GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (DCAF)

The Montreux Document on Private Military and Security Companies

Proceedings of the Regional Workshop for Latin America

The Montreux Document on Private Military and Security Companies: Proceedings of the Regional Workshop for Latin America

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On the 12th and 13th of May 2011 a workshop was held in Santiago, Chile, to discuss the "Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict" and its relevance for the Latin American region. The workshop was convened by the Swiss Federal Department of Foreign Affairs and the Chilean Ministry of Foreign Affairs, in co-operation with the International Committee of the Red Cross and in collaboration with DCAF and the Global Consortium on Security Transformation. The event included the participation of 80 representatives of governments, international organisations and civil society from 16 countries in Latin America and the Caribbean.

These proceedings were prepared by the Geneva Centre for the Democratic Control of Armed Forces at the request of the Swiss Federal Department of Foreign Affairs.

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WORKSHOP REPORT

On the 12th and 13th of May, 2011 in Santiago, Chile, a regional workshop for Latin America was held on 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" of 17 September 2008.

The workshop was convened by the Swiss Federal Department of Foreign Affairs and the Chilean Ministry of Foreign Affairs, in co-operation with the International Committee of the Red Cross (ICRC) and in collaboration with the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the Global Consortium on Security Transformation (GCST). The event included the participation of 80 representatives of both governments and civil society organizations from 16 countries in Latin America and the Caribbean.

The objective of the workshop was to further introduce the Montreux Document on private military and security companies (PMSCs) in Latin America, where three countries have endorsed it thus far (Chile, Ecuador and Uruguay)[*], and to open a space for debate within the region, considering not only their governments but including also academics and the civil society.

The opening remarks were given by the Chilean Deputy Minister of Foreign Affairs, Fernando Schmidt, and Theodor H. Winkler, Ambassador and Director of DCAF. The Swiss Ambassador to Chile, Yvonne Baumann, was present as well. Afterwards, the workshop was divided into six thematic panels, each including presentations and discussions.

[*] See http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html

1. Introduction to the Montreux Document

The first panel was dedicated to the presentation of the Montreux Document. Firstly, Felix Schwendimann of the Directorate of International Law within the Swiss Federal Department of Foreign Affairs and Ben Clarke of the ICRC introduced the history and contents of the Montreux Document.

The Montreux Document is the first international document to describe international law as it applies to the activities of private military and security companies whenever these are present in the context of an armed conflict. It is divided into two parts. Part I recalls the application of 27 core international obligations of States, PMSCs and their personnel. Part II describes 73 good practices for States, designed to assist governments in complying with these obligations. In both parts, the Montreux Document highlights the responsibilities of three types of States: Contracting States (a State that hires PMSCs), Territorial States (a State where PMSCs physically operate) and Home States (a State where PMSCs are registered or incorporated). In all these cases it is necessary to ensure that the companies respect international norms, especially international humanitarian law and international human rights law. The document is intended to serve as a guide on the legal and practical issues raised by PMSCs. In so doing, it makes reference to already existing international legal obligations. It does not create new ones and is itself a legally non-binding document. It is clear, therefore, that there is no legal vacuum for the activities of PMSCs.

The Montreux Document was finalised in 2008 when 17 States endorsed it by acclamation. Since then, further 19 States have joined the Montreux Document. Endorsing States come from all continents and include Home, Territorial and Contracting States. The Document invites any country and international organization to support the content of the text. This is easy to undertake: all it requires is a diplomatic note to the Swiss Ministry of Foreign Affairs which confirms the support of the Montreux Document.

The main questions from participants concerned the non-binding legal nature of the Montreux Document and the applicability in the context of Latin America. It was indicated that Part Two of the Montreux Document – the Good Practices section – is a tool to help national regulatory

authorities to deal with the issue. Switzerland noted that it is, for example, currently working on a national legislation for PMSCs with activities abroad. In this process, the Montreux Document gives good advice on how to regulate the use of PMSCs.

2. Other International Initiatives

In the second panel, international initiatives that complement the Montreux Document were presented.

The first of these was a Draft Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies, presented by Amada Benavides, of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination. This Draft Convention has been considered by the Human Rights Council and the General Assembly and although it has been developed in conjunction with the Montreux Document, the Convention has had a slower process of uptake and approval. While some may question the necessity of having a new convention or whether existing instruments are sufficient, the fact is that the security market has grown in all regions of the world and as such, is a complex and international problem with a real and demonstrated risk of human rights violations that come from such activity. Moreover, given that PMSCs are operating in environments as diverse as humanitarian crises, prisons, social protests and the protection of natural resources, it is essential to have a clear and valid regulatory framework worldwide. The importance of an instrument such as a Convention is that it would be binding and complementary to other existing regulatory frameworks. The presentation also highlighted the other work of the Working Group, composed of five members from each continent, who monitor the activity of these companies and present their reports to the UN Human Rights Council and General Assembly.

The second presentation was given by Anne Marie Buzatu, of DCAF's Privatization of Security Program, who presented the International Code of Conduct for Private Security Service Providers (ICoC) of 9 November 2010. The ICoC, like the Montreux Document, is also a Swiss initiative. The ICoC – elaborated in a multi-stakeholder process in close consultation with the companies, governments, human rights organizations, academics, clients

and other interested parties – sets-out high industry principles and standards of conduct firmly based on international human rights and humanitarian law. It is setting the bar against which provision of services and management practices will be measured. Furthermore, clients of private security providers can require in their contracts that services be performed in accordance with the ICoC. Setting clear guidelines and standards for the selection and training of industry personnel, as well as for the manner in which services are provided, will have a preventative effect, helping to head off potential violations before they arise.

However, such measures are not enough to support effective oversight and accountability of PMSC activities. The ICoC will only be effective insofar as it can be independently and effectively enforced. Accordingly, signatory companies have also committed to work with other stakeholders to establish external independent mechanisms for effective governance and oversight. At a minimum, these mechanisms will include certification of companies' compliance, auditing and monitoring of their work in the field, including reporting, and a mechanism to address alleged violations of the code. This process is ongoing through a multi-stakeholder Steering Committee. The ICoC has been signed by nearly one hundred companies from 27 countries. Approximately half the companies are from Europe (in particular the UK), with significant representation from North America and Africa. Two companies come from the Latin American region.[†]

Questions and comments were aimed at how to apply the content of these international instruments in a Latin American context free of armed conflict, as there was the perception that all of the instruments were designed for conflict settings in which PMSCs operate. It was noted that these international documents are relevant in any context – not just armed conflict or complex environments – as the principles of good governance and human rights protection applied in all circumstances.

It was noted that the ICoC is aimed principally, but not exclusively, at private actors, thus providing a complementary method of regulation from the perspective of a different circle of stakeholders – namely companies.

[†] As of 1 August 2011, the number of Signatory Companies has risen to 166. They are headquartered in 42 different countries. Over half (54.8%) are from Europe. There is also significant representation from North America (17.5%), Africa (13.3%) and Asia (10.8%). There are now five Signatory Companies from the Latin American & Caribbean region. Full details can be found on the Code's website: www.icoc-psp.org

Finally, there was discussion on the importance of vetting of PMSC personnel, given that PMSCs may recruit former soldiers and police who have a history of abuse or violation of human rights. In some cases they have actually been removed from their institutions, and yet are reinserted into the labor market where no one monitors their actions. There was also discussion on the need to revise the incentives offered by these companies, in order to prevent attracting public workers – principally police and soldiers – who are trained with public funds and yet eventually end up working for PMSCs, demonstrating a net-loss for the public security sector.

3. National Perspectives and Best Practices of Regulation

The third panel was devoted to the presentation of national perspectives and some local practices of regulation of PMSCs. In regards to the case of Colombia, Víctor Guerrero, of the Pontifical Javeriana University, noted the accelerated growth of armed forces and how it has doubled the number of troops in Colombia. He also discussed the different stages in the conflict in Colombia, describing the 1990's as a period where various armed groups were present. Later, in the next decade, the number of actual guerrillas reduced while there was a proliferation of private security. He then talked about how currently there are approximately 200 to 300 former police officers from Colombia working in Iraq while in Libya former guerrillas work in support of the Gaddafi regime. He noted that the definitions of PMSCs and the regulatory mechanisms are necessary in order to differentiate between the untrustworthy and the normal. There was also discussion on Colombia's counternarcotics strategy whether this was actually to combat narcotrafficking or rather for the protection of public order. He argued that instruments such as the UN Draft Convention should include the definition of inherently governmental activities and should include intelligence activities. Finally, he argued that the three international instruments presented – the Montreux Document, the International Code of Conduct and the Draft Convention – are all complementary to each other.

The next presentation was given by Patricia Arias, of the Chilean Center for Development Studies. She referred to Chilean regulation of private security. Ms. Arias began her presentation noting that in contexts such as Chile, private security is not an issue on the public agenda except for small specialized groups in the government and academic institutions.

However, illegal businesses proliferate throughout Latin America and there are cases, such as in Brazil, where the police also work as private security personnel. In regards to national examples, she noted cases, such as Peru and Mexico that have developed specific laws governing this sector. In Chile, on the other hand, the system functions in a transparent manner and the proliferation of these types of businesses is low. In terms of best practices, she noted several recommendations that have been made to the Chilean authorities in order to improve regulation, for example, the creation of a special category of workers for this sector and placing ultimate responsibility for abuses on the company and not only the individual involved. Finally, she stressed the need to include articles in the new Chilean legislation about private security, that regulate the activity of mercenaries, but that it is not necessary to have a special law on this matter.

The third presentation, conducted by Sol Espinoza of the Pontifical Catholic University of Ecuador, focused on the huge growth of private security companies in that country. In Ecuador, regulation of these companies is still in the process of developing, especially regarding the use and registration of arms with currently no record of them. As in other Latin American countries, in Ecuador the number of private guards far exceeds that of the police. She made specific reference to the case of Intag, a village in the Ecuadorian Andes in which a mining project has resulted in the relocation of small communities. These communities organized themselves in order to complain that the State unconstitutionally approved of a project that damaged the ecological equilibrium in a natural reserve area and changed the lifestyle of these indigenous communities who were not consulted in the process. The mining company used the services of a private security company in order to evict these communities, but without success, as the community organized and managed to detain the officers of the company. She noted the many irregularities observed, such as the illegal use of arms, the lack of legal authorization for the eviction, the absence of legal identity of some of the companies and their links with the Armed Forces.

The fourth presentation of this panel was given by Pedro Trujilo, of the Guatemalan Institute for Political and International Relations Studies, who referred to “private security” in Guatemala, removing the term “military” as he stated there are no companies that match this criterion in

Guatemala. In this country, as in other parts of Central America, after the period of civil war and the signing of peace accords, there was a proliferation of private security companies. This was mainly due to the absence of the State and the demand from citizens for more security, effectively constituting a market response to the general situation of insecurity. In terms of control, the major weakness of the Guatemalan State was the provision of security. This raised the question as to whether the State can truly supervise private security when the State itself is unable to provide a level of security for its population. It is often assumed that the police should supervise these companies, but most of them report that they have received no such supervision. This is compounded by the general lack of political will to better regulate this sector, as many of the private security companies finance political campaigns. As in other countries, the number of private security guards outnumbers members of the police and the army. These guards are mostly young people with little education that have received military training but do not have any further skills or training.

The fifth and final presentation of this panel was made by William Godnick, Coordinator of the Public Security Program at UNLIREC (United Nations Regional Centre for Peace, Disarmament and Development in Latin America and the Caribbean). His presentation was focused on the use of arms on the part of private security companies. He suggested that instruments such as the Montreux Document could include existing international norms on stockpile management in order to minimize risks in this area. UNLIREC performs stockpile management assistance, promoting the application of available standardized instruments and procedures. He noted that one of the greatest contributions of the Montreux Document in the Latin American context is the possibility to generate an exchange of standards and best practices for regulation.

Among the questions and comments raised after this panel, it was suggested that the proliferation of private security companies is not simply a market response to an existing demand, but rather it is related to the responsibility of the State to regulate a sector in which all stakeholders, including the State, profit. Examples were given of countries in the region such as Mexico, for example, where many of the companies are illegal and do not have any control. In general, the socio-political contexts and conditions do not aid in improving the legislation or in generating a greater concern for the rights of workers of these companies, which are violated

with ease due to the informal nature of the sector. Cases such as that in Intag, Ecuador, further demonstrate the ineffectiveness of regulation and judicial enforcement in cases of abuse by such companies.

4. Third Party Nationals: Latin American citizens working for international PMSCs

The fourth panel was dedicated to the phenomenon of Latin American workers employed by PMSCs working abroad. The first presentation, by Kristina Mani of the Oberlin College in the United States, made reference to the special relationship of the US to Latin America and how the North American "wars" opened the region to the international security market. While Latin American participation in this market is low, nonetheless it is a region that has entered the market most of all by supplying workers. In this regard, Chile is the largest contributor with 1,200 workers, followed by Peru. This gives us a marker of the transnational nature of the problem of regulation, as these workers are employed by companies registered in other countries and deployed in another still. With respect to workers, the problem is that there is no legal or institutional framework that protects them, demonstrating the capacity problems of the State to exercise control. In Chile, although control is well institutionalized at the internal level, the same capacity does not exist to handle the movement of Chilean nationals who work abroad for foreign companies. While it can be said that in conflicts such as in Iraq where many of Latin American workers deploy may be ending, thereby eventually reducing the flow of workers there, other opportunities will arise in other locations. In this regard, it is necessary to anticipate new phenomena, such as international military training in other countries. Finally, she concluded by noting that one key aspect of the Montreux Document is how to influence the national context.

The second presentation was given by Fernando Cafferata, a Research Associate with the Inter-American Development Bank and an advisor to the Ministry of Security of Argentina. He noted that one of the most important aspects for improving the regulation of private security in Latin America is having access to quality information on the industry. More data is needed to provide a background to improve policies, and at the moment this does not exist. In addition, existing information is not readily accessible. Probably 50% of the private security market in Latin America is

informal. In addition to this informality, there are legal loopholes regarding the limits to the activities of these companies although it is a market with discrete and concentrated development. He noted as well that the available figures show that the highest salaries are for the expatriate contractors and not the local or third country national workers. According to the available figures, he stated that there are approximately 8,000 Latin Americans working in private security companies although these are limited to the operational level rather than strategic, planning or management levels. That is, it is not just a problem of the lack of regulation and control, but also of the structure of the market. In Latin America, attention must be given to situations that potentially demand the services of PMSCs, such as internal conflicts and humanitarian operations (armed presence in certain situations), an example being Haiti, as well as the so-called "war on drugs" which creates another opening for the use of private security.

The third presentation of this panel was given by Patricia Orellana, of the Institute for International Studies of the University of Chile. She noted that in the case of Chile, the majority of workers in private security companies based in Chile are retired soldiers or police officers who use the private security market as a way to reintegrate into the labor force, although they require training nonetheless. She mentioned as well that there are no foreigners in the Chilean companies as Chilean citizenship is a prerequisite. Finally, she remarked that the companies should invest in professional and quality human resources.

Among the comments on these presentations, it was noted that the discussion presented a balance between letting supply and demand regulate the market, or having the State intervene. Since security should be provided as a public service, the State should intervene in order to regulate it. Likewise, it was remarked that an analysis of the rule of law in these countries could help to understand the legal and oversight gaps. In this sense, the purpose of encouraging the use and uptake of the Montreux Document must also be to help strengthen capacity for public control. In addition, the involvement and relationship of the police with PMSCs should be reviewed as police officers can offer their services as private security providers and clear conflicts of interest may generate as a result.

5. Mining, Oil & Forestry: PMSCs and the Extractive Industry

The first presentation of the fifth panel was headed by Mauricio Lazala, of the London-based Business and Human Rights Resource Centre. He began by noting that the extractive industries sector attracts the services of private security in large numbers. Thus, security companies do not employ people only in places of conflict, but also in places free of violence, although due to the presence of natural resources tensions can arise with local communities. Because of this it is greatly important to establish control especially as this usually occurs in remote areas. The Business and Human Rights Resource Centre disseminates information on this topic, including the responses from businesses to allegations of abuse. A number of cases have been identified in Latin America, such as in Chile, where foresting companies have contracted private guards in order to secure against conflict with the Mapuche communities. In Colombia the development of basic principles of conduct among contractors, such as not hiring former soldiers accused of human rights abuses, is now an established good practice. Even though the Resource Centre's approach is a voluntary initiative without sanctions, it is an agreement that supports transparency, and one that should work in both directions, namely that clients should also agree not to contract or work for companies found to have committed abuses.

The second presentation was made by Mar Pérez, of the National Coordinating Committee for Human Rights of Peru. In Peru, private security companies generate the greatest number of human rights claims. The Peruvian case stands out due to the enactment of a law preventing Peruvians from working for these companies. Regarding natural resources, she noted that the presence of PMSCs in Peru is based upon the economic growth of the mining sector. In this context, there have been many reported cases of abuse and excessive force on the part of private guards during labor strikes. Additionally, there are cases such as that of Securitas who have acquired local security companies with a history of human rights violations in post-conflict settings. The speaker also put emphasis on private police services, that is, when police are hired through private contracts to provide security services as has been the case in Peru with mining companies. In 2009, cases were reported of police who had been authorized to provide private services while on active duty, which is clearly

discriminatory to the rest of the population who cannot afford private security services. However, this also has to do with the precarious labour situation of the police, an issue that should also be reviewed.

Afterwards, there was presented a brief documentary that detailed the situation in Intag, Ecuador. The documentary was one means through which the indigenous community highlighted the irregularities of the private security companies, many of whom were "shell companies" subcontracting with each other, with the State failing to protect these communities.

Among the questions and comments raised following the presentations, there was doubt as to the extent to which these international principles can be extended to individuals. It was noted that the International Criminal Court eventually could judge cases like this and that laws already exist that can be applied, but that ultimately, it depends upon political will in order for that to happen. In this regard, comment was also made regarding the OECD Guidelines on Multinational Enterprises and the accompanying National Contact Point systems that have established to allow complaints to be brought, as well as the UN Declaration on the Rights of Indigenous Peoples which also discusses the responsibility of companies. Finally, it was noted that it is of great importance to ensure a victim's access to a remedy and redress.

6. War & Disasters: PMSCs in Armed Conflict and Humanitarian Operations

The final panel was dedicated to the relationship between wars, natural disasters and the presence of private security. The first presentation, given by Yasmín Espinoza of Amnesty International, highlighting the current context of "the war on terror". Particular highlight was raised as to the need for PMSCs to comply with international humanitarian and human rights law. One should not necessarily try to demonize private security companies because, after all, they arise from a particular need, but nonetheless their activity should be regulated, especially in regards to aspects such as training in countries with lower labor costs and the vetting of workers moving between companies.

The second presentation was from Stuart Groves, from the United Nations Department of Safety and Security, who highlighted the use by the

UN and other international organizations of private security in complex situations. He noted that the UN does use private security contractors in certain circumstances to protect its personnel, highlighting some of the internal tensions that the UN faces in its use of such contractors. Issues that were faced with private security personnel included not only use of force issues, but also a range of other issues, including the use by PSCs of persons under the age of 18 – an issue complicated by the fact that in some communities there was pressure to allow those under that age to work for a PSC to finance their studies. Continuing on the theme of personnel, he noted that the workers are usually young and do not necessarily have professional training. He noted that the UN system is itself seeking to improve its regulatory and selection processes of the companies with which they work, noting that a new policy on The UN's Use of Armed Private Security Companies would be forthcoming in the next few months. This was a policy developed after close consultation within and without the UN family, and incorporated elements of the Montreux Document, the ICoC and the work of the UN Working Group on the Use of Mercenaries.

The final presentation was made by Antoine Perret, a Researcher at DCAF, who focused on the context of urban warfare and the use of PMSCs. He noted that strong vetting and training in international human rights and humanitarian law is key. The peace operations in Haiti is a situation where there is an almost absolute absence of regulation by the State or other actors. Although the presence of private security is not very strong there, they nonetheless are present. Even though there are few reported incidents of abuse this could be due to the limited channels to report these and to the low capacity of civil society organizations. In Mexico, negotiations in cases of kidnapping have also been conducted through private mediation behind the back of the authorities.

With respect to the Montreux Document, he noted that it should be sufficiently clear that the State cannot delegate its responsibilities and that in contexts of natural disasters there should be no participation of private military companies. Furthermore, States must also anticipate situations of internal conflict where they may eventually contract private security services. The State is ultimately responsible for a clear regulatory framework that will minimize the risk of the presence of these types of companies. Mechanisms such as the International Code of Conduct can support monitoring as they are flexible and easily implementable through

contracts with clients. Companies of all sizes act trans-nationally, and an international contracting mechanism that seeks to hold these countries accountable is a useful additional tool.

Concluding Remarks

Among the concluding remarks, it was noted that the Montreux Document is potentially open to development to address regional perspectives, such as those specific to Latin America. Furthermore, it was noted that the Montreux Document and the other international initiatives presented are a baseline, while the development of national norms and standards remains crucial as well as the role of the State in implementing these standards and best practices. There was discussion on how the various approaches to regulation presented a mosaic or regulation. There is a range of tools out there now to better hold PMSCs accountable. The Montreux Document is not the final word on all questions – regulatory or otherwise – associated with PMSCs. This was never the intention. It does not endeavour to establish new regulations but simply seeks to provide guidance on a number of thorny legal and practical points, on the basis of existing international law. It does so without taking a stance on the much broader question of the legitimacy and advisability of using PMSCs in armed conflicts – a matter on which debate is no doubt important and necessary. But for humanitarian purposes, it appears equally important and necessary that a restatement of the law such as the Montreux Document remains impartial on the matter, that it acknowledge the reality on the ground, and that it do so now.

OPENING SPEECHES[‡]

Welcome and Introduction by Vice-Minister (Subsecretario) for Foreign Affairs, Fernando Schmidt Ariztía

Ambassador Theodor Winkler, Director of the Geneva Centre for the Democratic Control of Armed forces (DCAF), Swiss Ambassador Yvonne Baumann, Delegates and Representatives of national institutions.

Following the fall of the Berlin Wall, the world has witnessed significant changes that led to the emergence of several new figures in the world arena. Additionally, security-related requirements have also become more complex and some sort of "privatization" of armed conflicts has arisen, through the transfer of certain functions usually pertaining to States to private companies.

The emergence of new world phenomena in International Security forces us to be attentive to the changes and to respond to them in an effective and appropriate manner. In the case of armed conflicts and given the wide variety of new factors that characterize their development, we see how in armed conflict in Iraq and Afghanistan private security companies have played an increasingly central role that we cannot ignore.

In view of this scenario, the international community relies on 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. This instrument stands as a first effort to establish rules for the development of their activities based on the principles of Public International Law and, particularly, of International Humanitarian Law and Human Rights Law.

[‡] The following is a verbatim transcription and a translation of the opening remarks given by Vice-Minister (Subsecretario) for Foreign Affairs, Fernando Schmidt Ariztía and Ambassador Theodor Winkler, Director of the Geneva Centre for the Democratic Control of Armed Forces.

Chile adhered to this document on April 6, 2009, confirming our interest in deepening our multilateral scope of action, especially in those topics involving respect for human rights and protection of individuals in situations that threaten their integrity. Our country, Uruguay and Ecuador are the only Latin-American States which have so far signed this instrument.

The Montreux Document, the contents and scope of which will be discussed at this conference, addresses the need of having a framework that sets clear rules for the development of its activities and respect for the law based on universally recognised principles. Further, the "good practices" suggested in this document lead and permit us to establish guidelines that contribute to design national policies and strategies on this topic.

Regarding armed conflicts and the intervention of private companies, we cannot remain indifferent to those situations which violate the established law and order, mainly affecting innocent civilians and jeopardising their economic and social development. In this connection, Chile is unrestrictedly committed to the respect for human rights and assistance to victims, in accordance with the rules of International Law, particularly the Human Rights Law and International Humanitarian Law.

Additionally, we must consider the circumstances involving respect for the rights of those working for such companies. Many times the employees of these companies are subject to extreme conditions, to violations of their employment contracts, and to situations that endanger their integrity as workers.

Holding this regional conference will, therefore, allow us to share experiences regarding the situation of those companies, their participation in armed conflicts and the entailing challenges.

I wish to thanks the Federal Department of Foreign Affairs of Switzerland, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the International Committee of the Red Cross. These institutions have played a key role in the design and distribution of this document.

I also wish to thank these institutions for having elected Chile as the venue for this conference, which aims at sharing experiences and addressing the challenges on the activities of private security companies in armed conflicts from a regional perspective, considering Latin America as

the appropriate place for discussing the participation of private security companies in armed conflicts, natural disasters or productive sectors.

Finally, I wish to thank the participating delegations, experts, and national institutions who have committed their participation in this conference. I wish you a fruitful job and hope that the ideas to be exposed will allow us to establish contacts and information exchange network that permit to project the future work on this matter.

Welcome and Introduction by Ambassador Theodor Winkler, Director of the Geneva Centre for the Democratic Control of Armed Forces

I am very pleased to welcome you all to this conference on behalf of the Swiss Federal Department of Foreign Affairs and the Geneva Centre for the Democratic Control of Armed Forces. The aim of this workshop is to raise regional awareness about the Montreux Document, as well as to open a dialogue about both challenges faced as well as successes achieved regarding private military and security companies (PMSCs) in Latin America. This is the first in a series of regional workshops on the Montreux Document on Private Military and Security Companies. Other awareness raising workshops are planned to take place in Asia and Africa. The Montreux Document is now supported by 36 States and remains open to all states and international organisations. (More on this later).

Let me now briefly introduce DCAF to you. DCAF is one of the world's leading institutions in the areas of security sector reform (SSR) and security sector governance. Established in 2000 by the Swiss government, DCAF is an international foundation with 58 Member States, one of which – Argentina – is from this region. We provide in-country advisory support and practical assistance programmes, developing and promoting appropriate democratic norms at the international and national levels, advocating good practices and making policy recommendations to ensure effective democratic governance of the security sector.

In recent years, DCAF's involvement in Latin America has been on the rise; it has provided technical assistance to the Argentine Ministry of Defense, and has realized a project in El Salvador on SSR and Peace Processes. DCAF also has in the works a publication on Defence Policy in Latin America.

With the increasingly important role that the private sector plays in the security sector, we are particularly pleased to be involved in this initiative to raise awareness about the Montreux Document, which aims to clarify and reaffirm obligations to uphold international humanitarian law and to identify good practices for states engaging PMSCs. We believe that DCAF's neutrality and impartiality add value and we hope that our expertise across the entire spectrum of security sector reform and governance issues can inform this process.

As I mentioned, this conference builds on the ongoing successes of the Swiss Initiatives, including the adoption in October 2008 of the Montreux Document on legal obligations and good practices relating to PMSCs operating in armed conflict, and the adoption in November 2010 of the International Code of Conduct for Private Security Service Providers with continuing efforts focused on building an effective international oversight institution.

This conference also builds on the emerging consensus, among practitioners as well as academics, on the need to fill normative and accountability gaps in the area of PMSCs.

And as this industry – and the effects it has on human population – grows, so should our discussion and dialogue about how to improve its governance. But there is no "one-size fits all" approach to effective governance. For it to be effective, this discussion has to take into account the real challenges that are happening on the ground, in your cities and neighbourhoods. That is why we are here in beautiful Santiago today.

We will start off by looking at efforts that are happening at the international level—the Swiss initiatives, work happening at the UN level – and discuss how the growing use of PMSCs impact and inform international standards. Before the end of this day we will start to narrow our focus to the Latin American region, listening to perspectives from individual countries. This will continue tomorrow as we consider PMSC issues that are particularly relevant to the region, such as Latin American citizens working for international PMSCs, and PMSCs working for the Extractive Industry.

The reason we take this approach from international to local is very simple: because international principles must have real meaning on the ground to help safeguard persons from violations of their international humanitarian law protections and their human rights. And this requires a dialogue between the international and local, so that local practices are

aware of international standards, and international standards take into account actual security challenges faced by people every day.

This is the broader context within which this workshop is held. It is up to all of us to turn this meeting into this meaningful exchange.

With such a distinguished group of participants, I am quite sure that we will succeed. In order to facilitate success, we want you to speak openly. Therefore, we will apply the so-called Chatham House rules which means that, although a report of today's meeting will be prepared, no statements whatsoever will be ascribed to individual participants or their institutions of affiliation.

Let me conclude my opening remarks with my heartfelt thanks to the Chilean Government, and in particular to the Chilean Ministry of Foreign relations for hosting this conference, for the excellent organization together with the Global Consortium on Security Transformation, and to you all for attending. I certainly look forward to our coming discussions.

Thank you.

BACKGROUND PAPER

Private military and security companies in Latin America: the relevance of the Montreux Document*

Antoine Perret
May 2011

Introduction[1]

The use of Private Military and Security Companies (PMSCs)[2] is a growing phenomenon in Latin America. For instance PMSCs assisted International Organisations in peace operations in Haiti after the massive earthquake of 2010. Other companies provide intelligence, logistic and training to support the Colombian army.[3] Contractors also work for other private enterprises – for example mining companies – providing security services in complex situations all around the region.

Traditionally, these tasks were generally provided by public armed forces. The result of this privatization is the presence of a non-state actor that is allowed to use force in contexts where once states did so. The particular problem, however, is that the public control of PMSC activities is limited because the usual public mechanisms of accountability are generally not adapted for these private actors. This lack of accountability is particularly evident when contractors infringe upon human rights.

Several international initiatives have emerged in order to address this lack of accountability. The Swiss government has led two initiatives in this light: the Montreux Document (2008) and the International Code of Conduct for Private Security Service Providers (the ICoC) (2010). The UN

* The views expressed in this paper are those of the author alone and do not in any way reflect the views of the institutions referred to or represented within

Working Group on mercenaries has also been involved in an international initiative at the United Nations Human Rights Council, and in that light they submitted a proposed draft convention in September 2010. All these initiatives have expressed a common aim: the better regulation and accountability of PMSCs. Their approach is, of course, different: for example, the proposed convention would be a binding instrument of international law, while the two "Swiss Initiatives" may be considered a mix of existing international law and best practices on the one hand (the Montreux Document) and a hybrid form of voluntary or co-regulation (the ICoC) on the other. Further, the Montreux Document is addressed to States and its applicability is limited to situations of armed conflict; the ICoC is addressed to companies and is applicable in a broader range of contexts – so-called "complex environments";[4] an international convention would also be addressed to States, of course.

Nowadays, the Montreux Document and the International Code of Conduct – the possibility of a convention is still under discussion – can serve to help States, companies and civil society to prepare applicable standards for PMSCs. This paper focuses on the Montreux Document, and seeks to provide elements for its applicability and usefulness in the Latin American context.

It is possible to identify five situations that are relevant in Latin America. First, Latin-American contractors are hired by international PMSCs to work in other countries, such as Iraq and Afghanistan. In many cases the civil or working environment-related rights of the contractors are not fully respected. The multitude of different jurisdictions does not facilitate the enjoyment and enforcement of these rights.

Second, PMSCs are active in conflict situations in the region, specifically offering several services in Colombia to the police and the army in their fight against illegal groups, principally through the cooperation agreement between Colombia and the United States. In certain cases, human rights are not respected and the lack of an adequate enforcement regime does not permit a real investigation of the cases.

A third situation where PMSCs are active is during peacekeeping operations. In Latin America this is particularly the case in Haiti, where PMSCs were contracted by international organization and states to provide humanitarian services after the 2010 earthquake.

Fourthly, it is also worth mentioning the activity of PMSCs in urban wars in Central and South America, particularly in Mexico where PMSCs from the United States are contracted, in the framework of international cooperation between the United States and Mexico, to train local police.

Finally, PMSCs are increasingly contracted by multinational corporations to protect people or assets. There are numerous examples where such PMSCs – whether local or multinational corporations – are contracted and are accused of human rights abuses.

In each of these situations the Montreux document gives elements of the level of behaviour to be expected from contractors. Accordingly, it should serve as a base for the preparation of national standards, allowing for some kind of rough harmonization of laws, necessary for the collaboration of the different states involved in the use of PMSCs.

It is important to note that international initiatives often struggle to be implemented and have concrete effects on the ground. The traditional approach for the implementation of international law is invariably rooted at the national level. In a world of sovereign states multilateral commitments are only effective when given concrete expression in national legislation and institutions. The important step becomes the implementation of the initiative. Whether the initiative is "legally binding" or not is not in itself as important as whether it is effectively implemented. It is also relevant to note that there are considerable variations among regions, and as we saw it is possible to identify general trends in a specific region – in this case Latin America. These regional trends can be put into perspective with existing regional mechanisms or institutions to improve the implementation of the international initiative at the national level and / or directly on the ground. The regional level represents a good step between the other two levels because it maintains the international level element – necessary to regulate a transnational challenge and harmonize legislation – but also takes into account a regional and, thereby, culturally specific approach.

In order to discus all these points, and after briefly explaining the background to the Montreux Document, this paper will focus on specific cases in Latin America, starting with those where International Humanitarian Law (IHL) and Human Rights Law are applicable – namely conflict and peacekeeping operations – and secondly in those peacetime cases where only International Human Rights Law is applicable. This division

should allow a better understanding of which law applies and subsequently which international initiative should be useful to face these situations.

The Montreux Document: An Introduction

In the light of the growing presence of private military and security companies (PMSCs) in armed conflict, the Swiss Government and the International Committee of the Red Cross (ICRC) launched a joint initiative to promote respect for international humanitarian law and human rights law in the context of the operations of PMSCs. "The Swiss considered two approaches: one focusing on working with industry to develop an international 'code of conduct'; the other to work through intergovernmental discussion to clarify existing international law in the area."[5] The initiative culminated in the September 2008 endorsement of the Montreux Document by 17 governments from various regions of the world.[6] For the first time, an intergovernmental statement clearly articulated the most pertinent human rights and international humanitarian law obligations with regard to PMSCs. The second part of the Swiss Initiative took the form of an industry-wide international code of conduct that articulates principles for private security service providers to operate in accordance with international humanitarian law and international human rights standards. Nearly 60 private security providers signed the Code in Geneva on 9 November 2010,[7] and since then more than another hundred companies have also expressed their commitment to it.

In this paper we will focus on the Montreux Document, which is addressed to States and expressed to be applicable only in a conflict context. The document is divided into two main parts, the first on pertinent legal obligations relating to PMSCs binding under customary or treaty law – 'hard' law – and the second on good practices relating to PMSCs – 'soft' law or standards. The two parts are divided into law or practices relevant in respect of contracting States (States that directly contract for the services of PMSCs), territorial States (States on whose territory PMSCs operate) and home States (States of nationality of a PMSC).

The chosen approach of the Montreux Document is pragmatic: it is not a victim-centred but a state-centred perspective. As Cockayne explains, "this shift of perspective is perhaps unsurprising, given the exclusion of non-state actors from the final stages of the negotiation."[8] However, he

adds, "it is also important to acknowledge that the process of revision by states during 2008 also strengthened the final Document in a number of places. References to potential extradition of suspects were broadened to cover surrender, to allow for their trial before an international criminal tribunal; and the obligation of fair trial and commensurate sanctions were also inserted."[9] The Montreux Document is explicitly designed to have a bearing on the practical aspects of operations in the field. It does not endeavour to establish new regulations but seeks to provide guidance on a number of legal and practical points, on the basis of existing international law.

The document has drawn criticism from some sources, the most virulent coming from the UN Working group on mercenaries. Gomez del Prado, a member of the UN group alleged, "the document recognises *de facto* this new industry and the military and security services it provides. It legitimises the services the industry provides, which still remain unregulated and unmonitored."[10] Without entering too deeply into this discussion, it is easy to see that the industry did need the Montreux Document in order to exist and grow, and we can quote Cockayne who, while recognizing weaknesses in the Document, argues that it seems to "provide a set of generally respected standards on which other regulatory initiatives might be built"[11]. To illustrate, he quotes the Sierra Leonean representative to the Swiss Initiative who said that the Document was '*persuasive* in law' but now it fell to states to make it '*binding* in law'.[12] Finally apart from some occasional statements by Gomez del Prado,[13] the general tendency, including from the UN Working Group[14], now seems to be to defend the emerging complementary of the different initiatives (the Montreux Document, UN Convention and the International Code of Conduct).

In conclusion, we can affirm that the Montreux Document – as the first international document of its kind – provides a base for further regulation, calling for the respect of existing international norms and affirming good practices in respect of the industry. The Montreux process is ongoing with, as of today, 36 endorsing States[15], including three from the Latin American and Caribbean region[16], and the first regional workshop for the promotion of the document having taken place in Santiago, Chile in May 2011.

The Montreux Document: Relevance for Latin America when International Humanitarian Law applies

This part of the paper aims to analyze the situation where International Humanitarian Law would apply and thus where both parts of the Montreux Document could be helpful to States. These include the contracting of Latin American citizens by PMSCs to work in areas of armed conflict, and also the operation of PMSCs within Latin American conflict situations and peacekeeping operations.

Latin American citizens contracted to work for PMSCs in other conflicts

The direct application of the Montreux Document is limited to situations of armed conflict, which in the Latin American context is limited to few cases. However it is interesting to discuss here the relevancy of the document to respond to an important Latin American challenge of the past few years: Latin American citizens working for international PMSCs. According to Mani "No less than 1,200 Chileans, 1,000 Peruvians, 700 Salvadorans, and hundreds each from countries like Colombia, Honduras, Guatemala, and Nicaragua have taken up security work in Iraq. Indeed, when the security firm Triple Canopy landed a U.S. government contract in 2005 to provide security in the Green Zone, it recruited security personnel almost exclusively from Latin America."[17]

Some governments whose citizens have been recruited by transnational PMSCs voiced worries about not only the potential exploitation of their citizens, but also worries about its citizens committing illegal acts while abroad.[18]

Latin American PMSC workers are travelling to countries in conflict where the Montreux Document is applicable – Iraq and Afghanistan have both endorsed the Document – and working for PMSCs incorporated in or contracted by Montreux Document States.[19] In order to face transnational challenges States need to be able to collaborate, and the starting point for a fruitful collaboration is a common definition and standard to respect. The Montreux Document, as the first international document on the issue of PMSC, offers such a definition and a starting-point standard, facilitating increased future dialogue and collaboration among States.

The Montreux Document does not specifically mention any obligations for Third National States, although of course paragraphs 18 to 21 of the first part of the Montreux Document are addressed to all other States. Indeed, some have criticized it for not giving such States the same precedence as Home, Territorial and Contracting States.[20] Whether it should or not is a question open for discussion. In the meantime, Paragraph 23 of Part I does, however, mention that "the personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, *as far as applicable, the law of the States of their nationality*."[21] Of course, how a Third National State would ensure that its citizens respect its laws when they are working abroad is not an easy question. Educating its nationals that they should still be following their home country laws no matter where they work, and seeking to enforce that law on their return are two possibilities. Another question that can be raised here – and needs further discussion – concerns the possible threat to the neutrality of a Third State in case its nationals participate in hostilities. Certainly, there is the potential that non-state actors of Third Party States could directly participate in hostilities. Article 6**[22]** of the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land provides some guidance – essentially that a neutral State is not engaged simply because one its nationals "offer their services" to a belligerent. Whatever the international law status, there is certainly a reputational risk to a Third National State.

A further question concerns the possible responsibility of the Third National State in case of their nationals are found guilty of an international crime. In such a situation, although there is likely to be no State responsibility attributed to their actions,[23] the Third National State will of course have a duty to prosecute their national. Perhaps even a heightened responsibility, specifically because it is their citizen.

The implications at the international level are significant for the Third National State insofar as it should be collaborating with other States (other Third National States as well as Home, Territorial and Contracting States) in order to improve the control on PMSC activities and simultaneously protect its nationals. An example of such collaboration can be found, for example, in the facilitation of information for Contracting, Territorial and Home States on the background on the PMSCs personnel as referred in the Montreux Document in several paragraphs.[24]

Concerning recruitment, the Montreux Document contains a few elements considering "the respect of the PMSC for the welfare of its personnel as protected by labour law and other relevant national law."[25] There have been reports of abuse by PMSCs of the employment rights of Latin American personnel.[26] The Good Practices section of the Montreux document refers to this sort of problems and call for "providing personnel a copy of any contract to which they are party in a language they understand; providing personnel with adequate pay and remuneration arrangements commensurate to their responsibilities and working conditions; adopting operational safety and health policies."[27]

Some lessons can be taken from similar experiences in Asia. In much the same way as for Latin American citizens, Filipinos have also been recruited by PMSCs to work in Afghanistan. With the express intent of protecting its nationals, the Philippines passed a law banning the recruitment by PMSCs of its nationals to work in hostile environments. "However, the Filipino ban has been circumvented by PMSC recruiters using sub-agents scouting for potential personnel and acting individually so as not to attract the attention of the Philippine authorities."[28] Perhaps a better solution would be to "protect workers (for example through their embassy) if such workers were documented and their stay legitimized – something which cannot happen as long as their presence is deemed illegitimate."[29]

PMSCs in Armed Conflict

The Colombian conflict has laid down fertile conditions for the growth of the private security market; many PMSCs were formed or deployed in Colombia. The usefulness of the Montreux Document in the Colombian case is at several levels. On one hand, Colombia can be considered as a Contracting State. PMSCs are working for the Colombian government helping them to improve the intelligence, coordination and intervention against illegal groups. On the other hand Colombia is also a Territorial State because of the presence of PMSCs employed by the U.S. government in the framework of the military cooperation between the U.S. and Colombia. PMSCs have been contracted in order to carry out activities related to U.S. military and police aid to Colombia.[30]

Apart from the eight pertinent international legal obligations in the first part of the Montreux Document, there are also twenty-three best

practices which focus on Contracting States. States should take into account international law to determine whether a service is permitted to be contracted out; particular attention must be paid to services, which could cause PMSC personnel to become involved in direct participation in hostilities.[31] The procedure of selection is also a particular focus of the Montreux Document;[32] States are invited to select PMSCs carefully, with transparent processes according to criteria that account for the past services, background, resources, and personnel policies of firms. The training of personnel is particularly important when PMSC employees carry firearms and are in contact with the local population. States should take into account national law, international humanitarian law and international human rights law when they select PMSCs and write contracts.[33]

Similar attention to the kinds of services authorized to take place on its territory is suggested to Territorial State as a good practice. This good practice is particularly relevant in the case of, for instance, the contract of the US State Department with *DynCorp* to operate in Colombia. The company is hired to fumigate illegal cultivation, but also to provide "training, air transport, aircraft maintenance, reconnaissance, and search and rescue operations[34] which have as their mission locating and shutting down aircraft or hostile actions taken by drug producers or traffickers."[35] It is possible that such PMSCs may actually be directly participating in hostilities, as most of their activities are conducted in places where illegal groups are active.[36] If this is the case, then the Territorial State in this instance should be reviewing the types of activities that PMSCs are allowed to undertake.

Good practices of the Montreux Document also recommend that Territorial States develop procedures with regard to the authorization of PMSCs. It suggests that the State "provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing corporate criminal responsibility for crimes committed by the PMSC, consistent with the Territorial State's national legal system."[37]

Current Colombian laws seek to control this industry, including a special entity in charge of reviewing these companies' activities. [38] Nevertheless the implementation of these norms suffers significant logistical problems and does not take into account the transnational component of the companies. Another problem concerning the

accountability of PMSCs in Colombia is the granting of immunity to US PMSCs' employees from Colombian jurisdiction by bilateral agreement with the U.S. Consequences can be severe as shown by the tragic example of two cases of rape of minors involving PMSC employees. One of them is under investigation but the justice system has had its hands tied because of the immunity accorded under the bilateral agreement the other case was not investigated.[39]

Montreux Document Best Practice #51 references this problem, suggesting that Territorial States consider the impact of such a bilateral agreement on the compliance with national laws and regulations and should address the issue of jurisdiction and immunities to ascertain proper coverage and remedies. They are also encouraged to negotiate agreements on legal coordination and cooperate with Contracting States and Home States over the investigation of matters of common concern.[40]

PMSCs in Peacekeeping Operations

Times change: ten years ago Kofi Annan considered that the world was not ready to privatize peace.[41] Today, according to Buzatu and Buckland: "perhaps one of the least well-known clients of PMSCs are humanitarian organisations. Increasingly the target of attacks while working in the field, humanitarian organisations often require additional security in order to perform their missions. […] It is clear that this is a growing trend, with more and more organisations in the field hiring mostly local private security guards."[42] Suggestions have also been made for the expanded use of PMSCs, such as "employing them as UN blue helmets or even as UN-mandated or UN-led troops carrying-out military operations."[43]

In most of these cases, International Humanitarian Law is (or would be) applicable, as explained by the Department of Peacekeeping Operations of United Nations: "[Humanitarian law] is relevant to United Nations peacekeeping operations because these missions are often deployed into post-conflict environments where violence may be ongoing or conflict could reignite. Additionally, in post-conflict environments there are often large civilian populations that have been targeted by the warring parties, prisoners of war and other vulnerable groups to whom the Geneva Conventions or other humanitarian law would apply in the event of further hostilities."[44]

By extension, we would suggest that the International Humanitarian Law elements of the Montreux Document would be relevant in peace operations when PMSCs are hired, and that in that case International Organization and States involved should use it as a reminder of their international law obligations and also follow the recommendations made in the second part of the Montreux Document.

The presence of PMSCs providing civil tasks such as humanitarian assistance without adequate control is not always helpful, even in complicated environments. Concerns exist because in cases of company misconduct, the question of who bears the responsibility for their actions remains unclear. Further, as du Plessis has said, "there is also a risk of severe reputational damage arising from an incident, undermining the agency's credibility and reducing its access to the local population and its ability to perform humanitarian missions."[45]

In Latin America, the case of Haiti exemplifies these challenges. PMSCs were contracted to provide security or other services to help rebuild the country after the massive earthquake that rocked Haiti on 12 January 2010. For instance, the PMSC Triple Canopy oversaw a refugee camp;[46] the PMSC Raidon Tactics has at least 30 former soldiers of U.S. special operations in Haiti who have been guarding aid convoys and providing security for "news agencies".[47] For the moment, there is no significant complaint against PMSCs operating in Haiti. Their presence and role have been limited by the presence of United Nations forces on the field as well as the fact that the population remained very calm despite the situation, thus limiting the need for external security interventions.[48]

What is valid for States is valid for International Organizations too. Indeed the Montreux Document is expressly open for endorsement by International Organizations.[49] As mentioned above in the Colombian case, in the Montreux Document States are to select PMSCs carefully, with transparent processes according to criteria that account for past services, background, resources, and personnel policies of firms[50]. International Organizations should do the same, exercising due care in the selection and training of personnel and taking into account national law, international humanitarian law and international human rights law when they select PMSCs and conclude contracts with them.[51]

The good practices of the Montreux Document recommends that States should also monitor compliance with the terms of the duly-

concluded contract and relevant law, including ensuring that the local civilian population is informed about the rules of conduct by which PMSCs have to abide and available complaint mechanisms.[52] In the case of PMSCs that are contracted by an International Organization, this should be carried out by the organization in collaboration with the state concerned.

The Montreux Document: Relevance for Latin America generally

The second part of the Montreux Document lists 73 ''good practices'', "which may lay the foundations for further practical regulation of PMSCs through contracts, codes of conduct, national legislation, regional instruments and international standards." [53] Although the Montreux Document is limited to situations of armed conflict, by extension these good practices can be applied in many other circumstances outside of armed conflict.[54] According to Arias "many of them are applicable to the Latin-American reality […] [especially] procedures for the selection and hiring of companies that promote the parliamentary control of the companies of private security. Good practices about the implementation and maintenance of supervising and efficient control equipments of the private security companies."[55] In the following part we will discuss the applications of these good practices in the non armed-conflict context.

PMSCs in urban war and drug war

The gang- and drug-related security situation in various countries in Latin America has escalated dramatically in the last few years. In Mexico, government forces deal with various rival drug cartels which are fighting for regional control. In 2010 more than 12,000 persons were killed as a result.[56] The United States is supporting Mexico through the Merida Initiative which began in 2008.[57] Part of the support is in the form of privatized entities: PMSCs are providing training to Mexican police and some allegations have been made that PMSC employees were training Mexican police in various torture techniques.[58] Other PMSCs from the U.S. are active in Mexico, but not working for the US government. For instance some PMSCs are offering "kidnapping resolution and ransom negotiation services, often as part of broader "risk management" contracts sought by wealthy individuals and

transnational companies".[59] These companies are working for individuals or transnational corporations, and are "generally cooperative with U.S. law enforcement […] [but they] tend to manoeuvre as discreetly as possible in Mexico, usually avoiding contact with authorities who may not be trustworthy."[60]

The same escalade of violence is occurring in other parts of Central America. "In both Guatemala and El Salvador, the rate of killing is higher now than during their civil wars. Guatemala's government reckons that about two-fifths of murders are linked to the drugs business. Even Panama, much richer than many Central American countries […] has seen its murder rate almost double in the past three years."[61]

The situation is so dramatic that researchers have suggested that gangs should be considered as an 'insurgent group' arguing 'another kind of war'.[62] Dennis Rodgers also speaks about new urban wars and explains "that new urban wars of the 21st century involve a variety of actors who don't necessarily want to take over the state, but who might be defending some kind of resource, local territory, or may even just be trying to create spaces of order for themselves."[63] However, it is not yet the case that the situation in Central America and Mexico has been defined as a situation of armed conflict which would have the consequent application of international humanitarian law – and, of course, the Montreux Document. Hazen argues that "gangs share few characteristics with insurgent groups. Most importantly, gangs do not share the primary goal of insurgents: to seize state power. […] [and] they have not declared wars on governments or states."[64] She suggests "that such an approach is neither appropriate nor useful for understanding the thousands of gangs that exist in communities across the globe."[65]

Certainly the discussion as to whether international humanitarian law would apply, and the direct application of the Montreux Document, is beyond the scope of this paper. However, the second part of the document includes good practices that could be used in every context as a support to the practical regulation of PMSCs – through contract and national legislation, among others. The current context of violence has increased the use of PMSCs in Central America and, according to Trujillo everyone pays for protection, "including the poor, who pay for poor security."[66]

Several good practices of the Montreux Document can help States in the region to prepare common standards, enabling better control of the

increased presence of PMSCs, specifically on parts of the Territorial State. First, States should determine prohibited activities and should also develop procedures[67] with regard to authorization for PMSCs, with transparent processes according to criteria that account for the past services, background, resources, and personnel policies of firms. States should also monitor compliance with the terms of authorization, including ensuring that the local civilian population is informed about the rules of conduct by which PMSCs have to abide and available complaint mechanisms.[68] A regional approach for this last recommendation could be interesting: considering PMSCs are transnational and that it is also possible to identify trends in the region, if States are able to centralize and share information on PMSC activities and complaints, the efficiency of control will be much improved. In this case the International Code of Conduct[69] could also be helpful because it will include an independent governance and oversight mechanism, including by-laws or a charter which will outline mandate and governing policies for the mechanism.[70]

PMSCs and Extractive Industry

The presence of transnational extractive corporations in complex environments has as one of its consequences the use of PMSCs by these corporations to safeguard their assets. One of the biggest challenges of these corporations is to integrate themselves in the local context, including ensuring they respect human rights. Corporations can of course refer themselves to the UN Special Representative John Ruggie's framework: "Protect, Respect and Remedy"[71], unanimously endorsed by the United Nations Human Rights Council.

The use of PMSCs by other corporations is by definition a private law issue, and States consequently have a limited capacity to control these PMSC activities. However, as discussed above, the State has the obligation to prevent human rights violations by private actors. Corporations also have the obligation to respect human rights. A good starting point for States and corporations concerning the use of PMSCs is to ensure rigorous standards are met in the selection procedure. A good practice of the Montreux Document recommends to both the Territorial and Contracting States to develop procedures[72] with regard to authorization for a PMSC to provide services, with transparent processes according to criteria that account for

the past services, background, resources, and personnel policies of firms; the same applies to corporations, which should only contract PMSCs authorized by territorial State.

States – and by extension corporations contracting PMSC – should take into account national law, international humanitarian law and international human rights law when they process the selection and write contracts.[73]

The Good Practices also suggest that the State "provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing corporate criminal responsibility for crimes committed by the PMSC, consistent with the Territorial State's national legal system."[74]

The example of the PMSC *Forza* in Peru illustrates well these challenges posed by the use of PMSC by corporation. "*Forza* was created in 1991 by a group of marine officers to offer service of corporative security. They operate at the national level and are specialized in the extractive and industrial sector. [75] In August 2006, during a demonstration, two environmental rights defenders were killed by the security service of the Yanacocha mine. The investigation reveals that the perpetrators were three police officers who served on their days off as private security guards for *Forza*.[76] The Non Governmental Organization (NGO) Education and Action for Sustainable Development Group (GRIFUDES) founded by Father Marco Arana is active in the region of the Yanacocha mine. This NGO and other community leaders in Cajamarca (Peru) have been the subjects of serious intimidation and spying by the PMSC *Forza*. The National Human Rights Coordinator (CNDDHH) has recorded 20 incidents, which occurred between August and November 2006 against personnel of GRUFIDES, and as at the present moment the authorities have not conducted a full investigation.[77/78]

Two other reports of cases should also be mentioned: a Chilean PMSC contracted by a forestry corporation was involved in incidents against the Mapuche indigenous community in the South of the country;[79] and in Colombia *British Petroleum* contracted ex-military personnel of the UK Special Forces employed by the PMSC *DSL* in order to train the local police. The training contract was ended when it was found that the police began using tactics that involved human rights violations.[80]

A Montreux Document good practice that could certainly help raise standards in this field is that relating to training. It suggests that Home, Contracting and Territorial States all take into account that the PMSC's personnel are sufficiently trained. This includes reference to training to respect relevant national law, international humanitarian law and human rights law as well as religious, gender, and cultural issues, and respect for the local population. The same principles could be applied to a contracting party – for instance a company. With the Territorial and Home State also requiring that this type of training is carried out, enforcement of these types of provisions would go a long way to ensuring that these companies are not violating the rights of the local population.

The use of PMSCs by transnational extractive corporations tends to aggravate the already complicated relationship between international enterprise and the local population. For their own interests, corporations should be careful about how PMSCs are respecting human rights standards. States have the obligation to protect human rights. The Montreux Document good practices' offers a basis on which to build common standards for territorial States and corporations hiring PMSCs. The International Code of Conduct can also help transnational corporations at the moment of writing contracts with PMSCs, offering them a standardized way to include respect for human rights as part of their contractual obligations.

Conclusion

According to McCoy "in many Latin American nations, there has been a long-standing tension between the state's attempts to consolidate a monopoly on the use of force, and the reality of a proliferation of private armed groups, which are sometimes formed with the state's blessing. The tension consists, on one side, of the tradition of guerrillas, paramilitaries, "self-defense" groups, gangs and cartels; and on the other side, decades of U.S. funded "military professionalization" aimed at strengthening the military's monopoly on force and bringing it under the control of civilian institutions."[81]

The growing presence of PMSCs in Latin America adds a new dimension. States cannot be satisfied with a lax, *laissez-faire* approach to

these companies, and they need to work to correct any lack of accountability in case of violations of human rights by PMSC contractors. Three international initiatives emerge with the objective of helping to better regulate PMSC activities. The first two are led by Switzerland: the Montreux Document (2008) and the International Code of Conduct (ICoC) (2010). The third is at the U.N. level – a new intergovernmental working group considering the possibility of an international regulatory framework for PMSCs, which may include a draft convention prepared by an expert group – the U.N. Working Group on Mercenaries.

In this paper I have analyzed the relevance of the Montreux document in the Latin American context and see that the Montreux Document could be used in several ways. We have seen that the Montreux Document is applicable in Latin America in cases of conflict, particularly in the case of Colombia where the State can be considered as a territorial state and a contracting one. The Montreux Document is also applicable to peacekeeping operations, as it is the case in Haiti. Not only to states involved, but also to the international organization that contract PMSCs. In the case of Latin American citizens who work for international PMSC in conflict in other parts of the world, the Montreux Document could be helpful for States involved because it is a base for a slow but necessary harmonization of national laws globally.

Finally we can conclude that the second part of the Montreux Document, the good practices, is useful for States in all cases where PMSCs are active, particularly in the cases of use of PMSCs in drug wars, or by extractive corporations. These good practices establish which behavior we can expect of states involved, and also by all institutions or enterprises which contract PMSCs, regardless of the context: the good practices could be use also in situation where only human rights law apply.

The Montreux Document does not establish new regulations but provides guidance on a number of legal and practical points, on the basis of existing international law. The Montreux Document provides support for States, companies and civil society to better understand the security privatization phenomenon and to build a basis for better regulation.

One other area that may be considered in closing is that the Inter-American Court of Human Right could potentially use external sources for the interpretation of the American Convention on Human Rights, which make the Montreux Document a possible source for the interpretation of

which legal obligations concerning PMSCs States should respect. Moreover, considering the state obligation to prevent violations of human right which include the obligation to adapt domestic legislation, the Montreux Document can be the base for the preparation of such legislation.

Finally, the Montreux document together with the International Code of Conduct are the first step on the road to further legislation and are critical and useful for all actors involved in PMSC activities.

An international convention may eventually be agreed and provide a further international legal framework for effective international regulation of PMSCs, but at the moment States already have the obligation to prevent human rights violations, adopting legislation to be able to better-control PMSC activities and make them accountable in the case of wrongdoing. The Montreux Document provides a solid basis from which to embark on this.

Notes

[1] The author would like to thank André du Plessis, Anne-Marie Buzatu, and Paula Sáenz for their insightful comments and contributions to the text.

[2] In the Montreux Document, PMSCs are defined 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, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel."

[3] See the list of activities / contract of the US PMSC present in Colombia in: The United States Department of State. (2010). *Report to Congress On Certain Counternarcotics Activities in Colombia.* Washington.

[4] As defined in the International Code of Conduct: "any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent." International Code of Conduct, definitions, available at www.icoc-psp.org

[5] Cockayne, J. (2009). Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document**,** *Journal of Conflict & Security Law* (2009), Vol. 13 No. 3, p. 417.

[6] Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, United Kingdom, Ukraine, United States of America.

[7] http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=36144.

[8] Cockayne, J. (2009). *Op. cit*., p. 418.

[9] Idem.

[10] Gomez del Prado, (2009) 'Private Military and Security Companies and the UN Working Group on Mercenaries' *Journal of Conflict & Security Law* (2009), Vol. 13 No. 3, p. 444.

[11] Cockayne, J. (2009). *Op. cit*., p. 427.

[12] Idem.

[13] See for instance: Le Courrier, Business de la Guerre : la mise au pas manquée des armées privées, 9-10 avril, 2011, Genève, pp. 2-3.

[14] See for instance the speech of Amada Benavides de Pérez, Member of the UN Working Group, in Santiago on 12 May 2011 during the Latin American Regional Workshop on the Montreux Document on 12 & 13 May in Santiago, Chile.

[15] 17 initial States and the following additional States (with dates of endorsement): Macedonia (3 February 2009), Ecuador (12 February 2009), Albania (17 February 2009), Netherlands (20 February 2009), Bosnia and Herzegowina (9 March 2009), Greece (13 March 2009), Portugal (27 March 2009), Chile (06 April 2009), Uruguay (22 April 2009), Liechtenstein (27 April 2009), Qatar (30 April 2009), Jordan (18 May 2009), Spain (20 May 2009), Italy (15 June 2009), Uganda (23.07.2009), Cyprus (29.09.2009), Georgia (22.10.2009), Denmark (09.08.2010), Hungary (01.02.2011).

[16] Chile, Ecuador and Uruguay.

[17] Mani, K., *Latin America's Hidden War in Iraq*, Foreign Policy, October 2, 2007, available at: http://www.foreignpolicy.com

[18] As Mc Coy affirms "there was an outcry in Chile as well as the international press when it was revealed that several Chilean subcontractors working in Iraq were Pinochet-era commandos who had been forced to retire from the military for their role in the crimes of that regime. Although the veterans-turned-contractors were not formally breaking the terms of the agreement (since they were working for the private sector rather than the state) for human rights advocates and legislators, the deal violated the spirit of the agreement and opened up old wounds". Mc Coy, K., (2010). *Yesterday's Civil Warriors, Today's Global Guards: Latin Americans in the Privatized Military Industry*, p154-155, in Perret, A. (ed). *Mercenarios y Compañías Militares y de Seguridad Privadas: Dinámicas y Retos Para América Latina*, Universidad Externado de Colombia, Bogotá.

[19] Both, the United States and the United Kingdom, two significant Home and Contracting States, have endorsed the Montreux Document.

[20] United Nations, Report of the Working Group on the Use of Mercenaries, document, A/HRC/10/14 para. 48

[21] Montreux Document, part 1, para 23.

[22] Art. 6**.** The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents**.**

[23] As defined by the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Draft Articles") by the International Law Commission (ILC) in August 2001.

[24] Montreux Document, part 2: paras 2 ; 28 ; 57.

[25] Montreux Document, part 2, para 13.

[26] According to the report of the UN working Group on mercenaries mission to Peru: "the brief given to candidates by all employment agencies was that they were going to work in Baghdad's "Green Zone" to protect the United States Embassy or private facilities in that country.[…] None of the contracts signed by the Peruvians were submitted to the Ministry of Labour and Promotion of Employment as, since they were not going to be performed in Peru, they were not considered subject to Peruvian legislation. The Ministry of Labour said that it was only empowered to monitor work carried out in Peru, not abroad, even when Peruvian workers were involved. The Ministry does not have a register of the companies that act as intermediaries for private security companies." Contracts were in English and some clauses entail the renunciation of important rights and "complainants described the lack of medical attention and overcrowding in barracks, working days of over 12 hours." United Nations, Report of the Working Group on the Use of Mercenaries, Mission to Peru, document, A/HRC/7/7/Add.2. paras. 16 & 17, 30, 32I

[27] Montreux Document, part 2, para 13.

[28] du Plessis, A. (2009). PMSCs in South East Asia: An Exploration of the Potential of the Montreux Document in the Region - DCAF– unpublished (available on request from DCAF).

[29] Idem.

[30] The United States Department of State. (2010). Report to Congress On Certain Counternarcotics Activities in Colombia. Washington.

[31] Montreux Document, part 2, para 1.

[32] Montreux Document, part 2, para 2 - 9.

[33] Montreux Document, part 2, para 14 -18.

[34] DynCorp-State Department Contract, (2001) en http://www.corpwatch.org.

[35] Cabrera, I., & Perret, A., (2009) *Colombia: Regulating Private Military and Security Companies in a "Territorial State", Priv-War National Reports, 19/09, European University Institute, Florence,* available at http://priv-war.eu.

[36] For a more detailed discussion on the participation of Dyncorp in the hostilities in Colombia, see Perret, A. (2009), *Las compañías militares y/o de seguridad privadas en Colombia: ¿una nueva forma de mercenarismo?*, Pretexto nº34, Universidad Externado de Colombia, Bogotá, Colombia.

[37] Montreux Document, part 2, para 49.

[38] For a complete study of the Colombian law and its application see Cabrera, I., & Perret, A., (2009). op cit. see also Arias, P., (2009). *Seguridad privada en América Latina: el lucro y los dilemas de una regulación deficitaria*, FLACSO, Santiago, Chile, pp. 47-49.

[39] Murcia, D. (2007, October 19). Lawyer, Colectivo de Abogados José Alvear Restrepo. (A. Perret, Interviewer) Bogotá.

[40] Montreux Document, part 2, paras 51-52.

[41] Kofi Annan, 35th Ditchley Foundation Lecture, 26 June 1998, UN Press Release SG/SM/6613.

[42] Buzatu, A-M, Buckland, B., (2010). Private Military & Security Companies: Future Challenges in Security Governance, DCAF Horizon 2015, Working Paper n°3.

[43] Chesterman, S. & Fisher, A., (2009). *Private Security, Public Order, The Outsourcing of Public Services and Its Limits*, Oxford University Press, New York, p. 6.

[44] United Nations Peacekeeping Operations, Principles and Guidelines, United Nations, Department of Peacekeeping Operations, Department of Field Support, 2008, Review date: January 2010, available at http://www.peacekeepingbestpractices.unlb.org/PBPS/Pages/Public/Home.aspx.

[45] du Plessis, A. (2010). The Global Code of Conduct for Private Security Companies: why it matters to humanitarian organisations, *Humanitarian Exchange Magazine*, Issue 47, June.

[46] Jayanti, M. (2010). Providing Cover. *Journal of International Peace Operations , vol. 5*, N°6, May-June, p.10-12.

[47] Fenton, A. (2010, 02 27). *Private Contractors 'Like Vultures Coming to Grab the Loot'*. Retrieved 02 12, 2011 from IPS News: http://ipsnews.net/news.asp?idnews=50396

[48] UNHCR protection officer (2011, February 13). *by phone*. (A. Perret, Interviewer) Port-au-Prince, Haiti.

[49] Montreux Document, Preface

[50] Montreux Document, part 2, para 2 - 9.

[51] Montreux Document, part 2, para 14 -18.

[52] Montreux Document, part 2, para 46.

[53] White, N. D. (2011). "The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention", *Human Rights Law Review,* 11, pp. 133-151.

[54] "[The Good Practices] may also provide useful guidance for States in their relationships with PMSCs operating outside of areas of armed conflict." – Montreux Document Part Two, Introduction

[55] Arias, P., (2009). Private Security in Latin America: Trends and legal challenges, DCAF Paper, not published, p. 4.

[56] BBC news, Mexico's drug war: Number of dead passes 30,000, available at http://www.bbc.co.uk/news/world-latin-america-12012425

[57] The Merida Initiative, http://www.state.gov/documents/organization/158009.pdf

[58] "One of the videos, obtained two weeks ago by the newspaper El Heraldo de Leon, shows police appearing to squirt water up a man's nose, a torture technique once notorious among Mexican police. They then dunk his head in a hole that an unidentified voice on the video says is full of excrement and rats. In another video, an unidentified English-speaking trainer asks a police agent to roll in his own vomit. The English-speaking man belonged to a private U.S. security company hired to help train the agents." In Fox News, Report Mexico cop in torture case fired**,** July 19, 2008, available at http://www.foxnews.com/printer_friendly_wires/2008Jul19/0,4675,MexicoPoliceTorture,00.html

[59] Miroff, N., "As kidnappings for ransom surge in Mexico, victims' families and employers turn to private U.S. firms instead of law enforcement", Washington Post, Saturday, February 26, 2011.

[60] Miroff, N., *op., cit.*

[61] The tormented isthmus, The economist, Apr 14th 2011, available at http://www.economist.com/

[62] Max G. Manwaring, A Contemporary Challenge to State Sovereignty: Gang and Other Illicit Transnational Criminal Organizations in Central America, El Salvador, Mexico, Jamaica, and

Brazil, Strategic Studies Institute Monograph, US Army War College, Carlisle, PA, December 2007, pp. 1–2.

[63] Interview with Dennis Rodgers, 16 July 2010 by Toni Pfanner and Michael Siegrist, *International Review of the Red Cross*, Vol. 92, n° 878, June 2010.

[64] Hazen, J. M., (2010). "Understanding gangs as armed groups", *International Review of the Red Cross*, Vol. 92 n° 878, p. 377.

[65] Ibid. p. 386.

[66] Quoted in The tormented isthmus, The economist, Apr 14th 2011, available at http://www.economist.com/

[67] Montreux Document, part 2, para 2 – 9 and 26 - 29.

[68] Montreux Document, part 2, para 46.

[69] The Swiss Federal Department of Foreign Affairs is also facilitating a PMSC industry follow-up initiative to the Montreux Document. This has taken the form of an industry-wide international code of conduct that articulates principles for private security service providers to operate in accordance with international humanitarian law and international human rights standards. The Code was signed by 58 private security providers in Geneva on 9 November 2010, and since then another hundred companies have also expressed their commitment to it. Going forwards, signatory companies have also committed to work with other stakeholders to establish external independent mechanisms for effective governance and oversight. Further information on the International Code of Conduct is available at: www.icoc-psp.org.

[70] Now under preparation by the Steering Committee, find more information at www.icoc-psp.org

[71] All the information about the work of the Special Representative of the United Nations Secretary-General on business & human rights, John Ruggie is available at the portal http://www.business-humanrights.org/SpecialRepPortal/Home.

[72] Montreux Document, part 2, para 2 – 9 and 26 - 29.

[73] Montreux Document, part 2, para 14 -18.

[74] Montreux Document, part 2, para 49.

[75] *La República*, December 6, 2006, p. 3.

[76] Benavides de Perez, A. (2010). Mercenarios, Mercenarismo y Privatización de la Seguridad en América Latina, p117-118, in Perret, A. (ed). *Mercenarios Y Compañías Militares y de Seguridad Privadas: Dinámicas y Retos Para América Latina*, Universidad Externado de Colombia, Bogotá.

[77] For more information on the case and the answer of the corporation involucrated, visit the webpage of Business and Human Rights Resource Center at http://www.business-humanrights.org; see also United Nations, Report of the Working Group on the Use of Mercenaries, Mission to Peru, document, A/HRC/7/7/Add.2. See also Umlas, E. & al. (2011). Protected but Exposed: Multinational and private security, in small arms survey 2011: states of security, Cambridge: Cambridge University Press, Box 5.4 pp. 148 – 149

[78] Perret, A. (2011). Private Security Trends and Challenges in Latin America, Policy Paper, WHEMSAC, Applied Research Center, Florida International University.

[79] For more information see United Nations, Report of the Working Group on the Use of Mercenaries, Mission to Chile, document, A/HRC/6/12/Add.4.

[80] Olsson, C. (2003). "Vrai procès et faux débats : perspectives critiques sur les argumentaires de légitimation des entreprises de coercition para-privées", *Cultures & Conflits,* nº 52, pp. 11-48.

[81] Mc Coy, K., (2010). *Op. cit*., pp. 154-155.

ANNEX I: AGENDA

Regional Workshop on the Montreux Document on Private Military and Security Companies (PMSCs), Santiago, Chile – 12 & 13 May, 2011

Thursday 12 May: The Montreux Document and Regulation on PMSCs

10:00	**Welcome**	Ambassador Fernando Schmidt, Sub-Secretary of the Chilean Ministry of Foreign Affairs. Ambassador Theodor Winkler, Swiss Federal Department of Foreign Affairs (Swiss FDFA) and Director of DCAF.
10:30	**Panel 1**	*Introduction***:** *Explaining the Montreux Document and its key terms* Felix Schwendimann, Directorate of International Law, Swiss FDFA Ben Clarke, International Committee of the Red Cross (ICRC)
11:00		*Interactive Session on panel 1:* Chair: Lucia Dammert, Global Consortium on Security Transformation (GCST)
12:00	**Panel 2**	*International initiatives* Amanda Benavides de Pérez: The United Nations Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination. Anne-Marie Buzatu: Privatization of Security Programme, DCAF.
12:30		*Interactive session on panel 2* Chair: Liza Zúñiga, Global Consortium on Security Transformation (GCST)

14:30	**Panel 3**	*Country perspectives: regional regulation and best practices relating to PMSCs* Víctor Guerrero, Pontificia Universidad Javeriana, Colombia. Patricia Arias, Centro de Estudios del Desarrollo, Chile. María Sol Espinoza, Pontificia Universidad Católica de Ecuador. Pedro Trujillo, Instituto de Estudios Políticos y Relaciones Internacionales, Guatemala. William Godnick: Public Security Program, United Nations Regional Centre for Peace, Disarmament and Development in Latin America and the Caribbean.
16:00		*Interactive Session on panel 3* Chair: Andrea Quezada, Direction on International and Human Security, Ministry of Foreign Affairs, Chile.
17:00	**Close for the day**	
20:00	**Reception at the Swiss Residence**	

Friday 13-May: The Latin American Experience of PMSCs

09:00	**Panel 4**	*Third Party Nationals: Latin American citizens working for international PMSCs* Kristina Mani, Professor Oberlin College, USA. Fernando Cafferata, Research fellow, BID and consultant to the Ministry of Security, Argentina.
09:30		*Interactive session* Chair: Andrea Quezada, International and Human Security, Ministry of Foreign Affairs
11:00	**Panel 5**	*Mining, Oil & Forestry: PMSCs and the Extractive Industry* Mar Pérez, Coordinadora Nacional de Derechos Humanos, Perú. Mauricio Lazala, Deputy Director, Business and Human Rights Resources Centre, Colombia.

11:30		*Interactive Session* Chair: Miguel Navarro, Academia Nacional de Estudios Políticos y Estratégicos (ANEPE), Chile.
14:30	**Panel 6**	*War & Disasters: PMSCs in Armed Conflict and Humanitarian Operations* Yasmin Espinoza, Arms under control team, Amnesty International, Chile. Antoine Perret, Researcher DCAF, Swiss & France. Stuart Groves, UN Senior Operations Officers.
15:30		*Interactive Session* Chair: André du Plessis, Project Officer, Privatisation of Security Programme, DCAF
17:15	**Closing Remarks**	Chilean Ministry of Foreign Affairs, Chile and Swiss Federal Department of Foreign Affairs (Swiss FDFA)

ANNEX II: PARTICIPANTS

Representatives of Governments from the Region

Name	Position	Institution
Ezequiel Rodriguez Miglio	Undersecretary of Human Rights Protection	Ministry of Justice and Human Rights, Argentina
Martín Mainero	Secretary of Legal Counseling	Ministry of Foreign Affairs, Argentina
Ramiro Riera	Program Director, National Directorate of Human Rights and International Humanitarian Law	Ministry of Defense, Argentina
Tiago Ribeiro Dos Santos	Third Secretary, Department of United Nations	Ministry of Foreign Affairs, Brazil
Mauricio Antonio Peñate	Deputy Chief	Embassy of El Salvador in Chile
Diana Mejía Molina	Counselor	Embassy of Colombia in Chile
Carlos Cordero	Advisor to the Security Unit of the Directorate General of Foreign Policy	Ministry of Foreign Affairs, Costa Rica
Ángel Camacho Ubiera	Colonel, Technical Director	Superintendency of Private Security, Dominican Republic
Carlos Fernando Valerio	Colonel	National Police, Dominican Republic
Juan Antonio Benard Estrada	International Humanitarian Law Technician	Ministry of Foreign Affairs, Guatemala
Juan Angel Blanco Bejarano	Directorate of Human Rights and Humanitarian Law	Ministry of National Defense, Honduras
Gabriela Alejandra Moreno Hidalgo	Deputy Directorate of International Humanitarian Law in the Legal Department	Ministry of Foreign Affairs, Mexico
Francisco Noel Jarquín López	2nd Head of the Special Airport Security Department of the Directorate for Defense Information	Nicaraguan Army

Leoncio Hernández Morales	Antiterrorism Department Head	Ministry of Foreign Affairs, Panama
Francisco Pastor Alveranga Nuñez	Chief Economic and Financial Crimes	National Police, Paraguay
Humberto Velázquez Guevara	Second Secretary	Embassy of Peru in Chile
Luis Alberto Fajardo Castillo	Law Enforcement Attaché	Embassy of Peru in Chile
Marco Alberto Núñez-Melgar Maguiña	Director of National Protection and Assistance	Ministry of Foreign Affairs, Peru
Alejandra Castiñeira Latorre	First Secretary	Embassy of Uruguay in Chile

Attendees from Chilean and Swiss Governments

Sr. Germán Marx	Head of Studies and Analysis at the Center for Studies and Research of the Military	Chilean Army
Jorge Cristián Rodríguez Alfaro	Chief of Planning and Development Command in Chief of the of the Marine Infantry Corps	Chilean Navy
Tulio Rojas	Chief of of the Marine Infantry	Chilean Navy
Alberto Miguel Arturo Etcheberry Baquedano	Colonel . Director 0S-10	Chilean Police
Juan Astorga Lamas	National Chief Organized Crime	Investigative Police, Chile
Mauricio Luco	International Relations Department Head	Investigative Police, Chile
Coronel Valentín Segura Flores	Department Chief of Operations and International Cooperation	Joint Chiefs, Chile
Andrea Quezada	Directorate of International and Human Security	Ministry of Foreign Affairs, Chile
Armin Andereya Latorre	Minister Counsellor, Directorate of International and Human Security	Ministry of Foreign Affairs, Chile
Daniel Carvallo Cepernic	Ambassador, Director of European Affairs	Ministry of Foreign Affairs, Chile
Hellmut Lagos	Deputy Director of International Security	Ministry of Foreign Affairs, Chile
Iván Véjar	Directorate of International and Human Security	Ministry of Foreign Affairs, Chile
Miguel Angel González	Minister Counsellor, Directorate of Human Rights	Ministry of Foreign Affairs, Chile
Oscar Alcamán Riffo	Minister Counsellor, Directorate of Multilateral Policy	Ministry of Foreign Affairs, Chile

Fernando Schmidt Ariztía	Ambassador, Deputy Foreign Minister	Ministry of Foreign Affairs, Chile
Eduardo Verdugo	Analyst	National Intelligence Agency, Chile
Juan Abarca	Analyst	National Intelligence Agency, Chile
Ximena Meric	Analyst	National Intelligence Agency, Chile
Subcomisario Sr. Ernesto Moeller Oberg	Assistant Chief of Staff	Undersecretary for Research, Chile
Comisario Sr. Pablo Ibarra Cordero	Chief of Staff	Undersecretary for Research, Chile
Agnés Christeler Troesch	First Collaborator	Embassy of Switzerland in Chile
Felix Schwendimann	Directorate of International Law	Swiss Federal Department of Foreign Affairs
Theodor Winkler	Ambassador and Director	Swiss Federal Department of Foreign Affairs and DCAF
Yvonne Baumann	Ambassador	Embassy of Switzerland in Chile

Other Attendees

Marcelo Koyra	External Consultant on Public Safety and Human Rights	American Institute of Human Rights
Sr. Julio Alarcón	Senior Consultant	American Institute of Security, Chile
Yasmin Espinoza	Arms Control Program	Amnesty International
Juan Gómez Valdebenito	Co-coordinator Arms Control Program	Amnesty International
Mauricio Lazala	Deputy Director	Business and Human Rights Resources Centre
Patricia Arias	Researcher	Centre for Development Studies, Chile
Andre Du Plessis	Project Officer, Privatisation of Security Programme	DCAF
Antoine Perret	Researcher	DCAF
Anne-Marie Buzatu	Coordinator, Privatisation of Security Programme	DCAF

Liza Zúñiga	Researcher	Global Consortium for Security Transformation
Lucía Dammert	Executive Director	Global Consortium for Security Transformation
Juliana Arboleda	Research for the Business Sector, Conflict and Peacebuilding	Ideas for Peace Foundation, Colombia
Ana Verónica Peña	Journalist	Independent
Pedro Trujillo	Director	Institute of Political Studies and International Relations, Guatemala
Marìa Eugenia Suarez	Applied Research Director of Police, Security and Justice	Insyde Foundation, México
Fernando Gabriel Cafferata	External Advisor of the Ministry of Planning and Research Fellow	Inter-American Development Bank
Ramón Cadena	Director	International Commission of Jurists
Ben Clarke	Legal Adviser	International Committee of the Red Cross
César Carrasco	Masters student	National Academy of Political and Strategic Studies, Chile
Claudio Pereda	Masters student	National Academy of Political and Strategic Studies, Chile
Francisco Saavedra	Masters student	National Academy of Political and Strategic Studies, Chile
Gabriela Merino	Masters student	National Academy of Political and Strategic Studies, Chile
Luis Rodrigo Palomo Bravo	Masters student	National Academy of Political and Strategic Studies, Chile
Miguel Navarro	Director, Department of International Relations	National Academy of Political and Strategic Studies, Chile
Rudy Dulansky Cabrera	Masters student	National Academy of Political and Strategic Studies, Chile
Sebastián Salinas.	Masters student	National Academy of Political and Strategic Studies, Chile
Sr. Carlos Méndez Notari	Director of Graduates	National Academy of Political and Strategic Studies, Chile

Mar Pérez	Responsible for DESCA	National Human Rights Coordinator, Peru
Kristina Mani	Assistant Professor, Department of Politics	Oberlin College, United States
Maria Eugenia Hofer	Board Member	Penal Reform International
Sol Espinoza	Researcher	Pontificia Universidad Católica del Ecuador
Victor Guerrero	University Professor	Pontificia Universidad Javeriana, Colombia
Stuart Groves	UN Senior Operations Officer	United Nations
Gastón Isoardi	Professor of International Law	Universidad Nacional del Sur
Sra. Patricia Orellana	Academic Coordinator - Diploma in Private Security	University of Chile
William Godnick	Coordinator, Public Security Programme,	UNLIREC
Amada Benavides de Perez	Member of the Working Group on the Use of Mercenaries	
Jaime Polivio Pérez	DECOIN Project Coordinator, Ecological Defense and Conservation	

ANNEX III: THE MONTREUX DOCUMENT

United Nations A/63/467–S/2008/636

General Assembly
Security Council

Distr.: General
6 October 2008

Original: English

General Assembly
Sixty-third session
Agenda item 76
Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts

Security Council
Sixty-third year

Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General

I am pleased to inform you that on 17 September 2008, 17 States* came to an understanding on the "Montreux Document", a text containing rules and good practices relating to private military and security companies operating in armed conflict (see annex). The Montreux Document, which is the result of an international process launched in 2006 by the Government of Switzerland and the International Committee of the Red Cross, is intended to promote respect for international humanitarian law and human rights law.

We trust that the document will be of interest to all States, and invite them to consider adopting such measures as appear therein. We also invite all States to consider communicating their support for the document to the Federal Department of Foreign Affairs of Switzerland.

I would be most grateful if you could have the present letter and its annex circulated as a document of the General Assembly, under agenda item 76, and of the Security Council, as the international process is related to the question of protection of civilians in armed conflicts and was mentioned in paragraph 9 of your report to the Security Council on this topic (S/2007/643).

(*Signed*) Peter **Maurer**
Ambassador
Permanent Representative

* Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine and the United States of America.

Annex to the letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General

Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict

Montreux,
17 September 2008

Informal Summary of the Montreux Document by Switzerland

1. Private military and security companies (PMSCs) are nowadays often relied on in areas of armed conflict – by individuals, companies, and governments. They are contracted for a range of services, from the operation of weapon systems to the protection of diplomatic personnel. Recent years have seen an increase in the use of PMSCs, and with it the demand for a clarification of pertinent legal obligations under international humanitarian law and human rights law.

2. The Montreux Document seeks to meet this demand. The result of a joint initiative by Switzerland and the International Committee of the Red Cross (ICRC) launched in 2006, it recalls existing obligations of States, PMSCs and their personnel under international law whenever PMSCs – for whatever reason – are present during armed conflict. In a second part, it contains a set of over 70 good practices designed to assist States in complying with these obligations. Neither parts are legally binding, nor are they intended to legitimize the use of PMSCs in any particular circumstance. They were developed by governmental experts from seventeen States[1] with a particular interest in the issue of PMSCs or international humanitarian law. Representatives of civil society and of the PMSC industry were also consulted.

3. Part I differentiates between contracting States, territorial States and home States. For each category of States, Part I recalls pertinent international legal obligations according to international humanitarian law and human rights law. The question of attribution of private conduct to the State under with customary international law is also addressed. In addition, Part I devotes sections to the pertinent international legal obligations of "all other States", to the duties of PMSCs and their personnel, as well as to questions of superior responsibility.

4. Like Part I, Part II also differentiates between contracting States, territorial States and home States. The good practices draw largely from existing practices of States not only directly with regard to PMSCs but also, for instance, from existing regulations for arms and armed services. They range from introducing transparent licensing regimes to ensuring better supervision and accountability - so that only PMSCs which are likely to respect international humanitarian law and human rights law, through appropriate training, internal procedures and supervision, can provide services during armed conflict.

5. In the preface of the Montreux Document, the participating States invite other States and international organisations to communicate their support for the document to the Federal Department of Foreign Affairs of Switzerland.

[1] Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America.

CONTENTS

PREFACE

This document is the product of an initiative launched cooperatively by the Government of Switzerland and the International Committee of the Red Cross. It was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America in meetings convened in January and November 2006, November 2007, and April and September 2008. Representatives of civil society and of the private military and security industry were consulted.

The following understandings guided the development of this document:

1. That certain well-established rules of international law apply to States in their relations with private military and security companies (PMSCs) and their operation during armed conflict, in particular under international humanitarian law and human rights law;

2. That this document recalls existing legal obligations of States and PMSCs and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two);

3. That this document is not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements to which they are parties, in particular their obligations under the Charter of the United Nations (especially its articles 2(4) and 51);

4. That this document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law;

5. That existing obligations and good practices may also be instructive for post-conflict situations and for other, comparable situations; however, that international humanitarian law is applicable only during armed conflict;

6. That cooperation, information sharing and assistance between States, commensurate with each State's capacities, is desirable in order to achieve full respect for international humanitarian law and human rights law; as is cooperative implementation with the private military and security industry and other relevant actors;

7. That this document should not be construed as endorsing the use of PMSCs in any particular circumstance but seeks to recall legal obligations and to recommend good practices if the decision has been made to contract PMSCs;

8. That while this document is addressed to States, the good practices may be of value for other entities such as international organisations, NGOs and companies that contract PMSCs, as well as for PMSCs themselves;

9. That for the purposes of this document:

   a) "PMSCs" are 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, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

   b) "Personnel of a PMSC" are persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers.

   c) "Contracting States" are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.

   d) "Territorial States" are States on whose territory PMSCs operate.

   e) "Home States" are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the "Home State".

The participating States commend this document to the attention of other States, international organisations, NGOs, the private military and security industry and other relevant actors, which are invited to adopt those good practices that they consider appropriate for their operations. The participating States invite other States and international organisations to communicate their support for this document to the Federal Department of Foreign Affairs of Switzerland. The participating States also declare their readiness to review and, if necessary, to revise this document in order to take into account new developments.

PART ONE
PERTINENT INTERNATIONAL LEGAL OBLIGATIONS RELATING TO PRIVATE MILITARY AND SECURITY COMPANIES

INTRODUCTION

The following statements aim to recall certain existing international legal obligations of States regarding private military and security companies. The statements are drawn from various international humanitarian and human rights agreements and customary international law. This document, and the statements herein, do not create legal obligations. Each State is responsible for complying with the obligations it has undertaken pursuant to international agreements to which it is a party, subject to any reservations, understandings and declarations made, and to customary international law.

A. CONTRACTING STATES

1. Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities. If they are occupying powers, they have an obligation to take all measures in their power to restore, and ensure, as far as possible, public order and safety, i.e. exercise vigilance in preventing violations of international humanitarian law and human rights law.

2. Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions.

3. Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to:

   a) ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly;

   b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;

   c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

4. Contracting States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

5. Contracting States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have

committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

6. Contracting States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

7. Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:

   a) incorporated by the State into its regular armed forces in accordance with its domestic legislation;

   b) members of organised armed forces, groups or units under a command responsible to the State;

   c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorised by law or regulation to carry out functions normally conducted by organs of the State); or

   d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).

8. Contracting States have an obligation to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility.

B. Territorial States

9. Territorial States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs operating on their territory, in particular to:

   a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;

   b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;

   c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

10. Territorial States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these

obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

11. Territorial States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

12. Territorial States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

13. In situations of occupation, the obligations of Territorial States are limited to areas in which they are able to exercise effective control.

C. Home States

14. Home States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs of their nationality, in particular to:

    a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;

    b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;

    c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

15. Home States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

16. Home States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

17. Home States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

D. All Other States

18. All other States have an obligation, within their power, to ensure respect for international humanitarian law. They have an obligation to refrain from encouraging or assisting in violations of international humanitarian law by any party to an armed conflict.

19. All other States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.

20. All other States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

21. All other States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

E. PMSCs and Their Personnel

22. PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.

23. The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.

24. The status of the personnel of PMSCs is determined by international humanitarian law, on a case by case basis, in particular according to the nature and circumstances of the functions in which they are involved.

25. If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.

26. The personnel of PMSCs:

a) are obliged, regardless of their status, to comply with applicable international humanitarian law;

b) are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organised armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;

c) are entitled to prisoner of war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention;

d) to the extent they exercise governmental authority, have to comply with the State's obligations under international human rights law;

e) are subject to prosecution if they commit conduct recognised as crimes under applicable national or international law.

F. Superior Responsibility

27. Superiors of PMSC personnel, such as

a) governmental officials, whether they are military commanders or civilian superiors, or

b) directors or managers of PMSCs,

may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.

PART TWO
GOOD PRACTICES RELATING TO PRIVATE MILITARY AND SECURITY COMPANIES

INTRODUCTION

This Part contains a description of good practices that aims to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationships with PMSCs operating in areas of armed conflict. They may also provide useful guidance for States in their relationships with PMSCs operating outside of areas of armed conflict.

The good practices do not have legally binding effect and are not meant to be exhaustive. It is understood that a State may not have the capacity to implement all the good practices, and that no State has the legal obligation to implement any particular good practice, whether that State is a Contracting State, a Territorial State, or a Home State. States are invited to consider these good practices in defining their relationships with PMSCs, recognising that a particular good practice may not be appropriate in all circumstances and emphasising that this Part is not meant to imply that States should necessarily follow all these practices as a whole.

The good practices are intended, *inter alia*, to assist States to implement their obligations under international humanitarian law and human rights law. However, in considering regulation, States may also need to take into account obligations they have under other branches of international law, including as members of international organisations such as the United Nations, and under international law relating to trade and government procurement. They may also need to take into account bilateral agreements between Contracting States and Territorial States. Moreover, States are encouraged to fully implement relevant provisions of international instruments to which they are Parties, including anti-corruption, anti-organised crime and firearms conventions. Furthermore, any of these good practices will need to be adapted in practice to the specific situation and the State's legal system and capacity.

A. GOOD PRACTICES FOR CONTRACTING STATES

States contemplating to contract PMSCs should evaluate whether their legislation, as well as procurement and contracting practices, are adequate for contracting PMSCs. This is particularly relevant where Contracting States use the services of a PMSC in a State where law enforcement or regulatory capacities are compromised.

In many instances, the good practices for Contracting States may also indicate good practices for other clients of PMSCs, such as international organisations, NGOs and companies.

In this sense, good practices for Contracting States include the following:

I. Determination of services

1. To determine which services may or may not be contracted out to PMSCs; in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

II. Procedure for the selection and contracting of PMSCs

2. To assess the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:

   a) acquiring information relating to the principal services the PMSC has provided in the past;

   b) obtaining references from clients for whom the PMSC has previously provided similar services to those the Contracting State is seeking to acquire;

   c) acquiring information relating to the PMSC's ownership structure and conducting background checks on the PMSC and its superior personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.

3. To provide adequate resources and draw on relevant expertise for selecting and contracting PMSCs.

4. To ensure transparency and supervision in the selection and contracting of PMSCs. Relevant mechanisms may include:

   a) public disclosure of PMSC contracting regulations, practices and processes;

   b) public disclosure of general information about specific contracts, if necessary redacted to address national security, privacy and commercial confidentiality requirements;

   c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;

   d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies.

III. Criteria for the selection of PMSCs

5. To adopt criteria that include quality indicators relevant to ensuring respect for relevant national law, international humanitarian law and human rights law, as set out in good practices 6 to 13. Contracting States should consider ensuring that lowest price not be the only criterion for the selection of PMSCs.

6. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:

   a) no reliably attested record of involvement in serious crime (including organised crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately remedied such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and, where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;

   b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably

attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;

c) not previously been rejected from a contract due to misconduct of the PMSC or its personnel.

7. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

8. To take into account whether it and its personnel possess or are in the process of obtaining requisite registrations, licenses or authorisations.

9. To take into account whether it maintains accurate and up to date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Contracting State and other appropriate authorities.

10. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardisation of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:

a) rules on the use of force and firearms;

b) international humanitarian law and human rights law;

c) religious, gender, and cultural issues, and respect for the local population;

d) handling complaints by the civilian population, in particular by transmitting them to the appropriate authority;

e) measures against bribery, corruption, and other crimes.

Contracting States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

11. To take into account whether the PMSC:

a) acquires its equipment, in particular its weapons, lawfully;

b) uses equipment, in particular weapons, that is not prohibited by international law;

c) has complied with contractual provisions concerning return and/or disposition of weapons and ammunition.

12. To take into account the PMSC's internal organisation and regulations, such as:

a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery, corruption, and other crimes;

b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:

i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;

ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaint mechanisms and whistle-blower protection arrangements; and

iii. regular performance reporting, specific incident reporting, and reporting on demand to the Contracting State and under certain circumstances other appropriate authorities;

iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.

13. To consider the respect of the PMSC for the welfare of its personnel, as protected by labour law and other relevant national law. Relevant factors may include:

a) providing personnel a copy of any contract to which they are party in a language they understand;

b) providing personnel with adequate pay and remuneration arrangements commensurate to their responsibilities and working conditions;

c) adopting operational safety and health policies;

d) ensuring personnel unrestricted access to their own travel documents; and

e) preventing unlawful discrimination in employment.

IV. Terms of contract with PMSCs

14. To include contractual clauses and performance requirements that ensure respect for relevant national law, international humanitarian law and human rights law by the contracted PMSC. Such clauses, reflecting and implementing the quality indicators referred to above as selection criteria, may include:

a) past conduct (good practice 6);

b) financial and economic capacity (good practice 7);

c) possession of required registration, licenses or authorisations (good practice 8);

d) personnel and property records (good practice 9);

e) training (good practice 10);

f) lawful acquisition and use of equipment, in particular weapons (good practice 11);

g) internal organisation and regulation and accountability (good practice 12);

h) welfare of personnel (good practice 13);

Contractual clauses may also provide for the Contracting State's ability to terminate the contract for failure to comply with contractual provisions. They may also specify the weapons required for contract performance, that PMSCs obtain appropriate visas or other authorizations from the Territorial State, and that appropriate reparation be provided to those harmed by the misconduct of PMSCs and their personnel.

15. To require by contract that the conduct of any subcontracted PMSC is in conformity with relevant national law, international humanitarian law and international human rights law, including by:

a) establishing the criteria and qualifications for the selection and ongoing employment of subcontracted PMSCs and personnel;

b) requiring the PMSC to demonstrate that subcontractors comply with equivalent requirements as the PMSC initially contracted by the Contracting State;

c) ensuring that the PMSC is liable, as appropriate and within applicable law, for the conduct of its subcontractors.

16. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:

a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;

b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transport used by PMSCs.

17. To consider pricing and duration of a specific contract as a way to promote relevant international humanitarian law and human rights law. Relevant mechanisms may include:

a) securities or bonds for contractual performance;

b) financial rewards or penalties and incentives;

c) opportunities to compete for additional contracts.

18. To require, in consultation with the Territorial State, respect of relevant regulations and rules of conduct by PMSCs and their personnel, including rules on the use of force and firearms, such as:

a) using force and firearms only when necessary in self-defence or defence of third persons;

b) immediate reporting to and cooperation with competent authorities, including the appropriate contracting official, in the case of use of force and firearms.

V. Monitoring compliance and ensuring accountability

19. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing:

a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Contracting State's national legal system;

b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.

20. To provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel, including:

a) contractual sanctions commensurate to the conduct, including :

i. immediate or graduated termination of the contract;

ii. financial penalties;

iii. removal from consideration for future contracts, possibly for a set time period;

iv. removal of individual wrongdoers from the performance of the contract;

b) referral of the matter to competent investigative authorities;

c) providing for civil liability, as appropriate.

21. To provide for, in addition to the measures in good practices 19 and 20, appropriate administrative and other monitoring mechanisms to ensure the proper execution of the contract and the accountability of contracted PMSCs and their personnel for their improper and unlawful conduct; in particular to:

a) ensure that those mechanisms are adequately resourced and have independent audit and investigation capacity;

b) provide Contracting State government personnel on-site with the capacity and authority to oversee proper execution of the contract by the PMSC and the PMSC's subcontractors;

c) train relevant government personnel, such as military personnel, for foreseeable interactions with PMSC personnel;

d) collect information concerning PMSCs and personnel contracted and deployed, and on violations and investigations concerning their alleged improper and unlawful conduct;

e) establish control arrangements, allowing it to veto or remove particular PMSC personnel during contractual performance;

f) engage PMSCs, Territorial States, Home States, trade associations, civil society and other relevant actors to foster information sharing and develop such mechanisms.

22. When negotiating agreements with Territorial States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:

a) to consider the impact of the agreements on the compliance with national laws and regulations;

b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.

23. To cooperate with investigating or regulatory authorities of Territorial and Home States, as appropriate, in matters of common concern regarding PMSCs.

B. Good Practices for Territorial States

The following good practices aim to provide guidance to Territorial States for governing the supply of military and security services by PMSCs and their personnel on their territory. Territorial States should evaluate whether their domestic legal framework is adequate to ensure that the conduct of PMSCs and their personnel is in conformity with relevant national law, international humanitarian law and human rights law or whether it needs to establish further arrangements to regulate the activities of PMSCs.

Acknowledging the particular challenges faced by Territorial States in armed conflict, Territorial States may accept information provided by the Contracting State concerning the ability of a PMSC to carry out its activities in conformity with international humanitarian law, human rights law and relevant good practices.

In this sense, good practices for Territorial States include the following:

I. Determination of services

24. To determine which services may or may not be carried out on their territory by PMSCs or their personnel; in determining which services may not be carried out, Territorial States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

II. Authorisation to provide military and security services

25. To require PMSCs to obtain an authorisation to provide military and security services in their territory ("authorisation"), including by requiring:

    a) PMSCs to obtain an operating license valid for a limited and renewable period ("corporate operating license"), or for specific services ("specific operating license"), taking into account the fulfilment of the quality criteria set out in good practices 31 to 38; and/or;

    b) individuals to register or obtain a license in order to carry out military or security services for PMSCs.

III. Procedure with regard to authorisations

26. To designate a central authority competent for granting authorisations.

27. To allocate adequate resources and trained personnel to handle authorisations properly and timely.

28. To assess, in determining whether to grant an authorisation, the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:

    a) acquiring information relating to the principal services the PMSC has provided in the past;

    b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;

    c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures, or obtain information from the Contracting State on these matters.

29. To ensure transparency with regard to authorisations. Relevant mechanisms may include:

    a) public disclosure of authorisation regulations and procedures;

    b) public disclosure of general information on granted authorisations, including on the identity of authorised PMSCs and their number of personnel, if necessary redacted to address national security, privacy and commercial confidentiality requirements;

c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;

d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;

e) publishing and adhering to fair and non-discriminatory fee schedules for authorisations.

IV. Criteria for granting an authorisation

30. To ensure that PMSCs fulfil certain quality criteria relevant for the respect of relevant national law, international humanitarian law and human rights law by the PMSC and its personnel, including those set out below.

31. To require that the conduct of PMSCs and of any PMSC subcontracted is in conformity with relevant national law, international humanitarian law and international human rights law, which includes ensuring that:

a) the PMSC notifies any subcontracting of military and security services to the authorisation authority;

b) the PMSC can demonstrate that its subcontractors comply with equivalent requirements as the PMSC which initially obtained an authorisation by the Territorial State;

c) the subcontractor is in possession of an authorisation;

d) the PMSC initially granted authorisation is liable, as appropriate and within applicable law, for the conduct of its subcontractors.

32. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:

a) no reliably attested record of involvement in serious crime (including organised crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;

b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;

c) not previously had an operating license revoked for misconduct of the PMSC or its personnel.

33. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

34. To take into account whether the PMSC maintains accurate and up to date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Territorial State and other authorities.

35. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardisation of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:

    a) rules on the use of force and weapons;

    b) international humanitarian law and human rights law;

    c) religious, gender, and cultural issues, and respect for the local population;

    d) complaints handling;

    e) measures against bribery, corruption, and other crimes.

    Territorial States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

36. Not to grant an authorisation to a PMSC whose weapons are acquired unlawfully or whose use is prohibited by international law.

37. To take into account the PMSC's internal organisation and regulations, such as:

    a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery and corruption;

    b) the existence of monitoring and supervisory measures as well as internal accountability mechanisms, such as:

        i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;

        ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistle-blower protection arrangements;

        iii. regular reporting on the performance of the assignment and/or specific incident reporting;

        iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.

38. To consider the respect of the PMSC for the welfare of its personnel.

39. To take into account, in considering whether to grant a license or to register an individual, good practices 32 (past conduct) and 35 (training).

V. Terms of authorisation

40. To include clauses to ensure that the conduct of the PMSC and its personnel is continuously in conformity with relevant national law, international humanitarian law and international human rights law. The authorisation includes, where appropriate, clauses requiring the PMSC and its personnel to implement the quality criteria referred to above as criteria for granting general and/or specific operating licenses and relating to:

    a) past conduct (good practice 32);

    b) financial and economic capacity (good practice 33);

    c) personnel and property records (good practice 34);

    d) training (good practice 35);

    e) lawful acquisitions (good practice 36);

    f) internal organisation and regulation and accountability (good practice 37);

    g) welfare of personnel (good practice 38);

41. To require the PMSC to post a bond that would be forfeited in case of misconduct or non-compliance with the authorisation, provided that the PMSC has a fair opportunity to rebut allegations and address problems.

42. To determine, when granting a specific operating license, a maximum number of PMSC personnel and equipment understood to be necessary to provide the services.

VI. Rules on the provision of services by PMSCs and their personnel

43. To have in place appropriate rules on the use of force and firearms by PMSCs and their personnel, such as:

    a) using force and firearms only when necessary in self-defence or defence of third persons;

    b) immediately reporting to and cooperation with competent authorities in the case of use of force and firearms.

44. To have in place appropriate rules on the possession of weapons by PMSCs and their personnel, such as:

    a) limiting the types and quantity of weapons and ammunition that a PMSC may import, possess or acquire;

    b) requiring the registration of weapons, including their serial number and calibre, and ammunition, with a competent authority;

    c) requiring PMSC personnel to obtain an authorisation to carry weapons that is shown upon demand;

    d) limiting the number of employees allowed to carry weapons in a specific context or area;

    e) requiring the storage of weapons and ammunition in a secure and safe facility when personnel are off duty;

    f) requiring that PMSC personnel carry authorised weapons only while on duty;

g) controlling the further possession and use of weapons and ammunition after an assignment is completed, including return to point of origin or other proper disposition of weapons and ammunition.

45. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:

a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;

b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transportation used by PMSCs.

VII. Monitoring compliance and ensuring accountability

46. To monitor compliance with the terms of the authorisation, in particular:

a) establish or designate an adequately resourced monitoring authority;

b) ensure that the civilian population is informed about the rules of conduct by which PMSC have to abide and available complaint mechanisms;

c) requesting local authorities to report on misconduct by PMSCs or their personnel;

d) investigate reports of wrongdoing.

47. To provide a fair opportunity for PMSCs to respond to allegations that they have operated without or in violation of an authorisation.

48. To impose administrative measures, if it is determined that a PMSC has operated without or in violation of an authorisation; such measures may include:

a) revocation or suspension of the authorisation or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;

b) removing specific PMSC personnel under the penalty of revoking or suspending the authorisation;

c) prohibition to re-apply for an authorisation in the future or for a set period of time;

d) forfeiture of bonds or securities;

e) financial penalties.

49. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing corporate criminal responsibility for crimes committed by the PMSC, consistent with the Territorial State's national legal system.

50. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSC and its personnel, including:

a) providing for civil liability;

b) otherwise requiring PMSCs, or their clients, to provide reparation to those harmed by the misconduct of PMSCs and their personnel.

51. When negotiating agreements with Contracting States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:

a) to consider the impact of the agreements on the compliance with national laws and regulations;

b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.

52. To cooperate with investigating and regulatory authorities of Contracting and Home States in matters of common concern regarding PMSCs.

C. Good Practices for Home States

The following good practices aim to provide guidance to Home States for governing the supply of military and security services by PMSCs and their personnel abroad ("export"). It is recognised that other good practices for regulation - such as regulation of standards through trade associations and through international cooperation - will also provide guidance for regulating PMSCs, but have not been elaborated here.

In this understanding, Home States should evaluate whether their domestic legal framework, be it central or federal, is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel, or whether, given the size and nature of their national private military and security industry, additional measures should be adopted to encourage such respect and to regulate the activities of PMSCs. When considering the scope and nature of any licensing or regulatory regime, Home States should take particular notice of regulatory regimes by relevant Contracting and Territorial States, in order to minimise the potential for duplicative or overlapping regimes and to focus efforts on areas of specific concern for Home States.

In this sense, good practices for Home States include the following:

I. Determination of services

53. To determine which services of PMSCs may or may not be exported; in determining which services may not be exported, Home States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

II. Establishment of an authorisation system

54. To consider establishing an authorisation system for the provision of military and security services abroad through appropriate means, such as requiring an operating license valid for a limited and renewable period ("corporate operating license"), for specific services ("specific operating license"), or through other forms of authorisation ("export authorisation"). If such a system of authorisation is established, the good practices 57 to 67 set out the procedure, quality criteria and terms that may be included in such a system.

55. To have in place appropriate rules on the accountability, export, and return of weapons and ammunition by PMSCs.

56. To harmonise their authorisation system and decisions with those of other States and taking into account regional approaches relating to authorisation systems.

III. Procedure with regard to authorisations

57. To assess the capacity of the PMSC to carry out its activities in respect of relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:

    a) acquiring information relating to the principal services the PMSC has provided in the past;

    b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;

    c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.

58. To allocate adequate resources and trained personnel to handle properly and timely authorisations.

59. To ensure transparency with regard to the authorisation procedure. Relevant mechanisms may include:

    a) public disclosure of authorisation regulations and procedures;

    b) public disclosure of general information on specific authorisations, if necessary redacted to address national security, privacy and commercial confidentiality requirements;

    c) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;

    d) publishing and adhering to fair and non-discriminatory fee schedules.

IV. Criteria for granting an authorisation

60. To take into account the past conduct of the PMSC and its personnel, which include ensuring that the PMSC has:

    a) no reliably attested record of involvement in serious crime (including organised crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;

    b) conducted comprehensive inquiries within applicable law regarding the extent to which its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;

c) not previously had an authorisation revoked for misconduct of the PMSC or its personnel.

61. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

62. To take into account whether the PMSC maintains accurate and up to date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by competent authorities.

63. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardisation of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:

a) rules on the use of force and firearms;

b) international humanitarian law and human rights law;

c) religious, gender, and cultural issues, and respect for the local population;

d) complaints handling;

e) measures against bribery, corruption and other crimes.

Home States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

64. To take into account whether the PMSC's equipment, in particular its weapons, is acquired lawfully and its use is not prohibited by international law.

65. To take into account the PMSC's internal organisation and regulations, such as:

a) the existence and implementation of policies relating to international humanitarian law and human rights law;

b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:

i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;

ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistle-blower protection arrangements.

66. To consider the respect of the PMSC for the welfare of its personnel as protected by labour law and other relevant national law.

V. Terms of authorisation granted to PMSCs

67. To include clauses to ensure that the conduct of the PMSC and its personnel respect relevant national law, international humanitarian law and international human rights law. Such clauses, reflecting and implementing the quality criteria referred to above as criteria for granting authorisations, may include:

    a) past conduct (good practice 60);

    b) financial and economic capacity (good practice 61);

    c) personnel and property records (good practice 62);

    d) training (good practice 62);

    e) lawful acquisitions (good practice 64);

    f) internal organisation and regulation and accountability (good practice 65);

    g) welfare of personnel (good practice 66).

VI. Monitoring compliance and ensuring accountability

68. To monitor compliance with the terms of the authorisation, in particular by establishing close links between its authorities granting authorisations and its representatives abroad and/or with the authorities of the Contracting or Territorial State.

69. To impose sanctions for PMSCs operating without or in violation of an authorisation, such as:

    a) revocation or suspension of the authorisation or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;

    b) prohibition to re-apply for an authorisation in the future or for a set period of time;

    c) civil and criminal fines and penalties.

70. To support Territorial States in their efforts to establish effective monitoring over PMSCs.

71. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, consider establishing:

    a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Home State's national legal system;

    b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.

72. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel, including:

    a) providing for civil liability;

    b) otherwise requiring PMSCs to provide reparation to those harmed by the misconduct of PMSCs and their personnel.

73. To cooperate with investigating or regulatory authorities of Contracting and Territorial States, as appropriate, in matters of common concern regarding PMSCs.