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**COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW
(CAHDI)**

**40th meeting
Tromsø, Norway, 16-17 September 2010**

**COMMITTEE OF MINISTERS' DECISIONS OF RELEVANCE TO THE CAHDI'S
ACTIVITIES INCLUDING REQUESTS FOR THE CAHDI'S OPINION**

Ad hoc terms of reference to the Committee of Legal Advisers on Public International Law (CAHDI), to study the suggestions made in the Venice Commission's report on Private military and security firms and erosion of the state monopoly on the use of force (document CDL-AD(2009)038)

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1. Committee of Ministers' decision of relevance to the CAHDI's activities

CM/Del/Dec(2010)1083/10.1E / 23 April 2010

"Private military and security firms and the erosion of the state monopoly on the use of force" – Parliamentary Assembly Recommendation 1858 (2009) (REC_1858 (2009), CM/AS(2010)Rec1858 prov2)

Decisions

"The Deputies

1. adopted the reply to Parliamentary Assembly Recommendation 1858 (2009) on "Private military and security firms and the erosion of the state monopoly on the use of force", as it appears at Appendix 10 to the present volume of Decisions;¹

2. adopted Decision No. CM/881/21042010, as it appears at Appendix 11 to the present volume of Decisions², giving ad hoc terms of reference to the European Committee on Crime Problems (CDPC), the Steering Committee for Human Rights (CDDH) and the Committee of Legal Advisers on Public International Law (CAHDI), to study the suggestions made in the Venice Commission's report on Private military and security firms and erosion of the state monopoly on the use of force (document CDL-AD(2009)038), in the light of the Parliamentary Assembly's Recommendation 1858 (2009) on the same subject, and to report back."

¹ *Note of the Secretariat* : Appendix 10 appears in item 2 of this document.

² *Note of the Secretariat* : Appendix 11 appears in item 3 of this document.

2. Reply to Parliamentary Assembly Recommendation 1858 (2009) on “Private military and security firms and the erosion of the state monopoly on the use of force”

(Adopted by the Committee of Ministers on 21 April 2010 at the 1083rd meeting of the Ministers’ Deputies)

1. The Committee of Ministers has noted with interest Parliamentary Assembly Recommendation 1858 (2009) on “Private military and security firms and the erosion of the state monopoly on the use of force” which it has brought to the attention of the member states’ governments. It has also communicated it to the Steering Committee for Human Rights (CDDH) and to the European Committee on Crime Problems (CDPC), for information and possible comments and to the European Commission for Democracy through Law (Venice Commission) for information and for it to be taken into account in its future work.

2. Notwithstanding the fact that matters relating to national defence do not fall within the scope of the Council of Europe, the Assembly’s recommendation raises important questions related to the rule of law and protection of human rights, which are at the core of the Council of Europe’s activities. The Committee of Ministers notes the concerns expressed by the Assembly concerning the possibility of a legal vacuum at international level regarding certain private companies which carry out military or security related activities. The Committee of Ministers encourages all member states to consider carefully how to counter the perception feared by the Assembly.

3. The Committee of Ministers notes that in June 2009, the Venice Commission adopted a report “on private military and security firms and erosion of the state monopoly on the use of force” (see document CDL-AD(2009)038). It has invited the European Committee on Crime Problems (CDPC), the Steering Committee for Human Rights (CDDH) and the Committee of Legal Advisers on Public International Law (CAHDI), to study, in the light of the Parliamentary Assembly’s opinion, the suggestions made by the Venice Commission in its report and to report back.

4. The Committee of Ministers will keep the Parliamentary Assembly informed about any further developments as regards the issues covered by the recommendation.

3. **Ad hoc terms of reference for the European Committee on Crime Problems (CDPC), the Steering Committee for Human Rights (CDDH) and the Committee of Legal Advisers on Public International Law (CAHDI) to study the Venice Commission's report on private military and security firms and erosion of the state monopoly on the use of force**

1. Name of Committee:

European Committee on Crime Problems (CDPC), Steering Committee for Human Rights (CDDH) and Committee of Legal Advisers on Public International Law (CAHDI)

2. Source:

Committee of Ministers

3. Duration:

These terms of reference shall expire on 31 December 2010.

4. Terms of reference:

To study the suggestions made in the Venice Commission's report on private military and security firms and erosion of the state monopoly on the use of force (document CDL-AD(2009)038), in the light of the Parliamentary Assembly's Recommendation 1858 (2009) on the same subject, and to report back.

4. Parliamentary Assembly Recommendation 1858 (2009)³ on “Private military and security firms and erosion of the state monopoly on the use of force”

1. In recent years, there has been a growing trend in a number of states, including in Europe, to involve private companies in assuming various tasks in the military and security areas, which traditionally had been a domain for state actors.

2. According to some research publications, there are currently more than a million employees working as private soldiers or security officers for over one thousand private military and/or security companies (PMSCs) in over one hundred countries in the world. In 2006, the turnover in this new branch of the service industry was estimated at about US\$200 billion.

3. As this new industry seeks to develop its own markets, serious questions arise of a systemic and principled nature. On the one hand, most of the large PMSCs are organised as shareholder companies or are part of profit-oriented enterprises. As such, they have every interest in the outbreak or maintenance of conflicts as a means of securing their economic growth. The more conflicts increase, the more the market for their services becomes profitable. On the other hand, for states, the emergence and pursuit of conflicts place a major strain on public budgets and resources, leading to a conflict of interests between the public and private sectors.

4. States are the main contractors of PMSCs, but other actors, for example major international organisations (such as the United Nations), private businesses, humanitarian agencies, the media and non-governmental organisations, turn more and more often to these services to provide security in zones of conflict or instability.

5. The increasing privatisation of the military and security apparatuses undermines the traditional position of a state as the only actor allowed to legitimately and lawfully use force, both internally and externally. It presents a fundamental challenge to modern democracies, as the right to use force shifts from the state, guarantor of the public interest, to private actors driven by corporate interests.

6. Bearing in mind that PMSCs respond to some real needs and are already part of reality, states should make every effort to retain and regain full control over the activities of PMSCs, which should be limited as much as possible in order to avoid and, as the case may be, reverse the erosion of the states' monopoly on the exercise of force. It is at least necessary and possible to create an adequate framework for their activities to ensure that they are carried out in compliance with the basic principles of democracy, respect for human rights and the rule of law. The legal framework should take adequate account of the important differences between military missions on the one hand and security missions on the other.

7. To date, the main public concern about PMSCs' activities is related to possible – and in many cases real – human rights abuses by the personnel of these private companies and the difficulty of bringing perpetrators to justice, with the ensuing risk of impunity.

8. PMSCs' personnel and their employers are bound first and foremost by the law of the land of the country in which they operate, as well as by general provisions of international

³ Assembly debate on 29 January 2009 (8th Sitting) (see Doc. 11787, report of the Political Affairs Committee, rapporteur: Mr Wodarg; and Doc. 11801, opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Sasi). Text adopted by the Assembly on 29 January 2009 (8th Sitting).

humanitarian law. They are also bound by provisions of human rights law, insofar as they perform tasks which are normally performed by state actors. However, there are multiple difficulties in applying these provisions in practice.

9. Apart from the deficit of legal answerability, however, the activities of PMSCs raise a whole range of concerns related to the lack of democratic control, transparency and accountability, a higher risk of human rights violations, the growing influence of private businesses on political choices and policy orientations, the blurred division of tasks between the military and the police, and the shift from crisis prevention to rapid reaction and from the civilian handling of crises to the use of force.

10. As the PMSCs often operate internationally and their activities have transnational aspects and consequences, there is a clear need to regulate such activities at the international level. However, there are no specific legal instruments under existing international law that explicitly regulate such activities.

11. Many of the challenges arising from the increasing role of PMSCs reach to the core of the values protected by the Council of Europe. Our Organisation has therefore particular responsibilities in addressing the issue of regulating the activities of PMSCs on the basis of common principles. The Council of Europe, with its experience in defining, promoting and protecting common standards in the field of human rights, democracy and the rule of law, offers the appropriate framework for this, and should take the lead in this process, as it has before in many other groundbreaking areas.

12. Accordingly, the Parliamentary Assembly recommends that the Committee of Ministers draw up a Council of Europe instrument aimed at regulating the relations of its member states with PMSCs and laying down minimum standards for the activity of these private companies.

13. The Assembly suggests that such an instrument should, as a minimum, include the following elements:

13.1. definition of those areas of internal and external security that must remain a sovereign function of the state and that are “inherently governmental” in character;

13.2. standardisation of the principles for the safeguard of the state monopoly on the use of force;

13.3. clear affirmation of the dividing line between internal and external security as established by law and the constitution;

13.4. confirmation of priority of conflict prevention to rapid reaction and of the civilian handling of crises instead of the solution of conflicts by use of force;

13.5. standardisation of the principles for the use of PMSCs;

13.6. determination of criteria regarding the activities, obligations, duties, responsibilities, including accountability for breaches of international humanitarian law and human rights abuses, and the areas of work and competences of PMSCs;

13.7. definition of criteria that must be applied to authorise PMSCs to provide military and security services;

13.8. introduction of a registration and licensing system for PMSCs;

13.9. adjustment and harmonisation of national and international criminal law (especially rules of law enforcement) regarding criminal acts committed by PMSCs and their personnel;

13.10. introduction of specific rules for PMSCs in civil law (especially as regards conditions of liability);

13.11. setting up of a legal and regulatory framework for PMSCs that wish to export their services (for example, mission- and project-oriented authorisations which provide democratic oversight, control, supervision as well as accountability and specification of responsibilities; it would be advisable to combine such regulations with the existing arms export regimes);

13.12. requirement of parliamentary approval for missions of PMSCs outside their national territory, and provisions establishing co-operation, information sharing and assistance between the states involved;

13.13. application of laws and rules governing deployment of national military and police forces abroad to PMSCs as well;

13.14. introduction of rules and regulations (for example, a code of conduct and the requirement to register with the foreign ministry) for businesses, non-governmental or humanitarian organisations, etc., that wish to contract PMSCs for their security purposes abroad;

13.15. obligation on the part of the PMSC sector to set up a framework for self-regulation, including a binding code of conduct and the establishment of a PMSC Ombudsman and/or a PMSC violations investigation team. It is understood that any such self-regulation merely complements and does not replace the control of legality exercised by the competent state law-enforcement bodies, which shall be seized automatically of any violations encountered by the proposed self-regulation mechanisms;

13.16. regulations that include the following elements: an effective vetting and training system for PMSC personnel; an effective oversight and investigatory system; an effective enforcement system, and the protection of social rights of PMSCs' employees.

14. With regard to the possible nature of such an instrument, the Assembly states its preference for a legally binding document (convention). However, the Assembly would welcome it if, prior to drafting such a convention, and in order to achieve a sense of common purpose, the Committee of Ministers could adopt a recommendation to the member states.

15. In the meantime, the Assembly recommends that the Committee of Ministers support, on behalf of the Council of Europe, the Montreux Document on Private Military and Security Companies which sums up legal obligations under existing international law and best practices related to PMSCs' activities, and call on member states that have not already done so, to endorse it.