

## Submission to the Kenya National Assembly's Administration and National Security Committee

### Analysis of the Private Security Regulation Bill 2014

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## Introduction

The Institute for Human Rights and Business (IHRB) is a global centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards. We seek to shape policy, advance practice and strengthen accountability, with a view to ensuring that the activities of companies do not contribute to negative human rights impacts, and in fact lead to positive outcomes. The IHRB-Nairobi Processes made this submission on the draft Private Security Regulation Bill as part of our on-going work on reviewing and commenting on draft legislation relevant to the operation of the extractive sector in Kenya.

The Private Security Regulation Bill 2014 (the Bill)<sup>i</sup> seeks to provide a framework for the regulation of private security industry and to ensure that private security service providers “operate efficiently in accordance with the principles of good governance and sound commercial principles.”<sup>ii</sup>

This analysis focuses on select provisions of the Bill which require enhancement to integrate human rights standards and ensure greater respect for human rights and accountability, recognizing that the Bill already includes a number of welcomed references to human rights such as ensuring that the exercise of the powers of arrest does not infringe on rights and provisions on the human rights of those employed in the industry.

## General Recommendations: Cross-Cutting Concerns

### Summary of Recommendations

- Establish Chapter 4 of the Bill of Rights of the Constitution as a core guiding principle for the Bill
- Provide clear provisions about whether private security providers can be armed and how they will be regulated
- Include appropriate references to international humanitarian and human rights law and international human rights standards on the use of force
- Ensure coverage of all categories of private security services providers
- Define all key terms used and ensure consistency in the use of the terms

### Establish Chapter 4 of the Bill of Rights of the Constitution as a core guiding principle for the Bill.

Section 5 of the Bill outlines the guiding principles for the Bill that bind all persons subject to it. It provides that all persons subject to the Bill shall at all times respect, uphold and defend principles enshrined in the Constitution. In particular, the addressees of the Bill are expected to uphold and respect provisions of Article 238 (1) and 238 (2) of the Constitution that set out the principles of national security. Moreover, they are required to recognize and respect the role of national security organs as outlined in Chapter 14 of the Constitution or any other written law.

There is also a need to secure the protection and promotion of human rights in the context of private security services, both for service providers and the public. It is thus imperative to embed the respect for human rights and constitutional rights as guiding principles for the Bill in addition to the specific references to the national security provisions. To safeguard human rights, both for service providers and the public, Section 5 of the Bill should also include a specific reference to Chapter 4 of the Constitution.

### Provide clear provisions about whether private security providers can be armed and how they will be regulated.

One of the biggest gaps in the current Bill is its failure to provide clarity around whether private security providers can be armed and if so, what restrictions apply to the use of arms. This is a significant oversight that has the potential to create confusion about the requirements for arming private security guards, and ultimately could

threaten public safety. The Bill introduces the terms “armed guards and unarmed guards” in Section 35(b) – almost in passing in relation to notices of termination of guards -- but otherwise does not further address the issue of armed private security. Rather than specifically authorising the use of weapons if that is the Bill’s intention, it does so by implication.

Not all countries allow private security to be armed so this is already an important choice made in the Bill that should be clearly signalled. It has been shown in other jurisdictions that armed private sector security personnel often lack training, screening, regulation and proper pay. It is thus imperative that in addition to specifically authorising private security providers to be armed that this is accompanied by specific provisions in the Bill and follow up regulations, considering the responsibilities that are associated with handling firearms.

There is a need to define further forms of screening for guards who will be armed in addition to the requirements set out in Sections 23(2) and 29(2), which kinds of weapons private security providers will be entitled to carry, the conditions under which weapons may be used, how weapons will be controlled and registered, who is responsible when force is used unlawfully, their duties and specific responsibilities, and the frequency and scope of training needed for guards to be armed. Training should also focus on human rights including international human rights law and where relevant international humanitarian law for cases in extraterritorial contexts that involve humanitarian services. There is need to ensure accountability through monitoring and oversight both internally by the providers and externally by the Authority/Ministry. (See comments further below on the Code of Conduct for private security providers).

### **Include references to international humanitarian and human rights law and to the specific international protocols on the use of force.**

The Bill can be enhanced by including appropriate references to international humanitarian law. Private security providers increasingly operate in humanitarian crisis zones and in countries at war. The Bill allows foreign companies to register as private security service providers in Kenya (Section 29(b)) and also seeks to regulate private security services registered in Kenya rendered outside the Republic (Section 3(c)). Including these international standards will ensure that private security providers can be held accountable for their actions not only under local regulations but also under international humanitarian law.

Currently the Bill only includes a reference to “the use of minimal force in accordance with international best practices” in the Second Schedule on the Code of Conduct. The Bill should also include more specific references to international standards on the use of force that provide more specific guidance and are widely used and recognized by governments and the industry: the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>iii</sup>

## Ensure coverage of all categories of private security services providers.

Section 6 of the Bill requires mandatory registration of any person or firm offering private security services. However, it does not require the registration of private security guards, which contradicts sections 21 and 22 of the Bill. Section 21 provides that a person shall not 'engage in the provision of private security services or offer such series at a fee except when registered by the Authority.' Section 22 lists security guards as 'individual private security service providers.' To ensure consistency in the Bill, private security guards should be included in the general definition of private security service providers.

## Define all key terms used in the Bill and ensure consistency in the use of the terms.

It is important to define key terms used in the Bill and avoid using terms interchangeably. In some sections the Bill introduces new undefined terms. For example, section 39(1) (b) lists conditions that make a person ineligible for registration. These include the conviction for 'an offence involving violence, fraud or theft.' Since there is no official legal definition for an 'offence involving violence,' the term needs to be defined with reference to existing offences if it is to be used in the Bill.

Section 39(1) (d) introduces for the first time the term 'associating' in the Bill. This term has been used in relation to organization which are prohibited under any law. There is no definition or parameters provided for establishing such an association or even what 'associating means'. The lack of clear parameters will make it difficult to give effect to this provision. In addition, the terms 'public officer' in section 39(1) (d), 'locksmiths' (h) and who is and is not a "private investigator' should be defined.

## Part I of the Bill / Issue 1: Scope of Coverage

### Summary of Recommendations

- Include Kenya Police Reservists into the category of "Members of Disciplined Services"
- Regulate private security services registered in Kenya rendered outside the Republic

*Part I of the Bill, the "Preliminary" Section, is divided into 6 sections and addresses issues such as the objects of the Bill, its application, guiding principles and guidelines on mandatory registration. These sections can be enhanced through adjustments concerning the scope of coverage.*

## Include Kenya Police Reservists as part of "member of a disciplined Services".

The Bill defines "Members of a disciplined services" as including a members of the National Police Service, Kenya Defense Forces, National Intelligence Service, Kenya

Forest Service, Kenya Wildlife Service, Prisons Department and any other service established under an Bill of Parliament that offers security or quasi-security related services. This interpretation excludes Kenya Police Reservists (Reservists), a category established by Article 110 of the National Police Service Act. Reservists are bound by the same requirements as police officers and shall be supervised by the National Police Service (Article 110(4)). Moreover, Reservists may be deployed in Kenya to assist the Kenya Police Service with the maintenance of law and order, preservation of peace, protection of life and property, prevention and detection of crime, apprehension of offenders and enforcement of laws and regulations with which the Service is charged. Since Reservists are held accountable just as the Kenya Police Service officers, it is important that they be included in the definition of 'Members of Disciplined Services.'

## **Regulate private security services registered in Kenya rendered outside the Republic.**

Section 3(c) states that the Bill seeks to regulate private security services registered in Kenya rendered outside the Republic. This is a good provision and one that is intended to ensure accountability of private security service providers beyond Kenyan territory. However this requires further guidelines on how this will be effected. Regulation of extra-territorial services therefore should be clear to ensure effectiveness. States are better placed to regulate such extraterritorial operations when they have strong extraterritorial jurisdiction over operations of private security services abroad and be able to prosecute any acts that amount to violation of this Act.

It is important to note that extraterritorial oversight poses challenges, especially in regards to the supervision of foreign operations and services of a company. Efficient supervision constitutes a complex process. It requires significant financial investments in facilities and human resources. It becomes even more complex when it comes to the prosecution of the service provider. It is hence vital to clearly define the scope of such a regulation and the circumstances which would lead to prosecution. The Bill must be alive to the complex nature of extraterritorial regulation of private security services and consider the financial implications of oversight.

## **Part II of the Bill / Issue 2: Establishment and Composition of the Authority**

### **Summary of Recommendations:**

- Establish standards governing setting up private security training services
- Establish that existing redress avenues and laws be pursued for violations of law relating to services offered to users
- Ensure a lean number of Board members but increase the number of resident representatives to the Board
- Ensure that Authority Board members are free from conflicts of interest

*Part II of the Bill provides for the establishment and composition of the Private Security Regulatory Authority, which shall be mandated to oversee the private security services*

*industry in Kenya. These sections should be enhanced to strengthen the mandate of the Authority and ensure that the Authority executes its mandate effectively and efficiently.*

### **Establish standards governing setting up of private security training services.**

Section 9 outlines the functions of the Authority. Section 9(i) introduces private security training institutions and requires that the Authority sets standards and accredits such institutions. It is however important to note that the Bill fails to establish standards that govern setting up of private security training institutions. This may greatly affect vetting of training institutions and the actual oversight and hence such standards are needed. In addition, the monitoring and auditing of the quality of training functions performed by accredited persons (Section 9(ii)) should be open to both institutions and persons. This would make the provisions consistent with Section 9(i) Subsection (i) which refers to both persons and institutions. This would guarantee the hiring of accredited and qualified persons to offer high quality training services.

### **Establish that existing redress avenues and laws be pursued for violations of law relating to private security services offered to users.**

Section 9(q) provides for redress of complaints by users of private security services relating to violations of the law. The Authority is required to protect the interests of the users by offering avenues for redress. This is a positive measure considering that complaints may arise between providers and users. It is consequently important that the redress avenues offered allow the use of existing laws and institutions to make complaints. Users should have the choice to pursue complaints through avenues in which they trust and expect fair and just determination or through the complaints mechanism established under the Bill.

### **Ensure a lean number of Board members to start but increase the number of resident representatives to the Board.**

Section 11(a-e) establishes membership of the Board that shall govern the Private Security Regulatory Authority. A majority are members representing government ministries: principle secretaries in charge of internal security, finance, labour and National Police Service. Other members include two representatives of registered employee associations, private security firms associations and one member for registered resident associations respectively. Government representation dominates and this may greatly influence the independence and diversity of the Board. There is need to consider reducing government representation and diversifying into other sectors closely related to security for efficacy.

Resident Associations have been allocated only one slot (section 11) compared to the private security associations and associations of private security employees. This may have a negative influence on their bargaining power. Further, it may also be hard to establish legitimate and functional resident association/s representing the interest of all

residents in Kenya. The number of members representing the interests of residents should therefore be increase with consideration of gender representation as well.

## **Authority Board members must be free from conflict of interests.**

Section 11(3) establishes qualifications for appointment of the chairperson of the Authority. The Board's effectiveness can be better secured if members have no existing vested interests in the sector. It is thus important that the chairperson of the Board meets this condition. The qualifications outlined fail to include such an important qualification. It is thus imperative that the presidential appointee to the Authority shall be free from vested interests that may result in a conflict of interests of his or her role.

## **Part III of the Bill / Issue 3: Registration of Individual Private Security Providers**

### **Summary of Recommendations**

- Matters relating to national security should not be vested with the Authority

*Part III of the Bill outlines requirements for registration as an individual private security service provider. Section 21 defines individual private security service provider to include a security guard, a private security officer employed in a private security firm or a private security provider. Part III can be enhanced by establishing the limits of functions of the Authority relating to registration.*

## **Matters relating to national security should not be vested with the Authority.**

Section 26(4) establishes conditions for renewal of registration for individual private security providers. Upon investigation the Authority has the powers not to renew the registration of a private individual service provider if it is established that the person constitutes a threat to national security. This provision raises questions over who is mandated to determine entities that are a threat to national security. Is it a function of the Authority or the national security organs as provided in Article 239(1) of the Constitution? It is necessary to limit the capacity of the Authority to declare that a person constitutes a threat to national security in order to avoid overlapping mandates and conflict with state agencies/ministries mandated to handle matters of national security. The Authority should instead require clearance of persons or entities seeking renewal of registration from the relevant security bodies.

## Part IV of the Bill / Issue 4: Registration as a Corporate Private Security Provider

### Summary of Recommendations

- Ensure a clearer and more inclusive registration process for all intended persons
- Reconsider notification to the Authority on employment status

*Part IV of the Bill establishes procedures for those intending to register as a corporate private security service provider. It also establishes guidelines for approval and decline of licences as well as duties of the corporate private security provider. There is however a need to strengthen this section to better regulate corporate security providers.*

### Ensure a clearer and more inclusive registration process for all intended persons.

Section 33(1) forbids private security firms to employ private security service providers, security guards or trainers who are not registered under this Act. This condition also affects persons employed in private security service firms including those offering security training services (section 33(2)). There is need for consistency and clarity throughout the Bill as the Bill has not defined a trainer as a private security service provider. The requirement to register should apply to those who are recognised as private security service providers in the first instance. It is also important to define a 'trainer' and provide guidelines on the registration of trainers to avoid introducing trainers in the Bill only for purposes of registration. It is also important to define how experts hired to offer training services for short periods should be treated and whether they are subject to the registration requirement. Alternatively, consider establishing a clear process for clearance of this category of persons allowing them to offer the requested support within specified timelines.

### Reconsider notification to the Authority on employment status.

The Authority must be informed in writing of the reasons for any dismissal, resignation, retirement or termination of service of any armed or unarmed private security guard under Section 35(b). It is important to consider the complexity of implementing such a notification process. Will the Authority have the capacity to handle large volumes of notifications from security guards specifically? Otherwise, the requirement may establish a routine process without any significant outcome. Against this backdrop, it is important that the section is clear on how notifications will be handled and its intended goal – focusing on armed security guards who have been terminated or dismissed for cause should be a priority.

## Part V of the Bill / Issue 5: General Provisions on Registration

### Summary of Recommendations

- Establish a more structured process with reasonable timelines for appeals

*Part V of the Bill establishes general provisions on the registration of private security services providers. This includes inspections for registration compliance, ineligibility for registration, access to information from the Authority and appeals to the secretary and courts. Strengthening the provisions on appeals can enhance this section.*

### Establish a more structured process with reasonable timelines for appeals.

Sections 43 and 44 establishes that those with grievances can appeal to the secretary and those aggrieved by the decision of the Authority or Cabinet Secretary can further appeal to any court of competent jurisdiction. It seems ambitious that the Cabinet Secretary should be able to deliver a decision within fourteen days of the hearing of the case by an ad hoc committee. This viability of this set-up would depend on the number of complaints submitted requiring determination; setting up an ad hoc committee for each submitted complaint is also problematic. A more structured process - like a tribunal – should be considered as an avenue to handle complaints. The provision tends to limit appellants to the Cabinet Secretary without giving the option of seeking redress through the Cabinet Secretary's office or any other legal means of one's preference. Appellants should be able to bring their complaints directly to court and not first to the Cabinet Secretary.

## Part VI of the Bill / Issue 6: Cooperation with National Security Organs

### Summary of Recommendations

- Define the nature of cooperation between the national security organs and private security service providers to maintain law and order

*Part VI of the Bill establishes cooperation between private security service providers and the National Security Organs in the maintenance of law and order. There is however a need to enhance the provision by defining the nature of cooperation and the respective responsibilities.*

### Define the nature of cooperation between the national security organs and private security service providers to maintain law and order.

Sections 45(1) and (2) establish a duty to cooperate on the part of the private security service provider with a National Security Organ in maintenance of law and order or in any other manner as may be defined by the instrument of request. The Cabinet

Secretary shall be required to make regulations governing the cooperation in consultation with the Inspector-General and the Authority. The regulations shall define the scope, mechanism and command in the case of cooperation.

Cooperation with private security service providers poses significant challenges especially in situations where such cooperation negatively impacts on human rights and adherence to the rule of law.

The promotion of national security is a function of national security organs as provided for by Article 239 (1) and 239(2) of the Constitution and thus should not be a function of the private security providers. There is need to be clear whether private security service providers will be held to the same level of accountability as the national security organs. In light of the risk of potential human rights violations in situations of cooperation, it is important to establish rules of engagement guided by the Constitution, especially Chapter 4 on the Bill of Rights, Articles 238(1) and (2) and 239 and international human rights law. The guidelines should spell out the obligations of private security service providers and define respective accountability in case of any violations as a result of the cooperation. Further, rules of operation need to be developed, in particular regarding the use of firearms by private security. Will private security play the same role as the national security organs play with respect to of use of firearms?

There is need to also ensure that the line between public and private law enforcement is not blurred through such cooperation. The broad range of the functions, capabilities, expertise and resources of private security service providers needs to be well understood to determine the role they can play along with the National Security Organs in maintaining law and order. Their specific role in the cooperation needs to be clearly defined and delimited.

## Part VII of the Bill / Issue 7: Power to Arrest

### Summary of Recommendations

- Ensure that power to arrest is in accordance with the Constitution of Kenya and international human rights law

*Part VII of the Bill establishes that a private security provider has powers to arrest for offences in places where they have responsibility to guard. It also helpfully requires that the right to arrest does not infringe on the rights or fundamental freedoms of the person arrested however further enhancements to require compliance with the Constitution and international human rights law are needed.*

### **Ensure that power to arrest is in accordance with the Constitution of Kenya and international human rights law.**

Section 46 establishes the power to arrest and search as part of the general powers of a private security service provider. A private security service provider, a security guard or a security officer may arrest a person who commits an offence on the premises the security provider is responsible for and must immediately hand them over to the police.

The Bill already includes requirements that these actions should not infringe on the right or fundamental freedom of the person; the section or the regulations implementing the provisions can be enhanced by directly referring to specific rights that may be at risk of violation during the arrest of a person. This should include the acceptable timelines for being held and prohibition of any form of torture or other cruel, inhuman or degrading treatment or punishment. The provision can also be strengthened by reference to specific rights in the Constitution and international human rights law.

## Part XII & Second Schedule of the Bill / Issue 8: Code of Conduct for Private Security Providers

### Summary of Recommendations

- Include appropriate references to the Constitution of Kenya.
- Include appropriate references to international standards and initiatives on security and human rights.
- Require specific training on human rights.
- Expand the exclusions on recruitment to persons credibly implicated in past human rights violations.
- Ensure clarity on specific aspects of private security and human rights
- Require that security providers maintain an incident reporting system

*Section 66 of Part XII of the Bill establishes the Code of Conduct for private security service providers that is legally binding on all private security providers. The Code of Conduct also applies to on "every person using his or her own employees to protect or safeguard his or her own property or other interests" which significantly expands the scope of those who must comply with the Code. This section further establishes specific procedural guidelines and rules of enforcement for the Code of Conduct, rules for private security providers, penalties in respect to private security service provision and the process of developing the Code of Conduct. The Second Schedule sets out the Code of Conduct for private security providers.*

### **Include appropriate references to the Constitution of Kenya.**

As noted above, there is a need to secure the protection and promotion of human rights in the context of private security services, both for service providers and the public. As the Code of Conduct may be treated as a separate document from the Bill, it would be useful to also refer to Chapter 4 of the Constitution in the Code of Conduct.

### **Include appropriate references to international standards and initiatives on security and human rights.**

The Code of Conduct is a useful tool to define boundaries within which private security providers should operate. Including a specific obligation on private security providers to respect human rights and to avoid engaging in human rights abuses will be vital in

establishing a sector that positively contributes to the respect of human rights in their operations. In addition, including references to international human rights instruments and other human rights safeguards which relate specifically to private security providers could further strengthen the Code of Conduct by providing more clarity around what is expected.

The International Code of Conduct on Private Security Providers (ICOC)<sup>iv</sup> articulates the human rights responsibilities of private security companies and sets out international principles and standards for the responsible provision of private security services, particularly when operating in complex environments. The ICOC contain important principles and guidance for the conduct of private security personnel with respect to specific human rights issues that relate to private security services including: the prohibition of torture or other cruel or degrading treatment or punishment, the prohibition of sexual exploitation and abuse, of gender-based violence, human trafficking and the prohibition of child and forced labour.

### **Require specific training on human rights.**

Section (c) provides that registered private security providers shall provide basic training for new employees in circumstances where state institutions do not provide it. They are required to ensure internal trainings, on international and national law, cultural sensitivity, first aid and gender issues. Private security providers are likely to deal with sensitive issues and have exposure to or be involved in human rights violations.

To ensure appropriate human rights awareness and sensitivity, international human rights and humanitarian law should be part of these trainings. Adding trainings on the use of force only when strictly necessary and in a manner proportionate to the threat, how to respond to peaceful assemblies or protests in line with international human rights law and international protocols on use of force should be considered. These trainings should be in line with international human rights law and protocols on the use of force e.g. the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Private security providers should be required to maintain records adequate to demonstrate attendance and results from all professional training sessions, including from practical exercises.

### **Expand the exclusions on recruitment to persons credibly implicated in past human rights violations.**

Given the difficulty and time required to prosecute people involved in abusing human rights, the exclusion from employment in Section (d) should extend to persons credibly implicated in past human rights abuses, in addition to those convicted.

### **Ensure clarity on specific aspects of private security and human rights.**

Security providers should build internal systems that underscore the respect for human rights by their employees and that addresses in detail the minimal use of force and

management of weapons in accordance with international standards on use of force – not just international best practice. Section (e) at a minimum should include references to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials as these provide internationally agreed rules on the use of minimal force that are also appropriate for private security providers.

## **Require that security providers maintain an incident reporting system.**

Private security providers should be required to maintain an incident reporting system to identify the use of any weapon, which includes the firing of weapons under any circumstance (except authorized training), any escalation of force, damage to equipment or injury to persons, attacks, criminal acts, traffic accidents, incidents involving other security forces. Where there are incidents the security provider should conduct an internal inquiry in order to determine the time and location of the incident; identity and nationality of any persons involved including their addresses and other contact details; injuries/damage sustained; circumstances leading up to the incident; and any measures taken to respond.

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### **END NOTES**

<sup>i</sup> <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/ThePrivateSecurityRegulationBill2014.pdf>

<sup>ii</sup> The Private Security Regulation Bill, Memorandum of Objects and Reasons.

<sup>iii</sup> [United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials \(1990\)](#).

<sup>iv</sup> [The International Code of Conduct for Private Security Providers](#) (2010) is from the International Code of Conduct Association, a multi-stakeholder initiative established as a Swiss non-profit association which consists of States, intergovernmental organizations, private security companies, and civil society organizations. Private security companies who become members show their commitment to complying with the fundamental human rights and humanitarian law principles and commit to standards articulated in the ICoC. Certification by the Association is a public statement that the security company's policies and systems have been independently reviewed and found to be in compliance with the ICoC, and that member PSCs' activities are continuously monitored.