, remaining in their positions in and around the hills above Dili. The security condition further deteriorated with clashes between armed gangs in Dili and other parts of the country. Many gangs in Timor-Leste formed from clandestine resistance groups during the Indonesian occupation and emerged from heterogeneous backgrounds, such as disaffected veterans (CPDRDTL, Colimau 2000, and Sagrada Familia), resistance groups (7-7, 5-5, and Bua Malus), political groups (MUNJ), martial arts groups (PSHT, KORK, Kera Sakti, and Kung Fu Master), village-based gangs (Ameu Van Damme and Commando Comoro Market Gang), youth groups (Slebor, Green Villa Blok M, Aqui Jazz, and Predator), and informal security groups (Petitioners, Railos Group, and Isolados). These groups, who once defended their communities from Indonesian forces, were now protecting their community from each other. They grew in number and influence, resulting in all 13 districts of Timor-Leste becoming home grown battlegrounds. The groups utilised a variety of weapons such as stones, knives, machetes, slingshots, home-made explosives and rifles, as well as stolen or

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14 Ibid 41 [97]-[99].
16 Timor-Leste Armed Violence Assessment (TLAVA), Groups, Gangs and Armed Violence in Timor-Leste (Dili: TLAVA, April 2009) 1.
missing’ military and police firearms obtained from security forces sources. Most of the fights between them occurred in the streets of Dili, causing many residents to flee from the city. To restore law and order from the chaotic situation in Timor-Leste, the Timor-Leste government sent a formal request for military assistance to several countries. The requests were responded to by Australia, New Zealand, Malaysia, and Portugal, who sent soldiers and police to help restore the security condition. Furthermore, the crisis led to the resignation of Mari Alkatiri from the position of Timor-Leste Prime Minister.

Many people lost their lives in the 2006 Crisis. Additionally thousands more became internal displacement refugees, houses and buildings were burned down, and the widespread violence continued for several years both in Dili and other districts due to the fighting between the armed gangs. The 2006 Crisis was also connected to the assassination attempts on Xanana Gusmão and José Ramos-Horta in 2008, and has been viewed as the most violent situation since independence, indicating a weakness of the government and its institutions.

The author suggests that contributing factors to the 2006 Crisis included communal issues that have divided the Timorese population. In addition, the security condition was exacerbated by the politicisation of the Crisis itself, the Timor-Leste security force, and the illegal distribution of firearms and weapons among the population. Therefore, to have a better understanding about the security condition it is important to review and assess the patterns of violence and conflict within the country.

A.2. Patterns of Violence and Conflict

The civil unrest that occurred in Timor-Leste related to historical and political violence, which had the tendency to be repeated due to the desire for revenge and retribution. Revenge had become the most important factor in the escalation of violence, and the reason

\[17\] Ibid.
for its continuance.\textsuperscript{18} This condition created cycles of injury and retribution.\textsuperscript{19} Furthermore, given the history of conflict in the country, many Timorese believe that violence has become part of their society and developed as a ‘culture’ due to the experience of years of fighting and struggle. Violence has been incorporated into social interactions, many believing even domestic violence is ‘normal.’\textsuperscript{20} Also, the violence can be explained as the ‘frustration-aggression’ hypothesis, according to which the frustration drives a behaviour to harming some person or object perceived as the frustration cause in the first place.\textsuperscript{21}

The instability of Timor-Leste, and the insecure political environment that occurred since independence from Indonesia, related largely to the political violence that grew from the stagnancy of economy, the failure of state institutions, the use of military spending disproportionately, and the premature withdrawal of the peacekeeping force.\textsuperscript{22}

Political instability in Timor-Leste also resulted from rivalry between political leaders, many of which are former leaders of the resistance against Indonesian occupation. Their leadership characteristics include tenacity, inflexibility, approaching challenges resolutely, strength of conviction, and continual and persistent demand of discipline in the ranks. In

\begin{footnotesize}
\begin{enumerate}
\item Ana Cutter et al, 'Timor Leste Conflict Assessment: Final Report' (Center for International Conflict Resolution (CICR) at Columbia University and Fo Liman Ba Malu – Hakat Ba Oin, 31 July 2004) 16.
\item See Robert Baron and Donn Byrne, \textit{Social Psychology} (Allyn and Bacon, 8\textsuperscript{th} ed, 1997) 396; The poverty in Timor-Leste have considered mainly as primary cause of the frustration due to it seen as “form of social injustice”, discrimination of group, and creating “rivalry and conflict” between some group (see Dennis Shoesmith, \textit{The Crisis in Timor-Leste: Understanding the Past, Imagining the Future}, Charles Darwin University, 2007, 29).
\item Dennis Shoesmith, \textit{The Crisis in Timor-Leste: Understanding the Past, Imagining the Future}, Charles Darwin University, 2007, 24. Shoesmith’s indicators for Timor-Leste patterns of violence and conflict are assessed from the “feasibility of rebellion” by Collier which is identified variables, such as “low per capita income; a stagnant economy; large export of natural resources; disproportionate military spending; a precipice withdrawal by international peacekeeping force, and the incapacity of state institution to function effectively” (see Paul Collier, Anke Hoeffler and Måns Söderbom, ‘Post-Conflict Risks’ (CSAE WPS/2006-12, Centre for the Study of African Economies, Department of Economics, University of Oxford, 17 August 2006) 4-6).
\end{enumerate}
\end{footnotesize}
their view, good leaders must be brave, strong, and have gained attention and respect as resistance fighters.\textsuperscript{23} After becoming political leaders, they brought their resistance characteristics and mindsets into the political realm. This created a domain of hierarchical control within their respective political organisations and a tendency to display a rivalry toward other political leaders. For many political leaders, negotiation and compromise are considered signs of weakness;\textsuperscript{24} for example, many observers viewed the relationship between Xanana Gusmão and Mari Alkatiri as one of intense political rivalry.\textsuperscript{25}

This situation demonstrates that many political and historical factors in the turmoil of Timor-Leste are closely related. A component of the instability is the affiliation of armed gangs and martial arts groups with political parties. Some gangs have been exploited by the parties and encouraged to attack the others and their supporters. It is difficult, however, to prove such affiliation due to the relationship linkage through personal, kinship, clandestine alliances, membership, and family ties to the political party. If required by the situation, affiliation can even be through trusted middlemen or fixers.\textsuperscript{26}

The conflicts and civil unrests in Timor-Leste also relate to the natural resources in Timor-Leste, particularly oil and gas. These natural resources are mainly located in areas around the Timor Sea, such as the Timor-Leste Exclusive Area (TLEA), the Joint Petroleum Development Area (JPDA), and the Zone of Cooperation A (ZOC-A); while onshore areas are mainly located in District Suai and Viqueque.\textsuperscript{27} Based on a report released in October 2012, the revenue that Timor-Leste receives from its natural resources reached

\textsuperscript{23} Marc Sommers, ‘From Resistance to Independence: Timor-Leste’s Leadership Challenge’ (Discussion Paper No. 1, CM Partners) 4.
\textsuperscript{24} Ibid.
\textsuperscript{26} Timor-Leste Armed Violence Assessment, ‘Groups, Gangs and Armed Violence in Timor-Leste’ (Issue Brief No 2, Timor-Leste Armed Violence Assessment, April 2009) 2.
\textsuperscript{27} Autoridade Nacionaldo Petróleo, LAFAEK-Area Map and Detail<http://www.anptl.org/webs/anptlweb.nsf/pgMaps!OpenPage>. 
$126,078,300.28 Timor-Leste has rising revenue from the large export of its vast oil and gas deposits; however, it is followed by poverty, economic stagnation, and weak state capacity. This condition indicates the high political risk and could lead Timor-Leste into a so-called 'resource curse' condition, that is, the increase of the risk of conflict due to the inflow of energy export wealth. One of the side effects of the country’s significant level of natural resource wealth is that the revenue from these resources (primary industry commodities) forms a large proportion of national GDP. This single commodity reliance may have the effect of making the country more susceptible to instances of violent conflict. The government is vulnerable to unpredictable financial flows and economic shocks due to the volatility in the world market oil price, and heavy reliance on revenue from oil. In addition, there are indications of corruption relating to the natural resources.

Poverty could also become a conflict factor in Timor-Leste due to an expectation that after the achievement of independence, an improvement in the standard of living would follow. However, a growing number of the Timor-Leste population continue to live in poverty following independence. The population of Timor-Leste is approximately 1.1 million, 37 percent live below the international poverty line ($1.25 per day), while 40 percent suffer malnutrition. Life expectancy is 62.5 years. These conditions have placed Timor-Leste as one of the poorest countries in the world, ranking 147 from 187 countries on

31 Ibid.
32 Ibid.
the UN Human Development Index 2011. Moreover, the poverty in Timor-Leste has left the people feeling deprived and frustrated. These feelings have provoked aggression towards perceived social injustices that manifest as discrimination of certain groups in order to fulfil favours of another, creating rivalry and conflict between regions and ethnic groups. This type of situation ultimately leads to social trauma and repeated cycles of vengeance.

Exacerbating the situation is the economic stagnation caused by disputes relating to property ownership together with the lack of a comprehensive commercial code. This may hinder future foreign investment and long-term developments during the reconstruction period, thus causing Timor-Leste to depend on foreign assistance. The high rate of unemployment and lack of productive activities among the youth of Timor-Leste contributes to the creation of tension in many districts and participation in violent and destructive activities. These conditions place Timor-Leste in a position likely to be vulnerable to future conflict.

The weak institutional capacity may also contribute to vulnerability and future conflicts in Timor-Leste, particularly in areas of parliamentary activity, the rule of law, and the security sector. In parliamentary activity, many members of parliament have been seen as having misused their position and not representing the best interests of the people. In addition, there are widespread levels of corruption and nepotism resulting in problems with legitimacy and efficacy in all level of the public institution.

In the area of rule of law, there are several issues within the Timor-Leste legal system, such as: the lack of understanding of, as well as limited access to, state mechanisms for resolving conflicts by peaceful means; inability of the judicial system to address serious

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36 Ibid.
39 Ibid 15.
40 Ibid 17.
41 Ibid 17.
crimes; and, the shortage of trained personnel which restrict the processes for achieving a fair trial. This has resulted in corruption, inefficiency, and a failure to develop a culture of law and justice.\textsuperscript{42} In the security sector, the PNTL and the F-FDTL have been considered weak and often lacking in capacity to provide adequate security and order.\textsuperscript{43} This has been exacerbated by the rivalry and fighting between the two organisations, resulting in the lack of trust from the Timor-Leste population. Additionally, due to allegations of frequent abuse of power and inappropriate use of severe force by the police force, there is concern regarding professionalism resulting in mistrust and resentment by the general public.\textsuperscript{44}

A.3. **Suitable Environment**

It can be concluded that many of the conflicts or civil unrest that has occurred in Timor-Leste has been influenced by several factors, including historical, political, and economic backgrounds. In addition, weak institutional capacity, lack of a proper rule of law, and an inadequate security sector has further deteriorated the situation. Furthermore, the polarisation of political culture splintered by ethnic, religious and fractional enmities leading to open conflict, has further contributed to the instability in Timor-Leste. This polarisation has been utilised by some political players in society whose only interest is to gain the political favour of their particular ethnic or factional social group.\textsuperscript{45}

Besides those factors, crimes continue to feature in Timor-Leste, such as homicide and murder, assault, domestic assault, sex related crimes, burglary, and robbery. These crimes have also contributed to the deterioration of the security conditions and the creation of instability within Timor-Leste. Such situations created a very suitable environment for the services provided by PSCs and PMCs, especially in light of the fact that the Government mechanisms were not sufficient to provide security for the Timorese population. The PSCs

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{42} Ibid18.
\item \textsuperscript{43} Ibid.
\item \textsuperscript{44} Ibid18-19.
\item \textsuperscript{45} John R. Schmidt, ‘Can Outsiders Bring Democracy to Post-Conflict States?’ (2008) 52 Orbis 118 [2].
\end{itemize}
\end{footnotesize}
and PMCs therefore became the alternative source for the provision of security for the population, a profitable operation for both due to high demand for services.

B. PSCs and PMCs in Timor-Leste

These companies have been present in Timor-Leste since the country gained its independence, shortly after the arrival of the UN Peace Keeping Mission. Initially, the presence of PSCs and PMCs was to support the UN peacekeeping force and the UN administration in Timor-Leste, where they provided logistical services ranging from general support through to the security and policing functions for their UN clients. Today, the presence of PSCs and PMCs in Timor-Leste occurs in three forms: first, PSCs and PMCs form part of foreign government missions, as part of an international organisation in Timor-Leste; second, private companies or individuals have contracted them to operate within Timor-Leste;46 and third, the companies have been established locally in Timor-Leste.

Regarding the first scenario, the PSCs and PMCs are generally contracted to provide security services for the contracting foreign nation’s diplomatic staff. For example, the U.S. has used PSCs and PMCs such as Academi47, DynCorp International and Triple Canopy, Inc. 48 to provide security services for over 20 years, following the attack on the US Embassy

46 The latter form of presence is seen with multinational companies [usually natural extraction companies] or in Onix International presence.
47 Academi was formerly established in 1997 and known as Blackwater USA. In 2007 it changed to Blackwater Worldwide, changed again to Xe Services LLC in 2009, and last changed to be known as Academi in 2010. The changing names is suggested by some as a strategy to avoid the association of the company with a bad reputation as a mercenary organisation and crimes committed by the company in Iraq and elsewhere. See Jason Ukman, ‘Ex-Blackwater Firm Gets a Name Change, Again’, The Washington Post (online), 12 December 2011 <http://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/glQAX4YpO_blog.html>.
in Beirut, Lebanon, in 1983. Similar contracts could occur with the US Embassy in Timor-Leste. However it is difficult to confirm whether any foreign embassies or diplomatic missions, in particular US diplomatic missions, are in fact contracting PSCs and PMCs as part of their security services. Companies that are contracted by the US government in Timor-Leste can be categorised as US government “civilian contractors,” since they are either employed by, or accompany, the US State Department, and support its programs, projects, and activities, in accordance with Section 3272 (d) of the Civilian Extraterritorial Jurisdiction Act (CEJA).

There was a notion to use the personnel of PSCs and PMCs for the provision of security to Timor-Leste Government officials following independence. For example, in October 1999 two security companies from South Africa (Empower Loss Control Services and KZN Security) were requested by Xanana Gusmão, in his then capacity as Head of the National Council of the Timorese Resistance, to provide his personal security as it was believed that his safety could not be entrusted to Indonesian security. However, this notion was declined, as it would contradict South African efforts to eradicate mercenarism, and therefore its anti-mercenary laws. In addition, it was believed to be the task of the UN to provide such security, and not South African security companies.

In relation to the second scenario, many mining/natural resource extraction companies that operate in Timor-Leste may also contract security companies to provide services for their activities and employees. However, the scale of activities of the contracted PSCs and PMCs are neither intensive nor hazardous due to the off-shore Timor Sea location of most of

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50 Civilian Extraterritorial Jurisdiction Act, HR 4567, 111th Congress (2010) § 3272 (d) <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4567.IH:>
52 Ibid.
53 Ibid.
the oil/gas refineries, which one might safely presume to be unaffected by the conflicts on
the mainland. Additionally, the security condition of the Timor Sea is not considered
hazardous compared to the pirate-infested waters of the Malaka Strait or the Somalia Sea;
and even those located on the Timor-Leste mainland do not face as high a security threat as
those in, say, Colombia, Nigeria, or Algeria. The companies could provide services such as
assessments of security conditions of the area in order to secure both the workers and
businesses that may face unstable security conditions. If the situation deteriorated the PSCs
and PMCs could conduct a safe evacuation for employees.\textsuperscript{54} For the PSCs and PMCs
themselves, working with these companies would be quite lucrative, as payment for services
is high.

The more controversial presence of PSCs has been illustrated by the situation with
Onix International. In 2000, the Auckland-based company allegedly deployed former New
Zealand Special Air Service (NVSAS) personnel to Timor-Leste to conduct a covert hostage
rescue operation of Chinese businessman Johnson Cornelius Lowe, held hostage by
police/military officers for six months.\textsuperscript{55} However, there were conflicting accounts of this
incident – in no small part due to the denial of Ken Fatuera, the company principal, that the
operation was even conducted in Timor-Leste, but instead in Central Java, Indonesia.\textsuperscript{56}
Despite such accounts, Jenny McMannus, the first journalist to report on the operation,
insisted that it was conducted in Timor-Leste. These contradictory accounts were viewed by
McMannus as an attempt to prevent embarrassment to the UN Peacekeeping Force in Timor-
Leste, as the UN did not have any knowledge of the operation, which had allegedly occurred

\textsuperscript{54} D. Alan Johnson, ‘Why Corporations Hire Private Military Contractors; Part One’ on Simon
\textsuperscript{55} Jenny McMannus and Rachel Mealey, ‘NZ Mercenaries Rescue Chinese Businessman’, ABC
(online), 9 March 2000 <http://www.abc.net.au/am/stories/s108975.htm>; Matthew Quirk,
‘Private Military Contractors: A Buyer’s Guide’, The Atlantic (online), 1 September 2004
\textsuperscript{56} Jenny McMannus and Rachel Mealey, ‘NZ Mercenaries Rescue Chinese Businessman’, ABC
inside their jurisdiction. However, the company itself ceased operation on 7 December 2000.

For the third scenario, the first security company that operated in Timor-Leste was the Chubb Security Group in 2000, as part of the multinational Chubb Security Group. The Australian based security company provided services to international organisations and foreign personnel that operated in Timor-Leste, ceasing its Timor-Leste operations in 2004. After the withdrawal of the Chubb Security Group from Timor-Leste, Australian Warren Knight, and his Timorese partners, Marcus Karina and Eduardo Belo, established Maubere Security. However, after its establishment, Eduardo Belo left the company following internal conflict with Knight and another Australian, Brendan Cass, over the ownership and management of the company. Maubere Security claims to have approximately 1300 employees, and provides security services to clients such as Timor-Leste government institutions, various foreign embassies, banks, hotels, commercial premises, international business, aviation services, NGOs, International Aid Agencies, Timor-Leste Aid Agencies, United Nations buildings and residencies, and residential sites. In addition to Maubere Security, local Timor-Leste PSCs are also growing in number such as Gardamor, APAC Security, Gear Defence, and High Risk Security Group (Asia-Pacific). However, most of the PSCs in Timor-Leste are share-ownerships between the Timor and other foreign nationals, in particular those from Australia and the United States.

As mentioned above, Eduardo Belo following his departure from Maubere Security, and Abel de Amaral, who also had worked in Maubere Security, established Gardamor in 2007. Gardamor is a fully Timorese owned company and has approximately 2500

61 Ibid, _Clients_ <http://mauberesecuritylda.com/clients/>
personnel. It provides security services, such as civil security, civil protection, close investigation, asset transfer securing, body guards, and fire protection and evacuation services in cooperation with the Timor-Leste Fire Brigade (Bombeiros) and the PNTL. Timor-Leste government institutions, the Norwegian Embassy, the United Nations High Commissioner for Refugees (UNHCR), the Peace Dividend Trust, and businesses such as Tiger Fuel have become clients of Gardamor.

A US citizen and officer of the US Federal Bureau of Investigation (FBI), Christopher Whitcomb, founded APAC Security in 2007 as a successor to the PSC Seprositil. It has around 3,000 personnel and offers services such as security guards (including those for close protection), asset transportation, emergency response, and security consultation. Aside from Timor-Leste government institutions and the UN, APAC Security also provides services to security to telecommunication infrastructures throughout Timor-Leste for Timor Telecom, a Portuguese-Timorese telecommunication company. This contract grants APAC Security a more significant presence in rural areas in comparison to similar companies, with 26 percent of its operation outside Dili. Other APAC clients include oil and energy companies such as Conoco Philips and Eni Spa.

In 2004, Australian Paul Bonney, a former member of Australian Defence Force (ADF), established PSC High Risk Security Group (Asia-Pacific) with approximately 300 personnel. It provides security services, such as civil security, civil protection, close investigation, asset transfer securing, body guards, and fire protection and evacuation services in cooperation with the Timor-Leste Fire Brigade (Bombeiros) and the PNTL. Timor-Leste government institutions, the Norwegian Embassy, the United Nations High Commissioner for Refugees (UNHCR), the Peace Dividend Trust, and businesses such as Tiger Fuel have become clients of Gardamor.

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66 Ibid.
67 Ibid.
68 Ibid.
personnel. The company provides services such as: risk mitigation, physical protection, premium guard services, close personal protection, aero-medical evacuation (AME), paramedical services, security risk assessments, logistics, security awareness training, specialist security and law. The ADF and various large oil, gas, and construction companies have become clients of High Risk Security Group.

Gear Defence was established in 2009 with personnel in excess of 300. This security company, along with Gardamor, is one of the companies owned and managed entirely by Timorese. Besides providing security guards, it also supplies equipment to Timor-Leste government institutions such as the Ministry of Tourism Trade and Industry (MTCI).

While guarding clients’ properties, the personnel of PSCs do not carry firearms. They can carry non-lethal equipment, such as pepper spray, tasers and rubber batons; most of the time however they are not equipped at all. The guards can provide their services in all districts of Timor-Leste, but most of the operations are concentrated in the capital city, Dili. They are easy to identify, especially in Dili, as company signage is displayed on clients’ properties or premises and personnel are clearly visible.

The National Management of Public Buildings (Dirasaun Nasional Seguransa Publik - DNSEP) supervises all security companies and their activities. The institution falls under the Timor-Leste State Secretariat of Security and is authorised to conduct coordination and other activities as designated by the security sector of the Ministry of Defence and

71 Ibid 2.
74 Ibid 2.
75 Sarah Parker, ‘Handle with Care: Private Security Companies in Timor-Leste’ (2009) 4, [4].
Security. Additionally, it can provide security protection to government and public buildings. DNSEP has four departments: Department of Administration; Department of Operational Guard; Department of Information and Public Relations; and Department of Supervision and Control of Private Security. It is the last department, still in development, that has the authority to supervise and control private security companies in Timor-Leste.

Table 1. Local PSCs Operating in Timor-Leste

<table>
<thead>
<tr>
<th>Company Name</th>
<th>Management Origin</th>
<th>Operating Year</th>
<th>Services</th>
<th>Staff Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maubere Security (formerly Chub Security)</td>
<td>Timorese and Australian</td>
<td>2004</td>
<td>Civil security, electronic security, cleaner, fire extinguishing services</td>
<td>1,300</td>
</tr>
<tr>
<td>Gardamor</td>
<td>Timorese</td>
<td>2007</td>
<td>Civil security &amp; protection, close investigation, secure asset transfer, body guards, fire protection &amp; evacuation, cooperating with Timorese Fire Brigade (Bombeiros) and PNTL</td>
<td>2,500</td>
</tr>
<tr>
<td>APAC Security (Formerly Seprositil)</td>
<td>Australian/US</td>
<td>2007</td>
<td>Security guards (including close protection guards), asset transport, emergency response, security consultation</td>
<td>2,000</td>
</tr>
<tr>
<td>High Risk Security Group (Asia-Pacific)</td>
<td>Australian</td>
<td>2004</td>
<td>Risk mitigation, physical protection, premium guard services, close personal protection, aero-medical evacuation, paramedic services, security risk assessment, logistics, security awareness training, specialist security and law</td>
<td>51-300</td>
</tr>
<tr>
<td>Gear Defence</td>
<td>Timorese</td>
<td>2009</td>
<td>Equipment supply to government departments</td>
<td>+ 300</td>
</tr>
</tbody>
</table>

Source: compiled by the author

77 Ibid.
78 Ibid, p. 50.
79 Ibid, p.50-51. Further assessment relating to legal framework of the DNSEP in respect of PSCs is discussed in Chapter V.
81 Ibid.
Besides PSCs, PMCs also operate in Timor-Leste. The presence of private military organisations in Timor-Leste can be traced to the Portuguese colonisation period when mercenarism was introduced to Timorese communities.\(^{82}\) Timorese chiefs used mercenaries to conduct war against each other.\(^{83}\) Following independence, the modern evolution of such entities is evident in the country through the presence of PMCs. The best known PMC that operates in the country is DynCorp International,\(^{84}\) which provides services mostly to the UN Peacekeeping Force and the UN administration. DynCorp International’s services in Timor-Leste include:

- Contracted by the United States Army and UNTAET to provide heavy-lift helicopter services (November 1999).\(^{85}\)
- Contracted by the US State Department to recruit and administer 80 personnel for the United National Civilian Police to Timor-Leste.\(^{86}\)
- Contracted to provide satellite network communication support for the UN peacekeeping force.\(^{87}\)
- Based on the US Justice Department Worldwide International Criminal Investigative Training and Assistance Program (ICITIAP), contracted to train PNTL personnel (January 2001).\(^{88}\)


\(^{83}\) Ibid.

\(^{84}\) DynCorp International is a private military company established back in 1946. Currently it is under the management of Cerberus Capital Management and has approximately 15,000 personnel (see Crocodile, [DynCorp International](http://www.crocodyl.org/wiki/dyncorp_international)) and can operate globally. The company provides services such as aviation maintenance, air operations, drug eradication, law enforcement training, logistics, contingency operations, security services, land vehicles operations and maintenance (MRAPs), aircraft maintenance, support equipment, and weapons systems, intelligence training and solutions, international development, intelligence training and solutions, international development, and international development (see [DynCorp International, What We Do](http://www.dyn-intl.com/what-we-do.aspx)).

\(^{85}\) La’o Hamutuk, ‘USGET and DynCorp, Inc.’(2002) 3(8) the La’o Hamutuk Bulletin <http://www.etan.org/lh/bulletins/bulletinv3n23.html#USGET and DynCorp, Inc>.

\(^{86}\) Ibid.


\(^{88}\) Ibid.
- Contracted by the US Department of Defence to provide logistical support for the F-FDTL.  

- Through its branch-company Casal & Associates, contracted for $6.9 million by the Millennium Challenge Corporation, and administered by USAID in partnership with the Timor-Leste Government, to assist with anti-corruption efforts (2011 for three years).

- Contracted by the US Department of Defence to provide logistic support to the US Support Group East Timor (USGET) program.

- Awarded contract to provide facility support services for US Navy personnel part of Naval Mobile Construction Unit Timor-Leste.

There is a suggestion that the PMC Blackwater USA may also be operating in Timor-Leste. In 2008, the author encountered several local Timorese people wearing Blackwater USA official shirts. When asked, the people said that they received the shirts from foreigners in Dili. This is difficult to verify, since there are no documented accounts of the company operating in Timor-Leste, and there is also the possibility that the shirts were counterfeit.

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89 Ibid.
91 USGET is a Pentagon project funded by the US Department of Defence and overseen by the US Pacific Command, providing the villages across Timor-Leste with short-term aid from visiting US soldiers (see: La’o Hamutuk, ‘USGET and DynCorp, Inc., Inc’ (2002) 3(8) *the La’o Hamutuk Bulletin* <http://www.etan.org/lb/bulletins/bulletinv3n23.html#USGET and DynCorp, Inc>).
### Table 2. Foreign PSCs and PMCs Operate in Timor-Leste

<table>
<thead>
<tr>
<th>Name of Company</th>
<th>Company Type</th>
<th>Country</th>
<th>Operating Year</th>
<th>Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Onix International</td>
<td>PSC/PMC</td>
<td>New Zealand</td>
<td>Since 2000</td>
<td>Hostage Rescue Operation</td>
</tr>
<tr>
<td>DynCorp International</td>
<td>PMC</td>
<td>US</td>
<td>Since 1999</td>
<td>Supporting the UN administration and peacekeeping force and US Force operations in Timor-Leste. Providing certain services to Timor-Leste Government such as PNTL training, F-FDTL logistic support, and assisting the anti-corruption efforts.</td>
</tr>
<tr>
<td>Academia (formerly Blackwater USA/Blackwater International/Xe Service)</td>
<td>PMC</td>
<td>US</td>
<td>Exact year of first operation uncertain</td>
<td>Exact activities in Timor-Leste unidentified</td>
</tr>
</tbody>
</table>

Source: compiled by the author

### C. PSC and PMC Clients/Customers

PSCs in Timor-Leste provide security services, mostly security guards, to various embassies, international agencies buildings, government institutions, business, and private residences in Timor-Leste. The services include secure money movement, security alarm systems and mobile response, private investigation, and supplying equipment to Timor-Leste government institutions, including to the PNTL and F-FDTL. Clients are divided into two groups, not including the government and its institutions. The first group is local Timorese people, and the second being foreigners that work for various international agencies or
companies. The latter bears the highest number of clients for PSCs in Timor-Leste.\textsuperscript{93} It is suggested by von Boemcken that these clients have hired PSC due to rumours of violence without actually experiencing it,\textsuperscript{94} whereas the Timorese people have been both the witnesses and victims of violence for many years.\textsuperscript{95}

PMCs such as DynCorp International, which has conducted operations several times in Timor-Leste, provide services exclusively to the UN Peacekeeping Force, UN administration of Timor-Leste, and the country’s government itself, rather than individuals. These companies provide services that support the clients’ activities and operations, or enhance and improve clients’ own capability and capacity to conduct certain activities/operations. According to DynCorp International and Casal & Associates, their activities have been considered by their client companies as “highly effective, customizable and agile solutions to emerging or long-term development needs in justice and governance, stabilization and reconstruction, and humanitarian assistance’ in countries suffering ‘emergencies, conflicts and post-conflict transitions” in order to support development.\textsuperscript{96} More importantly, it demonstrates the flexibility of PMCs to adapt and provide forms of services according to the requirements of its clients, even if the particular activities do not fall within the scope of military or law enforcement.

\textbf{D. PSC and PMC Supportive Roles in Timor-Leste}

PSCs and PMCs can support the recovery and development of Timor-Leste, a notion affirmed by a Gardamor representative. This could be achieved by cooperation with government institutions such as the PNTL, and the UN mission in Timor-Leste (when still present in the country) to improve and develop better security conditions which can in turn


\textsuperscript{94} Ibid, 31.

\textsuperscript{95} Ibid.

support economic investments in Timor-Leste.\textsuperscript{97} For example there are insufficient numbers of law enforcement personnel in rural areas, whereas many PSCs have large numbers of personnel spread throughout rural areas that could assist the PNTL regarding security issues. In addition, PSCs and PMCs could provide assistance to extract members of the PNTL and UN Civil Police (UNCIVPOL) who may be caught in the middle of civil unrest, in a similar fashion to the 2006 Crisis in Dili. Many PSCs employees have more knowledge and connections within Dili neighbourhoods than both the PNTL and UNCIVPOL.\textsuperscript{98} Further, many employees of PSCs were Timorese youths who had previously been involved in youth groups.\textsuperscript{99} As such, PSCs could be regarded as ‘subsidiaries/important assets/helping tools’ of public security forces.\textsuperscript{100} In addition, the very presence of security companies correlates with decreasing crimes in Timorese society and therefore is most likely to have a deterrent effect on crime, in a similar vein to a neighbourhood watch program.\textsuperscript{101}

Furthermore, government institutions view PSCs as having an important role to play in the maintaining of security conditions in Timor-Leste. The Secretary of State for Security, Fransisco da Costa Gutteres, has stated that the government should maintain a good relationship and cooperation with PSCs in order to establish good security conditions, despite the lack of specific laws of regulation.\textsuperscript{102} This is not an official cooperation, however both the government and PSCs have the same objective, which is to provide and guarantee security to society. An APAC Security representative has stated that the company wished to have further cooperation or even cross training with the PNTL and F-FDTL.\textsuperscript{103} This might prove beneficial as PSCs could provide a more effective assistance to the PNTL and F-FDTL in either an emergency or other situation that might demand cooperation between those

\textsuperscript{97} Informal discussion with Gardamor representative, Dili, 27 of July 2012.
\textsuperscript{98} Ibid.
\textsuperscript{99} Ibid.
\textsuperscript{100} Marc von Boemcken (ed.), ‘Commercial Security and Development: Findings from Timor-Leste, Liberia and Peru’ (Brief 45, Bonn International Center for Conversion) 29.
\textsuperscript{101} Ibid 31.
\textsuperscript{103} Informal discussion with APAC Security representative, Dili, 27 August 2013.
The PSCs in Timor-Leste could also become a temporary solution in dealing with the lack of law enforcement personnel until this can be sufficiently increased to meet requirements in Timor-Leste. A similar stop-gap solution occurred in Ecuador and could probably be an efficient solution, as PSCs have more personnel in comparison to both PNTL and F-FDTL. PSCs could also contribute to the economic development of Timor-Leste. The country has a population of approximately 1.1 million with an unemployment rate of around 18.4\%\(^\text{106}\). The PSCs and PMCs are one of the largest job providers in Timor-Leste and can assist in reducing unemployment by providing jobs for the local population.\(^\text{107}\)

However, the PSCs favour international clients due to the amount of aid that can be, and sometimes is, provided in community development.\(^\text{108}\) For example, the UN Mission in Timor (UNMIT) had substantial indirect spending on rent and local supplies, inclusive of security services by PSCs.\(^\text{109}\) The departure of the UN Mission from Timor-Leste since 31 December 2012 (and subsequent cessation of contract arrangements) has therefore had a financial effect on the PSCs. This situation also affects security and economic conditions because many Timorese subsequently lost their jobs, in particular PSC personnel.\(^\text{110}\)

The PSCs may also assist with social development in Timor-Leste. In particular, the provision of security guards is closely linked to a traditional practice in Timorese culture where the hiring of local security guards meant wealth distribution occurred inside the neighbourhood, albeit on a small scale. This is important to the economic development of the

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\(^{107}\) Informal discussion with representative of the State Secretariat of Security, Dili, 24 of July 2012.


\(^{109}\) Ibid.

local population. However, the tendency of companies to employ in-house guards can become a social development setback, as some PSCs are not local residents but rather people from an outside neighbourhood. These types of actions could create friction between PSC’s and its personnel with people who reside around the guarded premises.

**E. Concerns relating to PSC and PMC Activities in Timor-Leste**

The presence of these kinds of companies in Timor-Leste also creates concerns. Some hold the view that the PSCs can provide security in a more efficient manner compared to the government (PNTL and F-FDTL), which is perceived as lacking the ability to provide adequate security to society in general. A Member of Parliament from Fretilin has stated that the presence of PSCs ‘is an indicator of a far too weak public police force’. This situation exacerbates the confusion between the PNTL and F-FDTL regarding responsibility to ensure national security and their mutual antagonism. This strained relationship between the PNTL and F-FDTL could lead to further destabilisation of security conditions in Timor-Leste and the presence of alternative security institutions.

With more personnel compared to military personnel, one can argue that PSCs should be subject to an adequate monitoring regime and a legal framework within which they should be regulated. Without such regulation, it could be dangerous if the companies undertake any actions that may further destabilise security conditions that may overwhelm the government. A representative of the Timor-Leste Secretariat of Security has also raised the issue of uniforms worn by the PSCs, which are similar in colour to the PNTL. Such similarity of uniform could create confusion among the Timorese population if they

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111 Ibid 33.
112 Ibid.
116 Ibid.
could not differentiate between the PNTL and PSCs. This raises concerns relating to potential misuse of the uniform if the PSCs with a similar colour uniform commit any crime, which may be construed as committed by the PNTL and not by PSCs.

From the perspective of the PSCs there is concern in relation to questions of conduct and cooperation with Timor-Leste police. An APAC Security representative has stated that, within PSC areas of operation or when PSCs are providing services to clients or reporting criminal activities, it can be difficult to obtain support or assistance from the PNTL. When this occurs, they usually call members of the PNTL that they know and use their support. In return for assistance provided by members of the police, the companies are required to pay them with some kind of fee or personal payment. In respect of the operation of local PSCs owned by foreigners, there is some concern that most only operate on a profit-orientation and not for the development and stability of Timor-Leste. This concern may be influenced by economic interest where PSCs owned by foreigners have more lucrative contracts in comparison to locally owned PSCs. Additional concerns of the operation of foreign-owned PSCs include the employment of foreign ex-military personnel rather than local Timorese.

Another issue that raises concern is unemployed PSC personnel. The departure of the UN mission from Timor-Leste financially affected PSCs due to the cessation of their contracts with the UN. This condition forced the security companies to reduce their employees/personnel. Many of the newly unemployed personnel were young and members of martial arts groups, which could create increased social and security problems. There exists a very real risk that they could re-join the groups, which could destabilise security conditions by involvement in civil unrest or conflict, or by being recruited by ‘organised criminal groups’. These behaviours can be seen as manifestations of frustration with their

119 Informal discussion with an APAC representative, Dili, 27 August 2013.
120 Ibid.
121 Informal discussion with a Gardamor representative, Dili, 27 July 2012.
own economic and social conditions.\textsuperscript{122} Therefore, it is of high importance for the Timor-Leste government to devise plans and policies to deal with this issue, such as absorbing the unemployed personnel into the PNTL or F-FDTL. In addition, with the new wealth that has been obtained from oil and gas, some Timorese have become wealthy within a brief period, while the numbers suffering urban poverty and other Timorese who live below the poverty line are on the increase. The PSC that provides services to the former group will be viewed as exacerbating the social tension with perceived elevation as ‘an important player in an emerging class conflict’.\textsuperscript{123}

The presence of foreign PSCs and PMCs raises concerns regarding whether the companies will support the recovery and development of Timor-Leste. Additionally, there are concerns relating to the manner in which Timor-Leste national law and regulations would apply to the companies and how they would be monitored, particularly if they have committed any wrongdoings while operating in the country. For example, the controversial previously-mentioned rescue operation of a Chinese businessman by Onix International has exposed that companies can operate ‘under the radar’ of the United Nations, as well as deceive the Timor-Leste Government.

Another problem is how to ensure that companies such as DynCorp International (that have allegedly committed violations in their areas of operation) do not create similar problems in Timor-Leste. A representative of F-FDTL has expressed concern over the company’s presence due to some within the company allegedly using their expertise to conduct operations and activities that do not support Timor-Leste, and which may therefore create further destabilisation in the country.\textsuperscript{124}

\textsuperscript{122} Ibid.
\textsuperscript{123} Marc von Boemcken (ed.), ‘Commercial Security and Development: Findings from Timor-Leste, Liberia and Peru’ (Brief 45, Bonn International Center for Conversion) 32.
\textsuperscript{124} Informal meeting with F-FDTL representative, Dili, 22 July 2012.
Moreover, some of the companies are covered by bilateral agreements, such as the Status of Force Agreement (SOFA) between the United States and Timor-Leste that grants the US personnel immunity from Timor-Leste jurisdiction and law. The agreements usually cover PSCs and PMCs that form part of a supporting foreign force or mission of an international organisation. The PSC and PMC requirements of the visiting force or international organisation in Timor-Leste, such as logistic support and equipment maintenance of their equipment, can thus be included in an agreement such as a SOFA.

DynCorp International, for example, was contracted and employed by the US Department of Defence to support US Forces and US Government programmes in Timor-Leste, even though the programmes were sometimes conducted under the auspices of the UN mission. Therefore, the company and its personnel meet the definition under Section 3267 of the US Military Extraterritorial Jurisdiction Act 2000, which defines a company "employed as civilian employee of Department of Defence...as a Department of Defence contractor...". According to this definition, it is reasonable to consider DynCorp International operational staff as ‘civilian personnel of the US Department of Defence’ under the Timor-Leste/US SOFA, rather than as a ‘contractor’ under United Nations Mission of Support in East Timor (UNMISET) terms. The SOFA categorisation is basically referring to the third Geneva Convention’s category of ‘person who accompanying armed forces’, thus providing a concept which allows civilian personnel to accompany an armed force in its area of operation without being members thereof.

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127 “The contractors” means persons engaged by the United Nations to perform services and/or supply equipment, provisions, supplies, materials and other goods in support of UNMISET activities, see the complete definition on the Article 1(g) of Timor-Leste/UNMISET Status of Mission Agreement 2002. Since the UN has ended its mission in Timor-Leste, the agreement is not relevant to further discussion in this thesis.
Pursuant to Article 37 of the Vienna Convention on Diplomatic Relations 1961, the inclusion of PSCs and PMCs in a SOFA renders them eligible for immunity and privileges in Timor-Leste.\textsuperscript{129} Article 37(3) of the Convention states:

Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 33.

While Article 1 of the US/Timor-Leste SOFA stipulates that:

United States military and civilian personnel of the United States Department of Defense who may be present in … Timor-Leste in connection with humanitarian and civic assistance, ship visits, military training and exercises and other agreed activities shall be accorded a status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations of April 18, 1961.

As a consequence, PSC (and PMC) companies can install and operate all kinds of communication devices and methods in Timor-Leste without any restrictions from the Timor-Leste government;\textsuperscript{130} they have freedom of movement and can use any kind of transportation modes without any restrictions, licences, or registrations;\textsuperscript{131} they have

\textsuperscript{129} Under the Timor-Leste/US SOFA, the US Government puts the “civilian personnel of US Department of Defence” in the same status in equivalent to the “administrative and technical staff” of the US Embassy (see: Status of Force Agreement between Government of the Democratic Republic of Timor-Leste and the Government of the United States of America, art I (1 October 2002)).


\textsuperscript{131} Ibid, arts I-II.
privilege to import and export equipment, provisions, supplies, fuels, materials, technology, training and other support goods;\textsuperscript{132} and they can operate free from any kinds of taxes.\textsuperscript{133}

In addition, the most important consequence of the immunity created by the Vienna Convention and the terms of the Timor-Leste/United States SOFA, is that the PSCs and PMCS and their personnel are immune from any prosecutions or proceedings under Timor-Leste national law. This immunity is demonstrated by Article VI of the Timor-Leste/US SOFA, which excludes personnel of the US government and its civilian contractors from any forms of prosecutions or proceedings under Timor-Leste national law or under international law for crimes that they may commit, including crimes that might otherwise enjoin the International Criminal Court, such as war crimes or crimes against humanity. Article VI of the SOFA provides that:

The Government of the Democratic Republic of Timor-Leste recognizes the particular importance of disciplinary control by U.S. military authorities over United States personnel and, therefore, the Government of the Democratic Republic of Timor-Leste authorizes the United States Government to exercise criminal jurisdiction over such personnel. The Government of the Democratic Republic of Timor-Leste and the Government of the United States of America confirm that such personnel may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the Government of the United States of America.

If the Timor-Leste government wished to prosecute or take any form of action against a foreign PSCs and PMCs, whether the PSCs and PMCs are part of a diplomatic mission or part of visiting force of an international organisation, and enjoying the immunity arising

\textsuperscript{132} Ibid, art III.
\textsuperscript{133} Ibid.
from the Vienna Convention and/or SOFA provisions, then their options are limited. The
Timor-Leste government might send a request to the sending or contracting state of the PSCs
and PMCs for the waiving of the immunity and privileges of ‘protected’ PSCs and PMCs
under Article 32 of the Convention. However, this measure is most unlikely to succeed since
it would negate the core objective of having the immunity provision in place. Furthermore,
the sending or contracting state, by virtue of being a powerful foreign country (for example
the United States or Australia) would be under little or no effective pressure to accede to the
request. Hence, the only practical measure would be to invoke the provisions of Article 9 of
the Vienna Convention on Diplomatic Relations 1961, that is, the Timor-Leste Government
notifying the sending or contracting state that ‘protected’ PSCs and PMCs or individual
personnel employed by them are declared to be ‘persona non grata’. Article 9 of the
Convention does not require any grounds or reasons to be given for such a declaration.
While this option might exist in principle, again, in practical terms it would be virtually
impossible for a small developing country such as Timor-Leste to enforce such action
against a powerful nation such as the United States.

According to Charles Scheiner, the granting of immunity and privilege seems to
contradict the Convention’s purpose, which he argues is ‘not to benefit individuals but to
ensure the efficient performance of the functions of diplomatic missions as representing
States’, as stipulated in the Preamble to the Convention.  

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135 Ibid
Such agreements have been viewed by an F-FDTL representative as agreements that can undermine the stability of Timor-Leste and create civil unrest, as PSCs and PMCs can more or less conduct their operations without any monitoring from Timor-Leste authorities. For instance, PSCs and PMCs could use their own communication system to spread provocative messages that may create civil unrest, conduct espionage activities, or even smuggle in weapons with the purpose of arming opposing groups, or forming groups of a military nature.\footnote{Informal meeting with F-FDTL representative, Dili, 22 July 2012.} However, this research has discovered that it is difficult to confirm the presence, and the nature of any activities, of foreign PMCs in Timor-Leste.\footnote{This could occur due to political and practical factors, but it would probably be too politically sensitive to share such information, which in any case, would probably have been covered as a state secret.}

\section*{F. Regulation of PSCs and PMCs under Timor-Leste Law}

In 2010, the Timor-Leste Government issued instructions in order to regulate PSCs by way of Secretary of State for Security Instruction No. 03/OSSS/VII/2010 of 6 August 2010 (hereinafter the “2010 Instruction”). It is the first and only specific regulation regarding the control of activities of PSCs in Timor-Leste. The Instruction is a remarkably brief document considering the subject matter with which it deals, consisting of only 13 clauses. Some of the clauses are also rather brief, although a few, such as Article 10, include a number of sections and subsections. The Instruction does not cover or even mention PMCs.

\subsection*{F.1. Key Provisions of the 2010 Instruction}

Article 1 of the Instruction defines PSCs as “Security Companies that provide protection of assets and crime prevention activities, in purpose to gain profit and/or income for them.”\footnote{Despacho no. 03/GABSES/VII/2010 de 6 de Agosto 2010 [State Secretary of Security Instruction no. 03/OSSS/VII/2010 6 August 2010] (Timor-Leste) art 1.} It does not provide any further clarity as to what is a PSC.
Articles 2 and 5 of the Instruction regulate the activities and duties of PSCs, which include:

- protection for dynamic and static assets;
- monitoring the presence and in-out movement of people;
- prevention of firearms smuggling or use of prohibited materials/equipment that could be used to incite/create violence; and
- prevention of activities involving assets, properties, buildings, or locations that could result in their closure to the public - such as business or shopping centres, public shows, or conventions.139

At the same time, the Instruction prohibits PSCs from conducting certain operations, such as:

- conducting prosecutions or any activities of the judiciary department or the PNTL;
- conducting activities that can threaten, prohibit, or restrict fundamental guarantees and rights; and
- providing security services to assets, activities, or persons that might be involved in illegal or criminal activities.140

Article 6 of the Instruction also prohibits the involvement of PSC owners, managers, or employees in company activities, especially operational activities, if they have fraud-related criminal records.141

The Instruction requires PSCs to be registered with the State Secretariat of Security. The nature and range of documentation required to obtain registration is comprehensive. It includes a provisional licence for company and business activities; address of the company

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139 Ibid arts 2 and 5.
140 Ibid art 3.
141 Ibid art 6.
and list of its assets; the company statute, articles of association or charter; identities of the company owners and managers, as well as employees and their ranks or positions; design of the company’s uniform; certification proving that the PSC is not in debt to the State; copy of the company’s identification card utilised by its employees; and the history of the company and its security services.\footnote{Ibid art 4.}

The requirements of the PSC identity card are prescribed by the Instruction.\footnote{Ibid art 7.} The card can be issued by the company, but needs to be countersigned and stamped by the Director of DNSEP. It must include the company name; cardholder name and personnel identification number; and card issue date. While conducting security services, PSC employees must wear uniforms and carry the identification card.\footnote{Ibid art 8.} They are prohibited from using firearms.\footnote{Ibid art 9.}

Article 10 of the 2010 Instruction requires PSCs and their employees to provide assistance and cooperation to public officials and authorities,\footnote{Ibid art 10 (1).} and place themselves under the latters’ command in the event of involvement in operation locations.\footnote{Ibid art 10 (2).} It continues that PSCs must immediately notify authorities if they encounter criminal activities.\footnote{Ibid art 10 (3).} All PSC personnel must ensure that they distinguish themselves and their activities from public officials to avoid confusion by the public.\footnote{Ibid art 10 (4).} PSCs and their personnel must keep information relating to their profession confidential, and ensure that it is only disclosed pursuant to the Penal Code and judicial process.\footnote{Ibid art 10 (5) and (6).}

\footnote{Ibid art 10 (1). Article 10 of the 2010 Instruction can be used in conjunction with Article 7(1) of the National Parliament Law No. 4/2010: Law of Internal Security, since both provisions oblige PSC owners, managers, and personnel/employees as Timor-Leste nationals/citizens to have a duty to collaborate with and support the Timor-Leste Authority to ensure the internal security, peace, and stability of Timor-Leste.}
that the monitoring of PSCs and their activities in Timor-Leste fall under the jurisdiction of the DNSEP. This body is charged with the responsibility of ensuring that PSCs conduct their activities according to the Instruction, 151 and to maintain records of those activities and PSC owners, managers, and personnel. 152

F.2. Deficiencies of the 2010 Instruction

However, the 2010 Instruction has some fundamental deficiencies, since it does not cover or make provision on a number of important issues, such as:

- standardised personnel recruitment requirements;
- restrictions on affiliation with certain political parties, organisations, or groups;
- participation in mercenary-related, subversive activities, or any other activities that could threaten the national integrity of Timor-Leste;
- rights and welfare of PSC personnel;
- PSC uniforms;
- accountability and sanctions for PSCs;
- PMC regulation.

F.2.1 Standardised Individual Recruitment Requirements

The 2010 Instruction does not regulate any specific provisions relating to the standardisation of individual recruitment requirements for PSC personnel, including training, as part of registration provisions. For example, the PSC APAC has set requirements that personnel ‘should be over 18 years old, free of communicable diseases, in good physical condition, have completed secondary school, possess basic reading and writing skills, and be fluent in Tetum and/or Indonesian’. 153 Maubere Security, on the other hand, requires its personnel to...

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151 Ibid art 11 and 12
152 Ibid art 13.
personnel to ‘have completed senior high school, be at last 160 cm tall and have some basic knowledge of Portuguese and English’. Maubere Security also requires that personnel undertake ”one month’s training, which includes the improvement of foreign language skills as well as the basics of customer relations and guarding activities - to be regularly refreshed in one-day or two-day courses”. Any PSC regulation should provide standardisation for individual PSC recruitment and training in order to monitor and ensure that activities are conducted in terms of law enforcing and public security. PSCs could set up their own recruitment and training methods, but they should be in accordance to standards set by the DNSEP.

**F.2.2. Affiliation with Certain Political Parties, Organisations, or Groups.**

A provision prohibiting PSC affiliation with certain political parties, organisations, or groups is very important because of the existence of organisations and groups with heterogeneous backgrounds, in particular political backgrounds, within the Timor-Leste population. PSCs should remain neutral and independent without any affiliation to political organisations or groups, enabling them to provide services more efficiently and independently without representing political interests. In addition, such a provision could eliminate the conflict of interest that might occur within PSCs that could affect their performance and reputation.

**F.2.3. Prohibitions on Mercenary-related, Subversive Activities, etc.**

Mercenary-related, subversive activities (or any other activities that could threaten the national integrity of Timor-Leste or other countries) are activities can become a major threat for Timor-Leste. These threatening activities of some PSCs and PMCs include supplying equipment and intelligence, providing training, or even direct fighting on behalf of certain groups or organisations whose objective is to destabilise a country. The 2010 Instruction

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154 Ibid.
155 Ibid.
does not contain any provision relating to such activities. Even though it is clear that the Instruction regulates PSC activities in a law enforcement environment, a provision relating to prohibition of these activities would emphasise their potential danger and show how they contradict the Timor-Leste legal system. They would particularly conflict with the Constitution and the efforts of Timor-Leste to develop from a post-conflict situation and promote peace and stability.

F.2.4. Rights and Welfare of PSC Personnel

The protection of the rights and welfare of PSC personnel is important, since the labour law in Timor-Leste is not properly enforced, and there is no existing social security or welfare system. This situation can adversely affect the rights and welfare of any company’s personnel. If they are absent from work due to illness they do not receive any payment and can even be fined for negligence up to five dollars – which is more than their actual daily salary. They also work 12-hour shifts for six or seven days a week, or up to 84 hours a week. These working hours are a violation of Article 4 (1) of Law 4/2012: Labour Code of the Democratic Republic of Timor-Leste, which prescribes a limit of an 8 hour work day, or 44 hour week. Personnel can also receive unfair treatment from employers on a daily basis. For example, in 2004 Chubb Security Company, without any consultation, cut the wages of its Timorese personnel and unlawfully issued terminations letters in response to their protest. The Timor-Leste government should have the power to take action or legal measures against such actions of PSCs, or provide legal assistance to PSC personnel whose rights have been violated.

156 Marc von Boemcken (ed.), ‘Commercial Security and Development: Findings from Timor-Leste, Liberia and Peru’ (Brief 45, Bonn International Center for Conversion) 34.
157 Ibid.
158 Ibid.
F.2.5. PSC Uniforms

While the 2010 Instruction provides simple statements in respect of the status of PSC uniforms, it is important that a future instruction contain more detailed provisions, since those used by many PSCs are similar in colour to the PNTL uniforms. This similarity can create some confusion among the Timorese population if they cannot differentiate between the PNTL and PSCs.\textsuperscript{160} To deal with this issue, the PNTL has conducted enforcement efforts regarding the uniforms of PSCs, including the arrest and questioning of employees wearing a confusingly similar uniform. There are several reports indicating that members of the PNTL have committed violations against PSCs, such as assaulting employees wearing similar uniforms to PNTL.\textsuperscript{161} However, this action creates more problems, since the PNTL have not acted professionally by dealing with the matter by violence and police brutality. Furthermore, because of this behaviour some PSC employees choose to remove their uniforms while on duty and wear plain clothes so as to avoid problems with the PNTL.\textsuperscript{162} This in turn makes it even more difficult to distinguish PSCs employees from the civilian population. In order to maintain good relations with the PNTL, security companies such as Maubere Security and Gardamor have changed the colour of their uniform so that they differ from those of the PNTL. Consequently, it is important to have more detailed requirements in relation to PSC uniforms, including design and colour, to ensure they are not similar to both the PNTL uniforms, or to military fatigues.

F.2.6. Accountability and Sanctions

The 2010 Instruction does not regulate any provisions relating to the accountability and sanctions for any violations committed by PSCs, or their owners, managers, and personnel.

\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid.
F.3. Regulation of PMCs

Another issue of concern is how the Timor-Leste government might or should regulate the operation of PMCs, as there are no existing laws or regulations in this regard. As already mentioned above, the 2010 Instruction does not regulate PMCs and does not even mention them. This is understandable because the Instruction is specifically designated to PSCs. However it raises concern that if PMCs operate in Timor-Leste it means that they operate in a legal vacuum.

G. Preliminary Conclusion

The departure of the United Nations from Timor-Leste on 31 December 2013 generally has not adversely affected the security situation in the country, with Timorese society generally continuing as it was prior to the UN departure.163 One major change is that the PNTL now have full responsibility for security in Timor-Leste, which before departure was shared with UNICIVPOL. The security situation is improving significantly through, for example, the banning of youth and martial arts groups that may disturb security. The banning of these groups is important as they often fight against each other, become involved in organised crime, and at times commit extortion, subsequently posing a threat to peace building efforts. The security improvement, as stated by the Secretary of State for Security, makes Timor-Leste less dependent on the United Nations and thus less prone to foreign control.164

The current number of PNTL personnel is approximately 3000, with an unspecified number of new recruitments.165 According to a State Secretariat of Security representative, this number is sufficient to overcome any issues or problems relating to security in the country as PNTL receives assistances from other government institutions, such as the F-

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163 Informal discussion with a representative of the State Secretariat of Security, Dili, 9 September 2013.
164 Ibid.
165 Ibid.
FDTL, the National Intelligence Services (*Serviço Nacional de Inteligência - SNI*), and the DNSEP. 166

Inter-agency cooperation, in particular between PNTL and F-FDTL, can be conducted even though the relationship between two institutions is often viewed as somewhat ‘rocky’. However, ultimately the leaders of both institutions will put aside their differences, since they have the same purpose – which is to guarantee the peace, security, and stability of the Timorese people and country.

Moreover, Timor-Leste society now has more confidence in the PNTL and views it as more capable in dealing with security matters in the country, as shown in the 2013 nationwide community-police perception survey. The survey shows that 74% of Timorese people are satisfied with the PNTL, an increase from 63% in 2008. 167

Despite the improvement of the security situation, PSCs and PMCs are still relevant to Timor-Leste because of their contribution to the economic and social developments of country. In addition, they do not pose a threat to human rights and in general are abiding by the law. 168 PMCs could also enhance and improve the capacity and capability of the Timor-Leste official apparatus, if they were contracted to do so. However, the companies still require regulation in future directives to provide them with a more adequate and proper legal framework so they can be more effective and not interfere with Timor-Leste development efforts with adverse results.

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166 Ibid.

167 Crawford School of Public Policy, ANU, Submission No. 82 to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Australia’s Relationship with Timor-Leste*, 6 February 2013, 2-3.

Despite a number of deficiencies, the 2010 Instruction can be viewed as a competent attempt to regulate PSCs because, in general, most companies comply with the Instruction and there are no reports of violations, or indications of such, committed by the PSCs against the Instruction. Again, the author also contends that such conditions can occur because there are many criminal violations, including some committed by PSCs, as well as violations of the Instruction and its implementation, that go unreported or are simply not documented in Timor-Leste.

In addition, as stated by a representative of DNSEP and supported by the Secretary of State for Security himself, the 2010 Instruction is intended as a temporary regulation until replaced by a more proper and adequate directive. Regardless, the Instruction itself has an important role as it prevents a legal vacuum for issues relating to PSCs inside the Timor-Leste legal system.

Currently, the drafting of a future directive for PSCs is still in progress in the Timor-Leste Parliament, but the State Secretariat of Security estimates that it will possibly be enacted during 2015. Hopefully the future directive will contain provisions that can deal with the shortcomings of the current regulations. The future directive is discussed further in the following Chapter V.

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169 Informal meeting with a DNSEP representative, Dili, 29 July 2012.
171 Informal discussion with a representative of the State Secretariat of Security, Dili, 9 September 2013.
CHAPTER V

ANALYSIS OF A PROPOSED TIMOR-LESTE STATUTE GOVERNING

PSCs AND PMCs

This chapter provides an analysis and assessment of what should be contained in a future Timor-Leste statute governing PSCs and PMCs. The analysis and assessment is based on national regulations, experiences, and international frameworks produced by other countries and the United Nations. The chapter then combines these bases with experiences of PSCs and PMCs inside Timor-Leste in order to produce a more adequate and proper legal framework for their governance.

A. Outline of a Future Statute

PSC and PMC presence in Timor-Leste was initially to support the operation of the UN administration and its peacekeeping force. However, their presence developed because of the unstable security situation, and the Timorese government’s lack of capacity to provide security while its military and police forces were still under development. The development was marked, if not enhanced, by the emergence of locally established security companies. Despite the improvement of the government in establishing stability, these companies are still relevant in Timor-Leste due to their contribution to the country’s economic and social development. They do not pose a threat to human rights and in general abide by the law.

However, to ensure that the companies continue to abide by the law and conduct activities supportive of Timor-Leste’s development process, there needs to be a legal framework within the country’s legal system. In 2010, the State Secretary of Security Instruction No. 03/OSSS/VII/2010 of 6 August 2010 (Despacho no. 03/GABSES/VII/2010 de 6 de Agosto 2010) (hereinafter the “2010 Instruction”) was the first specific law to regulate PSCs in Timor-Leste, but this Instruction still has deficiencies, for example, standardisation
of recruitment requirements, accountability and sanctions for breaches of the Instruction and other Timor-Leste regulations; prohibition on affiliation with political parties and certain other organisations; prohibition on mercenary-related and subversive activities or activities threatening the integrity of Timor-Leste; operational requirements and controls of PSC personnel; protection on the rights and welfare of PSCs personnel; existence of a regulatory body for PSCs in Timor-Leste. In addition, the future statute needs to provide a legal framework on PMCs.

Despite these deficiencies, the 2010 Instruction was always meant to be a temporary regulation until replaced by a new statute.¹ This status is affirmed by the State Secretary of Security himself that the Instruction was planned as a provisional regulation until proper regulation for PSCs existed within the Timor-Leste legal system.² A future statute needs to both develop from the 2010 Instruction and address the deficiencies that exist within the Instruction.

The Timor-Leste Parliament is currently debating the drafting of a new legal framework for the governing of PSCs and their activities in Timor-Leste.³ The exact form of the future legal framework is still undetermined; but because the drafting is being conducted within the Parliamentary context, it probably will be produced as an Act of Parliament or statute. This will give the statute much higher status and greater legal force than a Ministerial instruction or other delegated instrument. In respect of the format and breadth of such a statute, the Parliament may have two options – firstly, to create a statute that covers all regulations relating to both PSCs and PMCs, and secondly, create two separate statutes to regulate PSCs and then PMCs. The first option may provide the Government with an efficient regulation because it covers two similar organisations within the one legal

¹ Informal meeting with a DNSEP representative, conducted at DNSEP Offices, Dili, 29 July 2012.
² Discussion with the State Secretary of Security, Fransisco da Costa Gutteres, conducted at the State Secretariat Offices, Dili, 25 August 2013.
³ Discussion with Timor-Leste State Secretary of Security, Fransisco da Costa Gutteres, conducted at the State Secretariat Offices, Dili, 23 August 2013.
framework. However, it may be less effective since it may not regulate PSCs and PMCs specifically and does not have detailed provision about the companies and their activities. The second option probably can provide a detailed provisions and effective regulation towards PSCs and PMCs because the regulation will be designed specifically to address the issues relating to PSCs and PMCs. But in the end, the nature and prescription of the future statute is still to be determined since it is still undergoing the drafting process.

B. Analysis of a Future PSC Statute

This section provides an analysis of provisions that should form part of a future statute. They include improvements on articles in the 2010 Instruction and encompass matters not covered by the Instruction. The proposal for a future statute, in particular the future PSC statute, draws heavily on the South African experience and private security legislation, which is perhaps not surprising considering South Africa’s violent and unsafe domestic security situation during the apartheid and post-apartheid eras, and the dramatic growth of the private security industry as a result. In this section, the suggested form of text of the future statute is written in italics.

B.1. Objective of the Statute

In general terms, the primary objective of the future statute should be to regulate the private security industry and to provide effective control over the practice of the occupation of security service provider industry in both the public and national interest, and the private security industry itself.

In specific terms, the objectives of the statute should encompass the following:
(a) promote a legitimate and stable private security industry that operates in accordance with the terms of the Timor-Leste Constitution and other relevant domestic laws;

(b) ensure that all security service providers act in the public and national interest when providing security services;

(c) promote a private security industry characterized by professionalism, transparency, accountability, equity and accessibility;

(e) determine and enforce minimum standards of conduct in respect of security service providers;

(f) encourage and promote efficiency and responsibility with regard to the rendering of security services;

(g) promote, maintain and protect the status and interests of the security service provider profession;

(h) ensure that the process of registration of security service providers is transparent, fair, objective and concluded in timely manner;

(i) promote high standards in the training of security service providers and prospective security service providers;

(j) promote the protection and enforcement of the rights of security officers and other employees in the private security industry;

(k) ensure that compliance with existing legislation by security service providers is being promoted and controlled through a process of active monitoring and investigation of the affairs of security service providers;

(l) protect the interests of the users of security services;

(m) promote the development of security services which are responsive to the needs of users of such services and of the community.
Both these general and specific objectives follow the principles enshrined in the South African Private Security Industry Regulatory Act.4

**B.2. Definition of a PSC and Security Services**

However, the future statute also needs to provide a clear definition of PSCs and their legitimate activities, to establish a better understanding of their purpose and role, and provide some parameters and limits for their necessary monitoring and regulation. To do so, the Timor-Leste Government can take examples from how other countries, primarily South Africa and the United Kingdom, to obtain guidance as to possible definitions of PSCs, their personnel, and their services. Taking reference from the laws of other countries as a basis to form Timor-Leste’s own is sensible and common practice, but it needs to be done taking account of Timor-Leste’s unique circumstances and security conditions.

The 2010 Instruction defines a PSC as “an organisation, established by private entities in order to gain profit income, which offers security services for assets and entities protection, as well to [sic] the crime prevention”.5 The definition of PSCs in the Instruction is similar to the PSC’s definition in the South African law, since both define it as a private company that provides security services for monetary income; therefore it is very logical to maintain the Instruction’s PSC definition in the future statute.

For a definition of PSC personnel, since they are not regulated in the 2010 Instruction, the future statute can provide a definition of PSC personnel. It can refer to similar provision in South Africa’s PSC Act,6 which could be adopted and amended to accord with Timor-Leste PSCs’ conditions. The future statute can define PSC personnel as:

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4 See *Private Security Industry Regulatory Act No. 56 of 2001* (South Africa) s 3.
6 See further *Private Security Industry Regulatory Act No. 56 of 2001* (South Africa) s 1.
persons who are legally registered and working for PSCs; or who are employed by other persons, including organs of state, to carry out or perform security services which are offered by PSCs; or persons carrying out or performing security services of other PSCs; or persons rendering a security service under the control of another PSC; or persons whose services are directly or indirectly made by other PSCs.

The definition of PSC security services in the future statute can follow the definition and division as stipulated in the 2010 Instruction, and South Africa’s and the UK’s PSC laws. The Instruction defines security services as “services that are offered...by private company for assets protection and crime prevention.”

However, this definition is still too broad or general, so the future statute needs a more specific definition, such as:

security services are services provided by PSCs for the protection and safeguard of client’s assets, promises, and people, which include the giving of security advices; distribution, installing, servicing, and repairing of security devices; making a person or services of a person available; and managing, controlling or supervising the rendering of any security service. The security services must be in the nature of law enforcement and crime prevention.

The security services will be divided into two categories, namely, general and specific activities. The general activities would consist of activities such as: protection for mobile and stationary assets; people monitoring; and preventing the smuggling or distribution of firearms, materials, or prohibited items that can be used to instigate or cause violation action

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8 See further Private Security Industry Regulatory Act No. 56 of 2001 (South Africa) s 1.
or behaviour inside the closed access properties or locations or properties or location that can be used publicly. For the specific activities, the future statute can adopt descriptions of similar activities from the UK’s PSC regulation. These specific activities are: manned guarding, private investigation, security consultation, key holding, specific security equipment supply, and subcontracting activities.

The first category provides description of the security services in more general terms. On other hand, the second category focuses more on the nature of services requiring more specific provisions in order to such activities. For example the ‘manned guarding’ activity might need different regulations covering how the activity is to be carried out; whether the PSC personnel performing such activity may carry security equipment; the kind of security equipment that can be used in such services; and the nature of training required to perform such service.

B.3. Provisions on PSC Regulatory and Monitoring Body

It is very important that the future statute stipulates the regulatory and monitoring body responsible for the oversight and managing of PSCs and their activities inside Timor-Leste territory. The institution that could almost be considered as the current PSC regulatory and monitoring body in Timor-Leste is the National Management of Public Security (Dirasaun Nasional Seguransa Publik – hereinafter “DNSEP”).

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11 Including guarding clients’ properties, events, infrastructures, from any unlawful access, occupation, disorder outbreaks, damage, destruction, theft or misappropriation, as well as the guarding or protection of individuals from any assault or other unlawful conducts.
12 Including obtaining information about particular persons, their whereabouts and activities, as well as information on circumstances or means relating to lost or damaged property or infrastructures.
13 Including advice relating to security precautions for properties, events, infrastructures, or persons, as well as advice on any security services or operative acquisitions.
14 Including access control and custody of any keys or other devices with similar function to locks, whether mechanical, electronic, or otherwise.
15 Including supply of certain security equipment to clients and obtaining necessary clearances from the regulatory and monitoring bodies such as the State Secretariat Security, national police or Customs (if supplied from overseas). PSCs are not permitted to supply military-grade equipment to civilian or non-governmental clients.
16 If a PSC needs to subcontract some of its services, it is required to seek advice from DNSEP and to review its contract between its client and the company.
However, the institution seems to only act as a semi-monitoring body in that it maintains and updates information relating to PSCs. It does not act as a regulatory body of PSCs in Timor-Leste and does not have any authority to register or authority to set any standards for PSC activities. This situation raises a question about who is the main regulatory body of PSCs in Timor-Leste. If the main regulatory body is DNSEP pursuant to the 2010 Instruction, then it has very limited functions and authorities.  

The future statute must set an institution to be the PSC regulatory and monitoring body. Beside authority to regulate and monitor PSCs inside Timor-Leste, the statute should also grant the institution with some authority over such issues as PSC registration, setting standards for an industry code of conduct, training standards; determining permitted activities, and creating a reporting and complaints mechanism. These authorities will give the Timor-Leste PSC regulatory and monitoring body the same capacity as similar institutions in the United Kingdom and South Africa.

B.3.1. PSC Registration

The PSC registration authorisation is very important because it will produce an operating licence that can be used by PSCs as the legal basis to conduct operations and activities in Timor-Leste. The current process of PSC registration requires the company to submit documents to the State Secretariat of Security. The PSCs need to include in the documentation the provisional licences for company and business activities, namely, the

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18 This authorisation will also cover the monitoring and regulating of PSC subcontractors if they are operating in Timor-Leste.
19 The documents include provisional licences for company/business activities (Commercial Licence and Licence for Economic Activities); company statute; identities of the company owners and managers; certification of no indebtedness to the State; list of PSC personnel/employees and their ranks/positions; model/design of the PSC uniform and identification card; and the PSC background, security services offered, company address and assets. See Despacho no. 03/GABSES/VII/2010 de 6 de Agosto 2010 [State Secretary of Security Instruction no. 03/OSSS/VII/2010 6 August 2010, art 4.
Commercial Licence\(^{20}\) and the Licence for Economic Activities.\(^{21}\) To obtain these licences PSCs need to also register with the National Directorate for Registration and Notarial Offices under the Ministry of Justice and the Ministry of Tourism Trade and Industry of Timor-Leste (MTCI).\(^{22}\) Being inter-departmental, this registration process is very complicated and time consuming and can be confusing as to which institution is the ‘proper’ regulatory body for PSCs in Timor-Leste.

So it will be much more efficient and easier to monitor and regulate the PSCs if the registration process is conducted only by the would-be-PSC regulatory and monitoring body, and that institution through its registration mechanism produces the operating licence to PSCs. Moreover, the new registration mechanism could avoid overlapping tasks between governmental institutions relating to deal with the issue of PSCs and make the regulatory and monitoring body as relevant institution for PSCs, as suggested by Parker.\(^{23}\)

The new PSC registration powers in the future statute must also include and clearly state the revocation, refusal, approval, renewal and modification of the PSC operating licence,\(^{24}\) and individual PSC personnel registration authority by the PSC regulatory and monitoring body.

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\(^{20}\) The licence is the legal basis to conduct business activities in Timor-Leste and needs to be obtained through registration with the National Directorate for Registration and Notarial Offices of the Ministry of Justice. See Código de Registo Comercial (aprovado pelo Decreto-Lei nº 7/2006 de 1 de março de 2006) [Code of Business Registration (approved by Decree-Law No. 7/2006 of March 1, 2006), Preamble 1 [1].

\(^{21}\) This licence is as permit to carry on commercial activities and services, is obtained by registering to the Ministry of Tourism Trade and Industry of Timor-Leste (MTCI), before PSCs can conduct its operations/activities. See Decreto-Lei nº 24/11 de 8 de Junho 2011: Licenciamento das Actividades Comercias [Decree-Law no.24/2011 of June 8, 2011: Licensing of Commercial Activities].

\(^{22}\) In 2012 and the formation of the new elected government, the MCTI changed its name to Ministry of Commerce Industry and Environment (Ministerio ComercioIndustria no Ambiente - MCA).


\(^{24}\) The statute should also include the right to appeal against any decision on registration. These cancellation powers and the right of challenge are not something new for the Timor-Leste legal system. See Código de Registo Comercial (aprovado pelo Decreto-Lei nº 7/2006 de 1 de março de 2006) [Code of Business Registration (approved by Decree-Law No. 7/2006 of March 1, 2006) arts 15, 19 and 22.
A security business applying for registration must be able to demonstrate that it meets the prescribed requirements in respect of the infrastructure and capacity necessary to render a security service.

The future statute requires some degree of standardisation for the individual registration of PSC personnel. Currently every PSC in Timor-Leste has a different practice regarding to their personnel recruitment without any guidance on standardisation from the Government. So the future statute should provide for standards set up by the PSC regulatory and monitoring body, even though the companies may still conduct their own recruitment and training, according to their company policies. This registration should be a very important requirement for issuing operating licence to PSC personnel. The requirements should include: PSC personnel nationality; attainment of the minimum adult age according to Timor-Leste national law; physical, mental health and background checks; not an active member of police or armed forces; and completion of any training course relating to the PSC services/activities, including training on the use of force and lethal equipment.

For more specific regulation on the PSC personnel registration requirements, Timor-Leste Government can follow the requirements of the South African Act, namely:

(a) is a citizen or permanent resident of South Africa of at least 18 years of age;

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27 Background checks must ensure that PSC personnel have a clean criminal record; do not have any record relating to the misuse or abuse of alcohol, drugs, or other illicit substances; and do not have affiliation to any certain political parties, groups, and organisations in Timor-Leste.

28 See Private Security Industry Regulatory Act No. 56 of 2001 (South Africa) s 23.
has complied with the relevant training requirements prescribed for registration as a security service provider;

has not been found guilty of an offence specified in the Act’s schedule within the previous 10 years, or of improper conduct in terms of the Act within the previous five years;

submits a prescribed clearance certificate, together with such other information as the Authority may reasonably require, if a former member of any official military, security, police or intelligence forces or service in South Africa or elsewhere. A person in the permanent employ of any of these services may not be registered as a security service provider whilst so employed.

is mentally sound; and

is not currently employed in the Public Services in circumstances where such registration may conflict with a legislative provision applicable to the applicant;

The South African Act also allows the relevant Authority to refuse the registration of any applicant who is under investigation or being prosecuted in respect of an offence specified in the Act’s schedule.

Therefore, Timor-Leste’s future statute must contain provisions on individual registration, based on the South African Act and in accord with Timor-Leste’s condition, such as:

(a) is a citizen of Timor-Leste;

(b) is at least 18 years old (being minimum adult age under Timor-Leste law);

(c) has complied with the relevant training requirements prescribed for the registration;
(d) has not under investigation for a crime in or not been found guilty or improper
counsel in terms of this statute and any applicable Timor-Leste national
regulations;

(e) is physically and mentally healthy;

(f) is not currently employed in the Timor-Leste Defence Force (F-FDTL) or the
Timor-Leste National Police (PNTL);

(g) has paid the relevant application fee.

The PSC regulatory and monitoring body can refuse an applicant’s registration if it
finds that the applicant does not meet the PSC registration requirements.

B.3.2. Industry Code of Conduct

Within the future statute, the PSC regulatory and monitoring body needs to have
authority to establish an industry code of conduct relating to PSC operations, standards of
PSC training, and permitted PSC activities. The author suggests that the PSC regulatory and
monitoring body and the Timor-Leste government review the International Code of Conduct
for Private Security Service Provider (ICOC) and several domestic PSC organisations, such
as the International Stability Operations Association (ISOA), the British Association for
Private Security Companies (BASPC), the Security Association of South Africa (SASA),
and the Australia Security Industry Association Ltd (ASIAL). The authority to set up the
industry code of conduct should eliminate the tendency towards a self-regulation
mechanism, using a ‘voluntary approach’, as occurs in some international instruments that
contain an industry code of conduct. The ‘voluntary approach’ will not be legally binding on
PSCs and cannot become the basis of accountability and prosecution for PSC wrongdoings.29

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29 Emanuela-Chiara Gillard, ‘Business goes to War: Private Military/Security Companies and
In addition, it cannot guarantee PSC compliance with Timor-Leste regulations and an industry code of conduct.  

The industry code of conduct should cover regulations such as: PSCs and their personnel must respect Timor-Leste’s national law; PSCs must ensure their personnel have proper selection, recruitment, and training; their clients must be legitimate and recognisable; PSCs and their personnel only conduct or get involved in activities/services permitted by the PSC regulatory and monitoring body; PSCs must ensure their personnel’s safety, welfare and rights, and their compliance with the law; restrictions on the use of force, and mechanisms for enforcement, monitoring, and administration.

In respect of the regulation of the use of the force, the industry code of conduct requires a prohibition of the use of firearms or deployment of deadly or lethal force by PSC, which is a view supported by the companies themselves. There is concern that some PSC managers use firearms unnecessarily, and are creating “private armies”. There are similar provisions in the Article 9 of 2010 Instruction.

The code of conduct must be legally binding on all security service providers, to the extent provided for in the future statute.

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30 Ibid.
31 The regulation must include provisions such as: prohibition to use firearms or deploy deadly or lethal force in their operations; PSCs only deploy non-lethal equipment to support its operations; the non-lethal equipment should be only in defensive/last resort situations; non-lethal equipment deployment should only base on the PSC management decision as according to the situation and condition of the areas of operation; PSC personnel must have been through proper training before using the non-lethal equipment; and if need to restrain/holding a criminal suspect, it can only be conducted under the circumstances, such as: no police/public security personnel presence during the crime occur, under self-defence, the PSC personnel in official duty, not using excessive/lethal force, the action must not resulting unnecessary injuries/loss of life, and will cease after police or public security/law enforcement personnel arrive/presence in site
32 Marc von Boemcken (ed.), ‘Commercial Security and Development: Findings from Timor-Leste, Liberia and Peru’ (Brief 45, Bonn International Center for Conversion) 30
B.3.3. **Training Standards**

The future statute’s regulatory and monitoring body should have authority to set up standards and types of training, even though every company is different, in order to monitor and ensure PSCs conduct activities in terms of law enforcement and public security. The training activities and their curriculum should ensure personnel understanding of and compliance with any PSC regulations under Timor-Leste national law, the industry code of conduct, and international law principles and guidelines. In addition, PSCs should maintain records relating to the training and its results. Moreover, the training should be relevant to the services offered by PSCs. In addition, the training should accordance with relevant rules of the use of force, Timor-Leste national law, and international law principles/guidelines.

Even though the standards of training will be set up by the regulatory and monitoring body, PSCs can still give additional training or set up their own training methods according to company’s policies and client’s contracts.

B.3.4. **PSC Permitted Activities**

The regulatory and monitoring body in the future statute should be able to set permitted PSC activities. The main objective of regulating the activities is to make the monitoring of PSC in Timor-Leste easier and to ensure that a company’s activities are only conducted within the terms of law enforcement and public safety pursuant to the future statute itself. For example, the statute can follow or create lists similar to the list activities set up in the Schedule 2 of the British Private Security Industry Act 2001.

B.3.5. **Report/Complaint Mechanism**

The regulatory and monitoring body should also be provided with a mechanism for monitoring, inspection, reporting, and investigation of PSC activities in Timor-Leste. The mechanism can be conducted by several measures, such as: appointment an inspector to
monitor the PSCs and provide regulatory and monitoring body with inspections reports;\textsuperscript{34} or on the basis of reports received from local authorities and the general public relating to misconducts committed by PSCs; or by monthly and/or annual reports by the regulatory and monitoring body to the State Secretariat of Security and to the National Parliament; or general auditing activity.\textsuperscript{35}

\textbf{B.4. General Provisions for PSCs}

\textbf{B.4.1. Cooperation between PSCs and the Timor-Leste National Police}

The future statute must also make provision requiring PSCs and their employees to provide assistance and cooperation to public officials and authorities, and to position themselves under their command in the event of intervention in operation locations. PSCs should immediately notify authorities if criminal activities occur. All PSC personnel should ensure to distinguish themselves and their activities from the public officials to avoid confusion by the public. PSCs and their personnel should keep confidential information relating to their profession and ensure it is only disclosed pursuant to the Penal Code and its processes.

This provision is very important because it can emphasize how PSCs can become subsidiary to the National Police. The drafting of this provision can take, as an example, similar provision in the 2010 Instruction.\textsuperscript{36} In addition, to achieve better cooperation, it will

\textsuperscript{34} The notion of an appointed inspector to oversight a PSC and its activities is not new; PSC regulations in South Africa and the United Kingdom also undertake monitoring efforts of PSCs in their territory. See Private Security Industry Act 2001 (UK) c 12, s 19 and Private Security Industry Regulatory Act No. 56 of 2001 (South Africa) ch 5(31).

\textsuperscript{35} The auditing activities are very important whether for issuing the operating licence or for renewing it. The auditing activities include: document inspections, observation in PSC areas of operation, interviews, use of parameter of scoring. These activities can be adopted from the Indonesian regulation for the Satpam, See Peraturan Kepala Kepolisian Negara Republik Indonesia Nomor 24 Tahun 2007 Tentang Sistem Manajemen Pengamanan Organisasi, Perusahaan Dan/Atau Instansi/Lembaga Pemerintahan (Regulation of the National Chief of Police Number 24 of 2007 on Management of Security Organisations, Companies and Government Bodies) (Indonesia) art 75 (1).

\textsuperscript{36} Despacho no. 03/GABSES/VII/2010 de 6 de Agosto 2010 [State Secretary of Security Instruction no. 03/OSSS/VII/2010 6 August 2010] (Timor-Leste) art 10.
be very beneficial if both institutions can conduct some training together so that both can better understand how each operates and how to effectively cooperate with each other.

**B.4.2. PSC Uniform and Identification Card**

The future statute must provide that any PSC uniform must be different, in design and colour, from the Timorese police and military forces uniforms. This provision is very important because on some occasions the uniform issues have become an obstacle to a good relationship between PSCs and Timor-Leste National Police. Timor-Leste can assess several national laws and experiences from other countries that provide that PSC uniforms should be different to police or military force. Timor-Leste can use as an example the PSC uniform provisions in the Indonesian law, which also divides types of PSC uniform based on the activities and operations of PSCs.

The main premise of this provision is to eliminate the confusion that has occurred in Timor-Leste society, because it is likely that the population will have found it difficult to distinguish between PSC personnel and public security forces, especially in district areas. The differences must be distinguishable (from reasonable distances) with plain eyes. Additionally, the uniform must only be used on official PSC duty to avoid the misuse of the uniform for any illicit activities.

The PSC identification card can only be used for official duties of PSC personnel. The card’s function is to prove authority to conduct PSC services. The identification card

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37 Some sources allege that members of Timor-Leste National Police were attacking PSC personnel because they were wore uniforms similar to those of National Police. See Nelson Belo, ‘Saida Mak Akontese Ba Kompanía Siguransa Privadu iha Futuru?’ [Future of Private Security Companies in Timor-Leste?] (27, Fundasaun Mahein, 2011) 13 [2]).

provision in the future statute should use similar identification card provisions of the 2010 Instruction, thereby consisting of elements such as:\(^\text{39}\)

(a) issued by the DNSEP;
(b) stating the name of the company;
(c) stating the identity number and name of the personnel;
(d) specifying the date of issue; and
(e) containing the signature and stamp of the Director of DNSEP.

B.4.3. Prohibition of Affiliation with Political Parties and Certain other Organisation

The future statute must include an affiliation prohibition to ensure the independence and neutrality of PSCs. In addition, the provision can eliminate any possibilities of conflict of interest within the company. Even though a PSC may be contracted by a political party, organisation or other group, it still can provide services to the latter group. However it cannot intervene in the affairs of a political party.\(^\text{40}\)

It is very important for a PSC as a company not to have any affiliation with certain political parties or to certain organisations, groups or gangs, since most of the violence and conflicts that have occurred in Timor-Leste have had some relationship to political movements and clashes between some organisations, groups or gangs. So if a PSC with affiliation with a political party, certain organisation, group or gang presents in areas under the influence of an opposing party or organisation, the PSC will be viewed with hostility. This could lead to a clash or mistrust towards the PSC, and will aggravate the local security


\(^{40}\) United Nations Commission on Crime Prevention and Criminal Justice, Note by the Secretariat: Civilian Private Security Services: Their Oversight and Their Role in and Contribution to Crime Prevention and Community Safety, UNODC, 20\textsuperscript{th} sess, Agenda Item 6, E/CN.15/2011/14 (20 January 2011) [34]-[35].
conditions. In addition, such PSC will not be conducting its activities or performing its services effectively, neutrally and independently.

**B.4.4. Prohibition on Mercenary-related and Subversive Activities**

The future statute should include provision for mercenary activity to be prohibited. Even though it is not a signatory to the 1989 *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, Timor-Leste would set a positive example by respecting and complying with the Convention and Article 47 of the First Additional Protocol of the 1948 Geneva Conventions. Prohibition of mercenary acts is not a new issue, since it has been well established as a peremptory norm of international law and has been included in national laws of many countries and international organisations. Therefore, the adoption of anti-mercenary regulation in the Timor-Leste legal system, in particular in the future statute demonstrates that Timor-Leste supports the effort of international community to eradicate the mercenary.

The provision relating to mercenary and other subversive activities in the future statute and the statute itself may not be as developed as national laws of other countries, such as South Africa’s Act on the Prohibition of Mercenary Activities of 2006. However, in order to deal with this gap, the Timor-Leste government can use regulations already within the Timor-Leste legal system, such as the Penal Code (approved by Decree-law No. 19/2009) as precautionary measures in conjunction with the 2010 Security Instruction. For example, Article 134(2) of the Penal Code prohibits Timor-Leste nationals or resident foreigners being recruited or enlisting with a foreign power or group to “wage war against a State or overthrow the legitimate Government of another State through violent means”.\(^{41}\) Also, Article 188 prohibits groups committing or inciting the commission of crimes to disturb

\(^{41}\) *Código Penal (Aprovado pelo Decreto-Lei nº 19/2009)* [Penal Code (approved by Decree-Law No. 19/2009)] (Timor-Leste) art 134 (2).
public order; Article 196 prohibits activities that could be categorised as high treason;\textsuperscript{42} Article 197 prohibits provision of services or collaboration with hostile armed forces;\textsuperscript{43} and Article 202 (1) prohibits activities by persons through “means of violence, threat of violence or incitement to civil war, attempts to overthrow, change or subvert constitutionally established rule of law”.\textsuperscript{44} Even after the future statute is enacted by the Timor-Leste Parliament, these laws and regulation can also be used in conjunction with the State Secretariat of Security. Further, the Timor-Leste government, through the DNSEP, should ensure though the monitoring programme that PSCs in Timor are not conducting any mercenary activities in or from Timor-Leste.

B.4.5. 	extit{Prohibition on Conducting Judicial and National Police Activities and Providing Services to Persons Involved in Criminal Activities}

Even though PSCs are permitted to perform security services in the nature of law enforcement and crime prevention, it is very important to limit their activities so they are not breaching and/or overlapping activities that are exclusively conducted by and under the jurisdiction of the Ministry of Justice and the National Police. For example, PSCs cannot conduct any activities relating to the prosecution of criminal activities or activities that restrict persons’ freedoms, including basic human rights. In addition, PSCs are prohibited from providing or making their services available to any persons involved in criminal activities.

\textsuperscript{42} Ibid, art 196, the activities such as “means of violence, threat of violence, usurpation or abuse of office of sovereignty, hinders or attempts to hinder the exercise of national sovereignty on the whole or part of the territory of Timor-Leste or poses danger to the integrity of national territory as a form of subjecting or delivering it to foreign sovereignty”.

\textsuperscript{43} Ibid, art 197.

\textsuperscript{44} Ibid. art 202 (1).
Such prohibitions also need to be included into the future statute. These prohibitions are not new notions, since they are already regulated in the 2010 Instruction. They can be re-regulated in the future statute.45

**B.4.6. PSC Accountability and Sanctions**

The future statute should regulate the accountability and sanctions of PSCs and their personnel. PSCs have responsibilities under national law, in particular the national law of state where it operates, including the criminal, tax, immigration and labour laws.46 Therefore as a company, a PSC can be accountable for its wrongdoing under Timor-Leste national law.

Personnel of PSCs can be liable for wrongdoings or misconduct due to the nature of their participation in activities that lead to wrongdoings. The participation can be in such forms as:47 PSC personnel themselves committing the wrongdoings; or encouraging, ordering, abetting or assisting others to commit the wrongdoings; or, as a supervisor, providing instruction in the commission of the wrongdoings. Therefore, they must be prosecuted in the courts of Timor-Leste under Timor-Leste national law. In particular, PSC owners, managers and supervisors must be accountable, since they have *de facto* control, possess capacity to direct and instruct personnel, and control them legally and financially.48 In addition, they are accountable when they fail to take necessary measures to prevent or punish subordinates for their wrongdoings where they know or culpably ought to have known about the wrongdoings.49 Also, they are accountable if they either knew or

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45 See *Despacho no. 03/GABSES/VII/2010 de 6 de Agosto 2010* [State Secretary of Security Instruction no. 03/OSSS/VII/2010 6 August 2010] (Timor-Leste) art 3.
48 Ibid 1027 and n 74.
49 Ibid 1028.
disregarded information which clearly indicated subordinates were conducting or intended to conduct a wrongdoing, and wilfully ignored the information.

Therefore, PSCs, including their managers and personnel, should be accountable for any wrongdoings committed during company activities. The future statute should follow the example of the South African regulation relating to accountability and sanctions for any transgressions and breaches of statutory instructions. Transgressions could include conspiracy, incitement or attempt to commit a transgression. Breaches could be audited and investigated by the State or by the regulatory and monitoring body.

The investigation or enquiry on wrongdoings or other violations can be conducted based on any reports obtained from the PSC report/complaint mechanism or conducted by the Timor-Leste national police, as necessary. The sanctions where wrongdoings are established can include fines, temporary or permanent revocation or suspension of the PSC registration and licence, or imprisonment in accordance with the Timor-Leste Penal Code or other Timor-Leste national laws.

The accountability for PSC wrongdoings might not be limited to the PSC itself but can also be attributed to its clients, since the PSC may have committed the wrongful act on behalf of or acknowledged by its clients or under the contracts with the clients. This places a burden on the clients to prove that the wrongful acts were not committed in relation to the clients and were not part of PSCs’ official duties.

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51 Prosecutor v Delalić (Judgment) (International Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [387].

52 See, for example, Chapter 3 (26)(1)(a) and (b) of South Africa’s Private Security Industry Regulatory Act No. 56 of 2001.

B.4.7. Rights and Welfare of PSC Personnel

The future statute should provide for the rights and welfare of PSC personnel. The provision must accord with the Timor-Leste labour laws and codes, and also become part of the PSC industry code of conduct. This provision is very important to prevent any mistreatment of PSC personnel by their companies. Even though such provision has been regulated in Law 4/2012: Labour Code of the Democratic Republic of Timor-Leste, it will be very useful for it to be in the future statute, and referenced and aligned with the Labour Code.

The regulatory and monitoring body can help to regulate issues relating to welfare and rights of PSC personnel, as part of its authority to set the industry code of conduct and to ensure that the code is in accord with Timor-Leste law, in particular the Labour Code. It should also address such issues such as working hour of personnel, salary, and protection from unfair treatment. If necessary, the government must provide PSC personnel with legal assistance.

B.4.8 Delegated Authority

As part of its general provisions, the future statute should authorise and enable the responsible Minister to make subordinate regulations in respect of its implementation and proper operation. Again, in general terms this authority could cover any matter necessary or expedient to attain the objects of the statute, similar to the South African Act. In specific terms, the subordinate regulations could include the following:54

(a) registration of security service providers by the established Authority;

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54 See for more information Private Security Industry Regulatory Act No. 56 of 2001 (South Africa) s 35 (1).
(b) terms and conditions for the periodic renewal of registrations;

(c) obligatory security training by security service providers, and the nature and standards of that training;

(d) uniforms, insignia and identification cards of security service providers, including uniforms and insignia which may not be worn by a security service provider;

(e) procedures for the institution and conduct of proceedings or any other inquiry under the terms of the statute, including:
   (i) appointment, authority and duties of officials;
   (ii) attendance requirements of parties to the proceedings and witnesses;
   (iii) production of evidence, documents and other materials;
   (iv) procedures for orders, costs, fines and penalties, their payment and collection;
   (v) procedures for appeals, confirmation, review or substitution of any finding, punishment or other order;

(f) establishment and operation of a complaints office;

(g) compulsory keeping of records and documents concerning the management, administration and other matters relating to a security service and the format for their keeping, including the premises where the records and documents must be kept available:

(h) information which security service providers must provide to the Authority;

(i) issuing, possession and use of firearms and other weapons;

(j) nature of information to be provided by security businesses to consumers or prospective clients, including advertising services and use of certain security equipment;

(k) the importation, possession, use, selling and distribution of certain types of security equipment (including both approved and prohibited equipment);
(l) training, registration, use, treatment, transportation and general care of working animals by security service providers;

(m) use of certain types of equipment in the rendering of a security service;

(n) generally, any matter necessary or expedient to prescribe for the attainment of the objects of the future statute or the performance of the functions of the Authority.

C. Analysis of a Future Statute for PMCs

The PSC and PMC provisions in principle are similar because they cover regulations such as: the definition of the company and its services; the companies’ regulatory and monitoring body; registration of PSCs and PMCs; determination their services; and their accountability and sanctions. Even though they are similar, the following assessment on both regulations will show the differences between them.

C.1. Objective of the Statute

The primary objective of a future PMC statute is to regulate any PMCs that operate in Timor-Leste territory and jurisdiction, and to provide effective control and management of the companies, so their activities can serve the public and national interests of Timor-Leste.

C.2. Definition of a PMC and PMC Services

Similar to the PSC regulation in the future statute, the PMC regulation will also try to define PMC services, PMC personnel and the PMC as a company. However, to provide exact and proper definitions can be very difficult in some circumstances. Many experts disagree with each other on the definition of PMCs due to differences in such factors as “the focus of job tasks, the influence of profit and the client, and the inclusion of products, such
as the manufacturing, distribution, and installation of equipment and technology”. 55

Moreover, there is a tendency to categorise PMCs as mercenaries. However, Singer, a leading PMC researcher, states that PMCs and mercenaries are different entities based on their organisation, their operations, recruitment of their personnel, and company’s integration into a corporate structure. 56

Therefore, in order to provide definitions in the future statute relating to PMC services, personnel, and the PMC as a company, the Timor-Leste Government should use sources and information relating to PMCs not only from other countries’ laws, but also from previous results produced by PMC researchers.

As Parker states, the PMC as a company can be defined as a company associated with a military nature that provides services to support or to enhance the effectiveness of an army or armed group, such as in respect of combat operations, strategic planning and force development, operational and logistics support, training, maintenance of weapons systems, and technical skills. These services can be provided to legitimate domestic and foreign


56 Singer provides six basic and fundamental differences between PMCs and mercenary groups. First, PMCs operate and organize as business companies, whereas mercenaries tend to operate on an individual basis. Second, although PMCs are driven by profit, the PMC is more motivated for business profit rather than individual profit since its decision making is not person-based but corporate structure-based. Third, most PMCs compete openly in a global market, whereas mercenaries avoid open publicity in order to not attract any national and international anti-mercenary regulations. Fourth, PMCs can conduct diverse operations based on clients’ demands. However, mercenaries cannot conduct diverse operations since they work as individuals, cannot work for more than one client at a time and may lack supply, basic combat, and training skills. Fifth, PMCs recruit their employees through public application processes and established databases, in contrast to mercenary recruitment which is through black market or informal recruiting forms, such as covered newspaper advertisements or word-by-mouth recruitment. Sixth, PMCs are integrated into broader corporate structures and have close tie to greater monetary holders and conglomerates. These differences increase the legitimacy of PSC and PMC. This allows the companies to have greater access to capital and other company resources. See Peter Singer, Corporate Warriors: The Rise of the Privatized Military Industry (Cornell University Press, 2003) 42 – 47.)
entities.\textsuperscript{57} Another option is to review the definition of a PMC based on Singer’s ‘Tip of Spear’ Typology, as discussed in Chapter I.

Both definitions share common elements, which is can be used in the future statute, relating to a PMC company definition as:

\textit{A legal and registered private company that provides services of a military nature to support or develop the capability and capacity of its client’s armed forces.}

For a PMC personnel definition, the same difficulty as that encountered in defining a PMC company also may occur. Hence there is not a generally agreed PMC personnel definition, and a number of terminologies have been applied to them, such as ‘contractors’, ‘private military contractors’, ‘security contractors’, ‘mercenary’ or even slang terms, such as ‘guns for hire’ or ‘dogs of war’. However, it is generally accepted that PMC personnel are persons who are legally registered to work for or be employed by a PMC, or who can be employed by other persons, including state organs, to perform the services offered by a PMC.

This definition might be accepted and used in the future statute as well. However, the definition will need to be adjusted to best reflect and fit with Timor-Leste’s legal system and security conditions. Therefore PMC personnel in the future statute could be defined as:

\textit{Persons who are legally registered to work for or employed by a PMC that can be only employed by state organs of Timor-Leste, to perform the services that offered by PMC inside country territories.}

\textsuperscript{57} Sarah Parker, ‘Handle with Care: Private Security Companies in Timor-Leste’ (2009) 3.
The words “...can be only employed by state organs of Timor-Leste” is very important because they emphasize that the PMC, because the company’s activities are military in nature, can be only be employed by and permitted to perform their activities and services in the country with the permission and under the direction of the Timor-Leste Government.

PMC services can be defined in the future as:

services of a military nature that are provided by a PMC and performed by its personnel.

In determining the nature of PMC services, the Timor-Leste Government can utilise definitions established from previous researches. They can assess Singer’s ‘Tip of Spear Typology’ to determine the PMC services that could be permitted inside Timor-Leste, such as strategic advisory and training expertise; logistics, intelligence, supply, transport, and maintenance services to armed forces – in contrast to services that should be prohibited, such as direct and tactical military services/assistances.

Even though these definitions are still probably far from satisfactory, at least the definitions in the future statute could give some view, understanding, and notions relating to the nature and activities of PMC for government officials and the Timor-Leste population in preventing the overlapping of tasks between PSCs and PMCs.

58 Ibid 95. These particular services can transform the client’s military organisation and develop/improve their military capacities and capabilities.
59 Ibid 97. These services support the operations and activities of a client’s armed forces, so the armed forces can more concentrate on combat actions in order to achieve their objectives.
60 The services include direct participation in hostilities. See Peter Singer, Corporate Warriors: The Rise of the Privatized Military Industry (Cornell University Press, 2003) 92 & 93.
C.3. Provisions on PMC Regulatory and Monitoring Body

The future statute must also address issues relating to the regulatory and monitoring bodies for PSCs and PMCs. Such bodies will have a very similar function, which is to control and manage the companies and their activities inside Timor-Leste territory. The bodies can provide registration procedures including approval, renewal, revocation, refusal, modification, and individual personnel registration to produce operating licences for the companies and their personnel. The bodies can determine the PSCs and PMCs activities, including permitted and prohibited activities. The bodies can also establish a report/complaints mechanism for company wrongdoings. However, there are two authorisations of a PMC regulatory and monitoring body that are not the same as those of the PSC body: first, the authority to set up PMC procedures of selection, and second, the authority to set up PMC selection criteria (discussed further below).

C.3.1. PMC Registration

A PMC must receive authorisation and an operating licence from the PMC regulatory and monitoring body in order to conduct operation in Timor-Leste. The operating licence must include: the PMC services to be limited to being performed only in Timor-Leste; the number of PMC personnel involved in the contract, including PMC subcontractors; the registration of PMC personnel to obtain individual operating licences and identification cards to be worn during their services; and the registration of equipment, including any firearms, to be used to perform its services.

The operating licence can be either a ‘one-off’ licence or a ‘contract-by-contract’ licence, depending on a decision of the Ministry of Defence and Security. In addition PMCs must conduct their operations and services according to the authorisations, operating licences, and contracts they have received.
The second function of the authorisation and licence is to limit the number of PMC personnel in Timor-Leste. By doing so, it will be easy for the Timor-Leste government through the Ministry to monitor PMC activities. This is not a new idea, since a similar notion is regulated in the Afghanistan Law, which permit only 500 personnel from all PMC companies to operate inside Afghanistan unless the Afghan Authority permitted an increase.\(^\text{61}\) So, the Timor-Leste Authority in the new PMC statute can limit the number of PMC personnel according to Timor-Leste requirements. In addition, the authorisation will limit the individual operating licence to those PMC personnel which have the necessary expertise to perform the services. The individual operating licence is also applicable for a limited period, such as the ‘one-off’ licence or ‘contract-by-contract’. However, it can be renewable.

For the registration of PMC equipment, it can be very important for PMC activity oversight to only permit equipment that directly supports the services and activities. In addition, this restriction can be also been used as a preventive measure against any equipment that could be used to hinder the stability and security of the country. The use of firearms and weapons by PMCs must be through registration and authorisation and then only if the service is requiring it. Moreover, this registration can prevent any illegal weapons or firearms transfer and limit the types, and quantity of weapons and ammunition that might imported, possessed, acquired, and used by PMCs in an area of operation. Also, the registration and licence will also include the means of transportation for the services, personnel, and equipment that will be used by PMCs.

For the process of PMC registration as a business company, a PMC must register with the Timor-Leste Minister of Defence and Security in order to obtain the operating licence. To obtain the licence, a PMC needs to submit such documents as: services that they will

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perform in Timor-Leste;\textsuperscript{62} number of PMC personnel that will be involved in the services; list of equipment, vehicles, or other means of transportation that will be used in order to support and perform the services and will be imported and used inside Timor-Leste; list of weapons, lethal or non-lethal, including the firearms that will be imported and used in Timor-Leste; and any additional document that might be require by the regulatory and monitoring body.

For the PMC individual personnel registration the PMC needs to submit documents to the Timor-Leste Minister of Defence and Security covering: the nationality of the PMC personnel; evidence that personnel are of at least minimum legal age according to Timor-Leste law or the personnel’s country of origin; personnel physical, mental health and background checks;\textsuperscript{63} and evidence that personnel are not active members of public security, military, intelligence, or secret service forces of a foreign country.\textsuperscript{64}

\textbf{C.3.2. Determination of Service and Permitted Activities of PMC}

The Timor-Leste government has rights to determine the services that PMCs can perform inside the territory of Timor-Leste. The government needs to ensure that the services do not hinder the stability of the country and do not violate any regulation under Timor-Leste national law and international law. In addition, PMCs must perform services according to the requirements of the Timor-Leste government so the services can be useful for the stability and development of the country. Also, there should be a clear distinction between services performed by PMC personnel and those by the local public security or defence forces. Therefore, the Timor-Leste government can limit the services of PMCs and

\textsuperscript{62} The services should be exactly same with the contract that the PMC has received.

\textsuperscript{63} The background checks must consist with document such as: clean criminal record including never involve in a crime committed in other country or involve in a crime that can be categorised as violation or grave breach of international law; records regarding misuse/abuse of alcohol, drugs, or other illicit substances; record of military training or services; records of PMC services training including the contracted services; and records of weapon and firearms training.

\textsuperscript{64} In order to prevent any espionage activities committed inside Timor-Leste.
areas of operations through the contracts between them. The contracts need to contain clear and precise provisions or clauses relating to permitted services.65

As demonstrated in conflicts in other countries, PMCs have the potential to provide a wide range of services, so it is very important for Timor-Leste to restrict in the future statute the activities which PMCs are permitted to carry out to the following:

*Provision and supply of logistics or equipment or provision of military training. Such services can only be provided to the Timor-Leste government.*

In particular these services should be mainly restricted to the Defence Force, since they are of a military nature. Moreover, it will prevent any misuse of PMC services and make the monitoring of PMC activities easier. This will help to prevent any overlapping tasks between PSCs and PMCs, since experience in other countries has shown that on several occasions some PMCs perform services that should be conducted by PSCs. Furthermore, PMCs are prohibited from:

- *conducting any* services that can be categorised as mercenary-related, subversive activities or any activities that can be categorised in law enforcement and crime prevention nature; and
- *conducting activities that exclusively to F-FDTL, such as direct participation to any armed conflict that may occur inside Timor-Leste territory and any activities to maintain the defence of the country.*

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C.3.3. PMC Selection Procedures

The Timor-Leste government as a possible client of PMCs needs more options in the selection of PMCs before awarding contracts. Information from previous clients based on their experiences will be very useful guidance and reference for the government in PMC selection. In addition, the information could enable the government to avoid selecting PMCs with a deteriorated reputation, which could hinder the integrity and security condition of the country. Public tender announcements can become an important part of the effort to ensure the transparency of PMC selection and contract awarding processes. It will also provide Timor-Leste society with information relating to PMCs and also develop awareness that such organisations are operating in Timor-Leste so that society can also participate in the monitoring of PMCs.

C.3.4. PMC Selection Criteria

It is very important to determine that PMCs contracted to the Timor-Leste government are not, or have not been, involved in any activities that might be categorised as violations of Timor-Leste national law and international law. In addition, the criterion that a PMC has never been rejected from a contract in the past means that the PMCs is likely to have performed its services according to the terms of the contract and not committed wrongdoings in previous activities.

The PMC economic condition and financial capacity can become a selection indicator, since a PMC should not be in the condition of indebtedness or bankruptcy. It can show that the PMC is in a stable financial condition which in turn reduces the likelihood of the PMC misuse funds or acting corruptly on the contract funding. More important, it also can avoid the possibility of creating a conflict or prolonging an unstable security situation so that the company can try to gain more profit.
The current and accountable records of firearms and ammunition ownership and usage can be used by future clients to assess and determine whether the PMC has been involved in any illegal arms trafficking or transfer, as a violation of national laws and international law.

It is very important that PMC personnel have sufficient training in the task that they will carry out, so that they will perform the task or services effective and efficiently, respecting national laws and international law principles. Moreover, local knowledge can very helpful for PMC personnel in conducting their activities because this will give them some understanding of local society and oblige them to respect and perform their services based on it. Furthermore, it can prevent and avoid frictions and mistrust between PMC personnel and local populations.

C.3.5. Report/Complain Mechanism

Similar to the PSC provision, the PMC regulatory and monitoring body can also set up a report/complain mechanism in order to monitor the PMC activities. It can carry out an enquiry/investigation on any indications of PMC wrongdoings, which can be based on any report from local populations, local authorities, or from inspections conducted by the regulatory and monitoring body itself. If PMCs and their personnel are proven to have committed wrongdoings, the sanctions can be in the form of fines, revocation/termination of contract, prohibition on future applications, cancellation of visas, deportation or even imprisonment, or any other sanctions according to the Timor-Leste Penal Code and Civil Law. However, actions can also be taken if PMCs do not conduct their own remedial actions on wrongdoings after a reasonable period of time.66

66 Similar provision is included in Article 26 of Afghanistan’s Procedure for Regulating Activities of Private Security Companies

C.4.1. Prohibitions on PMCs activities

As with the PSC requirements, the future statute needs to make provisions relating to the activities that cannot be performed by PMCs. PMCs in Timor-Leste are not permitted to conduct activities that can be categorised as mercenary-related or subversive activities. In addition, the PMCs are prohibited from conducting activities that can obstruct the operation of the Timor-Leste government or activities that are exclusively under the jurisdiction of certain organs of the Timor-Leste government, in addition to military activities.

C.4.2. PMC Accountability

Like PSCs, a PMC as a company has responsibility under national law, in particular national law of the state where it operates, including the criminal, tax, immigration and labour laws of its personnel’s nationality.67

In addition, as stated by Gillard, prosecution of a company still can be conducted without international law, since certain violations of international law, including crimes committed by its personnel, can also be considered as violations under national law, especially in a country that recognises criminal responsibility of persons.68 The violations can become the basis for prosecution of both PSCs and PMCs, as companies, and their personnel. Gillard suggests that these certain violations, in countries that adopt the common law, are considered as torts: wrongful death; torture and cruel, inhuman or degrading treatment or punishment; and false imprisonment as unlawful liberty deprivation.69

68 Ibid.
69 Ibid 546-547.
One advantage of the pursuit of PMCs through civil action is that a civil action’s evidentiary standard is lower compared to that for criminal proceedings. And if successful, the victims could receive compensation from PMCs.

Also, prosecution of a company could only occur if its structure of organisation made it difficult to establish the criminal responsibility of a certain person. However, prosecution of a PMC as a company may more advantageous especially to for compensation purpose in criminal or civil courts because it is “less problematic actually to receive financial compensation, given the company’s assets”. It also could increase PMC’s awareness of the potential and actual effects of its business in conflict zones that could develop the corporate criminal responsibility inside the international crime.

For PMC personnel including the managers, responsibility and accountability will also be similar to the PSC provisions, since both regulations use same principle. They can be attributable for wrongdoings, violations or crimes based on their form of participation, such as: being the perpetrators; committing, encouraging, ordering, abetting or assisting in the commission of wrongdoings; or acting as superiors or providing instruction in the commission of the wrongdoings. For PMC managers or persons acting as supervisors in the field, they are accountable because they have de facto control, possess ability to give instruction to their personnel, and control them legally and financially. In addition, they are accountable when they fail to take necessary measures to prevent or punish subordinates for their wrongdoings where they know or culpably ought to have known about the wrongdoings. Also, they are accountable if they either knew or disregarded information

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71 Ibid.
72 Ibid.
74 Ibid 1028.
which clearly indicated subordinates were conducting or intended to conduct a wrongdoing, and wilfully ignored the information.

D. Preliminary Conclusions

The future statute will contain regulations for PSCs and PMCs but exactly how they will be regulated is still unknown, since the statute is still in the drafting stage. As mentioned earlier, the Timor-Leste government has two options for setting the statute; first, a statute that covers all regulations relating to both PSCs and PMCs and, second, two separate statutes for PSCs and for PMCs. The first option is more possible since, despite similarities, the PMC regulation will need some adjustment in order to cover specific PMC issues.

For the regulatory and monitoring bodies of PSCs and PMCs in the future statute, there are two options: first, appointment of an existing government institution to be the regulatory and monitoring body, and second, establish a new institution. The Timor-Leste government may use both options.

Under the first option, the government could appoint the National Management of Public Security (Dirasaun Nasional Seguransa Publik – DNSEP) as the regulatory and monitoring body of PSCs. This is the most logical option, since the DNSEP already has a department supervising and managing PSCs. More important, the historical background of the DNSEP is also a consideration; the institution was first established by the PSC Chubb Security Group as PSC “Civil Guard” on 26 February 2000. Hence it was a private company and not a government institution. On 30 August 2000, when a Timor-Leste transitional

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76 Prosecutor v Delalić (Judgment) (International Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [387].
78 Ibid, 49.
government was re-established as the Government Public Authority under UN auspices, the company separated from the Chubb Security Group and changed its name to “GPA Security”. However, it again changed its name in May 2002 to “ETPA Security”, when the Government Public Authority became the East Timor Public Administration. During this period, the company was integrated into the East Timor Public Administration, and become the DNSEP. Therefore, the background of the DNSEP is one advantage because it provides the institution with the experience and better understanding on the regulation and monitoring of PSCs.

However, the relationship between the DNSEP, its background, and PSCs may raise some negative assumptions, such as an internal conflict of interest because the DNSEP might only represent interests of some PSCs. For example, the DNSEP, Maubere Security, and Gardamor technically are related to each other because the company was established by the Chubb Security Group. This may create an assumption that the DNSEP is not a neutral institution (but again it is just an assumption).

The second option for a PMC regulatory and monitoring body may be more possible since the body needs to be separate and different from PSCs. In addition, it is also more possible that the new institution be under the State Secretariat of Defence because it has experiences and responsibilities for any military activities inside the country. This is the most logical option for the placement of PMCs which have a military and paramilitary nature. Placing PMCs under same regulatory and monitoring body as PSCs will create more issues because the institution that is supposed to be only responsible for activities of a law enforcement and crime prevention nature, will have overlapping jurisdiction into a military environment, which can be viewed as a violation of Timor-Leste national law.

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79 Ibid.
80 Ibid.
81 Ibid.
Even though it might not be regulated within the future statute, the Timor-Leste government should still give some attention to issues relating PSCs and PMCs that are part of a foreign diplomatic mission or accompanying visiting foreign force in Timor-Leste. Currently these companies enjoy immunity based on a diplomatic relationship and a Status of Forces (SOFA) agreement.

The future statute should include provision that PSCs and PMCs that are part of a diplomatic mission or under a SOFA must still coordinate with the local authority and require clearance from the Ministry of Defence and Security and Ministry of Foreign Affairs. Timor-Leste can set up such provision based on the similar regulation already set up in Afghanistan, which also regulates the movement restriction of foreign PSCs and PMCs that work for diplomatic missions or non-governmental organisations.\(^{82}\)

For accountability of these ‘protected’ PSCs and PMCs, it will be unlikely that they can be prosecuted for their wrongdoings under Timor-Leste national law, unless there is a bilateral agreement between Timor-Leste with the sending/contracting state that allows the Timor-Leste government to exercise its jurisdiction over PMC personnel, as demonstrated in the Danny Fitzsimmons Case in Iraq.\(^{83}\) It is very difficult for Timor-Leste to request a sending/contracting state to waive the immunity of the ‘protected’ PSC or PMC if the sending/contracting state is a powerful foreign country.

However, Timor-Leste can take some measures such as deporting such PSC or PMC personnel from the country, cancelling visas, making the PSCs or PMCs persona non grata,

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83 Under the new agreement between the Iraqi Government and the United State Government, the Iraqi Authority can exercise its authority towards foreign personnel of PSCs and PMCs (see: Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of the United States Forces from Iraq and the Organization of Their Activities during Their TemporaryPresence in Iraq, signed 17 November 2008 (entered into force 1 January 2009) Art 12).
or providing information relating to the misconduct of PSCs to PSC/PMC international monitoring bodies. These measures been taken in order to prevent further harm or destruction that can be caused by foreign PSCs and PMCs. Deportation and information relating to the misconduct PSC and PMC will tarnish their reputation. Prosecution under Timor-Leste national law could be difficult unless the Timor-Leste government and the sending/contracting state make a new SOFA.

For additional measures, Timor-Leste government can cooperate with other countries or international organisations to ensure the accountability of PMCs. The National Parliament Law No.15/2011: International Penal Judicial Cooperation can establish the basis of international cooperation to make PMCs accountable for their wrongdoings. The future statute will regulate criminal judicial cooperation between Timor-Leste courts and courts of other countries or international organisations to which Timor-Leste is a state party. In addition, it will also provide forms of cooperation, such as: extradition, transfer of criminal proceedings, criminal decisions enforcement, transfer of sentenced persons transfer to other punishments/liberty deprivation measures, conditional release under supervision, and criminal mutual legal assistance. Therefore, the Timor-Leste government can cooperate with intergovernmental organisations, such as the International Criminal Police Organisation (Interpol) and the International Criminal Court, in order to make a PMC accountable for its wrongdoings committed inside Timor-Leste, even if the company was located outside the territory and jurisdiction of Timor-Leste. Timor-Leste is a member of Interpol and has also deposited its instrument of accession to the Rome Statute, making it a party to the International Criminal Court since 1 December 2002. In addition, it can supplement cooperation between Timor-Leste and a country where PMCs are registered or with a country of the nationality of PMC personnel.

85 Ibid.
In addition, Timor-Leste also can provide assistance if needed to apprehend and extradite any PSC or PMC personnel that violate international law or international humanitarian law, either through a request of another country’s government or international organisation, or based on the Timor-Leste government’s own decision. These actions can be considered as part of Timor-Leste’s effort of universal jurisdiction over the wrongdoings committed by PSCs or PMCs and their personnel. It can also be seen as a responsibility of Timor-Leste to international law, in particular international humanitarian law.
CHAPTER VI

CONCLUSION

This chapter provides conclusions on the assessment of PSCs and PMCs and their activities in Timor-Leste and how they can, and should be, regulated within the Timor-Leste legal system.

A. Overview of the Thesis

The thesis is divided in six chapters. Chapter I provided assessments on the backgrounds of PSCs and PMCs and their definitions based on previous researches. The chapter also examined issues relating to their presence and operation in a country, including in Timor-Leste. The author proposed that PSCs and PMCs need to be regulated if they operate in Timor-Leste, because of previous reports and findings indicating allegations of violations or misconduct committed by them in other countries.

Chapter II reviewed and assessed the literature, previous researches, and findings on PSCs and PMCs. It examined the distinction between PSCs and PMCs, their presence in a country, why clients contracted them, and the options for their regulation. In this chapter, the author argued that there were difficulties occurring in particular in efforts to distinguish between PSCs and PMCs and to provide appropriate regulations governing them at both domestic and international level.

Chapter III assessed PSC and PMC statutes and regulations produced by other countries such as the United States, South Africa, the United Kingdom, Afghanistan, Iraq, and Indonesia, and organs of the United Nations such as the Commission on Crime Prevention and Criminal Justice. These laws and regulations have been utilised in the thesis.
in order to provide some options of regulations and provisions that may be able to be used in future PSC and PMC statutes.

Chapter IV discussed the background to the condition and situation of Timor-Leste, how PSCs and PMCs operate in the country, and how PSCs and PMCs are regulated under Timor-Leste national law. Through the assessment set out in this chapter, the author suggests that PSCs and PMCs operate in Timor-Leste due to the condition and situation of Timor-Leste itself as a suitable place to operate, and due to the presence of UN and other foreign forces in Timor-Leste. In addition, the author assessed how the PSCs and PMCs are regulated in the Timor-Leste legal system and argued that the legal framework for the companies have some deficiencies.

Chapter IV also illustrated that there two types of companies that operate in Timor-Leste, namely PSCs and PMCs contracted by a foreign power in Timor-Leste, and PSCs established locally in Timor-Leste. The first type of PSC and PMC is covered by a SOFA or under a diplomatic mission with immunities and privileges under Timor-Leste national law. However they were not discussed in detail since they were not the main focus of the thesis, which was to provide options of regulation and provision for PSC and PMC statutes in Timor-Leste national law.

The second type is the locally established PSC. These companies in general comply with Timor-Leste national law. These companies can contribute to the social, economic, security development efforts of Timor-Leste. Therefore, this demonstrated that these companies need to be properly regulated so they can keep contributing and to ensure their activities and operations are not contrary to Timor-Leste development efforts.

Chapter V discussed how PSCs and PMCs could be regulated under a future statute. The Chapter provided options for the Timor-Leste Government on settling the new PSC and
Chapter VI – Conclusion

PMC statute as one statute covering both types of companies, or as two statutes that
separately regulate them. It proposed that the provisions in the future statute relating to PSCs
and PMCs, including their division, can be adopted from PSC and PMC laws and regulations
produced by other countries and UN organs. However, their adoption into the Timor-Leste
legal system needs to be conducted in accordance with Timor-Leste’s requirements and
situation; these other countries have more developed and complex legal systems compared to
Timor-Leste. But, similar to these adopted PSC and PMC statutes, the future statute should
include some fundamental provisions, such as definitions of PSCs and PMCs and their
personnel, approved and prohibited activities, PSC and PMC regulatory and monitoring
bodies, and accountability requirements and sanctions.

B. The Way Forward

As demonstrated in Chapter IV, PSCs can contribute to Timor-Leste security; even the
Timor-Leste Government views PSCs as having an important role to maintain security in
Timor-Leste through positive relations and cooperation between government and PSCs,
since both share the same objective of providing and guaranteeing security to society.1 The
contribution of these companies can be shown in the area of economic development; with
Timor-Leste having a population of 1.1 million and an unemployment rate around 18.4%,2
PSCs are one of the largest job providers in Timor-Leste, and a growing business sector
which can help to reduce unemployment by providing jobs for the Timor-Leste population.
In addition, they do not pose a threat to human rights and are generally law abiding.3 Also,
the companies can offer assistances, or even become subsidiary, to the Timor-Leste National
Police. A similar practice has occurred in Ecuador where PSCs have become a stop-gap

1 Nelson Belo, ‘Saida Mak Akontese Ba Kompaña Siguransa PrivaduihaFuturu?’ [The Future of
Private Security Companies in Timor-Leste?] (2011) 27 Fundasaun Mahein 8; Suara Timor
2 The Heritage Foundation, 2014 Index of Economic Freedom: Timor-Leste
<http://www.heritage.org/index/country/timorleste>.
3 Marc von Boemcken (ed.), ‘Commercial Security and Development: Findings from Timor-Leste,
Liberia and Peru’ (Brief 45, Bonn International Center for Conversion) 30.
measure that provides assistance to the police force until the police forces have sufficient numbers and capacity.⁴

PSCs in Timor-Leste are regulated under the State Secretary of Security Instruction no. 03/OSSS/VII/2010 of 6 August 2010 (Despacho no. 03/GABSES/VII/2010 de 6 de Agosto 2010) (hereinafter the “2010 Instruction”). The 2010 Instruction includes provisions that specifically govern the PSC and its activities. The provisions include: the definition of the activities of PSCs, their activities and duties; registration of PSCs; the use of uniforms and identification card by PSC personnel while on duty; prohibition on the use of firearms by PSC personnel; obligation to provide assistance to, and cooperate with, the public authority and officials; notification to the local authority if criminal activities occur; distinguishing PSC duties and activities from those of public officials/authorities; confidentiality requirements in respect of confidential information obtained during professional activities.

In addition the 2010 Instruction provides provisions prohibiting PSCs from undertaking or being involved in certain activities, such as: activities that form part of the jurisdiction of the judiciary or national police (for example, conducting criminal prosecutions); activities that can threaten, prohibit or restrict fundamental guarantees and rights (for example, the unlawful arrest and detention of a person without giving notification to the police); providing security services to assets, activities or persons involved or potentially involved in illegal or criminal activities (such as providing security details or guards to persons or premises owned by persons involved in the commission of a crime); and involvement in PSC operations of owners, managers, or personnel convicted of fraud-related crimes.

However, the 2010 Instruction has a number of deficiencies, such as, lack of: individual recruitment requirements and standards; accountability and sanctions for PSCs, their owners, managers, and employees, for breaches of the 2010 Instruction and other Timor-Leste regulations; prohibition on PSC affiliation with certain political parties, organisations, or groups; prohibition on participation in mercenary, subversive, or any activities that could threaten the national integrity of Timor-Leste or other countries; and identification of the institution to act as main regulatory body of PSCs in Timor-Leste.

Besides the deficiencies of the 2010 Instruction, Timor-Leste currently does not have any statute that regulates PMCs and their activities that might occur within Timor-Leste territory. This lack of regulation for PMCs might not be a major concern of the Timor-Leste Government, since their presence in Timor-Leste is associated with foreign entities such as the United Nations or US Visiting Forces. So when the foreign entities leave Timor-Leste, the Government will consider that the PMCs will also gone, and that therefore there is no need to regulate them in the Timor-Leste legal system in the same manner as PSCs. This assumption can become very dangerous, since their operation while in Timor-Leste could be under a contract to the Timor-Leste Government itself, and enabling them to operate in a legal vacuum and able to conduct activities that contradict Timor-Leste policies.

So it is imperative that the Timor-Leste Government produce a legal framework to regulate both PSCs and PMCs. The legal framework needs to be in the form of a national law, rather than a regulation or instruction, to give it the highest status and strongest legal force. However, the exact form of the legal framework is still undetermined.

As argued in the Chapter V, the Timor-Leste Parliament may have two options to set the future statute, namely a single statute that covers all provisions relating to both PSCs and PMCs, or two separate statutes for PSCs and PMCs. The first option may provide the Government with a more efficient method because it will cover two situations within the one
legal framework. However, it may less effective since it will be more difficult to effectively regulate PSCs and PMCs specifically and to have detailed provision about the different types of companies and their activities. The second option probably can provide a detailed and comprehensive regulatory environment for both PSCs and PMCs and enable the separate statutes to specifically to address the issues uniquely relating to either PSCs or PMCs.

In drafting PSC and PMC statutes, it would benefit the Government and Parliament to draw upon and assess the PSC and PMC laws, regulations, and experiences from, and of, other countries and international organisation, so they can see how other countries deal with the PSCs and PMCs inside their jurisdictions. However, rather than simply implementing the laws or experiences from other countries or international organisations, the Timor-Leste Government needs to modify and amend them to be in accord with Timor-Leste’s needs and current situation; those laws and experiences were developed and occurred in countries with more complex situations and conditions, and with a more sophisticated legal structure than that which Timor-Leste currently possesses. In any case, the statutes for PSCs and PMCs in general will share similar fundamental provisions, such as definition of the two types of companies, and their personnel, and services; regulatory and monitoring bodies; authorisations and prohibitions; and accountability and sanctions.

The foremost provision need is to determine the definitions of PSC and PMC as companies, their personnel, and the services. These definitions are very important, since they provide limits for the PSC and PMC regulatory and monitoring bodies on how they will control and manage the companies. As described in Chapter V, PSCs and PMCs are civilian companies that provide particular services in return for monetary income, but the major difference on the definitions for PSCs and PMCs lie in the nature of the companies. PSCs can only operate in the civilian or non-armed conflict environment and providing law-enforcement and crime prevention services, while PMCs should only operate and provide services in military or paramilitary nature. Both PSCs and PMCs have similar definitions in
respect of their personnel, as persons employed by or working for the companies and performing services. ‘Services’ are activities that can be divided into law-enforcement and crime prevention or military services.

The future statute needs to include provisions relating to the regulatory and monitoring bodies of PSCs and PMCs. Both bodies in the future statutes have the same function, namely, to control and manage the companies which operate inside the territory of Timor-Leste. The bodies may share similar authorisations, such as registration, permitted activities, and report and complaint mechanisms. But a detailed regulation needs to show the differences between two bodies. A PSC regulatory body needs authority to set up the standards of an industry code of conduct and of training, while a PMC regulatory needs authority to set up criteria and procedure for selection of PMCs.

PSC and PMC provisions on prohibited activities can be basically the same since the primary prohibition should be on conducting activities that can be categorised as mercenary-related and subversive. In addition, both companies should be prohibited from conducting activities that exclusively belong to organs of the Timor-Leste Government. For example, PSCs cannot conduct any activities relating to prosecution of criminal activities or activities that restrict personal freedoms, including basic human rights, since this role is under the exclusive jurisdiction of the Timor-Leste Ministry of Justice and the National Police. In addition, PSCs are prohibited from having affiliations with certain political groups or other organisations. This provision is very important in order to ensure the independence and neutrality of PSCs and to eliminate any possibilities of conflicts of interest within the company. Similarly, PMCs should be prohibited from becoming involved directly in combat roles in a hostilities situation because such role is the duty of the Timor-Leste Defence Force.
Finally, a fundamental provision is accountability and sanction for PSCs and PMCs. Both companies have responsibilities under national law, in particular the national laws of the state where they operate, including criminal, tax, immigration and labour laws. All personnel including owners and managers, can be held responsible depending on their form of participation, such as, committing, encouraging, ordering, abetting or assisting in the commission of wrongdoings/crimes; or acting as superiors or providing instruction in the commission of the wrongdoings/crimes. Managers or persons acting as supervisors in the field can be held accountable because they have de facto control, possess the ability to give instruction over subordinate personnel, and have control legally and financially.\(^5\) In addition, they can be held accountable if they fail to take necessary measures to prevent or punish their subordinates for their improper actions if they knew or culpably ought to have known about these actions.\(^6\) Further, they can be held accountable if they either knew or disregarded consciously information which clearly indicated the subordinates were conducting or about to conduct a criminal act crime,\(^7\) and they wilfully ignored the information.\(^8\) The sanctions can be in the form of fines, temporary or permanent revocation or suspension of the PSC/PMC registration or licence, and/or imprisonment\(^9\) in accordance with the Timor-Leste Penal Code or other Timor-Leste laws or regulations.

### C. Facing Challenges

As demonstrated in Chapter IV, enacting a legal framework for PSCs and PMCs is a challenging exercise, since the Timor-Leste Government still faces major issues such as weak institutional capacity in areas of parliamentary activity and rule of law. In

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\(^{6}\) Ibid 1028.


\(^{8}\) *Prosecutor v žejnil Delalić, Zdravko Mucić also known as “Pavo”, Hazim Delić, and Esad Landžo also known as “Zenga” (Judgment)* (International Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [387].

parliamentary activity, there are reports that indicate that some members of parliament misuse their positions and that there are widespread levels of corruption and nepotism inside the public institution.\textsuperscript{10} In addition, the lack of understanding about PSCs and PMCs has the potential to make appropriate regulation for the companies. The Parliament may have obtained some understanding on PSCs since Timor-Leste has regulated the PSC industry within its legal system. But it is a different situation with respect to PMCs, since the Parliament is unlikely to understand what a PMC company is and what services it might offer. Therefore, there are grounds for concern that the Parliament cannot enact an appropriate legal framework for PSCs and PMCs for these reasons.

Besides enacting an appropriate legal framework for PSCs and PMCs, the implementation of the future statute after enactment also presents major challenges. The implementation of a PSC and PMC statute will face such issues as a general lack of understanding of the companies and their activities, which in turn will impact upon the capacity and willingness of the judicial system to address serious crimes that might be committed by PSCs and PMCs. Government bureaucrats can pass the future statute to the PNTL and F-FDTL in order to effect its enforcement. However it can be very difficult if these institutions do not have adequate knowledge and understanding about the future statute, and about PSCs and PMCs. Similar difficulty can also occur in the judicial institutions and Timor-Leste society generally. In respect of the judicial institutions, the lack of adequate knowledge and understanding about PSCs, PMCs, and their statute can affect the ability of the institutions to properly deal with crimes or misconduct committed by PSCs and PMCs. Similar difficulties arise in respect of Timor-Leste society, as part of the monitoring mechanism of PSCs and PMCs, in providing any information about PSCs and PMCs when they do not understand the future statute and the organisations involved. In order to deal

with such difficulties, dissemination of information on the future statute, and on PSCs and PMCs needs to be conducted at all levels of Timor-Leste society.

Lack of resources can also become an obstacle in the enforcement of the future statute. The resources can be interpreted as human resources and facilities that support the enforcement of the future statute. For example, the security and defence institutions need to have appropriate numbers of personnel with adequate knowledge and understanding about the future statute in order to enforce the statute and deal with any misconduct or violations committed by PSCs and PMCs. Furthermore, they need to be supported with the sufficient facilities in order to conduct their activities. The same condition also applies to judicial institutions which require sufficient personnel with knowledge about the companies and the statute. The personnel also need to be supported with the adequate facilities. So, the appropriate number of personnel and adequate facilities are very important to such institutions so that they can address the issues of PSCs and PMCs according to their jurisdiction.

In addition, politicisation and abuse of power in government institutions, such as once occurred in the police and defence forces by some political leaders in order to achieve their own political objectives, can hinder the implementation of the future statute. Misuse of authority can bypass or even circumvent a future statute, as shown in Afghanistan when President Karzai circumvented the enforcement of his own decree for his own brother’s PSC company. Such improper intervention in government institutions dealing with PSCs and PMCs will disturb the proper implementation and enforcement the statute. It may also exacerbate corruption because such political intervention committed by the political leaders is solely directed towards their own financial gain.

Even though the implementation of the PSC and PMC statute may face different issues, it can still be implemented and properly followed by the companies concerned. In the author’s opinion, following a review of the implementation of the 2010 Instruction, the PSCs in Timor-Leste in general comply with the Instruction and there are no reports of any grave violations of the Instruction committed by the PSCs. Therefore, the future statute is likely to be followed by PSCs and PMCs in the same manner. Also, even though there are some challenges there are some ways to overcome them. First, an educational strategy for government officials generally, non-government organisations, and private industry, and which would include some training programs regarding, PSCs and PMCs, is essential. This process would provide a proper understanding and knowledge relating to these companies and their operations for government officials so that they would know how to deal with PSCs and PMCs. The educational strategy can be in the form of short informal courses or trade training that includes PSC and PMC legal framework introduction, how the companies operate, how they are equipped and operate in their areas of operation, and so forth.

Second, clear instructions and regulations will also reduce the possibilities and likelihood of government officials acting with politicised motives and misusing authority. The existence of clear and comprehensive detail in such instructions and regulations will make it clear to all that their non-adherence will be considered a breach or violation of the instructions and regulations with consequences to follow.

Third, the availability of policies and guidelines regarding PSCs and PMCs for the Timor-Leste population will enable them to be informed about these companies, how they operate, and how they are regulated within Timor-Leste national law. For example, publication of the PSC and PMC policies and guidelines through print and electronic media can introduce such companies to the Timor-Leste population. This will improve the informal monitoring role that the population can play in respect of the companies. In addition, these policies and guidelines can become social control tools for the government when it has
enacted and implemented the PSC and PMC legal framework properly. Furthermore, as discussed in Chapter V, the reporting and complain mechanism in PSC and PMC future statutes can facilitate the informal monitoring role conducted by the Timor-Leste population.

Last, in respect of insufficient resources, lack of proper facilities and number of personnel, the government can allocate some funds to improve and provide the required facilities and personnel until they reach an appropriate quantum and number to support the implementation of the PSC and PMC legal framework. An appropriate source of funding for these initiatives would be derived from the ministerial operational budget, in particular from the Ministry of Defence and Security or the Ministry of Justice. The other option can be from the Petroleum Fund which derives revenues and royalties from the Timor Gap oil and gas fields.

However, it can be very difficult to derive funding that can be used to support the implementation of the future statute. Allocation of funding from both the Ministries’ operational budgets and the Petroleum Fund needs to be approved and regulated within the annual state budget law by the Parliament. So, unless the funding has been approved and regulated by the Parliament within the annual state budget law for the fiscal year and unless the funding has become one of the priorities of the related ministries, or the decision to allow the funding have been published in the Jornal da Republica with the amount of the funding approved by the Parliament as according to the fiscal year, it will be very difficult to obtain funding for the PSC and PMC legal framework implementation.

Therefore, the future statute relating to the PSC and PMC needs to state clearly levels and sources of funding – whether from the related ministries’ ministerial operational budget or from the Petroleum Fund, or a combination of both. The other option is proposed the funding as an inter-cooperation venture between related ministries (in this case, the Ministry
of Defence and Security and the Ministry of Justice) so it can be considered as part of the operational activity of these ministries and can receive approval from Parliament.

D. Concluding Remarks

It can be concluded that the presence of PSCs and PMCs in Timor-Leste after the country’s independence has brought some positive developments. The companies contribute to the recovery efforts of Timor-Leste, ranging from providing logistical support to providing workplaces that can help to reduce the unemployment rate in the country. Furthermore, the companies, in particular PSCs, probably have a big impact on the security development of Timor-Leste since they can become a stop-gap for, or subsidiary or supplementary to, the Timor-Leste National Police until that institution reaches appropriate numbers of personnel, capacity and capability to conduct comprehensive security operations.

This demonstrates that PSCs and PMCs have an important role in Timor-Leste development; however still they need to be regulated under an appropriate framework within the Timor-Leste legal system. Control and proper management is essential for them to continue their positive contributions to the prevention of conflict and the promotion of peace and stability in re-building the country.
BIBLIOGRAPHY

I. Legislation/Statutes

Afghanistan

Decree No. 62 of the President of the Islamic Republic of Afghanistan Concerning the Dissolution of Private Security Companies 2010

Indonesia

Peraturan Kepala Kepolisian Negara Republik Indonesia Nomor 24 Tahun 2007 Tentang Sistem Manajemen Pengamanan Organisasi, Perusahaan Dan/Atau Instansi/Lembaga Pemerintahan (Regulation of the National Chief of Police Number 24 of 2007 on Management of Security Organisations, Companies and Government Bodies)

Iraq

Coalition Provisional Authority Memorandum Number 17: Registration Requirements for Private Security Companies (PSC)

Coalition Provision Authority Order Number 17 (Revised)

South Africa

Act on the Prohibition of Mercenary Activities 2006


Private Security Industry Regulatory Act No. 56 of 2001

Timor-Leste


Despacho No. 03/GABSES/VII/2010 de 6 de Agosto 2010 (State Secretary of Security Instruction No. 03/OSSS/VII/2010 6 August 2010)

United Kingdom

Private Security Industry Act 2001

United States

Arms Export Control Act 1976, 22 USC.

Civilian Extraterritorial Jurisdiction Act 2010, 18 USC

Military Extraterritorial Jurisdiction Act of 2000, 18 USC

Uniform Code of Military Justice, 64 Stat.109, 10 USC
2. **International Agreements**


Agreement between the United States of America and the Republic of Iraq on the Withdrawal of the United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, signed 17 November 2008 (entered into force 1 January 2009)

International Code of Conduct for Private Security Services Providers, opened for signature 9 November 2012, (not yet in force)

Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (“Interim Administration”), (signed and entered into force 4 January 2002)


Status of Forces Agreement between Timor-Leste, Australia, New Zealand, and Portugal (signed 26 May 2006).

3. **Treaties and Conventions**


Geneva Conventions 1949 and their 1977 Protocols


Vienna Convention on Diplomatic Relations 1961

4. **Cases**


LaGrand (Germany v. United States of America) (Judgment) [1999] ICJ Rep 466
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment) [1986] ICJ Rep 14

Prosecutor v Akayesu (Judgement) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-4, 2 September 1998)

Prosecutor v Orić (Judgment) (International Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-68-T, 30 June 2006).


Prosecutor v Tadić (Opinion and Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997).

Prosecutor v Delalić (Judgment) (International Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998).

Restrepo, José Alvear, Accusation Against the Transnational DynCorp (24-27 February 2007) (Hearing on Biodiversity Humanitarian Zone) (Permanent People’s Tribunal Session on Colombia)


5. Governmental and other Official Reports


Autoridade Nacionaldo Petróleo, LAFAEK-Area Map and Detail at <http://www.anptl.org/webs/anptlweb.nsf/pgMaps!OpenPage>


Delvon, Ben, Rhoda Margesson, and Bruce Vaugh, ‘Timor-Leste: Political Dynamics, Development, and International Involvement’ (CRS Report for Congress No R42585, Congressional Research Service, 3 July 2012)


United States Headquarters Department of the Army, ‘Contractors on the Battlefield’ (Field Manual No. 3-100.21, Headquarters Department of the Army, 3 January 2003) at <http://www.fas.org/irp/doddir/army/fm3-100-21.pdf>.


Sommers, Marc, ‘From Resistance to Independence: Timor-Leste’s Leadership Challenge’ (Discussion Paper No. 1, CM Partners)


Timor-Leste Armed Violence Assessment (TLAVA), Groups, Gangs and Armed Violence in Timor-Leste (Dili: TLAVA, April 2009)


6. **Books/Book Chapters**

Baron, Robert and Donn Byrne, *Social Psychology* (Allyn and Bacon, 8th ed, 1997)


Horta, Jose Ramos, *Funu: The Unfinished Saga of East Timor* (Red Sea Press, 1987)


Shoesmith, Dennis, *The Crisis in Timor-Leste: Understanding the Past, Imagining the Future* (Charles Darwin University Press, 2007)


7. **Journal Articles**

Avant, Deborah D., ‘Privatization of Security: Lesson from Iraq’ (2006) 50 (2) *Orbis* 327


Fitzsimmons, Scott, ‘Dogs of Peace: A Potential Role for Private Military Companies in Peace Implementation’ (2005) 8 (1) *Journal of Military and Strategic Studies* 1


Lilly, Damian, ‘The Privatization of Peacekeeping: Prospect and Realities’ (2000) 3 *Disarmament Forum* 53


8. Media Reports and News

‘Blackwater Inherits CIA Job of Using Drones to Kill al-Qaeda Leaders’, The Sydney Morning Herald (online), 22 August 2009

<http://www.guardian.co.uk/world/2010/dec/02/foreign-contractors-hired-dancing-boys?intcmp=239>


Dunn, James, Timor: A People Betrayed (Australian Broadcasting Corporation, 1996)
Ghouri, Nadene, ‘How to Make a Killing in Kabul: Western Security and a Crisis in Afghanistan’, Daily Mail (online), 28 February 2011


Lynch, Colum, ‘U.N. Embraces Private Military Contractors’ (17 January 2010) Foreign Policy (online)
<http://turtlebay.foreignpolicy.com/posts/2010/01/17/un_embraces_private_military_contractors>


Risen, James, ‘Ex-Blackwater Guards Face Renewed Charges’, The New York Times (online), 22 April 2011


9. Websites


Crocodyl, DynCorp International <http://www.crocodyl.org/wiki/dyncorp_international>


Eduardo Bello Soares GATTOT, Linked In <http://www.linkedin.com/pub/eduardo-belo-soares-gattot/25/894/5a>

G4S, G4S Completes Acquisition of ArmorGroup International plc (7 May 2008) <http://www.g4s.com/en/Media%20Centre/News/2008/05/07/G4S%20Completes%20Acquisition%20of%20ArmorGroup%20International%20plc/>


---- ‘USGET and DynCorp, Inc., Inc’ (2002) 3(8) *the La’o Hamutuk Bulletin* <http://www.etan.org/lh/bulletins/bulletinv3n23.html#USGET and DynCorp, Inc>


---- *Clients* <http://mauberesecuritylda.com/clients/>


Scheiner, Charles, *East Timor Puts U.S. Soldiers Above the Law* <http://www.etan.org/estafeta/02/winter02/3law.htm>


Voluntary Principles on Security and Human Rights (2014) 


Vaknin, Sam, Private Armies (22 October 2002) Sandline 
<http://www.sandline.com/hotlinks/private_armies.html>

DynCorp International, DynCorp International Awarded Contract Valued at up to $15.5 Million to Provide Facility Support Services for Naval Facilities Engineering Command Pacific (2 April 2012)

Business Wire


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