Progress and Opportunities, Five Years On:

Challenges and Recommendations for Montreux Document Endorsing States

Benjamin S. Buckland and Anna Marie Burdzy

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

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

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Executive Summary

The modern security landscape is characterized by widespread and increasing privatisation. For instance, in South Africa, over 6,000 companies employed 375,000 active officers in 2009[1] and, in 2012, the Russian private security market was estimated to be worth 7 billion USD.[2] In the face of these trends, many observers have speculated that the state's monopoly on the use of force is eroding. Meanwhile, there is a tendency in the literature to treat private security as illicit, illegal, and immoral. This has hindered a clear-eyed look at the activities of PMSCs and their connections to wider structures of global governance.[3]

The Montreux Document demonstrates that the oversight role of the state has not necessarily receded in relation to PMSCs. In fact, as the Document makes clear, states are uniquely placed to ensure that PMSCs uphold a commitment to international law. The Montreux Document provides a roadmap in this regard by recalling pertinent international humanitarian law and human rights law and compiling a list of good practices that point the way forward for effective oversight of PMSCs.

This study was commissioned in the run-up to the fifth anniversary of the Montreux Document.[4] It draws on a combination of desk research, information gathered at four regional workshops,[5] and national reports provided by Montreux Document endorsing states (see Annex three). The study assesses progress and identifies the ways in which states are seeking to ensure effective regulation of the PMSC industry. At the same time, the report highlights important gaps where the Montreux Document's good practices could be better implemented.

The study addresses two interrelated objectives: it provides food for thought to inform discussions during the Montreux+5 Conference; and it identifies concrete ways in which the Montreux Document can advance implementation of PMSC regulation at the national level. The study is structured according to six key implementation "challenges." For each one, the challenges faced by states in this area are analysed and existing good practices are considered. Recommendations are then put forward for ways to support more effective implementation of the Montreux Document. These recommendations fall into three broad categories: roles and responsibilities; systems, processes and procedures; and monitoring and accountability.

Montreux Document implementation challenges

Roles and Responsibilities

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

   There is a lack of precision in the ways that laws address which functions PMSCs may or may not perform, with states adopting both proscriptive and permissive approaches to the determination of services. States have chosen to either restrict the functions of PMSCs through legislation that permits specific activities, prohibits them or does a mix of both. Regardless of the approach chosen, however, it is clear that the law should be carefully and precisely worded. It is an imprecise approach to limit the activities of PMSCs to exclude only "inherently governmental functions," unless governmental functions are clearly defined elsewhere. This is, quite predictably, difficult to do. On the other hand, providing a strict list of permitted activities may be equally unhelpful if the categories in the list are not clear and accurately defined. A list of permitted activities is often a static document, while the roles of PMSCs evolve in response to shifting state needs, advances in technology and new security environments. This is demonstrated by the expansion of PMSCs into prison management, intelligence gathering, and the operation of weapons systems. One way of balancing these tensions in the determination of services is by delineating between risk management, training and advisory functions, and those activities that may lead PMSCs to directly participate in combat. It is recommended that the determination of services should not be open to wide interpretation by companies, given that an indiscriminate expansion of PMSCs' activities has the potential to lead to IHL violations or human rights abuses.

2. *Inadequate extraterritorial applicability of legislation for PMSCs operating abroad*

   Collectively, Montreux Document endorsing states have generated a significant body of legislation and judicial precedent relating to the activities of PMSCs in a domestic context. In most Montreux states, PMSCs are subject to effective regulation and oversight when they operate domestically. What is not always clear, however, is how applicable this legislation is to the activities of PMSCs based in one state but operating abroad, either in another state or in international waters as part of maritime security operations. States can address this challenge in two ways: by clarifying that domestic legislation is applicable abroad or by separately adopting specific legislation relating to the foreign activities of PMSCs. By asserting their jurisdiction over their nationals and companies based on their territory, home states are in a strong position to hold PMSCs accountable and help ensure effective oversight. This is particularly important when PMSCs operate in complex environments where the rule of law may be weak or institutions may be fragile or ineffective, leaving local populations vulnerable to violations of IHL or international criminal and human rights law. In these situations, it is imperative that home states reduce the possibility of an accountability vacuum by asserting their jurisdiction over their companies and nationals and by bringing prosecutions against those that commit violations.

Procedures, Systems and Processes

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

   While most Montreux Document-endorsing states have identified a government organ with responsibility for the authorisation, contracting and licensing of PMSCs, it is less clear that such institutions have the capacity required to adequately carry out their functions. The activities undertaken by these agencies are complex and may include: background checks, issuing permits, auditing and monitoring compliance with terms of license, contract and authorisation, or implementing administrative sanctions for misconduct. Moreover, these activities are increasingly resource-intensive due to the growing number of companies entering the industry. Adequate human and

financial resources are therefore essential if licenses and authorisations are to be little more than rubber stamps, covering bad behaviour with the cloak of legitimacy. Conversely, licensing, contracting and authorisation regimes with adequate resources and effective systems can be a powerful tool for states wishing to ensure compliance with the Montreux Document good practices. Ways that states can ensure this include streamlining complex and parallel bureaucracies into a central agency, implementing targeted training programmes for agency managers and employees and by ensuring that they have the powers and resources they require to carry out their mandate.

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

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

Monitoring and Accountability

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

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

6. *Gaps in legal accountability and judicial liability*

Legal accountability gaps remain in this area, whether they relate to corporate, criminal or civil law. These gaps prevent victims of PMSC misconduct from seeking or obtaining justice. International legal remedies depend on the expediency and willingness of national prosecutors to bring cases before a criminal court. Where civil remedies are available, victims are often faced with long and costly judicial procedures. A number of factors exacerbate this problem. It may be unclear, for example, whether PMSC personnel are incorporated under the armed forces chain of command and thus protected by immunities. Elsewhere, courts may have difficulty deciding whether they have jurisdiction to prosecute misconduct that occurred on foreign soil. Additionally, territorial states (where PMSC misconduct has been concentrated in the past) often do not have the capacity to effectively investigate or prosecute foreign nationals and companies that may be

present within their territory. In this regard, home and contracting states should develop complementary judicial assistance programs with territorial states where their companies or nationals are present. This would help to close the accountability gap and reduce the risk that PMSCs evade liability based on technicalities, jurisdictional or otherwise. Status of Forces Agreements (SOFAs) and other agreements can help clarify the legal situation in some contexts. However, clear laws should be developed that state the jurisdiction and the provisions under which a PMSC and its personnel are liable for any misconduct.

The Way Forward

The concluding section to this study focuses on the way forward. It proposes concrete ways that the Montreux Document can serve as a force multiplier for effective implementation of PMSC regulation at the national level. Possible options fall into three substantive categories: targeted outreach, tool development, and training and capacity building. A fourth option proposes a consolidation of the Montreux Document process through the institutionalisation of a regular dialogue among Montreux Document participants.

Outreach

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

- Raising awareness of the Montreux Document in regions that have not, to date, been a focus of outreach efforts.
- Following-up on the regional workshops that have already been held in Central Asia, South America, Oceania, and South East Asia..
- Establishing a clear dialogue with other initiatives concerned with regulating the private security sector.
- Providing a focus to implementation support efforts.

Tools development

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

- Model laws.
- Templates for mutual legal assistance treaties.
- Contract templates.
- A generic training resources package.
- Resources and tools to help establish and support effective monitoring regimes.
- An implementation support guide.

Training and capacity building

The Montreux Document should provide a catalyst and focus to training and capacity building support for these actors. The different actors with responsibility for PMSC regulation require specialist knowledge of the industry as well as different possible methods of regulation. Effective regulation also requires a “joined up” approach across the range of actors involved in implementation, management and oversight aspects of PMSC regulation. The following elements would support effective training development:

- A training needs analysis.
- The identification of curriculum requirements and the development of training support tools.
- The institutionalization of a regular dialogue.
- Capacity building support should be linked to wider security sector reform programmes that promote whole of government approaches to reinforcing the management and oversight of the security sector.

Institutionalisation of a regular dialogue among Montreux Participants

The Montreux Document needs a centre of gravity if it is to optimise its role as a force multiplier for national efforts to regulate PMSCs. Regularising the dialogue between endorsing states would facilitate the sharing of lessons learned and good practice. It would also give the Montreux Document a clear voice and identity in relation to complementary pillars of the evolving international landscape of PMSC regulation, notably the new Association for the International Code of Conduct for Private Security Service Providers and the important work within the framework of the United Nations to develop international regulation in this area.

NOTES

1. Private Security Industry Regulatory Authority (PSIRA), *Annual Report 2008/2009*, Pretoria: PSIRA, 2009, 29.
2. Mark Galeotti, "An offer you can't refuse," The Moscow News, 17 May 2012.
3. Rita Abramsen, Micahel C. Williams, *Security Beyond the State: Private Security in International Politics*, New York: Cambridge University Press, 2011.
4. DCAF led the research and drafting of a series of reports focused on national regulations in all Montreux-endorsing states. Of particular interest were national regulations that addressed companies operating both domestically and transnationally. Additional information was provided by Swiss Government and the ICRC. Following an assessment of the national reports, the various elements were organised thematically and incorporated into this study.
5. A multi-year programme of regional workshops co-organised by the government of Switzerland, the ICRC, DCAF and the respective host government has sought to raise awareness of the Montreux Document and address relevant regional issues on PMSC regulation. Workshops to date have taken place in: Chile (12–13 May 2011); Mongolia (11–13 October 2011); Australia (8–9 May 2012); Philippines (9–10 July 2013).

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Benjamin S. Buckland and Annie Burdzy

Introduction

The Montreux Document[1] was endorsed by seventeen states when it was first adopted in 2008. In the five years since, that number has almost tripled and forty-eight states, plus two international organisations have now offered their endorsement. Together they represent an enormous corpus of good practice in both law and implementation that spans home states (where PMSCs are based), contracting states (which contract PMSCs to provide services) and territorial states (where PMSCs operate) with a variety of legal systems and highly varied levels of exposure to the phenomenon of private military and security companies (PMSCs). It is the goal of this report to provide an overview of states' experiences in this area, to discern major challenges in implementation, and to identify ways to build on existing good practices in the future.[2]

In preparation for the Montreux+5 Conference, Switzerland issued a questionnaire to all Montreux Document endorsing states. Its purpose was to solicit input and examples of how states and international organisations have put into practice the Montreux Document and to capture where implementation challenges remain. While not all of the questions are relevant for each state or international organisation, they were designed as a guide to structure responses. The drafters of the questionnaire hoped that answers would include references to the specific regulatory approach through which the implementation of the Montreux Document has been carried out, including, for example, national laws, policies and procurement and/or contractual requirements. The information provided through the answers to the questionnaire was used to prepare background materials and this report.

The willingness of states to share their experiences in the run up to Montreux+5 suggests that there are significant opportunities for deepening cooperation and the identification and adoption of good practices. Indeed, it is hoped that this report will lead to the identification of more and better methods and tools for sharing and implementing such practices. It is also hoped that this research, combined with the insights and conclusions flowing from the Montreux+5 Conference may help states and international organisations to better identify ways in which they can work together to ensure respect for international law, particularly in cases where PMSCs are structured or operate transnationally.

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

The second section examines procedures, systems and processes. This section is concerned with the way home states license PMSCs, contracting states contract or select PMSCs, and the way territorial states authorise PMSCs to operate on their territory. Here, the third challenge is the lack of adequate resources dedicated to agencies and systems tasked with licenses, contracting and authorisations. Finally, this section examines the criteria and terms upon which licensing, contracting and authorisation is based. The fourth challenge draws attention to the lack of clear, human rights-oriented criteria in terms of licenses, contracts and authorisations.

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

The main study is complemented by a series of Annexes that cover methodology and the scope of research; acronyms and abbreviations; and a copy of the questionnaire that was distributed to Montreux-endorsing states in early 2013.

The Montreux Document

The Montreux Document is an intergovernmental initiative intended to promote respect for international humanitarian law and human rights law by PMSCs, in particular in situations of armed conflict. The Montreux Document is not a new international treaty and it is not a new law. Most of the rules and good practices assembled in the Montreux Document derive from international humanitarian law and human rights law. Other branches of international law, such as the law of state responsibility and international criminal law, also serve as a basis. Regardless of their support for the document, states are already bound by the international legal obligations contained therein, by virtue of their ratification of the Geneva Conventions and other treaties, as well as the status of many of the obligations in the Document as customary international law. The Document does not intrude on national sovereignty over internal state policy; rather, the Montreux Document recalls, compiles, and reminds the reader of existing international legal obligations. This provides a clear response to the misconception that private military and security companies operate in a legal vacuum. It describes the basis for holding PMCSs accountable to their host (or territorial) states, contracting states, and home states.[3] Although the Montreux Document does not create new international legal obligations, it clarifies applicable rules of international law as they apply to the activities of PMSCs and provides practical tools for state oversight.

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

The Montreux Document, in line with IHL, was written bearing in mind that PMSCs may operate in an armed conflict environment. However, reflecting the wide variety of settings in which PMSCs operate, the Montreux Document is also meant to provide practical guidance in other contexts. It also contains statements on pertinent international

human rights law and international criminal law, which are applicable at all times. Furthermore most of the good practices identified are ideally put into place during peacetime. Examples of such past situations in which the Montreux Document may have been helpful include Malaysia, where a PMSC trained the Royal Malaysian Police in hostage rescue, close protection of infrastructure and people, defensive driving and crisis management for the Commonwealth Games (held in September 1998 in Kuala Lumpur).[4] Likewise, in Russia, there are roughly 30,000 registered private security organisations that guard local, national and foreign businesses and individuals.[5] Many states have used PMSCs aboard merchant vessels, for example in the Straits of Malacca[6] and in the Gulf of Aden. Other states contract PMSCs to guard extractive industry sites; in North East and Central Asia, both governments and companies are rapidly developing energy, oil, and gas infrastructure from Siberia to the Pacific, making PMSCs extremely relevant. In fact, PMSCs provide a broad range of services in complex environments and during peacetime (where they impact and sometimes even undermine the human rights of local populations). In the face of the rapid growth of this industry in both local and international contexts, the Montreux Document provides additional support for the establishment of effective oversight regimes. The good practices section can help states provide effective oversight of PMSCs and thus prevent any actions or misconduct that may contribute to violations of national and international law. Many states interact with the PMSC industry in peacetime: whether they host their headquarters, provide a base for the export of services, contract with PMSCs, or allow them to operate on their territory. The Montreux Document provides guidance for a regulatory regime as a preventative measure.

Many states have legislation that treats PMSCs no differently from other transnational companies; however, PMSCs have quite distinct characteristics and they compel distinct legislation. Granted, states that have endorsed the Document have their own national business codes and contract laws with which all companies must comply. The Montreux Document does not seek to replace, change or eliminate these national regulations. The Document does, however, make the case for treating PMSCs with special care under national law. This is particularly important because many PMSCs operate in armed conflict, where there is a chance that they may directly participate in hostilities. In the same way that manufacturers and exporters of defence-related or dual-use military materiel are subject to special regulations and restrictions (for instance being required to obtain end-user certificates to prevent the proliferation of weapons of mass destruction), PMSCs necessitate special oversight. PMSCs are a cause for humanitarian concern; "inasmuch as they are armed and mandated to carry out activities that bring them close to actual combat, they potentially pose an additional risk to the local population and are themselves at risk of being attacked."[7] Thus, the Montreux Document seeks to protect the rights of local populations as well as the safety of PMSC personnel themselves.

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

NOTES

1. *The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict.*
2. This study has been prepared by DCAF in the run up to the Montreux +5 Conference on the basis of research conducted by us in cooperation with the University of Denver, as well as the results of a questionnaire distributed among all Montreux Document endorsing states.
3. Deborah Avant, "Pragmatic action is the key to governing private security services," Commentary, Private Security Monitor, http://psm.du.edu/commentary/, Accessed August 27, 2013.
4. Fred Schreier and Marina Caparini, "Privatising Security: Law, Practice and Governance of Private Military and Security Companies," Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 6, 31.
5. Quoted in "Erica Marat, Regulating Private Military and Security Companies in Central Asia and Russia," *Proceedings of the Regional Workshop in the Montreux Document on PMSCs*, Geneva Centre for the Democratic Control of the Armed Forces (DCAF) Research Paper (2012), 23. See also Nicolas Florquin, *A Booming Business: Private Security and Small Arms, Small Arms Survey, 2011*.
6. See Noor Apandi Osnin, "Private Maritime Security Company in the Strait of Malacca: Options for Malaysia," *WMU Journal of Maritime Affairs 5*, no. 2 (2006), 195-206.
7. Montreux Document, 38.

Section One:
Roles and Responsibilities

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

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

This section discusses how Montreux Document endorsing states have approached this question. Their approaches can be roughly divided into the "permissive" and the "proscriptive." In other words, some states clearly outline every service that *can be* performed by a PMSC (the permissive approach), while others come at the problem from the other direction and seek instead to clearly delineate all those services that *cannot be* performed by PMSCs (the proscriptive approach). At the same time, this part of the report illustrates the challenges experienced by states in determining acceptable functions of PMSCs.

In the first category there are states such as Finland, where outsourcing to PMSCs is generally limited to what may be termed "support services:" food services, health care, clothing services and some depot maintenance and repair.[1] Likewise, in Denmark the law limits "security services" to the protection of goods (static or in transit), guarding of persons, guarding of transport of valuables, cash in transit, and private investigations.[2] Angola has similar limitations and adds the commercialisation, installation and assistance of technical security equipment in residences, commercial, industrial and service establishments to this list.[3]

Training is the other major type of activity that many states in this first category specify as appropriate for PMSC involvement. In Afghanistan, the law states that risk management companies can perform development-related security work in an advisory, training, or mentoring capacity, either for the Afghan Public Protection Force (APPF) or clients, although such firms are not able to maintain a force of guards or weapons or to "perform security services."[4]

Box 1: Regulation of PMSCs in the European Union

In Europe, private security services are provided by about 50,000 companies, with a combined yearly turnover of approximately 23 billion EUR. This field covers a wide range of services, from personal security services to critical infrastructure protection, both of which are increasingly used by public bodies and organisations.[5]

Both the EU and its member states have a variety of regulatory and licensing mechanisms in place which apply at least partially to PMSCs.[6] EU policies and regulations fall into three broad categories: Council "Regulations" which are directly applicable to member states, Council "Common Positions" which are binding legal acts that must be implemented into national laws or practices, and Council "Joint Actions" which are legal acts that define common activities such as Common Foreign and Security Policies. EU-level regulation typically addresses a broad range of concerns such as political and public accountability and control over the organisation of and types of services provided by PMSCs nationally and abroad.

Regulations in the EU have so far pertained primarily to the licensing of firms and personnel supplying internal security services while companies that sell "military services" have remained unregulated. Registration and licensing of PMSCs (beyond domestic internal security) is also a policy gap in this sense; existing regulations only apply to PMSCs operating nationally.

Directive 2006/123/EC on services in the internal market was adopted in December 2006 with a view to removing legal and administrative barriers within the EU in the services sector. However, given the significant differences that exist among EU Member State laws on private security services, such services were excluded from the scope of the directive. In the absence of common regulations, the EU Court of Justice has ruled that member states have to recognise the national standards of other EU countries albeit even if these are lower than their national licensing requirements.

Despite the absence of a common regulatory framework, the EU has played a critical role in promoting national and regional control over the provision and export of various military and security services. In terms of EU-led missions, contracting may be carried out by troop contributing nations, the ATHENA Administrator and/or EU military cadres through the ATHENA Mechanism as contracting agency under the authority of the ATHENA Special Committee.[7] ATHENA is a mechanism which administers the financing of common costs of EU operations with military or defence implications.[8] It does this on behalf of EU Member States contributing to the financing of EU military operations. ATHENA was set up by the Council of the European Union on 1 March 2004.

The EU Council Common Position 2008/944/CFSP controls not only the export of military equipment but also services such as brokering, trans-shipment, intangible transfers of software and technology, and technology required for the development, production, operation, installation, maintenance, repair, overhaul and refurbishing of some items specified in the EU Common Military List. The European Court of Justice has established the jurisdiction of the EU Commission over PMSCs in several rulings which identify private security services as an economic sector under EU purview. Nonetheless, the movement towards *common* European regulations on PMSCs has been slow. Instead, the European Parliament has been in favour of *harmonising* Member States' regulation of the sector. The Council also adopted (on 13 June 2002) a recommendation regarding cooperation between the competent authorities of Member States responsible for the sector.[9]

The second "proscriptive" category contains examples such as the United States, which uses the term "inherently governmental functions" to delineate domains of authorised PMSC activity. Unfortunately, however, the phrase "inherently governmental function" is vague and rather unhelpful in determining which particular government functions are inappropriate for outsourcing.[10] According to an Office of Management and Budget (OMB) Circular, "an inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel.[11] These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements."[12] According to the OMB, permissible PMSC functions include "guard services, convoy security services, pass and identification services, plant protection

services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed.[13] However, the OMB directs agencies to consider:

> [t]he provider's authority to take action that will significantly and directly affect the life, liberty, or property of individual members or the public, including the likelihood of the provider's need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas.[14]

Additionally, the National Defense Authorisation Act for Fiscal Year 2009 mandated that private security contractors are not authorised to perform inherently governmental functions in an area of combat operations.[15] This Act was vague with regards to specific restrictions on contractors but attempted to more carefully define "inherently governmental functions:"

> It is the sense of Congress that--
>
> (1) security operations for the protection of resources (including people, information, equipment, and supplies) in uncontrolled or unpredictable high-threat environments should ordinarily be performed by members of the Armed Forces if they will be performed in highly hazardous public areas where the risks are uncertain and could reasonably be expected to require deadly force that is more likely to be initiated by personnel performing such security operations than to occur in self-defense;
>
> (2) it should be in the sole discretion of the commander of the relevant combatant command to determine whether or not the performance by a private security contractor under a contract awarded by any Federal agency of a particular activity, a series of activities, or activities in a particular location, within a designated area of combat operations is appropriate and such a determination should not be delegated to any person who is not in the military chain of command;
>
> (3) the Secretaries of the military departments and the Chiefs of Staff of the Armed Forces should ensure that the United States Armed Forces have appropriate numbers of trained personnel to perform the functions described in paragraph (1) without the need to rely upon private security contractors; and
>
> (4) the regulations issued by the Secretary of Defense [...] should ensure that private security contractors are not authorised to perform inherently governmental functions in an area of combat operations.[16]

Similarly, in Angola, the law states that PMSCs should not let their actions be confused with those of the public security forces (art. 15(b))[17] and that their services should also not collide with the functions of the state regarding public security and protection (art. 4(2)). A clear division between the role of the police and PMSCs is, however, lacking. In the same vein, Section 9.1 of the Iraqi Coalition Provisional Authority (CPA) Memorandum 17 states that "The primary role of PSC is deterrence. No PSC or PSC employee may conduct any law enforcement functions."[18] Although, as in Angola, "law enforcement functions" is a term that is left undefined.

States have also opted to outlaw the participation of their nationals in the armed conflicts of foreign states. South Africa is the best-known exponent of this approach and here the law makes clear that (among many other restrictions): "(1) No person may within the Republic or elsewhere— (a) participate as a combatant for private gain in an armed conflict[19] [...] (b) negotiate or offer to provide any assistance or render any service to a party to an armed conflict or in a regulated country."[20] Likewise, Paragraph 128 of the Danish Penal Code, makes it an offence, punishable by a fine or up to two years imprisonment, to recruit Danish citizens into foreign war service.

A final relevant example that it is worth sharing in this section concerns limitations on, *inter alia,* technical assistance relating to specific types of weapons. Several states have chosen to regulate PMSCs as business entities, paying special attention to the services they export. Here the UK Export of Goods, Transfer of Technology and

Box 2: PMSC Regulation in South Africa

South Africa's private military and security industry has greatly expanded in recent years. Whether as a home state for companies seeking to export their services, or as a domestic market for the provision of security protection, South Africa is especially relevant to the Montreux Document process. Former military personnel employed during the apartheid years turned to the private security sector to continue their careers. Concerned that private security may undermine peace, security and human rights, South Africa has passed legislation in recent years banning mercenary activity (2007)[21] and heavily restricting the operations of companies from South Africa. South Africa has also created a sophisticated domestic regulatory regime for governing the industry. Worthy of mention is the Department of Safety and Security's 2003 Code of Conduct for Security Service Providers which lays out minimum standards of conduct. The Regulation of Foreign Military Assistance Act 15 of 1998 regulates the provision of security abroad by South African companies, while the Private Security Industry Regulatory Authority regulates the industry and exercises control over licensing and related activities. In February 2013, a new draft law was introduced with the intention of amending the Private Security Industry Regulation Act of 2001. The amendments would add accountability to the regulating council and empower the Minister of Safety and Security to add regulations, issue guidelines, and control firearms.

Provision of Technical Assistance (Control) Order 2003 is instructive. This order prohibits "any technical support related to repairs, development, manufacture, assembly, testing, 'use', maintenance or any other technical service ... in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices, or the development, production, maintenance or storage of missiles capable of delivering such weapons" outside the European Community.[22]

Recommendation One: Laws on what functions PMSCs may and may not perform should be written clearly and restrictively

There is a lack of precision in the ways that laws address which functions PMSCs may or may not perform, with states adopting both proscriptive and permissive approaches to the determination of services. States have chosen to either restrict the functions of PMSCs through legislation that permits specific activities, prohibits them or does a mix of both. Regardless of the approach chosen, however, it is clear that the law should be carefully and precisely worded. It is an imprecise approach to limit the activities of PMSCs to exclude only "inherently governmental functions," unless governmental functions are clearly defined elsewhere. This is, quite predictably, difficult to do. On the other hand, providing a strict list of permitted activities may be equally unhelpful if the categories in the list are not clear and accurately defined. A list of permitted activities is often a static document, while the roles of PMSCs evolve in response to shifting state needs, advances in technology, and new security environments. This is demonstrated by the expansion of PMSCs into prison management, intelligence gathering, and the operation of weapons systems. One way of balancing these tensions in the determination of services is by delineating between risk management, training and advisory functions, and those activities that may lead PMSCs to directly participate in hostilities. The determination of services should not be open to wide interpretation by companies, given that an indiscriminate expansion of PMSCs' activities has the potential to lead to IHL violations or human rights abuses. It is recommended that states hold discussions at the parliamentary and national policy levels to more clearly identify the services PMSCs may provide. Furthermore, such discussions should also take place at the international level, such as among Montreux Document endorsing states, in order to help set international standards for services provided by PMSCs.

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

The introduction to Part C. of the Montreux Document states that "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." This also applies to contracting states. While the good practices in this section relate to concrete steps that home states can take in this regard, fully implementing these good practices clearly requires that states clarify the applicability of domestic legislation to PMSCs operating abroad or otherwise enact specific legislation with regard to such companies.

Related to the discussion above about states placing appropriate restrictions on the functions of PMSCs is the important issue of ensuring that legislation is made clearly applicable to the activities of PMSCs operating abroad. The Ukrainian Law on Security Activities, for example, contains relatively extensive regulations on the use of force and firearms. However, the law is primarily aimed at the domestic private security industry and it is unclear to what extent this law applies to private companies based in Ukraine but working abroad or to companies with which the government contracts externally.[23]

An analogous lack of clarity is found in Finland, where the Constitution stipulates (in Section 124) that the delegation of administrative tasks to entities or persons other than the authorities is possible, if it is deemed necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, situations involving the use of force, such as police functions or tasks otherwise significantly affecting rights of individuals cannot be given to private entities[24] and, furthermore, any such delegation may only take place by virtue of a statute.[25] It is unclear, however, exactly how such domestic security regulations may be applicable to the export of PMSC services. The Finnish government has no outsourcing practice when it comes to such services, which means that there are no official policies on the subject and no contracts available for evaluation.

Box 3: Bosnia and Herzegovina

Bosnia and Herzegovina (BiH) has a complex constitutional structure following the 1995 Dayton Agreement under which the peacekeeping forces (first under NATO auspices and then as part of the European Union Stabilization Force [EUFOR]) have provided security. BiH is divided into two administrations: The Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS). Due to this structure, there is presently no national regulatory framework for the whole of Bosnia and Herzegovina; instead, relegation occurs at the cantonal level.[26] In both FBiH and RS, a company that intends to offer protection services to people and property can only be established by a legal domestic company or Bosnian national and must be registered with the cantonal Ministry of Interior.[27] These complex arrangements make it illegal for a PMSC registered in one entity to work in the other. The lack of a single overarching law or regulatory framework is problematic; there are significant variations between the laws of RS and FBiH. In both semi-autonomous entities, those applying to establish a PMSC must fulfil a number of demands, however; the regulations differ between the two administrations and commitment to upholding the regulations is unclear.

Moreover, there is scant legislation that applies to national companies operating abroad. Granted, the vast bulk of Bosnia and Herzegovina's private security industry is directed at domestic guarding of commercial or official premises; key employers are the banking sector, the manufacturing industry, the retail sector, international NGOs, diplomats and embassies, and the entertainment industry.[28] However, the current legal regime does not cover contracting of PMSCs or the export of private security services abroad. Indicative of this was an addition to the Dayton Accords whereby the Federation awarded a contract in 1996 to a PMSC to establish a training regime for the Federation's armed forces.[29] This indicates that the private security environment in Bosnia and Herzegovina is not strictly limited to domestic guard services but has broader implications for security and development; the Montreux Document's good practices can significantly assist in oversight of the industry.

While the activities of PMSCs operating abroad are not dealt with by specific German legislation, German companies do operate abroad, including in conflict areas.[30] Here, their activities primarily focus on the provision of logistical support and protection services for persons and buildings.[31] Nevertheless, despite the lack of specific legislation, the German government has clarified that (according to constitutional law), private companies cannot perform "governmental activities" in crisis areas abroad.[32] Furthermore, security service contracts commonly include obligations of conduct as well as obligations of results.[33] When the German government outsources security services, "companies are under close scrutiny and there is even effective political control by the government."[34]

Likewise, Norway appears to rely heavily on international law and principles of human rights to dictate acceptable behaviour by private security companies[35] and legislation enables Norway to revoke the permission of PMSCs to operate in Norway if supervising authorities become aware of breaches of either international or Norwegian law. While it is not specifically elucidated in the legislation, this latter provision would appear to preclude direct participation in hostilities by Norwegian PMSCs.[36]

In Lithuania, the Law on the Security of the Person and Property regulates the provision of private security services in Lithuania. This law also regulates the operation of foreign private security companies in the country. If a company is registered to a country belonging to the European Union, it can operate in Lithuania for up to three months without a licence. Otherwise, providing security services without a license is prohibited. Regarding Lithuanian PMSCs operating abroad, the Lithuanian Parliament has sole authority to decide on the use of armed forces in the zone of armed conflict and prospective use of PMSCs abroad.[44] Similarly, Australia has yet to provide specific regulatory measures aimed at private military and security services operating abroad. Australian nationals and companies do work in private security abroad and in these cases Australia defers to the host state laws for the prosecution of any misconduct that may occur.[45]

Box 4: PMSC Regulation in Norway

Norway's private security sector is primarily domestically focused. In 2011, there were 243 approved security organisations in Norway, most of them domestic, with a market value of around 1.6 billion USD.[37] Private security in Norway is primarily governed by Act 5 January 2001, No. 1, which has since been amended by Act 19 June 2009, No. 85.[38] The amendment was designed to prevent Norwegian companies from engaging in military activities abroad contrary to national and international law. Prior to the drafting of the amendment, the Ministry of Justice hosted a working group to review existing regulation, training, and oversight and provide recommendations. The working group report provided recommendations regarding the limitation of services, specifically warning against the use of security guards in a military context.[39] The Norwegian public and media are critical of questionable PMSC practices; such practices caused several PMSCs to lose contracts in 2012 and another to dissolve in 2009.[40]

Maritime Private Security, which may be the largest extra-national employment of Norwegian private security firms, is governed by the now permanent "Provisional guidelines – use of armed guards on board Norwegian ships," the Act of 16 February 2007 No. 09, and Regulation of 22 June 2004 No. 972 (amended in 2011).[41] Norway has six signatories to the International Code of Conduct for Private Security Providers and one company is a member of the Code's Association. Norway is a signatory of the Voluntary Principles on Security and Human Rights[42] and had passed Act 19 June 2009, No. 85 in order to regulate private security activities in a manner consistent with the Principles.[43] The Voluntary Principles on Security and Human Rights were established in 2000 to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights. Focusing on risk assessment, interactions between companies and public security as well as interactions between companies and private security, the VPs place human rights in the center of corporate social responsibility.

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

Collectively, Montreux Document endorsing states have generated a significant body of legislation and judicial precedent relating to the activities of PMSCs in a domestic context. In most Montreux states, PMSCs are subject to effective regulation and oversight when they operate domestically. What is not always clear, however, is how applicable this legislation is to the activities of PMSCs based in one state but operating abroad, either in another state or in international waters as part of maritime security operations. States can address this challenge in two ways: by clarifying that domestic legislation is applicable abroad or by separately adopting specific legislation relating to the foreign activities of PMSCs. By asserting their jurisdiction over their nationals and companies based on their territory, home states are in a strong position to hold PMSCs accountable and help ensure effective oversight. This is particularly important when PMSCs operate in complex environments where the rule of law may be weak or institutions may be fragile or ineffective, leaving local populations vulnerable to violations of IHL or international criminal and human rights law. In these situations, it is imperative that home states reduce the possibility of an accountability vacuum by asserting their jurisdiction over their companies and nationals and by bringing prosecutions against those that commit violations.

NOTES

1. Finland; Defence Committee Report 6/2007 [Puolustusvaliokunnan lausunto 6/2007 vp, Ministeriön selvitys maavoimien materiaalin kunnossapidon kehittämisestä]; Statement by Minister of Defence Jyri Häkämies in Parliament plenary session 16.12.2008 [Täysistunnon pöytäkirja PTK 127/2008 vp 16.12.2008]; Puolustusvoimien kumppanuusohjelma, 'Pääesikunta esittää maavoimien kunnossapidon strategista kumppanuutta Millog Oy:n kanssa', 20.12.2007 <tietokannat.mil.fi/kumppanuusohjelma/sisalto.php?a_id=114&type=uutiset&project_id=9> cited in Katja Creutz, "Private Military and Security Services in the Regulatory Context of Finland," *PRIV-WAR Report*, 28 February 2009, 14.
2. Denmark; Law on Private Security Companies (Act No 266 of 22 May 1986), Article 1; modified by Act no. 611 of 22 June 2000 on the legal ground of private security.
3. Angola; Angolan Law on Private Security Companies (19/92) cited by Lisa Rimli, "Case Study Angola," *In Private Security Companies and Local Populations: An Exploratory Study of Afghanistan and Angola*, edited by Ulrike Joras and Adrian Schuster, Working Paper 1, Swisspeace, Swiss Peace Foundation, Bern, April 2008. http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/WP1_2008.pdf (accessed 11 December 2012).
4. Government of Afghanistan, Presidential Decree 62 (August 2010). See also Afghan Public Protection Force, *Frequently Asked Questions*, http://www.appf.gov.af/faq.htm, Accessed 15 April 2013.
5. European Union; European Parliament, Question for written answer to the Commission, Follow-up to the exemption of private security services from the EU directive on services in the internal market," http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2010-010961&language=EN, Accessed November 2013.
6. For further reading see Born, Hans Marina Caparini, Eden Cole, "Regulating Private Security in Europe: Status and Prospects," *Policy Paper no.20*, Geneva Centre for the Democratic Control of the Armed Forces (DCAF): 2007; Elke Krahmann, and Aida Abzaporova, "The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options," *EUI Working Paper*. European University Institute, Academy of European Law, PRIV-WAR project 2010/8.
7. European Union; European Union Military Staff, *EU Concept for Logistic Support for EU-led Military Operations*, 31.
8. *See* Council of the European Union, Financing of CSDP Operations, http://www.consilium.europa.eu/policies/common-security-and-defence-policy-(csdp)/financing-of-csdp-military-operations
9. European Union; Council Recommendation of 13 June 2002 regarding cooperation between the competent national authorities of Member States responsible for the private security sector, *Official Journal*, C 153 (27.6.2002)
10. Kristine A Huskey and Scott M. Sullivan, "The American Way: Private Military Contractors & US Law After 9/11," PRIV-WAR National Reports Series 02/08, 13.
11. The Office of Management and Budget (OMB) Circular A-76, in which the phrase is found, does not provide the reader with further illumination on the issue of how and why certain functions obtain inherently governmental status.
12. USA; OMB Circular No. A-76: Performance of Commercial Activities (Revised 2003) (superseded) (White House Office of Management and Budget, Washington, DC, 1999), Section B (1) (a), *available at* http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction
13. Ibid, A (3).
14. Ibid.
15. USA; National Defense Authorisation Act of 2009, sec. 832 (PL 110-417) http://www.gpo.gov/fdsys/pkg/PLAW-110publ417/html/PLAW-110publ417.htm, Accessed 22 August 2013.
16. Ibid.
17. Rimli, "Case Study Angola," 40.
18. Despite the dissolution of the Coalition Provisional Authority, many of the rules remain in place. See "Private Security Companies Registration Regulations According to the Memorandum 17 for 2004 And the MOI Instructions" July 2013, http://psm.du.edu/media/documents/national_regulations/countries/middle_east_and_north_

africa/iraq/iraq_private_security_companies_registration_regulation_based_on_cpa_memo_17_2004-english.pdf Accessed 24 October 2013; *Memorandum 17*, Coalition Provisional Authority-Iraq, (2004), section 9.1.

19. South Africa; Definitions and Interpretations of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006, section 2. http://psm.du.edu/media/documents/national_regulations/countries/africa/south_africa/south_africa_act_on_prohibition_of_mercenary_activities_2006-english.pdf, Accessed 24 October 2013.
20. Ibid, section 3.
21. Ibid.
22. UK; Department of Industry and Trade, Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003, Statutory Instrument 2003 No. 2764, http://www.legislation.hmso.gov.uk/si/si2003/20032764.htm Accessed 30 July 2013.
23. Ukraine; Verkhovna Rada, Law of Ukraine "On Security Activities," from 22 March 2013, № 4616-VI. Translation in abstract text from 22 March 2012 , http://zakon2.rada.gov.ua/laws/anot/4616-17, Accessed 10 March 2013. "Security personnel may use physical influence in the case of 1: defending themselves or other persons from an attack that poses a threat to life, health or property; 2: avoiding an unlawful attempt to forcefully takeover specialized equipment; 3: the need to detain an offender who illegally entered the guarded object or is carrying out other unlawful acts and offers resistance; 4: neutralizing an animal that poses a threat to the life and health of the security personnel or other persons."
24. Katja Creutz, "Private Military and Security Services in the Regulatory Context of Finland," PRIV-WAR Report-Finland, National Reports Series 08/09, 28 February 2009.
25. The Constitution of Finland [Suomen perustuslaki] 11.6.1999/731, Section 124 (unofficial translation).
26. For laws governing PMSCs in Bosnia and Herzegovina see: The Law on Agencies for Protection of People and Property and Private Detective Work', Article 4, *Official Gazette in Republic of Srpska* No 50/2002; The 'Law on Agencies of Protection of People and Property' Article 4, *Official Gazette of FBiH*, Year IX, No 50, 14 October 2002.
27. This nationality principle would change if Bosnia joined the EU. Michael Page, Simon Rynn, Zack Tylor, and David Wood, "SALW and Private Security Companies in South Eastern Europe: A Cause of Effect of Insecurity?" The South Eastern Europe Clearinghouse of the Control of Small Arms and Light Weapons (SEESAC), August 2005, 22.
28. Ibid, 19; See also David A. Kassebaum, "Question of Facts- the Legal Use of Private Security Firms in Bosnia," *Columbia Journal of Transnational Law* no. 38: (1999-2000),581-602.
29. Kassebaum, 582.
30. In 2009, German Armed Forces were involved in 12 operations abroad; *See* http://www.bundeswehr.de/portal/a/bwde/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd443DgoESYGZASH6kTCxoJRUfW99X4_83FT9AP2C3IhyR0dFRQCopHXc/delta/base64xml/L3dJdyEvd0ZNQUFzQUMvNElVRS82X0NfNEFD; Heike Krieger „Der privatisierte Krieg: Private Militärunternehmen in bewaffneten Konflikt" in *Archiv des Völkerrechts*, vol. 44 (2006), 163.
31. Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, preliminary remark; Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 23.
32. Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 4.
33. Service contracts are addressed by Sections 611-630 of the German Civil Code; Bürgerliches Gesetzbuch (BGB), published on 2 January 2002 (BGBl. I 42, 2909; 2003 I 738), with amendments as of 10 December 2008 (BGBl. I 2399).
34. Ralf Evertz, "Regulation of private military, security and surveillance services in Germany," PRIV-WAR Report – Germany, National Report Series 16/09, 15 June 2009, 11.
35. Norway; Norwegian Ministry of Finance. *Companies Excluded From the Investment Universe*. 1 November 2013. http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/selskaper-som-er-utelukket-fra-fondets-i.html?id=447122, Accessed March 2013.
36. Norway, Norwegian Royal Ministry of Foreign Affairs. *Voluntary Principles Implementation Report in 2009- Plenary Report* Government Report, Oslo: Royal Ministry of Foreign Affairs, 2010.
37. Norway; NHO Service. "NHO Service 2011-2012 Security Sector Statistics ." *NHO Service*. 2012. http://www.nhoservice.no/getfile.php/Filer/Statistikk/Sikkerhet%202012.pdf, Accessed 24 Ocotber 2013.
38. Norway; Permanent Mission of Norway to the UN. "Norway response to the OHCHR request for information on national regulatory frameworks." OHCHR, National Regulatory frameworks, WG Mercenaries. 15 June 2012. http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Norway.pdf, Accessed 20 February 2013.
39. Norway; Ministry of Justice and Police. About the Law amending the Law on security guard services. Working Group, Oslo: Stoltenberg Government, 27 March 2009.
40. Norway; G4S, *The Biggest Contract- G4s continues to OSL*. 11 01, 2012. http://www.g4s.no/nb NO/Media%20Centre/News/2012/11/01/G4S%20vant%20kontrakt%20ved%20Oslo%20lufthavn%20Gardermoen/ (accessed 03 2013); Ervik, Kristian, and Bent Skjaerstad, *Special Intervention Group Dissolved*, June 2009. http://www.tv2.no/nyheter/innenriks/special-intervention-group-er-lagt-ned-2941646.html, Accessed February 2013).
41. Julie Ryland, *Norway Post- Armed guards on Norwegian ships*. 6 February 2013. http://www.norwaypost.no/index.php/news/latest-news/28080-armed-guards-on-norwegian-ships Accessed 23 February 2013.
42. *See:* Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/
43. Norway, Norwegian Royal Ministry of Foreign Affairs. *Voluntary Principles Implementation Report in 2009- Plenary Report* Government Report, Oslo: Royal Ministry of Foreign Affairs, 2010.
44. Lithuania; Article 84 of the Constitution of the Republic of Lithuania. See also Ieva Miluna, "The Regulatory Cotnext of Private Military and Security Services in Lithuania," PRIV-WAR Report-Lithuania, National Reprots Series 12/09, 25 May 2009.
45. UN Human Rights Council, "Addendum 1: Communications to and from governments," (A/HRC/7/7/Add.1), 13 February 2008, 4-5.

Section Two: Procedures, Systems and Processes

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

> Procedures of authorisation are outlined in Good Practices 2-4, 25–29, and 54–59. These procedures include: designating a central, publically accountable authority, allocating adequate resources to the licensing authority and ensuring personnel are sufficiently trained to meet the task of issuing licenses. Additionally important are mechanisms of transparency and oversight by parliamentary or other democratic oversight bodies.

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

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

In Belgium, the 1990 Law on Private Security Services[1] was amended and simplified in 2013. It now stipulates that private security companies which operate in Belgium must be authorised by the interior minister, after consultation with the security of state department and the Justice Minister, or the King's prosecutor local to the place of the company's establishment.[2] Companies can only gain a license once authorisation has been granted. It is unclear whether the law has extraterritorial applicability as it only explicitly refers to companies operating within Belgian territory. However, according to Chapter 2, Article 3, Clause 2 of the Law on Maritime Piracy, maritime security companies providing armed guards to ships are to be authorised and regulated by the Law on Private Security Services 1990, which provides an example of the extraterritorial application of this law.[3]

Box 5: PMSCs and the United States

Although contracting of PMSCs began to a modest extent under President Clinton during the Kosovo war, the conflicts in Iraq and Afghanistan created a situation where the industry expanded significantly.[4] Between 2003 and 2007, 85 billion USD was awarded in US contracts and 70 percent of those awards were for contracts performed in Iraq itself.[5] During this time, the DoD awarded the majority of contracts, totalling 76 billion USD, while USAID and DoS granted 5 billion USD and 4 billion USD respectively, over the same period.[6] When the US acts as a contracting state, PMSCs can contract directly with the Defense Department's Foreign Military Sales Programme which does not require any licensing. Instead, the Department of Defense serves as a liaison, arranging procurement, logistics, and delivery, often offering product support and training to the relevant foreign government which in turn reimburses the Pentagon for its payments to the private contractor.[7] In theatres of armed conflict, Department of Defense contracting is guided by Pentagon officials under the Logistics Civil Augmentation Program (LOGCAP) as the primary authority over policy for contracting. The State Department and the Bureau of Administration, Office of Logistics Management, Office of Acquisitions Management (A/LM/AQM) regulate Worldwide Protective Services (WPS) contracting for US diplomatic missions in high threat areas. PMSC as well as non-military/security contracting is subject to the same guidelines under the Federal Acquisition Regulation System (FARS). Besides being a client for services, the US is also a Home State for private security companies. As of September 2013, sixty-four companies signatory to the International Code of Conduct for Private Security Providers (ICoC) are headquartered or based in the US; meanwhile, thirteen US companies are members of the International Code of Conduct for Private Security Providers' Association (ICoCA), the ICoC's oversight mechanism launched in September 2013.[8] With respect to the US as a home state, the Office of Defence Controls issues licenses. Regulation, authorisation procedures, contracting protocol and legal grievance resolution avenues are undoubtedly complex due to the structure of the legislative and judicial branches of the US government and because of the demands of US military and foreign policy.

Sierra Leone's authorisation procedure for PMSCs[9] is quite detailed and is laid out in subsection 3 to 7 of the National Security and Central Intelligence Act of 2002 (NSCIA) and in a set of Standard Operating Procedures. Among the documents requested from companies seeking authorisation are: a business license, a personnel file[10] on every security officer with their designations[11] proof of financial capacity,[12] income tax clearance as well as details of all arms and ammunition.[13] After receiving the application, "the Office on National Security (ONS)[14] then has sixty days to make a determination."[15] In cases of refusal, the ONS has to issue a written statement to the applicant laying out the reasons for its decision. The applicant then has the right to appeal.

Interestingly, Chile requires authorisation to act as a private security company, as well as to employ private security services. While some locations, such as banks, ports, and airports are required to employ security, all other hiring or uses of private security must receive permission from the Ministry of the Interior. An authorisation to provide private security services requires a license obtained through the Carabineros (the state police). Maintenance of the authorisation to provide security is dependent on ensuring that the individuals operating as security guards are up to date on all relevant training. The Carabineros routinely audit training and are responsible for establishing training requirements, courses, and certification.[16]

Regarding the licensing of services associated with defence goods, the Montreux Document is applicable to business entities that conduct *inter alia* the maintenance and operation of weapons systems. The Document's good practices serve as a helpful tool for oversight of services associated with such products. Canada's Exports and Imports Permits Act (EIPA), for example, pertains to both exported goods and intended recipients. Provisions under this regime cover a range of arms, including dual-use goods and technologies, which may be relevant to PMSCs. Requirements exist for individual export contracts for defence goods to be vetted by government departments. Although outright export controls are uncommon (currently only the Democratic People's Republic of Korea and Belarus are on the list),[17] the EIPA allows the Governor in council to establish export control lists. In deciding whether to issue a permit, the Minister will consider whether the goods or

technology specified in an application for a permit may be used for a purpose prejudicial to "peace, security or stability in any region of the world or within any country."[18] The Controlled Goods Registration Program (under the EIPA) is mandatory for anyone in a position to examine, possess or transfer controlled goods in Canada[19] and the Special Economic Measures Act can be used to restrict the export of goods to designated foreign states and also to limit a range of other activities including commercial dealings with those states and/or nationals who do not ordinarily reside in Canada.[20]

With regard to companies providing maritime security, regulations here also contain a number of good practices relevant to the discussion of licensing and authorisations. In Norway, for example, Maritime Private Security providers are governed by the Regulation of 22 June 2004 No. 972 (as amended in 2011). Shipping companies must receive authorisation from the Norwegian Maritime Directorate, which retains the authority to deny PMSCs the right to operate on Norwegian flagged ships. The company must demonstrate "satisfactory procedures of training of personnel, procurement, use, maintenance, storage and transportation of equipment including firearms and ammunition, that guards hold the necessary qualifications and have completed necessary training, including firearms training, for the assignment in question; and ... can submit a recently issued certificate of good conduct..."[21]

Designating a central authority for licenses, contracting and authorisations

The Montreux Document notes that states should designate a central authority competent for granting authorisations. The majority of endorsing states have identified either the ministry of interior or the police force as the competent authority in this regard. An example of the former type is Afghanistan where "risk management companies" are required to obtain licenses through the Ministry of Interior Affairs.[22] Similarly, in Costa Rica, the Director of the Private Security Service of the Ministry of Public Safety receives requests for authorisation to which it then has 30

Box 6: PMSC Regulation in Afghanistan

Due to the high numbers of private contractors following the 2004 war, Afghanistan is considered a territorial state for PMSCs under the Montreux Document. In 2010, President Karzai issued Presidential Decree 62, ordering the disbandment of PMSCs in Afghanistan and the transfer of security services to the newly created Afghan Public Protection Force (APPF), a state-owned enterprise under the oversight of the High Council and chaired by the Ministry of Interior Affairs.[24] However, under Decree 62, a PMSC can disband, relicense and establish a new legal corporate entity as a Risk Management Company (RMC) which can perform development-related security work in an advisory, training, or mentoring capacity, either for the APPF or clients. RMCs no longer maintain a force of guards or weapons.[25] "RMCs are not authorised to perform security services or to hire employees to perform such services."[26] Afghanistan requires Risk Management Companies to obtain licenses through the Ministry of Interior Affairs before they are able to operate. Licenses are not granted to RMCs who may become involved in more active security services; authorisation is only granted to RMCs who perform the above training and planning-related services. Services that RMCs may perform include: threat and risk assessment, audit of security operations, emergency response procedures, project management, security plan development, and security contract assessment.[27]

The APPF is currently at an early stage of development and significant resources and expertise need to be dedicated to fight corruption, increase efficiency, and successfully transfer the provision of security to the state. In March 2012, APPF deputy ministers signed the first security service contracts with the International Relief and Development (IRD), a non-profit development organisation.[28] NATO Training Mission – Afghanistan's APPF Advisory Group has been providing advice and capacity building to the APPF to execute the transition from PMSCs. However, a recent report by the Special Inspector General for Afghanistan Reconstruction (SIGAR) voiced serious concerns about the state of transition and the inability of the APPF and RMCs to fill the security vacuum left by the disbandment of PMSCS.[29] The report additionally expressed grave misgivings regarding the APPF's cost effectiveness and adherence to Afghan regulations by RMCs. Undoubtedly, the APPF and the Afghan government require a great deal of resources to ensure this transition.

days to respond. During this time, the Department verifies the accuracy of the documents submitted, performs inspections on any PMSC facilities, and conducts an inventory of weapons, ammunition, and equipment.[23]

Norway provides an example of the latter case, designating the Norwegian Police as the authorising authority for PMSCs. Here, the police are required to review and audit companies, as well as to vet employees (*inter alia* for evidence of past criminal conduct).[30] This is also the approach taken in Chile where the Carabineros (National Police) approve the use of private security, license private security entities, and ensure that all regulations are upheld.[31]

Angola combines these two approaches by designating the Ministry of Interior as the relevant central authority for the granting of authorisations.[32] However, the General Commander of the National Police has a complementary role in deciding upon approvals and is ultimately responsible for monitoring PMSC activities.

The United Kingdom has taken a somewhat different approach by establishing the Security Industry Authority, a corporate body independent of the state with responsibility for both licensing and approvals. The Secretary of State, however, retains control of licensing and registration where it relates to the export of goods, transfer of technology and the provision of technical assistance.[33]

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

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

An example of this latter practice is found in Ecuador where the legal representative of a company is responsible for the selection of personnel working under him or her.[34] In addition, companies may not register with the same name as state institutions[35] and the articles of private security companies must be enrolled in a Registry.[36]

In order for such activities to take place, it is essential that adequate resources are provided to any central authority with the power to authorise, license, select or contract PMSCs and that, in addition, authorisation procedures are transparent and properly managed. Good practice in this latter regard is found in Canada, where the Treasury Board Contracting Policy relates to both contracting and related issues of financial accountability. The Policy states that: “all departments and agencies awarding contracts and/or amendments are required to submit an annual report to the Treasury Board Secretariat on all contracting activities.”[37] The Secretariat requires departments to disclose all contracts of more than 10,000 CAD; although, in practice, much of this information does not become public.[38] In the US, the Government Accountability Office has similar disclosure requirements for any amounts over 50 million USD.[39] However, tendering of military and security service contracts is only regulated under the general policy of Government Contracts Regulations, which does not take into account the unique status and position of PMSCs.

Relating to the management of the authorisation system, South African law goes into some detail regarding procedures for appointing the directors and staff of such an agency, stating that: “The Council [for the Authority] must appoint a suitable qualified and experienced person as the director of the Authority, as well as three deputy directors, on such conditions and terms as may be determined by the Council.”[40] The Act goes on to clarify procedures for ensuring accountability to the executive and parliament, noting that: “The Council is accountable to the Minister [for Safety and Security] for the performance of its functions and must: (b) as soon as may be reasonably practicable [...] supply the Minister with a copy of (i) the annual report on the activities of the Authority and the Council”[41] further that “ The

Committee must maintain a register of any— (a) authorisation issued by the Committee" and "must submit quarterly reports to the National Executive and Parliament with regard to the register."[42]

Unfortunately, it appears that little has been done to coordinate or share good practices relating to authorisation systems. The EU has taken some measures in this regard through common market rules relating to the harmonisation of domestic regulation on private policing. In addition, the EU Code of Conduct on Armaments Exports (drafted in 1998) has produced greater transparency and encouraged increasing harmonization among national armed services as well as with regard to arms exports legislation. Finally, some Common Foreign and Security Policy (CFSP) Joint Actions and Common Positions have been used to restrict the supply of some kinds of military assistance as well as goods and to control the export of private military services to certain destinations.[43]

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

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

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

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

The Montreux Document notes that contracting states should not hire PMSCs based solely on competitive pricing and technical ability; home states should only give licenses to companies that meet established regulations and respect national and international laws; and territorial states should only authorise entry to companies that meet national regulations and respect the law. PMSCs are unique economic actors; the industry

has the potential to significantly affect the human rights of local populations. PMSC contracts should thus be conditional on a good record of past conduct, high levels of training, effective internal company policies and other considerations. This section describes the ways that states have sought to include criteria and terms in authorizations, contracts and licenses while highlighting the widely observed need for standards that focus on human rights.

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

Past conduct

There are several ways in which states can ensure that PMSC personnel do not have a record of misconduct. On the subject of background checks, Angolan law provides us with a fairly typical list of criteria, including age, citizenship, physical health, mental health, and lack of a criminal record or ongoing criminal investigation. The law adds that "general preconditions to obtain authorisation from the Commander General of the National Police include… accomplished military service and … lack of criminal record.[44] Furthermore, the "requirement of staff having to be of Angolan nationality implies a strong constraint for foreign PSCs, de facto restricting them to operate in the country."[45]

Likewise, in Sierra Leone, the Standard Operating Procedure (SOP) requires applicants to undergo screening by the Special Branch (SB) or the Criminal Investigations Department (CID) prior to being employed.[46] Furthermore, PMSCs are asked to name a guarantor to "confirm that they know and trust the person applying for the job."[47] However, whether PMSCs screen employees themselves is rather unclear. Some observers note that companies screen applicants in this way but mention that the records data are not reliable, due to limited administrative capacity on the part of records-keeping bodies. Furthermore, no central records are kept about previously employed guards and security companies are not obliged to report to the police on employees dismissed due to misconduct.[48]

A similar procedure is in place in Afghanistan, where authorisation is only given to RMCs whose director, employees and operations managers have not been suspected, accused or convicted of a misdemeanour or felony.[49] The "Procedure for Regulating Activities of Risk Management Companies" states that the criminal background of the candidates should be investigated.[50] Furthermore, a national RMC's "staff must not be suspected of or accused of human rights violations as confirmed by the Afghanistan Independent Human Rights Commission."[51]

Likewise, in Chile, all PMSC personnel are vetted by the Carabineros. This vetting seeks to ensure, in part, that individuals with criminal records are disqualified from providing security services or

Box 7: German regulation of PMSCs[55]

In Germany, there is no specific legislation concerning the criteria and terms of license or contract for activities of PMSCs abroad. With respect to legal obligations between German non-state clients and PMSCs, some security service contracts include obligations of conduct as well as obligations of results.[56] When the German government outsources security services, "companies are under close scrutiny and there is even effective political control by the government."[57] German PSC contracts with the Armed Forces are regulated under The Law on the Application of Direct Force and on the Use of Special Powers by German and Allied Armed Forces and Civil Security Guards. However, the extent to which the German administration looks into the past conduct and background of of PMSCs and their personnel is unclear. Instead, general rules of export controls apply to PMSCs exporting their services abroad. German companies indeed operate in conflict areas abroad[58] where they primarily provide logistical support and protection services for persons and buildings.[59] According to German constitutional law, the German government has clarified that private companies cannot perform governmental activities in crisis areas abroad.[60] Germany's constitutional framework requires federal distribution of administrative powers; each *land* or province is independent in deciding which authority handles licenses.

engaging in activities related to the industry.[52] The law requires that Police Prefectures maintain a full record on each of the private security companies and personnel within their jurisdiction and, in addition, individual companies must maintain records of all incidents and perform performance evaluations.[53] Furthermore, any request for authorisation to use private security must include an attempt to prove: the "civic suitability, moral and professional character of the petitioner or of the partners or directors" of the requesting body.[54]

Financial and economic capacity

Many countries require PMSCs to have a minimum registered capitalisation,[61] present bank guarantees, submit bonds, or show proof of insurance. For instance, in Norway, financial statements and insurance coverage are required documentation for the authorisation of a PMSC. The Norwegian Maritime Directorate recommends that IMO guidelines be followed in this regard, but permits exceptions if some requirements are unable to be fulfilled. All PMSCs are, nevertheless, required to hold liability insurance.[62] In Denmark, authorisation can only be granted if the individual or company has not sought or been declared bankrupt or has significant public debt.[63] Firms in Iraq meanwhile, "must submit a minimum refundable bond of 25,000 USD[64] [as well as] evidence that they have sufficient public liability insurance to cover possible claims against them for a reasonable amount to be advised and published by the MOI."[65]

Personnel and property records

In Afghanistan, to receive a license, RMCs must "have a charter containing goals, structure and scope of activity of the company. Foreign staff shall have work permits and valid work visas to operate in Afghanistan."[66] PMSC's in Chile, meanwhile, must maintain records of personnel and weapons. These records include the use of firearms, and other incidents, as well as evidence of certifications.[67]

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

> a list with the names and identity numbers of all security officers and other employees of the security service provider...
>
> the wage register, payroll, pay-slips or other similar documentation in respect of such security officers, officials and employees;
>
> time-sheets and attendance registers reflecting the hours of work of such security officers, officials and employees;
>
> Posting sheets indicating the places where such security officers have been or are utilised in connection with a security service, the nature of such service, whether the security officers are in possession of any firearm or other weapon or have been provided with any firearm or other weapon by anyone and any legal authorisation regarding such a firearm;
>
> Documentation indicating the level of security training of such security officers and officials; personnel files of such security officers, officials and employees; [...][68]

Training

In Afghanistan, any Afghan or foreign citizen employed by a PMSC, must have "a graduation certificate in basic military training from a military training school or a security training certificate from a company licensed to conduct security related training."[69] "RMCs must employ personnel already professionally trained and qualified to deliver security advisory services or provide them with full and proficient training prior to their employment. As a principle of corporate responsibility, it is also recommended that RMCs provide periodic refresher training which in any case shall be mandatory for all armed personnel."[70]

South Africa's domestic Code of Conduct for Security Service providers, launched in 2003 by the Minister for Safety and Security, outlines different benchmarks for providing adequate training.[71] The Code requires that "(10) A security service provider may not - (a) use or make any person available for the rendering of a security service, whether directly or indirectly, unless such a person - (ii)

has successfully completed the security training required in of law in respect of the rendering of the relevant security service;"[72]

> (2) A security service provider must, before employing any person as a security officer, take all reasonable steps to verify the registration status as security service provider, level of training, qualifications and all other relevant facts concerning such a person."[73]
>
> "(7) A security service provider must, at his or her own cost and as often as it is reasonable and necessary, but at least once a year, provide training or cause such training to be provided, to all the security officers in his or her employ to enable them to have a sufficient understanding of the essence of the applicable legal provisions regarding the regulation of the private security industry and the principles contained in this Code.[74]

Lawful acquisition and use of equipment, in particular weapons

Many states allow their PMSCs to be armed. The Montreux Document urges that prior to granting a license, authorisation or contract, states ensure that the private company has lawfully acquired its weapons and complied with all national regulations. For instance in Afghanistan, PMSCs are forbidden to carry heavy arms; only small weapons necessary for self defence are allowed. "Licenses are separately issued for each weapon or non-tactical armoured vehicle and shall be valid for one year. After one year, the license can be renewed by paying the appropriate fee. Required weapons and ammunition must be procured through a company or individual with the proper licenses to import, export, and sell weapons or they may be provided by the Ministry of Interior in accordance with the Law on Firearms, Weapons, Ammunitions and Explosives."[75]

Of course, every state has national laws that pertain to the private possession of weapons. For instance, in Germany, the right to carry a weapon is regulated by the German Weapons Act,[76] which requires persons to obtain a firearms certificate in order to carry arms in Germany. Since the 1st of April 2003, certificates are also required for: arms used as warning devices or alarms; to fire non-lethal incapacitants; and signalling, all of which were previously exempt.[77] However, the Montreux Document urges that weapons laws are enacted specifically for PMSCs who may use their weapons in the line of duty. In Chile, the relevant law covers tasers and mace and specifies that weapons are limited to on duty use. Authorisation to use heavy weapons may be provided at the discretion of the Carabineros.[78]

Interestingly, Belgian law (in Chapter 3, Article 5, Clause 4 of the Law on Private Security Services) states that anyone employed in a private security company cannot also work as a private manufacturer or dealer of weapons or ammunition, or any other activity which, may constitute a danger to public order or the internal/external security of the state of Belgium.[79]

Internal organisation, regulation and accountability

In addition to reporting on their performance and activities to the RMC office quarterly,[80] the officers, directors, and employees of PMSCs in Afghanistan may not "participate in political activities, sponsor political parties and candidates for public office, use funds for religious activities and train at mosques and madrassas and recruit serving officers, non-commissioned officers, soldiers, and other active officials of the Ministry of Defence, Ministry of Interior, National Directorate of Security and other state departments."[81]

In Norway, firms are required to notify the licensing authority of changes to the company's board or partners. Companies are also required to maintain records and to provide information on operations to the authorities.[82] Additionally, for maritime security providers, regulations require that companies notify Kripos (the criminal investigative service) of suspected criminal offenses conducted on board ship.[83]

Welfare of personnel

Not only does IHL and human rights law protect personnel of PMSC companies if they are deployed

as civilians in situations of armed conflict but the Montreux Document urges states not to grant licenses, authorisations or contracts to PMSCs that do not make efforts to protect their personnel. This is both expressed in terms of physical safety as well as occupational welfare. Various states have developed rules that reflect this concern. In China, for example, the law states that "security practitioner units shall safeguard the legitimate rights and interests of the social insurance, labour and employment, labour protection, wages and benefits, education and training of security guards."[84] Similarly, Costa Rican law states that private security companies should, in the pursuit of their functions, protect civil liberties and the dignity of human rights (including of PMSC personnel themselves). If companies are found to be acting against the civil liberties and human rights, they can have their license revoked.[85]

Rules and limitations on the use of force and firearms

When it comes to the regulation of force and firearms, the Montreux Document suggests that states formulate clear laws and enforce their compliance accordingly. Many states have laws that restrict the use of force to self-defence. However, these laws should be clearly articulated with accompanying checks and balances. For instance in Italy, domestic private security guards can only use force for self-defence or the defence of third persons and any use of force needs to be immediately reported to the competent authorities.[86]

In the run-up to the 2009 adoption of amendments to regulations governing the use of force, the Norwegian Bar Association provided a number of recommendations, including relating to concerns over mission creep into customary police roles and the fact that provisions regarding the use of force were inadequately defined. Indeed, the Norwegian Bar Association has expressed concern that the authorisation to use force has been expanded through judicial precedent to equal that of police.[87] Norway appears to rely heavily on International law and principles of human rights to dictate acceptable behaviour by private security companies[88] and legislation enables Norway to revoke the permission of PMSCs to operate in Norway if supervising authorities become aware of breaches to international or Norwegian law. Though not specifically elucidated, this would appear to preclude direct participation hostilities by Norwegian PMSCs.[89]

Ukraine's law "On Security Activities" contains relatively extensive regulations on the use of force and firearms. However, the law is primarily targeted at the provision of domestic private security and it is unclear to what extent this law applies to private companies based in Ukraine but working abroad, or to companies with which the government contracts externally. Regardless, the law contains sections that may serve as good practices for other states. In particular, the law specifies that in the course of security activity, security personnel have the right to use physical force or equipment, if other measures fail to stop the activity concerned. It is worth noting that the law forbids "using special equipment in areas of high concentration of people, except in cases of self defence." And that any use of force requires "immediate verbal or written notification to immediate supervisor and territorial ministry of internal affairs and in the case of injuries, immediate call for medical assistance."[90]

In Afghanistan, the "use of force by personnel of RMCs, where necessary, shall be limited to self defense or the defense of others in accordance with Afghan penal law. When use of firearms becomes unavoidable any use of force must be proportionate to the threat and fire can only be initiated after serious consideration for the safety of innocent people [bystanders]..."[91]

Rules on the possession of weapons by PMSCs and their personnel

In addition to rules governing the use of firearms, the Montreux Document urges states to introduce regulations governing both the possession and acquisition of weapons. States regulate the right to carry arms in a variety of ways. In Afghanistan "all RMC personnel designated to possess and carry weapons on duty must obtain and at all times carry their identity card and weapon license."[92] Afghanistan's Presidential Decree 62 stipulates

penalties for violating arms possession regulations. Armoured vehicles which were imported illegally by PMSCs for contracts with entities other than Embassies, entities accredited with diplomatic status, or ISAF and coalition forces will be seized by the Government of Afghanistan. "Failure to register arms with the Ministry of Interior prior to August 17, 2010 shall be punishable by confiscation of weapons and fines in accordance with the Law of Firearms, Ammunition and Explosives."[93] Similarly, in Iraq, PMSC employees must have a "weapons card" issued by the Ministry of Interior and all import of weapons must occur through the MOI. PMSCs are required to track all serial numbers of weapons, notify the MOI of any changes in weapons, store weapons securely, ensure employees only carry weapons when on official duty, return them to storage afterwards, and only use weapons specified under CPA Order Number 3 (revised) (amended); privately owned weapons may never be used.[94]

The US 2007 Operational Law Handbook prescribes that PMSCs contracted by the US government to act in environments where they may be required to use force are allowed to carry arms only following explicit approval. The application to carry arms must include a description of: where such contract security personnel will operate; the anticipated threat; any non-military property or non-military personnel the operations are intended to protect; a description of how the movement of contractor personnel will be coordinated; how a contractor will be identified rapidly by the armed forces; a plan of communication for information sharing between US military forces and contractors; and training documentation.[95]

In Belgium, according to the Royal Decree on the Weapons Used by the Companies, Services, Organisations, and Persons to which Applies the 1990 Law on Private Security Services, private security companies operating within Belgium are required to apply for a special license in order to hold or bear arms. This license is granted for an initial period of five years and it can be renewed every five to ten years depending upon the service that the company is offering. The license may also be suspended or revoked in case of contravention of the law.[96]

Similarly, Canada's Firearms Act stipulates that an individual is eligible to hold a licence only if the individual successfully completes the Canadian Firearms Safety Course and passes the relevant tests, as administered by an instructor who is designated by a chief firearms officer.[97] Furthermore,

> (1) A business is eligible to hold a licence authorising a particular activity only if every person who stands in a prescribed relationship to the business is eligible ... to hold a licence authorising that activity or the acquisition of restricted firearms.
>
> (2) A business other than a carrier is eligible to hold a licence only if *(b)* the individuals who stand in a prescribed relationship to the business and who are determined by a chief firearms officer to be the appropriate individuals to satisfy the requirements of section 7 [described above] are eligible to hold a licence under that section.
>
> (3) A business ... is eligible to hold a licence ... only if every employee of the business who, in the course of duties of employment, handles or would handle firearms is the holder of a licence authorising the holder to acquire firearms that are neither prohibited firearms nor restricted firearms.[98]

The Firearms Act also determines the eligibility of a person to hold a license and establishes that the chief firearms officer will take under special consideration whether the applicant has been convicted of a violent offence, has been treated for a mental illness that was associated with violence, or has a history of violent behaviour.[99] Furthermore, according to a 2009 Priv-War report, Canadian "contracts with security providers in Afghanistan contain clauses ... establishing the authority ... to inspect weapons to ensure compliance with Canada's international obligations."[100]

Identification of PMSC personnel and their means of transport

In areas of armed conflict, it is imperative that PMSC personnel remain clearly identifiable. In this regard, the Montreux Document recommends that they

carry clearly visible identification insofar as this is compatible with safety requirements. Their means of transport should also be clearly distinguishable. Good Practices 16 and 45 are meant to ensure that PMSCs are not mistaken for national security personnel or the armed forces of parties to the conflict (although this principle is also relevant to non-conflict situations). In Afghanistan, "RMCs will identify their vehicles, helicopters, airplanes and other modes of transportation with signs or placards with the company name or logo visible as security conditions allow."[101] In Angola, although law enforcement is relatively weak, personnel identification[102] through uniforms is common. Here, the law states that staff must wear a uniform whenever they are exercising their duties.[103]

In situations outside of armed conflict, these good practices are relevant as well. Norwegian PMSC personnel, for example, are required by law to wear a uniform designed in such a way that it cannot be mistaken for that of a member of state security forces. Personnel are also required to carry proof of identity issued by the PMSC and approved by the licensing authority, and are required to present these documents upon request. The Ministry of Justice Working Group has suggested that the identification be worn openly, and include identification numbers.[104]

Recommendation Four: States should base licenses, contracts and authorisations on concrete terms and criteria that have their basis in a strong foundation that prioritises human rights

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

NOTES

1. Belgium; Law on Private Security Services, 10 Apr. 1990, *Moniteur Belge*, 29 May 1990.
2. Axelle Reiter-Korkmaz, "Belgian National Report on Private Military and Security Companies," PRIV-WAR Report-Belgium, National Reports Series 06/09, 18 May 2009, 4.
3. Belgium; Chapter 2, Article 3, Clause 2, Law on Maritime Piracy, 16 January 2013.
4. Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (New York: Cornell University Press 2003), 244.
5. US; US Congressional Budget Office Report, *Contractors' Support of US Operations in Iraq*, August 2008, at 1.
6. Ibid, at 3.
7. Ibid.
8. In terms of Home States, the US has the second highest number of headquartered companies under the ICOC. 209 ICOC companies are headquartered in the U.K.
9. Sierra Leone; Standard Operating Manual for Private Security Companies in Sierra Leone (SOP).
10. Sierra Leone; SOP Chapter 11.0/11.2 Personnel File.
11. Sierra Leone; SOP Chapter 1.2.2/1.j. Regulations by the ONS.
12. Sierra Leone; The National Security and Central Intelligence Act of 2002 (NSCIA), 19(3)(b)
13. Documents that have to be submitted are listed in subsection 3a-d NSCIA and more accurately under chapter 1.2.2/1.a-j SOP. Ammunition is mentioned in subsection 3b NSCIA, although it contradicts the SOP's rule of non-use of firearms.

14. The ONS is a Government agency in Sierra Leone which prepares joint intelligence assessments; acts as a secretariat for national, provincial and district security committees; and provides strategic security advice to the President. The ONS is now evolving into a de facto Cabinet Office with a much wider remit than intelligence assessment and national security coordination. The ONS now aims to provide policy research and coordination to the Government on human security. See Piet Biesheuvel, Tom Hamilton-Baillie and Peter Wilson, "Sierra Leone Security Sector Programme. Output to Purpose Review," April 2007, 6, http://s4rsa.wikispaces.com/file/view/SILSEP_07.doc (accessed 23 November 2012)). See also NSCIA 17.-18. where the functions of the ONS are laid out.
15. Sierra Leone; NSCIA, subsection 4.
16. Chile; Decree No. 1773, (10/10/1994), Decree No. 3.607
17. Canada; Area Control List SOR/81-543, http://laws-lois.justice.gc.ca/eng/regulations/SOR-81-543/FullText.html accessed 14 March 2013.
18. Canada; Export and Import Permits Act (R.S.C., 1985, c. E-19) http://laws-lois.justice.gc.ca/eng/acts/E-19/page-1.html Accessed March 25, 2013. EIPA incorporates the provisions of the W*assenaar Arangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies* www.wassenaar.org
19. Canada; Minister of Justice, Controlled Goods Regulations Program, SOR/2001-32. http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/index-eng.html Accessed 25 March 2013.
20. David Antonyshyn, Jan Grofe and Don Hubert, "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad." PRIV-WAR Report Canada-National Reports Series 03/0, 12 February 2009, 9.
21. Norway; Norwegian Maritime Directorate 2011, July 1; IMO guidelines must also be followed in the selection of a Maritime PMSC. An interpretation of these guidelines and those of the Norwegian Maritime Directorate can be found in the Provisional Guidelines for the Use of Armed Guards on Norwegian Ships, (Norwegian Maritime Directorate 2011)
22. Afghanistan; Article 4, Section 5.A., Ministry of Interior Affairs, Islamic Republic of Afghanistan, "Procedure for Regulating Activities of Risk Management Companies in Afghanistan," Kabul, Afghanistan, 10 January 2012, 4.
23. Costa Rica; Law on Private Security Services 2003, Article 8, Chapter 3.
24. The APPF provides security services for infrastructure, facilities, transportation missions, construction projects, personnel and sites. Embassies and entities with diplomatic status are exempt under the provisions of the Vienna Convention on Diplomatic Relations of 1961 and may continue to contract PSCs for their services.
25. Afghan Public Protection Force, *Frequently Asked Questions*, http://www.appf.gov.af/faq.htm Accessed April 15, 2013.
26. Afghanistan; Article 5, Ministry of Interior Affairs, Islamic Republic of Afghanistan, "Procedure for Regulating Activities of Risk Management Companies in Afghanistan." Kabul, Afghanistan, January 10, 2012, 4.
27. Afghanistan; Article 4, Section 5.A., Ministry of Interior Affairs, Islamic Republic of Afghanistan, "Procedure for Regulating Activities of Risk Management Companies in Afghanistan." Kabul, Afghanistan, January 10, 2012, 4.
28. NATO-ISAF, "Afghan Public Protection Force sings first contracts," ISAF News List, http://www.isaf.nato.int/article/news/afghan-public-protection-force-signs-first-contracts.html Accessed November 2013.
29. *See* Special Inspector General for Afghanistan Reconstruction (SIGAR), Audit 13-15, "Afghanistan Public Protection Force: Concerns Remain and about Force's Capabilities and Costs," July 2013, http://www.sigar.mil/pdf/audits/SIGAR%20Audit%2013-15%20APPF.pdf Accessed November 2013.
30. Norway; Ministry of Justice and Police. A*bout the Law Amending the Law on Security Guard Services.* Working Group, Oslo: Stoltenberg Government, 27 March 2009.
31. Chile; Decree No. 1773, (10/10/1994), Decree No. 3.607.
32. Angola; "Governo explica-se sobre demolições e expropriações de terras," *Voz da America*, 2 May 2006, quoted in Rimli, "Case Study Angola," 53.
33. UK; Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003, no. 2764
34. Ecuador; Surveillance and Private Security Law Number 012/2003, Section 6.
35. Ibid, Article 9.
36. Ibid, Article 10.
37. Canada; Treasury Board Secretariat, paragraph 5.1.2, http://www.tbs-sct.gc.ca/tbs-sct/index-eng.asp Accessed 27 March 2013
38. Ibid. See also Disclosure of Contracts, Online Foreign Affairs and International Trade Canada: http://www.tbs-sct.gc.ca/pd-dp/dc/index-eng.asp , Accessed 27 March 2013.
39. Sarah Percy, *Regulating the Private Security Industry* (New York, Routledge, 2006), 26.
40. South Africa; Private Security Industry Regulation Act (No. 56 of 2001), Section 14.
41. Ibid, Section 10.
42. South Africa; Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006, Section 8.
43. Eugenio Cusumano, "Policy Prospects on the Regulation of PMSCs", in Francesco Francioni and Natalino Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford: Oxford University Press, 2011), 36.
44. Angola: Law on Private Security Companies, 31 July 1992, Art. 10(1)(a-e), http://psm.du.edu/media/documents/national_regulations/countries/africa/angola/angola_law_on_private_security_companies_1992-portuguese.pdf, Accessed 24 October 2013; Rimli, "Case Study Angola," 40.
45. Rimli, "Case Study Angola," 40.
46. Sierra Leone; SOP Chapter 2.1/ii. Codes of Conduct.
47. Ibid, Chapter 11.0/11.3.
48. Rita Abrahamsen and Michael C. Williams, "The Globalisation of Private Security, Country Report: Sierra Leone," Series 1, The Globalisation of Private Security research project, University of Wales, Aberystwyth, October 2004. http://users.aber.ac.uk/rbh/privatesecurity/country%20report-sierra%20leone.pdf (accessed 21 November, 2012), 12.
49. Afghanistan; Ministry of Interior Affairs, Islamic Republic of Afghanistan, "Procedure for Regulating Activities of Risk Management Companies in Afghanistan." Kabul, Afghanistan, 10 January 2012, Article 11, 7.
50. Ibid, Article 14, 8.
51. Ibid, Article 11, 7.
52. Chile; Decree No. 1773, (10/10/1994), Decree No. 3.607.
53. Ibid.
54. Chile; Decree 3.607 Article 6.
55. For additional information see, Elke Krahmann, "Controlling private military companies: The United Kingdom and Germany," International Studies Association, Annual Convention, 2003.
56. Service contracts are addressed by Sections 611-630 of the German Civil Code; Bürgerliches Gesetzbuch (BGB), published on 2 January 2002 (BGBl. I 42, 2909; 2003 I 738), with amendments as of 10 December 2008 (BGBl. I 2399).
57. Evertz, "Regulation of private military, security and surveillance services in Germany," 11.
58. In 2009, German Armed Forces were involved in 12 operations abroad; *See* (http://www.bundeswehr.de/portal/a/bwde/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd443DgoESYGZASH6kTCxoJRUfW99X4_83FT9AP2C3IhyR0dFRQCopHXc/delta/base64xml/L3dJdyEvd0ZNQUFzQUMvNElVRS82X0NfNEFD); Heike Krieger „Der privatisierte Krieg: Private Militärunternehmen in bewaffneten Konflikt" in: Archiv des Völkerrechts, vol. 44 (2006), pp. 159-186 (163).
59. Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, preliminary remark; Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 23.
60. Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 4.
61. For instance, in China, a "Security service company should not

possess less than one million yuan of registered capital."The People Republic of China State Council Order, Security Service Management Ordinance, Article 8, http://www.gov.cn/zwgk/2009-10/19/content_1443395.htm

62. Norway; Norwegian Maritime Directorate. "Povisional Guidelines on the Use of Armed Guards on Board Norwegian Ships." *IGPandI.org*. 2011. http://www.igpandi.org/downloadables/piracy/news/Provisional_Guidelines.pdf (accessed 03 2013); Norwegian Government. *Act 5 January 2001*, *No. 1 Relating to Security Guard Services*. Legislation, Oslo: Norwegian Government, 2001.
63. Denmark; Law on Private Security Companies (Act No 266 of 22 May 1986), Article 3.
64. Iraq; *Memo*. 17, CPA (2004), Sec. 3.1
65. Iraq; Memo. 17, CPA (2004), Sec. 3.3.
66. Afghanistan; "Procedure for Regulating RMCs," Article 10, 6.
67. Chile; D.S. No. 1773, 10 October 1994, Decree No. 3.607.
68. South Africa; Private Security Industry Regulation Act (No. 56 of 2001), Section 34.
69. Afghanistan; "Procedure for Regulating RMCs," Article 14, 8.
70. Ibid, Annex 2, 12.
71. South Africa; Code of Conduct for Security Service Providers, 2003, Section 19,
72. Ibid, Section 9.
73. Ibid.
74. Ibid.
75. Afghanistan; "Procedure for Regulating RMCS," Article 15, 8.
76. Germany; Weapon Law in the Federal Republic of Germany, http://www.oslo.diplo.de/contentblob/2105474/Daten/287205/Vaapen_DownloadDatei.pdf, Accessed 24 October 2013.
77. Ibid.
78. Chile; Law No 17.798, Law No 9.080.
79. Belgium; Law on Private Security Services, 10 April 1990
80. Afghanistan; "Procedure for Regulating RMCs," Article 17, 9.
81. Ibid, Article 18, 9.
82. Norway; Norwegian Government, *Act 5 January 2001, No. 1 Relating to Security Guard Services*, 2001.
83. Norway; Norwegian Maritime Directorate, Regulations of 1 March 2005 No. 235.
84. China; The People Republic of China State Council Order, Security Service Management Ordinance, http://www.gov.cn/zwgk/2009-10/19/content_1443395.htm
85. Costa Rica; Regulation on the Implementation of the 2003 Law on Private Security Services ,2006, Article 5, Chapter 1.
86. Italy; Andrea Atteritano, "Italian Legislation on Private Military and Security Companies", PRIV-WAR Report-Italy, National Report Series 02/2009, January 2009, 11-12.
87. Norway; Norwegian Bar Association, *Work Report- Review of Legislation on Security Guard Services, Legal Review*, Oslo: Norwegian Bar Association, 2008.
88. Norway; Norwegian Ministry of Finance. *Companies Excluded From the Investment Universe*. 1 November 2013. http://www.regjeringen.no/nb/dep/fin/tema/statens_pensjonsfond/ansvarlige-investeringer/selskaper-som-er-utelukket-fra-fondets-i.html?id=447122, Accessed March 2013.
89. Norway, Norwegian Royal Ministry of Foreign Affairs. *Voluntary Principles Implementation Report in 2009- Plenary Report* Government Report, Oslo: Royal Ministry of Foreign Affairs, 2010.
90. Ukraine; Verkhovna Rada, Law of Ukraine "On Security Activities," from 22.03.2012, № 4616-VI. Translation in abstract text from 22 March 2012 , http://zakon2.rada.gov.ua/laws/anot/4616-17, Accessed 10 March 2013: Security personnel may use physical influence in the case of 1: defending themselves or other persons from an attack that poses a threat to life, health or property; 2: avoiding an unlawful attempt to forcefully takeover specialized equipment; 3: the need to detain an offender who illegally entered the guarded object or is carrying out other unlawful acts and offers resistance; 4: neutralizing an animal that poses a threat to the life and health of the security personnel or other persons
91. Afghanistan; "Procedure for Regulating RMCs," Annex 2, 12.
92. Ibid.
93. Afghanistan; Bridging Strategy, 7.
94. Iraq; *Memo*. 17, CPA (2004), Sec. 6.
95. USA; 2007 Operational Law Handbook, Judge Advocate General; Huskey, Sullivan, 17.
96. Belgium; Royal Decree on the Weapons Used by the Companies, Services, Organisms, and Persons to Which Applies the 1990 Law on Private Security Services, 17 Nov. 2006, *Moniteur Belge*, 24 Nov. 2006
97. Canada; Firearms Act (S.C. 1995, c. 39), section 7 (1a): http://laws-lois.justice.gc.ca/eng/acts/F-11.6/ Accessed 28 March 2012.
98. Ibid, Section 9.
99. Ibid, Section 5.
100. Antonyshyn et. al. "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad," 23.
101. Afghanistan, "Procedure for Regulating RMCs," Article 16, 8.
102. Angola; Rimli, "Case Study Angola," 40.
103. Ibid, 42. The Law on Private Security Companies 19/92, Art. 12(1).
104. Norway; Ministry of Justice and Police 2009, 27 March, Norwegian Government 2001.

Section Three: Monitoring and Accountability

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

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

This section presents a snapshot of managerial and administrative monitoring mechanisms that are used by Montreux states to improve oversight of PMSCs as well as the opportunity for companies to respond to allegations and initiate appeals. The section illustrates obligatory record-keeping requirements, as well as the obligations of companies to disclose information. It also addresses the powers of some oversight bodies to compel firms to allow access to documents and company premises when it is necessary for their work. Ultimately, the section brings attention to the overall weak state of procedures for monitoring compliance and affecting sanctions.

Administrative and monitoring mechanisms

The availability of managerial and administrative monitoring mechanisms is a key resource for states' effective oversight of PMSCs. In Belgium, private security companies send a yearly report on their activities to the Interior Minister, who, in turn, drafts a report on the application of the relevant law for the House of Representatives. The Interior Minister also keeps the chamber updated on the progress of the range of measures intended to limit the risks undertaken by private security companies in the exercise of their functions.[1] According to the Law on Maritime Piracy of Belgium, in cases where officers have used firearms or found people suspected of involvement in acts of piracy, or if the ship was attacked by pirates, the operational manager must promptly report the incident to the authorities.[2] For each mission, the operational

manager must keep a logbook of data and facts that is available for checks. Denmark's Law on Security Services permits the police to enter into the premises of a private security company in order to access their books, paper work, and to ensure adequate monitoring of their activities.[3]

In a similar vein, Sweden has established a system which requires PMSCs to submit a report each March on the previous year's activities to the County Administrative Board at which they are registered.[4] The Board then has the right to inspect all documents relating to a PMSC's corporate activities, something which it does at least every two years.[5] If PMSCs fail to provide required information, or prevent access to documents by the Board, they can be subject to fines.[6] If firms are found to be operating without proper authorisation, they can be subject to criminal penalties and up to six months in prison.[7] Portugal has a similar reporting system although, here, PMSCs are required to maintain daily report sheets (as well as annual reports) which must be submitted to the Home Office. As in Sweden, assessments can be made at any time and commonly take place in order to assess the ways in which companies have implemented recommendations relating to changes in internal procedures. When violations are found to have taken place, financial sanctions can be levied[8] and, if security services are found to be operating without proper authorisation, it is punishable with a fine or imprisonment for six months.[9]

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

In Afghanistan, PMSCs that violate regulatory procedures such as hiring non-Afghan personnel without a visa, hiring personnel prior to completion of licensing or possessing unregistered weapons are fined. Similarly in China, security practitioners are fined for violations of the provisions of the security guard training syllabus and are ordered to make corrections within a time limit.[12]

In the US, the Federal Awardee Performance and Integrity Information System (FAPIIS) is a database required by law which contains specific information on the integrity and performance of Federal agency contractors. FAPIIS provides users access to integrity and performance information through the reporting mechanism in the Contractor Performance Assessment Reporting System (CPARS) as well as information regarding suspension and debarment of contracts. However, somewhat problematically this system relies on self-reporting and much of the information

Box 8: The International Code of Conduct for Private Security Providers Association (ICoCA)

The International Code of Conduct for Private Security Service Providers Association (ICoCA) is an Association under Swiss law, which functions as an oversight mechanism for the operations of private security companies which are members of the ICoCA. It will ensure effective implementation of the ICoC through three core functions: the certification and monitoring of private security providers, as well as through the adoption of a complaint process. The Code sets out human rights based principles for the responsible provision of private security services, including rules for the use of force, prohibitions on torture, human trafficking and other human rights abuses, and specific commitments regarding the management and governance of companies, including how they vet personnel and subcontractors, manage weapons and handle grievances internally. Membership in the ICoCA consists of governments, private security companies and civil society organisations. The ICoCA was launched in September 2013 with an elected Board of Directors. The Board, in cooperation with DCAF, is currently developing internal procedures and the procedures for the three core functions. In August 2013, the US DoS announced the incorporation of the ICoC into Worldwide Protective Service contracts.[11]

Box 9: International Standards for PMSCs

ANSI/ASIS PSC. 1-2012 Management System for Quality of Private Security Company Operations is a managerial standards system launched by the American National Standards Institute (ANSI) and ASIS International (ASIS). However, it contains sections that provide for respect of IHL and human rights law, as well as customary international law. For its application under IHL, PCS.1 relies directly on the Montreux Document; moreover, for its human rights standards, it relies on the ICoC.[13]

PSC.1-2012 was recently submitted to the International Organisation for Standardization (ISO) to be considered for adoption as an international standard for PMSCs working in complex environments. An ISO-based approach involves a review of a company's different business processes such as quality, safety, training, financial, management, records, risk, human resources, ethics, and compliance. The review encompasses the existence, promulgation and enforcement of those processes as well as the existence of mechanisms to obtain feedback.[14]

A UK Foreign and Commonwealth Office Written Ministerial Statement of 17 December 2012 indicated the intention to issue a Her Majesty's Government (HMG) publication specifying ASIS PSC.1-2012 as the applicable standard for UK-based PMSCs working in complex environments on land overseas. The statement indicated that companies, independent auditors and the UK Accreditation Service (UKAS) will take further steps to enable auditing standards to begin.

is not available to the public. This has resulted in a system that does not meet the Montreux Document's requirements for transparency.

Monitoring, compliance and appeals relating to PMSC authorisation

Several states impose administrative measures for violations of an authorisation. Among them, Denmark[15] and Costa Rica[16] may revoke an authorisation and withdraw approval for employment in a private security company if an employee has been found guilty of gross or repeated violations of the terms or provisions laid down by law. Where violations are transnational in nature, specific provision for cooperation is rare. However, the US and Iraq provide us with one example. Here, the SOFA "Withdrawal Agreement" makes clear that: "at the request of either Party, the Parties shall assist each other in the investigation of incidents and the collection and exchange of evidence"[17]

In some states, provision is made for PMSCs to appeal against adverse rulings made against them. In Afghanistan, for example, RMC Grievance Resolution Procedures state that, "the RMC may provide documentation in support of an appeal to refute or explain the alleged violations and will have the right to schedule a hearing before the High Council."[18]

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

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

Box 10: UN Initiatives

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination was established in 2005 in reference to the Commission on Human Rights resolution 2005/2. The Working Group has dedicated its efforts to monitoring PMSC activities as well as providing concrete proposals aimed at complementing current standards and filling gaps to ensure the protection of human rights in areas where PMSCs operate. The Working Group relies on country visits and case studies and monitoring of mercenary-related activities and activities of PMSCs, additionally seeking opinions and information from relevant governments, State organs, non-governmental organisations (NGOs) and inter-governmental organisations (IGOs). Most recently, the Working Group is completing a study on the use of private security as well as a project collecting national legislation on PMSCs. Through a harmonious relationship, the Montreux Document and the Working Group perform complementary roles that contribute to the upholding of IHL and international human rights law and the monitoring and promotion of human rights wherever PMSCs operate.

In a separate initiative, the UN Human Rights Council established, in October 2010, "the Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies." The open ended working group is considering among international regulatory frameworks, the possibility of elaborating a legally binding instrument on the regulation, monitoring, accountability and oversight of the activities of PMSCs. This institution works closely with the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination to encourage states to view the development of an internationally binding regulatory framework in a positive light. This is undoubtedly a significant task; the Montreux Document and the ICoCA provide a valuable body of self-regulatory mechanisms to complement efforts aimed at achieving a robust legal initiative.

Challenge Six: Gaps in legal accountability and judicial liability

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

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

Criminal jurisdiction in national legislation over crimes under national and international law committed by PMSCs and their personnel

The Montreux Document strongly urges states to develop effective national mechanisms, including in the form of criminal jurisdiction. In home states, where many companies are based or headquartered, national criminal jurisdiction should be in place for violations committed abroad. For territorial states, national criminal jurisdiction which pertains specifically to PMSC operations is imperative. Establishing national criminal jurisdiction and extraterritorial criminal jurisdiction is possible, as the following examples

demonstrate. In Demark, the Penal Code stipulates that acts committed outside the territory of the Danish State by a Danish national or by a Danish resident shall also be subject to Danish criminal jurisdiction. This jurisdiction pertains to situations where the act was committed outside the territory recognised by international law as belonging to any state, provided the misconduct is punishable with a sentence more severe than short-term detention; or "where the act was committed within the territory of a foreign State, provided that it is also punishable under the law in force in that territory."[19]

Italian courts enjoy extraterritorial jurisdiction over certain types of crimes conducted by Italians abroad. Under articles 7 and 8 of the Italian criminal code, crimes against the Italian state, including mercenary activities and political crimes such as terrorism can be considered to fall under Italian jurisdiction.[20]

Some states require a link to the primary area of jurisdiction. Extraterritorial application of German criminal law, for example, requires a link to Germany and in particular, to German criminal law. Based on the nationality principle, the simplest cases from a jurisdictional perspective are those in which the perpetrator is of German nationality. Thus, a German employee of a PMSC may be liable under German criminal law for criminal offences committed abroad.[21]

Crimes committed abroad by PMSCs and their employees can be tried by Swedish courts under Swedish law as well. There are a number of legal requirements that must be satisfied such as double criminality, Swedish citizenship or Swedish residence.[22] Double criminality means that the crime must be punishable both in the country where it was committed as well as in Sweden. Moreover the crime must, according to Swedish law, render a more severe punishment than a fine. Sexual crimes committed against individuals under the age of 18 years, and genital mutilation, are exempted from the requirement of double criminality.[23]

In the United States, the 2000 Military Extraterritorial Jurisdiction Act's (MEJA) purpose is to extend federal court jurisdiction over civilians overseas that commit criminal offenses where domestic prosecution in that foreign nation is not feasible. MEJA was amended in 2004 because the act failed to cover contractors beyond those working for the DoD; the 2005 Defense Authorisation Act extended jurisdictional coverage of MEJA to employees and contractors of other federal agencies. The primary relevance of MEJA is for those "employed by" or "accompanying" the Armed Forces. "Employed by" is taken to mean civilian personnel while "accompanying" generally means military and civilian personnel dependents. However, MEJA does not create jurisdiction over individuals employed by or accompanying the military who are citizens of the state in which they are operating presumably because these persons are subject to domestic prosecution. MEJA in its original and amended form has been criticized that while granting US courts jurisdiction over extraterritorial acts, it was not accompanied by the necessary grant of resources to enable Department of Justice officials to engage in a meaningful investigation of acts occurring so far from their traditional realm of power.[34]

Corporate criminal responsibility

With respect to PMSCs, the prosecution of a company can be appropriate if the organisational structure makes it difficult to establish the criminal responsibility of a particular individual.[35] States should establish clear rules on corporate liability.[36] As a result, the Montreux Document additionally addresses the need for corporate criminal responsibility and presents pertinent good practices.

Various states have attempted to address the issue of corporate criminal responsibility. In the UK, the 2001 Private Security Industry Act provides for criminal liability of directors and managers of a body corporate.[37] The section sets punishment for offences committed with the consent, connivance, or attributable to neglect on the part of a director, manager, secretary, or similar officers acting in such a capacity.[38]

Canadian criminal law is applicable to both natural and legal persons. The criminal code specifically employs the terms "everyone," "person," and "owner"

Box 11: PMSC Regulation in Iraq

The Iraq war and subsequent reconstruction and stabilization efforts by the US and coalition forces have resulted in a situation where the US has the largest foreign military presence in Iraq and remains the most important outside actor in the private security landscape of the country.[24] A significant number of PMSCs in Iraq are also based in the United Kingdom.[25] PMSCs have been contracted to provide a broad range of military and security services including convoy security, operational coordination, intelligence analysis, risk management, and escort protection. The US Department of Defense (DoD) is one of the main contractors of PMSCs in Iraq but as the US government withdraws from Iraq militarily, the need for private security by agencies like the State Department or US Agency for International Development (USAID) increases.

Recently, the proportion of Iraqi PMSCs has increased significantly. At the invitation of the Government of Iraq, the UN Working Group on the use of mercenaries visited Iraq in 2011[26] and reported that 117 PMSCs were licensed in accordance with the procedure established in 2004 by the Coalition Provisional Authority Memorandum 17 to operate in Iraq.[27] Of these, eighty-nine companies were Iraqi and twenty-eight were foreign-based.[28] The UN Working Group was informed by the Ministry of Interior that of over 35 000 PMSC personnel in Iraq, 23,160 were Iraqis and 12,672 were foreign nationals.[29] The government of Iraq also contracted PMSCs to provide security services. One PMSC held a large contract with the Iraqi ministry of transport to provide security at Baghdad International Airport. From 2004–2011, the Private Security Companies Association of Iraq (PSCAI)[30] operated as a trade-group organisation coordinating mutual interests of the private security industry in Iraq. More than forty companies, both Iraqi and foreign, were members of the association. It required members to be licensed from the Iraqi Ministry of Interior or the Ministry of Interior of the Kurdistan Regional Government or both. CPA memorandum 17 is the legislation upon which licensing was developed even following the new 2009 Status of Forces Agreement. After the dissolution of the Provisional Government, the CPA memorandum 17 was supplemented by instructions issued by the Iraqi Ministry of Interior.[31]

As a result of reports of violations of human rights by PMSC personnel in events like the Nisour Square incident and the physical abuses of prisoners at Abu Ghraib,[32] a key point of concern for the international community has been the question of jurisdiction and immunity. On 1 January 2009, the Iraq and United States Governments negotiated a bilateral agreement which includes a provision removing the immunity of some private foreign security contractors in Iraq.[33] The new Status of Forces agreement (SOFA) creates two distinct categories of personnel in Iraq: the United States forces (including the civilian component) and American contractors and their employees. Iraq maintains exclusive jurisdiction over contractors and their employees but shares jurisdiction with the US over forces, including the civilian component. However, the term “United States Forces” refers only to contractors and their employees contracted by the US forces under the DoD and therefore excludes any other contractors operating under US departments and agencies not subject to the SOFA.

to describe those liable for criminal offenses. Corporations are therefore included within the definition of person within the Criminal Code of Canada and can be liable for criminal misconduct.[39] Corporate offences that require the prosecution to prove fault other than negligence, use the “identity doctrine” to determine if such a fault occurred. This doctrine merges the individuals that were in charge (for example, board members, managing directors, the executive authority of the corporation) with the conduct attributed to the corporation.[40]

Furthermore, a number of states exert jurisdiction over certain crimes based on nationality or other criteria. Canada, for example, exerts jurisdiction over certain crimes (such as crimes against humanity, war crimes, torture and other international crimes) when either the victim or the perpetrator are Canadian (or when the perpetrator, regardless of their nationality, is on Canadian territory).[41] Moreover, the Code of Service Discipline applies to contractors accompanying Canadian Forces and therefore, property damage, theft, and bodily offences are liable to punishment.[42]

Georgia’s Criminal Code also provides rules for corporate criminal responsibility. Chapter XVIII states that a “legal entity shall be held criminally responsible for the crime prescribed by the Code, which is perpetrated by a responsible person of a legal entity on behalf of a legal entity or through the use of legal entity or/and for the benefit of legal entity, whether an identity of a responsible

person is established or not." Furthermore, exemption from criminal responsibility of a responsible person does not automatically lead to an exemption from criminal responsibility of a legal entity. The criminal responsibility of legal entity does not exclude the criminal responsibility of an individual for the same crime.

Similarly, criminal jurisdiction is extended to all Qatari nationals abroad under the state penal code. If a Qatari citizen commits a crime outside of the country and then returns, he/she may be prosecuted under Qatar law. Otherwise, foreign nationals may be exempt from prosecution under Qatari law unless they have committed a crime abroad in relation to drugs, piracy, terrorism, or acts against the security of the state of Qatar.[43]

Regardless of these positive examples, corporate criminal responsibility is not a universally available statue. For instance, despite its extensive PMSC industry, the US has no provisions criminalizing the extraterritorial conduct of PMSCs as organizations.

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

In addition to criminal jurisdiction, the Montreux Document urges that civil liability mechanisms be available to victims of IHL and human rights violations by PMSCs. In the UK, tort law is the most likely form of legal accountability and the possibility of extraterritorial application to armed forces was demonstrated in the case of *Bici v Ministry of Defence*. In this case, the High Court ruled that British soldiers in Kosovo had been negligent in killing two Kosovar Albanians in Pristina.[44] The court found that soldiers taking part in United Nations peacekeeping operations in Kosovo owed a duty to prevent personal injury to the public and had breached that duty by deliberately firing on a vehicle full of people when they had no justification in law for doing so.[45] The High Court examined possible common law immunity granted to members of armed forces operating in combat situations. There were doubts as to whether there was an existing conflict at the time of the incident in 1999; however, the common law doctrine did not grant full immunity and required the payment of damages. This case is valuable because it demonstrates that an extension of this liability might be given to PMSCs if "forces for the crown" read "PMCs acting on behalf of the Crown."[46]

With respect to civil liability of PMSCs, US courts continually wrestle with the question of whether PMSC contractors are incorporated into the military to an extent that would be sufficient to grant them immunities under the chain of command and whether they act on discretionary government policy which additionally offers immunities from prosecution. The Federal Tort Claims Act (FTCA) allows persons to bring suits against the government for harm caused by negligent or wrongful conduct of government employees. Although not directly applicable to contractors, it has been used to bring contractors before federal courts. However, the FTCA excepts any claims based on the performance or failure of discretionary actions which are taken to mean government policy. Case law has developed in a way whereby the discretionary policy defense is often available to PMSCs.[47] Further complicating civil mechanisms is the US's *Political Question Doctrine*, a judicially created doctrine that keeps the separation of powers among the three branches of government and restricts federal courts from overstepping their constitutionally defined duties and roles. Under this doctrine, judges may decide that the court is an inappropriate forum to hear a particular case and that the case should be determined by the political branch. "Foreign relations" and "military affairs" are deemed to be powers of the executive; in civil cases involving these issues, the political question is almost always raised by the defendant to have the case dismissed for lack of jurisdiction. In recent cases involving PMSCs and contractor personnel who are accompanying the US military in Iraq or Afghanistan, the political doctrine is raised by PMSCs as a way of avoiding liability.[48] Much of this is based on interpretations of legal precedent and there is thus little in the way of stable legal avenues for victims of misconduct by PMSCs.

Legal status and jurisdiction in status of forces and similar agreements

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

The question of which accountability forum has jurisdiction is less important than the fact that gaps are closed and jurisdictional questions are clearly resolved. This has been the case in Afghanistan, for example, where the International Security Assistance Force (ISAF) (created in 2001, following the Bonn Conference) was intended to assist the Afghan Transitional Authority government to secure the reconstruction of Afghanistan. In 2003, NATO assumed leadership of the ISAF and became responsible for command and coordination. The ISAF has a SOFA with the Afghan government "in the form of an annex to a *Military Technical Agreement*[49] entitled "Arrangements Regarding the Status of the International Security Assistance Force." The agreement provides that all ISAF and supporting personnel are subject to the exclusive jurisdiction of their respective national elements for criminal or disciplinary matters, and that such personnel are immune from arrest or detention by Afghan authorities and may not be turned over to any international tribunal or any other entity or state without the express consent of the contributing nation."[50]

Recommendation Six: Gaps in legal accountability and judicial liability should be closed

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

NOTES

1. Belgium; Law on Private Security Services, Article 14, 10 April 1990, *Moniteur Belge*, 29 May 1990.
2. Belgium; Law on Maritime Piracy, Article 13.31.
3. Denmark; Law on Private Security Companies (Act No 266 of 22 May 1986), Article 19.
4. Sweden; Security Company Act (2009:311)
5. Sweden; Security Company Act (*1989:148*).
6. Sweden; Security Company Act (*1989:148*).
7. Sweden; Security Company Act (1974:191), sec. 14.
8. Sweden; Security Company Act (1989:148).
9. Sweden; Security Company Act (1974:191), sec. 14.
10. Costa Rica; Regulation on the Implementation of the 2003 Law on Private Security Services 2006, Article 19.
11. US Department of State, http://www.state.gov/r/pa/prs/ps/2013/08/213212.htm, Accessed November 2013.
12. China; The People Republic of China State Council Order, Art 43, 47. Security Service Management Ordinance, http://www.gov.cn/zwgk/2009-10/19/content_1443395.htm, Accessed 24 October 2013.
13. *See* "0. Introduction;" "0.2 Human Rights Protection;" "2. Normative References," ANSI/ASIS PSC.1-2012, ASIS International, Management System for Quality of Private Security Company Operations-Requirements with Guidance. See also the International Code of Conduct for Private Security Providers Association, http://www.icoca.ch/
14. Erik S. Quist, "The ICOC Contemplates PSC Certification, "*Journal of International Peace Operations* 6, no. 4 (January-February 2011), 11-12.
15. Denmark; Law on Private Security Companies (Act No 266 of 22 May 1986), Article 14.
16. Costa Rica; Regulation on the Implementation of the 2003 Law on Private Security Services 2006, Section 2, Chapter 2.
17. Iraq; SOFA, "Withdrawal Agreement" US-Iraq, (2008), Art. 12.
18. Afghanistan; "Procedure for Regulating RMCs," Chapter Four, 10.
19. Denmark; Denmark Penal Code, Section7, Consolidation Act No. 1068 of 06/11/2008.
20. Italy; Codice Penale della Repubblica Italiana, Artt. 7-9.
21. Evertz, "Regulation of private military, security and surveillance services in Germany," 9.
22. Sweden; Penal Code (1962:700), Chapter 2, Section 2.
23. Ibid.
24. Antenor Hallo de Wolf, "Modern Condottieri in Iraq: Privatizing War from the Perspective of International and Human Rights Law," *Indiana Journal of Global Legal Studies* 13, no. 2 (Summer 2006): 333.
25. E. Speers Mears, "Security Privatization in the Middle East," GCST Working Papers series, no. 10, November 2010, 6.
26. Report of the UN Working group on the use of mercenaries to the Human Rights Council, "Mission to Iraq," A/HRC/18/32/Add.4, 12 August 2011.
27. Ibid, 6.
28. Ibid.
29. Ibid, 7
30. *See* Private Security Companies Association of Iraq (PSCAI), http://www.pscai.org/pscreg.html, Accessed October 24, 2013.
31. Iraq; Private Security Companies Registration Regulations According to the Memorandum 17 for 2004 And the MOI Instructions" July 2013, http://psm.du.edu/media/documents/national_regulations/countries/middle_east_and_north_africa/iraq/iraq_private_security_companies_registration_regulation_based_on_cpa_memo_17_2004-english.pdf Accessed 24 October 2013;
32. *See* Antoni M. Taguba, Department of the Army, Article 16-6 *Investigation of the 800th Military Police Brigade* (2004); *Testimony on Allegations of Mistreatment of Iraqi Prisoners Before the Senate Committee of the Armed Services*, 108th Congress (2004), statement of Lance Smith, Lt, General, Central Command Deputy Commander US Army ; Inspector General, Department of the Army, *Detainee Operations Inspection* 33 (July 21, 2004).
33. Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organisation of Their Activities during Their Temporary Presence in Iraq, dated and signed 17 November 2008.
34. Huskey and Sullivan, 21.
35. Chia Lehnardt, "Individual Liability of Private Military Personnel under International Criminal Law," Academy of European Law, PRIV-WAR Project EUI Working Paper AEL 2009/4, 15.
36. For a discussion of 16 states' domestic criminal legislation over corporate criminal responsibility, see "Corporate, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law." http://www.fafo.no/liabilities/ See also Tina Garmon, "Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable to the Alien Tort Claims Act, 11 Tulane Journal of International and Comparative Law (2003) 325: 351.
37. UK; Private Security Industry Act 2001, http://www.legislation.gov.uk/ukpga/2001/12/section/23, Accessed 30 July 2013, Section 23.
38. Ibid, Chapter 12..
39. PRIV-WAR, "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad," *PRIV-WAR Report Canada-National Reports Series 03/09*, 12 February 2009, 11.
40. Canada; Limit to this doctrine: The identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him or her; (b) was not totally in fraud of the corporation, and (c) was by design or result partly for the benefit of the company. Fafo and International Peace Academy, Canada, "Survey Questions and Responses, A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions" (2004), 2.
41. Antonyshyn et al. "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad," 13.
42. Canada; Queen's Regulations and Orders for the Canadian Forces, Volume II (Disciplinary), Section 103.1, Article 77. http://www.admfincs.forces.gc.ca/qro-orf/vol-02/chapter-chapitre-103-eng.asp#cha-103-10, Accessed 24 October 2013,
43. Qatar; Law No. 2 of 2004, "The Penal Code," Art. 16-19.
44. Clive Walker and Dave Whyte, "Contracting out War ?: Private Military Companies, Law and Regulation in the United Kingdom," *The International and Comparative Law Quarterly* 54, no. 3 (July 2005), 670.
45. UK; Bici v Ministry of Defence [2004] EWHC (QB). Cf *Mulcahy v Ministry of Defense* [1996] QB 732; *Bell & Others v. Ministry of Defense* [2003] EWHC 1134.
46. Walker and Whyte, "Contracting out War ?: Private Military Companies, Law and Regulation in the United Kingdom," 670.
47. *See:* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (codified at 28 U.S.C. §§ 2671, 2674, 2679 (2006)); Huskey and Sullivan, 34.
48. *Baker v. Carr*, 369 U.S. 186, 210 (1962) (–The nonjusticiability of a political question is primarily a function of the separation of powers); *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008); *McMahon v. Presidential Airways*, 502 F.3d 1331 (11th Cir. 2007); *Carmichael v. Kellogg Brown & Root*, 564 F.Supp.2d 1363 (N.D. Ga. 2008); *Getz v. Boeing Co.*, 2008 WL 2705099 (N.D. Cal. 2008); *Potts v DynCorp Int'l LLC*, 465 F.Supp.2d 1245 (M.D. Ala. 2006); *Smith v. Halliburton*, 2006 WL 2521326 (S.D. Tex. 2006); *Whitaker v. Kellogg Brown & Root*, 444 F.Supp2d 1277 (M.D. Ga. 2006); *Lessin v. Kellog Brown& Root*, 2006 WL 3940556 (S.D. Tex. 2006); *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005).
49. International Security Assistance Force (ISAF); The *Military Technical Agreement* is available at http://www.operations.mod.uk/isafmta.pdf.
50. Chuck Mason, "Status of Forces Agreement (SOFA): What is it, How Has it Been Utilized?" *Congressional Research Service, Report for Congress*, 15 March 2012, 8.

The Way Forward

This study demonstrates that states and international organisations have made significant progress in meeting their obligations as endorsers of the Montreux Document. The good practices highlighted above are evidence of the mix of innovation and pragmatism with which states have met this complex challenge. However, the study also highlights a number of factors that hinder effective national regulation of PMSCs, consistent with the good practices contained in the Montreux Document.

The concluding section to this study focuses on the way forward. Building on work to date, it proposes concrete options that would enable the Montreux Document to serve as a force multiplier for effective implementation of PMSC regulation at the national level. Possible options fall into three substantive categories: targeted outreach, tools development, and training and capacity building. A fourth option proposes a consolidation of the Montreux Document process through the institutionalization of a regular dialogue among Montreux Participants.

The international regulatory framework for PMSCs is in constant evolution. The Montreux Document can play a key role in ensuring that human rights and IHL lie at the heart of this endeavour. Taken together, progress in the areas outlined below will ensure that the Montreux Document responds in an effective and coherent way to a clear need for effective, rights-based regulation of the global PMSC industry.

Outreach

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

- **Raising awareness of the Montreux Document in regions that have not, to date, been a focus of outreach efforts**. Given the extent and diversity of PMSC activities on the continent, Africa should be a key focus of regional outreach efforts.
- **Following-up on the regional workshops that have already been held in Central Asia, South America, Oceania, and South East Asia.** These workshops have sensitised key stakeholders to

the importance of PMSC regulation and enabled the identification of national "champions." In order to build wider international support for the Montreux Document, there is a need to build on this momentum and advance the work begun at those workshops.

- **Establishing a clear dialogue with other initiatives concerned with regulating the private security sector.** PMSCs operate in and respond to an evolving market. The sheer diversity of the market and the consequent regulatory challenges has led to a range of complementary initiatives at the international level. This includes the recently created Association of the International Code of Conduct for Private Security Service Providers as well as ongoing work within the United Nations to develop an international Convention in this area. To ensure these initiatives are complementary, the Montreux Document must have a clear voice as part of this wider regulatory framework.
- **Providing a focus to implementation support efforts.** Montreux Document outreach has generated valuable insights into context-specific challenges of PMSC regulation. These should be used to identify and prioritise opportunities to support national implementation strategies.

Tools development

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

- **Model laws** to assist states in their development and implementation of domestic regulatory legislation.
- **Templates for mutual legal assistance treaties** in order to support states' effective implementation of domestic regulation with extraterritorial reach.
- **Contract templates** for use by both state and non-state clients that attach IHL and human rights legal obligations directly to PMSCs.
- **A generic training resources package.** This could address two objectives: 1) to help ensure that PMSCs are effectively and appropriately trained in order to reduce the likelihood that they will commit violations; and 2) to support the work of national institutions and actors responsible for the contracting, management and oversight of PMSCs.
- **Resources and tools to help establish and support effective monitoring regimes;**
- **An implementation support guide** that draws together applicable good practices. This would need to be a "living document" that evolves with the industry in order to ensure that regulation remains relevant and effective.

Training and capacity building

The Montreux Document should provide a catalyst and focus to training and capacity building support for these actors. The different actors with responsibility for PMSC regulation require specialist knowledge of the industry as well as different possible methods of regulation. Effective regulation also requires a "joined up" approach across the range of actors involved in implementation, management and oversight aspects of PMSC regulation. The following elements would support effective training development:

- **An analysis of training needs** should be conducted with regard to institutions and actors responsible for the contracting, management and oversight of PMSCs. The focus should be on line ministries, independent oversight institutions, parliaments, and civil society organisations, with a view to identifying their particular roles and responsibilities with regard to PMSC regulation.
- A needs analysis would provide the basis for the identification of **curriculum requirements** and the development of **training support tools** tailored to different target audiences.

- Drawing on the experience of endorsing states, the institutionalization of a regular dialogue (see below) could provide the opportunity for sharing good practices in the area of training and capacity building.
- Capacity building support for national stakeholders involved in PMSC regulation should not be treated as a standalone issue. Many states face a range of security sector governance challenges of which private security represents only one aspect. **Capacity building support should therefore be linked to wider security sector reform programmes that promote whole of government approaches to reinforcing the management and oversight of the security sector.**

Institutionalization of a regular dialogue among Montreux Document participants

The Montreux Document needs a centre of gravity if it is to optimise its role as a force multiplier for national efforts to regulate PMSCs. Regularising the dialogue between endorsing states would facilitate the sharing of lessons learned and good practice. It would also give the Montreux Document a clear voice and identity in relation to complementary pillars of the evolving international landscape of PMSC regulation, notably the new Association for the International Code of Conduct for Private Security Service Providers and the important work within the framework of the United Nations to develop international regulation in this area.

Appendix One
Methodology and Scope of Research

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

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

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

Purpose

The purpose of the research was to identify practices showing the implementation of Montreux Document principles in endorsing states and international organisations, and to identify gaps and opportunities for future work to help such states/IOs to better implement the Montreux Document. This is in order to ensure the conference most effectively meets the needs of states/IOs, as well as the key supportive partners: Switzerland and the ICRC. The report seeks to contain examples of how states/IOs have put into practice the Montreux Document and capture where implementation challenges remain.

Scope

The research has focused on how Montreux States and International Organisations are implementing the Montreux Document within the following limiting factors:

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

2. PMSCs = private business entities that do one or more of the following:
   - armed guarding (persons, objects, convoys, buildings) – i.e. PSCs
   - maintenance and operation of weapons systems

- prisoner detention
- advice/training of local forces and security personnel
- intelligence

3. Looking at the three types of states, recognizing that a country may simultaneously be more than one:

- Home State
- Territorial State
- Contracting State

4. Looking at, within those States:

- Law
- Policy
- Procurement and/or contractual requirements (where relevant)
- Practice (in particular if there are indications that the practice is different from what law or policy requires)

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

- Domestic PSC legislation in non-Territorial States (especially if there is a chance that domestic laws/policies will be extended by analogy to companies working in Territorial States)
- Law/Policy/Practice State of Nationality of the PMSC employee, irrespective of if it is a Home State
- Other

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

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

Current Territorial State

- Afghanistan
- Iraq

Recent or Potential Territorial State

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

Sources

The primary source for the research was the questionnaire responses given by Montreux States and International Organisations.

DCAF undertook independent research to “fill-the-gaps” where a country provides no response or an incomplete one.

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

Appendix Two: List of Acronyms

APPF	Afghan Public Protection Force
A/LM/AQM	Bureau of Administration, Office of ogistics Management, Office of Acquisitions Management (US)
ANSI	American National Standards Institute
AU	African Union
BiH	Bosnia and Herzegovina
CF	Canadian Forces
CFSP	Common Foreign and Security Policy (European Union)
CID	Criminal Investigations Department (South Africa)
CPA	Coalition Provisional Authority (Iraq)
CPARS	Contractor Performance Assessment Reporting System (US)
DFAIT	Department of Foreign Affairs and International Trade (Canada)
DND	Department of National Defense (Canada)
DOD	Department of Defense (US)
EIPA	Exports and Imports Permits Act (Canada)
EU	European Union
EUFOR	European Union Stabilization Force
FARS	Federal Acquisition Regulation System (US)
FAPIIS	Federal Awardee Performance and Integrity Information System (US)
FBiH	Federation of Bosnia and Herzegovina
FTCA	Federal Tort Claims Act (US)
GP	Good Practice
HMG	Her Majesty's Government (United Kingdom)
ICC	International Criminal Court
ICoC	International Code of Conduct for Private Security Providers
ICoCA	International Code of Conduct for Private Security Providers' Association
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IMO	International Maritime Organisation
IRD	International Relief and Development
ISAF	International Security Assistance Force
LOGCAP	Logistics Civil Augmentation Program (US)
MEJA	Military Extraterritorial Jurisdiction Act (US)
MOI	Ministry of Interior
NATO	North Atlantic Treaty Organisation

NSCIA	National Security and Central Intelligence Act of 2002 (Sierra Leone)
OAU	Organisation for African Unity
ONS	Office on National Security (Sierra Leone)
OMB	Office of Management and Budget (US)
PMSC	Private Military and Security Company
PSC	Private Security Company
PSCAI	Private Security Company Association of Iraq
RMC	Risk Management Company
RS	Republika Srpska
SB	Special Branch (Sierra Leone)
SIGAR	Special Inspector General for Afghanistan Reconstruction
SOFA	Status of Forces Agreement
SOP	Standard Operating Procedure
UK	United Kingdom
UKAS	United Kingdom Accreditation Service
UN	United Nations
US	United States
USAID	United States Agency for International Development (US)
WPS	Worldwide Protective Services (US)

Appendix Three: Guiding Questionnaire

Section One: Determination of Services

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

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

2. Indicate if you require PMSCs to obtain an authorisation to provide any one or more private military and security services. This may include whether PMSCs and/or individuals are required to obtain licenses. [GP 25, 26, 54]

3. Is a central authority designated for authorisations? [GP 26] If so, please provide details.

4. Provide details of procedures for the authorisation and/or selection and contracting of PMSCs and their personnel [GP 2, 28, 57]. Please include details of how you ensure adequate resources are applied to this function [GP 3, 27, 58] and examples of how such procedures are transparent and supervised [GP 4, 29, 59].

5. To what degree have you sought to harmonize any authorisation system with those of other States [GP 56]?

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

6. Provide details on criteria that have been adopted that include quality indicators to ensure respect of relevant national law, international humanitarian law and human rights law. Indicate how you have ensured that such criteria are then fulfilled by the PMSC. [GP 5, 30] If relevant, please indicate if lowest price is not the only criterion for the selection of PMSCs. [GP 5]

7. Describe how the following elements, if any, are considered in authorisation or selection procedures and criteria. Please also indicate to what degree they are included in terms of contract with, or terms of authorisation of, PMSCs or their personnel [GP 14, 39, 40, 67]:

   a. past conduct [GP 6, 32, 60]
   b. financial and economic capacity [GP 7, 33, 61]
   c. possession of required registration, licenses or authorisations (if relevant) [GP 8]
   d. personnel and property records [GP 9, 34, 62]
   e. training [GP 10, 35, 63]
   f. lawful acquisition and use of equipment, in particular weapons [GP 11, 36, 64]
   g. internal organisation and regulation and accountability [GP 12, 37, 65]
   h. welfare of personnel [GP 13, 38, 66]
   i. other (please describe)

8. To what extent is the conduct of any subcontracted PMSC required to be in conformity with relevant law? Please include requirements relating to liability and any notification required. [GP 15, 31]

9. Do you use financial or pricing mechanisms as a way to promote compliance? These may include requiring a PMSC to post a financial bond against non-compliance. [GP 17, 41]

10. When granting an operating license to PMSCs, do you impose any limitations on the number of PMSC personnel and/or the amount/kinds of equipment employed when performing PMSC services? [GP 42] If so, please provide details.

11. Please describe any rules/limitations on the use of force and firearms. For example, these may include use of force "only when necessary and proportionate in self-defence or defence of third persons", and "immediately reporting to competent authorities" after force is used. [GP 18, 43]

12. Please provide information on any rules in place regulating the possession of weapons by PMSCs and their personnel. [GP 44, 55]

13. To what degree are personnel of a PMSC, including all means of their transport, required to be personally identifiable whenever they are carrying-out activities under a contract? [GP 16, 45]

14. Please indicate to what degree contracts with PMSCs provide for the following:

    a. the ability to terminate the contract for failure to comply with contractual provisions;

    b. specifying the weapons required;

    c. that PMSCs obtain appropriate authorisations from the Territorial State; and

    d. that appropriate reparation be provided for those harmed by misconduct. [GP 14]

Section Four: Monitoring Compliance and Ensuring Accountability

15. Provide details of how you provide for criminal jurisdiction in your national legislation over crimes under national and international law committed by PMSCs and their personnel. This may include details on if you have considered establishing corporate criminal responsibility and/or jurisdiction over serious crimes committed abroad. [GP 19, 49, 71]

16. Provide details of how you provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel. This may include contractual sanctions, referral to competent investigative authorities, providing for civil liability and otherwise requiring PMSCs, or their clients, to provide reparation to those harmed by PMSCs. [GP 20, 50, 72]

17. In addition to the criminal and non-criminal mechanisms referred to above, do you have other administrative and other monitoring mechanisms to ensure proper execution of the contract and/or accountability of the PMSC and their personnel for improper conduct? [GP 21]

18. Provide details of how you monitor compliance with the terms of any authorisation given to a PMSC. These may include establishing an adequately resourced monitoring authority, ensuring that the civilian population is informed about the rules by which PMSCs have to abide and available complaint mechanisms, requesting local authorities to report on PMSC misconduct and investigating reports of wrongdoing. It may also include establishing close links between your State's authorisation-granting authorities and your State's representatives abroad and/or with other States. [GP 46, 68]

19. Provide details of how you impose administrative measures or sanctions if it is determined that a PMSC has operated without or in violation of an authorisation. This may include revoking or suspending a license, removing specific PMSC personnel, prohibiting

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

20. Provide details of how you provide a fair opportunity for PMSCs to respond to allegations that they have operated without or in violation of an authorisation. [GP 47]

21. Provide details of how you support other States in their efforts to establish effective monitoring of PMSCs. [GP 70]

22. In negotiating with other States agreements which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel (e.g. Status of Forces agreements), please provide details on how you take into consideration the impact of the agreement on the compliance with national laws and regulations, and how you address the issue of jurisdiction and immunities. [GP 22, 51]

23. Please provide details of your cooperation with the investigating or regulatory authorities of other States in matters of common concern regarding PMSCs. [GP 52, 73]

Section Four: General Information

24. Please list any other measures you have in place for overseeing and/or contracting with PMSCs, and briefly describe how they are implemented or enforced.

25. Please describe any specific challenges you have encountered as a State or international organisation in relation to PMSCs.

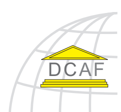
Progress and Opportunities, Five Years On:

Challenges and Recommendations for Montreux Document Endorsing States

The Montreux Document is an intergovernmental initiative, launched cooperatively by Switzerland and the International Committee of the Red Cross, to promote respect for international humanitarian law and human rights law whenever private military and security companies (PMSCs) are present in armed conflicts. The Montreux Document encourages the adoption of national regulations on PMSCs designed to strengthen respect for international law. The Montreux Document also offers practical guidance in contexts outside situations of armed conflict as its good practices are best implemented during peacetime.

The Montreux Document was endorsed by seventeen states when it was first adopted in 2008. In the five years since, that number has almost tripled and forty-eight states, plus two international organisations have now offered their endorsement. Together they represent an enormous corpus of good practice in both law and implementation that spans home states (where PMSCs are based), contracting states (that contract PMSCs to provide services) and territorial states (where PMSCs operate) with a variety of legal systems and highly varied levels of exposure to the phenomenon of private military and security companies

The study addresses two interrelated objectives: it provides food for thought to inform discussions during the Montreux+5 Conference; and, it identifies concrete ways in which the Montreux Document can advance implementation of PMSC regulation at the national level. The report provides an overview of states' experiences in this area, discerns major challenges in implementation, and identifies ways to build on existing good practices in the future. The study also focuses on the way forward by proposing concrete ways that the Montreux Document can serve as a force multiplier for effective implementation of PMSC regulation at the national level.



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