



Progress and Opportunities: Challenges and Recommendations for Montreux Document Participants

Second Edition

Geneva Centre for the Democratic
Control of Armed Forces



DCAF
a centre for security,
development and
the rule of law

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Benjamin S. Buckland and Anna Marie Burdzy



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DCAF is an international foundation whose mission is to assist the international community in pursuing good governance and reform of the security sector. The Centre develops and promotes norms and standards, conducts tailored policy research, identifies good practices and recommendations to promote democratic security sector governance, and provides in-country advisory support and practical assistance programmes.

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Executive Summary

Background

The Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies (PMSCs) during armed conflict reached its fifth anniversary in December 2013. From an initial seventeen states in September 2008, the number of Montreux Document participants has more than tripled to fifty two states and three international organisations in 2015.¹ This indicates a significant increase in political support for more effective regulation of PMSCs based on international humanitarian law (IHL) and human rights law. The size and scope of the industry has been growing significantly over the past ten years. Across the world, the modern security landscape is characterized by widespread and increasing privatisation, leading to valid concerns over ensuring the respect of human rights and IHL when PMSCs operate in areas of armed conflict but also more broadly – in post conflict and complex environments as well as in states enjoying peace and stability. Indeed, it is important to underline that the Montreux Document is relevant for all states as most of its good practices are ideally put into place in peacetime.

Many observers have speculated on shifting security norms and whether the state's monopoly on the use of force is eroding.² Meanwhile, there is a tendency in the literature to treat private security as illicit, illegal, and immoral.³ This has hindered an understanding of the activities of PMSCs and their connections to wider structures of global governance.⁴ The Montreux Document demonstrates that the oversight role of the state has not necessarily receded in relation to PMSCs. In fact, as the Document makes clear, states are uniquely placed to ensure that PMSCs uphold their commitment to international law. The Montreux Document provides a roadmap in this regard by recalling pertinent IHL and human rights law and compiling a list of good practices that point the way forward for effective oversight of PMSCs. The Montreux Document thus provides practical guidance for home states (where PMSCs are headquartered or based), contracting states (who hire PMSCs) and territorial states (on whose territory PMSCs operate).

Five Years of the Montreux Document

On the occasion of the fifth anniversary of the signing of the Montreux Document, Switzerland and the International Committee of the Red Cross (ICRC), in collaboration with DCAF, convened the Montreux+5 Conference which gathered all Montreux Document participants. The Conference provided an opportunity for participants to share experiences on the regulation of PMSCs and to discuss the implementation of the Montreux Document's rules and good practices.

As stated in the Chairs' Conclusions of the Conference,⁵ a general consensus emerged among attending states and international organisations on the need to promote further support for the Montreux Document and to ensure its implementation at the national level. Conference participants further recognised that a multilayered approach, which combines soft law instruments, self regulatory measures and national legislation provides an innovative and effective model and that these efforts are complementary to the important work of the United Nations related to the drafting of a binding international instrument to regulate the private military and security industry.

Progress and Opportunities: Challenges and Recommendations for Montreux Document Participants

During the run-up to the Montreux+5 Conference, Switzerland commissioned DCAF to conduct a study addressing two interrelated objectives: to provide food for thought to inform discussions during the Conference, and to identify concrete ways in which the Montreux Document can advance implementation of PMSC regulation at the national level.⁶ The resulting report, *Progress and Opportunities Five Years On: Challenges and Recommendations for Montreux Document Endorsing States* (2013) drew on a combination of desk research, information gathered at four regional workshops,⁷ and national reports provided by Montreux Document participants (see Annex three). This second edition (2015) was

commissioned by Switzerland to incorporate and build on the discussions and conclusions of the Montreux+5 Conference, to include feedback from Montreux Document participants, and to integrate new research regarding the regulation and oversight of PMSCs. The second edition reflects important new developments. In particular, one of the key recommendations of the Montreux+5 Conference has been realised: the establishment of the Montreux Document Forum (MDF) as a means to promote implementation and outreach among Montreux Document participants.

Structure of the Report

The study assesses progress and identifies the ways in which states are seeking to ensure more effective regulation of PMSCs. The study also highlights important gaps where states face challenges in implementing the rules and good practices of the Montreux Document. The report is complemented by a series of boxes, which provide a snapshot into individual states' experiences with the regulation of PMSCs. Other boxes describe the different existing international initiatives and instruments in this regard.

The study is structured according to six key implementation challenges faced by Montreux Document participants. Each challenge is analysed and existing good practices are considered. Recommendations are then put forward for ways to support more effective implementation of the Montreux Document. These recommendations fall into three broad categories: roles and responsibilities; procedures, systems and processes; and monitoring and accountability.

I. Roles and Responsibilities

1. Imprecise constraints on which functions PMSCs may or may not perform

There is a lack of precision in the ways that national legislative frameworks address the determination of services that PMSCs may or may not provide. States adopt both proscriptive and permissive approaches to the determination of services. In this sense, states have chosen to

either restrict the functions of PMSCs through legislation that permits specific activities, prohibits them or does a mix of both. Regardless of the approach, legislation should be carefully and precisely worded. Restrictions that limit the activities of PMSCs to exclude only “inherently governmental functions” are often imprecise, unless governmental functions are clearly defined elsewhere. On the other hand, providing a strict list of permitted activities may be equally unhelpful if the categories are not clearly defined. A list of permitted activities is often a static document, while the roles of PMSCs evolve in response to shifting state needs, advances in technology and new security environments. This is demonstrated by the expansion of PMSCs into management of detention centres, intelligence gathering, and the operation of weapons systems. One way of balancing these tensions is by delineating between risk management, training and advisory services, and those activities that may lead PMSCs to directly participate in combat. It is recommended that the determination of services should not be open to wide interpretation by companies, given that an indiscriminate expansion of PMSCs’ activities has the potential to lead to violations of IHL or human rights abuses.

2. Inadequate extraterritorial applicability of legislation for PMSCs operating abroad

Collectively, Montreux Document participants have generated a significant body of legislation relating to the activities of PMSCs in domestic contexts. In most Montreux Document states, PMSCs are subject to effective regulation and oversight when they operate domestically. However, the applicability of this legislation to the activities of PMSCs based in one state but operating abroad is unclear. States can address this challenge in two ways: by clarifying that domestic legislation has extraterritorial applicability or by separately adopting specific legislation relating to the foreign activities of PMSCs. In this way, home states are in a position to hold PMSCs accountable, by asserting jurisdiction over their nationals and the companies based or headquartered on their territory. This is particularly important when PMSCs operate in complex environments where the rule of law may be weak or institutions may be fragile or

ineffective, leaving local populations vulnerable to violations of IHL or international human rights law. In these situations, it is imperative that home states reduce the likelihood of an accountability vacuum by asserting their jurisdiction over their companies and nationals and by bringing prosecutions against those who commit violations.

II. Procedures, Systems and Processes

3. Insufficient resources dedicated to authorisations and to contracting and licensing systems

While most Montreux Document participants have identified a government body responsible for the authorisation, contracting and licensing of PMSCs, it is unclear whether such agencies and institutions have the capacity and resources required to adequately carry out their functions. The activities undertaken by these agencies are complex and may include background checks, issuing permits, auditing and monitoring compliance with terms of licenses, contracts, and authorisations, or implementing administrative sanctions for misconduct. Moreover, these activities are increasingly resource-intensive due to the growing number of companies entering the industry. Given adequate resources, agencies responsible for licensing, contracting and authorisations can be powerful tools for states wishing to ensure compliance with the Montreux Document’s rules and good practices. States can ensure this by streamlining complex and parallel bureaucracies into a central agency, implementing targeted training programmes for agency managers and employees, and by ensuring that they have the capacity and resources required to carry out their mandate.

4. Low standards as a basis for authorisations, contracts and licenses

In obtaining contracts, authorisations or licenses, a central concern of the Montreux Document is that factors such as past conduct, personnel training, and internal company policies are not adequately considered or are treated as less important than

competitive pricing. A wide variety of training programmes and requirements exist across Montreux Document participants, not all of which are adequate or enforced. This variation is (in part) due to the fact that PMSCs carry out a wide range of different activities, requiring differing degrees of specialisation and preparation. Nevertheless, PMSC personnel should receive training to ensure respect for IHL and human rights law. States are in a unique position to encourage and enforce good practices in this regard by requiring minimum training standards as part of contracting, authorisation and licensing processes. States can also require that companies have adequate internal complaints and accountability mechanisms. Of particular importance are requirements relating to the use of force and firearms given their obvious implications for human rights. For instance, granting a license or authorisation to a PMSC that has registered weapons should be conditional on the completion of approved weapons training by relevant staff.

III. Monitoring and Accountability

5. Weak monitoring of compliance with terms of authorisations, contracts and licenses

The availability of effective managerial and administrative monitoring mechanisms is a key resource to support national oversight of PMSCs. State agencies should regularly check compliance with license terms and communicate with parliamentary and other oversight bodies in the interest of transparency and accountability. However, monitoring compliance with licences and contracts is not always done systematically. Mechanisms should also be in place for revoking or suspending operating licences in cases where misconduct is found to have taken place. At the same time, companies should have a fair opportunity to respond to allegations of such misconduct. PMSCs themselves can aid in this process by establishing robust internal complaints and accountability mechanisms.

6. Gaps in criminal and civil legal accountability

Gaps in criminal and civil law remain across Montreux Document participants and this significantly hinders victims of PMSC misconduct from seeking or obtaining redress. International legal remedies depend on the expediency and willingness of national prosecutors to bring cases before a criminal court. However, it may be unclear, for example, whether PMSC personnel are incorporated under the armed forces chain of command and thus protected by immunities. Elsewhere, courts may have difficulties deciding whether they have jurisdiction to prosecute misconduct that has occurred on foreign soil. Where civil remedies are available, victims are often faced with long and costly judicial procedures. Additionally, territorial states (where PMSC misconduct has been concentrated in the past) often do not have the capacity to effectively investigate or prosecute foreign nationals and companies that may be present within their territory. In this regard, home and contracting states should cooperate with territorial states and explore the development of complementary judicial assistance programs. This would help to close the accountability gap and reduce the risk that PMSCs evade liability based on technicalities, jurisdictional or otherwise. Status of Forces Agreements (SOFAs) and other agreements can help clarify the legal situation in some contexts. However, laws should be developed that clarify the applicable jurisdiction and the provisions under which PMSCs and their personnel are liable for misconduct.

The Way Forward and the Montreux Document Forum

The concluding section of this study proposes concrete ways that the Montreux Document can serve as a force multiplier for effective implementation of PMSC regulation at the national level. The section identifies possible options falling into four substantive categories: targeted outreach, tool development, training and capacity building, and increased dialogue.

1. Outreach

Regional outreach has been an important success story for the Montreux Document. However, much remains to be done to increase support for the initiative in different world regions, notably in the Asia Pacific region, Africa, Latin America and the Caribbean. If engagement is to be maximised, there is a need for a more structured and targeted Montreux Document outreach programme. Such a programme could support the following objectives:

- Raising awareness of the Montreux Document in regions that have not been a focus of outreach efforts to date. As part of this effort, the 2015 Montreux Document regional conference will take place in Addis Ababa and will gather English-speaking African states.
- Targeted follow-up to the regional workshops held in Northeast and Central Asia (2011), Latin America (2012), the Pacific region (2012), Southeast Asia (2013), and Francophone and Lusophone Africa (2014).
- Targeted outreach activities to international and regional organisations such as the Organisation Internationale de la Francophonie (OIF), Association of South East Asian Nations (ASEAN), Economic Community of Central African States (ECCAS), the African Union (AU), Economic Community of West African States (ECOWAS).
- Establishing a clear dialogue and exchange with other initiatives concerned with regulating the private security sector.

2. Development of implementation tools

The country-specific and thematic research conducted in the run up to Montreux+5, complemented by the practical experience shared by participants, highlighted the need for practical tools to support implementation. Based on the framework provided by the Montreux Document, tailored guidance should be developed to provide legal and policy support to key stakeholders. These tools may include:

- A legislative guidance handbook
- Research and tools on the development of mutual legal assistance programmes
- Contract templates based on Montreux Document good practices
- Research and development of tools to support training
- Resources and tools to help establish and support effective monitoring regimes

3. Training and capacity building

The Montreux Document should provide momentum and focus to training and capacity building support for participants. Lawmakers require specialist knowledge of the industry and the different methods and good practices of regulation. Meanwhile, agencies and actors responsible for monitoring of PMSCs also require appropriate training and resources. Effective regulation thus requires a “joined up” approach across the range of actors involved in implementation, management and oversight aspects of PMSC regulation. The following elements would support effective training development:

- An analysis of training needs based on Montreux Document good practices
- The identification of curriculum requirements and the development of training support tools.
- Capacity building support linked to wider security sector reform programmes that promote whole of government approaches to reinforcing the management and oversight of the security sector.

4. Institutionalisation of a regular dialogue among Montreux Document participants: The Montreux Document Forum

The recommendations contained throughout this study concern the implementation of specific national processes to better regulate the PMSC industry. At the same time, there is a need for continuing discussions among Montreux Document participants on the ways that the Document's rules and good practices can be better implemented. During the Montreux+5 Conference, participants supported the idea of establishing a Forum to create a dedicated space for more regular dialogue for members of the Montreux Document community. According to participants, such a forum could gather and disseminate information on the Document, facilitate coordination and communication among participants and act as a repository for research and the compilation of good practices. The forum would further promote outreach to states and international organisations, and explore ways to implement more effectively the Montreux Document's rules and good practices. Participants agreed that the Montreux Document needs a centre of gravity if it is to optimise its role as a force multiplier for national efforts to regulate PMSCs.

As a result of the conference discussions, this report's recommendations and the agreement among participants on the need for more regular dialogue, Switzerland and the ICRC coordinated preparatory discussions and consultations with Montreux Document participants throughout 2014, with the goal of establishing the Montreux Document Forum (MDF). The MDF was launched in December 2014 during a Constitutional Meeting of Montreux Document participants. The MDF is currently chaired by Switzerland and the ICRC. DCAF supports the MDF as the secretariat.

Drawing on the experience of participants, the institutionalisation of a regular dialogue in the form of the MDF can play a significant role in supporting the implementation of the recommendations of this report.

NOTES

1. For an up-to-date list of participants, visit www.mdforum.ch.
2. Deborah Avant, "Private Security Companies," *New Political Economy* 10, no. 1 (March 2005), 121-131; Deborah Avant, *Market for Force: The Consequences of Privatising Security* (Cambridge University Press, 2005); 824-849; Alexis P. Kontos, "'Private' Security Guards: Privatised Force and State Responsibility under International Human Rights Law," *Non-State Actors and International Law* 4, no. 3 (2004); Elke Krahnmann, "Security: Collective Good or Commodity?" *European Journal of International Relations* 14, no. 3 (2008), 379-404; Anna Leander, "Regulating the Role of Private Security Companies in shaping Security and Politics," in Simon Chesterman and Chia Lehnhardt (editors), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007), 49-66. Laura Peterson, "Privatising Combat, the New World Order," in *Making a Killing: The Business of War* 5, 6 (2002); Martha Elizabeth Phelps, "Doppelgangers of the State: Private Security and Transferable Legitimacy," *Politics and Policy* 42, no. 6 (December 2014); Peter Singer "Corporate Warriors: The Rise of the Privatized Military Industry and its Ramifications for International Security," *International Security* 26, no. 3 (2001), 186-220.
3. Gloria Galloway, "Foreign Mercenaries : Accountability of Private Security Forces Questioned," *The Globe and Mail* (23 October 2007); Ulrich Petersohn, "Reframing the Anti-Mercenary Norm: Private Military and Security Companies and Mercenarism," *International Journal* 69, no. 4 (December 2014), 475-493; Simon Chesterman, "Leashing the Dogs of War: The Rise of Private Military and Security Companies," *Carnegie Reporter* 5, no. 1 (2008), 36-45. David Isenberg, *Shadow Force: Private Security Contractors in Iraq* (Connecticut: Greenwood, 2009).
4. Rita Abramsen and Michael C. Williams, *Security Beyond the State: Private Security in International Politics* (New York: Cambridge University Press, 2011).
5. See Annex 4.
6. DCAF led the research and drafting of a series of reports focused on national regulations in all Montreux Document participants. Of particular interest were national regulations that addressed companies operating both domestically and transnationally. Additional information was provided by the Swiss Federal Department of Foreign Affairs and the ICRC. Following an assessment of national reports, the various elements were organized thematically and incorporated into this study.
7. A multi-year programme of regional conferences was organised by Switzerland and the ICRC, in collaboration with DCAF and the respective host governments. The conferences sought to raise awareness of the Montreux Document and to address relevant regional issues on PMSC regulation. Conferences to date have taken place in Chile (12-13 May 2012), Mongolia (11-13 October 2001), Australia (8-9 May 2012), Philippines (9-10 July 2013), and Senegal (3-4 June 2014).

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Introduction

The Montreux Document¹ was endorsed by seventeen states when it was first adopted in 2008.² As of June 2015, that number has more than tripled; fifty two states, plus three international organisations have offered their support.³ Together they represent an enormous body of good practice in both law and implementation that spans home states (where private military and security companies (PMSCs) are based), contracting states (which contract PMSCs to provide services) and territorial states (where PMSCs operate) with a variety of legal systems and highly varied levels of exposure to the phenomenon of PMSCs. The goal of this report is to provide an overview of states' experiences in this area, to discern major challenges in implementation, and to identify ways to build on existing good practices in the future.⁴

On the occasion of the fifth anniversary of the Montreux Document, Switzerland and the ICRC, in collaboration with the Geneva Centre for the Democratic Control of Armed Forces (DCAF), held the Montreux+5 Conference. This event provided an opportunity for participants to take stock of the implementation of the Montreux Document and to share experiences with respect to the

regulation of PMSCs. The Conference further aimed to identify ways forward as participants discussed how to more effectively implement the Montreux Document and support further outreach. In preparation for the Montreux+5 Conference, Switzerland commissioned this study to address two interrelated objectives: to provide food for thought and inform discussions during the Conference, and to identify concrete ways in which the Montreux Document can advance the implementation of PMSC regulation at the national level. To form a basis for the report, Switzerland issued a questionnaire to all Montreux Document participants. The framers of the questionnaire intended to solicit input and examples of how states and international organisations have put the Montreux Document into practice and to capture where implementation challenges remain. While not all of the questions were relevant for each state or international organisation, they were designed as a guide to structure responses. The drafters of the questionnaire hoped that answers would include references to specific regulatory approaches through which the implementation of the Montreux Document has been carried out, including, for example, national laws, policies and procurement and/or contractual requirements. The

information provided through the answers to the questionnaire was used to prepare background materials and this report.

This second edition of the report integrates updated research on national regulations, takes into consideration the discussions held during the Montreux+5 Conference, reflects the Chairs' Conclusions, and incorporates feedback from Montreux Document participants as well as the discussions held during the first African regional conference on the Montreux Document.

The willingness of states to share their experiences in the run up to Montreux+5 and thereafter suggests that there are significant opportunities for deepening cooperation through the identification and sharing of good practices. Indeed, it is hoped that this report will lead to the identification of more and better methods and tools for sharing and implementing good practices. It is also hoped that this research helps states and international organisations to cooperate and ensure respect for international law, particularly in cases where PMSCs operate transnationally. The launch of the Montreux Document Forum in 2014 is a recognition of this need for greater collaboration and exchange among Montreux Document participants.

The study is divided into three main sections. Each section sets out two challenges encountered by states with corresponding recommendations aimed at addressing these challenges. The first section looks at good practices relating to roles and responsibilities. The first challenge relates to the way states rely on imprecise and unclear constraints when determining which functions PMSCs may or may not perform. The second challenge relates to the legal foundations from which these constraints are drawn. The laws applicable to PMSCs are commonly focused at the domestic level and it is often unclear whether this legislation applies to PMSCs' operations abroad.

The second section examines procedures, systems and processes. This section is concerned with how home states license PMSCs, contracting states contract or select PMSCs, and territorial states authorise PMSCs to operate on their territory. Here, the third challenge relates to the lack of

adequate resources dedicated to agencies and mechanisms tasked with licenses, contracting, and authorisations. Finally, this section examines the criteria and terms upon which licensing, contracting and authorisation are based. The fourth challenge draws attention to the lack of clear, human rights-oriented criteria in licenses, contracts and authorisations.

The final section focuses on monitoring and accountability. The fifth challenge relates to the lack of systematic monitoring of compliance with licenses, authorisations and contracts, while the final challenge draws attention to the gaps in criminal and civil legal accountability.

The main study is complemented by a series of annexes that addresses methodology and the scope of research, acronyms and abbreviations, and a copy of the questionnaire that was distributed to Montreux participants in early 2013.

The Montreux Document

The Montreux Document is an intergovernmental initiative intended to promote respect for international humanitarian law and human rights law by PMSCs, in particular in situations of armed conflict. The Montreux Document is not a new international treaty and it is not new law. Most of the rules and good practices assembled in the Montreux Document derive from international humanitarian law and human rights law. Other branches of international law, such as the law of state responsibility and international criminal law also serve as a basis. Regardless of their support for the Document, states are already bound by the international legal obligations contained therein by virtue of their ratification of the Geneva Conventions and other treaties, as well as the status of many of the obligations in the Document as customary international law. The Document does not intrude on national sovereignty over internal state policy; rather, the Montreux Document recalls, compiles, and reminds the reader of existing international legal obligations. This provides a clear response to the misconception that private military and security companies operate in a legal vacuum. It describes the basis for holding PMSCs accountable to their

host (or territorial) states, contracting states, and home states.⁵ Although the Montreux Document does not create new international legal obligations, it clarifies applicable rules of international law as they apply to the activities of PMSCs and provides practical tools for state oversight.

If the Montreux Document does not create new obligations under international law, then what is the added value of the initiative? The Document not only serves as a reminder of IHL obligations but it is also a practical tool which translates legal obligations into useful good practices. These good practices support governments in establishing effective oversight and control over PMSCs. The good practices relate to practical aspects of regulation, including authorisation systems, contract provisions, and licensing requirements and suggest other effective methods for states to oversee those PMSCs with which they come into contact.

The Montreux Document, in line with IHL, was written bearing in mind that PMSCs may operate in an armed conflict environment. However, reflecting the wide variety of settings in which PMSCs operate, the Montreux Document is also meant to provide practical guidance in other contexts. It also contains statements on pertinent international human rights law and international criminal law, which are applicable at all times. Furthermore most of the good practices identified are ideally put into place during peacetime. Examples of diverse contexts in which the Montreux Document may have been helpful include Malaysia, where a PMSC trained the Royal Malaysian Police in hostage rescue, close protection of infrastructure and people, defensive driving and crisis management for the Commonwealth Games (held in September 1998 in Kuala Lumpur).⁶ Likewise, in Russia, there are roughly 30,000 registered private security organisations that guard local, national and foreign businesses and individuals.⁷ The Montreux Document is also useful for regulating domestically-operating companies. Furthermore, many states have used PMSCs aboard commercial vessels, for example in the Straits of Malacca⁸ and in the Gulf of Aden.⁹ Other states contract PMSCs to guard extractive industry sites; in North East

and Central Asia, both governments and companies are rapidly developing energy, oil, and gas infrastructure from Siberia to the Pacific, making the issue of regulation extremely relevant.¹⁰ In the face of the rapid growth of the industry in both local and international contexts, the Montreux Document provides additional support for the establishment of effective oversight regimes. The good practices section can help states provide effective oversight of PMSCs and thus prevent any actions or misconduct that may contribute to violations of national and international law. Many states interact with the PMSC industry in peacetime: whether they host their headquarters, provide a base for the export of services, contract with PMSCs, or allow them to operate on their territory. The Montreux Document provides guidance for a regulatory regime as a preventative measure.

Many states have legislation that treats PMSCs no differently from other transnational companies; however, PMSCs have quite distinct characteristics and they compel distinct legislation. Granted, participants of the Montreux Document have their own national business codes and contract laws with which all companies must comply. The Montreux Document does not seek to replace, change or eliminate these national regulations. The Document does, however, make the case for treating PMSCs with special care under national law. This is particularly important because many PMSCs operate in armed conflict, where there is a risk that they may directly participate in hostilities. In the same way that manufacturers and exporters of defence-related or dual-use military materiel are subject to special regulations and restrictions (for instance being required to obtain end-user certificates to prevent the proliferation of weapons of mass destruction), PMSCs necessitate special oversight. PMSCs are a cause for humanitarian concern; “inasmuch as they are armed and mandated to carry out activities that bring them close to actual combat, they potentially pose an additional risk to the local population and are themselves at risk of being attacked.”¹¹ Thus, the Montreux Document seeks to protect the rights of local populations as well as the safety of PMSC personnel themselves.

The Montreux Document does not take a stance on the question of PMSC legitimacy. It does not encourage the use of PMSCs, nor does it constitute a bar for states who want to outlaw PMSCs. Nevertheless, PMSCs are present in armed conflicts, complex environments, and in peacetime and will likely remain so. It is important to tackle the issue from a practical, realistic perspective and to recall international legal obligations without either rejecting or welcoming the use of PMSCs. PMSCs are governed by international rules, whether their presence or activities are legitimate or not. The Montreux Document's good practices thus address the need for practical, pragmatic and balanced oversight by states of a growing industry.

Note on terminology:

There is no standard definition of a "military company" or a "security company." In ordinary parlance, certain activities (such as participating in combat) are traditionally understood to be military in nature, and others (such as guarding residences) are typically related to security. The Montreux Document defines PMSCs as

private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, maintenance and operation of weapons systems, prisoner detention and advice to or training of local forces and security personnel.

In reality, companies provide a wide variety of services; some services are typically military services and others are typically security services. Companies are therefore not easily distinguished. Moreover from a humanitarian point of view, the relevant question is not how a company is labelled but what specific services it provides in a particular instance. For this reason, the Montreux Document avoids any strict delimitation between private military and private security companies and uses the inclusive term "private military and security companies" to encompass all companies that provide either military or security services or both.

However, many Montreux Document participants regulate the industry by referring to private security companies (PSCs) without reference to companies which provide military services. Other states have regulatory regimes that address PMSCs and PSCs separately. For the purposes of this study, when quoting legislation, the editors have maintained the original terminology.

NOTES

1. *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.*
2. Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, United Kingdom, Ukraine, United States of America.
3. For an up-to-date list of participants, visit www.mdforum.ch
4. This study has been prepared by DCAF in the run up to the Montreux +5 Conference on the basis of research conducted by us in cooperation with the University of Denver, as well as the results of a questionnaire distributed among all Montreux Document endorsing states.
5. Deborah Avant, "Pragmatic action is the key to governing private security services," Commentary, *Private Security Monitor*, <http://psm.du.edu/commentary/>, Accessed August 27, 2013.
6. Fred Schreier and Marina Caparini, "Privatising Security: Law, Practice and Governance of Private Military and Security Companies," Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 6, 31.
7. Quoted in "Erica Marat, Regulating Private Military and Security Companies in Central Asia and Russia," *Proceedings of the Regional Workshop in the Montreux Document on PMSCs*, Geneva Centre for the Democratic Control of the Armed Forces (DCAF) Research Paper (2012), 23. See also Nicolas Florquin, *A Booming Business: Private Security and Small Arms, Small Arms Survey, 2011*.
8. See Noor Apandi Osnin, "Private Maritime Security Company in the Strait of Malacca: Options for Malaysia," *WMU Journal of Maritime Affairs* 5, no. 2 (2006), 195-206.
9. Joseph Christopher Coito, "Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden," *California Law Review* 100, no. 1 (2013): 173-365; Michon Motzouris, Institute for Security Studies, "Private Contractors in Anti-Piracy Operations in the Gulf of Aden," 8 June 2011, <http://www.issafrica.org/iss-today/private-contractors-in-anti-piracy-operations-in-the-gulf-of-aden>, Accessed 3 December 2014.
10. See Erica Marat, "Regulating Private Military and Security Companies in Central Asia and Russia," in *Proceedings of the Regional Workshop for North East and Central Asia: Ulaanbaatar, Mongolia, 12 & 13 October 2011*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), 23-50.
11. Montreux Document, 38

Section One:

Roles and Responsibilities

Challenge One: Imprecise constraints on which functions PMSCs may or may not perform

Good practices 1, 24 and 53 of the Montreux Document relate to which services may or may not be contracted out to PMSCs. The Document makes clear that certain services may not be contracted out as a matter of law. It notes that states may choose to limit the services that can be performed by PMSCs and suggests that in the interest of clarity, states should articulate which services can or cannot be performed by PMSCs. The Document states that special consideration should be given to whether activities may cause a PMSC to participate directly in hostilities.

This section discusses how Montreux Document endorsing states have approached this question. Their approaches can be roughly divided into the “permissive” and the “proscriptive.” In other words, some states clearly outline the services that *can be* performed by a PMSC (the permissive approach), while others address the problem from the other direction and seek instead to clearly delineate all those services that *cannot be* performed by PMSCs (the proscriptive approach). At the same time,

this part of the report illustrates the challenges experienced by states in determining acceptable functions of PMSCs.

In the first category there are states such as Finland, where outsourcing to PMSCs is generally limited to what may be termed “support services:” food services, health care, clothing services and some depot maintenance and repair.¹ Likewise, in Denmark the law limits “security services” to the protection of goods (static or in transit), guarding of persons, guarding of transport of valuables, cash in transit, and private investigations.² The German Industrial Code regulates the provision of domestic security services, without mentioning the regulation of potential military activities. It does not supply a concise definition of security services nor a determination of which services may or may not be provided.³ However, an important constraint to outsourcing is provided by the German Constitution (Basic Law), which obliges the federal government to maintain the general responsibility for the monopoly of use of force. This includes both the internal and external security as well as the armed forces, although the Basic Law cannot be interpreted as protecting every single military task or service from outsourcing.⁴

Box 1: Regulation of PMSCs in the European Union

In Europe, private security services are provided by about 50,000 companies, with a combined yearly turnover of approximately 23 billion EUR. This field covers a wide range of services, from personal security services to critical infrastructure protection, both of which are increasingly used by public bodies and organisations.⁵ The potential use of PMSCs falls into three broad categories: 1) contractor support to EU-led military missions, crisis management missions and humanitarian aid missions; 2) the PMSC industry in the internal market, and; 3) export of PMSC services to non-EU member states.

Contractor support to EU-led military, crisis management and humanitarian aid missions

Since 2002, 30 civilian and military missions have been launched under the EU Common Security and Defence Policy (CSDP). In 2014, the EU elaborated a concept for contractor support to EU-led military operations, intending to expand on the guidelines for the support of EU-led military operations.⁶ The Athena mechanism is responsible for financing EU military operations under the CSDP.⁷ Athena's rules for PMSCs procurement are set by the Special Committee which covers contracts concluded on behalf of Athena for "the supply of movable or immovable assets, the provision of series or the execution of works, through purchase, lease, rental or hire purchase, with or without an option to buy."⁸ Article 17 of the Rules provides for situations whereby candidates will be excluded from being considered for a contract; these reasons include professional misconduct as well as a history of criminal offences.

With respect to EU-funded humanitarian aid actions and the EU's humanitarian aid field missions,⁹ the Commission's Humanitarian Aid and Civil Protection Directorate General (ECHO) recognizes the potential necessity for private personnel to assure the safety of humanitarian personnel.¹⁰ ECHO has reviewed the security standards and practices for humanitarian personnel of partner organisations and produced a Generic Security Guide for Humanitarian Operations (2004) aimed at providing guidance on security management.¹¹ The document analyses costs and benefits of hiring local security contractors and concludes that engaging a local private company can have several advantages including reduced administration, more flexibility and immediate guard replacements. However, "PSCs usually cost significantly more than employing humanitarian agencies' own guards...private security guards have no training for their role...the loyalty of their staff can be weak."¹² In 2011, ECHO further produced Humanitarian Aid Guidelines for Procurement which aimed at creating common standards and good practices.¹³ The Guidelines do not reference PMSCs but outline principles of ethical procurement including working conditions, social rights, environmental impact, neutrality and ethical transport of cargo.¹⁴

Internal market regulations

Across different EU member states, the requirements imposed on PMSCs are relatively similar: total exclusion of non-resident companies, nationality requirements for owners, license, registration requirements, compulsory special identification, performance bonds etc.¹⁵ To concretise the trend toward general harmonisation of the services sectors in Member States,¹⁶ Directive 2006/123/EC was adopted in December 2006. However, private security services were excluded from the scope of the Directive, citing existing differences.¹⁷ Surveillance of property and premises, protection of persons, as well as the depositing, safekeeping, transport and distribution of cash and valuables were excluded from the Directive.¹⁸ Case law in the EU suggests a trend towards harmonisation.¹⁹ The European Court of Justice (ECJ) has also confirmed that private security services fall in principle, within the scope of application of internal market law in several cases involving Italy, the Netherlands and Spain.²⁰

Export control regulations

The general EU export control regime is governed by Regulation (EC) No 428/2009 which stipulates that dual-use goods may not leave the EU without an export authorisation.²¹ In certain circumstances, this may be relevant for PMSCs because the regime incorporates the export, transfer and brokering of an extensive list of dual use goods.²² If the scope of PMSCs activities or services falls under this list, the regulation is applicable. Services offered by PMSCs registered within the Member States of the European Union may also be governed by Common Position 2008/944/CFSP which turned the 1998 Code of Conduct on Arms Exports into a legally binding instrument. This regime controls not only the export of military equipment but also services related to the equipment.²³ The Common Position contains a notification and consultation mechanism for export license denials, includes a transparency procedure (publication of the EU annual reports on arms exports), and sets out criteria for the export of conventional arms.

Angola's 2014 law on national security covers domestic private security activity including the monitoring of property, personal protection, transportation, storage and distribution of goods and values, and training and instruction of private security personnel, among others.²⁴ However, the law prohibits foreign investment in the private security field and the foreign ownership and management of domestically operating companies.²⁵ In an indirect way, Angola has therefore prohibited the involvement of its private security industry from engaging in activity that may cause a PMSC to become involved in direct participation in hostilities.

The Czech Republic is the only EU member state where the provision of private security services is not regulated by specific legislation.²⁶ Though operating mostly domestically,²⁷ Czech PSCs are regulated as other private businesses under the 1991 Trade Licensing Act (455/1991 Coll.) which specified three types of licensed security services: private detective services, surveillance of persons and property, and provision of security-related technical services. The content of these licensed businesses has been clarified in the 2000 Government Decree No. 469/2000 Coll. which did cite more specifically the permitted services. A further amendment in 2008 set out minimum personnel hiring standards for the provision of security services (a clean criminal record, minimum professional qualifications). However, dissatisfaction with the implementation of and adherence to the provisions was expressed in a joint memorandum by industry associations themselves who cited "the need to enshrine clear and transparent rules for business in the industry."²⁸ In 2011 the Ministry of Interior prepared a draft law on Private Security Services; the law is currently being discussed in parliament.²⁹

Training is another major type of activity that many states in this first category specify as appropriate for PMSC involvement. In Afghanistan, the law states that risk management companies can perform development-related security work in an advisory, training, or mentoring capacity, either for the Afghan Public Protection Force (APPF) or clients, although such firms are not able to maintain a force of guards or weapons or to "perform security services."³⁰

Within the second "proscriptive" category, we can find examples such as the 2014 EU Concept for Contractor Support to EU-led military operations which states that "under no circumstances will the EU outsource to private companies inherently governmental functions." These functions include the "direct participation in hostilities, waging war and/or combat operations, taking prisoners... espionage, intelligence analysis...use of the power of arrest or detention, including the interrogation of detainees." Similarly, the United States uses the term "inherently governmental functions" to restrict domains of authorised PMSC activity. States often encounter the challenge of defining this term while leaving space and flexibility to reflect the changing and expanding roles and activities of the PMSC industry. The United States Department of Defence (DoD) has issued overlapping documents resulting in a complex definition of "inherently governmental functions" with respect to the determination of permitted PMSC services. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.³¹ In 2011, the US defined these functions more carefully. The Office of Management and Budget (OMB) Policy Letter 11-01 describes the inherently governmental functions that may not be contracted out, including "the command of military forces, combat, security operations performed in direct support of combat as part of a larger integrated armed force, security that entails the augmenting or reinforcing of others that have become engaged in combat and security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat."³² According to the OMB, permissible PMSC functions include "guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed."³³ However, the OMB directs agencies to consider:

[t]he provider's authority to take action that will significantly and directly affect the life,

liberty, or property of individual members or the public, including the likelihood of the provider's need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas.³⁴

Additionally, the National Defence Authorisation Act for Fiscal Year 2009 mandated that private security contractors are not authorised to perform inherently governmental functions in an area of combat operations.³⁵ This Act placed further restrictions on relying on PMSCs operating in complex environments:

(1) security operations for the protection of resources (including people, information,

equipment, and supplies) in uncontrolled or unpredictable high-threat environments should ordinarily be performed by members of the Armed Forces if they will be performed in highly hazardous public areas where the risks are uncertain and could reasonably be expected to require deadly force that is more likely to be initiated by personnel performing such security operations than to occur in self-defence;

(2) it should be in the sole discretion of the commander of the relevant combatant command to determine whether or not the performance by a private security contractor of a particular activity is appropriate and such a determination should not be delegated to any person who is not in the military chain of command;

Box 2: Regulation of PMSCs in South Africa

South Africa's private security industry has greatly expanded in recent years; as of 2013, the domestic private security industry recorded a 9.35% increase in the number of employed security officers over the previous year.³⁶ Several South African PMSCs "continue to be contracted by foreign countries to operate in conflict zones where they protect prominent individuals, critical infrastructure, property and strategic resources."³⁷ South Africa regulates private security through two different approaches: the first concerns PSCs operating both domestically and internationally, the second addresses mercenarism at the national and international level.

Concerned with controversial effects on peace, security and human rights, South Africa has banned mercenary activity (Act No. 27 of 2006, not yet in force) and regulated operations of South African PMSCs at home and abroad (Act No. 56 of 2001). The state's definition of mercenary activities includes both security and military services while PMSC services are restricted to security provision. Despite this rigorous legal framework, South Africa faces challenges to the implementation of its legislation. Furthermore, there is a challenge in differentiating between mercenarism, as defined under South African law, and PMSCs operating in situations of armed conflict abroad. According to the Consultative Draft of the South African Defence Review (2012), "a clear distinction must be made between mercenaries, being individuals availing their military skills, and private security companies who provide their services to either governments or non state actors." However, the Review neither defines "military services" nor does it discuss why persons who "avail their military skills" are regarded as mercenaries while companies "providing collective military services" are considered "PSCs."³⁸

With respect to its domestically operating companies, South Africa has taken a number of measures towards more effective regulation. Worthy of mention is the Department of Safety and Security's binding Code of Conduct for Security Service Providers (2003), which lays out minimum standards of conduct. Established by the Private Security Industry Regulation Act No. 56 of 2001, the Private Security Industry Regulatory Authority (PSIRA) is responsible for overseeing the industry, issuing licenses and monitoring compliance. In its 2013/14 annual report, PSIRA cites a 253% increase in inspections, a 294% increase in investigations and a total of R28 million income from fines imposed on PMSCs, as compared to the fiscal year 2010/11.³⁹ At the same time, a series of draft laws have been introduced since 2012 to amend the Private Security Industry Regulation Act of 2001 and to increase the efficiency of private security regulation and monitoring. The most recent draft law, the Private Security Industry Regulation Amendment Bill 27D, was passed by both houses of Parliament in 2014 and submitted to the President for signature. The amendments would increase accountability of the regulating institutions, the Council and Authority, and empower the Minister of Safety and Security to add regulations, issue guidelines, and control firearms. Furthermore, the Bill would limit foreign ownership of "PSCs" by requiring 51 percent sale of ownership and control to South African citizens.⁴⁰

(3) the Secretaries of the military departments and the Chiefs of Staff of the Armed Forces should ensure that the United States Armed Forces have appropriate numbers of trained personnel to perform the functions described in paragraph (1) without the need to rely upon private security contractors.⁴¹

A 2010 DoD Instruction further defined combat operations “as deliberate, destructive and/or disruptive action against the armed forces or other military objectives of another sovereign government or against other armed actors on behalf of the United States, including the authority to plan, prepare, and execute operations to actively seek out, close with and destroy a hostile force or other military objective with armed force.”⁴²

States have also prohibited PMSCs from conducting law enforcement functions, as in Iraq, where Section 9.1 of the Iraqi Coalition Provisional Authority (CPA) Memorandum 17 states that “The primary role of PSC is deterrence. No PSC or PSC employee may conduct any law enforcement functions.”⁴³ However, “law enforcement functions” is a term that is left undefined.

States have also opted to outlaw the participation of their nationals in the armed conflicts of foreign states. South Africa is the best-known example of this approach where the law stipulates, *inter alia*, that “(1) No person may within the Republic or elsewhere— (a) participate as a combatant for private gain in an armed conflict⁴⁴ [...] (b) negotiate or offer to provide any assistance

Box 3: Regulation of PMSCs in Bosnia and Herzegovina

Bosnia and Herzegovina (BiH) has a complex constitutional structure following the 1995 Framework Agreement for Peace (Dayton Agreement) under which the peacekeeping forces (first under NATO auspices and then as part of the European Union Stabilization Force [EUFOR]) have supported security. BiH is divided into two administrations: The Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS), which both have their own president, government and police. A central Bosnian government with a rotating presidency stands above these two entities. Due to this structure, there is presently no national regulatory framework for the whole of Bosnia and Herzegovina; instead, regulation occurs at the nation-state and cantonal level and legislation primarily refers to PSCs.⁴⁵ The PSC market expanded significantly during the mid 2000s, experiencing a 135 per cent growth between 2006 and 2007 and a 98 per cent increase between 2009 and 2010. By 2010, 94 PSCs were licensed in Bosnia and Herzegovina (BiH), employing more than 4,200 personnel.⁴⁶

The vast bulk of Bosnia and Herzegovina’s private security industry is directed at domestic guarding of commercial or official premises. Key employers are the banking sector, the manufacturing industry, the retail sector, international NGOs, diplomats and embassies, and the entertainment industry.⁴⁷ In FBiH, PSCs are permitted to provide “protection of persons and property, carried out in the form of physical and technical protection.” They are not allowed to perform operations “for the needs of the Federation Army and law enforcement agencies, nor of protection of heads of executive authorities and heads administrative authorities [...] and political parties.” However, there are examples of the contracting of PMSCs to perform other services, including in 1996 whereby the Federation awarded a contract to a PMSC to establish a training programme for the Federation’s armed forces.⁴⁸

In both FBiH and RS, a company that intends to offer protection services to people and property can only be established by a legal domestic company or a national of BiH and must be registered with the cantonal Ministry of Interior.⁴⁹ These complex arrangements make it illegal for a company registered in one entity to work in the other. As a home state, the lack of a single overarching law or regulatory framework is problematic and there are significant variations between the laws of RS and FBiH. In both semi-autonomous entities, those applying to establish a PSC must fulfill a number of demands. However, the regulations differ between the two administrations and the level of implementation is unclear. BiH has developed a framework for monitoring and accountability of PSCs. For instance, in FBiH, the Federal Minister of Interior and Cantonal Authorities conducts inspections on the legality of PSC licenses, their conduct, use of firearms, training of personnel, and overall adherence to the law. Likewise in RS, the Ministry of Interior oversees compliance with the relevant law. However, the scope of legislation for companies seeking to work abroad is untested. The BiH Criminal Code claims jurisdiction for criminal acts by any person outside BiH, however, this law does not apply explicitly to personnel of PSCs.⁵⁰ This indicates that the private security environment in Bosnia and Herzegovina may have broader implications for security and development and implementation of the Montreux Document’s good practices can significantly assist in improving oversight of the industry.

Box 4: Regulation of PMSCs in Norway

Norway's private security sector is primarily domestically focused. In 2011, there were 243 approved PMSCs in Norway, most of them domestically operating, with a market value of around 1.6 billion USD.⁵¹ PMSCs have operated domestically as well as abroad, including in Afghanistan and Iraq.⁵² Private security in Norway is primarily governed by the Law on Security Guard Services (Act 5 January 2001, No. 1) which has since been amended by Act 19 June 2009, No. 85 to include an explicit reference to private security companies.⁵³ The amendment was designed to prevent Norwegian companies from engaging in military activities abroad contrary to national and international law. Prior to the drafting of the amendment, the Ministry of Justice hosted a working group to review existing regulation, training, and oversight and provide recommendations. The working group report provided recommendations regarding the limitation of services, specifically warning against the use of security guards in a military context.⁵⁴ The Norwegian public and media are critical of questionable PMSC practices; such practices caused several PMSCs to lose contracts in 2012 and another to dissolve in 2009.⁵⁵ In addition to such public oversight, the police are the main monitoring authority and can carry out checks on PMSCs.⁵⁶ Companies are required to submit yearly reports, provide a list of employees, procedures and action plans as well as a report on their use of force.⁵⁷ Norway has also created a publically accessible register of approved security companies, which includes information on inspections.⁵⁸ With respect to monitoring and accountability processes, on-duty domestic PSCs are required to wear uniforms distinct from the Norwegian Armed Forces as well as to carry an approved identification card.⁵⁹ Violations of the Law on Security Guard Services result in a fine or imprisonment for up to three months.⁶⁰

The maritime industry which may be the largest extra-national employer of Norwegian private security firms, is governed by the Regulations No. 972 Concerning Protective Security Measures on Board of Ships and Mobile Offshore drilling Units⁶¹ as well as by the Ship Safety and Security Act.⁶² The government has emphasized that the regulation of this sector does not promote or endorse the use of PMSCs but is instead intended to improve oversight and regulation.⁶³ Furthermore, the Ship Safety and Security Act applies to all Norwegian vessels regardless of their location and the use and acquisition of firearms is regulated by the Firearms Act.

or render any service to a party to an armed conflict or in a regulated country.”⁶⁴ Likewise, Paragraph 128 of the Danish Penal Code, makes it an offence, punishable by a fine or up to two years imprisonment, to recruit Danish citizens into foreign war service.

A final relevant example concerns limitations on services and technical assistance related to specific types of weapons. Several states have chosen to regulate PMSCs as business entities, paying special attention to the services they export. Here, the UK Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 is instructive. This order prohibits “any technical support related to repairs, development, manufacture, assembly, testing, ‘use’, maintenance or any other technical service ... in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices, or the development, production, maintenance or storage of missiles capable of delivering such weapons” outside the European Community.⁶⁵

Recommendation One: Laws on what functions PMSCs may and may not perform should be clear and specific

There is a lack of precision in the ways that laws address which functions PMSCs may or may not perform, with states adopting both proscriptive and permissive approaches to the determination of services. States have chosen to either restrict the functions of PMSCs through legislation that permits specific activities, prohibits them or does a mix of both. Regardless of the approach chosen, it is clear that the law should be carefully and precisely worded. Legislation should avoid limiting the activities of PMSCs to exclude only “inherently governmental functions,” unless these functions are clearly and concisely defined. Furthermore, it is imperative that different government agencies adopt the same definition of inherently governmental functions to avoid confusion. On the other hand, providing a strict list of permitted activities may be equally unhelpful

if the categories in the list are not clear and accurately defined. Legislation should also allow some flexibility to consider the evolving roles and activities of the PMSC industry. A list of permitted activities is often a static document, while the roles of PMSCs evolve in response to shifting state needs, advances in technology, and new security environments. This is demonstrated by the expansion of PMSCs into detention centre management,⁶⁶ intelligence gathering,⁶⁷ and the operation of weapons systems.⁶⁸ One way of balancing these tensions in the determination of services is by clearly delineating between broader categories of risk management, training and advisory functions, and those activities that may lead PMSCs to directly participate in hostilities. The determination of services should not be open to wide interpretation by companies, given that an indiscriminate expansion of PMSCs' activities has the potential to lead to IHL violations or human rights abuses. It is recommended that states hold discussions at the parliamentary and national policy levels to more clearly identify the services PMSCs may provide. Furthermore, such discussions should also take place at the international level, such as among Montreux Document participants, in order to help set international standards for services provided by PMSCs.

Challenge Two: Inadequate applicability of domestic legislation to PMSCs operating abroad

The Montreux Document states that “home States should evaluate whether their domestic legal framework, be it central or federal, is adequately conducive to respect relevant international humanitarian law and human rights law by PMSCs.”⁶⁹ This also applies to contracting states. While the good practices in this section relate to concrete steps that home states can take in this regard, fully implementing these good practices clearly requires that states clarify the applicability of domestic legislation to PMSCs operating abroad or otherwise enact specific legislation with regard to such companies.

Related to the determination of services that PMSCs may or may not provide, it is important that legislation is clearly applicable to the activities of PMSCs operating abroad. For example, the Ukrainian Law on Security Activities contains relatively extensive regulations on the use of force and firearms. However, the law is primarily aimed at the domestic private security industry and it is unclear to what extent this law applies to private companies based in Ukraine but working abroad or to companies with which the government contracts externally.⁷⁰

An analogous lack of clarity is found in Finland, where the Constitution stipulates (in Section 124) that the delegation of administrative tasks to entities or persons other than the authorities is possible, if it is deemed necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, situations involving the use of force, such as police functions or tasks otherwise significantly affecting rights of individuals cannot be given to private entities⁷¹ and any such delegation may only take place by virtue of a statute.⁷² It is unclear, however, exactly how such domestic security regulations may be applicable to the export of PMSC services. The Finnish government has no outsourcing practice when it comes to such services, which means that there are no official policies on the subject and no contracts available for evaluation.

While the activities of PMSCs operating abroad are not dealt with by specific German legislation, German companies do operate abroad, including in conflict areas.⁷³ Here, their activities primarily focus on the provision of logistical support and protection services for persons and buildings.⁷⁴ Nevertheless, despite the lack of specific legislation, the German government has clarified that (according to constitutional law), private companies cannot perform “governmental activities” in crisis areas abroad.⁷⁵ Furthermore, security service contracts commonly include obligations of conduct as well as obligations of results.⁷⁶ When the German government outsources security services, “companies are under close scrutiny and there is even effective political control by the government.”⁷⁷

Likewise, Norway appears to rely heavily on international law and principles of human rights to dictate acceptable behaviour by private security companies⁷⁸ and legislation enables Norway to revoke the permission of PMSCs to operate in Norway if supervising authorities become aware of breaches of either international or Norwegian law. While it is not specifically elucidated in the legislation, this latter provision would appear to preclude direct participation in hostilities by Norwegian PMSCs.⁷⁹

In Lithuania, the Law on the Security of the Person and Property regulates the provision of private security services domestically. This law also regulates the operations of foreign private security companies in the country. If a company is registered to a country belonging to the European Union, it can operate in Lithuania for up to three months without a licence. Otherwise, providing security services without a license is prohibited. Regarding Lithuanian PMSCs operating abroad, the Lithuanian Parliament has sole authority to decide on the use of armed forces in the zone of armed conflict and prospective use of PMSCs abroad.⁸¹ Similarly, Australia has yet to provide specific regulatory measures aimed at private military and security services operating abroad. Australian nationals and companies do work in private

security abroad and in these cases, Australia defers to the host state laws for the prosecution of any misconduct that may occur.⁸²

Recommendation Two: Home and contracting states should adopt legislation that places PMSCs' operations abroad under their jurisdiction

Collectively, Montreux Document participants have generated a significant body of legislation and judicial precedent relating to the activities of PMSCs in a domestic context. In most Montreux states, PMSCs are subject to effective regulation and oversight when they operate domestically. What is not always clear, however, is how applicable this legislation is to the activities of PMSCs based in one state but operating abroad, either in another state or in international waters as part of maritime security operations. States can address this challenge in two ways: by clarifying that domestic legislation is applicable abroad or by separately adopting specific legislation relating to the foreign activities of PMSCs. By

Box 5: Switzerland: Federal Act on Private Security Services Provided Abroad

At the end of 2010, approximately twenty private security companies operating abroad or possessing the capacity to operate abroad in crisis or conflict zones were based in Switzerland. The 2010 registration of the private security company AEGIS Group in Basel city revived interest in regulating the activities of PMSCs abroad.⁸⁰ Due to Switzerland's federal structure, the majority of the regulations are cantonal, and do not apply to security companies operating abroad. On 27 September 2013, the Swiss Federal Assembly adopted the Federal Act on Private Security Services Provided Abroad to regulate private security companies and to require them to respect international human rights and humanitarian law. The law will come into force by 1 September 2015 and will apply to legal persons, and business associations (companies) that:

- provide, from Switzerland, private security services abroad;
- provide services in Switzerland in connection with private security services abroad;
- are established, based or managed in Switzerland and providing private security services abroad;
- exercise control from Switzerland over a company that provides private security services abroad.

Its scope also extends to companies based in Switzerland with a financial interest in security companies operating abroad. The Act foresees the prohibition of certain activities connected with the direct participation in hostilities or with serious violations of human rights. Furthermore, persons who live in Switzerland and are in the service of a company that is subject to the Act are prohibited from directly participating in hostilities abroad.

asserting their jurisdiction over their nationals and companies based on their territory, home states are in a strong position to hold PMSCs accountable and to help ensure effective oversight. This is particularly important when PMSCs operate in complex environments where the rule of law may be weak or institutions may be fragile or ineffective, leaving local populations vulnerable to violations of IHL or international criminal and human rights law. In these situations, it is imperative that home states reduce the possibility of an accountability vacuum by asserting their jurisdiction over their companies and nationals and by holding accountable those that commit violations.

NOTES

1. Finland; Defence Committee Report 6/2007 [Puolustusvaliokunnan lausunto 6/2007 vp, Ministeriön selvitys maavoimien materiaalin kunnossapidon kehittämisestä]; Statement by Minister of Defence Jyri Häkämies in Parliament plenary session 16.12.2008 [Täysistunnon pöytäkirja PTK 127/2008 vp 16.12.2008]; Puolustusvoimien kumppanuusohjelma, 'Päiesikunta esittää maavoimien kunnossapidon strategista kumppanuutta Millog Oy:n kanssa'; 20.12.2007 <tietokannat.mil.fi/kumppanuusohjelma/sisalto.php?a_id=114&type=uutiset&project_id=9> cited in Katja Creutz, "Private Military and Security Services in the Regulatory Context of Finland," *PRIV-WAR Report*, 28 February 2009, 14.
2. Denmark; Law on Private Security Companies (Act No 266 of 22 May 1986), Article 1; modified by Act no. 611 of 22 June 2000 on the legal ground of private security.
3. Germany; Bundesministerium der Justiz, §34a Bewachungsgewerbe, (1); Deutscher Bundestag, Antwort der Bundesregierung auf die Große Anfrage der Abgeordneten Kaja Keul, Tom Koenings, Omid Nouripour, weiterer Abgeordneter und der Fraktion BündNIS 90/ DIE GRÜNEN-Drucksache 17/4573. Regulierung Privater Militär und Sicherheitsfirmen, 18.
4. Germany; Bundesrepublik Deutschland, Annex 2: Ergänzende Informationen zur Demokratischen und Politischen Kontrolle privater Militär- und Sicherheitsfirmen. Anhang zur Meldung der Bundesrepublik Deutschland für das Jahr 2013, 2013, <http://www.auswaertiges-amt.de/cae/servlet/contentblob/644404/publicationFile/192261/OSZE-Verhaltenskodex-Informationsaustausch-Annex2.pdf>, Accessed 30 June 2014, 1; Deutscher Bundestag, Grundgesetz, art. 87a, https://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg_08/245140, Accessed 25 June 2014; Petersohn Ulrich, Outsourcing the Big Stick: The Consequences of Using Private Military Companies, Weatherhed, 13.
5. European Union; European Parliament, Question for written answer to the Commission, Follow-up to the exemption of private security services from the EU directive on services in the internal market," <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2010-010961&language=EN>, Accessed November 2013.
6. European Union; See Ref. F EEAS 00754/14. The 2014 EU Concept for Contractor Support to EU-led Military Operations links the EU Concept for Logistic Support with the Athena Mechanism and the European Defence Agency's (EDA) instruments support of EU-led military operations such as the Effective Procurement Methods and the EU's CSO Platform. The EU CSO platform was designed as a forum for interaction between experts from governmental authorities (logistics and CSO experts) and commercial operators for exchange of information in order to identify commercial solutions for operational demands.
7. Athena operates on behalf of the 28 EU member states who contribute financing to EU military operations. Currently, 5 EU military operations benefit from Athena financing for their common costs: EUFOR ALTHEA EUFOR ATALANTA, EUTM Somalia, EUTM Mali, EUFOR Central African Republic (CAR) (end of the mission was 15 March 2015). Previously, Athena financed AMIS 2 Sudan (June 2005-December 2007), EUFOR RD Congo (June- November 2006) EUFOR (Chad, CAR) (January 2008-March 2009) and EUFOR Libya) April-November 2011). Exceptionally, and when requested by the Operation Commander and approved by the Special Committee, Athena may finance reconnaissance and surveillance as well as "other critical theatre-level capabilities (demining, chemical, biological, radiological and nuclear (CBRN) protection, storage and destruction of weapons)." [http://www.consilium.europa.eu/policies/fac/financing-security-and-defence-military-operations-\(athena\)](http://www.consilium.europa.eu/policies/fac/financing-security-and-defence-military-operations-(athena)) See also Official Journal of the European Union, L 343/51, 23. 12., 2011.
8. Athena's procurement is primarily composed of satellite communications, ICT equipment, vehicles, fuel and infrastructure for the operation.
9. The security of field offices is guided by the ECHO Safety and Security Field Handbook.
10. Mirko Sossai and Christine Bakker, "The Role of EU External Relations in Ensuring Compliance with Human Rights and Humanitarian Law by Private Contractors," in *The Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms* ed. Christine Bakker and Mirko Sossai (Oxford: Hart Publishing, 2012), 79-103, 88-92.
11. It is relevant to note that the protection from harm and damage of staff and supplies used by ECHO's partner organisations in the implementation of humanitarian actions is the responsibility of the partner organisations themselves. Article 1a of the General Conditions applicable to Humanitarian Aid Actions financed by the EU and annexed to the 2014 Framework Partnership Agreement (FPA), as well as Article 2.1 of the General Conditions applicable to Delegation Agreements relating to Humanitarian Actions Financed by the Union (GC IMDA). In doing so, they should also comply with the humanitarian principles (Article 3.2 2014 FPA and Article 2.6 GC IMDA).
12. European Commission, ECHO, Generic Security Guide for Humanitarian Organisations, 2004.
13. The Guidelines are intended for partner organisations and complement and develop certain aspects of Annex IV to the 2008 Framework Partnership Agreement (FPA) which was signed with partner organisations and in force until 31 December 2013.
14. These Guidelines were replaced in 2014 by the FPA Guidelines under the FPA that entered into force on 1 January 2014. These are drafted along the same lines as the previous Humanitarian Aid Guidelines for Procurement, thus there is no reference to PMSCs. European Commission, ECHO, Guidelines for the Award of Procurement Contracts within the Framework of Humanitarian Aid Actions Financed by the European Union, 31 May 2011.
15. European Union; See Case C-114/97 Commission v Spain (private security) [1998] ECR I-6717 ; Case C-355/98 Commission v Belgium (private security) [2000] ECR I-1221; Case C-283/99 Commission v Italy (private security) [2001] ECR I-4363; Case C-189/03 Commission v Netherlands (private security) [2004] ECR I-5645; Case C-514/03 Commission v Spain (private security) [2006] ECR I-963.
16. Trends towards harmonization began as early as 2002. On 13 June 2002, the Council adopted Recommendation 2002/C 153/01 (OJ C 153, 27.6.2002, p.1) regarding cooperation between competent national authorities of Member States responsible for the private security sector.
17. European Commission, Service Directive, Directive 2006/123/EC, 12 December 2006, Article 2(2)(k).
18. Directorate-General for Internal Market and Services, Handbook on the Implementation of the Services Directive, 13. In accordance with Article 38 (b) of the directive, the Commission was to assess by 28 December 2010, the possibility of presenting proposals for harmonisation in this field. It is unclear the extent of progress in this regard.
19. Vassilis Hatzopoulos and Thien Uyen Do, "Overview of the Case Law of the ECJ in the Field of Free Movement of Services 2000-2005," *Common Market Law Review* 3, no. 43 (August 2006): 923-91.
20. European Union; See Commission v Spain, Case C-114/97, judgment of 29 October 1998; Commission v Belgium, Case C-355/98, judgment of 9 March 2000; Commission v Italy, Case C-283/99, judgment of 31 May 2001; Commission v Portugal, case C-171/02, judgment of 29 April 2004; Commission v Netherlands, Case C-189/03, judgment of 5 May 2003; Commission v Spain, Case C-514/03, judgment of 26 January 2006; Commission v Italy, Case C-465/05, judgment of 13 December 2007.
21. Dual use goods are products and technologies normally used for civilian purposes but which may have military applications.
22. European Union; Annex I, List of Dual-use items and technology at http://trade.ec.europa.eu/doclib/docs/2013/august/tradoc_151691.pdf#page=12; Quoted in Elke Krahnmann and Aida Abzhaparova, "The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options." EUI Working Paper AEL, August 2008.
23. Inter alia the brokering, transit transactions and intangible transfers of software and technology, and technology required for the development, production, operation, installation, maintenance, repair, overhaul, refurbishing of some items specified in the EU Common Military List.

24. Angola; Law No. 10/14 – National Assembly, Gazette Series No. 140, 30 July 2014, Art. 3. See also Art. 7.
25. *Ibid*, Art. 6 §2.
26. Oldrich Bures, "Private Security Companies in the Czech Republic: An Exploratory Analysis," *Central European Journal of International and Security Studies* 2 (2012), 47.
27. *Ibid*, 45.
28. Czech Republic; Jiří Reichl, "Ministr vnitra k Zakonu o soukromých bezpečnostních službách," 2010; quoted in *ibid*, 50.
29. Oldrich Bures, "Private Security Companies in the Czech Republic: Rearticulating the Security Field and Transforming Politics," *Security Dialogue* 45, no. 1 (2014), 90.
30. Government of Afghanistan, Presidential Decree 62 (August 2010). See also Afghan Public Protection Force, *Frequently Asked Questions*, <http://www.appf.gov.af/faq.htm>, Accessed 15 April 2013.
31. United States; OMB Circular No. A-76: Performance of Commercial Activities (Revised 2003) (superseded) (White House Office of Management and Budget, Washington, DC, 1999), Section B (1) (a), available at http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction
32. United States; Office of Management and Budget, Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, 12 September 2011, Appendix A; quoted in Permanent Mission of the United States of America to the United Nations and other International Organisations in Geneva, "United States Response to Questionnaire Concerning the Montreux Document."
33. *Ibid*, A (3).
34. *Ibid*.
35. United States; National Defence Authorisation Act of 2009, sec. 832 (PL 110-417) <http://www.gpo.gov/fdsys/pkg/PLAW-110publ417/html/PLAW-110publ417.htm>, Accessed 22 August 2013.
36. South Africa; Private Security Industry Regulatory Authority (PSIRA), 2013-2014 Annual Report, 6.
37. Department of Defence, Republic of South Africa, South African Defence Review: Draft Document for Public Engagement 90 (2012), paragraph 47.
38. South African Defence Review, note 789, paragraph 48. Quoted in Rebecca DeWinter-Schmitt, ed. "Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices," 2013, 145.
39. See page 9 of the report, available at http://www.ppsira.co.za/psira/dmdocuments/annual_report/annual_report_2013_2014.pdf, Accessed 25 November 2014.
40. South Africa; Private Security Industry Regulation Amendment Bill, B27B-2012, Section 20.2 (c).
41. United States; National Defence Authorisation Act of 2009, sec. 832 (PL 110-417) <http://www.gpo.gov/fdsys/pkg/PLAW-110publ417/html/PLAW-110publ417.htm>, Accessed 22 August 2013.
42. United States; Department of Defence Instruction 1100.22, Policies and Procedures for Workforce Mix, 12 April 2010, Footnote: Enclosure 4.1. (c); quoted in Permanent Mission of the United States, "United States Response to Questionnaire Concerning the Montreux Document."
43. Despite the dissolution of the Coalition Provisional Authority, many of the rules remain in place. See "Private Security Companies Registration Regulations According to the Memorandum 17 for 2004 And the MOI Instructions" July 2013, http://psm.du.edu/media/documents/national_regulations/countries/middle_east_and_north_africa/iraq/iraq_private_security_companies_registration_regulation_based_on_cpa_memo_17_2004-english.pdf Accessed 24 October 2013; Memorandum 17, Coalition Provisional Authority-Iraq, (2004), section 9.1.
44. South Africa; Definitions and Interpretations of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006, section 2. http://psm.du.edu/media/documents/national_regulations/countries/africa/south_africa/south_africa_act_on_prohibition_of_mercenary_activities_2006-english.pdf, Accessed 24 October 2013
45. For laws governing PMSCs in Bosnia and Herzegovina see: The Law on Agencies for Protection of People and Property and Private Detective Work; Article 4, *Official Gazette in Republic of Srpska* No 50/2002; The 'Law on Agencies of Protection of People and Property' Article 4, *Official Gazette of FBiH*, Year IX, No 50, 14 October 2002.
46. Confederation of European Security Services (CoESS), *Private Security Services in Europe. CoESS Facts & Figures 2011* (Wemmel: CoESS, 2011) [http://www.coess.eu/_Uploads/dbsAttachedFiles/Private_Security_Services_in_Europe-CoESS_Facts_and_Figures_2011\(1\).pdf](http://www.coess.eu/_Uploads/dbsAttachedFiles/Private_Security_Services_in_Europe-CoESS_Facts_and_Figures_2011(1).pdf) (accessed: 23 April 2014), 21.
47. *Ibid*, 19; See also David A. Kassebaum, "Question of Facts- the Legal Use of Private Security Firms in Bosnia," *Columbia Journal of Transnational Law* no. 38: (1999-2000), 581-602.
48. Kassebaum, 582.
49. This nationality principle would change if Bosnia joined the EU. Michael Page, Simon Rynn, Zack Tylor, and David Wood, "SALW and Private Security Companies in South Eastern Europe: A Cause of Effect of Insecurity?" The South Eastern Europe Clearinghouse of the Control of Small Arms and Light Weapons (SEESAC), August 2005, 22.
50. Bosnia and Herzegovina; Criminal Code of Bosnia and Herzegovina, 2003, <http://www.iccnw.org/documents/criminal-code-of-bih.pdf> Accessed 26 August 2014, art. 12.
51. Norway; NHO Service. "NHO Service 2011-2012 Security Sector Statistics." *NHO Service*. 2012. <http://www.nhoservice.no/getfile.php/Filer/Statistikk/Sikkerhet%202012.pdf>, Accessed 24 October 2013.
52. Anna Leander, *Commercializing Security in Europe. Political Consequences for Peace Operations* (New York: 2013, Routledge), 23.
53. Norway; Permanent Mission of Norway to the UN. "Norway response to the OHCHR request for information on national regulatory frameworks." OHCHR, National Regulatory frameworks, WG Mercenaries. 15 June 2012. <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Norway.pdf>, Accessed 20 February 2013.
54. Norway; Ministry of Justice and Police. About the Law amending the Law on security guard services. Working Group, Oslo: Stoltenberg Government, 27 March 2009.
55. Norway; G4S, *The Biggest Contract- G4s continues to OSL*. 11 01, 2012. <http://www.g4s.no/nb/NO/Media%20Centre/News/2012/11/01G4S%20vant%20kontrakt%20ved%20Oslo%20lufthavn%20Gardermoen>, Accessed March 2013; Ervik, Kristian, and Bent Skjaerstad, *Special Intervention Group Dissolved*, June 2009. <http://www.tv2.no/nyheter/innenriks/special-intervention-group-erlagt-ned-2941646.html>, Accessed February 2013).
56. Norway; Ministry of Justice, *Regulation on Security Guard Services*, 2011, art. 42-43, <http://lovdata.no/dokument/SF/forskrift/2011-03-28-337?q=FOR+2011-03-28-337>, Accessed 13 August 2014.
57. Norway; *Regulation on Security Guard Services*, 2001, art. 16, <http://lovdata.no/dokument/NL/lov/2001-01-05-1/%C2%A719#§19>, Accessed 8 August 2014.
58. Norway; Ministry of Justice, *Regulation on Security Guard Services*, 2011, art. 38.
59. Norway; *Law on Security Guard Services*, 2001, art. 10, <http://lovdata.no/dokument/NL/lov/2001-01-05-1/%C2%A719#§19>, Accessed: 8 August 2014; Ministry of Justice, Regulation on Security Guard Services, 2011, art. 28; Ministry of Justice, Regulation on Security Guard Services, 2011, art. 31.
60. *Ibid*, art. 20.
61. Norway; Regulation of 22 June 2004 No. 972 Concerning Protective Security Measures on Board Ships and Mobile Offshore Drilling Units, http://psm.du.edu/media/documents/national_regulations/countries/europe/norway/norway_june_22_n972_security_on_ships.pdf, Accessed 13 August 2014.
62. Norway; Act of 16 February 2007 No. 09 Relating to Ship Safety and Security (The Ship Safety and Security Act), http://psm.du.edu/media/documents/national_regulations/countries/europe/norway/norway_act_16_feb2007_n09_ship_safety_and_security_act.pdf, Accessed 13 August 2014.

63. Norway; Provisional Guidelines – Use of Armed Guards on Board of Norwegian Ships, 2009, http://psm.du.edu/media/documents/national_regulations/countries/europe/norway/norway_provisional_guidelines_use_of_armed_guard.pdf, Accessed 13 August 2014, 1.
64. South Africa; Definitions and Interpretations of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006, section 3.
65. UK; Department of Industry and Trade, Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003, Statutory Instrument 2003 No. 2764, <http://www.legislation.hmso.gov.uk/si/si2003/20032764.htm> Accessed 30 July 2013.
66. Michael Flynn and Cecilia Cannon, "The Privatisation of Immigration Detention: A Global View," A Global Detention Working Paper, Global Detention Project: September 2009; Deepa Fernandes, *Targeted Homeland Security and the Business of Detention*, New York: Seven Stories Press, 2007.
67. Steve Fainaru and Alec Klein, "In Iraq, a Private Realm of Intelligence-Gathering," *Washington Post Foreign Service*, 1 July 2007; Eric Rosenbach and Aki Peritz, "The Role of Private Corporations in the Intelligence Community" Memorandum, *Confrontation or Collaboration? Congress and the Intelligence Community*, Belfer Center for Science and International Affairs, Harvard Kennedy School, 2009.
68. Sam Perlo-Freeman and Elisabeth Sköns, "The Private Military Services Industry," SIPRI: no.1, September 2008; Edward G. Keating, "Contracting for Weapon System Repair," RAND, 1996, http://www.rand.org/pubs/research_briefs/RB46/index1.html, Accessed 1 January 2015.
69. Montreux Document, 25.
70. Ukraine; Verkhovna Rada, Law of Ukraine "On Security Activities," from 22 March 2013, № 4616-VI. Translation in abstract text from 22 March 2012, <http://zakon2.rada.gov.ua/laws/annot/4616-17>, Accessed 10 March 2013. "Security personnel may use physical influence in the case of 1: defending themselves or other persons from an attack that poses a threat to life, health or property; 2: avoiding an unlawful attempt to forcefully takeover specialized equipment; 3: the need to detain an offender who illegally entered the guarded object or is carrying out other unlawful acts and offers resistance; 4: neutralizing an animal that poses a threat to the life and health of the security personnel or other persons."
71. Katja Creutz, "Private Military and Security Services in the Regulatory Context of Finland," PRIV-WAR Report-Finland, National Reports Series 08/09, 28 February 2009.
72. The Constitution of Finland [Suomen perustuslaki] 11.6.1999/731, Section 124 (unofficial translation).
73. In 2009, German Armed Forces were involved in 12 operations abroad; See [http://www.bundeswehr.de/portal/a/bwde/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd443DgoESYGZASH6kTCxoJRUFW99X4_83FT9AP2C3IhyR0dFRQCopHXc/delta/base64xml/L3JdJdyEvd0ZQNQUFzQUMvNElVRS82X0NfNEFD;HeikeKrieger„DerprivatisierteKrieg:PrivateMilitärunternehmeninbewaffnetenKonflikt“inArchivdesVölkerrechts,vol.44\(2006\),163](http://www.bundeswehr.de/portal/a/bwde/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd443DgoESYGZASH6kTCxoJRUFW99X4_83FT9AP2C3IhyR0dFRQCopHXc/delta/base64xml/L3JdJdyEvd0ZQNQUFzQUMvNElVRS82X0NfNEFD;HeikeKrieger„DerprivatisierteKrieg:PrivateMilitärunternehmeninbewaffnetenKonflikt“inArchivdesVölkerrechts,vol.44(2006),163).
74. Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, preliminary remark; Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 23.
75. Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 4.
76. Service contracts are addressed by Sections 611-630 of the German Civil Code; Bürgerliches Gesetzbuch (BGB), published on 2 January 2002 (BGBl. I 42, 2909; 2003 I 738), with amendments as of 10 December 2008 (BGBl. I 2399).
77. Ralf Evertz, "Regulation of private military, security and surveillance services in Germany," PRIV-WAR Report – Germany, National Reports Series 16/09, 15 June 2009, 11.
78. Norway; Norwegian Ministry of Finance. *Companies Excluded From the Investment Universe*. 1 November 2013. http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/selskaper-som-er-utelukket-fra-fondets-i.html?id=447122, Accessed March 2013.
79. Norway, Norwegian Royal Ministry of Foreign Affairs. *Voluntary Principles Implementation Report in 2009- Plenary Report* Government Report, Oslo: Royal Ministry of Foreign Affairs, 2010.
80. See Swiss Federal Council, "Message concerning the Federal Act on Private Security Services Provided Abroad," 23 January 2012.
81. Lithuania; Article 84 of the Constitution of the Republic of Lithuania. See also Ieva Miluna, "The Regulatory Context of Private Military and Security Services in Lithuania," PRIV-WAR Report-Lithuania, National Reports Series 12/09, 25 May 2009.
82. UN Human Rights Council, "Addendum 1: Communications to and from governments," (A/HRC/7/7/Add.1), 13 February 2008, 4-5.

Section Two:

Procedures, Systems and Processes

Challenge Three: Insufficient resources dedicated to authorisations, contracting and licensing systems

Procedures of authorisation are outlined in good practices 2-4, 25-29, and 54-59. These procedures include: designating a central, publically accountable authority, allocating adequate resources to the licensing authority and ensuring personnel have sufficient training and resources to meet the task of issuing licenses. Mechanisms that provide transparency and oversight by parliamentary or other democratic oversight bodies are also important.

The Montreux Document urges states to develop licensing, contracting and authorisation systems for PMSCs. Home states, where PMSCs are headquartered or based, should consider establishing a system of issuing operating licenses for the provision of military and security services abroad. For territorial states, the Montreux Document urges states to require that PMSCs obtain authorisation in order to provide military and security services on their sovereign territory. Contracting states should develop systematic procedures that grant contracts to companies.

This section describes how different Montreux Document participants attempt to address the need for such procedures.

Licenses, contracts and authorisations to provide private military and security services

In Belgium, the 1990 Law on Private Security Services¹ was amended and simplified in 2013. It now stipulates that private security companies which operate in Belgium must be authorised by the interior minister, after consultation with the security of state department and the Justice Minister, or the King's prosecutor local to the place of the company's establishment.² Companies can only obtain a license once this authorisation has been granted. It is unclear whether the law has extraterritorial applicability as it only explicitly refers to companies operating within Belgian territory. However, according to Chapter 2, Article 3, Clause 2 of the Law on Maritime Piracy, maritime security companies providing armed guards to ships are to be authorised and regulated by the 1990 Law. Despite the unclear application to companies operating abroad, this provides an example of the extraterritorial application of this law.³

Box 6: Regulation of PMSCs in the United States

Although contracting of PMSCs began to a modest extent under President Clinton during the Kosovo war, this practice expanded significantly during the conflicts in Iraq and Afghanistan.⁴ The US Congressional Research Service reported that from 2007 to 2012, the Department of Defence (DoD) alone had contract obligations in Iraq and Afghanistan worth approximately 160 billion USD, higher than the total contract obligations of any other US federal agency.⁵ Between 2003 and 2007, USAID and the Department of State (DoS) granted contracts worth 5 billion USD and 4 billion USD respectively.⁶

As both a contracting state and home state for PMSCs, the US has a very complex regulatory regime. The US is one of the largest consumers of PMSC services as well as a significant base for companies registered and headquartered in the country. For PMSCs seeking to export their services abroad, the US requires registration with the DoS. A license or other authorisation is required for the export of “defence services,” including advice, training and the development, testing, repair, maintenance, operation, processing or use of a defence article.⁷ However, the International Traffic in Arms Regulations (ITAR) responsible for this registration regime contains no explicit reference to humanitarian or human rights law or norms. There is also no clear reference to training on the use of force or on religious and cultural sensitivities.⁸

When the US government contracts PMSCs to support operations, the procurement and acquisition process is governed by the Federal Acquisition Regulations (FAR) which provide standardised contract clauses in the same manner as non-military or security related services.⁹ The Defence Federal Acquisition Regulation Supplement (DFARS) and the Department of State Acquisition Regulation (DOSAR) provide additional procedures specific to the Defence and State departments respectively. In theatres of armed conflict, Department of Defence contracting is guided by Pentagon officials under the Logistics Civil Augmentation Program (LOGCAP) as the primary authority over policy for contracting. The State Department and the Bureau of Administration, Office of Logistics Management, Office of Acquisitions Management (A/LM/AQM) regulate Worldwide Protective Services (WPS) contracting for US diplomatic missions in high threat areas.

Within these systems, Contracting Officers are required to consider all criteria and information in the Federal Awardee Performance and Integrity Information System (FAPIIS) to determine a potential contractor’s record. FAPIIS is a reporting system designed to be a one-stop resource for Contracting Officers and gathers information on criminal, civil and administrative procedures which the prospective contract bidder is currently or has been involved in. FAPIIS is designed “to evaluate the business ethics and expected performance quality of prospective contractors and protect the [US] [g]overnment from awarding contracts to contractors that are not responsible sources.”¹⁰ However, FAPIIS has been criticised for being largely oriented towards assessing technical ability, costs, schedules and cooperative behaviour, as related to the “best value” of the contract and for not containing explicit references to factors that may affect a contractor’s ability to carry out his duties and act in accordance with IHL or IHRL.¹¹ Granted, instead of being included into the selection process, this criteria is incorporated into the contracts themselves.¹² It is important to note that contracts require personnel to be processed through DoD training on the Geneva Conventions, law of armed conflict, use of force and country and cultural awareness. No regulations or DoD directives referred explicitly to training on international human rights law¹³ until May 2012, when DoD contracts for security services in the areas of combat operations, contingency operations and other military operations were required to conform to the American National Standard on Management System for Quality of Private Security Operations – Requirements with Guidance (ANSI/ASIS PSC.1-2012).¹⁴

Sierra Leone’s authorisation procedure for PMSCs¹⁵ is quite detailed and is laid out in subsections 3-7 of the National Security and Central Intelligence Act of 2002 (NSCIA) and in a set of Standard Operating Procedures. Among the documents requested from companies seeking authorisation are: a business license, a personnel file¹⁶ on every security officer,¹⁷ proof of financial capacity,¹⁸ income tax clearance as well as details of all arms and ammunition.¹⁹ After receiving the application, “the Office on National Security (ONS)²⁰ then has

sixty days to make a determination.”²¹ In cases of refusal, the ONS has to issue a written statement to the applicant laying out the reasons for its decision. The applicant then has the right to appeal.

Interestingly, Chile also requires authorisation to open a private security company as a business, as well as to hire private security services as a client. While some locations, such as banks, ports, and airports are required to employ security,

all other hiring or uses of private security must receive permission from the Ministry of Interior. An authorisation to provide private security services requires a license obtained through the Carabineros (the state police). Maintenance of the authorisation to provide security is dependent on ensuring that the individuals operating as security guards are up to date on all relevant training. The Carabineros routinely audit training and are responsible for establishing training requirements, courses, and certification.²²

Regarding the licensing of services associated with defence goods, the Montreux Document is applicable to business entities that conduct *inter alia* the maintenance and operation of weapons systems. The Document's good practices serve as a helpful tool for oversight of services associated with such products. Canada's Exports and Imports Permits Act (EIPA), for example, pertains to both exported goods and intended recipients. Provisions under this regime cover a range of arms, including dual-use goods and technologies, which may be relevant to PMSCs. Requirements exist for individual export contracts for defence goods to be vetted by government departments. Although outright export controls are uncommon (as of 2014, only the Democratic People's Republic of Korea and Belarus are on the list),²³ the EIPA allows the Governor in Council²⁴ to establish export control lists. In deciding whether to issue a permit, the Minister will consider whether the goods or technology specified in an application for a permit may be used for a purpose prejudicial to "peace, security or stability in any region of the world or within any country."²⁵ The Controlled Goods Registration Program (under the EIPA) is mandatory for anyone in a position to examine, possess or transfer controlled goods in Canada²⁶ and the Special Economic Measures Act can be used to restrict the export of goods to designated foreign states and also to limit a range of other activities including commercial dealings with those states and/or nationals who do not ordinarily reside in Canada.²⁷

With regard to companies providing maritime security, regulations here also contain a number of good practices relevant to the discussion of licensing and authorisations. In Norway, for

example, maritime private security providers are governed by the Regulation of 22 June 2004 No. 972 (as amended in 2011). Shipping companies must receive authorisation from the Norwegian Maritime Directorate, which retains the authority to deny PMSCs the right to operate on Norwegian flagged ships. The company must demonstrate "satisfactory procedures of training of personnel, procurement, use, maintenance, storage and transportation of equipment including firearms and ammunition, that guards hold the necessary qualifications and have completed necessary training, including firearms training, for the assignment in question; and ... can submit a recently issued certificate of good conduct..."²⁸

Designating a central authority for licenses, contracting and authorisations

The Montreux Document describes that states should designate a central authority competent for granting authorisations. The majority of Montreux Document participants have identified either the Ministry of Interior or the police force as the competent authority in this regard. An example of the former type is Afghanistan where "risk management companies" are required to obtain licenses through the Ministry of Interior Affairs.²⁹ Similarly, in Costa Rica, the Director of the Private Security Service of the Ministry of Public Safety receives requests for authorisation to which it then has 30 days to respond. During this time, the Department verifies the accuracy of the documents submitted, performs inspections on any PMSC facilities, and conducts an inventory of weapons, ammunition, and equipment.³⁰

Norway provides an example of the latter case, designating the Norwegian Police as the authorising body for PMSCs. Here, the police are required to review and audit companies, as well as to vet employees (*inter alia* for evidence of past criminal conduct).³¹ This is also the approach taken in Chile where the Carabineros (National Police) approve the use of private security, license private security entities, and ensure that all regulations are upheld.³²

Box 7: Regulation of PMSCs in Afghanistan

Since 2001, Afghanistan has been among states with the largest number of PMSCs present on their territory. The United States government and its allies have contracted PMSCs extensively in the country. In 2012, 17.6 billion USD was spent on private security contracts by the DoD, 633 million USD by State Department and 714 million USD by US Agency for International Development (USAID).³³ Incidents involving misconduct of PMSCs and their personnel in Afghanistan and Iraq have drawn attention to the need for better regulation. Allegations have included disrespect of local customs, excessive drug and alcohol abuse, sexual misconduct, weapons misconduct, vehicle offences and tax evasion.³⁴ In light of these events, then-President Karzai issued the 2010 Presidential Decree 62, ordering the disbandment of PMSCs in Afghanistan and the transfer of security services to the newly created Afghan Public Protection Force (APPF), a state-owned enterprise under the oversight of the High Council and chaired by the Ministry of Interior Affairs.³⁵ A Bridging Strategy for the Implementation of Presidential Decree 62 was created to organise the transition of this responsibility to the APPF. Under this transition process, security for all development sites and agencies, military convoys and all International Security Assistance Force (ISAF) bases and military construction sites will be transferred to the APPF. Exempt from this are diplomatic institutions, international organisations, NGOs and economic organisations which are allowed to employ PMSCs “inside their compounds.”³⁶ In March 2012, APPF deputy ministers signed the first security service contracts with the International Relief and Development (IRD), a non-profit development organisation.³⁷

Under Decree 62, a PMSC can disband, relicence and establish a new legal corporate entity as a Risk Management Company (RMC) which can perform development-related security work in an advisory, training, or mentoring capacity, either for the APPF or clients. RMCs no longer maintain guards or weapons.³⁸ Furthermore, “RMCs are not authorised to perform security services or to hire employees to perform such services.”³⁹ Afghanistan requires Risk Management Companies to obtain licenses through the Ministry of Interior Affairs before they are able to operate. Licenses are not granted to RMCs who may become involved in more active security services; authorisation is only granted to RMCs who perform the above training and planning-related services. Services that RMCs may perform include: threat and risk assessment, audit of security operations, emergency response procedures, project management, security plan development, and security contract assessment.⁴⁰

Due to the history of private contractors and a continuing complex security situation in the country, Afghanistan's regulations are currently under development and will require resources and expertise to limit corruption and labour abuse, increase safety and efficiency, and successfully transfer the provision of security to the state.⁴¹ A report by the Special Inspector General for Afghanistan Reconstruction (SIGAR) voiced various concerns about the state of transition and the inability of the APPF and RMCs to fill the security vacuum left by the disbandment of PMSCS.⁴² The report additionally expressed misgivings regarding the APPF's cost effectiveness and adherence to Afghan regulations by RMCs. However, the director of USAID in Afghanistan, which now uses APPF security, stated in 2012 that there were no projects in danger of closing due to the alleged increased costs or inefficiency related to the APPF.⁴³ According to him, the creation of the APPF is part of a broader transition to sovereignty by Afghanistan. In support of this move, NATO Training Mission – Afghanistan's APPF Advisory Group has been providing advice and capacity building to the APPF to execute the transition from PMSCs. The APPF has also implemented three standard training programs provided by the APPF Training Center (ATC). These programs contain courses on self-defence, arrest procedures, body searches and handling of weapons.⁴⁴

On 4 March 2014, the Ministry of Interior announced the dissolution of the APPF as a state-run enterprise, saying that the “APPF will remain within the scope and mandate of Afghan National Police to provide security” and that the salaries of the APPF guards – once met by the clients of the program – “will be paid by the Afghan government.” The APPF has since been absorbed into the Afghan National Police.

Angola designates the Head of the Executive Power as the relevant central authority for the granting of authorisations.⁴⁵ However, the National Police has a complementary role in instructing the procedures for authorisations and granting the licenses.⁴⁶ The National Police is ultimately responsible for overseeing and inspecting PMSCs' activities, without prejudice to the powers of other competent authorities in this regard.⁴⁷

The United Kingdom has taken a somewhat different approach by establishing the Security Industry Authority, a corporate body independent of the state with responsibility for both licensing and approvals. The Secretary of State, however, retains control of licensing and registration where it relates to the export of goods, transfer of technology and the provision of technical assistance.⁴⁸

Establishing effective procedures for licensing, contracting and authorisation of PMSCs and their personnel

The Montreux Document calls on states to assess the capacity of PMSCs to carry out their activities in conformity with both national and international law. This may be done by acquiring information about past services provided by the company, by obtaining references from other clients, and by acquiring information about the ownership structures of the companies concerned.

An example of this latter practice is found in Ecuador where the legal representative of a company is responsible for the selection of personnel working under him or her.⁴⁹ In addition, companies may not register with the same name as state institutions⁵⁰ and the articles of private security companies must be enrolled in a Registry.⁵¹

In order for such activities to take place, it is essential that adequate resources are provided to any central authority with the power to authorise, license, select or contract PMSCs and that, in addition, authorisation procedures are transparent and properly managed. For instance, the US Department of Defence has more than 20 000 warranted Contracting Officers (COs) and more than twice as many trained and certified Contracting Officer's Representatives (CORs) to assist in the selection of contracted support for the DoD.⁵² There are no DoD directives or instructions that refer to IHL and human rights-specific training; however, since 2012, DoD contracts require conformance with ANSI/ASIS PSC.1-2012, an international management standard for private security operations, which clarifies norms of international human rights law.⁵³ Another good practice in this latter regard is found in Canada, where the Treasury Board Contracting Policy relates to both contracting and related issues of financial accountability. The policy states that "all departments and agencies awarding contracts and/or amendments are required to submit an annual report to the Treasury Board Secretariat on all contracting activities."⁵⁴ The Secretariat requires departments to disclose all contracts of more than 10,000 CAD; in practice, much of this information does not become public.⁵⁵ In the US,

the Government Accountability Office has similar disclosure requirements for any amounts over 50 million USD.⁵⁶

Relating to the management of the authorisation system, South African law goes into some detail regarding procedures for appointing the directors and staff of such an agency, stating that the persons appointed must be "citizens of the Republic and fit and proper persons with regard to their qualifications, experience, conscientiousness, and integrity."⁵⁷ The Act goes on to clarify procedures for ensuring accountability to the executive and parliament, noting that: "The Council must submit a report to the Minister (a) [...] (b) ... in connection with the activities of the Authority, including [...] (vi) instances in which firearms were discharged by a security officer in the performance of his or her duties causing death or injury; (vii) information of criminal complaints and investigations relating to security service providers reported to the Service by Authority [...]."⁵⁸ Furthermore the Committee must maintain a register of any— (a) authorisation issued by the Committee" and "must submit quarterly reports to the National Executive and Parliament with regard to the register."⁵⁹

Recommendation Three: States should identify or establish a government body with responsibility for the authorisation, contracting and licensing of PMSCs. This body should be given sufficient capacity and resources to fulfil these functions.

While most Montreux Document participants have identified a government organ responsible for the authorisation, contracting and licensing of PMSCs, it is less clear that such institutions have the capacity required to adequately carry out their functions. The activities undertaken by these agencies are complex and may include background checks, issuing permits, auditing and monitoring compliance with terms of license, contract and authorisation, or implementing administrative sanctions for misconduct. Moreover, these activities are increasingly resource-intensive due to the growing number of companies entering the industry. Adequate human and financial resources are therefore essential if licenses and authorisations are to be more than rubber stamps. Conversely, licensing, contracting and authorisation regimes with adequate resources and effective systems can be a powerful tool for states wishing to ensure compliance with the Montreux Document good practices. Ways that states can ensure this include streamlining complex and parallel bureaucracies into a central agency, implementing targeted training programmes for agency managers and employees and by ensuring that they have the powers and resources they require to carry out their mandate.

Challenge Four: Low standards for authorisations, contracts, and licenses

In addition to urging states to establish effective systems and procedures for selection, contracting, authorisation, and licensing, the Montreux Document proposes criteria for these systems and processes. According to the Document, states should include requirements in their authorisation, selection and licensing systems that ensure PMSCs fulfil criteria relevant for the respect of national laws, IHL and international human rights law. Good practices 5-13, 14-18, 30-42, and 60-67 outline several reporting mechanisms and requirements in this regard. These good practices include background checks into the past conduct of PMSCs, adequate training, lawful acquisition of weapons and equipment, and internal accountability policies.

The Montreux Document notes that contracting states should not hire PMSCs based solely on competitive pricing and technical ability; home states should only give licenses to companies that meet established regulations and respect national and international laws; and territorial states should only authorise entry to companies that meet national regulations and respect the law. PMSCs are unique economic actors; the industry has the potential to significantly affect the human rights of local populations. PMSC contracts should thus be conditional on a good record of past conduct, high levels of training, effective internal company policies and other considerations. This section describes the ways that states have sought to include criteria and terms in authorisations, contracts and licenses while highlighting the widely observed need for standards that focus on human rights.

Criteria and terms of licenses, contracts, and authorisations for home, contracting, and territorial states

Past conduct

There are several ways in which states can ensure that PMSC personnel do not have a record of misconduct. On the subject of background checks, Angolan law provides us with two requirements for PMSCs' managers and personnel: 1) Angolan citizenship and 2) a clean record of crimes punishable with a maximum sentence of imprisonment.⁶⁰ There are further specific requirements for personnel working in the private security profession: demonstrated physical and psychological aptitudes, accomplishment of compulsory military service, presentation of criminal records, lack of conviction for a crime punishable with maximum sentence of imprisonment, residence certificate issued by the local authority of residence and accomplishment

of training courses in the terms provided by this law.⁶¹

In Sierra Leone, the Standard Operating Procedure (SOP) requires applicants to undergo screening by the Special Branch (SB) or the Criminal Investigations Department (CID) prior to being employed.⁶² Furthermore, PMSCs are asked to name a guarantor to "confirm that they know and trust the person applying for the job."⁶³ However, whether PMSCs screen employees themselves is rather unclear. Some observers note that companies screen applicants in this way but mention that the records data are not reliable, due to limited administrative capacity on the part of records-keeping bodies. Furthermore, no central records are kept about previously employed guards and security companies are not obliged to report to the police on employees dismissed due to misconduct.⁶⁴

A similar procedure is in place in Afghanistan, where authorisation is only given to RMCs whose director, employees and operations managers

Box 8: Regulation of PMSCs in Germany⁶⁵

In Germany, the increasing role of PMSCs is demonstrated by the creation of the g.e.b.b., a company that was tasked with modernising the Department of Defence and overseeing government contracts with PMSCs.⁶⁶ In 2009, Germany was home to 3700 registered PMSCs with a yearly turnover of EUR 4.39 billion. In 2010, there were 168 000 registered PMSC personnel in the country. There is no specific legislation concerning the criteria and terms of license or contract for activities of German PMSCs operating abroad. In 2010, the German government stated that the regulation of PMSCs who provide services of a strictly military nature was not necessary and stated that no such company had headquarters in Germany.⁶⁷ Nonetheless, German companies operate to some extent in conflict areas abroad⁶⁸ where they primarily provide logistical support and protection services for persons and buildings.⁶⁹ However, the German government has clarified that according to German constitutional law, private companies cannot perform governmental activities in areas of armed conflict abroad.⁷⁰

The foreign operations of German PMSCs fall under general licensing provisions. The Foreign Trade and Payments Ordinance requires authorisation for "technical support relating to a military end use" to be obtained from the Federal Office of Economics and Export Control (BAFA).⁷¹ Paragraph 34 of the Industrial Code requires every PMSC headquartered in Germany to be authorised by a designated authority. Germany's constitutional framework requires federal distribution of administrative powers and each Land (province) is independent in deciding which authority handles licenses.

With respect to legal obligations between German non-state clients and domestically operating PMSCs, some security service contracts include obligations relating to conduct as well as performance.⁷² When the German government outsources security services, "companies are under close scrutiny and there is even effective political control by the government."⁷³ Contracts between German PMSCs and the Armed Forces are regulated by the Law on the Application of Direct Force and on the Use of Special Powers by German and Allied Armed Forces and Civil Security Guards. However, the extent to which the German administration looks into the past conduct and background of PMSCs and their personnel is unclear. With respect to monitoring, the German Federal Foreign Office publishes information related to the PMSCs contracted by the state. However Germany has not yet disclosed procurement contracts, citing this would represent "interference in entrepreneurial freedom."⁷⁴

have not been suspected, accused or convicted of a misdemeanour or felony.⁷⁵ The “Procedure for Regulating Activities of Risk Management Companies” states that the criminal background of the candidates should be investigated.⁷⁶ Furthermore, a national RMC’s “staff must not be suspected of or accused of human rights violations as confirmed by the Afghanistan Independent Human Rights Commission.”⁷⁷

Likewise, in Chile, all PMSC personnel are vetted by the Carabineros. This vetting seeks to ensure, in part, that individuals with criminal records are disqualified from providing security services or engaging in activities related to the industry.⁷⁸ The law requires that Police Prefectures maintain full records on private security companies and their personnel. Individual companies must also maintain records of all incidents and perform performance evaluations.⁷⁹ Furthermore, any request for authorisation to use private security services must include an attempt to prove: the “civic suitability, moral and professional character of the petitioner or of the partners or directors” of the requesting body.⁸⁰

Financial and economic capacity

Many countries require PMSCs to have minimum registered capital,⁸¹ present bank guarantees, submit bonds, or show proof of insurance. For instance, in Norway, financial statements and insurance coverage are required documentation for the authorisation of a PMSC. The Norwegian Maritime Directorate recommends that IMO guidelines be followed in this regard, but permits exceptions if some requirements are unable to be fulfilled. All PMSCs are, nevertheless, required to hold liability insurance.⁸² In Denmark, authorisation can only be granted if the individual or company has not sought or been declared bankrupt or has significant public debt.⁸³ Meanwhile, firms in Iraq “must submit a minimum refundable bond of 25,000 USD⁸⁴ [as well as] evidence that they have sufficient public liability insurance to cover possible claims against them for a reasonable amount to be advised and published by the Ministry of Interior (MOI).”⁸⁵

Personnel and property records

In Afghanistan, to receive a license, RMCs must “have a charter containing goals, structure and scope of activity of the company. Foreign staff shall have work permits and valid work visas to operate in Afghanistan.”⁸⁶ PMSCs in Chile must maintain records of personnel and weapons. These records include the use of firearms, and other incidents, as well as evidence of certifications.⁸⁷

South Africa perhaps goes furthest in this regard, requiring extensive reporting on the part of companies, including:

- (aa) a list with the names and identity numbers of all security officers and other employees of the security service provider...
- (bb) the wage register, payroll, pay-slips or other similar documentation in respect of such security officers, officials and employees;
- (cc) time-sheets and attendance registers reflecting the hours of work of such security officers, officials and employees;
- (dd) Posting sheets indicating the places where such security officers have been or are utilised in connection with a security service, the nature of such service, whether the security officers are in possession of any firearm or other weapon or have been provided with any firearm or other weapon by anyone and any legal authorisation regarding such a firearm;
- (ee) Documentation indicating the level of security training of such security officers and officials; personnel files of such security officers, officials and employees; [...]⁸⁸

Training

In Afghanistan, any Afghan or foreign citizen employed by a PMSC, must have “a graduation certificate in basic military training from a military training school or a security training certificate from a company licensed to conduct security related training.”⁸⁹ “RMCs must employ personnel already professionally trained and qualified to deliver security advisory services or provide them with full and proficient training prior to their employment. As a principle of corporate

responsibility, it is also recommended that RMCs provide periodic refresher training which shall be mandatory for all armed personnel.”⁹⁰

South Africa’s domestic Code of Conduct for Security Service providers, launched in 2003 by the Minister for Safety and Security, outlines different benchmarks for providing adequate training.⁹¹ The Code stipulates that “(10) A security service provider may not - (a) use or make any person available for the rendering of a security service, whether directly or indirectly, unless such a person - (ii) has successfully completed the security training required in of law in respect of the rendering of the relevant security service;”⁹²

(2) A security service provider must, before employing any person as a security officer, take all reasonable steps to verify the registration status as security service provider, level of training, qualifications and all other relevant facts concerning such a person.”⁹³

“(7) A security service provider must, at his or her own cost and as often as it is reasonable and necessary, but at least once a year, provide training or cause such training to be provided, to all the security officers in his or her employ to enable them to have a sufficient understanding of the essence of the applicable legal provisions regarding the regulation of the private security industry and the principles contained in this Code.”⁹⁴

Lawful acquisition and use of equipment, in particular weapons

Many states allow their PMSCs to be armed. The Montreux Document urges that prior to granting a license, authorisation or contract, states ensure that the private company has lawfully acquired its weapons and complied with all national regulations. For instance in Afghanistan, PMSCs are forbidden to carry heavy arms; only small weapons necessary for self defence are allowed. “Licenses are separately issued for each weapon or non-tactical armoured vehicle and shall be valid for one year. After one year, the license can be renewed by paying the appropriate fee. Required weapons and ammunition must be procured through a

company or individual with the proper licenses to import, export, and sell weapons or they may be provided by the Ministry of Interior in accordance with the Law on Firearms, Weapons, Ammunitions and Explosives.”⁹⁵

Of course, every state has national laws that pertain to the private possession of weapons. For instance, in Germany, the right to carry a weapon is regulated by the German Weapons Act,⁹⁶ which requires persons to obtain a firearms certificate in order to carry arms in Germany. Since 2003, certificates are also required for arms used as warning devices or alarms, for firing non-lethal incapacitants, and for signalling with firearms, all of which were previously exempt.⁹⁷ However, the Montreux Document urges that weapons laws are enacted specifically for PMSCs who may use their weapons in the line of duty. In Chile, the relevant law covers tasers and mace and specifies that weapons are limited to on-duty use. Authorisation to use heavy weapons may be provided at the discretion of the Carabineros.⁹⁸

Interestingly, Belgian law (in Chapter 3, Article 5, Clause 4 of the Law on Private Security Services) states that anyone employed in a private security company cannot also work as a private manufacturer or dealer of weapons or ammunition, or any other activity which, may constitute a danger to public order or the internal/external security of the state of Belgium.⁹⁹

Internal organisation, regulation and accountability

In addition to quarterly reporting on performance and activities to the RMC office,¹⁰⁰ the officers, directors, and employees of PMSCs in Afghanistan may not “participate in political activities, sponsor political parties and candidates for public office, use funds for religious activities, train at mosques and madrassas and recruit serving officers, non-commissioned officers, soldiers, and other active officials of the Ministry of Defence, Ministry of Interior, National Directorate of Security and other state departments.”¹⁰¹

In Norway, firms are required to notify the licensing authority of changes to the company’s board or

partners. Companies are also required to maintain records and to provide information on operations to the authorities.¹⁰² Additionally, for maritime security providers, regulations require that companies notify Kripos (the criminal investigative service) of suspected criminal offences conducted on board ship.¹⁰³

Welfare of personnel

Not only does IHL and human rights law protect personnel of PMSC companies if they are deployed as civilians in situations of armed conflict but the Montreux Document also urges states not to grant licenses, authorisations or contracts to PMSCs that do not make efforts to protect their personnel. This is both expressed in terms of physical safety as well as occupational welfare. Various states have developed rules that reflect this concern. In China, for example, the law states that “security practitioner units shall safeguard the legitimate rights and interests of the social insurance, labour and employment, labour protection, wages and benefits, education and training of security guards.”¹⁰⁴ Similarly, Costa Rican law states that

private security companies should, in the pursuit of their functions, protect civil liberties and the dignity of human rights (including of PMSC personnel themselves). If companies are found to be acting against civil liberties and human rights, they can have their licenses revoked.¹⁰⁵

Rules and limitations on the use of force and firearms

When it comes to the regulation of use of force and firearms, the Montreux Document suggests that states formulate clear laws and enforce their compliance accordingly. Many states have laws that restrict the use of force to self-defence. However, these laws should be clearly articulated with accompanying checks and balances. For instance in Italy, domestic private security guards can only use force for self-defence or the defence of third persons and any use of force needs to be immediately reported to the competent authorities.¹⁰⁶

In the run-up to the 2009 adoption of amendments to regulations governing the use of force, the

Box 9: Regulation of PMSCs in Francophone and Lusophone Africa: Montreux Document Regional Conference in Senegal

The Montreux Document regional conference for Francophone and Lusophone African states took place in Dakar, Senegal in June 2014. It gathered representatives from 16 different states as well as international and regional organisations and civil society.¹⁰⁷ It was organised by the Swiss Federal Department of Foreign Affairs, the International Committee of the Red Cross (ICRC), in cooperation with DCAF and the Centre of Security and Defence Studies (CHEDS) from Senegal. Conference participants built on the discussions held during the Montreux +5 Conference and identified similar challenges to the promotion and implementation of Montreux Document in the region.

Participants of the regional conference discussed several issues related to PMSCs:

- Expansion of the private security sector in the region, in particular domestic PSCs
- Insufficient national legal and regulatory frameworks specific to PMSC services, coupled with a lack of oversight of their activities from states, including through authorisation and licensing procedures
- Varying approaches among states regarding PMSCs’ use of force and possession of weapons; the implementation of the Montreux Document’s good practices is a challenge in this context
- Need for better training programmes for PMSC personnel and managers based on international human rights and humanitarian law

All participants agreed that a dialogue on the use and regulation of PMSCs is needed and should be contextualised to the specific challenges faced by states in the region. For instance, special attention should be given to the roles that PMSCs play in different settings, such as in situations of armed conflict, mining and extractive sites, or in maritime zones affected by piracy. Montreux Document good practices were considered as a useful and practical tool to assist states in regulating PMSCs’ activities and services more effectively.

Norwegian Bar Association provided a number of recommendations, including those related to concerns over the crossover of PMSC activities into traditional police roles and the inadequate provisions over use of force. Indeed, the Norwegian Bar Association has expressed concern that the authorisation to use force has been expanded through judicial precedent to equal that of police.¹⁰⁸ Norway appears to rely heavily on international law and principles of human rights to dictate acceptable behaviour by private security companies¹⁰⁹ and legislation enables Norway to revoke the permission of PMSCs to operate in Norway if supervising authorities become aware of breaches to international or Norwegian law.¹¹⁰

Ukraine's law "On Security Activities" contains relatively extensive regulations on the use of force and firearms. However, the law is primarily targeted at the provision of domestic private security and it is unclear to what extent this law applies to private companies based in Ukraine but working abroad, or to companies with which the government contracts externally. Regardless, the law contains sections that may serve as good practices for other states. In particular, the law specifies that in the course of security activity, security personnel have the right to use physical force or equipment, if other measures fail. It is worth noting that the law forbids "using special equipment in areas of high concentration of people, except in cases of self defence." And that any use of force requires "immediate verbal or written notification to immediate supervisor and territorial ministry of internal affairs and in the case of injuries, immediate call for medical assistance."¹¹¹

In Afghanistan, the "use of force by personnel of RMCs, where necessary, shall be limited to self-defence or the defence of others in accordance with Afghan penal law. When use of firearms becomes unavoidable, any use of force must be proportionate to the threat and fire can only be initiated after serious consideration for the safety of innocent people [bystanders]..."¹¹²

Rules on the possession of weapons by PMSCs and their personnel

In addition to rules governing the use of firearms, the Montreux Document urges states to introduce regulations governing both the possession and acquisition of weapons. States regulate the right to carry arms in a variety of ways. In Afghanistan, RMCs' light weapons and armoured vehicles must be registered and licensed, and renewed annually. The procurement of weapons and ammunition can only be made through certified companies. "All RMC personnel designated to possess and carry weapons on duty must obtain and at all times carry their identity card and weapon license."¹¹³ Afghanistan's Presidential Decree 62 stipulates penalties for violating arms possession regulations. Armoured vehicles imported illegally by PMSCs for contracts with entities other than those exempt from Decree 62 (embassies, entities accredited with diplomatic status, or ISAF and coalition forces) will be seized by the government of Afghanistan. "Failure to register arms with the Ministry of Interior prior to 17 August 2010 shall be punishable by confiscation of weapons and fines in accordance with the Law of Firearms, Ammunition and Explosives."¹¹⁴ Similarly, in Iraq, PMSC employees must have a "weapons card" issued by the Ministry of Interior and all weapons imports must occur through the MOI. PMSCs are required to register all serial numbers of weapons, notify the MOI of any changes in weapons holdings, store weapons securely, ensure employees only carry weapons when on official duty, return them to storage afterwards, and only use weapons specified under CPA Order Number 3 (revised) (amended); privately owned weapons may never be used.¹¹⁵

The US 2014 Operational Law Handbook prescribes that PMSC personnel are allowed to carry arms for use in self-defence only following explicit approval. The application to carry arms must include a description of where such contract security personnel will operate, the anticipated threat, any non-military property or non-military personnel that operations are intended to protect, a description of how the movement of contractor personnel will be coordinated, how a contractor will be identified rapidly by armed forces, a plan for information sharing between US

military forces and contractors, and training and documentation.¹¹⁶

In Belgium, according to the Royal Decree on the Weapons used by Companies, Services, Organisations, and Persons and the 1990 Law on Private Security Services, private security companies operating within Belgium are required to apply for a special license in order to hold or bear arms. This license is granted for an initial period of five years and it can be renewed every five to ten years depending upon the service that the company is offering. The license may also be suspended or revoked in case of contravention of the law.¹¹⁷

Similarly, Canada's Firearms Act stipulates that an individual is eligible to hold a licence only if the individual successfully completes the Canadian Firearms Safety Course and passes the relevant tests, as administered by an instructor who is designated by a chief firearms officer.¹¹⁸ Furthermore,

(1) A business is eligible to hold a licence authorising a particular activity only if every person who stands in a prescribed relationship to the business is eligible ... to hold a licence authorising that activity or the acquisition of restricted firearms.

(2) A business other than a carrier is eligible to hold a licence only if (b) the individuals who stand in a prescribed relationship to the business and who are determined by a chief firearms officer to be the appropriate individuals to satisfy the requirements of section 7 [described above] are eligible to hold a licence under that section.

(3) A business ... is eligible to hold a licence ... only if every employee of the business who, in the course of duties of employment, handles or would handle firearms is the holder of a licence authorising the holder to acquire firearms that are neither prohibited firearms nor restricted firearms.¹¹⁹

The Firearms Act also determines the eligibility of a person to hold a license and establishes that the chief firearms officer will take under special

consideration whether the applicant has been convicted of a violent offence, has been treated for a mental illness that was associated with violence, or has a history of violent behaviour.¹²⁰ Furthermore, according to a 2009 Priv-War report, Canadian "contracts with security providers in Afghanistan contain clauses ... establishing the authority ... to inspect weapons to ensure compliance with Canada's international obligations."¹²¹

Identification of PMSC personnel and their means of transport

In areas of armed conflict, it is imperative that PMSC personnel remain clearly identifiable. In this regard, the Montreux Document recommends that they carry clearly visible identification insofar as this is compatible with safety requirements. Their means of transport should also be clearly distinguishable. Good practices 16 and 45 are meant to ensure that PMSCs are not mistaken for national security personnel or the armed forces of parties to the conflict (although this principle is also relevant to non-conflict situations). In Afghanistan, "RMCs will identify their vehicles, helicopters, airplanes and other modes of transportation with signs or placards with the company name or logo visible as security conditions allow."¹²² In Angola, personnel identification through uniforms is common and the law states that staff must wear a uniform whenever they are exercising their duties.¹²³ The design of the uniforms and distinctive symbols of the PMSCs must not create confusion with those of the Defence Forces, Security, Internal Order or Civil Protection of the State.¹²⁴

In situations outside of armed conflict, these good practices are relevant as well. Norwegian PMSC personnel, for example, are required by law to wear a uniform designed in such a way that it cannot be mistaken for that of a member of state security forces. Personnel are also required to carry proof of identity issued by the PMSC and approved by the licensing authority, and are required to present these documents upon request. The Ministry of Justice Working Group has suggested that the identification be worn openly, and include identification numbers.¹²⁵

Recommendation Four: States should base licenses, contracts, and authorisations on concrete terms and criteria that prioritise human rights

In obtaining contracts, authorisations or licenses, a central concern of the Montreux Document is that factors such as past conduct, personnel training, and internal company policies are being ignored or treated as less important than competitive pricing. In particular, minimum training standards are commonly non-existent or not enforced. Both across Montreux Document states, as well as within specific jurisdictions, there exists a wide variety of training programmes and requirements; however, not all are adequate. This variation is partly due to the fact that PMSCs provide a range of services, requiring differing degrees of specialisation and preparation. Nevertheless, PMSC personnel should be trained to ensure they respect IHL and human rights law in their areas of operation. States are in a unique position to encourage or enforce good practices in this regard by requiring minimum training standards as part of contracting, authorisation, and licensing processes. States can also require that PMSCs have adequate internal complaints and accountability mechanisms. Of particular importance are requirements relating to the use of force and firearms given their obvious implications for human rights. Granting a license or authorisation, for example, to a PMSC that has registered weapons should be conditional on the completion of approved weapons training by relevant staff.

NOTES

1. Belgium; Law on Private Security Services, 10 April. 1990, *Moniteur Belge*, 29 May 1990.
2. Axelle Reiter-Korkmaz, "Belgian National Report on Private Military and Security Companies," PRIV-WAR Report-Belgium, National Reports Series 06/09, 18 May 2009, 4.
3. Belgium; Chapter 2, Article 3, Clause 2, Law on Maritime Piracy, 16 January 2013.
4. Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (New York: Cornell University Press 2003), 244.
5. United States; Appendix B. DoD Contract Obligations, in Moshe Schwartz and Jennifer Church, "Department of Defence's Use of Contractor's to Support Military Operations: Background, Analysis and Issues for Congress," *Congressional Research Services Report for Congress* (17 May 2013): 26; Quoted in Rebecca DeWinter-Schmitt, ed. *Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices* (2013): 17.
6. *Ibid*, at 3.
7. Permanent Mission of the United States of America to the United Nations and other International Organisations in Geneva, "United States Response to Questionnaire Concerning the Montreux Document.
8. Rebecca DeWinter-Schmitt, ed. *Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices* (2013): 56.
9. United States; Federal Acquisition Regulation System (FARS), 48 C.F.R. Ch. 1 (2013).
10. United States; Federal Register / Vol. 75, No. 55, Rules and Regulations, 23 March 2010, 14059.
11. Rebecca DeWinter-Schmitt, ed. *Montreux Five Years On*, 58.
12. United States; 48 C.F.R. Paragraphs 52.225-19 (2013); 48 C.F.R. Paragraphs 252.225-7995 (2013); Office of the Under Secretary of Defence, Class Deviation, Contractor Personnel Performing in the US Central Command Areas of Responsibility, Deviation No. 2013-00015 (27 July 2013).
13. United States; 48 C.F.R. Paragraphs 252.225-7039; 48 C.F.R. Paragraphs 7040; US Department of Defence Instruction Private Security Contractors Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises, DoDI 3020.50 Encl. 3 (22 July 2009); US DoD Instruction Operational Contract Support (OCS) Encl. 2 DoDI 3020.41 (20 December 2011); US DoD Directive Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order or Counterintelligence Activities Encl. 2 DoDD 5210.56 (1 April 2011); 48 C.F.R. Paragraphs 252.225-7019.
14. United States; The National Defence Authorisation Act for Fiscal Year 2011, Pub. L. No. 111-383, Paragraphs 833, 124 Statute 4137 (2011). See page xx for more information on ANSI/ASIS PSC.1-2012.
15. Sierra Leone; Standard Operating Manual for Private Security Companies in Sierra Leone (SOP).
16. Sierra Leone; SOP Chapter 11.0/11.2 Personnel File.
17. Sierra Leone; SOP Chapter 1.2.2/1.j. Regulations by the ONS.
18. Sierra Leone; The National Security and Central Intelligence Act of 2002 (NSCIA), 19(3)(b)
19. Documents that have to be submitted are listed in subsection 3a-d NSCIA and more accurately under chapter 1.2.2/1.a-j SOP. Ammunition is mentioned in subsection 3b NSCIA, although it contradicts the SOP's rule of non-use of firearms.
20. The ONS is a Government agency in Sierra Leone which prepares joint intelligence assessments; acts as a secretariat for national, provincial and district security committees; and provides strategic security advice to the President. The ONS is now evolving into a de facto Cabinet Office with a much wider remit than intelligence assessment and national security coordination. The ONS now aims to provide policy research and coordination to the Government on human security. See Piet Biesheuvel, Tom Hamilton-Baillie and Peter Wilson, "Sierra Leone Security Sector Programme. Output to Purpose Review," April 2007, 6, http://s4rsa.wikispaces.com/file/view/SILSEP_07.doc (accessed 23 November 2012)). See also NSCIA 17-18. where the functions of the ONS are laid out.

21. Sierra Leone; NSCIA, subsection 4.
22. Chile; Decree No. 1773, (10/10/1994), Decree No. 3.607
23. Canada; Area Control List SOR/81-543, <http://laws-lois.justice.gc.ca/eng/regulations/SOR-81-543/FullText.html> accessed 14 March 2013.
24. Canada; Governor in Council (GIC) appointments are made by the Governor General on the advice of the government Cabinet. The appointments range from heads of agencies to CEOs of Crown (government owned) corporations. The Governor General is the federal representative of the British monarch, who is appointed to carry out constitutional and representative duties in Canada.
25. Canada; Export and Import Permits Act (R.S.C., 1985, c. E-19) <http://laws-lois.justice.gc.ca/eng/acts/E-19/page-1.html> Accessed March 25, 2013. EIPA incorporates the provisions of the *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies* www.wassenaar.org
26. Canada; Minister of Justice, Controlled Goods Regulations Program, SOR/2001-32. <http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/index-eng.html>, Accessed 25 March 2013.
27. David Antonyshyn, Jan Grofe and Don Hubert, "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad." PRIV-WAR Report Canada-National Reports Series 03/0, 12 February 2009, 9.
28. Norway; Norwegian Maritime Directorate 2011, July 1; IMO guidelines must also be followed in the selection of a Maritime PMSC. An interpretation of these guidelines and those of the Norwegian Maritime Directorate can be found in the Provisional Guidelines for the Use of Armed Guards on Norwegian Ships, (Norwegian Maritime Directorate 2011)
29. Afghanistan; Article 4, Section 5.A., Ministry of Interior Affairs, Islamic Republic of Afghanistan, "Procedure for Regulating Activities of Risk Management Companies in Afghanistan," Kabul, Afghanistan, 10 January 2012, 4.
30. Costa Rica; Law on Private Security Services 2003, Article 8, Chapter 3.
31. Norway; Ministry of Justice and Police. *About the Law Amending the Law on Security Guard Services*. Working Group, Oslo: Stoltenberg Government, 27 March 2009.
32. Chile; Decree No. 1773, (10/10/1994), Decree No. 3.607.
33. United States Government Accountability Office, "Afghanistan: Key Oversight Issues," Report to Congressional Addressees, February 2013, 31.
34. Moshe Schwartz, *The Department of Defence's Use of Private Security Contractors in Afghanistan and Iraq: Background, Analysis and Options for Congress* (Congressional Research Service, 2011), 15.
35. The APPF provides security services for infrastructure, facilities, transportation missions, construction projects, personnel and sites. Embassies and entities with diplomatic status are exempt under the provisions of the Vienna Convention on Diplomatic Relations of 1961 and may continue to contract PSCs for their services.
36. President of Islamic Republic of Afghanistan, *About Dissolution of Private Security Companies*, art. 7.
37. NATO-ISAF, "Afghan Public Protection Force signs first contracts," ISAF News List, <http://www.isaf.nato.int/article/news/afghan-public-protection-force-signs-first-contracts.html>, accessed November 2013.
38. Afghan Public Protection Force, *Frequently Asked Questions*, <http://www.appf.gov.af/faq.htm>, accessed 15 April 2013.
39. Afghanistan; Article 5, Ministry of Interior Affairs, Islamic Republic of Afghanistan, "Procedure for Regulating Activities of Risk Management Companies in Afghanistan." Kabul, Afghanistan, 10 January 2012, 4.
40. Afghanistan; Article 4, Section 5.A., Ministry of Interior Affairs, Islamic Republic of Afghanistan, "Procedure for Regulating Activities of Risk Management Companies in Afghanistan." Kabul, Afghanistan, 10 January 2012, 4.
41. Azam Ahmed, "For Private Security Guards in Kabul, Hazardous Duty," *The New York Times*: 25 November 2012; United States Government Accountability Office, Afghanistan. Key Oversight Issues, 18; Sarah Chacko, "Contractors See Risks in Getting Security from Afghans," *Federal Times*, February 23, 2012, <http://www.federaltimes.com/article/20120223/ACQUISITION03/202230307/Contractors-see-risks-getting-security-from-Afghans>, accessed 20 2014.
42. See Special Inspector General for Afghanistan Reconstruction (SIGAR), Audit 13-15, "Afghanistan Public Protection Force: Concerns Remain and about Force's Capabilities and Costs," July 2013, <http://www.sigar.mil/pdf/audits/SIGAR%20Audit%2013-15%20APPF.pdf>, accessed November 2013.
43. Lawrence Quill, "Afghan Public Protection Force Replaces Contractors," *NPR*: 23 May 2012.
44. Afghan Public Protection Force, "Training Center", Afghan Public Protection Force, <http://www.appf.gov.af/training.htm>, accessed 30 May 2014; The Bridging Strategy for Implementation of Presidential Decree 62 (Dissolution of Private Security Companies) Bridging Period, 4.
45. Angola; Law No. 10/14 – National Assembly, Gazette Series No. 140, 30 July 2014, Art. 25
46. *Ibid*, Arts. 26 and 29 §1.
47. *Ibid*, Art. 32 §1.
48. UK; Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003, no. 2764.
49. Ecuador; Surveillance and Private Security Law Number 012/2003, Section 6.
50. *Ibid*, Art. 9.
51. *Ibid*, Art. 10.
52. Permanent Mission of the United States of America to the United Nations and other International Organisations in Geneva, "United States Response to Questionnaire Concerning the Montreux Document;" See also the Defence Contingency Contracting Officer Representative Handbook, <http://www.acq.mil/dpap/ccap/cc/corhb/index.html>, accessed 27 March 2013.
53. ANSI/PSC.1-2012 American National Standard on Management System for Quality of Private Security Operations – Requirements with Guidance.
54. Canada; Treasury Board Secretariat, paragraph 5.1.2, <http://www.tbs-sct.gc.ca/tbs-sct/index-eng.asp>, accessed 27 March 2013.
55. *Ibid*. See also Disclosure of Contracts, Online Foreign Affairs and International Trade Canada: <http://www.tbs-sct.gc.ca/pd-dp/dc/index-eng.asp>, accessed 27 March 2013.
56. Sarah Percy, *Regulating the Private Security Industry* (New York, Routledge, 2006), 26.
57. South Africa; Private Security Industry Regulation Amendment Bill), Section 14.
58. *Ibid*, Section 10.
59. South Africa; Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006, Section 8.
60. Angola; Law No. 10/14 – National Assembly, Gazette Series No. 140, 30 July 2014, Art. 8 §1 and §2.
61. *Ibid*, Art. 8 §4.
62. Sierra Leone; SOP Chapter 2.1/ii. Codes of Conduct.
63. *Ibid*, Chapter 11.0/11.3.
64. Rita Abrahamsen and Michael C. Williams, "The Globalisation of Private Security, Country Report: Sierra Leone," Series 1, The Globalisation of Private Security research project, University of Wales, Aberystwyth, October 2004, <http://users.aber.ac.uk/rbh/privatesecurity/country%20report-sierra%20leone.pdf>, accessed 21 November 2012, 12.
65. For additional information see, Elke Krahmhann, "Controlling private military companies: The United Kingdom and Germany," *International Studies Association, Annual Convention*, 2003.

66. Germany; g.e.b.b., g.e.b.b. – *The Inhouse Company of the German Federal Ministry of Defence*, 2013 <http://www.gebb.de/de/unternehmen/englishInformation.html>, accessed 29 July 2014; Gesellschaft für Entwicklung, Beschaffung und Betrieb (g.e.b.b.), "Unternehmen," <http://www.gebb.de/de/unternehmen.html>, accessed 26 June 2014; Anna Eberhardt und Tim Engartner, "Private Renditen aus Kriegen", *International*, 12 June 2014, http://www.fb03.uni-frankfurt.de/51053691/WOZ_PrivateRenditen.pdf, accessed 26 June 2014.
67. Germany; Deutscher Bundestag, *Antwort der Bundesregierung auf die Grosse Anfrage der Abgeordneten Kaja Keul, Tom Koenings, Omid Nouripour, weiterer Abgeordneter und der Fraktion BündNIS 90/ DIE GRÜNEN-Drucksache 17/4573. Regulierung Privater Militär und Sicherheitsfirmen*, 11.
68. In 2009, German Armed Forces were involved in 12 operations abroad; See <http://www.bundeswehr.de/>; Heike Krieger "Der privatisierte Krieg: Private Militärunternehmen in bewaffneten Konflikt" in: *Archiv des Völkerrechts*, vol. 44 (2006): 159-186, 165.
69. Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, preliminary remark; Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 23.
70. Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 4.
71. Germany; *Foreign Trade and Payments Ordinance*, 2013, sections 45-54, http://www.gesetze-im-internet.de/englisch_awv/, accessed 15 July 2011; Deutscher Bundestag, *Antwort der Bundesregierung auf die Grosse Anfrage der Abgeordneten Kaja Keul, Tom Koenings, Omid Nouripour, weiterer Abgeordneter und der Fraktion BündNIS 90/ DIE GRÜNEN-Drucksache 17/4573. Regulierung Privater Militär und Sicherheitsfirmen*, August 5, 2011, <http://dipbt.bundestag.de/dip21/btd/17/071/1707166.pdf>, Accessed 15 July 2014.
72. Service contracts are addressed by Sections 611-630 of the German Civil Code; Bürgerliches Gesetzbuch (BGB), published on 2 January 2002 (BGBl. I 42, 2909; 2003 I 738), with amendments as of 10 December 2008 (BGBl. I 2399).
73. Evertz, "Regulation of private military, security and surveillance services in Germany", 11.
74. Germany; Deutscher Bundestag, *Antwort der Bundesregierung auf die Grosse Anfrage der Abgeordneten Kaja Keul, Tom Koenings, Omid Nouripour, weiterer Abgeordneter und der Fraktion BündNIS 90/ DIE GRÜNEN-Drucksache 17/4573. Regulierung Privater Militär und Sicherheitsfirmen*, August 5, 2011, <http://dipbt.bundestag.de/dip21/btd/17/071/1707166.pdf>, accessed 30 June 2014.
75. Afghanistan; Ministry of Interior Affairs, Islamic Republic of Afghanistan, "Procedure for Regulating Activities of Risk Management Companies in Afghanistan." Kabul, Afghanistan, 10 January 2012, Article 11, 7.
76. Ibid, Article 14, 8.
77. Ibid, Article 11, 7.
78. Chile; Decree No. 1773, (10/10/1994), Decree No. 3.607.
79. Ibid.
80. Chile; Decree 3.607 Article 6.
81. For instance, in China a "Security service company should not possess less than one million yuan of registered capital."The People Republic of China State Council Order, Security Service Management Ordinance, Article 8, http://www.gov.cn/zwgk/2009-10/19/content_1443395.htm, accessed 3 December 2014.
82. Norway; Norwegian Maritime Directorate. "Provisional Guidelines on the Use of Armed Guards on Board Norwegian Ships." *IGPandi. Org*, 2011. http://www.igpandi.org/downloadables/piracy/news/Provisional_Guidelines.pdf, accessed March 2013; Norwegian Government. *Act 5 January 2001, No. 1 Relating to Security Guard Services*. Legislation, Oslo: Norwegian Government, 2001.
83. Denmark; Law on Private Security Companies (Act No 266 of 22 May 1986), Article 3.
84. Iraq; Memo. 17, CPA (2004), Sec. 3.1
85. Ibid, Sec. 3.3.
86. Afghanistan; "Procedure for Regulating RMCs," Article 10, 6.
87. Chile; D.S. No. 1773, 10 October 1994, Decree No. 3.607.
88. South Africa; Private Security Industry Regulation Act (No. 56 of 2001), Section 34; Private Industry Regulation Amendment Bill (2012).
89. Afghanistan; "Procedure for Regulating RMCs," Article 14, 8.
90. Ibid, Annex 2, 12
91. South Africa; Code of Conduct for Security Service Providers, 2003, Section 19.
92. Ibid, Section 9.
93. Ibid.
94. Ibid.
95. Afghanistan; "Procedure for Regulating RMCs," Article 15, 8.
96. Germany; Weapon Law in the Federal Republic of Germany, http://www.oslo.diplo.de/contentblob/2105474/Daten/287205/Vaapen_DownloadDatei.pdf, accessed 24 October 2013.
97. Ibid.
98. Chile; Law No 17.798, Law No 9.080.
99. Belgium; Law on Private Security Services, 10 April 1990
100. Afghanistan; "Procedure for Regulating RMCs," Article 17, 9.
101. Ibid, Article 18, 9.
102. Norway; Norwegian Government, *Act 5 January 2001, No. 1 Relating to Security Guard Services*, 2001.
103. Norway; Norwegian Maritime Directorate, Regulations of 1 March 2005, No. 235.
104. China; The People's Republic of China State Council Order, Security Service Management Ordinance, http://www.gov.cn/zwgk/2009-10/19/content_1443395.htm, accessed 3 December 2013.
105. Costa Rica; Regulation on the Implementation of the 2003 Law on Private Security Services 2006, Article 5, Chapter 1.
106. Italy; Andrea Atteritano, "Italian Legislation on Private Military and Security Companies", PRIV-WAR Report-Italy, National Reports Series 02/2009, January 2009, 11-12.
107. Algeria, Benin, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Guinea, Guinea-Bissau, Ivory Coast, Madagascar, Mali, Mauritania, Niger, Senegal, Togo.
108. Norway; Norwegian Bar Association, *Work Report- Review of Legislation on Security Guard Services, Legal Review*, Oslo: Norwegian Bar Association, 2008.
109. Norway; Norwegian Ministry of Finance. *Companies Excluded From the Investment Universe*. 1 November 2013. http://www.regjeringen.no/nb/dep/fin/ema/statens_pensjonsfond/ansvarlige-investeringer/selskaper-som-er-utelukket-fra-fondets-i.html?id=447122, accessed March 2013.
110. Norway; Norwegian Royal Ministry of Foreign Affairs. *Voluntary Principles Implementation Report in 2009- Plenary Report* Government Report, Oslo: Royal Ministry of Foreign Affairs, 2010.
111. Ukraine; Verkhovna Rada, Law of Ukraine "On Security Activities," from 22.03.2012, № 4616-VI. Translation in abstract text from 22 March 2012, <http://zakon2.rada.gov.ua/laws/ano/4616-17>, accessed 10 March 2013: Security personnel may use physical influence in the case of 1: defending themselves or other persons from an attack that poses a threat to life, health or property; 2: avoiding an unlawful attempt to forcefully takeover specialized equipment; 3: the need to detain an offender who illegally entered the guarded object or is carrying out other unlawful acts and offers resistance; 4: neutralizing an animal that poses a threat to the life and health of the security personnel or other persons.
112. Afghanistan; "Procedure for Regulating RMCs," Annex 2, 12.
113. Ibid.
114. Afghanistan; Bridging Strategy, 7.
115. Iraq; *Memo*. 17, CPA (2004), Sec. 6.
116. United States; 2014 Operational Law Handbook, Judge Advocate General, Section VI; Huskey, Sullivan, 17.
117. Belgium; Royal Decree on the Weapons Used by the Companies, Services, Organisms, and Persons to Which Applies the 1990 Law on Private Security Services, 17 November 2006, *Moniteur Belge*, 24 November 2006.

118. Canada; Firearms Act (S.C. 1995, c. 39), section 7 (1a): <http://laws-lois.justice.gc.ca/eng/acts/F-11.6/>, accessed 28 March 2012.
119. Ibid, Section 9.
120. Ibid, Section 5.
121. Antonyshyn et. al. "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad," 23.
122. Afghanistan; "Procedure for Regulating RMCs," Article 16, 8.
123. Angola; Law No. 10/14 – National Assembly, Gazette Series No. 140, 30 July 2014, Art. 12 §1 (a).
124. Ibid, Art. 28 § 2 (b).
125. Norway; Ministry of Justice and Police 2009, 27 March, Norwegian Government, 2001.

Section Three:

Monitoring and Accountability

Challenge Five: Weak monitoring of compliance with terms of authorisations, contracts, and licenses

The Montreux Document's good practices 21, 23, 46-48, 52, 68, 69, and 73 appeal to states to effectively monitor PMSC's compliance with the terms found in their licenses, contracts and authorisations. Through systematic, institutionalised administrative and monitoring mechanisms, states can ensure that the activities of PMSCs are consistent with their obligations regarding IHL and human rights law. Especially when licenses, contracts and authorisations contain clear terms and criteria pertaining to human rights (as elaborated in the previous challenge), this helps to ensure that a company's continued ability to operate rests on a record clean of any misconduct, violations, or breach of contract terms.

This section presents a snapshot of managerial and administrative monitoring mechanisms that are used by Montreux states to improve oversight of PMSCs as well as the opportunity for companies to respond to allegations and initiate appeals. The section illustrates obligatory

record-keeping requirements, as well as the obligations of companies to disclose information to parliamentary committees, oversight bodies or to the general public. It also addresses the powers of some oversight bodies to compel firms to allow access to documents and company premises when it is necessary for their work. Ultimately, the section brings attention to the overall weak state of procedures for monitoring compliance and affecting sanctions.

Administrative and monitoring mechanisms

The availability of managerial and administrative monitoring mechanisms is a key resource for states' effective oversight of PMSCs. In Belgium, private security companies send a yearly report on their activities to the Minister of the Interior, who, in turn, drafts a report on the application of the relevant law for the House of Representatives. The Interior Minister also keeps the chamber updated on the progress of the range of measures intended to limit the risks undertaken by private security companies in the exercise of their functions.¹ According to Belgian Law on Maritime Piracy, in cases where officers have used firearms or found people suspected of involvement in acts of piracy, or if the ship was attacked by pirates, the

operational manager must promptly report the incident to the authorities.² For each mission, the operational manager must keep a logbook of data and facts that is available for checks. Denmark's Law on Security Services allows the police to enter into the premises of a private security company in order to access their books, paper work, and to ensure adequate monitoring of their activities.³

In a similar vein, Sweden has established a system which requires PMSCs to submit a report each March on the previous year's activities to the County Administrative Board at which they are registered.⁴ The Board then has the right to inspect all documents relating to a PMSC's corporate activities, something which it does at least every two years.⁵ If PMSCs fail to provide required information, or prevent access to documents by the Board, they can be subject to fines.⁶ If companies are found to be operating without proper authorisation, they can be subject to criminal penalties and up to six months in prison.⁷ Portugal has a similar reporting system although, here, PMSCs are required to maintain daily report sheets (as well as annual reports) which must be submitted to the Home Office. As in Sweden, assessments can be made at any time and commonly take place in order to assess if companies have implemented recommendations relating to changes in internal procedures. When violations are found to have taken place,

financial sanctions can be levied⁸ and, if security services are found to be operating without proper authorisation, the offence is punishable by a fine or imprisonment of up to six months.⁹

Costa Rica has gone a step further and created the Commission on Private Security Services. According to the law, this Commission is responsible for setting policies and strategic programmes for the private security industry. This includes coordinating crime prevention activities; coordinating with stakeholders to develop and implement policies regarding the standardisation of the private security industry; collaborating with law enforcement agencies; and recommending actions aimed at improving the professionalization of the private security workforce.¹⁰

In Afghanistan, PMSCs that violate regulatory procedures such as hiring non-Afghan personnel without a visa, hiring personnel prior to completion of licensing or possessing unregistered weapons are fined. Similarly in China, security practitioners are fined for violations of the provisions of the security guard training syllabus and are ordered to make corrections within a time limit.¹¹

In the US, Department of Defence Instruction 3020.50 is the primary instrument applicable to DoD, DoS, USAID and all federal agencies using private security contractors to support

Box 10: The International Code of Conduct for Private Security Providers Association (ICoCA)

The International Code of Conduct for Private Security Service Providers Association (ICoCA) is an Association under Swiss law, which functions as an oversight mechanism for the operations of private security companies which are members of the ICoCA. It will ensure effective implementation of the ICoC through three core functions: the certification and monitoring of private security providers, as well as the adoption of a complaint process. The Code sets out human rights based principles for the responsible provision of private security services, including rules for the use of force, prohibitions on torture, human trafficking and other human rights abuses, and specific commitments regarding the management and governance of companies, including how they vet personnel and subcontractors, manage weapons and handle grievances internally. Membership in the ICoCA consists of governments, private security companies and civil society organisations. The ICoCA was launched in September 2013 with an elected Board of Directors. The procedures for the three core functions of the ICoCA are currently being developed. An important incentive to comply with the ICoC will arise when clients of PSCs require adherence to the ICoC in their procurement policies and contracts. For instance, In August 2013, the US DoS discussed the incorporation of the ICoC into Worldwide Protective Service contracts.¹² Similarly, the UK, UN, Switzerland and Australia have included specific reference to ICoC in the selection criteria as part of short listing processes for contracting PSCs. Other clients from the extractive side, as well as international organisations, are setting out similar criteria.

Box 11: International Standards for PMSCs

The framework of international initiatives, codes, and standards aimed at improving the regulation of PMSCs includes the ANSI/ASIS PSC. 1-2012 Management System for Quality of Private Security Company Operations. The standard was developed by the American National Standards Institute (ANSI) and ASIS International (ASIS), an organisation of security professionals, with the support of the US Department of Defence. Aimed at PSCs operating particularly in complex environments, PSC.1 contains sections that provide for respect of IHL and human rights law, as well as customary international law. For its application under IHL and human rights standards, PSC.1 relies directly on the Montreux Document and the ICoC, respectively.¹³

PSCs must develop a quality assurance management system (QAMS) based on specific requirements in order to establish conformity with the standard. PSC.1-2012 was recently submitted to the International Organisation for Standardisation (ISO) to be considered for adoption as an international standard for PSCs working in complex environments. An ISO-based approach involves a review of a company's different business processes such as quality, safety, training, financial, management, records, risk, human resources, ethics, and compliance. The review encompasses the existence, promulgation and enforcement of those processes as well as the existence of mechanisms to obtain feedback.¹⁴

In the United Kingdom, the Foreign Commonwealth Office has stipulated PSC.1 compliance for overseas contracted security services. The US Department of Defence and the Department of State are also developing contractual provisions for PSC.1 compliance.

contingency operations, humanitarian or peace operations, or other military operations. Under this Instruction, responsibility for implementing and managing monitoring procedures is found with the geographically assigned Combatant Commander. He or she is tasked with keeping records, verifying that PSC personnel meet legal, training and qualification requirements for authorisation to carry a weapon, and establish weapons accountability procedures.¹⁵ Contractors operating outside the US in "critical areas" are required to maintain with the designated government official a current list of all their contractor personnel in the areas of performance as well as a specific list of those personnel authorized to carry weapons.¹⁶ Furthermore, private security contractors are required to report incidents to the Combatant Commander including when a weapon is discharged by or against PSC personnel, as well as when lethal and non-lethal countermeasures are employed, or when injuries occur.¹⁷

Monitoring, compliance, and appeals relating to PMSC authorisations

Several states impose administrative measures for violations of an authorisation. Among them, Denmark¹⁸ and Costa Rica¹⁹ may revoke an authorisation and withdraw approval for employment in a private security company if an employee has been found guilty of gross or repeated violations of the terms or provisions laid down by law. Where violations are transnational in nature, specific provision for cooperation is rare. However, the US and Iraq provide us with one example. Here, the SOFA "Withdrawal Agreement" makes clear that: "at the request of either Party, the Parties shall assist each other in the investigation of incidents and the collection and exchange of evidence."²⁰

In some states, provisions are made for PMSCs to appeal against adverse rulings made against them. In Afghanistan, for example, RMC Grievance Resolution Procedures state that, "the RMC may provide documentation in support of an appeal to refute or explain the alleged violations and will have the right to schedule a hearing before the High Council."²¹

Box 12: UN Working Group on the use of mercenaries

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (hereinafter the Working Group) was established in July 2005 pursuant to the Commission on Human Rights resolution 2005/2. Its mandate is to identify, study, monitor issues and trends with respect to the activities of mercenaries and private military and security companies (PMSCs). As part of this mandate, the Working Group has been conducting a worldwide survey of national laws and regulations for PMSCs, including three comprehensive regional studies of regulations in Anglophone Africa,²² Francophone Africa²³ and Asia²⁴ since 2011. These studies aimed to identify common features, good practices and regulatory gaps in the national laws regarding PMSCs in order to assess their effectiveness to protect human rights and promote accountability for violations.²⁵

The Working Group has identified several common themes and challenges regarding PMSC regulations:

- There is a variety of different legal frameworks regulating the private security industry between all examined states and within provinces of the same country (such as in India or in Pakistan);
- Where they exist, PMSC regulations often focus on the provision of domestic private security services;
- The definition of services provided by PMSCs varies from one country to another, and from one region to another;
- The governmental authority responsible for authorisations and licenses to the private security sector varies from one country to another: such responsibility can be performed by the Ministry of Interior (e.g. in Ghana), the Police (e.g. in Uganda), an intergovernmental body under the direction of the ministry responsible for internal security or the local government (e.g. in Senegal and Cameroon, respectively), etc.
- The provisions for the use of firearms and ammunitions vary from one legal framework to another; and
- Extraterritorial jurisdiction is often not contemplated in existing PMSC regulation;²⁶

The Working Group was also able to identify good practices in existing PMSC regulation, particularly in Asia. Such good practices relate to licensing procedures for PMSCs employees, the liability of legal persons and organisations, the duty to revoke the license in instances of the violation of human rights or engagement in criminal activity, etc.²⁷

The Working Group will complete its analysis in 2015 with additional studies in different world regions, particularly in Western and Eastern Europe, Latin America and the Caribbean.²⁸

Recommendation Five: Monitoring compliance with contracts and licenses should be diligent and systematic

The availability of effective managerial and administrative monitoring mechanisms is a key resource to support national oversight of PMSCs. State agencies should regularly check compliance with license terms and communicate with parliamentary and other oversight bodies in the interest of transparency and accountability. However, monitoring compliance with licences and contracts is not always done systematically. Mechanisms should also be in place for revoking or suspending

operating licences in cases where misconduct is found to have taken place. At the same time, companies should have a fair opportunity to respond to allegations of such misconduct. PMSCs themselves can aid in this process by establishing robust internal complaints and accountability mechanisms.

Challenge Six: Gaps in criminal and civil legal accountability

While the Montreux Document seeks to help states oversee the PMSC industry in the interest of preventing adverse effects on human rights, the Document additionally urges states to make use of good practices 19, 20, 49, 50, 71, 72 to hold PMSCs accountable for their actions. Through criminal jurisdiction, corporate criminal responsibility and civil remedies, states can ensure that PMSCs' activities are consistent with national and international legal obligations. Where territorial states are concerned, it is imperative that good practices 22, 70, and 51 (related to status of forces agreements) are upheld given the existence of armed conflict and particular concern for human rights of vulnerable populations.

This section looks at criminal jurisdiction in national law, corporate criminal responsibility, non-criminal accountability mechanisms, and the ways in which status of forces agreements affect the legal status and jurisdiction relating to PMSCs. States have used a variety of innovative ways to close jurisdictional gaps but this section reveals that many challenges persist and victims often face considerable barriers if they wish to gain access to effective remedies.

National legislation on criminal jurisdiction over crimes committed by PMSCs and their personnel

The Montreux Document strongly urges states to develop effective national and extraterritorially applicable mechanisms, including in the form of criminal jurisdiction. In home states, where many companies are based or headquartered, national accountability mechanisms should be in place for violations committed abroad. For territorial states, national criminal jurisdiction which pertains specifically to PMSC operations is imperative. There are several examples of this among Montreux Document participants. In Denmark, the Penal Code stipulates that acts committed outside the territory of the Danish State by a Danish national or by a Danish resident shall also be subject to Danish criminal jurisdiction. This jurisdiction pertains to

situations where the act was committed outside the territory recognised by international law as belonging to any state, provided the misconduct is punishable with a sentence more severe than short-term detention; or "where the act was committed within the territory of a foreign state, provided that it is also punishable under the law in force in that territory."²⁹

Italian courts enjoy extraterritorial jurisdiction over certain types of crimes committed by Italians abroad. Under articles 7 and 8 of the Italian criminal code, crimes against the Italian state, including mercenary activities and political crimes such as terrorism can be considered to fall under Italian jurisdiction.³⁰

Some states require a link to the primary area of jurisdiction. Extraterritorial application of German criminal law, for example, requires a link to Germany and in particular, to German criminal law. Based on the active nationality principle, the simplest cases from a jurisdictional perspective are those in which the perpetrator is of German nationality. Thus, a German employee of a PMSC may be liable under German criminal law for criminal offences committed abroad.³¹

Crimes committed abroad by PMSCs and their employees can be tried by Swedish courts under Swedish law. There are a number of legal requirements that must be satisfied such as double criminality, Swedish citizenship or Swedish residence.³² Double criminality means that the crime must be punishable both in the country where it was committed as well as in Sweden. Moreover the crime must, according to Swedish law, render a more severe punishment than a fine. Sexual crimes committed against individuals under the age of 18 years, and genital mutilation, are exempted from the requirement of double criminality.³³

In the United States, the 2000 Military Extraterritorial Jurisdiction Act's (MEJA) purpose is to extend federal court jurisdiction over civilians overseas that commit criminal offences where domestic prosecution in that foreign nation is not feasible. MEJA was amended in 2004 because the act failed to cover contractors beyond those working for the DoD; the 2005 Defence Authorisation

Act extended jurisdictional coverage of MEJA to employees and contractors of other federal agencies, “to the extent that their employment is related to the support of the DoD mission overseas.”³⁴ The primary relevance of MEJA is for those “employed by” or “accompanying” the Armed Forces. “Employed by” is taken to mean civilian personnel while “accompanying” generally means dependents of military and civilian personnel. However, MEJA does not create jurisdiction over individuals employed by or accompanying the military who are citizens of the state in which they are operating, presumably because these persons are subject to *domestic* prosecution. MEJA is also restricted to civilians and contractors working for the US government agencies, whereas PMSCs are also hired by other clients such as NGOs

and corporations.³⁵ Furthermore, MEJA has been criticized that while granting US courts jurisdiction over extraterritorial acts, it was not vested with the necessary resources to enable Department of Justice officials to engage in a meaningful investigation of acts occurring at a geographical distance from the US.³⁶ These procedural, practical and operational barriers further hamper the effectiveness of this law.³⁷

Furthermore, a number of states exert jurisdiction over certain crimes based on nationality or other criteria. Canada, for example, exerts jurisdiction over certain crimes (such as crimes against humanity, war crimes, torture and other international crimes) when either the victim or the perpetrator are Canadian (or when the perpetrator, regardless

Box 13: Regulation of PMSCs in Iraq

The Iraq war and subsequent reconstruction and stabilisation efforts by the US and coalition forces have resulted in a situation where the US has been the most important outside actor in the private security landscape of the country.³⁸ A significant number of PMSCs working in Iraq are also based in the United Kingdom.³⁹ PMSCs have been contracted to provide a broad range of military and security services including convoy security, operational coordination, intelligence analysis, risk management, and escort protection. The US Department of Defence (DoD) is one of the main contractors of PMSCs in Iraq but as the US government has withdrawn from Iraq militarily, the need for private security by agencies like the State Department or US Agency for International Development (USAID) has increased.

Recently, the proportion of Iraqi PMSCs has increased significantly. At the invitation of the government of Iraq, the UN Working Group on the use of mercenaries visited Iraq in 2011⁴⁰ and reported that 117 PMSCs were licensed in accordance with the procedure established in 2004 by the Coalition Provisional Authority Memorandum 17 to operate in Iraq.⁴¹ Of these, eighty-nine companies were Iraqi and twenty-eight were foreign-based.⁴² The UN Working Group was informed by the Ministry of Interior that of over 35 000 PMSC personnel in Iraq, 23,160 were Iraqis and 12,672 were foreign nationals.⁴³ The government of Iraq also contracted PMSCs to provide security services. One PMSC held a large contract with the Iraqi ministry of transport to provide security at Baghdad International Airport. From 2004–2011, the Private Security Companies Association of Iraq (PSCAI)⁴⁴ operated as a trade-group organisation coordinating mutual interests of the private security industry in Iraq. More than forty companies, both Iraqi and foreign, were members of the association. It required members to be licensed from the Iraqi Ministry of Interior or the Ministry of Interior of the Kurdistan Regional Government or both. CPA Memorandum 17 forms the basis of legislation upon which licensing is developed. This process continued following the 2009 Status of Forces Agreement. After the dissolution of the Provisional Government, the CPA memorandum 17 was supplemented by instructions issued by the Iraqi Ministry of Interior.⁴⁵

As a result of reports of violations of human rights by PMSC personnel in events like the Nisour Square incident and the physical abuses of prisoners at Abu Ghraib,⁴⁶ a key point of concern for the international community has been the question of jurisdiction and immunity. On 1 January 2009, the Iraq and United States Governments negotiated a bilateral agreement which includes a provision removing the immunity of some private foreign security contractors in Iraq.⁴⁷ The new Status of Forces agreement (SOFA) creates two distinct categories of personnel in Iraq: the United States forces (including the civilian component) and American contractors and their employees. Iraq maintains exclusive jurisdiction over contractors and their employees but shares jurisdiction with the US over forces, including the civilian component. However, the term “United States Forces” refers only to contractors and their employees contracted by the US forces under the DoD and therefore excludes any other contractors operating under US departments and agencies not subject to the SOFA.

of their nationality, is on Canadian territory).⁴⁸ Moreover, the Code of Service Discipline applies to contractors accompanying Canadian Forces and therefore, property damage, theft, and bodily offences are liable to punishment.⁴⁹

Criminal jurisdiction is extended to all Qatari nationals abroad under the state penal code. If a Qatari citizen commits a crime outside of the country and then returns, he/she may be prosecuted under Qatar law. Otherwise, foreign nationals may be exempt from prosecution under Qatari law unless they have committed a crime abroad in relation to drugs, piracy, terrorism, or acts against the security of the state of Qatar.⁵⁰

Corporate criminal responsibility

Generally, criminal sanctions are mainly applied to natural persons, while corporate criminal responsibility extends the application of criminal sanctions to legal persons, such as corporations and companies. With respect to PMSCs, the prosecution of a company can be appropriate if the organisational structure makes it difficult to establish the criminal responsibility of a particular individual.⁵¹ States should establish clear rules on corporate liability.⁵² As a result, the Montreux Document addresses the need for corporate criminal responsibility and presents pertinent good practices.

Various states have attempted to address the issue of corporate criminal responsibility. In the UK, the 2001 Private Security Industry Act provides for criminal liability of directors and managers of a corporate body.⁵³ The section sets punishment for offences committed with the consent or connivance, on the part of a director, manager, secretary or similar officers acting in such a capacity, or if the offences are attributable to neglect on the part of such an officer.⁵⁴

Canadian criminal law is applicable to both natural and legal persons. The criminal code specifically employs the terms “everyone,” “person,” and “owner” to describe those liable for criminal offences. Corporations are therefore included within the definition of a “person” within the Criminal Code of Canada and can be liable for criminal misconduct.⁵⁵ Corporate offences that require the prosecution

to prove fault other than negligence, use the “identity doctrine” to determine if such a fault occurred. This doctrine merges the individuals that were in charge (for example, board members, managing directors, the executive authority of the corporation) with the conduct attributed to the corporation.⁵⁶

Georgia’s Criminal Code also provides rules for corporate criminal responsibility. Chapter XVIII states that a “legal entity shall be held criminally responsible for the crime prescribed by the Code, which is perpetrated by a responsible person of a legal entity on behalf of a legal entity or through the use of legal entity or/and for the benefit of legal entity, whether an identity of a responsible person is established or not.” Furthermore, exemption from criminal responsibility of a responsible person does not automatically lead to an exemption from criminal responsibility of a legal entity or vice versa.

Regardless of these positive examples, corporate criminal responsibility is not widespread. For instance, despite its extensive PMSC industry, the US has no provisions criminalizing the extraterritorial conduct of PMSCs as organisations. A patchwork of statutes exists that allows for the possibility of prosecution of PMSC personnel, but not the company itself, neither in federal nor civilian courts.⁵⁷

Non-criminal accountability mechanisms for unlawful conduct of PMSCs and their personnel

In addition to criminal jurisdiction, the Montreux Document urges that civil liability mechanisms should be available to victims of IHL and human rights violations by PMSCs. In the UK, tort law is the most likely form of legal accountability and the possibility of extraterritorial application to armed forces was demonstrated in the case of *Bici v Ministry of Defence*. In this case, the High Court ruled that British soldiers in Kosovo had been negligent in the deaths of two Kosovar Albanians in Pristina.⁵⁸ The soldiers stated they acted in self defence, as they believed one of the car’s occupants was about to shoot them. The court found that soldiers taking part in United

Nations peacekeeping operations in Kosovo owed a duty to prevent personal injury to the public and had breached that duty by deliberately firing on a vehicle full of people when they had no justification in law for doing so.⁵⁹ The High Court examined possible common law immunity granted to members of armed forces operating in combat situations. There were doubts as to whether there was an existing conflict at the time of the incident in 1999; however, the common law doctrine did not grant full immunity and required the payment of damages. This case is significant because it demonstrates that this liability might be extended to PMSCs if “forces for the Crown” read “PMSCs acting on behalf of the Crown.”⁶⁰

With respect to civil liability of PMSCs, US courts continually wrestle with the question of whether PMSC contractors are incorporated into the military to an extent that would be sufficient to grant them immunities under the chain of command and whether they act on discretionary government policy which additionally offers immunities from prosecution. The Federal Tort Claims Act (FTCA) allows persons to bring suits against the government for harm caused by negligent or wrongful conduct of government employees. Although not directly applicable to contractors, it has been used to bring contractors before federal courts. However, if a PMSC or its personnel are operating as directed by discretionary actions, or official government policy, they cannot be brought under the FTCA. Indeed, case law has developed in a way whereby the discretionary policy defence is often available to PMSCs.⁶¹ Further complicating

civil mechanisms is the United States’ “political question doctrine”, that keeps the separation of powers among the three branches of government and restricts federal courts from overstepping their constitutionally defined duties and roles. Under this doctrine, judges may decide that the court is an inappropriate forum to hear a particular case and that the case should be determined by the political branch. “Foreign relations” and “military affairs” are deemed to be powers of the executive; in civil cases involving these issues, the political question is almost always raised by the defendant to have the case dismissed for lack of jurisdiction. In recent cases involving PMSCs and contractor personnel accompanying the US military in Iraq or Afghanistan, the political doctrine is raised by PMSCs as a way of avoiding liability.⁶² Much of this is based on interpretations of legal precedent and there is little in the way of predictable legal avenues for victims of misconduct by PMSCs. With respect to tort claims against PMSCs, military claimants, contractor employees and civilians have brought cases against the PMSCs themselves after suffering injuries.⁶³ Civilian plaintiffs have brought claims under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA) which allow foreign nationals to bring claims for torts committed in violation of international law. However, the ATS does not have direct extraterritorial applicability as the courts have been of the opinion that the ATS should be limited to situations where the tort occurs on US territory, or if the defendant is an US national or if the defendant’s conduct substantially or adversely affects an important US national interest.⁶⁴

Box 14: The Voluntary Principles on Security and Human Rights

The Voluntary Principles on Security and Human Rights (VPs) are a multi-stakeholder initiative, established in 2000, in which governments, extractive companies and NGOs work together to address security and human rights challenges around extractive operations. The VPs guide extractive companies in maintaining the safety and security of their operations within a framework that ensures respect for international human rights, international humanitarian law (IHL), and fundamental freedoms. The principles provide guidance on risk assessments, relations with public security, and relations with private security.

Member governments should provide an enabling environment for the implementation of the VPs. By supporting the Montreux Document and establishing national legal frameworks to regulate the private security industry based on international law and best practices, governments contribute to improving the implementation of the VPs with regard to the interactions between companies and private security. Seven out of nine VPs member governments are also signatories to the Montreux Document, including Australia, Canada, the Netherlands, Norway, Switzerland, the United Kingdom and the United States.

Legal status and jurisdiction in status of forces agreements and similar agreements

When PMSCs operate in situations of armed conflict, they have responsibilities to the territorial state. For territorial states, SOFAs are imperative in establishing legal jurisdiction. The fact that outside armed forces may contract PMSCs separately from the host government complicates the picture. However, territorial states have a number of tools at their disposal to ensure that PMSCs respect national laws and are held accountable under national jurisdiction.

In Afghanistan, the International Security Assistance Force (ISAF) has a SOFA with the Afghan government in the form of an annex to a *Military Technical Agreement*⁶⁵ entitled “Arrangements Regarding the Status of the International Security Assistance Force.” The agreement provides that all ISAF and supporting personnel are subject to the exclusive jurisdiction of their respective national elements for criminal or disciplinary matters, and that such personnel are immune from arrest or detention by Afghan authorities and may not be turned over to any international tribunal or any other entity or state without the express consent of the contributing nation.”⁶⁶

Beginning in 2011, responsibility for security was gradually transitioned to Afghan forces which assumed full security responsibility at the end of 2014, when the ISAF mission was completed. A new NATO non-combat mission (“Resolute Support”) was launched on 1 January 2015 to provide further training, advice and assistance to the Afghan security forces and institutions.⁶⁷

Recommendation Six: Criminal and civil legal accountability should be assured

Legal accountability gaps remain in this area, whether they relate to corporate, criminal or civil law. These gaps prevent victims of PMSC misconduct from seeking or obtaining justice. International legal remedies depend on the expediency and willingness of national prosecutors to bring cases before a criminal court. Where civil remedies are available, victims are often faced with long and costly judicial procedures. A number of factors exacerbate this problem. It may be unclear, for example, whether PMSC personnel are incorporated in the armed forces chain of command and thus protected by immunities. Elsewhere, courts may have difficulties deciding whether they have jurisdiction to prosecute misconduct on foreign soil. Additionally, territorial states (where PMSC misconduct has been concentrated in the past) often do not have the capacity to effectively investigate or prosecute foreign nationals and companies that may be present within their territory. In this regard, home and contracting states should develop complementary judicial assistance programs with territorial states where their companies or nationals are present. This would help to close the accountability gap and reduce the risk that PMSCs evade liability based on technicalities, jurisdictional or otherwise. SOFAs and other agreements can help to clarify the legal situation in some contexts. However, laws should be developed that clearly state the jurisdiction and the provisions under which a PMSC and its personnel are liable for any misconduct.

Box 15 : Open-ended intergovernmental working group on PMSCs

On October 2010, the United Nations Human Rights Council resolution 15/26 was unanimously adopted, thereby establishing the Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies (OEIGWG). As the two bodies work closely together, the OEIGWG takes into consideration the principles, main elements and draft text of a possible convention as proposed by the Working Group on the use of mercenaries (See Box 12). To date, there have been four sessions of the OEIGWG which deliberated the first draft text of a possible convention. The sessions also focused on the range of challenges to effective regulation, the definition and scope of PMSCs, and the shared goals of protecting human rights and ensuring accountability for violations and abuses related to the activities of PMSCs. During the most recent session of April- May 2015, the Working Group on mercenaries presented a concept note which proposes a revision of the existing draft of a possible convention; the OEIGWG is currently discussing the ways forward for this concept note. The Montreux Document is complementary to these important discussions as it helps clarify and reaffirm the existing obligations of states under international law, in the aim of creating a robust legal framework.

NOTES

1. Belgium; Law on Private Security Services, Article 14, 10 April 1990, *Moniteur Belge*, 29 May 1990.
2. Belgium; Law on Maritime Piracy, Article 13.31.
3. Denmark; Law on Private Security Companies (Act No 266 of 22 May 1986), Article 19.
4. Sweden; Security Company Act (2009:311).
5. Sweden; Security Company Act (1989:148).
6. Sweden; Security Company Act (1989:148).
7. Sweden; Security Company Act (1974:191), sec. 14.
8. Sweden; Security Company Act (1989:148).
9. Sweden; Security Company Act (1974:191), sec. 14.
10. Costa Rica; Regulation on the Implementation of the 2003 Law on Private Security Services 2006, Article 19.
11. China; the Peoples Republic of China State Council Order, Art 43, 47. Security Service Management Ordinance, http://www.gov.cn/zwqk/2009-10/19/content_1443395.htm, accessed 24 October 2013.
12. United States; Department of State, <http://www.state.gov/r/pa/prs/ps/2013/08/213212.htm>, accessed November 2013.
13. See "0. Introduction;" "0.2 Human Rights Protection;" "2. Normative References;" ANSI/ASIS PSC.1-2012, ASIS International, Management System for Quality of Private Security Company Operations- Requirements with Guidance. See also the International Code of Conduct for Private Security Providers Association, <http://www.icoca.ch/>.
14. Erik S. Quist, "The ICOC Contemplates PSC Certification," *Journal of International Peace Operations* 6, no. 4 (January-February 2011), 11-12.
15. United States; Department of Defence Instruction 3020.50, 22 July 2009.
16. United States; 48 Code of Federal Acquisitions Regulations, 52.225-19 (g) (2013).
17. United States; 48 Code of Federal Acquisitions Regulations, 225.370-4; 252.225-7039.
18. Denmark; Law on Private Security Companies (Act No 266 of 22 May 1986), Article 14.
19. Costa Rica; Regulation on the Implementation of the 2003 Law on Private Security Services 2006, Section 2, Chapter 2.
20. Iraq; SOFA, "Withdrawal Agreement" US-Iraq, (2008), Art. 12.
21. Afghanistan; "Procedure for Regulating RMCs," Chapter Four, 10.
22. This study focused on regulation of PMSCs in seven countries: Ghana, Kenya, Mauritius, Nigeria, Sierra Leone, The Gambia and Uganda. The Working Group also analysed the legal framework of Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe in its 2013 Annual Report to the Human Rights Council. See: Human Rights Council, A/HRC/24/45, 1 July 2013. Further: Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Anglophone Africa Study, available at: <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx>, accessed 10 February 2015.
23. This study focused on regulation of PMSCs in eight countries: Burkina Faso, Cameroon, Côte d'Ivoire, the Democratic Republic of Congo, Mali, Morocco, Senegal and Tunisia. Further: Working Group, Francophone Africa Study, available at: <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx>, accessed 10 February 2015.
24. This study focused on regulation of PMSCs in eight countries: China, India, Malaysia, Pakistan, the Philippines, Singapore, Sri Lanka and the United Arab Emirates. Further: Working Group, Asia Study, available at: <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx>, accessed 10 February 2015.
25. Human Rights Council, A/HRC/27/50, 30 June 2014.
26. Only India regulates the import and export of PSCs' activities.
27. Further: Working Group, Asia Study, 26-28.
28. Human Rights Council, A/HRC/27/50, 30 June 2014.Xxx
29. Denmark; Denmark Penal Code, Section7, Consolidation Act No. 1068 of 6 November 2008.
30. Italy; Codice Penale della Repubblica Italiana, Art. 7-9.
31. Evertz, "Regulation of private military, security and surveillance services in Germany," 9.
32. Sweden; Penal Code (1962:700), Chapter 2, Section 2.
33. Ibid.
34. United States; National Defence Authorisation Act for FY 2005, P.L. 108-375, paragraph 1088, 116 Stat. 2066 (28 October 2004); Jennifer K. Elsea, "Private Security Contractors in Iraq and Afghanistan: Legal Issues," Congressional Research Service: 22 December 2009.
35. DeWinter-Schmitt, 93.
36. Huskey and Sullivan, 21.
37. DeWinter-Schmitt, 93
38. Antenor Hallo de Wolf, "Modern Condottieri in Iraq: Privatizing War from the Perspective of International and Human Rights Law," *Indiana Journal of Global Legal Studies* 13, no. 2 (Summer 2006): 333.
39. E. Speers Mears, "Security Privatisation in the Middle East," GCST Working Papers series, no. 10, November 2010, 6.
40. Report of the UN Working group on the use of mercenaries to the Human Rights Council, "Mission to Iraq," A/HRC/18/32/Add.4, 12 August 2011.
41. Ibid, 6.
42. Ibid.
43. Ibid, 7
44. See Private Security Companies Association of Iraq (PSCAI), <http://www.pscai.org/pscereg.html>, accessed 24 October 2013.
45. Iraq; Private Security Companies Registration Regulations According to the Memorandum 17 for 2004 And the MOI Instructions" July 2013, http://psm.du.edu/media/documents/national_regulations/countries/middle_east_and_north_africa/iraq/iraq_private_security_companies_registration_regulation_based_on_cpa_memo_17_2004-english.pdf, accessed 24 October 2013;
46. See Antoni M. Taguba, Department of the Army, Article 16-6 *Investigation of the 800th Military Police Brigade (2004); Testimony on Allegations of Mistreatment of Iraqi Prisoners Before the Senate Committee of the Armed Services*, 108th Congress (2004), statement of Lance Smith, Lt, General, Central Command Deputy Commander US Army; Inspector General, Department of the Army, Detainee Operations Inspection 33 (21 July 2004).
47. Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organisation of Their Activities during Their Temporary Presence in Iraq, dated and signed 17 November 2008.
48. Antonyshyn et al. "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad," 13.
49. Canada; Queen's Regulations and Orders for the Canadian Forces, Volume II (Disciplinary), Section 103.1, Article 77. <http://www.admfnscs.forces.gc.ca/qro-orf/vol-02/chapter-chapitre-103-eng.asp#cha-103-10>, accessed 24 October 2013.
50. Qatar; Law No. 2 of 2004, "The Penal Code," Art. 16-19.
51. Chia Lehnardt, "Individual Liability of Private Military Personnel under International Criminal Law," Academy of European Law, PRIV-WAR Project EUI Working Paper AEL 2009/4, 15.
52. For a discussion of 16 states' domestic criminal legislation over corporate criminal responsibility, see "Corporate, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law." <http://www.fao.no/liabilities/>. See also Tina Garmon, "Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable to the Alien Tort Claims Act, 11 Tulane Journal of International and Comparative Law (2003) 325: 351.
53. UK; Private Security Industry Act 2001, <http://www.legislation.gov.uk/ukpga/2001/12/section/23>, accessed 30 July 2013, Chapter 23.
54. Ibid.
55. PRIV-WAR, "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad," PRIV-WAR Report Canada-National Reports Series 03/09, 12 February 2009, 11.

56. Canada; Limit to this doctrine: The identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him or her; (b) was not totally in fraud of the corporation, and (c) was by design or result partly for the benefit of the company. Fafo and International Peace Academy, Canada, "Survey Questions and Responses, A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions" (2004), 2.
57. De Winter-Schmitt, 90.
58. Clive Walker and Dave Whyte, "Contracting out War?: Private Military Companies, Law and Regulation in the United Kingdom," *The International and Comparative Law Quarterly* 54, no. 3 (July 2005), 670.
59. UK; *Bici v Ministry of Defence* [2004] EWHC (QB). Cf *Mulcahy v Ministry of Defence* [1996] QB 732; *Bell & Others v. Ministry of Defence* [2003] EWHC 1134.
60. Walker and Whyte, "Contracting out War?: Private Military Companies, Law and Regulation in the United Kingdom," 670.
61. See: Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)); Huskey and Sullivan, 34.
62. United States; *Baker v. Carr*, 369 U.S. 186, 210 (1962) (The nonjusticiability of a political question is primarily a function of the separation of powers); *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008); *McMahon v. Presidential Airways*, 502 F.3d 1331 (11th Cir. 2007); *Carmichael v. Kellogg Brown & Root*, 564 F.Supp.2d 1363 (N.D. Ga. 2008); *Getz v. Boeing Co.*, 2008 WL 2705099 (N.D. Cal. 2008); *Potts v DynCorp Int'l LLC*, 465 F.Supp.2d 1245 (M.D. Ala. 2006); *Smith v. Halliburton*, 2006 WL 2521326 (S.D. Tex. 2006); *Whitaker v. Kellogg Brown & Root*, 444 F.Supp2d 1277 (M.D. Ga. 2006); *Lessin v. Kellogg Brown & Root*, 2006 WL 3940556 (S.D. Tex. 2006); *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005).
63. DeWinter-Schmitt, 98.
64. The U.S. Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum* limited the jurisdiction of the ATS for conduct occurring abroad, requiring plaintiffs to exhibit that the case has sufficient links to the US. This decision has potentially increased the bar for which these links are accepted. See Federal Society Podcast Group, "What is Left of the Alien Tort Statue?" 22 April 2013.
65. International Security Assistance Force (ISAF); The *Military Technical Agreement* is available at <http://www.operations.mod.uk/isafmta.pdf>.
66. Chuck Mason, "Status of Forces Agreement (SOFA): What is it, How Has it Been Utilized?" *Congressional Research Service, Report for Congress*, 15 March 2012, 8.
67. North Atlantic Treaty Organisation, "Resolute Support Mission in Afghanistan," http://www.nato.int/cps/en/natohq/topics_113694.htm, accessed 10 March 2015.

The Way Forward and the Montreux Document Forum

This study demonstrates that states and international organisations have made significant progress in meeting their obligations as participants of the Montreux Document. The good practices highlighted in this report are evidence of the mix of innovation and pragmatism with which states have strived to meet complex challenges. However, the study also illustrates a number of factors that hinder effective national regulation of PMSCs and the challenges with implementing the good practices contained in the Montreux Document.

Building on developments to date, this section focuses on the way forward and proposes concrete options that could enable the Montreux Document to serve as a force multiplier for effective implementation of PMSC regulation at the national level. Possible options fall into four substantive categories: targeted outreach, tools development, training and capacity building, and institutionalised exchange among Montreux Document participants through the Montreux Document Forum (MDF).

The international regulatory framework for PMSCs is in constant evolution. The Montreux Document can play a key role in ensuring that human rights and international humanitarian law (IHL) lie at the

heart of this endeavour. Taken together, progress in the areas outlined below will ensure that the Montreux Document responds in a coherent way to the clear need for effective regulation of the global PMSC industry.

Outreach

Regional outreach has been an important success story for the Montreux Document. However, much remains to be done to increase support for the initiative in different world regions, notably in regions outside of Europe and North America. If engagement is to be maximised, there is a need for a more structured and targeted outreach programme. Such a programme could support the following objectives:

- **Raising awareness of the Montreux Document in regions that have not been a focus of outreach efforts to date.** Given the extent and diversity of PMSC activities on the continent, Africa should be a key focus of regional outreach efforts. As part of this effort, the 2015 Montreux Document regional conference will take place in Addis Ababa and will gather English-speaking African states.

- **Ensuring targeted follow-up to the regional workshops that have already been held in Central Asia, Latin America, the Pacific region, South East Asia, and Francophone and Lusophone Africa.** These workshops have sensitised key stakeholders to the importance of PMSC regulation and enabled the identification of national “champions.” In order to build wider international support for the Montreux Document, there is a need to build on this momentum and advance the discussions held at those workshops.
- **Conducting outreach to international and regional organisations** such as the Organisation International de la Francophonie (OIF), Association of South East Asian Nations (ASEAN), Economic Community of Central African States (ECCAS), the African Union (AU), Economic Community of West African States (ECOWAS).
- **Establishing a clear dialogue with other initiatives concerned with regulating the private security sector.** PMSCs operate in and respond to an evolving market. The sheer diversity of the market and the consequent regulatory challenges has led to a range of complementary initiatives at the international level. This includes the recently created Association of the International Code of Conduct for Private Security Service Providers as well as ongoing work within the United Nations to develop an international convention in this area. To ensure these initiatives are complementary, the Montreux Document must have a clear voice as part of this wider regulatory framework.

Development of Implementation Tools

The country-specific and thematic research conducted in the run up to Montreux +5, complemented by the experience shared by Montreux Document participants highlights the need for practical tools to support implementation. Based on the framework provided by the Montreux Document, tailored guidance should be developed to provide legal and policy support to key stakeholders. Montreux Document outreach has generated valuable insights into regional

context-specific challenges of PMSC regulation. These should be used to identify and prioritise opportunities to support national implementation strategies.

Tools to support implementation may include:

- **A legislative guidance handbook** to assist policy and lawmakers in the development and implementation of effective legal frameworks to regulate PMSCs. This would act as a support guide that draws from applicable good practices and concrete examples of existing provisions.
- **Research and tool development on mutual legal assistance programmes** to support states’ effective implementation of domestic regulation with extraterritorial applicability.
- **Contract templates based on Montreux Document good practices** useful for both state and non-state clients. These templates would refer to IHL and human rights legal obligations directly related to PMSCs.
- **Research and development of training tools.** This could address two objectives: 1) to help ensure that PMSCs are effectively and appropriately trained in order to reduce the likelihood that they will commit violations; and 2) to support the work of national institutions and actors responsible for the contracting, management and oversight of PMSCs.

Training and capacity building

Joining the Montreux Document should provide momentum and focus to training and capacity building support for participants. Lawmakers require specialist knowledge of the industry and the different methods and good practices of regulation. Meanwhile, the different agencies and institutions responsible for monitoring of PMSCs also require appropriate training and resources. The following elements would support effective training development:

- **An analysis of training needs** should be conducted with regard to institutions and actors responsible for the contracting, management and oversight of PMSCs. The focus should be on

ministries, independent oversight institutions, parliaments, and civil society organisations, with a view to identifying their particular roles and responsibilities regarding PMSC regulation. A needs-analysis could provide the basis for the identification of curriculum requirements and the development of training support tools

tailored to different target audiences.

- **Capacity building** support for national stakeholders involved in regulating PMSCs should not be treated as a standalone issue. Many states face a range of security sector governance challenges of which private security represents only one aspect. Capacity building support should therefore be linked to wider security sector reform programmes that promote whole of government approaches to reinforcing the management and oversight of the security sector.

Institutionalisation of a regular dialogue among Montreux Document participants: The Montreux Document Forum

During the Montreux+5 Conference, participants expressed an interest in creating a dedicated space for more regular dialogue for members of the Montreux Document community. According to participants, such a forum could gather and disseminate information on the Document, facilitate coordination and communication among participants and act as a repository for research and the compilation of good practices. The Forum would support outreach to states and international organisations and promote more effective implementation of the Montreux Document's rules and good practices. Participants agreed that the Montreux Document needs a centre of gravity if it is to optimise its role as a force multiplier for national efforts to regulate PMSCs.

As a result of the conference discussions, this report's recommendations and the agreement among Montreux Document participants on the need for more regular dialogue, Switzerland and the ICRC coordinated preparatory discussions and consultations with participants throughout 2014, with the goal of establishing the Montreux Document Forum. The MDF was launched in December 2014 during a Constitutional Meeting of Montreux Document participants. For more information visit www.mdforum.ch. The MDF is currently chaired by Switzerland and the ICRC. DCAF supports the MDF as the secretariat.

Drawing on the experience of participants, the institutionalisation of a regular dialogue in the form of the MDF can play a significant role in supporting the implementation of the recommendations of this report.

Appendix One:

Methodology and Scope of Research

All states and international organisations participating in the Montreux Document were asked by the Swiss government and the ICRC to complete a questionnaire on the ways in which they have implemented the good practices of the Montreux Document. Questionnaires were received from Albania, Afghanistan, Australia, Austria, Canada, Finland, Georgia, Hungary, Lichtenstein, the Netherlands, Portugal, Ukraine, United Kingdom, the United States of America, Slovenia, Sweden, and Switzerland. Policy statements or general responses, albeit not questionnaires, were received from Cyprus, France, Macedonia, and Spain.

At the same time, the Swiss government mandated DCAF to conduct research on the level of existing implementation by Montreux Document states and international organisations (IOs). In addition to assessing progress since the signing of the Montreux Document, the research involved taking a holistic view of existing good practices in Montreux Document participants. Many national laws and regulations concerning PMSCs were in effect before the Montreux Document was signed; however, many were also affected after its drafting.

DCAF carried out this research, with assistance from the Sié Chéou-Kang Center for International Security and Diplomacy, Josef Korbel School of International Studies at the University of Denver, during the first half of 2013. With a focus on international humanitarian law and international human rights law, DCAF led the drafting of a series of reports focused on national regulations. The national regulations under review were those addressed at companies operating transnationally as well as domestically. Although domestic legislation is often aimed at regulating the activities of companies at the national level, it can nevertheless provide guidelines for regulating the activities of PMSCs that operate abroad.

Purpose

The purpose of the research was to identify practices showing the implementation of Montreux Document principles in endorsing states and international organisations, and to identify gaps and opportunities for future work to help such states/IOs to better implement the Montreux Document. This was in order to ensure the conference most effectively met the needs of states/IOs, as well as the conveners of the Montreux Document, Switzerland and the ICRC. The report sought to contain examples of how states/IOs have put into practice the Montreux Document and capture where implementation challenges remain. This second edition was commissioned to integrate updated information on national regulations, as well as the discussions and feedbacks from the Montreux +5 Conference. The developments since then – in particular the establishment of the MDF – were also taken into consideration.

Scope

The research has focused on how Montreux Document participants are implementing the Montreux Document within the following limiting factors:

1. Situations of armed conflict:
 - International armed conflict; and
 - Non-international armed conflict (under common Art. 3, or under Art. 1 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977).

2. PMSCs = private business entities that do one or more of the following:
 - Armed guarding (persons, objects, convoys, buildings) – i.e. PSCs
 - Maintenance and operation of weapons systems
 - Prisoner detention
 - Advice/training of local forces and security personnel
 - Intelligence
3. Looking at the three types of states, recognizing that a country may simultaneously be more than one:
 - Home state
 - Territorial state
 - Contracting state
4. Looking at, within those states:
 - Law
 - Policy
 - Procurement and/or contractual requirements (where relevant)
 - Practice (in particular if there are indications that the practice is different from what law or policy requires)

Additional research has been carried out on the following, where relevant. Examples include:

- Domestic PSC legislation in non-Territorial states (especially if there is a chance that domestic laws/policies will be extended by analogy to companies working in Territorial States)
- Law/policy/practice state of nationality of the PMSC employee, irrespective of if it is a Home state
- Operations of PMSCs in areas not experiencing armed conflict such as complex environments as well as peacetime

For research purposes, we considered that all states are potentially Home states and Contracting states. On Contracting states, initial research determined if contracting-out is prohibited (by law or policy, or in practice) and if so, then it was not the target of more in depth research.

The following were considered as current or recent/potential Territorial states, recognizing that any state could potentially be a Territorial state. The reason for identifying these countries was simply to limit the scope of research on pragmatic grounds.

Current Territorial state

- Afghanistan
- Iraq

Recent or potential Territorial state

- Angola
- Bosnia and Herzegovina
- Cyprus
- Georgia
- Jordan
- Sierra Leone
- South Africa
- Former Yugoslav Republic of Macedonia
- Uganda

Sources

The primary source for the research was the collection of questionnaire responses submitted by Montreux Document participants.

DCAF undertook independent research to “fill-the-gaps” where a country provided an incomplete response.

Research included references to the specific regulatory approach through which the implementation of the Montreux Document has been carried out, for example through national laws and policies.

Appendix Two:

List of Acronyms

APPF	Afghan Public Protection Force	DOS	Department of State (US)
A/LM/AQM	Bureau of Administration, Office of Logistics Management, Office of Acquisitions Management (US)	DOSAR	Department of State Acquisition Regulations (US)
ANSI	American National Standards Institute	ECCAS	Economic Community of Central African States
ATS	Alien Tort Statute (US)	ECHO	European Commission Humanitarian and Civil Protection Department (EU)
AU	African Union	ECJ	European Court of Justice (EU)
BiH	Bosnia and Herzegovina	ECOWAS	Economic Community of West African States
CF	Canadian Forces	EDA	European Defence Agency (EU)
CFSP	Common Foreign and Security Policy (European Union)	EEAS	European External Action Service (EU)
CID	Criminal Investigations Department (South Africa)	EIPA	Exports and Imports Permits Act (Canada)
CO	Contracting Officer (US)	EU	European Union
COR	Contracting Officer's Representative (US)	EUFOR	European Union Stabilization Force
CPA	Coalition Provisional Authority (Iraq)	FAPIIS	Federal Awardee Performance and Integrity Information System (US)
CPARS	Contractor Performance Assessment Reporting System (US)	FARS	Federal Acquisition Regulation System (US)
CSDP	Common Security and Defence Policy (EU)	FAPIIS	Federal Awardee Performance and Integrity Information System (US)
CSO	Contract Support to Operations (EU)	FBiH	Federation of Bosnia and Herzegovina
DFAIT	Department of Foreign Affairs and International Trade (Canada)	FTCA	Federal Tort Claims Act (US)
DFARS	Defence Federal Acquisitions Supplement (US)	GIC	Governor in Council (Canada)
DND	Department of National Defence (Canada)	GP	Good Practice
DOD	Department of Defence (US)	HMG	Her Majesty's Government (United Kingdom)

HNS	Host Nation Support (EU)	OMB	Office of Management and Budget (US)
ICC	International Criminal Court	PMSC	Private Military and Security Company
ICoC	International Code of Conduct for Private Security Service Providers	PSC	Private Security Company
ICoCA	International Code of Conduct for Private Security Service Providers' Association	PSCAI	Private Security Company Association of Iraq
ICRC	International Committee of the Red Cross	PSIRA	Private Security Industry Regulation Authority (South Africa)
IHL	International Humanitarian Law	QAMS	Quality Assurance Management System (PSC1. 2012)
IMO	International Maritime Organisation	RMC	Risk Management Company
IO	International organisation	RS	Republika Srpska
IRD	International Relief and Development	SB	Special Branch (Sierra Leone)
ISAF	International Security Assistance Force	SIGAR	Special Inspector General for Afghanistan Reconstruction
ISO	International Standards Organisation	SOFA	Status of Forces Agreement
ITAR	International Traffic in Arms Regulations (US)	SOP	Standard Operating Procedure
LOGCAP	Logistics Civil Augmentation Program (US)	TVPA	Torture Victim Protection Act (US)
MDF	Montreux Document Forum	UK	United Kingdom
MEJA	Military Extraterritorial Jurisdiction Act (US)	UKAS	United Kingdom Accreditation Service
MOI	Ministry of Interior	UN	United Nations
NATO	North Atlantic Treaty Organisation	US	United States
NSCIA	National Security and Central Intelligence Act of 2002 (Sierra Leone)	USAID	United States Agency for International Development (US)
OAU	Organisation for African Unity	VPs	Voluntary Principles on Security and Human Rights
OEIGWG	Open-ended intergovernmental working group (United Nations)	WPS	Worldwide Protective Services (US)
OIF	Organisation Internationale de la Francophonie		
ONS	Office on National Security (Sierra Leone)		

Appendix Three:

Guiding Questionnaire

Section One: Determination of Services

1. Provide examples, if any, of how you have determined which services may or may not be contracted out to PMSCs. If you have done so, please specify what and how services are limited, and how you take into account factors such as whether those services could cause PMSC personnel to become involved in direct participation in hostilities. Please indicate by what means you do this (e.g. national legislation, regulation, policy, etc.). [GP 1, 24, 53]

Section Two: Authorisation to Provide Military and Security Services – General and Procedure

2. Indicate if you require PMSCs to obtain an authorisation to provide any one or more private military and security services. This may include whether PMSCs and/or individuals are required to obtain licenses. [GP 25, 26, 54]
3. Is a central authority designated for authorisations? [GP 26] If so, please provide details.
4. Provide details of procedures for the authorisation and/or selection and contracting of PMSCs and their personnel [GP 2, 28, 57]. Please include details of how you ensure adequate resources are applied to this function [GP 3, 27, 58] and examples of how such procedures are transparent and supervised [GP 4, 29, 59].
5. To what degree have you sought to harmonize any authorisation system with those of other States [GP 56]?

Section Three: Authorisations, or selection and contracting of PMSCs – Criteria, Terms and Rules

6. Provide details on criteria that have been adopted that include quality indicators to ensure respect of relevant national law, international humanitarian law and human rights law. Indicate how you have ensured that such criteria are then fulfilled by the PMSC. [GP 5, 30] If relevant, please indicate if lowest price is not the only criterion for the selection of PMSCs. [GP 5]
7. Describe how the following elements, if any, are considered in authorisation or selection procedures and criteria. Please also indicate to what degree they are included in terms of contract with, or terms of authorisation of, PMSCs or their personnel [GP 14, 39, 40, 67]:
 - a. past conduct [GP 6, 32, 60]
 - b. financial and economic capacity [GP 7, 33, 61]
 - c. possession of required registration, licenses or authorisations (if relevant) [GP 8]
 - d. personnel and property records [GP 9, 34, 62]
 - e. training [GP 10, 35, 63]
 - f. lawful acquisition and use of equipment, in particular weapons [GP 11, 36, 64]
 - g. internal organisation and regulation and accountability [GP 12, 37, 65]
 - h. welfare of personnel [GP 13, 38, 66]
 - i. other (please describe)

8. To what extent is the conduct of any subcontracted PMSC required to be in conformity with relevant law? Please include requirements relating to liability and any notification required. [GP 15, 31]
9. Do you use financial or pricing mechanisms as a way to promote compliance? These may include requiring a PMSC to post a financial bond against non-compliance. [GP 17, 41]
10. When granting an operating license to PMSCs, do you impose any limitations on the number of PMSC personnel and/or the amount/kinds of equipment employed when performing PMSC services? [GP 42] If so, please provide details.
11. Please describe any rules/limitations on the use of force and firearms. For example, these may include use of force “only when necessary and proportionate in self-defence or defence of third persons”, and “immediately reporting to competent authorities” after force is used. [GP 18, 43]
12. Please provide information on any rules in place regulating the possession of weapons by PMSCs and their personnel. [GP 44, 55]
13. To what degree are personnel of a PMSC, including all means of their transport, required to be personally identifiable whenever they are carrying-out activities under a contract? [GP 16, 45]
14. Please indicate to what degree contracts with PMSCs provide for the following:
 - a. the ability to terminate the contract for failure to comply with contractual provisions;
 - b. specifying the weapons required;
 - c. that PMSCs obtain appropriate authorisations from the Territorial State; and
 - d. that appropriate reparation be provided for those harmed by misconduct. [GP 14]

Section Four: Monitoring Compliance and Ensuring Accountability

15. Provide details of how you provide for criminal jurisdiction in your national legislation over crimes under national and international law committed by PMSCs and their personnel. This may include details on if you have considered establishing corporate criminal responsibility and/or jurisdiction over serious crimes committed abroad. [GP 19, 49, 71]
16. Provide details of how you provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel. This may include contractual sanctions, referral to competent investigative authorities, providing for civil liability and otherwise requiring PMSCs, or their clients, to provide reparation to those harmed by PMSCs. [GP 20, 50, 72]
17. In addition to the criminal and non-criminal mechanisms referred to above, do you have other administrative and other monitoring mechanisms to ensure proper execution of the contract and/or accountability of the PMSC and their personnel for improper conduct? [GP 21]
18. Provide details of how you monitor compliance with the terms of any authorisation given to a PMSC. These may include establishing an adequately resourced monitoring authority, ensuring that the civilian population is informed about the rules by which PMSCs have to abide and available complaint mechanisms, requesting local authorities to report on PMSC misconduct and investigating reports of wrongdoing. It may also include establishing close links between your State’s authorisation-granting authorities and your State’s representatives abroad and/or with other States. [GP 46, 68]
19. Provide details of how you impose administrative measures or sanctions if it is determined that a PMSC has operated without or in violation of an authorisation. This may include revoking or suspending a license, removing specific PMSC personnel, prohibiting

a re-application for authorisation, forfeiting bonds or securities, and/or financial penalties. [GP 48, 69]

20. Provide details of how you provide a fair opportunity for PMSCs to respond to allegations that they have operated without or in violation of an authorisation. [GP 47]
21. Provide details of how you support other States in their efforts to establish effective monitoring of PMSCs. [GP 70]
22. In negotiating with other States agreements which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel (e.g. Status of Forces agreements), please provide details on how you take into consideration the impact of the agreement on the compliance with national laws and regulations, and how you address the issue of jurisdiction and immunities. [GP 22, 51]
23. Please provide details of your cooperation with the investigating or regulatory authorities of other States in matters of common concern regarding PMSCs. [GP 52, 73]

Section Four: General Information

24. Please list any other measures you have in place for overseeing and/or contracting with PMSCs, and briefly describe how they are implemented or enforced.
25. Please describe any specific challenges you have encountered as a State or international organisation in relation to PMSCs.

Appendix Four:

Montreux+5 Conference Chairs' Conclusions

Distinguished Representatives,
Ladies and Gentlemen,
Dear Colleagues and Friends,

We would like to thank all of you most heartily for your participation at this conference and for the meaningful and constructive discussions that have taken place over the past three days. We would also like to thank the speakers for the quality of their presentations, which provided a valuable basis for our discussions. Our gratitude and appreciation also goes to the Geneva Centre for Democratic Control of Armed Forces for its work in the organisation of this conference and the preparation of its report on the implementation of the Montreux Document and the challenges it presents.

As Professor Avant put it so well, the Montreux Document may be both nothing new and all new at the same time! What is not new is that the Document is a restatement of well-established rules of international law. What is all new is that it is the first document to specifically address this issue at the international level and translates international law into the specific domain of private military and security companies. What was also new was that it has been the starting point and the spark setting off international and national efforts to ensure respect for IHL and IHRL.

These three days have been an opportunity to confirm general support among States and international organisations for the Montreux Document and the need to ensure its implementation. It has also been an occasion to take stock of the recent progress made in regulating PMSCs as well as the influence and catalysing effect of the document.

The main focus of the Montreux Document is on situations of armed conflict. Our discussions here have also demonstrated, however, that the Document is relevant to post-conflict and complex environments. In addition, the question of its relevance and applicability to maritime security has been repeatedly raised, albeit prompting a range of different opinions. Some take the view that the

Montreux Document already addresses the needs of the maritime sector. Others feel, however, that the standards outlined in the Document need to be further adapted to the specificities of the sector, while others insist that standards developed in other fora — in particular the IMO contact group — sufficiently address this issue.

The discussions also highlighted the following major challenges which call for further action.

Promoting further support for the Montreux Document

Currently, forty-nine States and three international organisations support the Montreux Document. This is already a substantial number. We are confident, however, that this number could be higher. Promotion of the Montreux Document will therefore remain an important objective.

As mentioned during the conference, the ICRC together with Switzerland and host Governments and in collaboration with DCAF have organised several outreach workshops with the aim of increasing awareness of the Montreux Document and promoting further support. These workshops paved the way to this conference by highlighting the benefit to be gained from governments and stakeholders sharing experiences. More work will be done to increase the number of States supporting the Montreux Document especially from the South. The next workshop will be in Senegal. This has been confirmed over the past three days along with the need to address from a regional perspective the issues and challenges raised by the activities of PMSCs, especially in those parts of the world with fewer participating States.

With regard to increasing support for the Montreux Document, the growing interest of international organisations deserves our attention. The European Union, the OSCE and NATO have now joined the initiative. These organisations will undoubtedly act as a vector for promoting and enlisting support for the Document on a much larger scale.

Need for implementation of the Montreux Document

The need to implement the rules and good practices set out in the Montreux Document was at the centre of our discussions during this conference. In this regard, the importance of taking the following steps was underlined in both the background report and the statements of participants:

- ☒ To ensure that PMSCs respect IHL and IHRL in their activities and that those responsible for violations are held accountable, it is essential that States enact adequate national laws and put in place robust regulatory regimes. In this regard, it is also essential that States clearly determine which services may or may not be performed by PMSCs. During the conference, several States noted that their national legislation already restricts the services that PMSCs may perform. It was particularly interesting to note that many States clearly prohibit PMSCs from performing any combat related activities. Others generally agreed with the idea that inherent State prerogatives should not be undermined, while allowing for some flexibility

regarding exceptions. Although clear progress has been made, States that have not yet done so should prioritise the determination of services that PMSCs may or may not provide.

- ☒ The multinational nature of PMSC activities has also been highlighted as an important challenge for national legislation, which generally does not apply extraterritorially. For instance, some States whose domestic law prohibits their nationals from working for PMSCs abroad have pointed out the difficulties they face in ensuring that other States and foreign companies respect their law abroad. In this respect, specific cooperation, as well as further discussion on how to address this complex legal issue - including through an internationally binding instrument - would be useful.
- ☒ Ensuring that existing licensing and authorisation systems are able to effectively perform their tasks is also a highly effective way for States to ensure respect for the Montreux Document. Furthermore, sufficient resources are essential for, *inter alia*, proper screening, investigation of past conduct, compliance with relevant regulations, licensing with regard to weapons and ammunition, and assessing whether PMSC personnel are adequately trained.

Finally, participants highlighted the important role of civil society in raising awareness of the flaws in national laws and regulatory frameworks and in advancing the availability of remedies and recourse for victims.

Switzerland, the ICRC and DCAF are committed to assisting States in the implementation of their international legal obligations and the rules and good practices set out in the Montreux Document. In particular, the ICRC Advisory Services remain available to provide the necessary legal and technical assistance to States in this regard.

Different layers of regulation

The Montreux Document spells out existing obligations of States and good practices under international law. Regulation of the industry is an additional and complementary layer of regulation. In this sense, soft law instruments can help clarify obligations and help States translate international rules into national law or policies.

Effective implementation of the ICoC by the industry is an important part of the regulatory framework. Signing the Code is the first step in a process leading eventually to full compliance. If all clients of private security companies – in particular governments and international organisations – require in their contracts that all services be performed in accordance with the ICoC, this ‘soft law’ instrument will progressively become mandatory.

For example, the Swiss Federal Act on Private Security Services Provided Abroad (which was adopted in September this year by the Swiss Parliament) states that companies which are based in Switzerland but provide security services abroad as well as companies contracted by Switzerland are

obliged to sign up to the Code. Other countries stipulate in their procurement legislations that only companies that have accepted the Code may be hired.

This multi-layered approach, combining soft law instruments, self-regulatory instruments and national legislation is innovative and has proven to be both effective and efficient. It may also provide a model for regulating other areas where many different actors are involved, such as natural resources and environmental issues.

However, as mentioned by some, a soft law approach might not be sufficient to address some specific issues, such as jurisdictional matters and mutual legal assistance. For this reason, some participants indicated that it could be useful to negotiate a binding instrument in these areas. Providing effective remedies and accountability is crucial to ensuring that the regulation of the PMSC industry is both legitimate and credible.

This is a concrete area where the efforts conducted within the United Nations are complementary to what is being done in the context of the Montreux Document. They both aim to uphold IHL and international human rights law.

The need for further dialogue: A Montreux Document Participants' Forum

Participants in the Montreux+5 Conference have expressed their interest in institutionalizing the dialogue among Montreux Document participants. Many expressed their readiness to provide advice to the ICoC Association on national and international policy and regulatory matters as provided for by Article 10 of the articles of Association.

Most Montreux Document participants were of the view that such a forum should go further than this advisory function and establish a permanent structure for Montreux Document participants, allowing States to discuss and exchange information on challenges they face, notably in the national implementation of obligations related to PMSCs. Such a forum could provide a centre of gravity for the Montreux process as well as a venue for informal consultations among supporters of the Montreux Document. It would also enable them to share lessons learned and good practices.

Montreux Document participants agreed that any forum established for these purposes should be "light" and create synergies with existing fora. However, they agreed that an institutional structure could gather and disseminate information, facilitate coordination and communication among endorsing states, and act as a repository for research and the compilation of a list of good practices.

More in-depth discussions are necessary to identify what kind of additional functions such a forum should perform for the benefit of Montreux Document participants. Switzerland and the ICRC will therefore convene informal discussions in Geneva next year on the establishment of a Montreux Participants' Forum. The first discussion will take place in the first quarter of next year.

Before closing the meeting, I would like to thank DCAF for its valuable support in the organisation of the Conference and for the excellent background paper that helped frame our discussions during these last three days. We would also like to thank the members of EDA-Event for all their work in making our Conference a success and our stay so pleasant.

And, finally, a thank you to all of you for your attention and active participation. We wish you a safe journey home and we look forward to continuing our discussions among Montreux Document Participants in Geneva very soon.

Progress and Opportunities: Challenges and Recommendations for Montreux Document Participants, 2nd edition

The Montreux Document is an intergovernmental initiative, launched by Switzerland and the International Committee of the Red Cross, to promote respect for international humanitarian law and human rights law whenever private military and security companies (PMSCs) are present in armed conflict. The Montreux Document encourages the adoption of national regulations on PMSCs and offers practical guidance designed to strengthen respect for international law. Support for implementation of the rules and good practices of the Montreux Document was also reflected in the establishment of the Montreux Document Forum (MDF). Launched in 2014, the MDF acts as a platform for informal consultation among Montreux Document participants, supports national implementation and aims to strengthen dialogue on the regulation of PMSCs.

The Montreux Document was endorsed by seventeen states when it was first adopted in 2008. In the years since, that number has more than tripled to fifty two states and three international organisations. Montreux Document participants offer a significant knowledge base of good practices for home states (where PMSCs are based), contracting states (which contract PMSCs to provide services) and territorial states (where PMSCs operate). This study draws on extensive research to provide an overview of the experiences of Montreux Document states and international organisations. The study discerns major challenges in implementation and identifies ways to build on good practices in the future. Originally commissioned in 2013 to inform discussions during the Montreux +5 Conference, the report focuses on the way forward by proposing concrete ways that the Montreux Document can serve as a force multiplier for effective implementation of PMSC regulations.

For additional information, please visit the Montreux Document Forum at www.mdforum.ch



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