CHAPTER TWO

Domestic Regulation

Regulations created by states to deal with PSCs operating within their territory form part of the web currently controlling the private security industry. Domestic regulation succeeds in some arenas. It seems obvious that when states contract PSCs to assist with state-approved projects or to work alongside government armed forces the state itself should decide on the rules governing the relationship. However, domestic regulation on its own is incapable of solving all the problems that have been outlined so far. Relying solely on domestic regulation to control PSCs leaves regulatory gaps open. The most serious of these problems is the fact that if regulations in one state are too tight, PSCs may simply move to states with weaker rules. Indeed, states take vastly different regulatory approaches. The focus here is on three national domestic regulatory systems – those of the United States, the United Kingdom and South Africa – and the strong and weak points of each system. The general deficiencies of domestic regulation and the problems of a wholly domestic approach to regulating the private security industry are also discussed.

Domestic regulation in the United States
The current system of PSC regulation in the United States has two components. First, there is a licensing system, whereby potential PSC contracts are scrutinised. Second, there are laws regarding the prosecution of contractors for crimes committed while serving abroad.
The licensing system: International Traffic in Arms Regulation (ITAR) and the Arms Export Control Act (AECA)

The United States uses the same methods to control PSC services as it uses to control the sale of arms and other defence services. In theory, just as the sale of arms is regulated to ensure that it promotes broader American policy, the sale of security services such as those offered by PSCs is scrutinised by specific government bodies. Private security companies’ services are dealt with using the ITAR, which is part of the AECA. The ITAR’s provisions for the sale of services were adapted to deal with the private security industry, specifically the sale of ‘defence services’ or the sale of assistance, technical data or training related to military units. The ITAR is administered by the Office of Defense Trade Controls (based in the Department of State).

ITAR is used to grant licences for PSCs to sell their services abroad. Some countries, such as those deemed to be a threat to the United States, are proscribed from buying security services (just as they are prevented from buying US weapons). A PSC application is sent to relevant parties within the State Department for comment: regional desks, the political–military bureau, country specialists and others like the Bureau of Democracy, Human Rights and Trade. Before an application can be approved, it must be checked against the list of proscribed countries; in cases where it is not clear whether or not the client is proscribed, the Assistant Secretary decides after hearing from the parties within the State Department affected by the decision.

There are several specific problems with the ITAR system. First, the licensing process is repeatedly described as idiosyncratic and inconsistent. The offices involved change from contract to contract, and ‘neither the companies nor independent observers are exactly clear about how the process works’. Second, Congress is only notified about a contract going through the ITAR process after a threshold of US$50 million has been reached, and contracts can be written specifically so that they fall below this threshold, thus avoiding the licensing process. There is ‘nothing to prevent a company from selling several separate contracts for services to avoid the $50m bar’. Third, even if a licence is granted, there are no real oversight mechanisms in place. One option is for the embassy or consulate in the country receiving the services to keep an eye on the contract, which presupposes that they have the time and the inclination to enter battle zones. Many officials believe that oversight is ‘contrary to their job’.

Contracts for security services are rarely administered or overseen by officials with the relevant training and expertise. The industry’s rapid
growth has worsened this problem, as the number of qualified contract administrators in the Pentagon cannot meet the demand. Even before 11 September 2001, there were shortages in the number of administrative personnel, and the growth in the number of contracts awarded subsequently has not been matched by recruitment of administrators; indeed, posts in this area have been cut back.\textsuperscript{11} Pressure to fill contracts results in poor administration. The focus is first on ‘upon awarding contracts and less upon administering those contracts once awarded’.\textsuperscript{12} On the ground in Iraq, the monitoring of PSC contracts has been provided by a PSC which is itself a major US government contractor.\textsuperscript{13} It is hard to imagine this situation occurring in any other industry; automotive safety standards are not and should not be supervised by a car company.

Contracts, furthermore, are not awarded in a manner that encourages competition and accountability. In the United States, complicated budget rules mean that one agency can ask another to award and administer a contract. There is a ‘proliferation of fee-based arrangements that permit government agencies to avoid longstanding contracting constraints by off-loading their procurement functions to other agencies’ \textsuperscript{14} The contractors involved in the scandal at Abu Ghraib, acting as interpreters and interrogators for the US Army, were hired under a contract with the Department of the Interior’s National Business Center (NBC). The problem with this system is that the NBC, which was paid a fee to arrange for the award of the contract, had no major incentive to manage it. For a ‘nominal fee, the NBC permitted the Army to inappropriately use a streamlined, commercial contracting vehicle to obtain contractor personnel through a closed, non-competitive process, after which neither Army nor Interior procurement personnel’ managed contractor performance.\textsuperscript{15} A further problem with this type of fee-based contract exchange is that, until 2005, only contractors employed by the Department of Defense itself could be prosecuted under the Military Extraterritorial Jurisdiction Act (MEJA).

Finally, inappropriate contracts are often used for security services. Contracts that fix a price in advance but do not specify either the services to be provided or when they are to be delivered are used frequently. In theory, one overarching contract is put in place and then companies compete to fulfil aspects of it. These ‘indefinite delivery/infinite quantity’ (ID/IQ) contracts are popular in part because they solve a particular problem with the contractual regulation of PSCs. If a contract is too specific, it may slow down a company’s ability to fulfil it and perhaps make it uneconomical to compete for the contract in the first place. ID/IQ contracts ensure that contractors arrive and begin work quickly. Because the contractors
are unlimited, companies can easily abuse the system by overcharging for work.¹⁶ Competition for each part of the overarching contract rarely occurs and agencies focused on speed and convenience often hire only one company to fulfil the whole contract.¹⁷

The licensing and contract scheme used to deal with PSCs in the United States demonstrates how existing legislation intended to regulate the sale of arms can be adapted to control PSCs. However, the US system also demonstrates that oversight is a necessary part of the contracting process; that the kinds of contracts used need to be considered carefully; and that governmental idiosyncrasies, like the contract exchange between agencies, can affect accountability. Problems with oversight in the American system also indicate the hidden cost of privatisation: oversight mechanisms require substantial investments in order to be effective, in particular, large numbers of personnel must be hired to deal with contracts and procurement.

The prosecution system: the Military Extraterritorial Jurisdiction Act

The MEJA was passed in 2000 in order to ensure that non-military personnel associated with the American military abroad could be prosecuted in the United States for crimes in situations where the host nation was unwilling or unable to do so. It was not specifically designed to deal with contractors, but rather to deal with crimes committed by any civilian accompanying or working with the American military, including the spouses of service personnel. However, it was quickly applied to contractors, in part because under Status of Forces Agreements US personnel of all types are often immune to prosecution by local governments. The DynCorp employees who were involved in the prostitution ring scandal in Bosnia avoided prosecution because of this loophole.¹⁸ In Iraq, under CPA Order 17, contractors had immunity from Iraqi prosecution. Immunising contractors from local prosecution is a double-edged sword. On the one hand, it is useful because it protects non-military personnel from being tried in a state with a flawed judicial system or where it would be unlikely that they would receive a fair trial. On the other hand, it has made it impossible to call contractors to account for their actions.

Because the MEJA was not designed specifically to deal with contractors, it has not been a robust way of ensuring that PSC employees can be prosecuted for crimes committed abroad. The MEJA originally only applied to contractors who were working directly for the Department of Defense (DoD) or a contractor hired by the DoD. But the contractors embroiled in the Abu Ghraib scandal were employed by the Department of
the Interior, and so could not be prosecuted. This gap was closed by legislation designed to include any contractors working for any federal agency supporting the DoD’s missions abroad. However, some agencies, including the Federal Bureau of Investigation, the Drug Enforcement Agency, the Central Intelligence Agency and the Department of Homeland Security, still fall outside this definition. Nor does the MEJA apply to Americans hired by PSCs working for other governments. The Patriot Act of 2001 further tightens these loopholes as it extends to crimes committed by or against Americans on lands or facilities designated for American use. However, the Patriot Act’s jurisdiction would not include activities away from US bases or other facilities.

A second problem with the MEJA is that the legislation was designed to include ‘implementing regulations’ that would have allowed the legislation to work more effectively, and these took years to come into force. When the MEJA was created, it required the Secretary of Defense to prescribe ‘regulations governing the apprehension, detention and removal of persons under MEJA’ and to make these regulations uniform across all branches of the American armed forces. Without the implementing regulations, it was unclear who could arrest and detain civilian contractors. Neither was it clear how long the US should wait for host countries to begin prosecution, where it was possible for them to do so. Implementing regulations finally came into force in 2006.

The MEJA only applies to crimes punishable by one year or more of imprisonment, effectively excluding ‘misdemeanours’. While the effects of excluding misdemeanours from the legislation might appear minimal, in practice it could have an impact both on military discipline and on community relations. Unpunished misdemeanours such as petty theft may alienate local populations and breed resentment among regular soldiers who are called to account for their actions.

Finally, as with all prosecutions, the MEJA relies on the desire of prosecutors to bring a case to court. Extraterritorial prosecutions are complex and expensive, as all the relevant detail about the crime (including witnesses and evidence) are located far away. The absence of prosecutorial will is one explanation for the dearth of prosecutions under the MEJA.

Despite the shortcomings of the MEJA, the basic idea of creating extraterritorial legislation to control contractors is good. In situations where contractors are immunised from local prosecution and not subject to courts martial, the ability to prosecute for contractor crimes would be an essential part of any attempt to regulate PSCs. However, the legislation must be carefully designed. And it is worth noting that even though the MEJA
has existed since 2000, and though contractors are widely alleged to have committed crimes in Iraq, as of September 2006 no contractor had been prosecuted under the MEJA. Extraterritorial prosecutions are a tool that might best be described as better than nothing but far from good enough.

However, the American approach is not the only potential model for the domestic regulation of PSCs.

**Domestic regulation in South Africa**

South Africa approaches the legal control of the private security industry in a completely different manner. Rather than seeking to place controls on the industry, the South African system effectively attempts to ban it. The difference in approach can partly be explained by South Africa’s apartheid history and experience with the combat company, EO.

EO came to prominence in the mid-1990s, when it provided security services and ‘combat solutions’ for Angola and Sierra Leone. It famously and controversially incorporated many members of the South African army’s 32 Battalion, notorious for its apartheid-era activities. Its activities garnered significant attention, both positive and negative, but its apartheid links proved to be embarrassing to the post-apartheid government, which ‘embarked on a campaign to “leash” the dogs of war’. The Regulation of Foreign Military Assistance Act (1998) differentiates between mercenary activity, which it defines as ‘direct participation as a combatant in armed conflict for private gain’, and ‘foreign military assistance’, which is defined as military advice or training short of combat, security services, or any activity which may have the effect of assisting a party to armed conflict or overthrowing the government. The act bans mercenary activity outright, and requires any type of foreign military assistance to be examined by the National Conventional Arms Control Committee (NCACC), which looks at the relationship of the intended recipient to the armed conflict, and provides a licence, which it retains the power to revoke. It applies to all South African citizens and passport holders.

The act suffered from major enforcement problems and until 2003, there were no prosecutions under its auspices. There have since been two prosecutions, a very small number given the large amount of South African PSC activity. The act is often criticised for trying to encompass too many actors and for being imprecise. There is an argument that some of its provisions violate the right of South Africans to choose their own occupations, which is protected in the South African constitution. The act defines what constitutes military assistance very broadly. This broad definition means that it could be applied to many different actors, including
actors not normally considered military in nature, such as humanitarian agencies.\textsuperscript{31}

South African legislation demonstrates some of the more challenging problems associated with domestic regulatory regimes. Domestic regulation that is too tight will force companies to relocate abroad or to go underground; after the first piece of legislation, EO officially went out of business and apparently reconstituted itself in several new forms.\textsuperscript{32} And, if companies go underground, they are harder to reach with legislation.\textsuperscript{33} One view is that legislation will only affect legitimate companies seeking to be regulated and make it more difficult for them to conduct business, while opening up opportunities for companies operating at the margins of the industry.\textsuperscript{34}

Since 2005 the South African government has been debating the creation of new legislation to deal with the issues caused by private force. The Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill passed through the committee stage in late August 2006. It will now have to be passed by both houses and signed into law by the president. The bill has several goals:

To prohibit mercenary activity; to prohibit, subject to exceptions, the provision of assistance of service of a military, security, or other nature in an area of armed conflict; to prohibit, subject to exceptions, the enlistment of South African citizens or permanent residents in foreign armed forces; to regulate the provision of humanitarian aid in an area of armed conflict; to provide for extraterritorial jurisdiction for the courts of the republic with regard to certain offences.

Individuals and companies must apply to the NCACC before selling any service to an area of armed conflict. Humanitarian services cannot be provided without explicit authorisation.

The bill suffers from important potential shortcomings. One of the most significant is its broad scope. The term ‘areas of armed conflict’ is particularly vague, and so the new legislation could be used against South Africans working all over the world in a variety of scenarios. To make matters more complex, the bill excludes acts that assist popular struggles for national liberation, self-determination and resistance against foreign occupation. While this measure is understandable, given South Africa’s history, it makes deciding whether or not assistance is legal even more complicated.
The foreign enlistment provisions could mean that South Africans are no longer able to serve in the British army, a concern that was brought up by Paul Boateng, the British High Commissioner in South Africa, during the committee phase of the bill. ‘Security services’ are defined broadly and include some relatively uncontroversial services, like medical and para-medical services and the procurement of equipment. Regulating these services may prevent necessary and legitimate assistance from reaching war-torn countries. The tighter regulations for humanitarian agencies will have the same effect, and it is not clear why they are included in a bill dealing with the provision of security services.

A variety of actors have expressed serious concerns about the bill, including the IPOA and the South African Institute for Security Studies (ISS). Len Le Roux of the ISS has pointed out that South Africans working in a country that then becomes an area of armed conflict will suddenly find themselves falling foul of the law, and that requiring all South Africans currently working in Iraq to apply for authorisation may cause many of them to return home to minimal employment prospects. Indeed, the complexities of the legislation have already caused Erinys to dismiss its South African employees.35

**Domestic regulation in the United Kingdom**

Regulation of PSCs in the UK has been discussed since at least the late 1990s, but proposals for regulation presented in 2002 have not resulted in legislation. In 1998 the Report of the Sierra Leone Arms Investigation (the ‘Legg Report’) analysed the Sandline (‘arms to Africa’) scandal and called for a British government Green Paper into the regulation of private military companies.36 The Green Paper was published in February 2002 and argues that regulation is necessary because of the practical problems that might be caused by the actions of a British-based military company, such as undermining British policy. The Green Paper suggests six options for regulation: a ban on military activity abroad; a ban on recruitment for military activity abroad; a licensing regime for military services; a system of regulation and notification; a general licence for companies; and self-regulation, or the creation of a voluntary code of conduct.37 In August 2002 the House of Commons Foreign Affairs Select Committee responded with the publication of a report, ‘Private Military Companies’, which recommends that the US model be carefully examined,38 that a licensing regime be created requiring disclosure of the company’s structures and policies,39 and that a monitoring and evaluation regime be created.40 In response, the Secretary of State for Foreign and Commonwealth Affairs agreed to look into these recommendations.41
However, the UK process has subsequently stalled and it is unclear what will happen next. The industry’s rapid growth and the war in Iraq are partly to blame for the slow process, with further delays caused by Cabinet reshuffles. Nevertheless, in March 2005 it was reported that the eventual regulation would be tight because of a recognition that companies ‘are taking advantage of unstable political regimes by disregarding humanitarian and ethical codes’.42

Changes in the industry and among its key players since 2002 will have complicated the task of keeping potential new regulations up to date. One obvious change is that while the Green Paper responded to the actions of EO and Sandline, these two companies no longer exist and no company in the UK now openly offers the same sort of services.

The UK industry’s own views are also in flux. Christopher Beese, chief administrative officer of ArmorGroup, points out that one of his main concerns about regulation was ensuring that the industry distanced itself from the Sandline model. Now that this has happened anyway, the need for regulation is less pressing.43 Tim Spicer, formerly head of Sandline, is now chief executive officer of Aegis, a PSC that does not sell combat services.

The BAPSC has also been responsible for change in the British regulatory environment. Launched in February 2006, the organisation has already made significant inroads into unifying the position of its 17 members with regard to regulation. Bearpark hopes that the government might give the BAPSC control over UK regulation, in a similar fashion to the way the Bar Council and the General Medical Council regulate barristers and doctors respectively.44 However, the merits of this type of ‘self-regulation’ are debatable.

In light of the continuing regulatory debate in the UK, there may be merit in highlighting some of the difficulties associated with each potential type of regulation. The first two options (a ban on military activity abroad and a ban on recruitment for military activity abroad) are the most stringent, but also the most unlikely to be adopted.

In 1976, after British mercenaries were captured and tried for their participation in the civil war in Angola, Prime Minister Harold Wilson ordered an inquiry into the laws that could be used to call the mercenaries to account. Lord Diplock, who led the inquiry, released a report that thoroughly dismissed the idea that legislation could be used to ban foreign military service or to ban the recruitment for such service on UK soil. The Diplock Report argues that a ban on mercenary activity would violate an individual’s right to freedom of movement, a right considered part of
This conflict between bans on mercenary activity and individual freedom of movement has been an international concern since the early twentieth century. During the debate leading to the creation of the Hague Conventions of 1907, designed to codify laws and customs of war on land, an attempt to ban mercenaries outright failed because of concerns about violating freedom of movement. The prohibition of military service on behalf of other states was considered an ‘innovation’, which ‘departed from established usage up to the present time and seriously threatened individual liberty’. Such proposed bans also suffer from serious problems of enforceability: it is difficult to stop individuals leaving the country on a pretext and then undertaking paid military work. As Kinsey points out, it is also plausible that in some cases an outright ban would prevent the sale of useful services, either quasi-humanitarian services like land-mine clearance, or military assistance to weak but legitimate states. The legal and enforcement difficulties associated with banning foreign military service make the first two options inherently unlikely. Moreover, since 2002, the war in Iraq has created a significant and lucrative market for the sale of security services and this sale supports UK policy in Iraq. Both these factors make a ban on either recruitment or service even more unlikely.

The remaining four options are genuinely regulatory, in that they seek to establish procedures for the use of private companies rather than setting out to ban them. A licensing regime would require the government to decide on which activities ought to be allowed and then to create a procedure whereby companies would apply for a licence. Under a regulation and notification scheme, companies would register with the government. Once approved, companies could take up any contract so long as they notified the government of their intentions. Under a general licensing scheme, companies would receive licences specifying the type of work they are allowed to do and the countries where they are allowed to do it. A voluntary code of conduct leaves regulation up to the industry itself.

**Other types of domestic regulation**

As well as the approaches taken in the US, South Africa and the UK, there are a number of general legal instruments that governments could use to regulate private security industries.

*Foreign enlistment legislation*

One of the most common pieces of legislation discussed in the literature on the regulation of PSCs is a law designed to prevent the enlistment of
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soldiers in foreign armies or the recruitment of soldiers for foreign armies on domestic soil (in other words, instruments of the type dismissed by the Diplock Report as violating freedom of movement).

However, these instruments are not really relevant for the regulation of today’s private security industry. These foreign-enlistment acts were all created in the nineteenth century. By 1898, virtually all states in the international system had some sort of legislation regarding recruitment for or enlistment in foreign militaries. Apart from violating the entrenched customary right under international law to freedom of movement, they are notoriously unenforceable. The large number of Americans who enlisted abroad as volunteers during the First World War drove a significant hole in the legislation, as they were not prosecuted. The movement of foreign volunteers to enlist during the Spanish Civil War presented another challenge. No one has ever been prosecuted for such offences under UK law.

Given that these venerable instruments have seldom been used successfully, it is hard to see how they might form the foundation for any future regulation.

The Security Industry Authority (SIA)

In the UK context, authors often suggest that the type of regulation offered for domestic security services under the auspices of the SIA could be applied internationally. Elke Krahmann of Bristol University argues that across the EU domestic regulation should ensure ‘that any private security company registered in one of the EU member states, even if hired for personal or site protection in countries such as Iraq, will have been required to go through a substantial vetting process’. The SIA regulates the domestic private security industry, including security guards and door supervisors, and also the sale of security services, like home burglar alarms. It does not currently apply to the international private security industry and officials at the SIA point out that as it is presently constituted it could not be so applied. Not yet active throughout the entire United Kingdom (not yet having extended its ambit to Northern Ireland), the SIA lacks the capacity for the kind of extraterritorial supervision required for the international private security industry.

While the roles of the domestic and international industries are similar in some respects, they are markedly different in others. Whereas private security guards working in the UK are unarmed, PSC employees working abroad are often armed, meaning that each group requires a different level of regulation. Moreover, if a door supervisor goes on a rampage it will affect only his own reputation and perhaps the reputation of his employer. But if there is a disaster involving PSC employees in Iraq or Afghanistan
it could have negative ramifications for UK foreign policy. Background checks and licensing can only be a useful tool when accompanied by stringent oversight, which the SIA would not be able to apply internationally. Even if SIA vetting did apply to employees of PSCs, there would be no guarantee that ‘bad apples’ would be weeded out. No vetting system can predict with complete accuracy whether or not a person without a criminal record will commit a crime in the future. Licensing systems must be accompanied by oversight and enforcement mechanisms to be effective. Finally, because of these problems with the SIA model, neither the SIA, PSC representatives nor the BAPSC favour the extension of SIA’s role to regulate the UK element of the international private security industry.37

Application of similar legislation
Another way that governments could regulate PSCs is through the application of existing legislation designed to deal with other issues. Just as the United States has adapted its rules regarding the sale of arms abroad, other states could use arms sales regulations to deal with the sale of security services. Krahmann suggests that the private security industry is not as unregulated as it first appears, given that the industry is subject to European mechanisms on armaments and arms exports.58 However, the instruments she examines are mechanisms designed to deal with the technology associated with weapons of mass destruction and services associated with these weapons, meaning that they do not apply to mainstream PSCs. Clive Walker and Dave Whyte argue that the UK Export Control Act 2002 and the Terrorism Act’s provisions about weapons training could be used to regulate PSCs.59 However, neither of these instruments directly applies to the private security industry. The Terrorism Act covers weapons training only when given to ‘terrorists’. Using legislation designed to control trafficking in weapons of mass destruction and training terrorists to control PSCs is redundant; if the activity is already illegal then it makes no difference whether or not the person trafficking or training is employed by a PSC. Moreover, general arms export legislation, as is the case in the United States, often does not have stringent enough oversight mechanisms to supervise a large number of individuals operating in numerous international locations.

General disadvantages of domestic regulation
In many ways, domestic regulation is the most important strand of the web necessary to control the private security industry: because states have traditionally held a monopoly over the use of force, they ought to
determine whether and in what ways security services can be sold. In other ways, however, domestic regulation is the weakest strand. The transnational nature of PSCs makes any kind of domestic regulation difficult. There are three specific problems with any domestic approach to regulation.

**Extraterritoriality**

The most significant obstacle for domestic regulation of the private security industry is the problem of extraterritoriality. The home state (where the PSC is based) is, in effect, regulating an industry that does the vast majority of its business in the territory of other states. The home government may not be the PSC’s main employer and so will not necessarily retain any kind of contractual control. Therefore, for domestic regulation to work, it would have to be designed to give the state extraterritorial jurisdiction. More simply put, the state would have to be able to oversee activities abroad and, if necessary, prosecute infractions that occurred in another state. Both extraterritorial oversight and, to an even greater extent, extraterritorial prosecution pose significant difficulties for governments.

Extraterritorial measures are expensive. Supervising a company’s operations abroad requires facilities and manpower to ensure substantive oversight. Prosecuting a company or its employees for activities undertaken abroad is even more complex. There are difficulties in securing witness statements and with transporting evidence. In states where prosecutors are elected, such as the United States, a prosecutor must justify why he or she is spending public funds on conducting an unusually expensive trial for an infraction committed abroad, as opposed to focusing limited funds on crimes committed within their usual jurisdiction.

Extraterritorial enforcement has already proved to be a serious issue in both the United States and in South Africa. In the United States, despite legislation designed to enable prosecution of contractors for criminal acts committed abroad, no such prosecutions have occurred. In South Africa, the attempt to design legislation applicable abroad has resulted in questions being asked about which situations fall under the legislation.

Extraterritorial oversight is especially important for the private security industry, given its tendency to operate in weak or failed states with limited judicial capacity. States hosting PSCs may simply be unable to oversee PSC actions or to prosecute transgressors, and contracts may be unenforceable in post-conflict settings. In some cases, contractors are rendered immune from prosecution. To make matters worse, the host state may not have influence over who is allowed to contract for private services; private
companies, NGOs and intervening states may all hire whatever private protection they see fit, even if doing so is bad for the host state.

Extraterritorial provisions in domestic legislation to deal with contracts between PSCs and other non-state actors (NGOs and private companies) are also necessary to ensure good behaviour in states with weak judicial systems. Provisions for extraterritorial prosecution in the state sending the PSC can thus protect the state in which the PSC operates, as can robust international law. Relying on domestic regulation to deal with the private security industry does not recognise the difficulties caused by an industry which operates in weak states without the capacity for effective domestic regulation.

There are very few industries that operate in a fashion analogous to PSCs, which conduct their business almost exclusively overseas and are subject only to the regulation of their home state. The analogy between PSCs and container ships is probably closer. Ships need only be registered and meet the regulation of one state in order to operate around the world. Civil aviation provides an interesting counterpoint. Domestic airlines, which are based at home but, of course, operate around the world, are subject to the regulation of the International Civil Aviation Authority, as well as to the rules of their home state. In addition, there are a number of international treaties regarding how problems associated with air travel ought to be solved, ranging from small ones (statutory rights if a flight is delayed) to major ones (how to handle hijacking). Aviation is controlled both domestically and internationally, thus helping to overcome the problems associated with the extraterritorial application of the law.

The balancing act of domestic regulation

Any framework aimed at regulating PSCs domestically must tread carefully, balancing between being so tight that it makes companies less competitive and forces them to seek new bases, and so loose that it hardly makes a difference. The impact of regulation on competitiveness is an issue of concern for PSCs. A licensing regime that were to scrutinise every contract could hinder the ability of companies to deploy quickly, or to deploy at all. However, ‘registration and notification’ systems might give companies too much free rein. Unless there are serious consequences associated with being removed from the list of approved companies, and unless there are oversight mechanisms to ensure that companies who break the rules will face consequences, registration and notification systems will be prone to abuse.

Extremely tight regulation runs the risk of alienating potential partners for governments, or, even worse, driving them offshore. Governments
may well find it useful in the future to be able to rely on PSCs and the risk of prohibitive regulation is that they will deny themselves this option. It is for this reason that it is most unlikely that states such as the US and the UK will opt for outright bans on PSCs. This problem is visible in the shipping industry, where operators who wish to avoid meeting stringent regulations simply register their ships in a state with lax rules. The only likely solution to this problem is to have clear and applicable international standards, as well as domestic rules, meaning that moving offshore would not necessarily mean moving away from oversight.

**Regulation of the willing**

Regulation may serve to make the more legitimate PSCs even more legitimate, while marginalising their less legitimate competitors. Regulation will have very little effect on the most dangerous elements of the industry. Implementing the proposals set out in the UK Green Paper would not have prevented Simon Mann’s coup attempt in Equatorial Guinea. Any new regulation will only serve to control those companies who already want to be controlled. Domestic regulation cannot control or punish those companies or individuals who work for illegitimate or dangerous causes abroad. It would be naive to think that regulating PSCs will solve the problems caused by private actors using force for their own interests around the world. At its best, all regulation (as opposed to a ban) will be able to do is to draw a sharp distinction between the good, the bad and the ugly, and ensure that state contracts only go to legitimate companies. However, the only way to gain control over those entities unwilling to join trade organisations or to apply for governmental licences is to focus on regulation at the international level.

Hard questions need to be asked about domestic regulation. As Lucia Zedner of the University of Oxford argues in relation to the domestic private security industry, reducing security to the level of a commodity to be bought and sold like any other ‘denies it any larger ethical purpose … instead of debating what security is for, for whom it must be secured, and by what means, the emphasis of governmental regulation is upon ensuring the health and profitability of the industry’. Ethical concerns about privatising a core function of the state have a long lineage and ought to be considered in any type of regulation. These concerns not only include questions about the nature of security, but also questions about whether privatising security reduces popular control over the decision to use force and whether it is acceptable to fight for profit. While it is not useful to argue that the clock should be turned back and that the reality of today’s
industry be ignored, it is worth discussing the way the industry should be developed, and to do so demands that ethical questions be confronted.

**Conclusion**

Examining the state of domestic regulation in the United States, South Africa and the United Kingdom, and discussing the challenges of regulating private security at the domestic level, reveals that while domestic regulation is a good start, by no means does it offer a complete solution to the challenges posed by PSCs. The question remains: what would it take to overcome the problems of domestic regulation? And furthermore, what would a system with fair competition for contracts, deep scrutiny of each licence granted to a PSC, stringent oversight of the performance of that PSC, and clear and organised mechanisms for prosecution for any crimes committed look like? How much work would it take to create the kind of oversight and accountability mechanisms needed, and to ensure the whole system were transparent?

Creating a series of mechanisms to ensure transparency, accountability and oversight is, in a sense, duplicating the procedures in place for state militaries in modern democracies. The decision to use force in a democracy is subject to debate by elected bodies. After the military is sent to fight, its actions are scrutinised by the media and by elected officials. Militaries in modern democracies have a clear and well-recognised system of courts martial, which ensures that transgressors are accountable for their actions. Private security companies operate without democratic debate, without formal oversight and without mechanisms for legal accountability. Moreover, domestic regulation is ill-suited for dealing with an industry that not only operates offshore, but tends to operate in places where the rule of law is hampered. Many of the obstacles for effective domestic regulation might be improved by robust international regulation. It makes sense that an industry that operates internationally should be regulated internationally.