Private Military and Security Companies:

Options for Regulation under Human Rights Law

by

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ABBREVIATIONS

ACHR American Convention on Human Rights
AComHPR African Commission on Human and Peoples’ Rights
ATCA Alien Tort Claims Act
BAPSC British Association of Private Security Companies
CAT Committee against Torture
CCPR Committee on Civil and Political Rights
CEJA Civilian Extraterritorial Jurisdiction Act
CESCR Committee on Economic, Social and Cultural Rights
CIA Central Intelligence Agency
CoE Council of Europe
CoESS Confederation of European Security Services
CPA Coalition Provisional Authority
CRC Committee on the Rights of the Child
DC District Court
DoD Department of Defense
ECHR European Convention on Human Rights
ECtHR European Court of Human Rights
EU European Union
FMAA Foreign Military Assistance Act
FYROM Former Yugoslav Republic of Macedonia
GA General Assembly
GC Geneva Convention
HRC Human Rights Committee
IACtHR Inter-american Court of Human Rights
IACPPT Inter-american Convention to Prevent and Punish Torture
<table>
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<tr>
<th>Abbreviation</th>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICoC</td>
<td>International Code of Conduct for Private Security Providers</td>
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<td>ICRC</td>
<td>International Committee of Red Cross</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>IPOA</td>
<td>International Peace Operations Association</td>
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<td>ISOA</td>
<td>International Stability Operations Associations</td>
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<td>ITAR</td>
<td>International Traffic in Arms Regulations</td>
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<td>KFOR</td>
<td>Kosovo Force</td>
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<td>MEJA</td>
<td>Military Extraterritorial Jurisdiction Act</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NGO</td>
<td>Non-governmental Organization</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
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<td>PMC</td>
<td>Private Military Companies</td>
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<td>PMSC</td>
<td>Private Military and Security Companies</td>
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<td>PSI</td>
<td>Private Security Industry</td>
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<td>PSIA</td>
<td>Private Security Industry Act</td>
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<td>SOFA</td>
<td>Status-of-Forces Agreement</td>
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<td>UCMJ</td>
<td>Uniform Code for Military Justice</td>
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<td>UK</td>
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ABSTRACT

In the aftermath of the Cold war, new actors began to carry out a wide range of tasks with regard to the use of force. For instance, States relied on private business entities to perform military and security services which before had been performed by national armed forces. PMSCs are requested by governments, international organizations and NGOs or other corporations to provide with land-based or maritime military and/or security services that traditionally belonged to States. These services usually include the armed guarding and the protection of persons and objects, the maintenance and operation of weapons system, intelligence and technical assistance, prisoner detention and interrogation of suspects and transport, advice of and/or training of local forces/security personnel, and –in some cases- the direct participation in hostilities.

Consequently, the engagement of PMSCs with several and different tasks and the transnational nature of their operations increase concerns about the effectiveness of their regulation, both at international and national levels. However, some questions concerning their responsibilities for any misconduct committed by them are raised. Most actually, PMSCs are usually being involved in violations of international human rights law and international humanitarian law during their operations. However, the absence of a coherent and binding international legal framework to regulate PMSCs and oversee their activities in conjunction with the lack of national regulatory and advocacy frameworks which have jurisdiction directly over PMSCs’ misconduct relieved private contractors to escape from prosecution and accountability from alleged human rights violations.

Within the aforementioned context, the present thesis attempts to find out whether the PMSCs and their activities could be regulated throughout the context of human rights law.
Therefore, the current thesis is divided into two main parts; the first part on the international and national efforts for regulation of PMSCs; and the second one on obligations of States to regulate PMSCs’ activities and punish the perpetrators. In particular, this thesis examines the obligations of States to regulate and monitor PMSCs’ activities with regard to the Montreux Document’s standards and it also focuses on the need of the adoption of a new coherent international regulatory regime which is going to demonstrate precisely the obligations and responsibilities of States, international organisations and PMSCs for land-based and maritime-based activities.

Moreover, it presents and analyses the national regulatory mechanisms for punishment and prosecution of PMSCs’ employees for human rights violations. By using examines different national legislative frameworks, the present thesis considers that the absence of an international framework to punish private contractors for human rights violations allows for non-compliance with human rights law.

Furthermore, the application of human rights law on the regulation of PMSCs’ activities constitutes an important part of the present research. So as, it examines the States’ human rights obligations to regulate PMSCs’ activities and demonstrates the States’ efforts to fulfil their obligations under human rights law regarding the regulation of PMSCs’ and their employees’ activities. In conclusion, the present thesis goes one step further. It explores whether the human rights judiciary bodies, and particular the ECtHR have the jurisdiction to adjudicate PMSCs’ employees for human rights abuses.
CHAPTER I

INTRODUCTION

The end of Cold war brought great increase of new actors who carry out a wide range of tasks with regard to the use of force. The last two decades, States relied on business entities to perform military and security services which before had been performed by their own armed forces. This practice has initially started during the wars in Iraq and Afghanistan; nonetheless the use of private entities is widespread, covering anti-piracy operations in the Horn of Africa to combatting drug trafficking in Latin America. To that extent, Bassiouni argued that the proliferation of non-state actors in conflicts and post-conflicts environment emerged the

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concept of the ‘‘new culture of wars’’\textsuperscript{3}. Moreover, the concept of the ‘‘new culture of war’’ is based on a general enthusiasm of States to outsource their functions and also on a growing reluctance by them to intervene in conflicts which are not of their particular strategic interests\textsuperscript{4}.

PMSCs are requested by governments\textsuperscript{5}, international organizations and NGOs or other corporations\textsuperscript{6} to provide with land-based or maritime military and/or security services that traditionally belonged to States\textsuperscript{7}. PMSCs are universally defined as:

‘‘legally established international firms (which) offering services that involve the potential to exercise force in a systematic way and by military or paramilitary means, as well as the enhancement, the transfer, the facilitation, the deterrence, or the defusing of this potential, or the knowledge required to implement it, to clients’’\textsuperscript{8}.


\textsuperscript{5} Laura Dickinson, Outsourcing War and Peace: Preserving Public Values in a World or Privatized Foreign Affair, (New Heaven and London: Yale University Press, 2011), 37.

\textsuperscript{6} Lindsey Cameron, ‘Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation’ [2006] 88 International Review of Red Cross, p. 573.


\textsuperscript{8} Carlos Ortiz, Private Armed Forces and Global Security: A Guide to the Issues (Santa Barbara, Denver, Oxford: Praeger, 2010), p. 48
Their services usually include the armed guarding and the protection of persons and objects, as well as the maintenance and operation of weapons system, intelligence and technical assistance, prisoner detention and interrogation of suspects and transport, advice of and/or training of local forces/security personnel\(^9\), and even direct participation in hostilities\(^{10}\).

Accordingly, Singer in his book *Corporate Warriors: The Rise of Privatized Military Industry* distinguishes PMSCs into three different “sectors”: 1. military provider companies, which supply a State party to a conflict with direct, tactical and military assistance; 2. military consulting firms that advise and train members of the national armed forces; and, 3. military support companies that are responsible to provide logistic maintenance and other services to armed forces\(^{11}\). As a consequence, the widespread use of outsourcing of governmental military and/or security functions to PSMCs has seen further growth very rapidly with the conflicts in Afghanistan and Iraq\(^{12}\).

Consequently, the extensive use of PMSCs, their engagement with several and different tasks and the transnational nature of their operations increase concerns about the effectiveness

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\(^{10}\) Cameron *supra* note 6, p. 573.


\(^{12}\) For instance, it is estimated that in 2010, the 54% of the United States Department of Defence’s workforce in Iraq and Afghanistan consisted of private contractors. M. Schawartz, Department of Defence Contractors in Iraq and Afghanistan: Background and Analysis (Congressional Report Services, 2 July 2010).
of their regulation\textsuperscript{13}, both at international and national levels\textsuperscript{14}. However, some questions concerning their responsibilities for any misconduct committed by them are raised\textsuperscript{15}. Most notably, PMSCs are usually being involved in violations of international human rights law and international humanitarian law during their operations\textsuperscript{16}. Several States, such as the U.S.A., the U.K., the South Africa, Iraq and Afghanistan have been confronted by violations of human rights law by private contractors. To that extend, the UN Working Group on the Use of Mercenaries has reported human rights violations perpetrated by PMSCs’ employees as ‘summary executions, acts of torture, cases of arbitrary detention, trafficking of persons and

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serious health damages caused by the activities of PMSCs’ employees, as well as attempts against the right of self-determination.\(^\text{17}\)

The most notorious episodes took place during the second war in Iraq. In 2004 the killing of four employees of “Blackwater” in Fallujah and the torture of detainees at Abu Ghraib prison in Iraq committed by two United States-based PMSCs, CACI and Titan.\(^\text{18}\) A military investigation, that is published as “’Tabuga Report’”, explicitly indicates the extensive sexual abuse and humiliated treatment of detainees by private contractors.\(^\text{19}\) It showed that American soldiers and private contractors were involved in ‘sadistic, blatant and wanton criminal abuses’ of prisoners at Abu Ghraib in Iraq.\(^\text{20}\) However, whilst the military officers were subjected to court-martials and were sentenced to prison, none of these PMSCs were prosecuted,\(^\text{21}\) since the USA Higher Court of Appeals granted them immunity for working for


\(^{18}\) Blackwater is one of the most high-profile PMCs operating in Iraq, with around 1,000 employees as well as a fleet of helicopters in the country.


\(^{21}\) Peter Spiegel, ‘’’No Contractors Facing Abu Ghraib Charges’’, Financial Times, 9 August 2005.
American military forces\textsuperscript{22}. The main reason for granting such immunity was that the USA Army was unsure whether they had any jurisdiction over them\textsuperscript{23}. This revealed a legal vacuum under which PMSCs employees operate\textsuperscript{24} and raised also ambiguities regarding the norms that govern their operations and the legitimacy of their activities\textsuperscript{25}.

Moreover, the killing of 17 unarmed Iraqi civilians at Nisour square in Baghdad strengthened the questions of private contractors’ responsibilities. Five contractors have been charged with counts of voluntary and attempted manslaughters; they managed to escape from prosecution, as the District Court identified a violation of the right to fair trial, since statements

\textsuperscript{22} Ibrahim vs. Titan Corp 556 FSupp2d 1 (DDC 2007) (Ibrahim II), aff’d Saleh vs. Titan 580 F3d 1 14-16 (DC Cir 2009) (Saleh II).


\textsuperscript{24} Singer was the first who introduced the term of ‘legal vacuum’ with respect to PMSCs’ activities. Peter W. Singer, ‘War, Profits and the Vacuum of Law: Privatized Military Firms and International Law’ [2004] 42 Columbia Journal of International Law, p. 521. On the other hand, Lehnardt denotes that speaking for a legal vacuum is a kind of ignorance several States obligations which apply in complex environment whereas PMSCs operate. Chia Lehnardt, ‘Private Military Companies and State Responsibility’, in Chesterman and Lehnardt, supra note 4, p. 42.

given by the five Blackwater guards had been improperly used\textsuperscript{26}. However upon appeal, the defendants petitioned the United States Supreme Court to hear their case. So, after seven years of delays, finally, Blackwater’s contractors were charged with convictions of first-degree murder and manslaughter, since the use of lethal force at that occasion was unnecessary\textsuperscript{27}. To this end, the ‘‘\textit{Memorandum: Additional Information on Blackwater U.S.A}’’ denoted that Blackwater’s personnel have been involved in more than 195 incidents in Iraq from 2005 to 2007\textsuperscript{28}. Apart from the aforementioned incidents, PMSCs have been also accused for attacking civilians in Colombia\textsuperscript{29} and even for buying and keeping women and girls in sexual slavery in Bosnia\textsuperscript{30}.

Despite the involvement of private contractors in human rights abuses, in the most of the cases none of them has been prosecuted effectively\textsuperscript{31}. The absence of a coherent and binding

\textsuperscript{27} ‘‘Trial of Blackwater Guards Charged with Killing Iraqis to Open in US’’, 10 June 2014 available at \url{http://www.voanews.com/content/trial-of-blackwater-guards-charged-with-killing-iraqis-to-open-in-us/1934146.html} (visited on May 2016).
\textsuperscript{28} House of Representatives, Committee, on Oversight and Government Reform, Congress of the U.S.A., ‘\textit{Memorandum: Additional Information on Blackwater U.S.A}’, 01/10/2007, 6.
international legal framework to regulate PMSCs and oversee their activities\textsuperscript{32} in conjunction with the lack of national regulatory and advocacy frameworks which have jurisdiction directly over PMSCs' misconduct relieved private contractors to escape from prosecution and accountability from alleged human rights violations\textsuperscript{33}. As a result, the private military and security industry remains ‘‘less regulated than the cheese market’’,\textsuperscript{34} and/or ‘‘the toy industry’’\textsuperscript{35}. Plainly, the absence of those mechanisms is coming after and above, if not beyond, the law\textsuperscript{36}. Nevertheless Lehnardt argues that the lack of private contractors’ accountability is matter of enforcement of law rather that the problem of applicable law\textsuperscript{37}. The same has been highlighted

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\textsuperscript{32} Kamminga and Zia-Zarifi argued that the multinational character of (PMSCs) operations and the ‘amorphous structure’ of those companies make them immune from the control of States. Therefore, it requires to be regulated at international level. See Menno T. Kamminga and Saman Zia-Zarifi, ‘Liability for Multinational Corporations under International Law: An Introduction’ in Menno T. Kamminga and Saman Zia-Zarifi (eds.), \textit{Liability for Multinational Corporations under International Law} (The Hague/London/Boston, Kluwer Law International, 2000), p. 3.


\textsuperscript{35} See the abstract of José Luis Gómez del Prado, ‘A U.N. Convention on PMSCs?’ [2012] 31(3) Criminal Justice Ethics, p. 262. One of the primary reasons that this market continues to be unregulated is the transnational character of PMSCs’ activities. See Deborah V. Avant, \textit{supra} note 2, p. 144.


by herself by stating that ‘speaking of a legal vacuum we ignore the numerous State obligations that apply in the environment in which Private Military Companies operate’.

In an attempt to fill the existing regulatory and accountability gaps regarding the PMSCs and their employees, the international community has launched some significant initiatives in order to encourage States to implement regulatory frameworks with regard to PMSCs. For instance, 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 (the Montreux Document) is the first international document that emphasizes States’ obligations to regulate and monitor PMSCs’ activities and highlights the obligation to enact proper legislative measures to punish perpetrators for violations of international humanitarian law and human rights law. Moreover, the Montreux Document is focused on two particular areas: firstly which security functions could be outsourced and which not; and secondly, the legal status of PMSCs. This initiative also

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38 Lehnandt, supra note 24, p. 142.


42 The International Committee of Red Cross emphasized that its intention was not to completely ban PMSCs’ operations, but to regulate their activities by stating the responsibility of States for their actions. See ‘Switzerland
demonstrates the States’ obligations under international humanitarian law and international human rights law in which PMSCs are registered (home States), are engaged (hiring States), or operate (host States). In addition, the Montreux Document illustrates 73 ‘‘good practices’’, which may be the reason of further regulation of PMSCs through contracts, codes of conduct and national regulations 43.

Yet, this does not go far enough since the Montreux Document is ‘‘not a legally binding instrument and so does not affect existing obligations of States under customary international law or under international agreements to which they are parties’’ 44. As a piece of soft law, the Montreux Document has to deal with the problem of its legitimacy, since only 17 States were represented at the drafting process 45. The contribution although of ICRC to disseminate the Montreux Document and call all States to endorse it increased somehow its legitimacy 46. Notwithstanding the issue of its legitimacy, the Montreux Document applies only to situations of armed conflicts on land and does not cover conflict situations at sea or anti-piracy services as well 47.


43 See Cockayne, supra note 41, p. 401.

44 The Montreux Document, para. 3.

45 Currently 50 States have signed the Montreux Document.


Irrespective of the significant contribution of the Montreux Document to the regulation towards to PMSCs’ activities, its non-binding nature and its limited application – since it applies only during armed conflicts – was unable to fill the accountability gap for human rights abuses by private contractors\textsuperscript{48}. The same critical argument against the Montreux Document was made by the UN Working Group on Mercenaries as well. In its 2009 report the UN Working Group recognizes the Montreux Document’s contribution to promote the existing principles under international humanitarian law and human rights law, but it fails to ‘address the regulatory gap in the responsibility of States with respect to the conduct of PMSCs and their employees’\textsuperscript{49}.

Recognizing the significance of the Montreux Document, the Human Rights Council welcomed the elaboration of a legally binding document with regard to PMSCs and their employees. The final document - named as the UN Draft Convention\textsuperscript{50} - constitutes the first effort to create a catalogue concerning the States' obligations for using of force by PMSCs, the licensing and authorization of PMSCs' activities and addressing accountability issues for PMSCs for human rights violations. Since it is still an ongoing process, the UN Draft Convention constitutes a kind of a law with regard to PMSCs, in order to assist all the efforts


\textsuperscript{49} Report of the UN Working Group (UN Doc. A/HRC/10/14, 21/01/2009) para. 44.

made by States towards the regulation and controlling of PMSCs’ operations\textsuperscript{51}. Therefore, as it derived by the both of the aforementioned initiatives, it is more than necessary for States to take decisive legislative measures to regulate PMSCs’ activities and hold accountable private contractors for human rights violations. According to Schneiker\textsuperscript{52} there are two main reasons which indicate the emerged need of such regulation. To begin with, States remain responsible for violations committed by PMSCs – by outsourcing certain security activities to them\textsuperscript{53}. In the second place, even the national regimes are less effective than an international one\textsuperscript{54}, national regulations are easier to be enforced. Accordingly, Caparini\textsuperscript{55} highlights that there is a general need to clarify under whose jurisdiction PMSCs' employees operates and who has competence over their activities. For example, whether a Colombian contractor working for a Belgian PMSC commits grave violations of human rights law, than who has jurisdiction to prosecute him/her and under which could he/she should be tried?

\textsuperscript{51} Jose Luis Gomez del Prado, \textit{supra} note 46, p. 429.


\textsuperscript{54} The possible ineffectiveness of national regulations derived from the transnational nature of PMSCs' operations. As Singer argues, in the most cases, PMSCs are registered in one country, they operate within the territory of another one and they hire contractors from a third State. See Singer, \textit{supra} note 11.

At the same time, the private security industry throughout different associations has undertaken efforts to come up with issues of legitimacy of PMSCs’ activities, of regulation and monitoring their activities, and -in cases of human rights allegations- of effectiveness and accountability for PMSCs’ activities. Thus, the adoption of the ICoC is the most recent and coherent international effort that imposes directly human rights obligations to PMSCs regarding the prevention of human rights abuses committed by their employees.

According to its Preamble, the ICoC constitutes the follow-up process of the Montreux Document, in order to extend its principles to private security industry as well. In doing so, PMSCs have to support the rule of law; to protect, prevent and respect human rights and fundamental freedoms and to protect the interests of their clients. The main goal of this initiative is to ensure that signatory PMSCs fully comply with ICoC’s standards and principles during their operations. Even if the Montreux Document gives particular emphasis to the regulation of PMSCs and their obligations during armed conflicts, the applicability of the ICoC is extended to both armed and unarmed PMSCs’ services. In contrast, the ICoC does not enlist PMSCs’ services as the Montreux Document does, but it uses the term of ‘‘any other activity

56 Sorcha MacLeod, ‘The Role of International Regulatory Initiatives on Business and Human Rights for Holding Private Military and Security Contractors to Account’, in Francioni and Ronzitti, supra note 47.
57 The ICoC is a stakeholder initiative convened by the Swiss government. It aims to set principles and standards to private security industry based on international human rights and humanitarian law. This document adopted on 9th of November 2010 by private companies and it is available at http://www.icoc-psp.org.
58 ICoC, Section A, para. 3.
59 ICoC, Section B, para. 13.
60 For instance, the Montreux Document illustrates that the PMSCs’ services include armed guarding, the protection of person and military objects, the maintenance and operation of weapons systems, prisoner detention and advice of or training of local forces and security personnel. See the Montreux Document, Preface, para. 9.
for which the personnel of the companies are requires to carry or operate a weapon in the performance of their duties”

61. Furthermore, in 2012 stakeholders and private security providers agreed on the establishment of an oversight mechanism by adopting the ICoC’s Association


**Thesis Structure**

This study seeks to address its seminal research question in a systematic manner:

“Does the human rights law provides with States obligations to prevent human rights abuses committed by PMSCs?”

In order to evaluate that question, this study is divided into two main parts. The first part explores the international and national efforts for regulation of PMSCs; and the second one focuses on the States’ obligations to regulate PMSCs’ activities and punish the perpetrators. In particular, followed the approach of the Montreux Document and the ICoC, the thesis demonstrates the obligations of States to regulate and monitor PMSCs’ activities with regard to the Montreux Document’s standards. Furthermore, it argues PMSCs’ obligations under the Montreux Document and ICoC regarding any potential improvements to oversee the activities of their contractors and establish accountability for their harmful activities. Overall, it focuses on the emerge need of the adoption of a new coherent international regulatory regime which is going to demonstrate States’, international organisations’ and PMSCs’ international
obligations and responsibilities for land-based and maritime-based PMSCs’ activities and to specify criminal liability for PMSCs’ contractors in case of human rights infringements (Chapter IV).

Apart from the examination of the international legal framework, the present study focuses on the examination of national regulatory mechanisms for punishment and prosecution of PMSCs’ employees for human rights violations (Chapter V). More precisely, this chapter examines four different types of national regulatory regimes pertaining to PMSCs’ operations (USA, UK, South Africa and Germany). It explores the existing national legislative framework, under which private contractors may be held accountable for their misconducts. Further, it considers that the absence of an international framework to punish private contractors for human rights violations allows for non-compliance with human rights law.

Additionally, the second part of the present thesis is focused on the application of the human rights law in regulation of PMSCs’ activities (Chapter VI). That happens because in the absence of a coherent and binding international legal framework to regulate PMSCs’ and prosecute their contractors for human rights violations, the need to find out option to regulate PMSCs for another domain of international law is has been emerged. So as, the present chapter explores the existing States’ obligations to regulate PMSCs’ activities under the human rights law. Considering that PMSCs are operating in unstable environments, the study assesses the States’ procedural obligations under human rights law with respect to allegations of the right to life and the prohibition of torture. Moreover, it demonstrates the States’ efforts to fulfil their obligations under human rights law regarding the regulation of PMSCs’ and their employees’ activities. Above all, this chapter advocates that human rights law has a significant role in the
regulation of PMSCs and the prevention of the commission of human rights violations by PMSCs and their employees.

Following the analysis regarding the human rights obligations of States to regulate and monitor PMSCs’ activities, this study goes one step beyond the existing literature. This study - by using as an example the ECtHR - assesses whether the human rights judiciary bodies could adjudicate human rights violations committed by PMSCs and their employees. Furthermore, by examining the existing jurisprudence of the ECtHR, the present thesis demonstrates the jurisdiction of the EcHr over private entities – as PMSCs are. Moreover, Chapter VI describes the obligations of the hiring State, host State and home State to prevent, investigate, punish and redress human rights violations under human rights law. Above all, this chapter focuses on the contribution of the ECtHR in the harmonization of the national legal orders towards the establishment of a common accountability regime for abuses committed by PMSCs.
Historically, States had the exclusive and overall control over the use of legitimate force. Their forces – national armed forces – used to have an important role as guarantors of the security of their citizens and the fulfilment of their defensive policies. Chesterman and Lehnardt argue that the end of the Cold War led to the rise of the private military and security industry\textsuperscript{63}. Currently, PMSCs are hired by States, international organizations and other multinational corporations to carry out functions that traditionally belonged to States\textsuperscript{64}. To that end, this chapter examines the legal status of PMSCs and analyse the effectiveness of the legal frameworks governing them.

PMSCs are considered as private business entities that offer their services to States, international organizations, NGOs and other corporations. These services mainly include firstly military maintenance as ‘strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, military training and logistics, and material and technical support to armed forces’; and secondly security services such as ‘armed guarding or protection of buildings, installations, property and people, police training, material and technical support to police forces,’

\textsuperscript{63} Simon Chesterman and Chia Lehnardt (eds.), \textit{From Mercenaries to the Market: The Rise and Regulation of Private Military Companies} (Oxford: Oxford University Press, 2007), p. 1

\textsuperscript{64} \textit{Ibid.}
elaboration and implementation of informational security measures". Certainly, PMSCs replaced importantly members of national armed forces in several situations ranging from participation into hostilities, and security in peace-building operations to intelligence and interrogation of suspects at prisons.

The issues of the privatization of security and the outsourcing of the use of force are very well documented by the literature. However, PMSCs constitute a recent phenomenon and the publications around this topic are very controversial. The published work covers a range of aspects such as the nature of the PMSCs and their functions, their status under international law, their responsibilities for violations of humanitarian law and human rights law and also


the obligations of States to regulate their activities\textsuperscript{69} and of private military and security industry for self-regulation\textsuperscript{70}. In order to provide a coherent overview of the existing literature on PMSCs, the present study uses the adoption of the Montreux Document as a milestone. So as, the following lines present the existing published work with regard to the issue of PMSCs before and after 2008.

Initially, the present research is heavily reliant on published sources. To that extent, it is worth mentioning that the thesis gathers the most recently published developments with regards to the regulation of the PMSCs’ activities and their impact on the protection of human rights. For more and foremost, the most influential publication around the topic of PMSCs is Peter W. Singer, \textit{Corporate Warriors: The Rise of the Privatized Military Industry} (New York: Cornell University Press, 2003). In this book, Singer provides with a general overview of the rise of privatized military and security industry. He begins for the post-colonisation era in order to explain why PMSCs currently have an active role in the battlefields worldwide. He concludes that governments

‘\textit{transfer some of their public duties to the private sector. They may also do so because of issues of cost, quality, efficiency, or charging conceptions of governmental duties. Health care,}'


police, prisons, garbage collection, postal services, tax collection, utilities, education and so on are examples of services that have been shifted back and forth between viewed as essential public responsibilities of the government to something best left to the private market".

Moreover, Singer presents the historical development of the outsourcing of the governmental functions from the ancient history until the end of the Cold war. Through this analysis, he observes that ‘the State’s monopoly of both domestic and international force was a historical anomaly. Thus, [...] we should not expect that organized violence would only be located in the public realm’.

Furthermore, Singer classifies the industry and distinguishes PMSCs into three types. The first type of PMSCs are the military provider companies. This type of PMSCs supplies a State party to a conflict with direct, tactical and military assistance. For example, Sandline International and Executive Outcomes provided their clients with direct combat participation mostly in Angola, Sierra Leone and Papua New Guinea. However, the direct participation into hostilities may affect the stability of the host country since the dynamic character of the market for force. The military consulting firms constitute the second category of PMSCs. They are used to advice and train members of the national armed forces and they are placed in-

71 Singer, supra note 66, p. 7.
72 Ibid., p. 19.
73 Ibid., p. 39.
74 See also David Isenberg, Soldiers of Fortune Ltd.: A Profile of Today’s Private Sector Corporate Mercenary Firms (Centre for Defense Information, 1997).
between the front line of an armed conflict and non-combat support. For instance, the role of these type of PMSCs in Colombia constitutes a significant example of that type of PMSCs’ operation. As the last type of PMSCs, Singer identifies the military support firms. Such companies are responsible to provide logistic maintenance and other services to armed forces.

Despite the fact that Singer emphasizes some monitoring challenges regarding the contracts of outsourcing governmental functions to PMSCs, he does not conclude in a particular model –international or national- on how the oversight of PMSCs’ operations could be ameliorated. Similar to Singer’s approach, Deborah Avant –with her book ‘The Market of Force: the Consequences of Privatizing Security’ – comments the emergence of the use of PMSCs and the impact of the privatization of the use of force on the State control.

However, the significance of her contribution rests upon the mentioning of possible dilemmas around the regulation and control of the private military and security services. Yet, according to her approach, a potential way to regulate PMSCs’ activities is the strengthening of the regulations regarding the exports of arms. Through the analysis of the three largest exports of military and security services –the USA, the UK and the South Africa- she demonstrated that the transnational nature of the private military and security industry has

77 Singer, supra note 66.
78 Ibid., p. 153.
79 Avant, supra note 66, p. 3.
80 Ibid., p. 45.
81 Ibid., p. 143.
82 Ibid.
serious impact on the political, social, economic and functional control of States on the exports of arms\textsuperscript{83}.

Three years before the adoption of the Montreux Document, Avant managed to provide a brief overview of the application of the international mechanisms of the status of PMSCs and their employees\textsuperscript{84}. To that extent, she deduces that despite the wide interpretation of the international humanitarian law, it still stands an uncertainty to explicit clarify the circumstances in which a PMSCs’ employee could be considered as combatant or civilian and even when he/she could be responsible for any misconduct\textsuperscript{85}.

Before the adoption of the Montreux Document, concerns about the regulation of PMSCs’ activities has drawn the attention of the most of the scholars. Most of the scholars argued that the dramatically expansion of the number of PMSCs worldwide\textsuperscript{86} and their involvement in notorious human rights episodes\textsuperscript{87} raised questions regarding the regulation of

\textsuperscript{83} Ibid., p. 177.
\textsuperscript{84} Ibid., p. 230.
\textsuperscript{85} Ibid., p. 233.
\textsuperscript{86} Deborah Avant, ‘The Emerging Market for Private Military Services and the Problems of Regulation’, in Chesterman and Lehnardt, \textit{supra} note 63, p.181;
PMScs, both at international and national level. According to Singer, the private military and security industry seems “less regulated that the cheese market.”

Singer concludes to that point by taking into account the most notorious human rights episodes that took place during the second war in Iraq. More particularly, in 2004 four employees of “Blackwater” were killed in Fallujah and detainees at Abu Ghraib prison in Iraq have been tortured by two USA-based PMSCs, CACI and Titan. The “Tabuga Report” - a published military investigation – has explicitly shown that the detainees in Abu Ghraib prison had been extensively sexually abused and humiliated by PMSCs’ employees. It also illustrated that American soldiers along with private contractors were involved in ‘sadistic, blatant and wanton criminal abuses’ of prisoners at Abu Ghraib in Iraq. However, whilst the


90 Blackwater is one of the most high-profile PMCs operating in Iraq, with around 1,000 employees as well as a fleet of helicopters in the country.


military officers were subjected to court-martials and were sentenced to prison, none of these PMSCs were prosecuted\(^93\), since the U.S. Higher Court of Appeals granted them immunity for working for American military forces\(^94\). The main reason for granting such immunity was that the USA’s Army was unsure whether they had any jurisdiction over them\(^95\). This matter revealed the legal vacuum under which PMSCs employees operate\(^96\) and raised ambiguities regarding the norms that govern their operations and the legitimacy of their activities\(^97\).

Simultaneously, the killing of 17 unarmed Iraqi civilians at Nisour square in Baghdad strengthened further questions regarding the private contractors’ responsibilities. In this case, five contractors have been charged with counts of voluntary and attempted manslaughters; they

\(^{93}\) Peter Spiegel, ‘‘No Contractors Facing Abu Ghraib Charges’’, Financial Times, 9 August 2005.


\(^{96}\) Singer was the first who introduced the term of ‘legal vacuum’ with respect to PMSCs’ activities. Peter W. Singer, *War, Profits and the Vacuum of Law: Privatized Military Firms and International Law* [2004] 42 Columbia Journal of International Law, p. 521. On the other hand, Lehnardt denotes that speaking for a legal vacuum is a kind of ignorance several States obligations which apply in complex environment whereas PMSCs operate. Chia Lehnardt, ‘Private Military Companies and State Responsibility’, in Chesterman and Lehnardt, *supra* note 4, p. 42.

managed to escape from prosecution, as the District Court identified a violation of the right to fair trial, since statements given by the five Blackwater guards had been improperly used. However upon appeal, the defendants petitioned the USA Supreme Court to hear their case. So, after seven years of delays, finally, Blackwater’s contractors were charged with convictions of first-degree murder and manslaughter, since the use of lethal force at that occasion was unnecessary. However, the ‘‘Memorandum: Additional Information on Blackwater U.S.A’’ denoted that Blackwater’s personnel have been involved in more than 195 incidents in Iraq from 2005 to 2007. Apart from the aforementioned incidents, PMSCs have been accused for attacking civilians in Colombia and even for buying and keeping women and girls in sexual slavery in Bosnia.

Under this framework of escaping accountability for their misconduct, the edited book of Chesterman and Lehnardt provides with an examination of the normative control of private

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military and security market and an overview of the public control over PMSCs’ operations. In the Section of norm (chapters 7 to 9), the contributors give particular emphasis on the status of PMSCs under international law. In particular, Louise Doswald-Beck examines the status of PMSCs’ employees as combatants or civilians and under which circumstances they can be considered as prisoners-of-the-war. Moreover, Lehnardt examines whether States incur responsibility for any violations may be committed by PMSCs and their employees. More precisely, she illustrates the circumstances under which a PMSCs’ conduct is attributable to a State party to an armed conflict. She founds her analysis on the jurisprudence of international tribunals, such as the ICJ and the ICTY. Further, from these aspects, their publication covers also the issue of the domestic regulation of PMSCs’ activities. In particular, Caparini analyses the licensing system of USA and South Africa with respect to the export of military goods and security services. However, this book seems to be ‘anachronistic’ since it does not include the recent developments according to the regulation and monitoring of PMSCS’ operations and the activities of their employees.

Furthermore, in Fred Schreier and Marina Caparini, Privatising Security: Law, Practice and Governance of Private Military and Security Companies (DCAF: Geneva, 2005), the same

103 Chesterman and Lehnardt, supra note 63.


105 Ibid.


107 Ibid.

approach is followed. This means that they demonstrated the expansion of the use of the private military and security industry and they commented its nature. However, it is the first publication before the endorsement of the Montreux Document which emphasizes the deficiencies in the governance of Private Military and Security Companies. They provide with the obligations of PMSCs at international level according to the prohibition of mercenaries, the law of neutrality and the law of use of force.

Similar to Avant’s approach, they explore the regulation of PMSCs’ activities at national level based on the exports of security and arms. However, it is the first published work which proposes several important options of regulations at international level, such as the ratification on behalf of States of all the relevant international instruments, and at national level, such as States have to adopt similar approach as the UK Green Paper (2002).

It is worth mentioning that before 2008, the discussions around the regulation and the control of PMSCs’ activities and their obligations under international law were speculations. The adoption of the Montreux Document constitutes a revolution in the field of the PMSCs as it is the first international initiative that addresses directly obligations on States to regulate PMSCs’ activities. As a result, in the aftermath of the adoption of the Montreux Document and even the ICoC, the academia elaborated more on the issue of PMSCs’ regulation. To that extend, Cockayne’s paper ‘Regulating Private Military and Security Companies: The Content, Negotiations, Weaknesses and Promise of the Montreux Document’ provides an overview of the deliberations prior the adoption of the final document and emphasises its significant

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109 Schreier and Caparini, supra note 66, p. 103.
110 Ibid., p. 105.
111 Ibid., p. 116.
contribution to the field. He also argues whether the Montreux Documents is the primary basis for any further improvements regarding the accountability of PMSCs and their employees.\textsuperscript{112}

At the same time, Hoppe’s article on ‘Passing the Buck: State Responsibility for Private Military Companies’ reveals the existing regulatory gap within States try to reduce their international responsibility in case of violations committed by PMSCs. By considering the positive obligations of States under human rights law to prevent and protect human rights within their jurisdiction, he acknowledges that the regulatory gap could be minimized in the absence of an international framework on PMSCs.\textsuperscript{113} He also argues that the ‘governmental functions’ of PMSCs could be attributed to State—in particular the hiring State—as that of ‘persons forming part of its armed forces’.\textsuperscript{114} So as, a State cannot evade international responsibility for the PMSCs’ actions.\textsuperscript{115}

The endorsement of the Montreux Document creates the hope that ‘the Montreux Document will form the basis for self-regulatory efforts by the PMSC industry’. As a result, the literature on PMSCs criticizes also the efforts of the private military and security industry to adopt regulatory mechanisms. To that extent, De Nevers in his article about the ‘The Effectiveness of Self-Regulation by the Private Military and Security Industry’ assesses whether


\textsuperscript{114} Ibid.

\textsuperscript{115} Ibid., p. 1014.
the International Peace Operations Association and the British Association of Private Security Companies have adopted relevant mechanisms in order to monitor, control and sanction PMSCs that are members to these associations. However, he observes that these self-regulatory initiatives are ineffective because they are the result of two different national approaches on PMSCs—the American and the British one.

In any event, the lack of a decisive international efforts to establish effective, coherent and sufficient regulatory regimes for PMSCs’ activities, allows PMSCs and their employees to escape from prosecution. According to Singer that happens because there is an existing legal vacuum in relation to PMSCs’ activities. However, Lehnardt denotes that the matter of accountability of PMSCs and their employees is a matter of enforcement law rather than the problem of applicable law. As a result, by speaking for a legal vacuum is a kind of ignorance several States obligations which apply in complex environment whereas PMSCs operate. For that reason, the edited book of Francioni and Rozitti (eds.), War by Contract: Human Rights, Humanitarian Law and Private Contractors (Oxford: Oxford University Press, 2011) constitutes a milestone in the area of regulation of PMSCs’ activities throughout other areas of international law. It explores the existing States obligations under human rights law and


118 Ibid.


120 Lehnardt, supra note 3106.
humanitarian law in relation to the regulation, monitoring and oversee PMSCs’ operations. In particular, it examines the obligations of the home State, the hiring State and the host State in ensuring the compliance of PMSCs’ activities with the fundamental principles of human rights law and humanitarian law.

The most comprehensive approach regarding the regulation on PMSCs at international and national level is the research conducted by Bakker and Sossai (eds.) Multilevel Regulation of Private Military and Security Contractors: the Interplay between International, European and Domestic Norms (Oxford: Hart Publishing, 2012). This publication presents the interaction between international and European norms of monitoring PMSCs’ activities and the


domestic legislative mechanisms to hold accountable PMSCs’ employees for any possible misconduct may occurred\textsuperscript{127}. Even the editors and the contributors examine in detail most of the aspects according to the regulation of PMSCs, it remains less analysed the national accountability regimes that applied directly over PMSCs’ employees’ misconduct. For instance, in the cases of the USA\textsuperscript{128}, the UK\textsuperscript{129}, the South Africa\textsuperscript{130} and Germany\textsuperscript{131}, the contributors do not mention the efforts that the abovementioned States did after the endorsement of the Montreux Document and the adoption of the ICoC by the private military and security industry.

In the following years, particular attention is given at the status of the PMSCs under international law. As a result, the book of Cameron and Chetail, \textit{Privatizing War: Private Military and Security Companies under Public International Law} (Cambridge: Cambridge University Press, 2013) provides a comprehensive and coherent analysis of the law that applies directly over the PMSCs’ operations during an armed conflict. They examine any possible limitations with regard to outsourcing to PMSCs functions relating to the use of force\textsuperscript{132}. They

\begin{itemize}
\item Compliance with Human Rights and Humanitarian Law by Private Contractors’, in Bakker and Sossai, \textit{supra} note 125, p. 79 – 104.
\item Bakker and Sossai, \textit{supra} note 125, p. 123 – 526.
\item Alexandra Bohm, Kerry Senior and Adam White, ‘The United Kingdom’, in Bakker and Sossai, \textit{supra} note 125, p. 309 – 328.
\item Cameron and Chetail, \textit{supra} note 68, p. 10.
\end{itemize}
also examine how PMSCs are bound by international humanitarian law\textsuperscript{133} and how their activities are attributable to States. So as, in the event of any violation of humanitarian law, the responsibility of States incurs\textsuperscript{134}. Overall, they demonstrate how the existing international legal obligations could have a primary role in the regulation of the industry\textsuperscript{135}.

The same approach is followed by Tonkin in \textit{State Control over Private Military and Security Companies in Armed Conflict} (Cambridge University Press, 2013). However, she evaluates the international obligations of States within the context of the hiring State\textsuperscript{136}, the home State\textsuperscript{137} and the host State\textsuperscript{138} and identifies under which circumstances the international responsibility of States is risen.

Apart from the above-mentioned approaches on PMSCs’ activities, their status under international law and the responsibilities of PMSCs and their employees, Seiberth published the first most inclusive and comprehensive study in the field of the regulation of PMSCs. The book \textit{Private Military and Security Companies in International Law} contributes to the growing debate and concern about the rise of private military and security and the difficulties in achieving an effective international regulation\textsuperscript{139}.

\begin{flushleft}
\footnotesize
136 Tonkin, \textit{supra} note 68, p. 123.
139 Seiberth, \textit{supra} note 67.
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In particular, she demonstrate the applicable international law to the use of PMSCs and analyses under which cases an unlawful PMSCs’ activity is attributable to a State. Moreover, she observes that PMSCs’ employees have individual accountability for violations of international law. Further, she provides an extensive analysis of the Montreux Document and the ICoC. In addition, her book constitutes the first detailed publication on the functions of the ICoC Oversight mechanism. However, this publication does not provide with the appropriate national measures that States adopted after the endorsement of the Montreux Document.

Besides, Seiberth’s extensive analysis on the international initiatives of PMSCs, the scholars continue to have concerns regarding the matter of the regulation of PMSCs. To that extent, Richemond-Barak supports that while the international and national regulatory frameworks have not made a significant progress, the self-regulation of the private military and security industry is advanced continuously. As a result, her article ‘Can Self-Regulation Work? Lessons from the Private Security and Military Industry’ provides a normative assessment of self-regulation in the private security and military industry – and as such offers insights for other industries that are transnational in reach and under-regulated by domestic, regional, and international law.

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140 Ibid., p. 75.
141 Ibid., p. 82.
142 Ibid., p. 105.
143 Ibid., p. 123.
144 Ibid., p. 161.
145 Ibid., p. 191.
Moreover, she tends to comment on the normative 'softness' of self-regulation system and of its voluntary nature. She suggests that the adoption of an OECD-type model of governance for the private security and military industry could overpass any deficiencies with regard to the monitoring and sanctioning of PMSCs and the issue of corporate accountability.

Deviating from the analysis of the regulation of PMSCs, Moyakine investigates the application of the doctrine of State responsibility to the employment of PMSCs in conflict areas affected by conflicts and in cases of grave breaches of international law may be committed by PMSCs and their personnel.\footnote{Moyakine, \textit{supra} note 69.}

Similar to Seiberth, Moyakine examines in which circumstances an unlawful conduct of PMSCs and their employees may be attributed to States under international law.\footnote{\textit{Ibid.}, p. 201.} She further analyses the application of positive obligations imposed by international humanitarian law and human rights law on States.\footnote{\textit{Ibid.}, p. 303.} Moreover, she emphasizes that the States in question also bear international responsibility when they fail to comply with their positive duties of result and diligent conduct stemming from the fields of international humanitarian and human rights law.

Taking into account the abovementioned analysis of the existing literature on the regulation of PMSCs, the current research tries to fill the existing gaps. In particular, this research proposes a new initiative on the regulation of PMSCs’ activities and their employees.
Chapter IV specifies the characteristics of an initiative like this, such as the inclusion of regulative options for both land-based and maritime-based operations and more precise obligations and responsibilities of States, International Organisations and PMSCs under human rights law and humanitarian law. Furthermore, a new international initiative has to be precise regarding the accountability of States, International Organisations and PMSCs by failing to fulfil their obligations under international law, and to specify criminal liability for PMSCs’ contractors in case of human rights infringements. Apart from that the establishment of an oversight body that supervises the effective implementation of its provisions is required.

Moreover, the present thesis explores the international regulatory regimes that apply over PMSCs’ activities, more emphasis is given on States’ obligation to adopt national initiatives to monitor PMSCs’ activities and to enact proper legislative measures to prosecute their private contractors’ for human rights violations (Chapter V). Most notably, the second part of the chapter compares four different types of national regulatory regimes regarding PMSCs’ operations (USA, UK, South Africa and Germany). By analysing the different types of national legislative frameworks for holding private contractors accountable for their misconducts, it identifies that an international framework to punish private contractors for human rights violations could be play an important role in the creation of a national model with regard to the punishment of private contractors.

Besides, the outcome of that part of the research stresses out a provisional national law which could apply directly over private contractors’ misconduct. To be more precise, it specifies that the adoption of a national legislative commitment which is addressed directly to PMSCs and their personnel is more than necessary. Therefore, it suggests that the UK Private Security Industry Act is a distinguished example, but some additional changes are required.
More particular, that proposal has to set out specific requirements regarding the registration regime and licensing of PMSCs and their employees, outline explicit standards about the training and vetting of the private contractors according to human rights principles and humanitarian law standards and accountability for possible human rights violations in the event that these occur. Moreover, the establishment of an oversight mechanism is essential in order to supervise the registration procedures and examine human rights allegations against private contractors. Thus, that national model has to have extraterritorial application as well, to provide access to remedies for the victims irrespectively where the violations may be committed.

Due to the non-binding nature of the existing international initiatives with regard to private contractors’ responsibilities, a lot of attention has been paid by the international community to the prevention of human rights abuses committed by PMSC and their employees. To that extent, this study demonstrates that the human rights law could play a vital role to the regulation of PMSCs and the responsibilities of private contractors. Thus, the Chapter VI of the research entitled as *States Procedural Obligations Regarding Private Military and Security Companies’ Activities* examines the States’ procedural obligations under international human rights treaty bodies in relation to violations of the right to life and prohibition of torture by private contractors.

Following this approach, the current study concludes that the jurisprudence of the international human rights judiciary bodies, and particular the case-law precedent of the ECtHR, could apply over the activities of PMSCs, whilst focusing on the obligations of States to prevent and investigate human rights allegations committed by private contractors. To that extent, the human rights law has a significant and crucial role in the regulation of PMSCs and the prevention of the commission of human rights violations by private contractors.
Accordingly, human rights law seeks to impose duties not only on States, but also on individuals and business entities. Therefore, the research supports that both States and PMSCs have the obligation to adopt appropriate legislative measures in order to prevent the commission of human rights violations by PMSCs and vice versa. To that extend, it suggests that establishment of independent institutional bodies under which the government coordinates with and the PMSC industry will be sufficient in investigating and punishing violations of human rights by private contractors.

Taking into account the significant role of the human rights law in the regulation of PMSCs’ activities and their employees, this research focuses also on the obligations to prevent, investigate, punish and redress human rights violations of the hiring State, host State and home State under human rights law in the context of the Council of Europe. In particular, this study distributes to the academia with the unique opportunity to discuss –based on the case-law of the ECtHR the possibility to prosecute private contractors under the ECtHR. More accurately, it indicates the primary aims of the ECtHR in the harmonization of the national legal orders so as to create a common regulatory standards regarding to the protection of human rights and fundamental freedoms among Europe. As a result, the ECtHR has to have a more decisive and direct role to the regulation of PMSCs contractors and their prosecution for human rights abuses. Therefore, the Council of Europe has to put forward initiatives, such as the adoption of a new convention or a new additional protocol to the ECHR with regard to prevent human rights abuses by PMSCs contractors. Thus, the ECtHR will be the accountability mechanism in order not only to secure the preventive measures from human rights violations by contractors, but also to specify and clarify the legal framework under which the PMSCs
contractors can operate either within or outside of the Europe and to ensure that the actions of PMSCs do not contravene the norms of human rights law.
CHAPTER III

METHODOLOGY

The primary focus of the current thesis is the analysis of the existing States’ obligations under human rights law with regards to the regulation of PMSCs. The aim of the research is to assess the role of the human rights law in regulating and monitoring the activities of PMSCs and holding accountable PMSCs’ employees for any possible human rights violation occurred. As a result, it evaluates whether the human rights law constitutes a vital area of law to improve oversight, control and accountability for PMSCs. The following chapter provides an overview of the research methodology and research design used in order to examine whether the obligations of States under human rights law apply over the conduct of PMSCs and their personnel and -to that extent- to hold private contractors accountable in the event of these violations.

1. Research Methodology

As research methodology is described the ‘science of studying how research is done scientifically’\textsuperscript{150}. It includes all the appropriate and various steps that a researcher has to undertake to answer his/her primary research question\textsuperscript{151}. Apart from the relevant research methods, the term of research methodology also includes the research philosophy of a study. In other words, the research methodology constitutes the main procedure of how to conduct a research.

\textsuperscript{150} Khushal Vibhute and Filipos Aynalem, Legal Research Methods (Justice and Legal System Research Institute, 2009), p. 19.

\textsuperscript{151} Ibid.
Kothari observed that ‘research methodology has many dimensions and research methods do constitute a part of the research methodology. The scope of research methodology is wider than that of research methods. Thus, when we talk of research methodology we not only talk of the research methods but also consider the logic behind the methods we use in the context of our research study and explain why we are using a particular method or technique and why we are not using others so that research results are capable of being evaluated either by the researcher himself or by others. Why a research study has been undertaken, how the research problem has been identified, in what way and why the hypothesis has been formulated, what data have been collected and what particular method has been adopted, why particular technique of analysing data has been used and a host of similar other questions are usually answered when we talk of research methodology concerning a research problem or study’\textsuperscript{152}.

However, it is very difficult for a legal researcher to explain the nature of his research to colleagues of other and various disciplines\textsuperscript{153}. According to Becher, legal researchers are ‘not really academic […] arcane, distant and alien: an appendage to the academic world … vociferous, untrustworthy, immoral, narrow and arrogant\textsuperscript{154} and the outcomes of their research are usually dismissed as ‘[…] unexciting, uncreative, and comprising a series of intellectual puzzles scattered among large areas of description\textsuperscript{155}.


\textsuperscript{155}Ibid.
The main reason for the above negative perception for legal research is the lack of awareness regarding the nature and the contribution/dissemination of the legal research\textsuperscript{156}. For instance, in 1987, the legal research has been described as a ‘failure to provide any significant explanation or jurisdiction of what academic lawyers do (as is normally demanded of the theoretical component of a discipline) and thus of what academic law is or might be’\textsuperscript{157}.

Up to then, the legal research is categorised\textsuperscript{158} as:

1. **Doctrinal research** - ‘Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments’;

2. **Reform-oriented research** – ‘Research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting’;

3. **Theoretical research** – ‘Research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity.’


Despite the abovementioned distinction regarding the nature and the contribution of the legal research, Arthus has proposed a forth category of legal research. This category includes the ‘research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law’\textsuperscript{159}. He named this new category as Fundamental Research.

Arthus also provided with particular research taxonomy for legal scholars. He distinguished the legal research between pure (for academic purposes) and applied (for professional purposes) research. Simultaneously, he made a further distinction between the methodologies that used for legal researches. He made out that there is a doctrinal and interdisciplinary methodology for legal research; the first one is used for research in law and the letter one for research about law\textsuperscript{160}.

\textsuperscript{159} Consultative Group on Research and Education in Law, Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada (Information Division of the Social Sciences and Humanities Research Council of Canada, 1983).

Following the matrix above, as doctrinal research method is defined the formulation of legal doctrines through the analysis of the legal rules. To that extent, a doctrinal research is a study that analyses legal texts (statutes, acts and cases) – it is most known as research in law. Nevertheless sometimes for the purposes of a doctrinal analysis, the legal researcher has to make reference to some other external factors in order to find out relevant answers. This means that the researcher deviates from the traditional analysis of a legal rules and takes into account other external facts in order to interpret and explain it.

To conclude, the doctrinal research methodology is used for the present research. According to the doctrinal research analysis, the current research 1. Reviews and synthesizes the existing knowledge (Chapter II reviews the existing bibliography regarding the regulation of PMSCs’ activities and their personnel); 2. Investigates some existing situation and/or problem (Chapter IV and V explore the existing international and national frameworks in relation to the regulation of PMSCs’ activities and their personnel. These chapters also emphasize that the most important problem regarding the control and monitor of PMSCs is the

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absent of a coherent and binding international and national legal framework); 3. Provides solution to the problem (Chapter IV suggests that an international legal binding framework will provide an effective and sufficient answer to the regulation problems of PMSCs. Moreover, to achieve an effective regulation regarding the PMSCs, Chapter V demonstrates the need of the adoption of national mechanism to adjudicate human rights violations committed by PMSCs’ employees); 4. Explains the phenomenon and generates new knowledge (Chapter VI reviews the existing jurisprudence of international human rights judicial bodies in order to conclude that human rights judicial bodies could advocate human rights allegations against private contractors).

Moreover, it is worth a mention that the current research is a result of a library-based work and the examination of the relevant case-law. So as, in order to explain the contribution of the Montreux Document and the ICoC to the regulation and monitoring of the PMSCs’ operation, I used a comparative research approach (Chapter IV). Besides the non-binding nature of these two legal rules drives me to examine all the relevant external facts in order to evaluate their enrichment.

Apart from the analysis of the international legal framework that governs the activities of PMSCs, the comparative research approach is used in order to examine the national regulatory mechanisms for punishment and prosecution of PMSCs’ employees for human rights violations (Chapter V). To that extent, by comparing four different current legislative regimes relating to private contractors' prosecution for their wrongful acts, namely those of the USA, the UK, South Africa and Germany, I managed to assess which of them is more effective. Moreover, the examination and analysis of the recent national developments regarding the prosecution of private contractors helps me to understand whether States succeed or failed to
comply with the international standards set out in the Montreux Document and the ICoC. Consequently, in the context of the absence of an international prosecution model for human rights violations by PMSCs, this chapter suggests a national prosecution model which may encourage States to fulfill their obligations under human rights law by better regulation of PMSCs’ operations.

Similar to the examination of the international non-binding legal rules and the national regulatory accountability regimes, the comparative research approach is used in order to explore the obligations of States under human rights law regarding the regulation and control of PMSCs’ activities and the accountability of PMSCs and their employees (Chapter VI). Since the international conventions of human rights are static legal document, the examination of the jurisprudence and other documentation of the human rights judicial bodies helps me to understand whether the human rights obligations apply in the case of PMSCs. This means that first, the general comments of the international human rights judicial bodies helped me to understand the scope and the interpretation of a particular human rights rule, and secondly, the relevant jurisprudence provided me with the possibility to assess the application of the human rights law in particular cases.

Furthermore, a research carried out through case study, reports and other supplementary materials allows the understanding of complex issues\(^\text{162}\). For instance, examination of the General Comment 31 provides me with the perception that ‘individuals should be protected by the States not just against violations of Covenant rights by its agents, but also against acts

committed by private persons or entities. Similar the examination of the jurisprudence of human rights judicial bodies enriched me with the understanding that the human rights States’ obligations fully apply over the cases of PMSCs; such as the AComHPR denoted that States have to protect the rights of their individuals, to prevent any violation of their rights and to investigate those human rights allegations; regardless whether these violations are attributable to State agents or private parties.

Adopting the same approach, Chapter VI explores whether the ECtHR has jurisdiction to adjudicate PMSCs’ employees for human rights abuses. Initially, I demonstrate the obligations of States to prevent human rights abuses committed by PMSCs within their territories and distinguished them in accordance with the Montreux Document approach on host State, hiring State and home State. Furthermore, based on the case-law of the ECtHR, I examined in which cases the ECtHR mentioned the role of private entities in the protection of human rights, such as López Ostra v. Spain, Taşkin and Others v. Turkey and Osmanoglu v. Turkey. At this point, the comparative research approach assisted me to support my argument that the ECtHR could constitute a regional accountability mechanism for human rights violations committed by PMSCs.

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165 López Ostra v. Spain Appl no 16798/90 (ECtHR, 9 December 1994).

166 Taşkin and Others v. Turkey Appl no 46117/99 (ECtHR, 10 December 2004).

167 Osmanoglu v. Turkey Appl no 48804/99 (ECtHR, 24 January 2008).
1.1. Types of Research

According to Kothari, a research is grouped into several types:

(i) Descriptive and Analytical Research; Descriptive research presents the problem as it exists at present, while the analytical uses all the available information to comment and evaluate a problem.

(ii) Applied and Fundamental Research; Applied research aims to find a solution for a problem immediately, however, the fundamental research tries to find out more information about a particular phenomenon.

(iii) Quantitative and Qualitative Research; the research which is based upon the measurement of quantity is called quantitative and it tries to develop mathematical models and theories, however, qualitative research aims to investigate the reasons or motives behind a certain human behaviour.

(iv) Conceptual and Empirical Research; Conceptual research is focused on new idea and/or theories, while empirical research based on observations\(^{168}\).

The present study is grouped into described and analytical research. This happens because the present study analyses the problem of the ineffectiveness of international and national legal frameworks regarding the control and monitor of PMSCs’ activities, and also suggests some possible solutions based on the existing information.

\(^{168}\) Kothari, *supra* note 152, p. 2.
2. Research Philosophy

A research philosophy is the way in which the researcher collects, analyses and uses the data about a particular matter. The term epistemology demonstrates which is true and the doxology which should be true. Based on that distinction, within the western tradition, two main research philosophies have been developed; the positivist and the interpretivist\textsuperscript{169}.

The present study is based on the positivist research philosophy. That happens because the positivist research philosophy supports that the researchers are independent of their research as they do not affect their participants during their research\textsuperscript{170} and so they can observe, describe and identify objectively\textsuperscript{171}.

2.1. Research Approach

According to positivist research philosophy, the researcher is able make predictions based on previous work (Chapter II: Literature Review) in order to observe and explain further the inter-action and the inter-relation with the current research. The choice of the positivist philosophy usually drives to the adoption of a deductive approach\textsuperscript{172}. On the other hand, the inductive research approach is usually associated with a phenomenology philosophy.


\textsuperscript{171} David-Michael Levin, \textit{The Opening of Vision: Nihilism and the Postmodern Situation} (London: Routledge, 1988)

A deductive approach requires the ‘developing a hypothesis (or hypotheses) based on existing theory, and then designing a research strategy to test the hypothesis’\textsuperscript{173}. In other words, the deductive approach means that the researcher moves from the particular to the general. So as, he/she tests whether there is a particular link which applies in more general circumstances.

On the other hand, inductive approach works on the other way; it means than the inductive approach ‘involves the search for pattern from observation and the development of explanations – theories – for those patterns through series of hypotheses’\textsuperscript{174}.

<table>
<thead>
<tr>
<th></th>
<th>Deductive Reasoning</th>
<th>Inductive Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Premises</strong></td>
<td>Stated as facts or general principles (&quot;It is warm in the summer in Spain.&quot;).</td>
<td>Based on observations of specific cases (&quot;All crows Knut and his wife have seen are black.&quot;).</td>
</tr>
<tr>
<td><strong>Conclusion</strong></td>
<td>Conclusion is more special than the information the premises provide. It is reached directly by applying logical rules to the premises.</td>
<td>Conclusion is more general than the information the premises provide. It is reached by generalizing the premises' information.</td>
</tr>
<tr>
<td><strong>Validity</strong></td>
<td>If the premises are true, the conclusion must be true.</td>
<td>If the premises are true, the conclusion is probably true.</td>
</tr>
<tr>
<td><strong>Usage</strong></td>
<td>More difficult to use (mainly in logical problems). One needs facts which are definitely true.</td>
<td>Used often in everyday life (fast and easy). Evidence is used instead of proved facts.</td>
</tr>
</tbody>
</table>


However, for the purposes of the present research, the researcher adopts both deductive and inductive research approach\textsuperscript{175}. That happens because he provides arguments, international frameworks and case-law regarding the obligations of States to protect human rights (general) in order to explain whether States have the obligation to prevent human rights abuses committed by PMSCs (specific).

Most notably, the sexual abuse and inhuman treatment of detainees by PMSCs’ employees in Afghanistan and the shooting of 17 unarmed Iraqi civilians at Nisour square in Bagdad are used as case-study to demonstrate the involvement of PMSCs in human rights abuses. Both of the abovementioned incidents were received wide coverage in the media, literature and reports which criticized the effectiveness of the investigations on these grave breaches of human rights law, the lack of effective legal proceedings either nationals or internationals to punish the perpetrators of these crimes.

Furthermore, this study explores the international non-binding regulative framework relating to the PMSCs’ operations. It assesses the contribution of the Montreux Document in imposing obligations on States to regulate, control and oversee the operations carrying out by PMSCs. At the same time, it examines the significance of the ICoC in imposing particular human rights obligations on PMSCs and their employees. However, considering the non-binding nature of these initiatives, the current study focuses on the structural weaknesses of both the Montreux Document and the ICoC. In the context of the present thesis, such an analysis refers also to the interaction between the Montreux Document and the ICoC with recent developments in the field at national level.

\textsuperscript{175} Charner M. Perry, ‘Inductive vs. Deductive Method in Social Science Research’ [1927] 8 (1) The Southwestern Political and Social Science Quarterly, p. 66.
In order to examine further the issue of regulation of PMSCs’ operations and the accountability regime for any human rights violation may be committed by their employees, this research explores the existing national accountability frameworks for the prosecution of PMSCs’ employees. Therefore, there is a comparative element regarding the relationship between international law and domestic legal order for the purposes of the topic. So as, this research reviews four national accountability frameworks (the United States, the United Kingdom, South Africa and Germany) for the prosecution and punishment of PMSCs’ misconduct. The main reason for using these particular countries as case-study is that they have adopted different approaches towards the use of PMSCs and the outsourcing military and security services to private corporations. In particular, the United States are one of the major exporters of military and security services; the same as the United Kingdom. On the other hand, South Africa has a more strict national policy with respect to the outsourcing of military and security services and Germany based PMSCs’ operations on common regulatory regimes. Following the comparative analysis, the present research presents the particular features of national regulatory and accountability framework of PMSCs and their employees.

At the same time, based on inductive approach, he accommodates arguments from specific observations; such as the UK Private Security Industry Act of 2001 in order to propose that all States have to adopt a similar national framework because currently it is the most effective and close to the international standards.

2.2. Research Strategy

The main key problem that a researcher has to deal with is what strategy he/she has to adopt in order to conduct his/her study. As a research strategy is defined ‘the general plan of how the
researcher will go about answering the research questions. So as, the research strategy provides the researcher with the overall direction of the research including the process by which the research is conducted. Such examples of research strategies are the experiment, the case study, the survey, the action research, the grounded theory and the ethnography.

Saunders et al suggest that the research strategy should be selected by taking into account the research questions and objectives of the study, the existing literature on the topic be researched, the available resources, and the philosophical underpinnings of the researcher. However, Robert Yin argues that a particular research strategy should be selected in according to the type of research question, the extent of control an investigator has over actual behavioural events, and the degree of focus on contemporary or historical events.
### Characteristics of Research Strategies

<table>
<thead>
<tr>
<th>Strategy</th>
<th>Form of research question</th>
<th>Requires control over behavioural events</th>
<th>Focuses on contemporary events</th>
</tr>
</thead>
<tbody>
<tr>
<td>Experiment</td>
<td>How, Why</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Survey</td>
<td>Who, What, Where, How many, How much</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Archival</td>
<td>Who, What, Where, How many, How much</td>
<td>No</td>
<td>Yes/No</td>
</tr>
<tr>
<td>History</td>
<td>How, Why</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Case Study</td>
<td>How, Why</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>


#### 2.2.1. Justification for the Chosen Research Strategy

Yin defines that a case study is an *empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident*. Moreover, he argues that the case study research strategy is the appropriate one whereas the phenomenon and the context are not readily distinguish. The issue of the international and national regulation of PMSCs in order to prevent human rights violations and/or a context which adjudicates PMSCs for alleged human rights violations is a kind of a phenomenon like this. That happens because during an operation we can hardly distinguish PMSCS from the national armies.

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Similarly, Dul and Hak argue that a case study is ‘a study in which (a) one case (single case study) or a small number of cases (comparative case study) in their real life context are selected and (b) scores obtained from these case are analysed in a qualitative manner’\textsuperscript{182}. In other words, a case study is more often associated with contemporary challenges in which the regulation and the monitoring of the PMSCs falls within this scope.

Taking into account the aforementioned definitions of the case study research strategy, at the present study the case study strategy is chosen in order to demonstrate the real and important problems around the context of the use of PMSCs. Adopting a case study research enabled the researcher the opportunity to be close to the research objects (regulation and control of the PMSCs’ activities), allowing the researcher the opportunity to gain in-depth understanding of the phenomenon (international and national framework surrounded PMSCs and their employees activities).

At the present study, two of the most notorious episodes of human rights violations are used in order to demonstrate the legal vacuum in which PMSCs their employees operate. The Abu Ghraib prison scandal (2003) and the Blackwater accident (2007) obviously illustrate that PMSCs operate within an elusive and unclear international framework. This is the reason that this study moves one step forward and examines, apart the international frameworks on PMSCs’ activities, the national ones. It uses as a case study the greatest four exporters and users of PMSCs, the USA, the UK, the South Africa and the Germany, in order to analyse the

context within the PMSCs operate and also whether there are relevant mechanism to adjudicate PMSCs and their employees for human rights violations.

Apart from the case study research strategy, in the present research the comparative research strategy is also used. That happens because a current study tends also to look for differences among its cases. This is the reason that the present study examines the four different types of national frameworks (Chapter V) in order to conclude which one is the more appropriate and suitable to regulate PMSCs activities and adjudicate their employees for human rights violations. So as, by adopting the comparative research strategy, the present research demonstrates also the insufficiencies of the current legal frameworks –international and nationals- in order to suggest that human rights law constitutes a new, secure and vital option for the regulation of PMSCs activities.
CHAPTER IV:
A NEW PATHWAY TOWARDS PRIVATE MILITARY AND SECURITY COMPANIES’ INTERNATIONAL REGULATION

The current chapter demonstrates the obligations of States to regulate and monitor PMSCs’ activities with regard to the Montreux Document’s standards. Furthermore, it argues PMSCs’ obligations under the Montreux Document and ICoC regarding any potential improvements to oversee the activities of PMSC’s contractors and to establish accountability mechanisms for their harmful activities. Overall, it focuses on the emerge need of the adoption of a new coherent international regulatory regime which is going to demonstrate States’, international organisations’ and PMSCs’ international obligations and responsibilities for land-based and maritime-based PMSCs’ activities and to specify criminal liability for PMSCs’ contractors in case of human rights infringements.

1. Introduction

Over the last decade the presence of new actors who carry out a range of tasks with regard to the use of force has increased. It the previous chapter, it is mentioned that PMSCs are requested by governments, international organizations, non-governmental organizations or other corporations to provide land-based or maritime security and/or military services183. Their functions usually include the protection of personnel or military property, the training and

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183 Elke Krahmann, Private Security Companies and the State Monopoly on Violence: A Case of Norm Change?, (Frankfurt: Peace Research Institute, 2009).
advising of national security forces, the interrogation of suspects and even participation in hostilities. Accordingly, Singer distinguishes PMSCs into three different “sectors”: 1. military provider companies, which supply a State party to a conflict with direct, tactical and military assistance; 2. military consulting firms that advise and train members of the national armed forces; and, 3. military support companies that are responsible to provide logistic maintenance and other services to armed forces. For instance, in Iraq, the ‘civilian contractors’ had ranged from logistic supports to food preparation for the military forces. Further, PMSCs were involved in training military personnel in former Yugoslavia, active in Afghanistan and constructed camps for displace people in Former Yugoslav Republic of Macedonia during Kosovo conflicts.

The widespread use of outsourcing of governmental military and/or security functions to PSMCs has seen further growth very rapidly with the conflicts in Afghanistan and Iraq. To that extent, some questions have arisen concerning their responsibilities for any misconduct committed by them. Most actually, the UN Working Group on the Use of Mercenaries has

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186 In 2010, the 54% of the United States Department of Defence’s workforce in Iraq and Afghanistan consisted of private contractors. Moshe Schawartz and Joyprada Swain, Department of Defence Contractors in Iraq and Afghanistan: Background and Analysis (Congressional Research Service, 13 May 2011).

reported human rights violations perpetrated by PMSC’s employees as ‘summary executions, acts of torture, cases of arbitrary detention, trafficking of persons and serious health damages caused by PMSC employee activities, as well as attempts against the right of self-determination’\textsuperscript{188}.

In particular, in 2004 the killing of four employees of “Blackwater” in Fallujah and the torture of detainees at Abu Ghraib prison in Iraq committed by two United States-based PMSCs, CACI and Titan\textsuperscript{189}. These accidents revealed an existing legal vacuum under which PMSCs employees operate\textsuperscript{190} and raised ambiguities regarding the norms that govern PMSCs’ operations and the legitimacy of their activities\textsuperscript{191}. Moreover, the killing of 17 unarmed Iraqi


\textsuperscript{189} Blackwater is one of the most high-profile PMCs operating in Iraq, with around 1,000 employees as well as a fleet of helicopters in the country.


civilians at Nisour square in Baghdad strengthened the questions of private contractors’ responsibilities. Five contractors have been charged with counts of voluntary and attempted manslaughters; yet they managed to escape from prosecution, as the District Court identified a violation of the right to fair trial, on the grounds that the given statements by the five Blackwater guards had been improperly used. However upon appeal, the defendants petitioned the USA Supreme Court to hear their case. So, after seven years of delays, finally, Blackwater’s employees were charged with convictions of first-degree murder and manslaughter, since the use of lethal force at that occasion was unnecessary.

As States continue to transfer military and security functions to PMSCs during armed conflicts and/or stability operations, the discussions to establish a coherent legal framework to govern these operations are raised. This need has been highlighted by the UN Working Group on the Use of Mercenaries by arguing that ‘the lack of rules governing the activities carried out by PMSCs created a culture of impunity dangerous for the stability of the country’. Moreover, in conjunction with the primary obligation of States to protect and respect human


rights within their territory and/or jurisdiction\textsuperscript{195}, States have to execute overall and effective control over the activities of PMSCs and to ensure that their operations re fully complied with the principles of international humanitarian and human rights law. Therefore, the Montreux Document\textsuperscript{196} is the first international initiative that addresses direct obligations to States to regulate PMSCs’ activities and encourage them to establish national legislative frameworks to hold accountable PMSCs’ employees for any possible human rights abuses.

Simultaneously, international law does not apply directly to private contractors. So it remains insufficient to hold them accountable for human rights abuses, besides they are acting under effective and official control of a State. It is also recognised that PMSCs have an obligation to respect human rights and to prevent any breaches\textsuperscript{197}. In order to fill this gap, the private security industry throughout PSI associations has undertaken efforts to come up with issues of legitimacy of PMSCs’ activities, of regulation and monitoring their activities, and -in cases of human rights allegations- of effectiveness and accountability for PMSCs’ activities\textsuperscript{198}.


\textsuperscript{197} UN Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 2011.

Thus, the adoption of the ICoC\textsuperscript{199} constitutes the most recent and coherent international effort that imposes directly human rights obligations to PMSCs regarding the prevention of human rights abuses committed by their employees. Regardless the non-binding nature of both the aforementioned initiatives, this chapter outlines the obligations that these documents impose on States and PMSCs to regulate and monitor PMSCs’ activities. Moreover, it emphasizes the responsibility of States for any possible PMSCs’ misconduct. It also assesses States’ efforts to comply with the Montreux Document. In addition, it focuses on the importance of the international oversight mechanism as established by the ICoC. Overall it argues the emerging need of a binding international regime for the regulation of PMSCs’ activities.

2. The Montreux Document: the First States’ International Effort to Regulate Private Military and Security Companies’ Activities

After the incidents of human rights abuses at Abu Ghraib and Nisour square and more than three years of negotiations, some States have endorsed the first international document of a coherent and effective regulation for PMSCs which improves the accountability of business entities for violations of international law. The Montreux Document remains the most recent and the clearest collection of international legal norms regarding States’ obligations towards

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\textsuperscript{199} The ICoC is a stakeholder initiative convened by the Swiss government. It aims to set principles and standards to private security industry based on international human rights and humanitarian law. This document adopted on 9\textsuperscript{th} of November 2010 by private companies and it is available at http://www.icoc-psp.org.
the PMSCs’ activities and contains also administrative practices for States to regulate and oversee PMSCs’ operations\textsuperscript{200}.

Cockayne\textsuperscript{201} summarized the significance of the Montreux Document in five main points: firstly, the Montreux Document constitutes the outcome of a long way negotiation by a diverse group of States with different interests; Secondly, this document repeats the existing obligation of States to protect human rights and to ensure respect for international humanitarian law towards PMSCs’ operations; Thirdly, it is the first international document that reminds to States that the obligation to regulate extraterritorial PMSCs’ activities derives by the existing treaty and customary law; Fourthly, the Montreux Document contains also a guide of ‘good practices’ regarding options to regulate PMSCs activities\textsuperscript{202}; and finally, the Montreux Document constitutes the first international achievement which compromises two different approaches on PMSCs’ regulations; a States’ and an industry one.


\textsuperscript{202} The Montreux Document, Preface, para. 5: ‘... that existing obligations and good practices may also be instructive for post-conflict situations and for other, comparable situations; [...]’.
2.1. States’ Obligations to Regulate and Monitor the Activities of Private Military and Security Companies

The Montreux Document expresses legal concerns regarding the monitoring of PMSCs’ activities. It explicitly specifies the duties of the contracting States, territorial States, home States and all other States to regulate and monitor the activities that carried out by PMSCs and their personnel; while PMSCs and their personnel do not escape from the obligation to comply their operations with the principles of international humanitarian law and human rights law.

However, since the Montreux Document focuses on the use of PMSCs in conflict situations, it is clearly that it highlights the obligations of States as they derived by the common article 1 of the four 1949 Geneva Conventions to ensure respect for international humanitarian law.

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204 As “the contracting State” is defined the state which directly hires PMSCs. See the Montreux Document, Preface, para. 9 (c).

205 The state on whose territory PMSCs operate is called “territorial state”. See the Montreux Document, Preface, para. 9 (d).

206 According the Montreux Document, “Home States” are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the “Home State”. See the Montreux Document, Preface, para. 9 (e).

207 Seibert, supra note 203, p. 132.
law.\textsuperscript{208} Therefore, all States have the primary obligation ‘not to encourage of assist […] violations of international humanitarian law’ by PMSCs activities and their employees\textsuperscript{209}. To that extent the adoption of appropriate measures to prevent violations of international humanitarian law during PMSCs’ operations is more than necessary\textsuperscript{210}. Under such general obligation, States have to restrict the outsourcing to functions which traditionally belonged to States; such as the supervision of prisoner-of-war camps and/or civilian places and the performing of certain actions in case of occupation\textsuperscript{211}. In particular, contracting (hiring) States have the additional obligation to ensure that PMSCs and their personnel ‘are aware of their obligations’ during their operations under international humanitarian law, so they should be trained accordingly\textsuperscript{212}. Besides, in conjunction with the establishment of selective\textsuperscript{213} and transparent procedures\textsuperscript{214} to contract of PMSCs, States assure that PMSCs fully comply with the obligations derived by international humanitarian law and human rights law\textsuperscript{215}. Altogether States should have efficient national oversight mechanisms to monitor PMSCs’ contracts and

\textsuperscript{208} The common article 1 illustrates that ‘the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’.

\textsuperscript{209} The Montreux Document, Part I: Pertinent International Legal Obligations Relating to Private Military and Security Companies, A para. 3 (b). Also in B para. 9 (b) and in C para. 14 (b).

\textsuperscript{210} The Montreux Document emphasises that these measures are range from ‘”military regulations, administrative orders and other regulatory measures to administrative disciplinary or judicial sanctions”’. See The Montreux Document, Part I, supra note 212, A para. 3 (c). Also in B para. 9 (c) and in C para. 14 (c).


\textsuperscript{212} Explanatory Comments to the Montreux Document, supra note 214, p. 33.

\textsuperscript{213} The Monteux Document, Part II: Good Practices Relating to Private Military and Security Companies, A para. 2.

\textsuperscript{214} The Monteux Document, Part II, supra note 216, A para. 4.

\textsuperscript{215} The Monteux Document, Part II, supra note 216, A para. 5.
to ensure accountability for PMSCs’ employees in case of misconduct\footnote{The Monteux Document, Part II, \textit{supra} note 216, A paras. 19-23.}. Consequently, the obligations of territorial States, the Montreux initiative imposes further obligations. It remains on its discretion to establish or not restrictions on PMSCs’ operations throughout national law\footnote{Explanatory Comments to the Montreux Document, \textit{supra} note 214, p. 33.}. Therefore in order to certify which of PMSCs respect international law principles, the territorial State should adopt a coherent authorization mechanism to provide licenses to PMSCs and their employees as well\footnote{The Monteux Document, Part II, \textit{supra} note 216, B para. 25.}. Moreover, the territorial State is responsible to clarify which function could be outsourced or not on its territory\footnote{The Monteux Document, Part II, \textit{supra} note 216, B paras. 43-45.}.

Apart from these obligations under the international humanitarian law, States have also the duty to undertake all necessary and reasonable measures to prevent any human rights violations by PMSCs and their employees, to protect their individuals by PMSCs’ harmful activities, to investigate effectively human rights allegations by private contractors and to prosecute them\footnote{Additionally the Montreux Document affirms that States should enact specific legislative measures to hold private contractors’ accountable for grave breaches on international humanitarian law, irrespectively of their jurisdiction. Montreux Document, Part I, \textit{supra} note 212, A para. 5. Also in B para.11 and in C para. 16.}, and - in case of a violation has been occurred – to provide reparations to victims\footnote{The Monteux Document, Part I, \textit{supra} note 212, A para. 4. Also in B para.10 and in C para. 15.}. 
2.2. Obligations Imposed on Private Military and Security Companies

The Montreux Document also outlines PMSCs’ commitments. According to its provisions, PMSCs have to fully comply with the national laws that reflect international humanitarian law and human rights law standards\textsuperscript{222}. Moreover, not only PMSCs but also their employees should act in accordance with the obligations and accountability provisions imposed by national frameworks\textsuperscript{223}. In particular, they have to respect national criminal law provisions either of the home State or territorial’s one\textsuperscript{224}.

Regarding their status under international humanitarian law, PMSCs’ personnel ‘are obliged [...] to comply with the applicable international law’\textsuperscript{225}. In spite that the majority view qualifies PMSCs’ employees as civilians, they are not allowed to participate directly to hostilities\textsuperscript{226}. Therefore, the Montreux Document illustrates further under which circumstances the private contractors lose their civilian immunity\textsuperscript{227}. In particular, in situations where a PMSC contractor is part of the armed forces of a State-party to a non-international armed conflict - and effectively is qualified as a rebel soldier – the private contractor can be attacked under humanitarian law. Moreover, even though they are civilians, during international armed conflict private contractors are entitled to prisoner-of-war status, since they are acting as ‘civilians accompanying the armed forces’\textsuperscript{228}. Yet, when they are acting as State agents, private

\textsuperscript{222} The Montreux Document, Part I, supra note 212, E para. 22.

\textsuperscript{223} The Montreux Document, Part I, supra note 212, E para. 23.

\textsuperscript{224} Ibid.

\textsuperscript{225} The Montreux Document, Part I, supra note 212, E para. 26 (a).

\textsuperscript{226} Seibert, supra note 203, at 106.

\textsuperscript{227} The Montreux Document, Part I, supra note 212, E para. 26 (b).

\textsuperscript{228} The Montreux Document, Part I, supra note 212, E para. 26 (c).
contractors are bound to respect human rights; and in case of any violations they are subjected to prosecution\textsuperscript{229}. In order to ensure that private contractors are clearly distinguishable during their operations, the Montreux Document recommends that they have to carry clear and visible identification in accordance with safety requirements and moreover their means of transport should be clearly distinguishable as well\textsuperscript{230}.

Overall, the Montreux Document establishes also the superiors’ responsibility for crimes\textsuperscript{231} committed by private contractors, as a result of supervisor’s failure to exercise effective and adequate control over them. However, even there are different approaches regarding the establishment of superior’s responsibility; a contract cannot do it by itself. Yet in contrast, the Statute of ICC differs significantly in the determination of the superior responsibility\textsuperscript{232} that the one established by the ICRC Study on Customary International

\textsuperscript{229} The Montreux Document, Part I, supra note 212, E para. 26 (e). For instance, regarding the incidents of torture at Abu Ghraib prisons, the USA established settlements to provide accountability for those contractors and offer some measure of justice for the victims. See more Patrick Cockburn, ‘Iraqis win $5.8m from US firm in Abu Ghraib torture lawsuit’, (January 2013), available at \url{http://www.independent.co.uk/news/world/middle-east/iraquis-win-58m-from-us-firm-in-abu-ghraib-torture-lawsuit-8444907.html} (last visited on May 2015).

\textsuperscript{230} The Montreux Document remarks that: ‘’ [...] to require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should: a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand; b) allow for a clear distinction between a PMSC’s personnel and the public authorities in the State where the PMSC operates. The same should apply to all means of transportation used by PMSCs [...]”’. See The Montreux Document, Part II, supra note 216, A para. 16 and also B, para. 45.

\textsuperscript{231} The Montreux Document, Part I, supra note 212, F para. 27.

\textsuperscript{232} Article 28 of the Statute of ICC.
Law. So the Montreux Document leaves certain loopholes with regard to the superior’s criminal responsibility. In cases where the applicable International Law is not applicable for PMSCs’ – for example British PMSCs and their employees are hired by the government of the U.S.A.

2.3. State Responsibility for Private Military and Security Companies’ Wrongful Acts

The Montreux Document illustrates not only States’ obligations under Treaty and customary law to regulate and monitor PMSCs activities, but also designates in which cases a State cannot evade international responsibility for PMSCs’ employees’ wrongful acts. More specifically, it is highly important to hold a State responsible for wrongful acts committed by private contractors; these acts should be attributable to the State concern.

To that end the Montreux Document recalls the rules on State responsibility as contained in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter as ‘Draft Articles’). Consequently, a PMSCs’ misconduct is attributable to a State in the following cases: the PMSC is incorporated into State’s national armed forces, PMSCs’ employees are acting under a command responsible to the States, PMSCs are hired

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234 Cockyane, supra note 204, p. 411.
238 The Montreux Document, Part I, supra note 212, A para. 7 (b) and Article 4 of Draft Articles.
to exercise inherent governmental functions\textsuperscript{239}, and PMSCs are acting on the instructions of
the State under direct effective control\textsuperscript{240}. In the aforementioned cases and when an incident of
a violation occurred by PMSCs employees, the State should provide reparation to victims\textsuperscript{241}. In this degree, Ruggie\textsuperscript{242} explained further the notion of providing reparation to victims of such violations. He denotes that States have to enact ‘\textit{independent, non-discriminatory and fair}’ mechanisms to provide ‘\textit{legitimate, accessible, predictable equitable, rights-compatible and transparent}’ remedy to individuals harmed from PMSCs’ activities.

However, the Montreux Document did not manage to close the loopholes regarding the
State responsibility for PMSCs’ misconducts. That happened because it follows the narrow
interpretation with regard to which acts are attributable to a State as it establishes by the Draft
Articles. To that extent when a State contracts out a PMSC to operate on an occupied territory,
the State does not engage international responsibility because the overall, direct and effective
control by the contracting State is missing\textsuperscript{243}.

2.4. Achievements of States to Reach the Montreux Principles
Since the endorsement of the Montreux initiative by stakeholders and international
organizations, States engaged with the efforts to achieve an effective and coherent regulatory
framework to oversee PMSCs’ activities. While Cockyane argues that the Montreux Document tries to ‘provide a set of generally respected standards on which other regulatory initiatives could be built’, it is worth to highlight the measures that States have already undertook in order to comply with the good practices suggested by the Montreux Document.

The report on ‘Progress and Opportunities: Five Years On’ of the Montreux Document highlighted that endorsing States have to face with crucial challenges on regulation of PMSCs at national level. For instance, States should articulate which functions can or cannot be performed by PMSCs. To that extent, States tried to delineate domains of authorized PMSCs activities. For instance, the USA Office of Management and Budget Circular indicates which functions could be carried out by PMSC. These functions include ‘guard services, convoy protection services, pass and identification services, plant protection services or the operation of prison or detention facilities’. At the same time, the USA has narrowed the scope of using PMSCs by stating that these civilian contractors are not authorized to exercise governmental functions by taking part into hostilities.

244 Cockyane, supra note 204, p. 427.


Some States—on the other hand—adopted a more restrictive policy regarding the hiring of PMSCs. One significant example to that end is the South Africa which completely bans the participation of its nationals in an armed conflict of a foreign State. Moving forward from this restrictive approach, the British example stands far different; as the UK regulates PMSCs regarding the activities that they export.

Another important step to regulate effectively PMSCs’ activities and to prevent possible violations of international humanitarian law and human rights law is to ensure that PMSCs and their contractors (including subcontractors as well) respect the principles of international law. Thus, States have to improve oversight mechanisms and to exercise adequate control over the relationship between States and PMSCs. Therefore, the development of a licensing, contracting and authorization system for PMSCs is required. This system seems to be more than necessary in order to prevent any violation of their contractual activity and also


250 As the Report “Progress and Opportunities: Five Years On” emphasises that all States have to adopt these procedures. ‘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’. Buckland and Burdzy, supra note 248, p. 25.
to avoid impunity in cases of misconduct\textsuperscript{251}. For example, in the UK, an independent body named as the Security Industry Authority, which is responsible for licensing PMSCs, has been established. At the same time, the British Secretary of State retains control of licensing and registration when it relates to the export of goods, transfer of technology and provisional technical assistance\textsuperscript{252}.

Moreover, South Africa has a more detailed approach regarding the functions and the procedures of this oversight body. According to the Private Security Industry Regulation Act 56 ‘[…] 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 […]’\textsuperscript{253}. The Act goes further in order to clarify procedures to ensure accountability for this institution; it highlights that: ‘[…] the Council is accountable to the Minister 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’\textsuperscript{254} and moreover that ‘[…] the Committee must maintain a register of any— (a) authorisation issued by the Committee […]’ and ‘[…] must


\textsuperscript{252} Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 No. 2764, \textit{supra} note 252.


\textsuperscript{254} \textit{Ibid.}, section 10.
submit quarterly reports to the National Executive and Parliament with regard to the register [...]255.

The establishment of these procedures could be enhanced by the evaluation of past PMSCs’ conducts and their employees’ past conduct as well. To that extent in order to select a PMSC and/or approve its authorisation, States should examine whether that PMSC has been involved in any serious violations of international humanitarian law and human rights law during its previous operations; and if so, whether they provided adequate remedies to victims or not.

Nevertheless these potential good practices256, Seiberth257 observes that ‘the idea of a poor reputation being bad for business only applies to small PMSCs’258. As an example she mentions the case of DynCorp International. Despite several accusations against DynCorp of providing Afghan police with drugs and child prostitutes, the USA Department of Defence renewed its contract in 2010 for training police forces in Afghanistan259. These examples indicates that the past conduct of the PMSC, even good or bad one, still does not affect at all States decisions to contract to them governmental functions.

255 Republic of South Africa, Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, supra note 251, Section 8.
256 The Monteux Document, Part II, supra note 216, A. para. 6, B. para. 32, C. para. 60.
257 Seiberth, supra note 203, p. 143.
Also, a State is responsible to gather information regarding the criminal records of PMSCs’ employees. With this respect South Africa constitutes a unique example, as it asks for detailed reports from PMSCs, including personal details of the employees, registers reflecting the hours of work of PMSCs’ personnel, records regarding the places where PMSCs’ employees have been or are utilised, the nature of the operation, whether the PMSCs’ personnel are carried any firearm or other weapon, and also certified documents that indicate the level of security training of such security officers and officials.\textsuperscript{260}

3. The International Code of Conduct for Private Security Providers

Two years after the endorsement of the Montreux Document, fifty-eight private security companies signed the final version of the ICoC under the auspices of the Swiss Federal Department of Foreign Affairs, the Geneva Centre for the Democratic Control of Armed Forces and the Geneva Academy of International Humanitarian Law.\textsuperscript{261} The significance of this effort is that it is an industry driven process, representatives from PMSCs, industry associations, such as ISOA, members of civil society – as Human Rights First and ICRC, and governments, such as the USA, the UK, Afghanistan and Switzerland, have been involved.\textsuperscript{262}


\textsuperscript{262} Despite that the ICoC is built upon the Montreux Document’s foundation and constitutes its follow-up process, there is no uniform use regarding the terminology. For instance, the draftsmen of the ICoC instead of using the term of PMSCs, they use the term of Private Security Providers. The main reason is to disclaim any negative connection with the mercenaries and/or even with any PMSCs’ involvement in human rights abuses. For all the
This process has been completed in two main stages. The first one was the drafting of
the core commitments, which contains the principles and standards that PMSCs and their
employees should respect during their operations under the international humanitarian law and
human rights law. The second one was the improvement of accountability of PMSCs by
establishing also an external independent oversight mechanism\(^{263}\). This mechanism constitutes
‘a founding instrument for a broader initiative to create better governance, compliance and
accountability\(^{264}\) and the ‘first step in a process towards full compliance\(^{265}\) with the ICoC’s
principles and standards. To that end, in 2012 stakeholders and private security providers
agreed on the establishment of an oversight mechanism by adopting the Articles of the
Association (ICoC’s Association)\(^ {266}\).

According to its preamble, the ICoC constitutes the follow-up process of the Montreux
Document, in order to extend its principles to private security industry\(^ {267}\). In doing so, PMSCs
have to support the rule of law; to protect, prevent and respect human rights and fundamental
freedoms and to protect the interests of their clients. The main goal of this initiative is to ensure
that signatory PMSCs fully comply with ICoC’s standards and principles during their

\(^{263}\) ICoC, Section A, paras. 7 (a) and (b).

\(^{264}\) ICoC, Section A, para. 7.

\(^{265}\) ICoC, Section A, para. 8.

\(^{266}\) The Articles of the Association are available at http://www.icoc- psp.org/uploads/ICoC_Articles_of_Association.pdf (last visited on May 2016).

\(^{267}\) ICoC, Section A, para. 3.
operations. Even if the Montreux Document gives particular emphasis to the regulation of PMSCs and their obligations during armed conflicts, the applicability of the ICoC is extended to both armed and unarmed PMSCs’ services. In contrast, the ICoC does not enlist PMSCs’ services as the Montreux Document does, but it uses the term of ‘any other activity for which the personnel of the companies are requires to carry or operate a weapon in the performance of their duties’.

Unlike the recommendations set out by the Montreux Document, it couldn’t manage to specify PMSCs’ activities during a maritime operation. However, the ICoC leaves the option to extend its applicability on the training of external forces, maritime security services and all the operations related to detainees and other protected persons. Therefore, the expansive application of the ICoC could be seen as complementary to the narrow one of the Montreux Document. Particularly, the ICoC embodies three types of commitments; firstly it specifies general commitments for PMSCs and their personnel, secondly it states specific policy commitments to respect human rights and thirdly governance commitments to monitor and oversee the policy ones.

3.1. Private Military and Security Companies’ Duties under the Provisions of the ICoC

268 ICoC, Section B, para. 13.

269 For instance, the Montreux Document illustrates that the PMSCs’ services include armed guarding, the protection of person and military objects, the maintenance and operation of weapons systems, prisoner detention and advice of or training of local forces and security personnel. See the Montreux Document, Preface, para. 9.

270 ICoC, Section B.

271 ICoC, para. 7.
3.1.1. General Commitments with Regard to Private Military and Security Companies

By signing the ICoC, a PMSC has to exercise due diligence obligation and to act in accordance with the international humanitarian law, human rights law principles and national law\textsuperscript{272}. This obligation should be also restated into the contractual agreements between the State and the PMSC\textsuperscript{273} and between the PMSC and their personnel. For example, PMSCs should ensure that the rights and the freedoms of their employees are fully respected, such as the freedom of expression, freedom of association and peaceful assembly and the prevention of arbitrary or unlawful interference with privacy or deprivation of property\textsuperscript{274}.

Since PMSCs act in accordance with the law – both in terms of international and national laws - they should restrain from signing contracts with governments which act in contrast with the resolutions of the UN Security Council\textsuperscript{275}. Respecting international law’s principles, PMSCs should ensure that their contractors (and subcontractors) are not involved in the commission of any serious breach of human rights law and international humanitarian law\textsuperscript{276}. In this category of breaches, the ICoC includes war crimes, crimes against humanity, torture, the crime of genocide, forced labour, sexual exploitation and human trafficking, hostage-taking, illicit drug or/and weapons trafficking, child abuse and arbitrary executions\textsuperscript{277}. With that way, PMSCs assure that their activities are fully complied with international law.

\textsuperscript{272} ICoC, Section E, para. 21.

\textsuperscript{273} ICoC, Section E, para. 19.

\textsuperscript{274} ICoC, Section E, para. 21.

\textsuperscript{275} ICoC, Section E, para. 22.

\textsuperscript{276} These restrictions are imposed under any circumstances. Even there is a superior command or a threat against international peace and security, PMSCs and their contractors should restrain from these acts. See ICoC, Section E, para. 23.

\textsuperscript{277} ICoC, Section E, para. 22.
standards. On the other hand, in the case suspicion of grave breach of international law of any PMSCs and their employees should address it directly to Competent National Authorities of the country where the violation occurred; and then they should inform properly the country of origin of the victim/victims and of the criminal.

3.1.2. Specific Commitments for Private military and Security Companies’ Conduct

Followinw the aforementioned general commitments, the ICoC contains a non-exhaustive catalogue of PMSC’s obligations regarding the prevention of human rights abuses. To that end the document calls all signatory PMSCs and their personnel to ‘treat all persons humanely and with respect for their dignity and privacy’.

3.1.2.1. Rules for the use of force and firearms by private contractors

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278 ICoC, Section E, para. 26.

279 ICoC, Section E, para. 25.

280 Despite the fact that the ICoC reiterates significant human rights commitments for the companies and their personnel, an important category of rights which has been violated by their operations is missing. To this matter, the ICoC does not include any clear obligation for PMSCs to restrain from violations of people’s right to culture and its exercise. Allegations for these violations have been reported, the ICoC did not mention it at all, except from an unspecific reference under the phrase of ‘’[...]

281 ICoC, Section F, para. 28.
PMSCs usually operate in high-risk security environment, therefore it was impossible for ICoC to introduce a total prohibition of the use of force. Recognising the same problem, the draftsmen of the Montreux Document urged States to adopt regulations regarding the use of force and firearms by private contractors. Thus, the ICoC affirms that in case of using force and firearms, it should be done in accordance with the applicable law and proportionate to the threat.

Moreover, like the Montreux Document does, the ICoC clearly repeats that ‘using firearms against persons’ should be happen only in case of ‘self-defence of defence of others against imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life’. Despite this general approach regarding the use of force, the ICoC goes one step further as follows; whenever private contractors are officially incorporated within national armed forces, and so they are ‘authorised to assist in the exercise of a State’s law enforcement authority’ – act as a State agent – PMSCs have to assure that activities of their contractors are compliant – as a minimum – with the standards set out by the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

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282 The Montreux Document, Part II, supra note 216, A. 10, 12, 18 for recommendations to contracting States. See also The Montreux Document, Part II, supra note 216, B. 37, 43 for suggestions to territorial States and for home States see The Montreux Document, Part II, supra note 216, C. 63.

283 ICoC, Section F, para. 30.

284 ICoC, Section F, para. 31.

285 ICoC, Section F, para. 32.

286 Ibid.
At that point, the ICoC tries to fill the gap that the Montreux Document failed to do so. To be more precise, ‘Good Practices’ of the Montreux Document avoid to clarify which is the legislative framework that governs contractors while they are using force or firearms. On the other hand, the draftsmen of the ICoC were enough bold to specify that the use of force and firearms by private contractors, in case of exercising governmental functions, is governed by the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. In spite of that fact, the ICoC signifies that whenever PMSCs’ contractors -as State agents- carrying firearms and getting involved in any misconduct, they should be treated as State officials and their actions are attributable the State. In all other cases, the use of force should be limited by circumstances of self-defence.

3.1.2.2 Human rights’ commitments for Private Military and Security Companies and their personnel

In several cases, performing governmental functions, PMSCs and their employees have been implicated in incidents violating inherent human rights; ranging from the abuse of prisoners.

287 At that point it is worthy to notice that the draftsmen of the Montreux Document used vague references with regard to the use of force and firearms. For instance, they describe the legislative framework of use of force as ‘‘firearms conventions’’ (The Montreux Document, Part II), ‘‘rules on the use of force and firearms (The Montreux Document, Part II, supra note 216, A. 10 (a), B. 43 (a) and C. 63 (a)) and ‘‘policies on use of force and firearms’’ (The Montreux Document, Part II, supra note 216, A. 12 (a), B. 37 (a)).

288 See Article 5 of Draft Articles.


to shooting at unarmed civilians\textsuperscript{291}. Thus it was far clear that the ICoC points out PMSCs’ obligations with regard to detention services. To that extent, the ICoC specifies under which circumstances a PMSC could provide detention services. Firstly, the PMSCs should be contracted out by a State to guard, transport or question detainees; and secondly if only PMSCs’ personnel have received adequate training according to human rights law and international humanitarian law to do so\textsuperscript{292}. In conjunction with PMSCs’ obligations providing with detention services, the ICoC illustrates their obligation to restrain from acts of apprehending persons\textsuperscript{293}. Only in cases of self-defence or defend others against any threat of violence, or in cases of any possible attack or crime occur against another private contractors or against their clients or property which they protect, the ICoC permits the holding and/or taking any persons.

Either providing detention services or apprehending persons, PMSCs and their employees should not get involved in any serious violations of the prohibition of torture or other cruel, inhuman or degrading treatment\textsuperscript{294}. Moreover, the ICoC reiterates the existing general obligation under human rights law to prohibit any form of torture under any circumstances\textsuperscript{295}. Any incident of prohibition of torture should be reported directly to the


\textsuperscript{292} ICoC, Section F, para. 33.

\textsuperscript{293} ICoC, Section F, para. 34.

\textsuperscript{294} ICoC, Section F, para. 33 and para.35. This obligation derives by the general commitment to treat all individuals humanely. See as above ICoC, Section F, para. 28.

competent authority whereas the violation took place, and to the country of nationality of the victim, or the country of nationality of the perpetrator\textsuperscript{296}.

Attempting to prevent any reoccurrence of PMSCs’ involvement in sexual exploitation\textsuperscript{297} and human trafficking, the ICoC requires that PMSCs and their personnel should avoid to engaging in such misconduct\textsuperscript{298}. Therefore PMSCs have to prevent any form of sexual exploitation and any gender-based violence or crimes, such as rape and sexual harassment either within the PMSC or externally\textsuperscript{299}. Regarding also the prohibition of any form of human trafficking, the ICoC adopts a similar terminology as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children\textsuperscript{300} does. Thus, PMSCs should prevent \textit{the recruitment, harbouring, transportation, provision, or obtaining of a person for (1) a commercial sex act induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or (2) labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, debt bondage, or slavery} \textsuperscript{301}. At the same time, PMSCs are engaged with the obligation to not use slavery and/or forced or compulsory labour either internally or

\textsuperscript{296} ICoC, Section F, para. 37.

\textsuperscript{297} Jamie Wilson and Kevin Maguire, \textit{American Firm in Bosnia Sex Trade Row Poised to Win MoD Contract}, (November 2009).

\textsuperscript{298} ICoC, Section F, para. 33.

\textsuperscript{299} ICoC, Section F, para. 38.


\textsuperscript{301} ICoC, Section F, para. 39.
externally,\textsuperscript{302} and also they have to restrain from any forced child labour and trafficking of children\textsuperscript{303}.

Additionally, taking into account the safety of civilians, the ICoC reiterates that PMSCs should have specific identification and registration of vehicles and materials in order to be clearly distinguishable\textsuperscript{304}. That principle is a restatement for the Montreux Document as well, in order to emphasize their questioning status under international humanitarian law.

3.1.3. Commitments regarding the management and governance of the Private Military and Security Companies

In order to fulfil their obligations set out by the ICoC, PMSCs are required not only to incorporate ICoC’s principles and standards within their internal policies,\textsuperscript{305} but also they have to establish specific internal procedures in order to prevent any misconduct. Therefore, the ICoC demonstrates important guidelines which must be followed to achieve a sufficient and coherent internal management framework. These guidelines are ranged from the selection of private contractors and subcontractors,\textsuperscript{306} the standards of their contracts,\textsuperscript{307} their training according to the human rights law and humanitarian law principles\textsuperscript{308}, the use of weapons and

\textsuperscript{302} ICoC, Section F, para. 40.
\textsuperscript{303} ICoC, Section F, para. 41.
\textsuperscript{304} ICoC, Section F, para. 43.
\textsuperscript{305} ICoC, Section G, para. 44.
\textsuperscript{306} ICoC, Section G, para. 45 - 51.
\textsuperscript{307} ICoC, Section G, para. 52 – 54.
\textsuperscript{308} ICoC, Section G, para. 55.
being trained on them, the management of material of war, the reporting scheme of wrongful acts, the working environment, the harassment and finally, complaint procedures. Similarly to the Montreux Document, the ICoC highly emphasizes the considerations of private contractors’ records before hiring them.

3.1.3.1. The oversight mechanism of the International Code of Conduct

Apart for the abovementioned commitments with regard to the PMSCs’ responsibility to respect human rights of individuals and their employees and the establishment of internal policies on management and governance private contractors’ training and activities, the ICoC suggests the creation of an external independent oversight mechanism, which further promotes and oversees the implementation of its principles and standards. Besides in 2011, the UN Human Rights Council endorsed the UN Protect, Respect and Remedy Framework which recognises that the responsibility to respect human rights and to prevent their abuses is

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309 ICoC, Section G, para. 56 - 59.
310 ICoC, Section G, para. 60 – 62.
311 ICoC, Section G, para. 63.
312 ICoC, Section G, para. 64.
313 ICoC, Section G, para. 65.
314 ICoC, Section G, para. 66 – 69.
316 The draftsmen of the ICoC appointed a steering committee to prepare a Draft Charter of an International Governance and Oversight Mechanism. Until 2012, this Draft Charter was being opened for public consultations, further discussion and possible suggestions. Finally, in 2013 the final Articles of the Association were adopted and the ICoC’s Association inaugurated on September 2013.
317 ICoC’s Association, Article 2, para. 2.2.
extended to all kind of business entities as well\textsuperscript{318}. That happens because their activities have impact on internationally recognised human rights. So PMSCs bound - as States do - by the obligation to respect them\textsuperscript{319}.

In doing so, the ICoC’s Association seeks the establishment of different mechanisms, such as certification, auditing, monitoring and reporting. To that extent, the ICoC’s Association ensures the effective implementation of the ICoC’s standards. More precisely, these mechanisms are assessed and ruled by three main bodies: the General Assembly, the Board of Directors and the Secretariat with and the Executive Director\textsuperscript{320}. Moreover, the ICoC’s Association suggests also the establishment of another body, which provides information and gives advices regarding the national and international policies’ compliance with the Montreux Document’s principles and good practices: the Advisory Forum of the Montreux Document Participants\textsuperscript{321}.

The establishment of a certification procedure confirms whether a PMSC has already internal policy to fulfil ICoC’s requirements or not\textsuperscript{322}. Simultaneously the reporting, monitoring and assessing performance review PMSCs’ operations and informs for any possible violation of the ICoC.\textsuperscript{323} Thus, the Board of Directors could advice PMSCs to address ‘specific

\textsuperscript{318} U.N. Guiding Principles on Business and Human Rights, supra note 15, Section II, para. 11.

\textsuperscript{319} Ibid., para. 12.

\textsuperscript{320} ICoC’s Association, Article 5.

\textsuperscript{321} ICoC’s Association, Article 10.

\textsuperscript{322} ICoC’s Association, Article 11.

\textsuperscript{323} ICoC’s Association, Article 12.
In case of failing to comply with ICoC’s standards and principles, the ICoC’s Association imposes two main types of sanctions; as the termination of PMSC’s membership and/or suspension. More significantly, the ICoC’s Association sets out a complaints procedure through an international independent body. This procedure raises the opportunity to everyone, mostly the victims, to bring a complaint against PMSCs for alleged violations of ICoC’s principles. In such cases, the ICoC’s Association has to act directly, as most of the judicial bodies do so, to carry out prompt and impartial investigation due the allegation and - in case of violation - to offer effective remedies to prevent any reoccurrence. However, the ICoC’s Association does not include any further provisions regarding the remedies for PMSCs’ harmful activities. To that extent, the creation of independent body which provide remedies to victims seems incomplete. Yet, it encourages States and/or PMSCs to enact grievance mechanisms which could be responsible to provide effective remedies to victims.

4. Concluding Remarks

The increasing importance of PMSCs in international stability operations enhanced several efforts to address their duties and responsibilities towards the protection of human rights and

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324 ICoC’s Association, Article 12, para. 12.2.6.
325 A kind of sanctions can be found in other self-regulatory regimes as well, such as in ISOA Code of Conduct, para. 14.2: ‘‘[...]14.2. The enforcement of the ISOA Code of Conduct is guided by the ISOA Enforcement Mechanism, the complaint system available to the public at-large. Signatories who fail to uphold any provision contained in this Code may be subject to dismissal from ISOA [...]’’, available at http://www.stability-operations.org/?page=Code (last visited on May 2016).
326 ICoC’s Association, Article 13. See also ICoC, Section F, paras. 66 et seq.
fundamental freedoms. PMSCs and other business entities frequently escape from their accountability for human rights abuses. Therefore, the evolution of the Montreux Document based on the imposed obligations on States to regulate and monitor PMSCs and their personnel’s activities in conflict environments. It is the first international initiative in its kind which drafted by the significant contribution of States, non-governmental organizations and the private security and military industry. But only States can officially endorse it. Even though the Montreux Document compiles with existing obligations under international humanitarian law and human rights law, its importance lies also upon the recommendations – ‘Good Practices’- which are suggested to States. By implementing those proposals, States could really achieve a high level of oversight and accountability framework for PMSCs’ conduct.

Besides its contribution, the Montreux Document reveals some weakness which frustrates a completed approach towards the regulation of PMSCs. Firstly; the Montreux Document is referring only to regulative options with regard to land-based PMSCs’ operations. Thus, it leaves maritime security operations outside of its scope. Secondly, the Montreux Document particularly emphasises issues of State responsibility by attributing PMSCs’ misconduct to States – in a case-by-case basis. However the initiators of the document avoided to addressing issues of responsibility of international organisations whenever they hire PMSCs.


To date fifty States have already signed the Montreux Document. Even though only seventeen States finalised the Monteux Document, its universal value was increased by the presence of the ICRC during the drafting process and the cooperation which has been developed between States – the most affected by PMSCs’ operations (Afghanistan, Sierra Leone) and the biggest users of PMSCs (USA and the UK).
to carry out their operations\textsuperscript{330}. Besides, they could point out some suggestions – as a minimum – regarding the responsibility of international organisations for PMSCs’ wrongful acts occurring under their authority and control. Thirdly, since the Montreux Document focuses more on the monitoring of PMSCs in conflict environments, and to that extent the States; obligations under international humanitarian law, it leaves aside the exercise of due diligence obligation in conjunction with the extraterritorial application of human rights\textsuperscript{331}. Fourthly, apart from the issues of State responsibility, the Monteux Document does not specify issues of corporate responsibility by failing to fulfil the Monteux Document’s principles and standards. That omission could be justified by the reluctance of States at the time of drafting the document. Both States and PMSCs were enough hesitant to conclude on such prominent topic. Hence, it took three years waiting for the adoption of the UN Guiding Principles on Business and Human Rights\textsuperscript{332} to recognise directly the duty to respect the human rights during PMSCs; operations. Fifthly, the main weakness of the Montreux Document could be found in the absence of mechanism which ensures the compliance of national PMSCs’ policies with the recommendations set out by the Montreux Document.

Having identified the aforementioned missing points of the Montreux Document, the ICoC came to fill these grey zones of regulation from an industry-driven perspective. The main


\textsuperscript{332} U.N. Guiding Principles on Business and Human Rights, supra note 200.
scope of the ICoC is the creation of an oversight system according to which PMSCs are going to act with its commitments. Its non-binding nature does not affect a lot its implementations since it constitutes a kind of bylaw for the signatory PMSCs. However, its effective implementation depends exclusively on the structure of the mechanisms which would be adopted by PMSCs.\textsuperscript{333}

Nevertheless, the implementation of the independent oversight mechanism hides some of deficiencies which PMSCs have to overpass through the ICoC’s incorporation within their internal policies. In particular, due to the complexities of the environments the ICoC’s Association does not specify which is the examination process for a complaint to be admissible or not and then to proceed with further impartial investigation throughout PMSCs’ harmful activities. Moreover, another crucial weakness’ point for the ICoC is that it does not include any provision on remedies for PMSCs harmful activities. With respect to remedies procedure, the ICoC’s Association indicates then after the examination of the complaint, the ICoC’s Association to which mechanism the victim/victims should be addressed to have access to effective remedies.\textsuperscript{334}

To surmount the aforementioned weaknesses the ultimate solution is the adoption of an international legally binding document to ensure the application of minimum standards for

\textsuperscript{333} Seibert, \textit{supra} note 203, p. 225.

\textsuperscript{334} ICoC’s Association, Article 13.2.2.
regulations and monitoring PMSCs’ operations. As Gómez del Prado argues a binding initiative has some important advantages. Firstly, it has a broad applicability irrespectively the nature of the PMSC’s operation. It applies on land-based or maritime-based operations during wartime or peacetime as well. Secondly, apart from the states, it imposes obligations to regulate and monitor PMSCs’ operations to international organisations, such as NATO. Thirdly, it creates an international monitoring body to oversee states’ efforts to comply with its provisions, and also it establishes a complaint procedure – inter-state and individual petition procedures.

Nevertheless, most of the Western States stand against on this initiative, as they strongly support that the only thing is missing is not the absence of a binding regulatory framework regarding the PMSCs activities, but the delayed adoption of the already existing international mechanisms and the lack of support to new self-regulatory mechanisms, such as the Montreux Document and the ICoC, which have not yet been fully implemented. Moreover, the adoption of a binding legal document shields another important danger. White indicates that the

335 Benjamin Perrin, ‘Searching for Accountability: the Draft U.N. International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies’ [2009] 47 Canadian Yearbook of International Law, p. 299. Moreover, Percy argues that ‘the international regulation has the capacity to protect States with weak judicial systems from potential problems caused by PMSCs; it can prevent PMSCs from moving abroad to avoid regulations; it can ensure that contracts between non—State actors and PMSCs adhere to minimum standards’. See Sarah Percy, Regulating Private Security Industry (Adelphi Paper, 2006).


338 White, supra note 203, p. 31.
adoption of an international binding document ‘will attract a different clientele of States’ than
the non-binding initiatives did. That is, States, who are high connected with the PMSC industry,
might be strongly opposed to a binding regulatory framework, and those who are completely
opposed to PMSCs’ activities as a modern form of mercenary would support it more. Moreover, even a non-binding document as ICoC is hardly implemented. To date, only the UK,
Switzerland and Australia have already endorsed ICoC and they asked for membership339.

In conclusion, since the adoption of a binding document seems to be a longstanding and
difficult process, -for instance - it took five years for the Human Rights Council to conclude
on the final document of the Draft International Convention on the Regulation, Oversight and
Monitoring of Private Military and Security Companies (hereinafter as ‘the Draft
Convention’)340 after of almost ten year of international negotiations regarding the regulation,
monitoring and accountability of PMSCs and their employees, States and PMSCs are enough
ready to come up with a new challenge - the drafting of a new international initiative like the
Montreux Document - with more broad approach. Moreover, the Montreux process inspired
other international organisations to suggest measures to States to adopt coherent and sufficient
regulatory frameworks regarding PMSCs’ activities. In particular, to fully support the
implementation of the UN Protect, Respect and Remedy Framework, the OECD adopted
*Guidelines for Multinational Enterprises* (2011)341 and also, the CoE approved the *Declaration*


340 This process is still undergoing. For the draft of a possible Convention on PMSCs see Report of the Working
Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right

341 For the full document of OECD Guidelines for Multinational Enterprises see at
of the Committee of Ministers on the UN Guiding Principles on business and human rights (2014)\textsuperscript{342}. That new initiative has to include regulative options for both land-based and maritime-based operations. Secondly a document like this has to illustrate obligations and responsibilities of States, International Organisations and PMSCs under human rights law and humanitarian law. Moreover, it has to be precise regarding the accountability of States, International Organisations and PMSCs by failing to fulfil their obligations under international law, and to specify criminal liability for PMSCs’ contractors in case of human rights infringements. Overall an international initiative like that has also to establish an oversight body which supervise the effective implementation of its provisions. Such marks out the new pathway towards an enforceable international code.

5. Summary

Following the analysis of the international legal framework on the regulation of PMSCs, the present study focuses also on the examination of national regulatory mechanisms for punishment and prosecution of PMSCs’ employees for human rights violations. So as, the next chapter examines the national regulatory regimes of the greatest exporters of PMSCs pertaining to PMSCs’ operations (USA, UK, South Africa and Germany). Moreover, it explores the existing national legislative framework, under which private contractors may be held accountable for their misconducts. Further, it considers that the absence of an international framework to punish private contractors for human rights violations allows for non-compliance with human rights law.

CHAPTER V:
NATIONAL REGULATORY MECHANISMS TO
PROSECUTE PRIVATE MILITARY AND SECURITY
COMPANIES’ EMPLOYEES FOR HUMAN RIGHTS
VIOLATIONS

By carrying out several security tasks that traditionally belonged to States, PMSCs have purportedly been involved in violations of international human rights and humanitarian law.

In the last two decades, States relied on business entities to perform military and security services, which prior to that, had been performed by national armed forces. This practice has initially begun during the wars in Iraq and Afghanistan and now on the use of private entities is widespread, covering for example anti-piracy operations in the Horn of Africa and combatting drug trafficking in Latin America. See Kateri Carmola, Private Security Contractors and New Wars: Risk, Law and Ethics (London: Routledge, 2010); Deborah V. Avant, The Market of Force: the Consequences of Privatizing Security (Cambridge: Cambridge University Press, 2010). See also United Nations Working Group on the Use of Mercenaries as Means of Impeding the Exercise of the Right of Peoples to Self-determination, ‘Why We Need an International Convention on Private Military and Security Companies’ (17 May 2011) U.N. Doc. A/HRC/WG.10/CRP.1, para. 1. See also Tanya Cook, 'Dogs of War or Tomorrow's Peacekeepers? The Role of Mercenaries in the Future Management of Conflict' [2002] 5(1) Culture Mandala, Article 1. Bassiouni argued that the proliferation of non-state actors in conflicts and post-conflicts environment emerged the concept of the ‘new culture of war’. Cherif M. Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflicts by Non-State Actors’ [2008] 98 Journal of Criminal Law and Criminology 711, 717. To that extent, that “new culture of war” is based on a general enthusiasm of States to outsource their functions and also on a growing reluctance by them to intervene in conflicts which are not of their particular strategic interests. See Simon Chesterman and Chia Lehnardt (eds.), From Mercenaries to the Market: The Rise and Regulation of Private Military Companies (Oxford: Oxford University Press, 2007) 1.
during their operations\textsuperscript{344}. Several States, such as the USA, the UK, South Africa, Iraq and Afghanistan have already experienced violations of human rights law by private contractors. The most notorious examples have allegedly taken place in Iraq. In particular, in 2004, Titan Corporation and CACI – two American PMSCs latterly, they contracted out to provide interpretation and interrogation services at Abu Ghraib prison – were accused of being involved with torturing of Iraqi detainees\textsuperscript{345}. A military investigation, which resulted in the publication


of a report titled ‘Tabuga Report’, explicitly indicates the extensive sexual abuse and humiliating treatment of detainees by private contractors.

Notwithstanding these allegations, the US State Department hired Blackwater to guard the US diplomatic mission in Iraq. A few years later, in 2007 Blackwater’s private contractors were involved in shooting innocent Iraqi civilians in Nisour Square in Iraq while they were escorting US vehicles to the Green Zone. As result, 17 people were killed and 24 were wounded, among them women and children. According to the ‘Memorandum: Additional Information on Blackwater U.S.A’ Blackwater’s personnel have been involved in more than 195 incidents in Iraq from 2005 to 2007. Apart from the aforementioned incidents, PMSCs

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347 The International Zone known as ‘the Green Zone’ was a guarded area of closed-off streets in central Baghdad whereas the US governments officials were living and working.


have also been accused of attacking civilians in Colombia\textsuperscript{350} and even of buying and keeping women and girls in sexual slavery in Bosnia\textsuperscript{351}.

Despite the national reports, such as the ‘‘\textit{Memorandum: Additional Information on Blackwater U.S.A}’’, and the media constitute a proven record of the involvement of private contractors in human rights abuses, they also highlight that in most cases none of them had been prosecuted\textsuperscript{352}. The absence of a coherent and binding international legal framework to regulate PMSCs and oversee private contractors’ activities\textsuperscript{353}, together with the lack of national regulatory and advocacy frameworks, which have jurisdiction related to PMSCs’ misconduct, means that private contractors have managed to escape from prosecution for human rights


\footnotesize{\textsuperscript{353} Kamminga and Zia-Zarifi argued that the multinational character of (PMSCs) operations and the ‘amorphous structure’ of those companies make them immune from the control of States. Therefore, it requires to be regulated at international level. See Menno T. Kamminga and Saman Zia-Zarifi, ‘Liability for Multinational Corporations under International Law: An Introduction’ in Menno T. Kamminga and Saman Zia-Zarifi (eds.), \textit{Liability for Multinational Corporations under International Law} (The Hague/London/Boston, Kluwer Law International, 2000) 3.}
violations. As a result, private military and security industry remains ‘less regulated than the cheese market’ and/or ‘the toy industry’.

In an attempt to fill the regulatory and accountability gap regarding the PMSCs and their employees, the international community has launched some significant initiatives in an attempt to encourage States to implement regulatory frameworks with regard to PMSCs. The Montreux Document forms the first international document that emphasizes States’ obligations both to regulate and monitor PMSCs’ activities and to enact proper legislative measures to punish perpetrators for violations of international humanitarian law and human rights law. More specifically, the Montreux Document provides that States have the ultimate


356 See the abstract of José Luis Gómez del Prado, ‘A U.N. Convention on PMSCs?’ [2012] 31 (3) Criminal Justice Ethics 262. One of the primary reasons that this market continues to be unregulated is the transnational character of PMSCs’ activities. See Avant, supra note 346, p. 144.


obligation to establish relevant judicial mechanisms to prosecute persons for ‘committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I’. It requires also States to be bound by the obligation to ‘search for persons alleged to have committed’ those acts ‘regardless of their nationality, before their own courts’. Therefore, States have to enact relevant laws to prosecute private contractors, as perpetrators for human rights abuses, regardless of the place where violations have been committed. Moreover, the Montreux Document underlines that the lack of national laws with extraterritorial effect and the immunity provided to private contractors enjoy under the status-of-forces agreements, could lead to impunity. That is exactly what happened with the punishment of private contractors in Iraq. In both cases of Abu Ghraib and Nisour Square, private contractors enjoyed immunity from Iraqi courts in case of misconduct. This is the Montreux Document in improving the standards of accountability for private contractors’ misconduct. See James Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document’ [2008] 13(3) Journal of Conflict and Security Law, p. 401.

Ibid.

Status-of-Forces Agreements (SOFAs) are agreements between the host State and a State stationing military force within the territory of that State. SOFAs are also included along with other types of military agreements, as a comprehensive security agreement. See also Chunk R. Mason, Status of Forces Agreement (SOFA): What Is It and How It Been Utilized? (CRS Report for Congress, 15 March 2012).


According to the Coalition Provisional Authority (CPA) Order No 17, the agreement that was signed between the Iraqi government and the U.S.A. Department of Defence regarding the use of private contractors in military operations states ‘Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts [...]’. See National Legislative Bodies/National Authorities, Iraq: Coalition
because USA Courts had exclusive jurisdiction over the crimes committed by private contractors on the Iraqi territory\textsuperscript{364}. Yet the problem remains, since the USA does not have proper legislative enforcement over private contractors' misconduct\textsuperscript{365}. Irrespective of the

\textit{ Provisional Authority Order No. 17 of 2004 (Revised), Status of the Coalition Provisional Authority, MNF - Iraq. Certain Missions and Personnel in Iraq, 27 June 2004} \texttt{<http://www.refworld.org/docid/49997ada3.html>}

accessed on May 2016. Nonetheless after the killing of the Iraqi unarmed civilians in 2007, the Iraqi government approved this agreement by ending private contractors’ immunities. By contrast, in Libya the U.S.A. managed to achieve immunities for all PMSCs’ employees. See also Christopher. M. Kovach, ‘Cowboys in the Middle East: Private Security Companies and the Imperfect Reach of the United States Criminal Justice System’ [2010] IX(2) The Quarterly Journal, p. 17. The United Nations Resolution 1970 (2011) on Libya states that the Security Council ‘decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State’’. See UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, 26/02/2011), para. 6.

\textsuperscript{364} It is worth to be noticed that States usually adopt specific legislative procedures in order to exercise exclusive jurisdiction over their nationals. Thus, their citizens are excluded from the possibility of surrender to the jurisdiction of another State. Micaela Frulli, ‘Immunity for Private Contractors: Legal Hurdles or Political Snags?’ in Francesco Francioni and Natalino Ronzitti (eds.), \textit{War by Contract: Human Rights, Humanitarian Law and Private Contractors} (Oxford: Oxford University Press, 2011), p. 460.

significant contribution of the Montreux Document in the field of regulating PMSCs’ activities, its non-binding nature and its limited application (since it applies only during armed conflicts) makes it unable to fill in the accountability gap for human rights abuses by private contractors. For instance, the UN Working Group on Mercenaries criticized the contribution of the Montreux Document. In particular, in its 2009 report the UN Working Group which recognized that the Montreux Document failed to ‘address the regulatory gap in the responsibility of States with respect to the conduct of PMSCs and their employees’.

Yet, recognizing the significance of the Montreux Document, the Human Rights Council welcomed the addition of a legally binding document with regard to PMSCs and their employees. The final document – titled the U.N. Draft Convention constitutes the first effort to create States’ obligations for using PMSCs, their licensing and authorization of PMSCs’ activities as well as addressing accountability issues for PMSCs for human rights violations. Since it is still an ongoing process, the UN Draft Convention makes the intentions


of States towards the regulation and control of PMSCs' operations. Therefore, it is a result of the aforementioned initiatives, it places an onus is placed on States to take decisive legislative measures to regulate PMSCs’ activities and hold private contractors accountable for human rights violations. According to Schneiker, there are two main reasons, which indicate the emerged need of such regulation. First, States remain responsible for violations committed by PMSCs by outsourcing certain security activities to them. Secondly, even though the national regimes are less effective than an international one, as they are easier to be enforced. Caparini therefore highlights that there is a general need to clarify under whose jurisdiction PMSCs' employees operate and who holds the competence over their activities. For example, if a Colombian contractor working for a Belgian PMSC commits grave violations of human rights law, whose jurisdiction will prosecute him/her and under which laws should he/she be tried?


372 The possible ineffectiveness of national regulations derived from the transnational nature of PMSCs' operations. As Singer argues, in most cases, PMSCs are registered in one country, they operate within the territory of another one and they hire contractors from a third State. See Peter W. Singer, Corporate Warriors: the Rise of Privatized Military Industry (Ithaca: Cornell University Press, 2003).

Due to lack of international binding regulations, the need for the establishment of accountability mechanisms regarding violations of human rights law has never seen higher, in order to establish effective prosecution for private contractors. This chapter focuses on the existing national accountability regimes that apply over private contractors. First, it compares four different legislative regimes relating to private contractors' prosecution for their wrongful acts, namely the greatest exporters of PMSCs (the USA, the UK, South Africa and Germany) and assesses their effectiveness based on their contribution to the prosecution of private contractors for their misconduct. Consequently, thereafter, in the context of the absence of an international prosecution model for human rights violations by PMSCs, this chapter suggests a national prosecution model which encourages States to fulfill their obligations under human rights law by better regulation of PMSCs’ operations.

2. Current National Legislative Pathways to Prosecute Private Contractors for Human Rights Breaches

Since the international community’s failure to enact decisive measures to control PMSCs’ activities and establish an international accountability body to hold private contractors responsible for serious human rights violations, States have postponed the adoption of effective national legislative mechanisms to govern PMSCs and for their employees\(^\text{374}\). From PMSCs’ perspective, the enforcement of national regulation in relation to PMSCs’ activities also promotes the safety and wellbeing of private contractors during their activities. For instance, following the killing of four Blackwater’s employees in Fallujah in 2004, their families

\(^{374}\) *Ibid.*
investigated legal proceedings against Blackwater, claiming that the company sent the four employees into Iraq’s hostilities without the adequate equipment and training\textsuperscript{375}.

Overall, the lack of a coherent governance framework serves only to enhance the perception that PMSCs enjoy legal impunity in conflict zones\textsuperscript{376}. In 2005, four military veterans were hired by Custer Battles and later were accused of using brutal tactics against unarmed Iraqi civilians, including children. This case against Custer Battles was eventually dismissed, as there was no evidence, this reinforced that perception\textsuperscript{377}. The lack of accountability and oversight mechanisms has been further amplified by the Amnesty International in 2006; where it was pointed out that at least twenty incidents of abusing and humiliating civilians were forwarded by the US Department of Defense and the CIA to the Department of Justice for


prosecution. Yet only one PMSCs contractor was indicted\textsuperscript{378}, two were dismissed and seventeen cases remain open\textsuperscript{379}.

2.1. The United States of America

the USA is one of the major exporters of private military and security services to many unstable environments\textsuperscript{380}, so as it is the best choice to examine the national regulations aimed at prosecuting private contractors for human rights abuses. In order to ensure that private contractors were accountable for their actions, the U.S. government has adopted some administrative arrangements as a mean of control. In 2000, the Congress passed the MEJA\textsuperscript{381}. The MEJA is the only U.S. legal instrument that applies to any American contractor living and/or operating abroad\textsuperscript{382}. Initially, the MEJA only applied to those civilians who were either employed by, or accompanied security operation authorised by the U.S. Department of Defence. Most notably, in the case of the \textit{U.S.A. v. Gatlin}, the U.S. Court of Appeal of the


\textsuperscript{381} The U.S.A. Congress passed the MEJA, concerned “the lack of U.S.A. criminal jurisdiction [over potential crimes] committed by civilians, including military dependents and contractors accompanying U.S.A. armed forces overseas”. See \textit{Reid v. Convert}, 354 U.S.A. 1 [1957], U.S.A. Supreme Court [82].

second Circuit argued that there was no jurisdiction relating to the crimes committed abroad by U.S. nationals\textsuperscript{383}. However, the subsequent 2004 amendment to MEJA was added with an aim of including all private contractors under its jurisdiction\textsuperscript{384}. In particular it provides jurisdiction over private contractors who \textit{are employed by or accompanying armed forces outside the USA} \textsuperscript{385}, which includes private contractors and sub-contractors not only under the U.S. Department of Defence, but also under \textit{other federal agencies and/or provisional authorities} \textsuperscript{386}.

For example, in the Blackwater’s scandal was used lethal force, in 2008 five Blackwater’s employees were indicted under MEJA for their misconduct\textsuperscript{387}. At the first instance, the defendants claimed that the court had no jurisdiction to preside over the case, since they were hired by the U.S. Department of State and not by the U.S. Department of Defence\textsuperscript{388}. The DC of Columbia dropped the case. However, in 2011 the DC Circuit Court of  


\textsuperscript{384} 18 U.S.C., paras 3261-67.

\textsuperscript{385} \textit{Ibid.}

\textsuperscript{386} \textit{Ibid.} However, under the term of ‘\textit{other federal agencies and/or provisional authorities}’, MEJA provides coverage only to those who have a function under the mission of the U.S.A. Department of Defense’’.\textsuperscript{386}

\textsuperscript{387} However, Tara Lee at her article on DePaul Rule of Law Journal in 2009 strongly supported that even MEJA is considered as the most appropriate jurisdictional mechanism for advocating crimes committed by private contractors, there are still other more appropriate legislative pathways. She came to that conclusion by observing that throughout MEJA war crimes are tried out as they are merely street crimes. See Tara Lee, MEJA for Street Crimes, NOT for War Crimes’ [2009] DePaul Rule of Law Journal, p. 1.

\textsuperscript{388} ‘These private security contractors were not engaged in employment supporting the DoD mission overseas and, therefore, are not subject to Federal criminal prosecution under the Military Extraterritorial Jurisdiction Act’’.
Appeals overruled this decision and the U.S. Supreme Court instigated the proceedings against the defendants\textsuperscript{389}. Eventually, successful prosecutions under MEJA occurred. In particular, private contractors faced convictions under MEJA for child pornography\textsuperscript{390}, sexual harassment\textsuperscript{391} and assaults\textsuperscript{392}.

In addition to the MEJA, accountability issues concerning private contractors are governed under the War Crimes Act of 1996\textsuperscript{393}. This Act criminalises any crime committed by or against a member of the U.S. armed forces\textsuperscript{394}. However, to date no one has been prosecuted under this Act. At the same time, the UCMJ\textsuperscript{395} can also apply to the misconducts by U.S. civilians ‘supporting the U.S. national armed forces in declared war and contingency operations’.\textsuperscript{396} However, none of the U.S. Supreme Court’s decisions have involved private contractors; despite the fact that their misconduct took place during hostilities\textsuperscript{397}. In particular, US Supreme Court in the case of \textit{U.S. ex rel. Toth v. Quarles} did not speak directly of ‘the issue of court-martial jurisdiction over contractor employees or to the issue of jurisdiction

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\textsuperscript{389}\textit{ibid}.

\textsuperscript{390}U.S.A. Department of Justice, U.S.A. Attorney for the Eastern District of Virginia, Military Contractor Sentenced for Possession of Child Pornography in Baghdad [May 25, 2007].


\textsuperscript{394}\textit{Ibid}.

\textsuperscript{395}U.S.A. Code, Title 10, Subtitle A, Part II, Chapter 47.

\textsuperscript{396}Art. 2 para 802 (a) (10).

\textsuperscript{397}For instance the case of \textit{Kinsello vs. Singleton}, 361 U.S.A. 234 [1960].
during active military hostilities as contemplated by [the] UCMJ […] which provides for court-martial jurisdiction over persons serving with or accompanying an armed force […] during time of war.\textsuperscript{398} Even though the UCMJ states that the national courts should have jurisdiction relating to PMSCs’ misconducts, in the case of \textit{U.S.A. v. Averette}\textsuperscript{399}, the Court of Appeals for the Armed Forces argued that the court had no jurisdiction to decide this case, since the war in Vietnam was not declared by the Congress\textsuperscript{400}. On the other hand, Stigall\textsuperscript{401} states that ‘\textit{any person who commits a crime and accompanying the national armed forces, falls within the national courts’ jurisdiction either as U.S. citizen or a third-State national’}. To override these difficulties, in 2007 the UCMJ was revised to allow military jurisdiction ‘\textit{in time of declared war and contingency operations}\textsuperscript{402} over ‘\textit{persons serving with or accompanying the armed forces in the field}\textsuperscript{403}. However, the prosecution of civilians under the UCMJ is constitutionally


\textsuperscript{399} See \textit{U.S.A. v. Averette et al.}, 19 C.M.A. 363 [1970].

\textsuperscript{400} \textit{Ibid}, [365].


\textsuperscript{403} To that end, the Deputy Secretary of Defense, Gordon England issued a directive to senior officers in the Pentagon, reminding them that all the contractors who are hired under the U.S.A. Department of Defense are subject to the UCMJ and encouraging them to begin legal proceedings against those that have violated the U.S.A. military law.
barred. In *Reid v. Covert* case, the U.S. Supreme Court held that the U.S. Constitution prohibits the prosecution of civilians by court-martials, as it lacks trial by jury. Only one reported case can be cited in support of a successful use of the UCMJ to hold private contractors accountable for human rights violations.

Finally, under the ATCA, a civil claim can be brought by an alien against PMSCs whose employees commit human rights abuses for monetary compensation. In particular, in 2007

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404 *Reid v. Covert* 354 U.S.A. 1 39-41 [1957]. Also, the UCMJ’s jurisdiction is limited only to individuals possessing an official military status (*Solorio v. United States* 483 U.S. 435 450-51 [1987]). The uses of military courts to try civilians raised serious human rights concern. The U.N. Human Rights Committee stressed out that the trial of civilians by military courts should be exceptional and occur only under conditions that genuinely afford full due process. See Human Rights Committee, ‘General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial’ (2007) UN Doc CCPR/C/GC/32. See also Evelyne Schmid, ‘A Few Comments on a Comment: the U.N. Human Rights Committee’s General Comment No. 32 on Article 14 of the ICCPR and the Question of Civilians Tried by Military Courts’ [2010] 14(7) International Journal of Human Right, p. 1058.


a complaint was filed with the USA District Court for the District Court of Columbia against Blackwater on behalf of an injured survivor and the families of some of the victims.\footnote{Estate of Himoud Athban et al v. Blackwater USA et al., U.S.A. District Court for the District Court of Columbia, No. 1:2007cv01831 - Document 37 [2009]. <http://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2007cv01831/127734/37/> accessed on May 2016.}

2.2. The United Kingdom

The UK is also another home State for some of the largest PMSCs, such as the Group 4 Securior and Aegis. As a result, the UK’s approach towards governing PMSCs is to follow a two-fold policy regarding the regulation of their operations\footnote{Corinna Seiberth, Private Military and Security Companies in International Law (Cambridge/Antwerp/Portland: Intersentia, 2014), p. 246.} and for PMSCs\footnote{Alexandra Bohm, Kerry Senior and Adam White, ‘The United Kingdom’ in Christine Bakker and Mirko Sossai (eds.), Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms (Oxford/Portland, Hart Publishing, 2012).} the industry's initiatives\footnote{Regarding the self-regulation approach for PMSCs’ activities see Engeni Moyakine, The Privatized Art of War: Private Military and Security Companies and State Responsibility for their Unlawful Conduct in Conflict Areas (Cambridge/Antwerp/Portland: Intersentia, 2015), p. 132. See also Renee de Nevers, ‘(Self) Regulating War?: Voluntary Regulation and the Private Security Industry’ [2009] 18 Security Studies, p. 479.}.

Where human rights violations occur by private contractors, the UK government has a wide range of legislation which can apply on them\footnote{In any case, Michael Byers emphasizes that the British courts constitute the most desirable pathway to litigate abuses against private corporations. That is based on the deepen knowledge of the British judges for public international law. In particular, he highlights the decision of Trendex Trading Corp. vs. Central Bank of Nigeria –back in 1977- according to which the judges accepted the importance of customary international law as an}.

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remains the only legal pathway that directly applies to the activities of PMSCs’ and
their employees, even when they operate abroad; but, no prosecution has ever been brought
successfully under this Act, due to the difficulty of gathering information regarding non-State
actors’ operations abroad. Since most of the British PMSCs operate abroad, including Iraq and
Afghanistan, there is a requirement that the jurisdiction over extraterritorial activities de
extended. As emphasized in the case of Bici v. Ministry of Defense, the High Court found
that a soldier who violated the duty to prevent an injury to the public by deliberately firing at
them, liability against them arises. However, the extension of the jurisdiction over military
operations is often refused first, on grounds that they are ‘forces of the Crown’ – it could be
said that PMSCs’ are acting on behalf of the Queen; and secondly, based on a broader

The Human Rights Act stipulates that the State has to secure that everyone within its
jurisdiction enjoys the rights and freedoms defined in the European Convention on Human
Rights. Moreover, Lord Justice Rix explored the application of the Human Rights Act 1998 to
the extraterritorial activities of the armed forces in R (Al-Skeini and Others) v. Secretary of

413 Bohm, Senior and White, supra note 412, p. 312.
He highlighted that the Article 1 of the ECHR – therefore, the Human Rights Act applies not only on a territorial basis, but also in cases where the State exercises effective control over the operation. Therefore, it follows that the Human Rights Act can apply to British-controlled detention facilities abroad. Accordingly, an individual who has been subjected to human rights abuses by private contractors would be able to bring its case before the British courts, but only if the PMSC’ misconduct is attributable to Britain.

Another way of holding private contractors liable for human rights violations when operating as a PMSC is to exercise jurisdiction through the ICC Act of 2001. To date, only one soldier has been tried by a court-martial for abusing prisoners in Iraq in this way. However, the application of the ICC Act is restricted since PMSCs do not typically operate in war zones and moreover, they are not engaged in offensive military actions. Furthermore, the activities of PMSCs within Britain’s territory are directly regulated and monitored by the

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417 The Article 1 stipulates the obligations of State Parties to respect human rights. In particular, it indicates that ”The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

418 R (Al-Skeini and Others) v. Secretary of State of Defense, op. cit., paras. 248, 249, 265 and much better 270.


PSIA. The main goal of the PSIA is to protect citizens from the negligent and harmful practices of private security companies. However, in recent years, the PSIA has tried to hold PMSCs accountable by stipulating that a private contractor ‘shall be guilty of that offence and liable to be proceeded against and punished accordingly’.

This illustrates that ‘where an offence […] is committed by a body corporate and is proved to have been committed with the consent […] of […] a direction, manager, secretary or other similar officers of the body corporate […] he […]’ is criminally liable.

Despite the establishment of contractors’ accountability, the Private Security Authority does not have competence to examine such allegations. The Authority is only responsible for granting or refusing to grant licenses to PMSCs’ employees and supervising the self-regulation administrative functions contented in the Act. Apart from the existing legislative context, the UK has initiated negotiations for the adoption of a regulatory regime regarding the PMSCs’ activities. In 2002, the UK’s Foreign and Commonwealth Office

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424 See Private Security Industry Act 2001 Chapter 12, Supplemental Section 23.

425 See Private Security Industry Act 2001 Chapter 12, Explanatory Notes, Commentary, Part II, Door Supervisors, etc for Public Houses, Clubs and Comparable Venues, Section 23.

426 The Private Security Authority is the monitoring body of the Private Security Industry Act 2001. Its primary responsibility is to oversee the effective implementation of the PSIA 2001 and to carry out the functions related to licensing. See Private Security Industry Act 2001 Chapter 12, Supplemental Section 1.

427 See Private Security Industry Act 2001 Chapter 12, Supplemental Section 1.
launched the ‘Private Military Companies: Options for Regulation’\(^\text{428}\), which outlined how an appropriate framework for the regulation of PMSCs' activities could be achieved. This so-called Green Paper, – provides ‘options for the control of private military companies which operate out of the UK, its dependencies and the British Islands’\(^\text{429}\). Not only did the Green Paper stress the lack of clear lines of accountability\(^\text{430}\), but also private security industry welcomed any proper regulation from the UK government, provided self-regulation was an integral part of the process\(^\text{431}\). Yet, the BARSC claims that they are working towards the harmonization of industry standards through voluntary codes of conduct, but it is a weak obstacle to prevent abuse.

2.3. **South Africa**

South African Republic is addressing the growth of PMSCs and the challenges posed by the use of mercenaries in the African continent, as it has the most effective legal regime regarding the regulation of PMSCs' activities. This is not a surprising fact since that country used to be a major exporter of PMSCs in the post-apartheid era.\(^\text{432}\) After their first democratic elections in 1994, the South African Constitution is the primary source of law that applies to the private military and security services\(^\text{433}\). The willingness of the new government was to give direct and

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\(^{429}\) Ibid, para. 1.

\(^{430}\) Ibid, para. 34.


\(^{433}\) According to the Annual Report of the Working Group on Mercenaries, the South Africa is the only anglo-speaking African State, which had specific legislation regarding the export of military and security services. See
decisive response to the involvement of Executive Outcomes in Sierra Leone in 1995\(^{434}\), led to the adoption of the FMAA of 1998\(^{435}\). The FMAA sets out a restrictive structure with regard to the engagement of any national with the training and/or financing of any military and security assistance abroad\(^{436}\). In addition to the establishment of an authorization and registration regime of PMSCs and their employees, the FMAA contains provisions for the prosecution of private contractors when a violation of FMAA provisions occurs\(^{437}\). In *Rouget v. S.*, the involvement of a former French soldier who was convicted for recruiting mercenaries in South Africa to participate in the civil war in Ivory Coast\(^{438}\). Furthermore, in *Zimbabwe* case a former British officer was found guilty of trying to supply weapons in order to overthrow the

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government of Equatorial Guinea, including South Africans, although only two of them were fined because of the lack of evidence\textsuperscript{439}.

Despite the limited cases that have been brought before the national courts under the FMAA, in order to comprehensively implement the FMAA, several concerns need to be addressed. First, relates to the gathering of information and evidence to secure the convictions, whilst the second to the problematic extraterritorially enforcement of certain FMAA’s provisions. In order to overcome these shortcomings, the government replaced the FMAA with the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 (hereinafter as ‘the Mercenary Act’)\textsuperscript{440}. The Mercenary Act applies to any South African citizen or permanent resident, any incorporated, or registered company, or any foreign citizen, who contravenes the provisions of the Mercenary Act within the borders of the South Africa\textsuperscript{441}. Therefore, a citizen who recruits or trains mercenaries within or outside of the territory of the Republic falls under the scope of the Mercenary Act. A foreign citizen would come within the jurisdiction of the Mercenary Act, if the recruitment, training or financing takes place within the borders of the South Africa.

Even so, the Mercenary Act 2006 leaves certain loopholes regarding the prosecution of foreigners even if where they operate within the territory of the State or extraterritorially, under the domestic courts, the ICC Act could provide a possible pathway for punishing private

\textsuperscript{439} Case No 12967/2004 Kaunda and Others v. President of the Republic of South Africa and Others 2004 (5) SA 191 (T), and Case No CCT 23/04 Kaunda v. President of the Republic of South Africa 2005 (4) SA (CC).


\textsuperscript{441} Sections 11 (a) – (d) and 2 (a) – (b).
contractors who have committed any misconduct\textsuperscript{442}. This legislative context applies to any person accused of commissioning of genocide, crimes against humanity and war crimes within the territory of the South Africa and under certain circumstances, beyond its borders.

\textbf{2.4. Germany}

Despite some similarities in historical backgrounds, European domestic approaches towards regulating PMSCs’ activities differ. According to one scholar, Bazatu\textsuperscript{443} finds four different approaches to domestic regulation of PMSCs’ operations and classifies them as follows: First, some States lack altogether a national framework, as in the case of Cyprus. Secondly, some countries adopt a more decentralized approach, for instance Switzerland and Italy. Others, including Ireland and the U.K., adopt a more specific approach regarding PMSCs’ operations within their territory. Finally, States such as Germany and Austria have a more permissive approach based on the application of general commercial regulatory rules over PMSCs’ conduct. In addition, the fact that compliance with human rights law and humanitarian law is one of the top priorities within the EU policies\textsuperscript{444}. This is evidenced by the EU endorsement of


\textsuperscript{444} Concerning the use of PMSCs, the EU hires private security guards to protect EU offices, civilians and police missions. See Elke Krahmann, ‘The United States, PMSCs and the State Monopoly on Violence: Leading the Way Towards Norm Change’ [2013] 44 (1) Security Dialogue, p. 62.
the Montreux Document. Through its attempt the EU has yet to harmonize the domestic regulations in relation to PMSCs’ operations.\footnote{The EU endorsed the Montreux Document on July 2012 <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html> accessed on May 2016.}

An example of a permissive approach is Germany. It is a home State for several PMSCs offering protection to persons, buildings and cash-in-transit operations, but there is no explicit domestic regulation to monitor and control such activities. Despite Germany’s opens support to the effective application of the Montreux Document, it has a restrictive view with regard to the outsourcing of military and security functions abroad.\footnote{Seiberth, supra note 203, p. 249. In particular, core military and security activities can be outsourced to PMSCs only if they are related to internal security and not to external. See Answer by the German Government to Parliament, Bundenstag printed paper 15/5824, preliminary remarks, Answer No. 1a, <http://dip21.bundestag.de/dip21/btd/15/058/1505824.pdf> accessed on May 2016.} However, when an allegation against a private contractor is made regarding human rights violations, German criminal law fully applies to the private contractors’ misconduct.\footnote{The German Government did not approve the application of co-martial jurisdiction over PMSCs’ employees. Bundestag printed paper 15/5824, preliminary remark, Answer No. 12, <http://dip21.bundestag.de/dip21/btd/15/058/1505824.pdf> accessed on May 2016. More particular, the German government argued that PMSCs’ employees could not claim the status of combatant and so they cannot be tried under the German military law.} In cases, where these companies operate within the territory of a third State, the application of the German criminal law requires that a link exists to the official German Armed Forces before the law can be applied. For instance, \footnote{Ralf Evertz, ‘Germany’ in Christine Bakker and Mirko Sossai (eds.), Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms (Oxford/Portland, Hart Publishing, 2012), p. 228.}
Germany has enacted agreements with regard to the promotion criminal prosecution and co-operation on criminal matters for offences committed by PMSCs within the territory of a third State. As an example, the Law on International Legal Assistance in Criminal Matters covers any co-operation for the extradition of execution and non-German court decisions⁴⁴⁹.

Apart from that, the German Criminal Code is entirely applicable to PMSCs’ employees. For instance, in 2010, the German Federal Government observed that employees of private security companies […] are bound by international humanitarian law and can be prosecuted by domestic courts or the International Criminal Court if they have committed war crimes in armed conflicts⁴⁵⁰. Taking into account the principle of personality for the private contractor, it is easy for him/her to be prosecuted by having German nationality for offences committed abroad based on his/her German nationality⁴⁵¹. Additionally, the Federal High Court of Justice highlighted that in case of a PMSCs’ misconduct, State has the ultimate responsibility for grave breaches of international law committed by private contractors⁴⁵².


⁴⁵⁰ Germany, Lower House Federal Parliament (Bundestag). Reply by the Federal Government to the Minor Interpellation by Members Inge Hoger, Jan Aken, Christine Buchholz, further Members and the Parliamentary Group Die linked, BT-Drs, 17/4012, 1 November 2010, 9.


⁴⁵² The issue of State responsibility rises only if the PMSCs’ mission has been authorised by a governmental authority. See Evertz, supra note106, p. 229.
Thus, in the case of Former Yugoslavia\textsuperscript{453}, the Federal High Court of Justice claimed that in the absence of connection between a private act and the German official authority, the States could evade international responsibility\textsuperscript{454}. Thus, in order to hold Germany responsible for violations committed by PMSCs, the nexus between them should be proved\textsuperscript{455}.

Therefore, in summary, the discussion above shows that in terms of regulatory schemes, the following approaches are drafted.

\textsuperscript{453} The case was concerned the destruction of a bridge by an aerial attack during the NATO operation in Kosovo (KFOR) in 1999.


\textsuperscript{455} \textit{Ibid}, paras. 20 -23.
<table>
<thead>
<tr>
<th>National Regulatory Approaches regarding PMSCs’ regulation</th>
<th>United States of America</th>
<th>United Kingdom</th>
<th>South Africa</th>
<th>Germany</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Regulatory Framework over PMSCs’ Activities</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Adjudicating Pathways to Prosecute Private Contractors in Case of Misconduct</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>National Laws with Extraterritorial Application over Private Contractors’ Misconduct</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Support for the Montreux Document</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>PMSCs endorsed the ICoC</td>
<td>64</td>
<td>208</td>
<td>22</td>
<td>13</td>
</tr>
<tr>
<td>Self-Regulation system</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Support for the U.N Draft Convention on PMSCs</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

*These figures are taken by the ICoC website [http://www.icoc-psp.org/](http://www.icoc-psp.org/). Last update on September 2013. (last accessed on May 2016).

Overall, the above table highlights that the absence of a coherent and binding international regulatory scheme relating with the PMSCs’ activities makes States to deviate from their obligation to establish relevant mechanism to monitor and control PMSCs’ activities.
3. The Absent International Model for the Prosecution of Human Rights Violations by PMSCs

The extensive involvement of PMSCs in unstable environments gives rise to some of the most notorious human rights abuses, such as the shooting at Nisour Square\textsuperscript{456} and the Abu Ghraib scandal\textsuperscript{457}. These incidents revealed the lack of transparent mechanisms regarding PMSCs’ activities and more distantly the absence of mechanisms to hold private contractors accountable for such violations\textsuperscript{458}. Consequently, individual States are inspired to work towards the establishment of national and international accountability mechanisms to punish perpetrators and to provide victims with effective remedies. However, the aforementioned analysis of national mechanisms demonstrates that States avoid the adoption of a coherent accountability framework for PMSCs’ misconduct. In 2008, the USA failed to control effectively PMSCs’ activities, and the Department of Justice was unable and/or unwilling to hold them criminally liable for acts of excessive violence or abuse by private contractors\textsuperscript{459}. This shows that the


\textsuperscript{459}Eric De Brabantere argued that in the most cases the unwillingness of the local government to protect human rights and/or their inability to ensure that protection effectively could give impunity to PMSCs and their employees for their misconduct. See Eric De Brabantere, ‘Human Rights Obligations ad Transnational
adoption of a clear national legal framework to govern PMSCs’ conduct remains problematic, yet it is required for States to establish a comprehensive regime to monitor PMSCs’ activities by registration and licensing these companies and regulating the variety types of functions that they can perform. Moreover the UN Working Group on Mercenaries emphasized that States must also be able to prosecute where violations of human rights law and/or international humanitarian law occur, in order to ensure accountability.

Despite these efforts, there is still a need to hold private contractors accountable for their misconduct; the transnational nature of PMSCs’ activities helps them to avoid national regulation and the jurisdiction of national courts. Therefore the enactment of a coherent international legally binding framework for PMSCs which could supplement the national regimes is needed, such as the UN Draft Convention. However, to date the international efforts seem to have failed for three main reasons. First, their voluntary nature means that all current international initiatives that address PMSCs directly, such as the Montreux Document, do not have a binding nature. Secondly, they lack an oversight and enforcement mechanism in order to secure accountability for private contractors for human rights violations. Thirdly, they do not establish a judiciary body that could examine complaints concerning human rights violations by private contractors. A case in point is the Montreux Document. It is the most


Ibid.
popular and detailed restatement of well-established States’ obligations under international humanitarian law and human rights law regarding PMSCs’ activities and their personnel. Even though it is not a legally binding document, it encourages States to establish national monitoring and supervision bodies to regulate PMSCs’ activities instead of an international one. However, it continues to hold the status of soft law. Additionally the Montreux Document has limited application in application to PMSCs' activities, since according to its title; it applies only in situations of armed conflicts.

Despite its limited effect, the Montreux Document has led to the development of the ICoC. Its great significance relates to the need to achieve higher standards for PMSCs from an industry perspective. Since it is a non-governmental initiative, the ICoC does not address human rights issues of accountability of PMSCs and their employees for human rights allegations. Accordingly, the voluntary nature of this document means that it cannot meet the goal of ensuring that all PMSCs are addressed.

The aforementioned international initiatives have not been implemented; the Human Rights Council proposed that only an international legally binding instrument would ensure that States adopt minimum standards to regulate PMSCs’ activities. To that extent, Gomez del Prado suggested that a this binding document will relate to cover all the types of PMSCs’ functions and their impact on the enjoyment of human rights, the registration and authorization

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463 White, *supra* note 24, p. 11.


regime to monitor PMSCs' operations, the ensuring of accountability when it is necessary and the provision of remedies for the victims\textsuperscript{466}. The UN Draft Convention on PMSCs constitutes the first international effort which envisages an international system of oversight and monitoring for PMSCs' activities - named Committee on the Regulation, Oversight and Monitoring of PMSCs (hereinafter as ‘the Committee on PMSCs’).

The Committee on PMSCs is required to collect periodical reports on the legislative, judicial and administrative and other measures that States must adopt to implement sufficiently the Convention on PMSCs\textsuperscript{467}. Moreover, in case of ‘grave and/or systematic’ violations of human rights, the Committee on PMSCs has to launch \textit{in loco} investigations\textsuperscript{468}. To that end, the UN Draft Convention establishes a twofold complaint mechanism, namely the Inter-State Complaint Mechanism and the Individual and Group Petition Procedure\textsuperscript{469}.

\textbf{4. Concluding Remarks}

In the absence of a coherent and binding international framework regarding the regulation of PMSCs’ activities and an accountability mechanism for the punishment of private contractors for human rights violations, States are required to develop domestic regulations to comply with


\textsuperscript{467} Art. 33 of the UN Draft Convention.

\textsuperscript{468} Art. 36 of the UN Draft Convention.

\textsuperscript{469} Art. 37 of the UN Draft Convention.
the international standards. In Seiberth's view, one of the main aims of the Montreux Document was to raise awareness with regard to legal challenges posed by PMSCs and to make some non-exclusive recommendations on how domestic legal regimes could sufficiently respond to these challenges.

Despite the fact that, the Montreux Document provides common guidelines for all States, that is contracting, territorial and home States, in order to achieve an efficient national regulatory regime for PMSCs’ operations and a sufficient accountability mechanism for private contractors’ misconduct, States implemented these recommendations differently. For instance, following the endorsement of the Montreux Document, the USA opted for the revision of the Defense Federal Acquisition Regulation Supplement, Defense Department Instructions and Combatant Commander Orders. Moreover, in order to increase the operational standards for PMSCs’ functions, the USA enacted the Public Law 111-383 (2011). According to Section

470 In particular the Montreux Document emphasised that ‘[…] to provide for […] appropriate administrative and other monitoring mechanisms to ensure the proper execution of the contract and the accountability of contracted PMSCs and their personnel for their improper and unlawful conduct […]’. See the Montreux Document, Part II, Good Practice No. 21.

471 See Seiberth, supra note 203, p. 256.


833 of this Act, the USA adopted high standards and strict certification criteria for private security contractors\textsuperscript{474}. For example, this Act incorporates the principles of the Montreux Document into its framework. In particular, contractors must ensure training and awareness on human rights law, such as the prohibition of torture, the protection of relevant culture and religion\textsuperscript{475}, and also contractors must establish, implement, and maintain procedures to ensure respect for human rights\textsuperscript{476}. In contrast, some States are unwilling to enact separate and additional legislative measures to implement the principles of the Montreux Document. One such example is South Africa. Even if South Africa endorsed the Montreux Document and fully supported the dissemination of the Montreux Document’s standards\textsuperscript{477}, it prefers to wait until the negotiations for the adoption of a binding international convention come to an end. The main reason for this approach is that South Africa believes that the adoption of an international binding norm in a form of the U. N. Draft Convention on PMSCs would be more direct and effective than the non-binding normative provisions of the Montreux Document\textsuperscript{478}. Moreover,

\textsuperscript{474} Section 833 of the Act has the title of \textit{Standards and Certification for Private Security Contractors}.

\textsuperscript{475} U.S. Department of Defense, Procedures Guidance and Information § 225.7401.


the endorsement of the ICoC by the South African PMSCs is akin to the implementation of the Montreux Document’s standards\textsuperscript{479}. The same approach has been adopted concurrently by some European States, such as Germany\textsuperscript{480}. Despite the fact that European Union has joined the Montreux Document in 2012 and recognized the high significance of the international principles that are contained therein, Germany considers that there is no reason to enact additional legislative measures to regulate and monitor PMSCs’ activities\textsuperscript{481}. In addition to the aforementioned comparative analysis, Germany holds one of the most effective mechanisms to establish criminal sanctions on private contractors for their misconduct.

As a parallel process to the Montreux Document, the United Nations ‘‘Protect, Respect and Remedy’’ Framework\textsuperscript{482} highlights that States have the primary role in preventing and addressing human rights violations committed within their territory and/or jurisdiction.\textsuperscript{483} Thus, States have to undertake all appropriate policies, regulations and adjudication measures to prevent human rights abuses, which may be committed by third parties –including those committed by PMSCs. While some States are moving in the right direction as described previously, they fail to enforce their existing laws over PMSCs’ activities and their employees’

\begin{flushright}
\textit{Ibid.}
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\textsuperscript{479} See Seiberth, \textit{supra} note 203, p. 249.
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\begin{flushright}
\textsuperscript{480} See Evertz, \textit{supra} note 451, p. 231.
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misconduct – as was the case with legal action against Blackwater. This failure is caused mostly by the inconsistency between the departments that have the overall and direct control of PMSCs’ operations. For instance, the U.S.A. International Traffic in Arms Regulations is responsible for the Arms Export Control Act during a PMSC operation and not for the supervision whether the private contractors’ behaviour is in accordance with the human rights standards⁴⁸⁴.

Moreover, as part of their inherent international duty to protect human rights, States have to enact those specific and direct national regulatory measures in order to ensure that in case of any possible violation that may occur within their territory and/or jurisdiction by PMSCs, the victims should have access to effective remedy⁴⁸⁵. In cases of the PMSCs-related human rights claims, todate there are limited non-judicial mechanisms that provide remedy to those affected by PMSCs operations. More specifically, some States that have signed the OECD Guidelines on Multinational Enterprises⁴⁸⁶ – including the UK, established National Contact Points as a non-judicial grievance mechanism. Therefore, States must adopt a national legislative framework, which will directly address to PMSCs and their personnel. In this regard, the UK Private Security Industry Act is a prime example, but some additional changes are


required. So that, such an example of a national initiative has to set out specific requirements regarding the registration regime and licensing of PMSCs and their employees, outline explicit standards about the training and vetting of the private contractors according to human rights principles and humanitarian law standards and also accountability for possible human rights violations in the event that these occur. Moreover, the establishment of an oversight mechanism under this initiative is essential in order to supervise the registration procedures and examine human rights allegations against private contractors. Consequently, such a model has to have extraterritorial application in order to provide access to remedies for the victims irrespective of where the violations may have been committed.

1. Summary

This chapter examined the national mechanisms regarding the punishment and prosecution of PMSCs’ employees for human rights violations. It concludes that as part of the States’ inherent international duty to protect human rights, they have to enact proper, specific and direct national regulatory measures in order to ensure that in case of any possible violation that may occur within their territory and/or jurisdiction by PMSCs, the victims should have access to effective remedy. However, in the absence of such measures, a State has still the responsibility to protect its individuals from any human rights violations committed by PMSCs.

This approach is coming through another area of law; the human rights law. That is the reason that the next chapter focuses on the application of human rights law on the regulation of the activities of PMSCs. It emphasizes the obligations of States under human rights law to regulate and control PMSCs’ activities. It examines further whether the ECtHR has the jurisdiction to adjudicate PMSCs’ employees for human rights abuses. Moreover, it focuses on
the contribution of the ECtHR in the harmonization of the national legal orders towards the establishment of a common accountability regime for abuses committed by PMSCs.
CHAPTER VI:
THE APPLICATION OF HUMAN RIGHTS ON
THE REGULATION OF PRIVATE MILITARY AND
SECURITY COMPANIES’ ACTIVITIES

This chapter is focused on the application of human rights law over the activities of PMSCs. It is divided into two parts. The first part of this chapter examines the obligations of States under human rights law to regulate and control PMSCs’ activities. Considering that PMSCs are operating in unstable environments, this chapter assesses the States’ procedural obligations under human rights law with respect to allegations of the right to life and the prohibition of torture. Moreover, it demonstrates the efforts of States to fulfil their obligations under human rights law regarding the regulation of PMSCs’ and their employees’ activities. Above all, this chapter advocates whether human rights law has a significant role in the regulation of PMSCs and the prevention of the commission of human rights violations by PMSCs and their employees. Following this analysis, the second part of the present chapter uses as a case study the ECtHR. In particular, it explores whether the ECtHR has the jurisdiction to adjudicate PMSCs’ employees for human rights abuses. Further, it focuses on the contribution of the ECtHR – and the other regional human rights judicial bodies- in the harmonization of the national legal orders towards the establishment of a common accountability regime for abuses committed by PMSCs.
PART A: STATES’ PROCEDURAL OBLIGATIONS REGARDING PRIVATE MILITARY AND SECURITY COMPANIES’ ACTIVITIES

1. Introduction

Over the past few decades the international community has several concerns about the responsibilities of private businesses for human rights violations. PMSCs and their employees/private contractors have been accused of involving in numerous episodes of human rights violations during their operations. The most notorious examples have allegedly


489 Similarly, the Montreux Document demonstrates that ‘PMSCs’ employees/private contractors are persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers’. See Ibid.

taken place in Iraq. In 2004, Titan Corporation and CACI – two American PMSCs latterly, they contracted out to provide interpretation and interrogation services at Abu Ghraib prison – were accused of being involved in torturing of Iraqi detainees. Few years later, private

contractors of Blackwater were involved in shooting innocent Iraqi civilians in Nisour Square. As a result, 17 people were killed and 24 were wounded, among them women and children\textsuperscript{492}.

Despite the fact that there seems to be a proven record of involvement of private contractors in human rights abuses, none of them had been prosecuted\textsuperscript{493}. Usually, the absence of a coherent and binding international legal framework for the regulation of PMSCs and monitoring private contractors’ activities\textsuperscript{494} - as it is mentioned in Chapter V - helps PMSCs’ employees to escape from prosecution for human rights violations\textsuperscript{495}. Hence, private military


\textsuperscript{494} Kamminga and Zia-Zarifi argued that the multinational character of (PMSCs) operations and the ‘amorphous structure’ of those companies make them immune from the control of States. Therefore, it requires to be regulated at international level. See Menno T. Kamminga and Saman Zia-Zarifi, ‘Liability for Multinational Corporations under International Law: An Introduction’ in Menno T. Kamminga and Saman Zia-Zarifi (eds.), Liability for Multinational Corporations under International Law (The Hague/London/Boston, Kluwer Law International, 2000), p. 3.


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and security industry seems ‘less regulated than the cheese market’ and/or ‘the toy industry’.

In the aftermath of those accidents, the international community elaborated more towards the establishment of an international framework to regulate PMSCs’ activities and advocate human rights allegations. The Montreux Document constitutes a unique effort to encourage States to comply with the international humanitarian law and human rights law with respect to PMSCs. However, the Montreux Document has limited application – only during land-based military and security operations - and also it recognizes that its provisions do not affect States’ existing obligations under customary international law or under any other international agreement to which States are parties.

At the same time, the private security industry adopted self-regulatory frameworks regarding the responsibilities of PMSCs and their employees during their operations. The most significant and recent example is the ICoC\textsuperscript{500}. It is mentioned in the previous chapter that this self-regulation code of conduct enlists human rights standards for PMSCs and their employees; and it also engages with operational guidelines concerning the governance, management and internal policies of PMSCs in order to improve oversight and accountability for their employees’ misconduct\textsuperscript{501}. Yet, the non-binding nature of both documents makes them more a kind of suggestions for PMSCs rather than a binding and coherent international framework.

Notwithstanding the absence of a coherent regulatory framework for PMSCs’ activities and of an accountability scheme for their misconduct, States have already bound by human rights law to regulate PMSCs’ activities, and to adopt special measures in order to adjudicate PMSCs for human rights violations. Namely, the application of human rights law to PMSCs’ operations is further interpreted by international and regional human rights bodies. For instance, the HRC expressed that States parties to the ICCPR\textsuperscript{502} have the primary obligation ‘to ensure [the rights recognised by the Covenant] to all individuals in their territory and


subject to their jurisdiction\textsuperscript{503}. However, this obligation does not concern only violations committed by State’s agents, but also from violations they may have committed by private entities\textsuperscript{504}.

To that end, the main question is how human rights law imposes obligations on States to regulate PMSCs’ activities and prevent human rights violations committed by them. In other words, whether the human rights law provides with States the obligation to prevent human rights abuses committed by PMSCs. Therefore, the present chapter examines human rights obligations to regulate PMSCs’ activities. Considering that PMSCs are operating in unstable environments and that PMSC are used in detention centres and in protecting military objects, this chapter assesses the States’ procedural obligations under human rights law with particular emphasis to allegations of the right to life and the prohibition of torture. Moreover, it demonstrates the efforts of the USA, UK, South Africa and Germany to fulfil their obligations under human rights law regarding the regulation of PMSCs and the activities of their employees. Above all, this chapter advocates whether human rights law has to play a significant role in the regulation of PMSCs and the prevention of the commission of human rights violations by PMSCs and their employees.

2. **Human Rights Obligations to Regulate Private Military and Security Companies’ Activities**


\textsuperscript{504} Ibid, para. 8.
International human rights law requires that States have the primary responsibility to prevent and address human rights abuses within their territory or jurisdiction by PMSCs. The impact of PMSCs’ activities on the enjoyment and exercise of human rights and the emerging need for the prevention and punishment for violations of human rights law illustrate the need of

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505 This obligation has been firstly highlighted by the International Court of Justice (ICJ) in the *Barcelona Traction Case*. The ICJ noticed that the obligation to respect human rights is ‘in concern of all States’ because every commission of a human rights violation does not affect only a single State, but the international community as a whole. *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (Feb. 5), para. 33. Besides the International Law Commission (ILC) recognised in cases of a State tortures its citizens that ‘if a State is responsible for torturing its own citizens, no single State suffers any direct harm. Apart from the individual or individuals directly concerned, any harm attributed to anyone else is purely notional, that is, constructed on the basis of the assumption that such action violates some values or interests of “all”, or in the vocabulary of the Barcelona Traction case, the “international community as a whole”’. *International Law Commission, Fragmentation of International Law: Difficulties Arising From Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, U.N. Doc. A/CN.4/L.682, 13/04/2006, para. 393.

further regulation of PMSCs\textsuperscript{507}. Along with the human rights treaties, States have the obligation to ‘ensure’ that all rights guaranteed by the treaties are respected ‘for all individuals in their territory and subject to their jurisdiction’\textsuperscript{508}.

Therefore, human rights law could play such an important and decisive role towards the regulation of PMSCs’ activities and adjudication of private contractors for human rights violations. That happens because, human rights rules are designated as \textit{jus cogens}\textsuperscript{509}. This has occurred by invoking the peremptory character of human rights obligations such as the prohibition of slavery, torture, and genocide. Even the \textit{Restatement (Third) of the Foreign Relations Law of the United States} characterized a high number of human rights norms as having attained peremptory status\textsuperscript{510}.

As \textit{jus cogens}, human rights law imposes \textit{erga omnes} obligations on States with respect to the protection and respect of human rights and fundamental freedoms. \textit{Erga omnes} obligations are determined as obligations that States have towards the international community as a whole. The concept of \textit{erga omnes} obligations is supported by the \textit{South West Africa}}


cases\textsuperscript{511} and the \textit{Barcelona Traction}\textsuperscript{512}. However, it should be noted that the \textit{South West Africa cases} dealt \textit{inter alia} with human rights violations and not only with international crimes and that the \textit{Barcelona Traction} case is concerned as an issue of civil law.

At the same time, human rights law also provides legal limitations on the activities of PMSCs and their employees. These legal boundaries are important since PMSCs may use lethal force during their operations, such as support during an armed conflict, interrogation and detention of prisoners, guarding persons or instalments. Since, PMSCs employees are usually working in endangered areas with a high level of institutional instability, they are in need to safeguard their lives during PMSCs operations\textsuperscript{513}. So as, human rights law could be considered as a protective framework for themselves.

To be more precise, one of the most important human rights treaty bodies, in General Comment 31, the HRC highlighted that ‘\textit{individuals should be protected by the States not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities}’\textsuperscript{514}. Thus, in order to create an effective protective framework for individuals from human rights abuses by PMSCs’ employees, States have the obligation to ‘\textit{take appropriate measures [...] to prevent, punish, investigate or redress the harm caused by}’

\begin{itemize}
\item \textsuperscript{511} \textit{South West African Cases (Ethiopia v. South Africa, Liberia v. South Africa)}, (Preliminary Objections), 1963 \textit{ICJ REP.} 319 (Dec. 21).
\item \textsuperscript{514} See HRC, General Comment 31, \textit{The Nature of the General Legal Obligation Imposed on State Parties to the Covenant}, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26/05/2004, para. 8.
\end{itemize}
such acts by private persons or entities [...] and to provide effective remedies in the event of breach [...] 515.

Accordingly, the absence of a binding and coherent international regulatory framework with a consistent oversight mechanism with regards to PMSCs raised the question whether human rights treaties, such as the ICCPR, create duties and responsibilities directly to PMSCs and their employees516. In addition to this, States are frequently reluctant to accept responsibility for PMSCs’ operations; most of the times – such as at Abu Ghraiib incident – States emphasize the civilian status of the private contractors and the lack of ‘effective control’517 over the activities of PMSCs. However, Buzatu argues that the activities of PMSCs should be regulated and monitored by the domestic criminal system of the State in which a PMSC is operating518. Nonetheless in unstable areas, the territorial government is unable to

515 Ibid.
517 The test of ‘effective control’ was set by the ICJ for the attribution to a State actions of non-State actors when the State has effective control of the operations. See Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), ICJ, 1986, para. 109.
518 Anna-Marie Buzatu, European Practices of Regulation of PMSCs and Recommendations for Regulation of PMSCs through International Legal Instruments (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2008), p. 27.
fulfil the aforementioned obligation; and this fact creates a *de facto* gap within human rights protection\(^{519}\).

Furthermore, it is very important to highlight that human rights law sets aside the national boundaries for the regulation of PMSCs and could apply over their activities irrespective of the territory whereas PMSCs’ operations taking place. Yet, Art. 2 of the ICCPR argues that States

> *undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [...] Covenant*\(^{520}\).

It means that States parties are required to protect and respect *‘the rights of anyone within the power or effective control of the State’,* even if they are not living within the territory of that State\(^{521}\). This principle is extremely important in matter of PMSCs’ operations, because it applies to everyone with respect to *‘those within the power or effective control of the forces of a State acting outside its territory, regardless of the circumstances in which such power or effective control was obtained’*\(^{522}\). Therefore, the approach of the HRC ensures that the

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\(^{520}\) Art. 2, para. 1 of the ICCPR.


\(^{522}\) *Ibid.* Even in cases that ‘States are not *per se* responsible for human rights abuses by private actors’, they remain responsible for their activities when these are attributable directly to them or when States fail to take appropriate measures to prevent them and/or investigate such violations. See United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect*
provisions of the ICCPR are adapted into different contexts regardless where the human rights violations are committed; such as in occupied territories\textsuperscript{523} or during peacekeeping operations\textsuperscript{524}.

3. States’ Obligations to Prevent Human Rights Abuses Committed by Private military and Security Companies

It is aforesaid that international human rights law imposes obligations on States to safeguard the rights of their individuals within their territories and to prevent human rights violations may be committed by States and/or private agents. In this regard, States have the obligation to take appropriate measures to prevent, investigate, punish and provide effective remedies for misconduct by PMSCs and their employees. As the UN Working Group the Use of Mercenaries denoted that if a State decides to outsource certain inherently governmental functions\textsuperscript{525}, such

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{523} See Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the HRC: Cyprus, UN CCPR/C/79/Add.39, 03/08/1994, para. 3.
\item \textsuperscript{524} The HRC stressed out ‘that the Covenant automatically applies when it exercises power or effective control over a person outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent assigned to an international peacekeeping or peace enforcement operation’. See Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the HRC: Belgium, UN CCPR/CO/81/BEL, 21/08/2004, para 6.
\item \textsuperscript{525} Simon Chesterman, ‘We Can’t Spy … If We Can’t Buy!’: The Privatization of Intelligence and the Limits of Outsourcing ‘Inherently Governmental Functions [2008] 19 (5) European Journal of International Law, p. 1055.
\end{itemize}
\end{footnotesize}
as the monopoly of use of force, the obligation to prevent and investigate human rights abuses committed by private entities remains\textsuperscript{526}.

To this degree, regardless the territorial application of human rights treaties\textsuperscript{527}, States are obliged to exercise ‘due diligence obligations’ to adopt proper legislative measures to prevent, investigate, punish and/or redress any harm caused by the activities of private persons/entities\textsuperscript{528}. In case that the violated rights are core rights, such as the right to life and the prohibition of torture, States cannot derogate from the obligation to protect them\textsuperscript{529}. Therefore, a State cannot deviate from its procedural obligations under human rights law for violations committed by private entities. Similarly, the HRC noticed that ‘\textit{the contracting out to the private commercial sector of core State activities which involve the use of force and the...}'


\textsuperscript{527} As it is stated above, States parties to the ICCPR have the primary obligation ‘\textit{to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party}’. See HRC, General Comment 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26/05/2004, para. 10.

\textsuperscript{528} See \textit{ibid}, para. 8.

detention of persons does not absolve a State party of its obligations under the Covenant. Thus, a State has to ensure that PMSCs’ activities are compatible with the standards set out by the ICCPR and to provide effective remedies for victims in case of violations committed by ‘persons acting in an official capacity’.

Further, the procedural obligations of States towards the activities of PMSCs have been developed throughout the jurisprudence of regional human rights judicial bodies. The ECtHR interpreted that in the event of failing to adopt appropriate measures to protect the rights of its citizens by third parties, a State holds international responsibility. Apart from human rights violations, a State should take reasonable and appropriate measures to investigate these allegations and punish perpetrators, even they are private actors. In particular, in Osman, the ECtHR considered that:

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531 According to the Art. 2, para. 3 (a) of the ICCPR, the term of a ‘person acting in an official capacity’, the ICCPR does not include only official forces, such as members of the national army, but also PMSCs employees hired by the State to exercise governmental functions.


533 In Varnava and Others, the ECtHR held that the State violated the European Convention on Human Rights (ECHR) by failing to ‘conduct an effective investigation into the fate of the nine men who disappeared in life-threatening circumstances’. See Varnava and Others v. Turkey Apps nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009), para. 194.

534 See Osmanoglu v. Turkey App no 48804/99 (ECtHR, 24 January 2008).
‘the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk’

Similarly, the IACtHR affirmed that the responsibility of a State is triggered by failing to exercise its ‘due diligence’ obligations with regard to private entities. In particular, in Pueblo Bello Massacre, the IACtHR found that a State is responsible by failing to adopt sufficient preventive measures to protect victims by the activities of a paramilitary group. It is worthy a mention that from its very first case, the IACtHR recognized that the failure to adopt reasonable and adequate measures to prevent and investigate human rights violations by third parties constitutes a decisive element of State responsibility.

Furthermore, the significance of the procedural obligations of States in relation to violations committed by PMSCs has been highlighted by the AComHPR. The AComHPR

535 See Osman v. the United Kingdom supra note 44, para. 116.

536 ‘[…] This Court considers that Colombia did not adopt sufficient prevention measures to avoid a paramilitary group of approximately 60 men from entering the municipality of Pueblo Bello at a time of day when the circulation of vehicles was restricted and then leaving this zone, after having detained at least the 43 alleged victims in the instant case, who were subsequently assassinated or disappeared […]’. See Pueblo Bello Massacre case (2006) IACtHR, Series C, No. 140, para. 138.

537 ‘[…] An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention […]’. I/A Court H.R., Velasquez Rodriguez case (1988) IACtHR, Series C, No. 4, para. 172.
highlighted that States have the primary obligation to protect the rights of their individuals, to prevent any violation of their rights and to investigate those human rights allegations; regardless whether these violations are attributable to State agents or private parties. Notably, the AComHPR in *Social and Economic Rights Action Center and Center for Economic and Social Rights* recognized that a State should exercise its ‘due diligence’ obligations to ensure that all the rights that granted by the *African Charter of Human and Peoples’ Rights* are protected ‘against political, economic and social interferences’.

3.A. Right to Life

3.A.1. Procedural Obligations of States to Ensure the Protection of the Right to Life

The activities of PMSCs usually have impact on the enjoyment of the most human rights. Those rights, including rights of individual or rights with collective character, are contemplated

538 Particularly, the AComHPR states that ‘[…] the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders […]’. Decision Regarding Communication No. 74/92 (Commission Nationale des Droits de l’Homme et des Libertés v. Chad) (AComHPR, 11 October 1995), para. 22.


540 ‘[…] the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences […]’. See Decision Regarding Communication No. 155/96 (*Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*), Case No. ACHPR/COMM/A044/1 (AComHPR, 27 October 2001), para. 46.

and protected by international and regional legal instruments. Human rights treaty bodies
developed human rights obligations imposed on a State; as a primary responsibility is to respect
the rights of individuals. Additionally, a State has to promote the enjoyment of human rights
by preventing any possible violation by third parties. A State should also protect and/or fulfil
human rights within its territory. That means that a State should enact proper legislative
measures in order to ‘create a necessary and conductive environment within which the relevant
government at the international level

This chapter examines first the States’ procedural obligations towards the rights to life. The right to life as ‘the supreme right’⁵⁴³ is ‘essential in making the enjoyment of all other
rights possible’⁵⁴⁴. As a result, the protection of the right to life should be guaranteed under
any circumstances and no derogation is possible ‘even in time of public emergency’⁵⁴⁵. Its
protection entails a broad range of obligations. For instance, States are required not only to
abstain from unlawful killings and/or arbitrary deprivation of life, but also they must undertake

⁵⁴² Human Rights, Civil and Political: The Human Rights Committee, Fact Sheet No 15 (Rev. 1) 6. The same
four-layer construction of States’ human rights obligation has been emphasized by the AComHPR as well. In
Social and Economic Rights Action Center and Center for Economic and Social Rights communication, the
AcomHPR argues that States have to ‘resect, protect, promote and fulfil’ the enjoyment of human rights of all
individuals with their territory. See Decision Regarding Communication No. 155/96 (Social and Economic Rights
Action Center and Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1
(AComHPR, 27 October 2001), para. 45-47.

⁵⁴³ Art. 6.1 of the ICCPR.

⁵⁴⁴ See Lenzerini and Francioni, supra note 38, p. 61.

⁵⁴⁵ See HRC, General Comment 6: Article 6: The Right to Life, U.N. Doc. HRI\GEN\1\Rev.1 at 6, 27/05/2008,
para. 1.
positive measures to protect the individuals within their jurisdiction\textsuperscript{546}; and even to prevent any threaten against their lives.

This obligation should be examined in conjunction with the \textit{erga omnes} obligations under Art. 2 of the ICCPR\textsuperscript{547}. In particular, Art. 2 of the ICCPR stipulates that States parties to the Covenant should undertake appropriate measures in order to \textit{‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant’}\textsuperscript{548}. Thus, all of the rights that are guaranteed by the Covenant should be protected by proper laws\textsuperscript{549}; and also States parties are required to establish procedures for providing effective remedies in cases of human rights violations\textsuperscript{550}. Correspondently States


\textsuperscript{547} The term \textit{erga omnes} for the obligations derived by Art. 2 of the ICCPR is used in accordance with the General Comment 24 in which HRC argued that: ‘[a] State could not make a reservation to Art. 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy’. See HRC, General Comment 24, Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 11/11/1994, para. 11.

\textsuperscript{548} Art. 2, para 1 of the ICCPR.

\textsuperscript{549} In paragraph 2 of the Art. 2, the ICCPR sets out that ‘[…] each State Party to the present Covenant undertakes to take the necessary steps […] to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant […]’.

\textsuperscript{550} These remedies should be provided by the State under whose territory the violation occurred. See also Art. 2, para 3 (a) indicates that States parties in order ‘[…]To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity […]’.
have procedural obligations regarding the prevention of violations of the right to life. So, States have the responsibility to proceed with an effective and sufficient investigation when a violation might be committed either by State agents or private actors. In particular, the HRC in the General Comment 31 argues that:

‘[However] the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by art. 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.’

Simultaneously, in William Eduardo Delgrado Paez, the HRC held that ‘[it] cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States are under an obligation to take reasonable and appropriate measures to protect [them].’ It means that States have the obligation to guarantee the enjoyment of the right to life for everyone

552 Ibid.
within State’s jurisdiction; and to ensure that the activities from state and private agents do not violate it.

The additional obligation of a State is to undertake ‘legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations’ and it includes the obligation to provide the victims with effective remedies. Thus, every time that a State is engaged with allegations of the right to life, the obligation to provide effective remedies arises. Therefore, in order to protect the right to life and to prevent any possible violation of this right, States should enact administrative laws and enforce proper criminal law provisions and to punish the perpetrators.

On the other hand, in cases of serious human rights allegations, the HRC held that ‘purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of Art. 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, especially when violation of the right to life is alleged’. The obligation to enact proper legislation is interpreted as the creation of an administrative structure in order to investigate independently human rights violations by taking

into account the special vulnerabilities of persons. If a failure of this obligation occurs, then this is ‘a separate breach of the Covenant’ .

3.A.2. Obligation to Investigate and Prosecute and Punish Private Contractors for Violations of the Right to Life

States have also to enact administrative mechanisms in order to investigate allegations of the right to life and a failure like that constitutes a violation of their obligations under human rights law, and in particular under the ICCPR. The General Comment 6 argues that ‘States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life’. Simultaneously, States have also the obligation to prosecute and criminally punish the perpetrators of such violations and moreover to prevent a reoccurrence of a similar violation. In Mr. S. Jegatheeswaran Sarma, the HRC held that ‘the State party is also under an obligation to expedite the current criminal proceedings […]. The State party is also under an obligation to prevent similar violations in the future’.

Observations regarding the obligation to investigate, prosecute and punish the private contractors for violating the right to life have been developed by regional human rights treaty


558 See HRC, General Comment 6: Article 6: The Right to Life, U.N. Doc. HRI\GEN\1\Rev.1 at 6, 27/05/2008, para. 4.

bodies as well. According to the ECtHR, the duty to investigate is implied in the ECHR and the obligation to protect the right to life ‘[…]
read in conjunction with the State’s general duty under Art. 1 of the
Convention [...] (which) requires by implication that there should be
some form of effective official investigation when individuals have been
ekilled as a result of the use of force by, inter alia, agents of the State560.
Therefore, the ECtHR initially established a narrow meaning for the
obligation to investigate an unlawful deprivation of life resulting from
the use of force, inter alia, by State agents561.

Similarly, the McCann emphasized that the duty to investigate is no longer implied but
an established obligation. In fact, the ECtHR frequently demonstrates within its jurisprudence
the procedural aspect of the right to life,562 and finds that this obligation has been violated563.
The main purpose of the investigation is to ensure that the right to life is protected effectively

560 McCann and Others v. the United Kingdom App no 18984/91 (ECtHR, 27 September 1995), para. 161. This
reasoning is identical to the one adopted by the HRC with regard to the duty to investigate under the ICCPR in its
General Comment No. 20. HRC emphasised that the ‘[…] Art. 7 should be read in conjunction with article 2,
paragraph 3, of the Covenant […]. Complaints must be investigated promptly and impartially by competent
authorities so as to make the remedy effective […].’ See HRC, General Comment 20: Article 7: Prohibition of
Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HRI/GEN/1/Rev.1 at 30
(1994), para. 30. See also HRC, Joaquin David Herrera Rubio et al. v. Colombia (Communication no. 161/1983)
U.N. Doc. CCPR/C/OP/2 at 192 (1990), para. 10.5. It is also similar to the approach taken by the IACtHR in the
case of Godínez Cruz case (1989) IACtHR, Series C, No. 5, para 175.

561 Kaya v. Turkey App no 22535/93 (ECtHR, 28 March 2000), para 105.

562 Some cases that cases dealing with the duty to investigate for allegations of the right to life are Kurt v. Turkey
App no 24276/94 (ECtHR, 25 May 1998); Ergi v. Turkey App no 23818/94 (ECtHR, 28 July 1998); Ertak v.
Turkey App no 20764/92 (ECtHR, 9 May 2000); Timurtas v. Turkey App no 23531/94 (ECtHR, 13 June 2000).

563 Tanrikulu v. Turkey App no 23763/94 (ECtHR, 8 July 1999), para. 110.
by domestic laws and to ensure the accountability of the perpetrators. Trying to articulate the meaning of the ‘effective investigation’, the ECtHR established specific rules while referring to an investigative action. As a result, an investigation should include eye-witness testimonies and forensic evidences and autopsies by specialized pathologists, whereas appropriate. By deviating from the principles that were determined as required for an effective investigation or lacking of a specific investigative step, a violation of the duty to investigate may be occurred.

564 Bazorkina v. Russia App no 69481/01 (ECtHR, 27 July 2006), para. 117.

565 The notion of the ‘effective investigation’ is described by the ECtHR as ‘[…] it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence […]. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or as not justified […] and to the identification and punishment of those responsible […]. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident […]. A requirement of promptness and reasonable expedition is implicit […] there must be a sufficient element of public scrutiny […] to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure […]’. See Jordan v. United Kingdom, Appl no 24746/94 (ECtHR, 4 May 2001), paras. 106-109 (emphasis added).

566 McKerr v. the United Kingdom App no 28883/95 (ECtHR, 4 May 2001), para. 126.

567 Kaya v. Turkey, supra note 73, para. 89.

568 Tanlı v. Turkey App no 26129/95 (ECtHR, 10 April 2001), para. 150; Angelova and Iliev v. Bulgaria App no 55523/00 (ECtHR, 2007), para. 97.

569 Kolevi v. Bulgaria App no 1108/02 (ECtHR, 5 November 2009), para. 201.
In relation to the duty to investigate for violations of the right to life, the most recent and famous case of Blackwater’s misconduct in Iraq is regarded as the new watershed towards regulation. In that case, the HRC denoted that:

‘[the] State party should ensure that all cases of unlawful killing, [...] or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behavior should also be established’ ⁵⁷⁰.

Thus, the USA was encouraged to adopt sufficient national mechanisms in order to prosecute private contractors for violations of the right to life. Moreover, with regard to violations of use of lethal force, the HRC suggested the USA has to:

‘improve reporting of violations involving the excessive use of force and ensure that reported cases of excessive use of force are effectively investigated; that alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions; that investigations are reopened when new evidence becomes available; and that victims or their families are provided with adequate compensation’ ⁵⁷¹.

Similarly, the Human Rights Council addressed this issue during the examination of the USA Report of the Working Group on the Universal Periodic Review. More precisely,


⁵⁷¹ Ibid, para. 11.
since private contractors have been involved in more than two hundred shootings in Iraq from 2005 to 2007, the Human Rights Council recommended the USA to ‘take effective legal steps to halt human rights violations by its military forces and private security firms in Afghanistan and other states’ and also to ‘halt selective assassinations committed by contractors, and the privatization of conflicts with the use of private military companies’.573

In 2007, following the fatally shooting of Iraqi unarmed civilians by Blackwater, the USA began to investigate impartially Blackwater’s operations in Iraq. However this inquiry abandoned because Mr. Daniel Carroll, the Project Manager of Blackwater, did not give leave to Mr. Jean C. Richter, the investigator of the US State Department, to do so574. Moreover, as Jean C. Richter afterwards submitted a report to US State Department officials in which he mentioned that Mr. D. Carroll threatened to kill him whether he would proceed with the investigations575.

3.B. Prohibition of Torture

3.B.1. Procedural Obligations to Prevent Torture or Cruel Treatment


One of the most common reasons for using PMSCs is to manage detention centres and interrogate prisoners. In 2004 two American PMSCs, CACI and L-3 Services Inc. were responsible to interrogate prisoners at Abu Ghraib prisons and to provide with translation services. During their operation, private contractors were involved in torturing of Iraqi detainees. Thus, a crucial aspect of human rights violations committed by private contractors is the acts of torture at detention centres.

Similarly to the right to life, the right to be free from torture or cruel, inhuman or degrading treatment corresponds a *jus cogens* rule; and pursuant to international human rights instruments, States should not refrain from this obligation even in times of emergency. The HRC clarified that the ‘Art. 7 of the ICCPR reflects a non-derogable obligation for States with regard the prohibition of torture and all forms of cruel, inhuman or degrading treatment or punishment’.

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577 It is worthy noted that in the aftermath of the incident at Abu Ghraib, the United States incorporated into the U.S. Code a provision regarding the interrogation of detainees by civilian contractors. This provision entails that any of the contractor personnel should not interrogate detainees. See 48 U.S. Code, para. 252.237-7010: Prohibition on interrogation of detainees by contractor personnel.


The traditional obligation of a State to respect, to protect and to fulfil human rights through the adoption of positive measures is complemented by the obligation to prevent torture and other forms of ill-treatment. The HRC reiterated that ‘[it] is also implicit in Art. 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power’581. This duty includes not only the prevention of acts of torture may be committed by State agents, but also is extended to human rights abuses may be committed by PMSCs employees as well582.

The same has been emphasized by the CAT. In the General Comment 2, the CAT stipulated that a State has the obligation to protect its individual from acts of torture or inhuman treatment, otherwise the State incurs ‘international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or

581 See HRC, General Comment 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, U.N. Doc. CCPR/C/21/Add.13, 26/05/2004, para. 8. Moreover, the United Nations Convention against Torture (CAT), states parties have the obligation to prevent torture and other forms of ill-treatment. In Art. 2, it is stated that ‘[each] State party shall take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its [jurisdiction]’.

582 See HRC, General Comment 20: Article 7: Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 2: ‘[I]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private [capacity]’. Moreover, since 1989, the Constitution Court of Malta recognized that the prohibition of torture applies not only to State agents, but also to private actors. See Maltese Sunday Times (1989).
control, or otherwise under color of law\textsuperscript{583}. Through if a State fails to respond sufficiently to acts of torture by adopting appropriate legislation to prevent them, then a State is responsible for those violations beyond its control.

For example, there are many reports of cases that affirming that individuals suffered by ill-treatment by private contractors during forced removals; the U.K. did not prevent these violations. Conversely, a Report published by the U.K.’s House of Commons Home Affairs Select Committee with regard to the treatment of people being deported, stated that lethal head-down restraints may still be being used, even though they are not authorized. Therefore, the U.K. failed to undertake appropriate measures to refrain from acts of torture or inhuman treatment committed by PMSCs\textsuperscript{584}.

Likewise, the obligation to prevent the commission of torture and to protect individuals from such acts in new, even if the commission of such acts is attributable to private persons, was highly considered by regional human rights judicial bodies. In \textit{HLR}, the ECtHR held that the obligations derived under the Art. 3 of the ECHR\textsuperscript{585} also apply when the acts of torture and/or inhuman treatment are committed by persons ‘who are not public officials’\textsuperscript{586}. Moreover, the primary responsibility for the State is to secure that its individuals are not subjected to acts of ‘torture or inhuman or degrading treatment, including such ill-treatment


\textsuperscript{584} Amnesty International, \textit{United Kingdom: Briefing to the UN Convention against Torture} (50\textsuperscript{th} Session, 2013).


\textsuperscript{586} See \textit{HLR v. France} App no 24573/94 (ECtHR, 29 April 1997), para. 40.
administered by private individuals." The same was also recognised by Gezici; whereas the ECtHR reaffirmed that a State is not only responsible for human rights abuses committed by State organs, but also for acts of torture and inhuman treatment or punishment committed by third persons.

The ECtHR reached to that conclusion by examining the obligations under Art. 3 of the ECHR in conjunction with those under the Art. 1 of the ECHR. Therefore, the ECtHR emphasized that ‘the obligation on High Contracting Parties under Art. 1 of the Convention to secure to everyone within their jurisdiction [...] , taken in conjunction with Art. 3, requires States to [...] to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment’, including those committed by private persons/entities. Furthermore, the IACtHR has developed its jurisprudence towards States’ procedural obligations to protect the inherent integrity of the persons and to prevent acts of torture or inhuman treatment committed by private actors. Yet, the duty to prevent the commission of any act of torture by private contractors/groups has been emphasized in several cases, such as in cases of enforced disappearance, custody, formation of and/or support the creation of paramilitary groups and even in massacre cases.

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587 See Z. And Others v. the United Kingdom App no 29392/95 (ECtHR, 10 May 2001), para. 73.
588 See Gezici v. Turkey App no 34594/97 (ECtHR, 17 March 2005), para. 49-54.
590 Art. 5 of the ACHR.
592 See Velasquez Rodriguez case, supra note 49.
594 Ibid.
3.B.2. Duty to Legislate the Prohibition of Torture

The HRC highlighted that it is very important for States to adopt special measures in order to prevent any occurrence of acts of torture. According to Art. 7 of the ICCPR, the duty to legislate the prohibition of any forms of torture or inhuman treatment raised. Therefore, States have the obligation ‘to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Art. 7’\footnote{See HRC, General Comment 20: Article 7: Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 2. The requirement to adopt a proper regulatory framework that prevents and totally prohibits the commission of acts of torture has been also emphasized by the ICTY. Specifically, in case of Prosecutor v. Furundzija, the ICTY argues that ‘[…]in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring […]’. Prosecutor v. Furundzija, Case No. IT-95-17/I-T, ICTY, (10 Dec. 1998) para. 149.}

Consequently, if a State fails to provide with adequate mechanisms to ensure that State or private agents not acting in violation of the Art. 7 of the ICCPR, for example by torturing detainees, then the State violates its procedural obligations under the ICCPR. Moreover, in that case, States have to adopt a proper national legislation to ensure that private contractors could be prosecuted effectively\footnote{For instance, according to the Coalition Provisional Authority (CPA) Order No 17, the agreement that signed between the Iraqi government and the U.S. Department of Defense regarding the use of private contractors in military operations, ‘[…] Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts […]’. However, after the killing of the Iraqi unarmed civilians in 2007, the Iraqi government approved this agreement by ending private contractors’ immunities. In contradiction, in}.
The same issue has been highlighted by the CAT. In *Hajrizi Dzemajl et al.*[^597] the CAT considered that the lack of action to prevent acts of torture or cruel, inhuman or degrading treatment, or to prosecute private entities by enacting proper legislative measures giving rise to responsibility under the Convention against Torture[^598]. In cases of the hosting State’s ineffective judicial system or immunities from the host State’s jurisdiction, the hiring State or the home State of the PMSCs has to prosecute private contractors for human rights violations. Otherwise when a State violates the duty to legislate, raises issues of international responsibility[^599].

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[^599]: For more regarding the failure of a State to investigate and prosecute PMSCs employees, see the analysis of Laura Dickinson concerning the status of Blackwater’s employees under U.S. legal order in Laura Dickinson, ‘Accountability for Private Security Contractors under International and Domestic Jurisdiction’ [2007] 11 American Society of International Law, p. 31.
Unlike the international instruments, the ECHR does not contain a specific provision regarding the duty to enact proper legislation to punish the perpetrators of torture. However, the Art. 7.2 of the ECHR indicates that there is no punishment without law. Therefore, the obligation to legislate the prohibition of torture derives by the duty of States to protect their individuals and to investigate such allegations. In particular, the ECtHR emphasized that a State has an inherent obligation under Art. 3 of the ECHR to enforce legislative measures to punish acts of torture and to investigate them.

Analogous duties imposed on States under the ACHR. States are bound by the ACHR to ‘adopt […] legislative or other measures as may be necessary to give effect’ to human rights and freedom set out by the Convention. Therefore, States should be ‘capable of juridical ensuring the free and full enjoyment of human rights’. In parallel, the obligation to enact legislative measures specifically regarding the prohibition of acts of torture is highlighted by

600 ‘[…] This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations […]’.

601 In M.C. for example, the ECtHR stressed out that ‘States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution’. See M. C. v. Bulgaria App no 39272/98 (ECtHR, 4 December 2003), para. 153.


603 Art. 2 of the ACHR.

604 Velasquez Rodriguez case, supra note 49, para. 166.
the IACPPT\textsuperscript{605}. The IACPPT develops further this obligation by considering that acts of torture and any attempts to commit torture or inhuman treatment should be punishable under national criminal laws\textsuperscript{606}. It is worth mentioning that, the IACPPT establishes universal jurisdiction for acts of torture. It means that states have the obligation to carry out investigations for allegations of torture and/or to conduct criminal prosecutions regardless the nationality of the perpetrator – this obligation fully applies to PMSCs employees - and even more to extradite suspects for the commission of acts of torture\textsuperscript{607}.

Further in relation to the obligation of States to adopt legislative measures to prevent the acts of torture may be committed by private contractors, it is very interesting fact to include the attitude of the AComHPR. In \textit{Zimbabwe Human Rights NGO Forum}, the AComHPR noticed that the prosecution and punishment of private actors who commit abuses like the commission of torture is one of the primary obligations for States under the African Charter\textsuperscript{608}.


Apart from the aforementioned obligations, States are also engaged with the obligation to provide effective remedies by conducting investigations for commissions of acts of torture by PMSCs’ employees and prosecuting those who are responsible. In this respect, the HRC held

\begin{itemize}
\item \textsuperscript{606} Art. 6 of the IACPPT.
\item \textsuperscript{608} Decision Regarding Communication No. 245/02 (Zimbabwe Human Rights NGO Forum v. Zimbabwe) (AComHPR, 15 May 2006), para. 159.
\end{itemize}
that the obligations under Art. 7 should be examined in conjunction with Art. 2, para. 3609 which obliges States parties to ‘ensure that any person whose rights or freedoms […] recognized (by the Covenant) are violated shall have an effective remedy’. Moreover, States should guarantee that they have already adopted proper legislative measures to terminate all the acts of torture as described in Art. 7 and appropriate redress; irrespectively whether these acts have been committed by persons on acting in their private capacity610.

Even in cases of a State outsources its governmental functions to a private entity; the State does not absolve its obligations under the ICCPR. Thereby, in Mr. Carlos Cabal and Mr. Marco Pasini Bertran, the HRC argued that ‘[…] the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under Art. 7 and 10 […]’ 611, irrespectively where these activities took place612.

Furthermore, the examination of complaints regarding violations of the prohibition of torture should be investigated promptly and impartially613; and also this duty continues to apply


610 Ibid, para. 2.


‘a fortiori in cases in which the perpetrators of such violations have been identified’\(^ {614}\). However, the HRC recognised that an investigation should not depend on the receipt of a complaint, but should be initiated as soon as there are grounds for believing that act of torture or inhuman treatment has occurred\(^ {615}\).

Additionally, the HRC repeatedly considers the importance of providing effective remedies to victims. Thus, in Rodriguez, the HRC reiterated that in order to ensure the victim’s right to redress, States parties have to adopt legislative measures to be able ‘a) to carry out an official investigation into the [...] allegations of torture, in order to identify the persons responsible for torture and ill-treatment and to enable (the victim) to seek civil redress; b) to grant appropriate compensation [...]}; and c) to ensure that similar violations do not occur in the future’\(^ {616}\).

Thus, the HRC recognised that the obligation to prevent the reoccurrence of a violation falls under the obligation to redress for human rights abuses\(^ {617}\).


In the absence of an *a priori* investigation procedure regarding the commission of acts of torture and inhuman treatment, it could be difficult to clarify whether an allegation of prohibition of tortured occurred. To be more precise, in *Teofila Casafranca de Gomez*, the HRC considered that when a State party to the ICCPR failed to conduct an effective investigation and to provide ‘any additional information in this regard, or initiated an official investigation of the events described’\(^{618}\), it is a clear violation of Art. 7 of the Covenant.

The procedural obligation to investigate, prosecute and redress is guaranteed more clearly in the Convention against Torture. The CAT argues that under the general obligation of the prohibition of torture, the obligation to investigate allegations of torture includes also the prosecution of those responsible for such acts\(^ {619}\) and the providing of adequate redress to victims\(^ {620}\). Moreover, according to Art. 12, reading together with Art. 1 of the CAT, States have the obligation to investigate promptly and impartially allegations of torture or other inhuman or degrading treatment or punishment that have been committed by private contractors\(^ {621}\). In case that there are reasonable grounds of believing that someone is involved

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\(^{619}\) Art. 12 of the Convention against Torture.


in acts of torture, this person should be suspended from its duties immediately in order to prevent the reoccurrence of the alleged act.\(^\text{622}\)

Moreover, other human rights judicial bodies, such as the ECtHR, recognized the obligation to investigate and prosecute private entities for breaches of Art. 3 of the ECHR.\(^\text{623}\) For instance, in Assenov and Others, the ECtHR recognized that any individual claim for violation of Art. 3 of the ECHR by State or private organs requires an effective and official investigation into these allegations.\(^\text{624}\) A potential failure on behalf of the State to conduct an effective investigation constitutes a procedural violation of Art. \(^\text{3}\).\(^\text{625}\) However, the obligation to conduct an effective investigation does not rest upon the submission of an official complaint.\(^\text{626}\) ECtHR’s case-law has detailed several requirements regarding an effective

\(^{622}\) CAT, Concluding observations on the second periodic report of the Plurinational State of Bolivia as approved by the Committee at its fiftieth session (6–31 May 2013), CAT/C/BOL/CO/2, 14 Jun. 2013, para 11. In Blanco Abad, the CAT considered that ‘[…] promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear […]’. See CAT, Blanco Abad v. Spain (Communication No 59/1996) CAT/C/20/D/59/1996, 14 May 1998, para. 8.2.

\(^{623}\) See Secic v. Croatia App no 40116/02 (ECtHR, 31 May 2007), para. 67.


\(^{625}\) See Kaya v. Turkey, supra note 73, para. 86; Libita v. Italy App no 26772/95 (ECtHR, 12 February 2000), para. 131.

\(^{626}\) In 97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others Case, the ECtHR stressed out that ‘[…] even in the absence of an express complaint, an investigation should be undertaken if there are other sufficiently clear indications that torture or ill-treatment might have occurred […]’. See 97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others Case v. Georgia App no 71156/01 (ECtHR, 3 May 1997), para. 97. Similarly, Batt and Others v. Turkey Apps nos 33097/96 and 57834/00 (ECtHR, 3 June 2004), para. 136.
investigation into allegations of acts of torture. The victim for example has to have access to the investigatory procedure. The investigation should be prompt and it should be carried out by independent persons.

Correspondingly, the IACtHR recognized that when an accusation of being subjected to torture occurs within the jurisdiction of a State, the latter has to conduct an effective investigation into the allegation and to enact the proper criminal process. Thereby, in Vargas Areco, the IACtHR reaffirmed that ‘the duty to investigate is a compulsory obligation of the State’ under human rights law and there are no limitations from any other national legislation. Since State perceives that an act of torture has occurred, obliges to react directly by beginning a serious investigation. This investigation should be ‘carried out throughout all available legal means’ in order to achieve the prosecution and punishment of those who are responsible for such violations.

In contrast, the AComHPR has adopted a more restricted attitude towards the effectiveness of an investigation into acts of torture by private contractors. In Zimbabwe Human Rights NGO Forum, the AComHPR held that an ineffective investigation does not

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627 See Aksoy v. Turkey App no 21987/93 (ECtHR, 18 December 1996), para. 98.
629 See Anghelescu v. Romania App no 46430/99 (ECtHR, 23 October 2004), para. 66.
630 Art. 8 of the IACPPT.
632 For an investigation to be serious and effective the IACtHR considered that the investigation ‘[…] should take into consideration the international rules for documenting and interpreting forensic evidence elements regarding the commission of acts of torture […].’ Ibid, para. 93.
633 See Servellón-García et al. case (20060 IACtHR, Series C, No. 152, para. 119.
constitute a failure to fulfil the obligation to investigate allegations of torture by itself. It is required to examine the measures that have been adopted by the State on a case by case basis in order to clarify and evaluate where the State failed to undertake the proper investigation. Furthermore, the AComHPR affirmed that it does not require to examine all of the allegations of torture and assured that States are capable to prove that the ‘measures taken were proportionate’ to deal with the allegations.

4. Recent Steps to Comply with States’ Obligations to Regulate Private Military and Security Companies under Human Rights Law

Despite the widespread use of PMSCs, the policy environment remains inactive. The willingness of States to reinforce national regulatory frameworks was expressed during the Second UN Session of the Intergovernmental Working Group for a possible regulation of the PMSCs’ sector. All of the States focused on the issues of accountability of PMSCs and their employees for violations of human rights law. During the discussions on that session, two

636 See Avant, supra note 502, p. 8; Singer, supra note 498.
groups of States were created. The first one, such as the USA and the UK, totally supported the reinforcement of national legislative polices based of the Montreux Document and the ICoC. On the other hand, there were some States, such as Russian Federation, China, Venezuela, South Africa and Egypt that were insisted on a binding normative framework due to the transnational nature of PMSCs operations.

At the same time, States started implementing the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework in order to reinforce a coherent legal framework on preventing human rights violations by PMSCs’ employees. For instance, in 2013 the UK government adopted an action plan - ‘Good Business: Implementing the UN Guiding Principles on Business and Human Rights’ - in order to demonstrate government’s commitment to integrate of human rights policies into

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638 Additionally the non-binding nature of the already existing regulations postpones their implementation to the discretion of States. Concerning the Montreux Document, it is very difficult for most of the States to accept the narrow view of State responsibility, based only on the effective control between the State and PMSCs’ activities. It means that every time that a PMSCs’ conduct fail, the State holds responsibility for this failure. Moreover, the Montreux Document lacks of a reporting system, which could demonstrate the compliance of national regulations with the international standards. See more Corinna Seiberth, Private Military and Security Companies under International Law (Cambridge-Antwerp-Portland: Intersentia, 2014), p. 123.

639 U.N. Human Rights Council, supra note 523, 3

640 See HM Government, Good Business: Implementing the U.N. Guiding Principles on Business and Human Rights, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, Cm 8695 (September 2013).
PMSCs operations. Yet, the UK encouraged the development of the self-regulation policy by excluding a national licensing mechanism, as it is proposed by the Monteux Document.

Furthermore, in order to adapt the national legislation with the standards set out by the Montreux Document and the ICoC, the USA introduced the Civilian Extraterritorial Jurisdiction Act (CEJA) to the Congress. Even it is not enacted; CEJA affirmed the USA Justice Department has jurisdiction over all private contractors that hired on behalf of the USA government. So the prosecution of PMSCs for certain crimes committed overseas is feasible.


643 Assistant of Attorney General Lanny A. Breuer highlighted that the Military Extraterritorial Jurisdiction Act, which passed in 2000, enforced only against contractors that were hired by the Department of Defense. To that extent, it means that certain U.S. Government employees can commit crimes overseas without been prosecuted. See Holding Criminals Accountable: Extending Criminal Jurisdiction for Government Contractors and Employees Abroad: Hearing Before the Senate Comm. on the Judiciary, 112th Cong., 1st sess. (2011).

644 The CEJA was introduced as House Bill (H.R. 2136) by Representative Prince and as Senate Bill (S. 1145) by Senator Leahy; approved with amendments by the Senate Judiciary Committee. The final document of CEJA is available at https://www.govtrack.us/congress/bills/112/hr2136/text

To-date the current debate has focussed on a compromise in order to seek to agree on a binding and consistent regulatory framework. When, in fact, in any event, human rights law contains all necessary elements in order to hold accountable private contractors for human rights violations. For instance, the main parameter of a sufficient regulation of PMSCs’ activities and adjudication of their employees for their misconduct could be the effective participation of the State in planning their operations. In this regard, the State could have the primary responsibility for PMSCs to choose appropriate means and methods that do not violate human rights. Likewise this option was proposed by the international human rights monitoring bodies and courts in cases whereas fundamental human rights have been violated during security operations. In particular, the HRC emphasised that security forces violate the right to life whereas the methods and means that have been chosen for the operation are disproportional to the aims of the operation.

In parallel, the ECtHR pointed out the significant duty of the State to be involved into planning all of the security service. Apart from the State’s participation, the ECtHR highlighted emerge need to oversee the training of private contractors. More specifically, in Avsar, the ECtHR held that the State should ‘establish the principles and procedures relating to temporary village guard’s appointments, training, duties and responsibilities, the areas

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648 See for example *McCann and Others v. the United Kingdom* App no 18984/91 (ECtHR, 27 September 1995); *Ergi v. Turkey* App no 23818/94 (ECtHR, 28 July 1998); *Andronikou and Constantinou v. Cyprus* App no 25052/94 (ECtHR, 9 October 1997).
within which they shall perform their duties as well as their occupational rights and their dismissal from duty”\textsuperscript{649}.

The need of oversight, accountability and license mechanisms is indispensable towards to the creation of a common binding framework for PMSCs’ activities. The International Commission of Jurists emphasized that the establishment of clear responsibilities of national human rights institutions and Parliaments will be vital in controlling PMSCs\textsuperscript{650}. Similarly, this approach is welcomed by the Human Rights Council. In particular, the Human Rights Council suggested the establishment of independent bodies which are going to investigate allegation of torture and degrading punishment\textsuperscript{651}. Likewise, during the examination of the German Report on the Universal Periodic Review, the Human Rights Council proposed the establishment of ‘an independent body to promptly and thoroughly investigate all allegations of torture and ill-treatment by the police’\textsuperscript{652}. It means that the investigations for allegations of torture by police officers would be prompt, effective and sufficient and their prosecution and punishment would

\textsuperscript{649} See \textit{Avsar v. Turkey} App no 25657/94 (ECtHR, 10 July 2001), para. 274.


\textsuperscript{652} Ibid.
be possible. These national independent bodies will be also responsible to confirm whether a PMSC meets the appropriate standards653.

Since 2011, only the UK tries to establish PMSCs’ certification bodies with the coordination of PMSCs’ industry, in order to harmonize PMSCs’ activities according to the international standards. These initiatives still remain under discussion, because their establishment depends on the willingness of the PMSCs’ industry itself. So ambiguities may be raised in relation to the guarantee of their independent work654.

5. Concluding Remarks

In conclusion, human rights violations have drawn the attention of the international community to quell, scrutinize and seek to regulate and control PMSCs. Clearly, the absence of a coherent and binding international regulatory framework allows PMSCs’ employees to escape prosecution for violating fundamental human rights. Private contractors often seek to avoid prosecution because the chain of command was outside of the national military forces. For instance, regarding the killing of unarmed civilians in Iraq, the relationship between PMSCs operating in Iraq and the U.S. military described as an informal coordination655. On the other

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653 A similar oversight mechanism in established by the ICoC as well. Art.11 of the Articles of Association. For the Articles of ICoC Association see http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf. Regarding the functions of this oversight mechanism see Seiberth, supra note 1639, p. 191

654 For a review against this UK initiative see http://waronwant.org/component/content/article/17897.

hand, PMSCs’ employees who were involved in the Abu Ghraib incident might be under the supervision of governmental official. To set aside those barriers, human rights law offers a framework of controlling PMSCs’ activities, accountability mechanisms for human rights abuses committed by private contractors and effective remedies for reparation of the victims. Despite there is no international legally binding instrument on private contractors’ responsibilities vis-à-vis human rights, States’ obligation to protect fundamental human rights and prevent and redress human rights violations committed by State agents and/or individuals could be applied to PMSCs.

Observing that the existing international initiatives – the Montreux Document and the ICoC – are a restatement of well-establish principles of human rights law, the human rights bodies should have a decisive role to guide States to fulfil their obligations under human rights law. For Instance, in 2013 the CRC drafted a new General Comment on State Obligations regarding the Impact of the Business Sector on Children’s Rights. According to this General Comment, States have the obligation to ensure that all actors respect children’s rights ‘by adopting transparent business-related policies and legislative or administrative acts that consider the impact on the rights of the child’. The CRC also highlights that a sufficient

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656 In the Report of MG G. R. Fay ‘Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade’ it is stated that ‘[…] CACI employees were in positions of authority, and appeared to be supervising government personnel […]’. See Antony A. Jones and George R. Fay, Investigation of Intelligence Activities at Abu Ghraib (2004), p. 51.

657 See CRC, General Comment No. 16 on State Obligations regarding the Impact of the Business Sector on Children’s Rights, UN Doc. CRC/C/GC/16, 17/04/2013.

investigative procedure requires the adoption of child-sensitive mechanisms; civil criminal or administrative\(^{659}\). Therefore, human rights bodies are engaged with the challenge to deepen in States’ procedural obligations regarding the prevention of fundamental human rights abuses by PMSCs’ employees.

Finally, human rights law seeks to impose duties not only on States, but also on individuals and business entities\(^{660}\). Thus, States and PMSCs have the obligation to take appropriate steps to prevent the commission of human rights violations by PMSCs and vice versa. Therefore, through the establishment of independent institutional bodies under which the government coordinates with and the PMSCs’ industry will be sufficient in investigating and punishing violations of human rights by PMSCs’ employees. Apart from that, Francioni argues that the inter-State cooperation is also necessary in order to prevent and investigate efficient whenever PMSCs are involved in international crimes\(^{661}\).

\(^{659}\) Ibid, para. 30.

\(^{660}\) This is one of the fundamental principles that were set out in Art.29 of the Universal Declaration on Human Rights. ("everyone has duties to the community").

\(^{661}\) See Francioni, supra note 514, p. 108.
PART B: PROSECUTING PRIVATE CONTRACTORS UNDER THE EUROPEAN COURT OF HUMAN RIGHTS: REALITY OR UTOPIA?

It is well documented that the last two decades the international community has witnessed the rapid growth of the private military and security industry. PMSCs are business entities providing land-based or maritime security and military services, such as to support regular armed forces in armed conflicts, to guard diplomats, to manage detention and interrogation centres upon the request of governments, international organizations and other corporations. In Latin America, DynCorp and Northrop Grumman are deployed to fight narco-traffickers. In Somalia, governments deploy PMSCs, such as Sterling Corporate Services and Bancroft Global Development to protect shipments of humanitarian aid and fight

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664 International Committee of Red Cross, ‘Private Military and Security Companies (PMSCs)’, August 29, 2012, available at https://www.icrc.org/casebook/doc/glossary/private-military-security-companies-glossary.htm (accessed on May 2016). Moreover according to their operation, Singer distinguished PMSCs into three different “sectors”: 1. military provider companies, which supply a State party to a conflict with direct, tactical and military assistance, 2. military consulting firms that advise and train members of the national armed forces, and 3. military support companies that are responsible to provide logistic maintenance and other services to armed forces. See Singer, supra note 663.

piracy. Moreover, in 2010, the 54% of the workforce of the USA Department of Defense is consisted of private military and security contractors in Afghanistan and Iraq.

Despite the fact that the use of PMSCs is a worldwide industry which provides States with military and security services, PMSCs were involved in several notorious human rights episodes. Those incidents revealed that PMSCs may operate in a legal vacuum. Yet many challenges have arisen in the field of human rights protection, democracy and the rule of law. In that regard, the CoE has already adopted a wide range of conventions and recommendations which are related to the PMSCs’ activities in the CoE member States. Thus, CoE has to play an important role in the preservation of the rule of law and the respect


667 Moshe Schwartz, Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis (Congressional Research Service, 2 July 2010).


670 It is important to mention that CoE Council of Ministers adopts CoE conventions which have a binding force for States Parties to those conventions. On the other hand, CoE Parliamentary Assembly makes Recommendations and adopts Resolutions that only have an advisory effect.
and protection of human rights in relation to violations which might be committed by corporations.

The activities of the CoE regarding the issue of human rights and corporations are dated back to 2009, when the Parliamentary Assembly of the CoE adopted the Recommendation 1858 (2009)\(^671\) on private military and security firms and the erosion of the State monopoly on the use of force. The Parliamentary Assembly suggested the creation of an instrument which aims “at regulating the relations of its member States with PMSCs and laying down minimum standards for the activity of these private companies”\(^672\). It also pointed out the need to establish specific criteria with regard to the activities, duties, responsibilities, obligations and accountability for human rights abuses of PMSCs and to introduce-registration and licensing systems for PMSCs. Finally, it set out the importance of an effective training system for PMSCs’ contractors and the establishment of an oversight mechanism for human rights violations that may be committed by private contractors.


\(^672\) *Ibid*, para. 12.
One year later, focusing on issues of businesses and human rights, the Parliamentary Assembly adopted the Resolution 1757\(^{673}\) and the Recommendation 1936\(^{674}\), in which the existing legal gaps in the protection of human rights during PMSCs’ activities are emphasized. More precisely, the Resolution 1757 emphasized the difficulties to bring an extraterritorial violation of human rights by PMSCs before the ECtHR or even the national courts, since ‘many of the alleged human rights abuses by businesses occur in third countries - especially outside Europe’\(^{675}\). Moreover, it argued that “while [...] an individual alleging a violation of his or her rights by a private company cannot effectively raise his or her claims before this jurisdiction”\(^{676}\). For this reason, the Recommendation 1936 (2010) on Human Rights and Business supported that the CoE should promote further the corporate responsibility in the area of human rights abuses by PMSCs. Therefore, two of the most important monitoring bodies of the CoE - the ECtHR and the European Committee of Social Rights\(^{677}\) - have to play a more decisive role in the protection of individuals by human rights violations by PMSCs’ contractors\(^{678}\).


\(^{674}\) The Recommendation 1939 (2010) on Human Rights and Business adopted at the 32\(^{nd}\) Sitting of the Parliamentary Assembly of CoE on 6\(^{th}\) of October 2010.

\(^{675}\) Resolution 1757 (2010), *supra* note 12, para. 3.

\(^{676}\) *Ibid*, para. 4.

\(^{677}\) The European Committee of Social Rights is the monitoring body of the European Social Charter; its main responsibility is to assess whether a State Party acts in conformity with the provisions of the European Social Charter.

Having noticed the challenges that the human rights law has to deal with PMSCs’ activities, either inside or outside of territory and/or jurisdiction of the CoE member States, the Parliamentary Assembly proposes the enforcement of the already existed mechanisms towards the protection of the rights of individuals from PMSCs misconduct and the elaboration of a complementary legal instrument, such as a convention or an additional protocol to the ECHR. This chapter presents an in-depth analysis the positive obligations of States under the ECHR. Moreover, it explicitly describes the obligations to prevent human rights violations of the hiring State, host State and home State under the ECHR. Overall, this chapter explores the contribution of the case-law of the ECtHR – and the other regional human rights bodies- in the harmonization process of the national legal orders towards the establishment of a common accountability mechanism addressing human rights abuses by PMSCs.

1. States’ Obligations under European Convention on Human Rights to Prevent Human Rights Abuses by Private Contractors

Similar to other human rights instruments, ECHR imposes on States the obligation to protect human rights leaving to them the choice of means. Article 1 of the ECHR stipulates that ‘’the High Contracting Parties shall secure to everyone within their jurisdiction the rights and


680 Hiring States are States that directly contract PMSCs for military and security services.

681 Host States are States on whose territory PMSCs operate.

682 Home State is the State of nationality of a PMSC; for example where a PMSC is registered or incorporated.

freedoms defined in [...] this Convention”684. There is also a longstanding discussion among scholars whether Article 1 of the ECHR imposes obligations between individuals. To that point, Clapham denotes that even if the ECHR creates obligations for violations by a State against an individual and not between individuals, it does not exclude the existence of obligations between individuals685. On the contrary, some other scholars argue that the ECHR and the case-law of the ECtHR does not recognize horizontal obligations between individuals and/or non-State actors as Article 1 of the ECHR only addresses States Parties686.

Irrespective of this, the ECtHR has primarily focused on the interpretation of Article 1 when complainants are within the jurisdiction of a State Party. In Costello-Roberts v. the United Kingdom, the ECtHR emphasized that 'a] State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction'687. As a result, the ECtHR had to further elaborate on the concept of jurisdiction.

To this extent, the ECtHR has adopted two main approaches; a national territorial approach and an extraterritorial one688. In Assanidze v. Georgia, the ECtHR emphasized that

684 Article 1 of the ECHR.
686 Pla and Puncernau v. Andorra Appl no 69498/01 (ECtHR, 13 July 2004).
the government of a State Party is accountable for any human rights violation that occurs in all parts of its territory. Moreover, in case that the activities of a State Party ‘performed, or producing effects, outside of its territory’, the ECtHR highlighted that the State Party can still exercise jurisdiction over them within the meaning of Article 1 of ECHR. Military occupation has been characterized as ‘an exceptional case’. In fact, the ECtHR held that

‘a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully - in the latter State. […] Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.

689 In particular, the ECtHR held that ‘[…] each State Party to the Convention nonetheless remains responsible for events occurring anywhere within its national territory. Further, the Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels […]’. Assanidze v. Georgia Appl no 71503/01 (ECtHR, 8 April 2004), para. 146. See also Ireland v. the United Kingdom Appl no 5310/71 (ECtHR, 18 January 1978), para. 239.

690 Banković and Others v. Belgium and 16 Other Contracting States Appl no 52207/99 (ECtHR Decision on the Admissibility, 12 December 2001), para. 67. See also Stephens v. Malta (no. 1) Appl no 11956/07 (ECtHR, 21 April 2009), para. 57.

691 Issa and Others v. Turkey Appl no 31821/96 (ECtHR, 19 November 2004), para. 68; Al-Saadoon and Mufdhi Appl no 61498/08 (ECtHR, 2 March 2010).


693 Issa and Others v. Turkey Appl no 31821/96 (ECtHR, 19 November 2004), para. 71.
Hence, in the event that the activities of a State Party’s agents produce effect outside of its territory, then the State Party holds also liability for their misconduct. In *Al-Skeini and others v. the United Kingdom*, the ECtHR described under which circumstances the State incurs responsibility extraterritorial activities. In particular, in case that a ‘State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual’⁶⁹⁴.

Thus, Article 1 - as read in conjunction with other articles – creates a number of implied positive obligations for State Parties with regard to actions of a State and of private persons. To that point, the ECtHR in *Young, James and Webster v. the United Kingdom* affirms that States should undertake appropriate measures to protect human rights and fundamental freedoms specified by the ECHR because the company was under the control of the State⁶⁹⁵. Those positive obligations include both procedural duties - as the States have the duty to carry out prompt and effective investigations into killings⁶⁹⁶ - and substantive duties - as to protect persons known to be at risk of unlawful killing by others⁶⁹⁷.

⁶⁹⁴ *Al-Skeini v. the United Kingdom* Appl no 55721/07 (ECtHR, 07 July 2011), para. 137.

⁶⁹⁵ *Young, James and Webster v. the United Kingdom* Appl no 7601/76 and 7806/77 (ECtHR, 13 August 1981), para. 49.

⁶⁹⁶ *Kelly and others v. the United Kingdom* Appl no 30054/96 (ECtHR, 4 August 2001); *McCann and Others v. the United Kingdom* Appl no 18984/91 (ECtHR, 27 September 1995), para. 161.

⁶⁹⁷ *Opuz v. Turkey* Appl no 33401/02 (ECtHR, 9 June 2009).
State Parties are also obliged to take preventive measures for human rights violations that may be committed against an individual by another individual. In *Osman v. the United Kingdom*, the ECtHR stated that:

‘the Court notes that the first sentence of Article 2§1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. [...] It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’.

Pursuant to this view, a State would violate its positive obligation to respect and protect the right to life of the complainants and the State Party would incur international responsibility. Within the context of the positive obligations, the ECtHR also denoted that in case that ‘the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a

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698 *Osman v. the United Kingdom* Appl no 23452/94 (ECtHR, 28 October 1998), para. 115. See also *L.C.B. v. the United Kingdom* Appl no 14/1997/798/1001 (ECtHR, 9 June 1998), para. 36.
third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.\textsuperscript{699}

So the State Party holds liability by failing to fulfil its positive obligations. Similarly, in 	extit{Ergi v. Turkey} the ECtHR found that the government failed to minimize the risk of civilian causalities caused by State agents during a counter-terrorism operation. Therefore, the State failed to take all reasonable precautions in the choice of means and methods to protect the civilian life.\textsuperscript{700}

To apply the concept of the positive obligations of States over PMSCs, the ECtHR has to examine its jurisdiction over their activities abroad and the attribution of such actions to a State Party to the ECHR. In two cases for example - 	extit{Issa and others v. Turkey}\textsuperscript{701} and 	extit{Islamic Republic of Iraq Shipping Lines v. Turkey}\textsuperscript{702} - the ECtHR highlighted that a State Party to the ECHR is not allowed to perpetrate human rights violations within the territory of another State\textsuperscript{703}; therefore, the State has to preserve that its agents, natural persons and legal entities protect human rights when they operate abroad. Moreover, in order to define under which circumstances the actions of a legal entity could be attributed to a States Party, the ECtHR made a clear distinction between those legal entities which constitute governmental

\textsuperscript{699} Osman v. the United Kingdom Appl no 23452/94 (ECtHR, 28 October 1998), para. 116. See also Kilic v. Turkey Appl no 22492/93 (ECtHR, 28 March 2000); Akkoc v. Turkey Appl nos 2947/93 and 22948/93 (ECtHR, 10 October 2000).

\textsuperscript{700} Ergi v. Turkey Appl no 23818/94 (ECtHR, 28 July 1998), para. 79 et seq.

\textsuperscript{701} Issa and Others v. Turkey Appl no 31821/96 (ECtHR, 19 November 2004).

\textsuperscript{702} Islamic Republic of Iraq v. Turkey Appl no 40998/998 (ECtHR, 13 December 2007).

\textsuperscript{703} Issa and Others v. Turkey, supra note 702, para. 67.
organizations and those who are non-governmental. That happens because the ECtHR could extend its jurisdiction over legal entities that exercise governmental functions or carry out public services only under specific governmental control.

In particular, the ECtHR has to examine further that ‘account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities’\(^{704}\) in order to decide whether the legal entity exercises governmental functions or not. Therefore, to examine a case regarding human rights violations by PMSCs, the ECtHR has to clarify whether there is a connection with a State Party. That occurs because PMSCs are not traditional legal entities with commercial activities; yet, the nature of their activities distinguish them considerably from other businesses.

Taking into consideration the aforementioned analysis on the positive obligations of States, this chapter examines further the positive obligations of the hiring State, the host State and the home State.

1.1. Positive Obligations of the Hiring States

Hiring States have the primary obligation to adopt positive measures to prevent, investigate, punish and redress for relevant misconduct of PMSCs and their personnel within their territory\(^{705}\). This general rule is stipulated in the Montreux Document. The Montreux

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\(^{704}\) *Islamic Republic of Iraq v. Turkey*, supra note 703, para. 79.

\(^{705}\) Carsten Hoppe, ‘Positive Human Rights Obligations of the Hiring State in Connection with the Provision of ‘Coercive Services’ by a Private Military or Security Company’, in Francesco Francioni and Natalino Ronzitti
Document illustrates that ‘Contracting States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel’. Within the context of the ECHR, the positive obligation to prevent human rights abuses by private persons is also highly important. Thus, to comply with that duty, the hiring State has to adopt such a legal framework not only to prevent branches of human rights law, but also to investigate and punish the perpetrators.

That approach could prevent an anticipated violation, when the hiring State knows that a violation is likely to occur and States have to ensure that a breach does not take place. In the constant case-law, the ECtHR emphasized that State Parties have to control individuals who are considered to be dangerous for the States and the society as a whole. For instance, in Mastromateo v. Italy, the ECtHR argued that:

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707 X. and Y v. the Netherlands Appl no 8978/80 (ECtHR, 26 March 1985), para. 23.


‘[…] Article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual […]’\textsuperscript{710}.

Furthermore, the ECtHR emphasized that States are not only responsible for the actions of their own organs, but also have to ensure that their individuals are not subjected to lethal attacks at the hands of third parties\textsuperscript{711}. To that direction, in \textit{A v. the United Kingdom}, the ECtHR – by examining the Article 1 in conjunction with Article 3 – emphasized that the Article 3 of the ECHR imposes a positive duty on the State to protect its individuals, particularly those who are especially vulnerable, against abuse by third parties\textsuperscript{712}. More precisely, the ECtHR held that, even during operations in detention services, every detainee has to be guaranteed conditions that preserve their human dignity\textsuperscript{713}. Equally, Hoppe argues that the failure to fulfill the positive obligations under Article 3 would be fully applied over the inhuman practices that were committed by private contractors at Abu Ghraib prison\textsuperscript{714}.

\textsuperscript{710} \textit{Mastromatteo v. Italy} Appl no 37703/97 (ECtHR, 24 October 2002), para. 67.

\textsuperscript{711} \textit{Gezici v. Turkey} Appl no 34594/97 (ECtHR, 17 March 2005), paras 49 – 54.

\textsuperscript{712} ‘[…] The obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals […]’. See \textit{A. v. the United Kingdom} Appl no 100/1997/884/1096 (ECtHR, 23 September 1998), para. 22.

\textsuperscript{713} \textit{Valasinas v. Lithuania} Appl no 44558/98 (ECtHR, 24 July 2001), paras. 102 – 106.

Additionally to the compliance with the obligation to prevent and intervene when a human rights violation may occur, the hiring State is obliged to take positive steps to minimize any risk of life to the greatest extent possible\textsuperscript{715}. In that case, a State has the primary obligation to plan and control all the security operations that are carried out by its forces in order to ‘minimize, to the greatest extent possible, recourse to lethal force’\textsuperscript{716}. The same is emphasized in the case of Andronicou and Constantinou v. Cyprus, whereas the ECtHR affirmed that ‘where deliberate lethal force is used’ the State has to take ‘into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination’\textsuperscript{717}.

In any event, the nature of PMSCs’ activities –known as coercive services\textsuperscript{718}- and the environment in which they operate, make them stand liable for violations of the most important fundamental human rights; the right to life and prohibition of torture. In order to fulfill the positive obligations under the ECHR, the hiring State should exercise effective and overall control over the activities of PMSCs, in order to prevent any possible human rights violation. Similarly, in Osman v. the United Kingdom, the ECtHR suggested that ‘the State not only to


\textsuperscript{716} McCann and Others v. the United Kingdom Appl no 18984/91 (ECtHR, 27 September 1995), para. 194.

\textsuperscript{717} Andronikou and Constantinou v. Cyprus Appl no 25052/91 (ECtHR, 9 October 1998), para. 171. See also Ergi v. Turkey Appl no 23818/94 (ECtHR, 28 July 1998), para. 81.

\textsuperscript{718} Hoppe highlighted that the meaning of ‘coercive services’ includes the ‘element of compelling individuals or groups by force or authority’. Hoppe, \textit{supra} note 715, p. 111.
refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.\textsuperscript{719} To this end, the national authorities have to undertake appropriate preventive measures to protect citizens whose lives are at risk.

Even though the aforementioned cases argued the positive obligation of a State in relation to security services carried out by State agents, the ECtHR has also commented upon the use of civilians in quasi-security operations. For instance, in Avsar v. Turkey, the ECtHR argued that Turkey failed to train properly the civilian volunteers\textsuperscript{720}. Therefore, Turkey incurs international responsibility for failing to comply with the obligation to plan and control the security operation\textsuperscript{721}.

1.2. Duty to Prevent Human Rights Abuses of the Host State
States in which PMSCs perform their activities should also comply with the obligation to prevent any violation taking place within their territory\textsuperscript{722}. The Montreux Document addresses that obligation directly to the host State by determining that:

\textsuperscript{719} Osman v. the United Kingdom Appl no 23452/94 (ECtHR, 28 October 1998), para. 115.

\textsuperscript{720} Avsar v. Turkey Appl no 25657/94 (ECtHR, 10 July 2001). Moreover, the ECtHR in McCann and Others v. the United Kingdom used the word of ‘“other agents”’ in order to describe those are taking part in a security operation. See McCann and Others v. the United Kingdom Appl no 18984/91 (ECtHR, 27 September 1995), para. 151.

\textsuperscript{721} Avsar v. Turkey Appl no 25657/94 (ECtHR, 10 July 2001).

Territorial States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.\footnote{The Montreux Document, Part I, para. 10.}

However, it is worth mentioning that the obligations of the host State are usually suspended when a foreign State exercises effective control over its territory and/or certain areas, such as prisons. Moreover, in some other cases, the host State may have lost control over a part of its territory, or lack the institutional capacity to control PMSCs’ contractors effectively. As a result, the host State cannot fully comply with the positive obligations under human rights law.

Yet, the ECtHR emphasized that the host State is still under the positive obligation to take all the appropriate measures to prevent human rights violations within its power of circumstances\footnote{Tonkin, \textit{supra} note 716, p. 154.}. In Ilascu and Others v. Moldova and Russia, the ECtHR has clarified that States have

‘\textit{[positive] obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory. Those obligations remain even where the exercise of the State’s authority by Contract: Human Rights, Humanitarian Law, and Private Contractors}’ (Oxford University Press, 2011), p. 146.
is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take.\textsuperscript{725}

Similarly, host States should adopt appropriate measures against those who present a danger to the society\textsuperscript{726} and should undertake appropriate measures to protect individuals whose lives are at risk. For instance, when the host State knows or is likely to know that the lives of its individuals are at risk, it should take adequate measures to protect their inherent right to life\textsuperscript{727}. To this end, it is highly important for the host State to adopt such licensing and authorization regimes which could allow only PMSCs that are operating properly within its territory. Thus, in case of misconduct, the host State could withdraw the license of that PMSC and their employees who were involved in human rights abuses\textsuperscript{728}. For example, following a fatal and random shooting took place in Nisour Square in Baghdad and 17 Iraq civilians were killed and over 20 were injured by Blackwater’s personnel while they were escorting American diplomats in Iraq\textsuperscript{729}. As a result, after this notorious episode, Iraq – as the host State- revoked Blackwater’s license.

\textsuperscript{725} Ilaşcu and Others v. Moldova and Russia Appl no 48787/99 (ECtHR, 8 July 2004), para. 313.

\textsuperscript{726} Osman v. the United Kingdom Appl no 23452/94 (ECtHR, 28 October 1998), para. 115.

\textsuperscript{727} According to the Osman v. the United Kingdom Case, the ECtHR noted that “the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person”. See Osman v. the United Kingdom Appl no 23452/94 (ECtHR, 28 October 1998), para. 116 et seq. See also X and Y v. Netherlands Appl no 8978/80 (ECtHR (Merits and Just Satisfaction), 26 March 1985), para. 23.

\textsuperscript{728} Moyakine, supra note 723, p. 371.

1.3. The Role of the Home State in Preventing Human Rights Violations by Private Military and Security Companies

Human rights law imposes numerous obligations on States in order to ensure and secure the enjoyment and the respect of human rights and the fundamental freedoms of individuals only within their jurisdiction. Similar to the hiring and host State, the home State has undertaken the obligation to prevent human rights abuses by enacting appropriate positive measures.\(^{730}\) Similarly, the Montreux Document exhibits that:

> 'home States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.'\(^{731}\)

Nonetheless, home States are taken on the obligation, in cases where a PMSC is registered in one State and operates in the territory of another State, the first State – the home one – does not have any obligation under human rights law to take positive steps to prevent the company’s human rights abuses overseas.\(^ {732}\) In contrast, in Drozd and Janousek v. France and


\(^{731}\) The Montreux Document, Part I, para. 15.

\(^{732}\) Tonkin, supra note 716, p. 256. Concerning the issues of jurisdictional control abroad, Ruggie noticed that ‘States [...] are not required to regulate the extraterritorial activities of businesses incorporated in their
Spain, the ECtHR emphasized that there is no limitation based on the territorial application of ECHR\textsuperscript{733}. So, the responsibility of a State for any failure to prevent human rights abuses ‘can be involved because of acts of their authorities producing effects outside their own territory’\textsuperscript{734}.

To set aside this legal barrier, Moyakine\textsuperscript{735} argues, that home States can control, monitor and oversee effectively the activities of PMSCs throughout their internal policies and laws. One of the main key factors is to establish effective regulatory mechanisms with extraterritorial effect in order to achieve better control and monitoring of PMSCs wherever they operate\textsuperscript{736}.

2. The Role of the European Court of Human Rights in Advocating Human Rights Allegations against Private Contractors

\textit{jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis and that an overall test of reasonableness is met}’ see John Ruggie, Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” framework, U.N. Doc. A/HRC/11/13, 22 April 2004, para. 15. However, in case of there is close link between the territory in which a PMSC operates and the home State, the States have to regulate the extraterritorial activities of those companies. Banković and Others v. Belgium and 16 Other Contracting States Appl no 52207/99 (ECtHR Decision on the Admissibility, 12 December 2001), para. 59; Al-Saadoon and Mufdhi v. the United Kingdom Appl no 61498/08 (ECtHR, 2 March 2010), para. 128


\textsuperscript{734} Drozd and Janousek v. France and Spain, supra note 734, para. 91.

\textsuperscript{735} Moyakine, supra note 723, p. 378.

To-date, States have no explicit obligation under their national laws to register PMSCs. Schutter noticed that it seems like ‘international law does not directly reach the corporate actor’\(^{737}\). However, in the absence of an obligation like that, the ECtHR has already examined cases concerning not only natural persons, but also legal entities\(^{738}\), such as media corporations, private banks, private hospitals and private schools, trade unions and environmental corporations\(^{739}\).

In particular, López Ostra v. Spain demonstrated that health problems caused by a private waste-treatment plant had affected the right to privacy and family life\(^{740}\); the ECtHR further considered that


\(^{738}\) Islamic Republic of Iraq v. Turkey Appl no 40998/998 (ECtHR, 13 December 2007).

\(^{739}\) For instance, in the case Castello-Roberts v. the United Kingdom found that the United Kingdom held responsibility regarding to corporal punishment in private schools Costello-Roberts v. the United Kingdom Appl no 13134/87 (ECtHR, 25 March 1993). Moreover, from a different perspective, the State incurred responsibility of nuisance from private airplanes that based at a private airport. See Powell and Ryaner v. the United Kingdom Appl no 9310/81 (ECtHR, 21 February 1991). Daniel Augenstein, State Responsibilities to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights, Submission to the Special Representative of the United Nations Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, April 2011 at 3.

\(^{740}\) López Ostra v. Spain Appl no 16798/90 (ECtHR, 9 December 1994); Fadeyeva v. the Russian Federation Appl no 55273/04 (ECtHR, 9 June 2005). It is worth to be noticed that other bodies under CoE have focused on environmental issues and human rights abuses by corporations. See Marangopoulos Foundation for Human Rights v. Greece, Collective Complaint No. 30/2005, ECSR, Decision of 26\(^{th}\) of December 2006.
‘[…] in the present case, even supposing that the municipality did fulfil the functions assigned to it by domestic law […] it need only establish whether the national authorities took the measures necessary for protecting the applicant’s right to respect for her home and for her private and family life […]’”741.

Also, in Taşkin and Others v. Turkey, the ECtHR found that the gold mining company is responsible for the pollution of the local area, which means that Turkey has failed to take reasonable and appropriate measures to secure individuals’ rights under the ECHR742.

At the same time, in order to clarify the obligation of the State to prevent human rights abuses by private contractors, the ECtHR focuses more on the significance of Article 1 of the ECHR. Consequently, ECtHR highlights that States’ obligations are ranging from the prevention of any murder of a person743 to issues of disappearances by non-State actors744.

Additionally, many questions have been raised with respect to the human rights violations that have been committed by PMSCs outside of Europe. In some cases, the victims reside outside of Europe and apparently fall out of the jurisdiction of the States. However, the ECtHR removed this limitations and - in Issa and Others v. Turkey – stated that

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741 López Ostra v. Spain, supra note 746, para. 55.
742 Taşkin and Others v. Turkey Appl no 46117/99 (ECtHR, 10 December 2004).
743 Osman v. the United Kingdom Appl no 23452/94 (ECtHR, 28 October 1998).
744 Osmanoglu v. Turkey Appl no 48804/99 (ECtHR, 24 January 2008).
‘the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory’\textsuperscript{745}.

Besides, in certain cases, the States’ extraterritorial jurisdiction could apply, only if there is jurisdictional link between the PMSCs’ activities and the State Party to the ECHR\textsuperscript{746}. In other words, the jurisdiction of a State Party to the ECHR is established only if the State has factual effective control over territory, an area, a place and/or an operation outside its own territory\textsuperscript{747}. Otherwise, the ECtHR does not have competence in examining those cases\textsuperscript{748}.

Additionally, the ECtHR also highlighted the significant obligation of States to investigate, punish and redress human rights violations by private contractors within their jurisdiction. For instance, in \textit{Klass v. Germany}, the ECtHR noted that the concept of access to effective remedies under Article 13 of the ECHR does not only include the prosecution of

\begin{itemize}
\item Issa and Others v. Turkey Appl no 31821/96 (ECtHR, 16 November 2004), para. 71.
\item Al-Skeini and others v. the United Kingdom Appl no 55721/07 (ECtHR, 7 July 2011); Al Saadoon and Mufdhi v. the United Kingdom Appl no 61498/08 (ECtHR, 30 June 2009).
\item As the ECtHR emphasized in \textit{Ben El Mahi and Others v. Denmark}, the applicants, who were resident in Morocco and complained that the Danish government had failed to intervene in publication of caricatures of the prophet Muhammad, lacked a jurisdictional link with Denmark, so the ECtHR dismissed as inadmissible the application under Article 9 of the Convention. See \textit{Ben El Mahi and Others v. Denmark} Appl no 5853/06 (ECtHR, 11 December 2006).
\end{itemize}
perpetrators or the compensation to the victims, but also includes investigations for these violations\textsuperscript{749} and the appropriate national procedures to submit individual complaints\textsuperscript{750}.

3. Concluding Remarks

In the aftermath of the Montreux Document\textsuperscript{751}, the CoE endeavoured to contribute further in the regulation of PMSCs’ activities and in the oversight and public control over their services\textsuperscript{752}. Through the adoption of recommendations and resolutions, the CoE demonstrated that States have the obligation to protect human rights within their jurisdiction from activities of private legal entities. At the same time, the jurisprudence of the ECtHR highlights that States have the positive obligation to prevent human rights abuses that committed by ‘other agents’\textsuperscript{753}.

\textsuperscript{749} Regarding the nature of the investigations, the ECHR stated that ‘the investigation into serious allegations of ill-treatment must be both prompt and thorough’. See \textit{El-Marsi v. F.Y.R.O.M.} Appl no 39630/09 (ECtHR, 13 December 2012), para. 183.

\textsuperscript{750} \textit{Klass and Others v. Germany} Appl no 5029/71 (ECHR) Ser. A. No. 61 (1983), para. 113.


\textsuperscript{752} ‘Ad hoc terms of reference for the Council for Police Matters (PC-PM) relating to the regulation of private security services’ CM 924th Meeting of Deputies, Council of Europe, Strasbourg, 21-22 April 2005.

\textsuperscript{753} \textit{McCann and Others v. the United Kingdom} Appl no 18984/91 (ECtHR, 27 September 1995), para. 151.
Moreover, it suggests that State Parties to the ECHR have to adopt adequate measures in order to prevent human rights violations, performed inside\textsuperscript{754} or outside\textsuperscript{755} of their territory.

Despite the efforts made by the CoE and the ECtHR to set particular standards for the regulation of PMSCs, to improve the governance of military and security services in Europe and to outline the accountability of PMSCs in case of alleged human rights violations, the European countries have adopted differing national policies. For instance, some countries still have no specific operational framework for PMSCs, such as Serbia\textsuperscript{756}. Other countries, as Germany and Austria, regulate the private military and security industry through their commercial frameworks. In this end, there is an increasing concern about how those commercial rules can protect effectively human rights\textsuperscript{757}. On the other hand, there are some countries that have already enacted a precise framework for PMSCs’ activities—as France and the United Kingdom\textsuperscript{758}.

\textsuperscript{754} Ilascu and Others v. Moldova and Russia Appl no 48787/99 (ECtHR, 8 July 2004). The ECtHR adopted the same attitude in Treska Case. See Treska v. Albania and Italy Appl no 26937/04 (ECtHR Decision of Admissibility, 29 June 2006).

\textsuperscript{755} Kovačić v. Slovenia Appl no 24376/08 (ECtHR, 18 April 2013). See also Ranstev v. Cyprus and Russia Appl no 25965/04 (ECtHR, 7 January 2010).

\textsuperscript{756} OSCE, Private Security Companies in Serbia: Friend or Foe? (Belgrade: GORAGRAF) 74.


Regardless the existence or not of a coherent national framework for the regulation and monitoring of the activities of PMSCs, there are different national institutions which exercise oversight of PMSCs. For instance, the Italian the Ministry of the Interior is responsible for controlling the activities of PMSCs\textsuperscript{759} and in Luxembourg the Ministry of Justice.

In conclusion, the ECtHR aims to harmonize the national laws and to create common regulatory standards regarding the protection of human rights and fundamental freedoms among Europe. It is vital for the ECtHR to engage with a more decisive approach over the regulation of PMSCs’ contractors and their prosecution for human rights’ abuses. Therefore, the CoE has to put forward such initiatives, as for example the adoption of a new convention at regional level or even an additional protocol to the ECHR with respect to prevent human rights’ abuses by PMSCs. Consequently, the ECtHR will be the accountability mechanism not only for securing the human rights respect by PMSCs, but also specifying and clarifying that PMSCs’ activities do not contravene the norms of human rights law.

Similar to the ECtHR, the other two regional human rights treaty bodies – the IACtHR and AComHPR - could undertake a significant role in adjudicating human rights allegations committed by private contractors. In \textit{Pueblo Massacre Case}, the IACtHR examined the responsibility of a State in failing to prevent violations by a paramilitary group. The AComHPR also emphasized the obligation of States to prevent and protect human rights regardless who the perpetrator is.

Consequently, the European example could be constitute a positive precedent for the other regional bodies to undertake a more decisive role in order to exercise jurisdiction over cases involving PMSCs. Therefore, the establishment of a determining inter-regional cooperation could constitute a milestone for States – and particular the greatest exporters of PMCS, the USA, the UK, South Africa and Germany – to enact appropriate mechanisms to prevent human rights violations by PMSCs and their employees.
CHAPNER VII: CONCLUSIONS

The use of PMSCs has become a very popular practice. PMSCs are deployed to carry out several tasks ranging from the training and advice to interrogation of prisoners. However, these services are usually accompanied by human rights violations: indiscriminate shooting of civilians, international killings, torture and/or degrading treatment of prisoners and sexual abuses. These breaches revealed the weakness of international norms and domestic legal orders to deal with the issue of PMSCs. Therefore, the main purpose of the present study is to investigate whether the human rights law imposes obligations on States to control, regulate and oversee PMSCs’ operations and also to prevent human rights violations committed by them. Thus, this research examines the existing international framework that governs PMSCs’ activities, the national legal frameworks that directly apply over the misconduct of PMSCs’ employees and assesses whether the jurisprudence of the human rights judiciary bodies apply over the PMSCs’ operations.

Chapter four focuses on the obligations of States to regulate and monitor PMSCs’ activities derived by the Montreux Document. By considering the Protect, Respect and Remedy: a Framework for Business and Human Rights, the Montreux Document constitutes the first initiative that is applicable to PMSCs’ operations. In particular, the Montreux Document provides a set of generally respected standards on which other regulatory initiatives

might be built. In other words, the Montreux Document is ‘persuasive in law’, but eventually, it suggests States to make it a ‘binding in law’\(^{761}\).

However, the Montreux Document fails to address issues of application – and more particularly the extraterritorial application – of human rights law over PMSCs’ activities. Similarly, it adopts the approach of States’ ‘effective control’ instead of ‘overall control’ with respect to the operations of PMSCs. Yet, its non-binding nature creates only non-binding (soft-law) commitments for States and PMSCs. Based on these commitments, the Montreux Document constitutes a vital guidance for both states and PMSCs to comply with the international law standards. Its importance lies also upon the recommendations – ‘Good Practices’ – which are suggested to States. By implementing those proposals, States could really achieve a high level of oversight and accountability framework for PMSCs’ conduct.

At the same time, the ICoC came to fill these grey zones of regulation from an industry-driven perspective. The ICoC provided with a detailed commitments for PMSCs and their employees. It also clarified the human rights expectations towards PMSCs, by stipulating a comprehensive catalogue of governance actions that should be taken at the company level. The main scope of the ICoC is the creation of an oversight system according to which PMSCs are

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\(^{761}\) James Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document’ (2008) 13:3 Journal of Conflict and Security Law 401. Besides, Cockayne emphasizes that in order to be transformed into a binding law, the Montreux document has to endorse several regulatory steps, such as the establishment of a peer review mechanism to oversee the States’ compliance with the provisions of the Montreux Document. See James Cockayne et al., Beyond Market Forces (New York: International Peace Institute, 2009).
going to act with its commitments. However, its non-binding nature does not affect a lot its implementations since it constitutes a kind of bylaw for the signatory PMSCs\textsuperscript{762}.

Nevertheless, the implementation of the independent oversight mechanism hides some of deficiencies which PMSCs have to overpass through the ICoC’s incorporation within their internal policies. As it in analysed in chapter four, due to the complexities of the environments in which PMSCs operate, the ICoC Association does not specify the examination process for a complaint to be admissible or not; and then how the ICoC Association will proceed with further impartial investigation throughout PMSCs’ harmful activities. Moreover, another crucial weakness point is that it does not include any provision on remedies for PMSCs harmful activities. With respect to remedies procedure, the ICoC Association indicates then after the examination of the complaint, the victim/victims should be addressed to have access to effective remedies\textsuperscript{763}.

To overpass the aforementioned weaknesses of both international initiatives, a potential solution could be the adoption of an international legally binding document to ensure the application of minimum standards for regulation and monitoring of the operations of

\textsuperscript{762} Seibeth, \textit{supra} note 18, at 225.

\textsuperscript{763} ICoC’s Association, Article 13.2.2.
PMSCs. Gómez del Prado argued that a binding initiative has some important advantages. Firstly, it has a broad applicability irrespectively the nature of the PMSC’s operation. It applies on land-based or maritime-based operations during wartime or peacetime as well. Secondly, apart from the states, it imposes obligations to regulate and monitor PMSCs’ operations to International Organisations, such as NATO. Thirdly, it creates an international monitoring body to oversee states’ efforts to comply with its provisions, and also it establishes a complaint procedure – inter-state and individual petition procedures.

As a result, the Human Rights Council decided to establish an international mechanism regarding the regulation, oversight and monitoring of PMSCs’ activities. However, this idea was not welcomed by the majority of the UN member States. But it has only been proposed by members of the U.K. House of Commons and by members of the Parliamentary Assembly

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764 Perrin, ‘Searching for Accountability: the Draft U.N. International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies’, 47 Canadian Yearbook of International Law (2009) 299. Moreover, Percy argues that ‘the international regulation has the capacity to protect States with weak judicial systems from potential problems caused by PMSCs; it can prevent PMSCs from moving abroad to avoid regulations; it can ensure that contracts between non—state actors and PMSCs adhere to minimum standards’.


of the CoE\textsuperscript{769}. The main reason is that the use of force and public security is a very sensitive issue, so they cannot leave corporations to decide without strict limitations of what are inherently state functions. Besides the UN Draft Convention promotes a more narrow understanding regarding the ‘inherent governmental functions’ instead of the Montreux Document and the ICoC do.

Moreover, the adoption of a binding legal document shields another important danger. White\textsuperscript{770} indicated that the adoption of an international binding document ‘will attract a different clientele of States’ than the non-binding initiatives did. That is, States, who are high connected with the PMSC industry, might be strongly opposed to a binding regulatory framework, and those who are completely opposed to PMSCs’ activities as a modern form of mercenary would support it more. Moreover, even a non-binding document as ICoC is hardly implemented. To date, only the UK, Switzerland and Australia have already endorsed ICoC and they asked for membership.\textsuperscript{771}

Since the adoption of a binding document seems to be a longstanding and difficult process, it is worth a mention that the UN Draft Convention provides for a monitoring system for PMSCs at national level. In order to obtain an effective control and accountability of PMSCs, States have to establish a comprehensive national framework to regulation and oversight ‘[…] over the activities in (their) territory of PMSCs and their personnel including

\begin{flushleft}
\textsuperscript{769} Rapport de l’Office fédéral de la justice concernant une éventuelle réglementation sur les entreprises de sécurité privées opérant depuis la Suisse dans des zones de crise ou de conflit, December 30, 2010
\textsuperscript{770} White, supra note 18, at 31.
\textsuperscript{771} See footnote 869 in Seibeth, supra note 18, at 159.
\end{flushleft}
all foreign personnel, in order to prohibit and investigate illegal activities as defined by this Convention as well as by relevant national laws [...]".

To that extent, chapter five explores the existing national legislative frameworks, under which private contractors may be held accountable for their misconducts. It considers that the absence of an international framework to punish private contractors for human rights violations allows for non-compliance with human rights law. Similar to Seiberth’s view, the main aim of the Montreux Document was to raise awareness regarding the legal challenges posed by PMSCs and to make some non-exclusive recommendations on how domestic legal regimes could sufficiently respond to these challenges.

Likewise, the UN ‘‘Protect, Respect and Remedy’’ Framework -as a parallel process to the Montreux Document- highlights that States have to play the primary role in preventing

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773 In particular the Montreux Document emphasised that ‘‘[...] to provide for [...] appropriate administrative and other monitoring mechanisms to ensure the proper execution of the contract and the accountability of contracted PMSCs and their personnel for their improper and unlawful conduct [...]’’. See the Montreux Document, Part II, Good Practice No. 21.

774 See Corinna Seiberth, Private Military and Security Companies in International Law, (Intersentia, 2014) 256.

and addressing human rights violations committed within their territory and/or jurisdiction.\textsuperscript{776} Thus, States have to undertake all appropriate policies, regulations and adjudication measures to prevent human rights abuses, which may be committed by third parties—including those committed by PMSCs. Therefore, chapter five examines four different types of existing national accountability regimes that apply over private contractors (USA, UK, South Africa and Germany).

This comparative analysis emphasizes the possible ineffectiveness of national regulations due to the transnational nature of PMSCs’ operations. Singer also argues that in most cases PMSCs are registered in one country, they operate within the territory of another one and they hire contractors from a third State\textsuperscript{777}. Consequently, thereafter, in the context of the absence of an international prosecution model for human rights violations by PMSCs, this chapter suggests a national prosecution model which may encourage States to fulfill their obligations under human rights law by better regulation of PMSCs’ operations.

In this regard, the UK Private Security Industry Act could constitute a prime example. So that, such an example of a national initiative has to establish an independent oversight mechanism which:

1. authorizes and/or appeals licenses of PMSCs and their employees;


2. sets out the vetting and training standards of PMSCs’ employees according to the international principles of human rights law and humanitarian law;

3. monitors their activities through the submission of periodical reports;

4. investigates allegations against PMSCs and their employees;

5. establishes civil and criminal accountability for PMSCs and their employees; and,

6. establishes an adequate compensation mechanism for victims of abuses committed by PMSCs and their employees irrespective of where the violations may have been committed.

However, in the absence of relevant steps to incorporate international standards regarding the operation of PMSCs and their employees within their domestic legal order, States enriched with the obligation to regulate them under human rights law. For several human rights notorious episodes that took place in the meantime of a PMSC’ operation, it seems that States had authorized these activities. For instance, PMSCs’ employees who were involved in the Abu Ghraib incident might be under the supervision of governmental official778.

In this regards, chapter six argues if human rights law constitutes an adequate framework of controlling the activities of PMSCs, and providing States with such accountability mechanisms for human rights abuses committed by private contractors and effective remedies for reparation of the victims. This is also the primary research question. So,

by observing that the existing international initiatives—the Montreux Document and the ICoC—are a restatement of well-established principles of human rights law, chapter six argues that the human rights bodies should have a decisive role to guide States to fulfil their obligations under human rights law.

It is worth mentioning that in 2013 the CRC drafted a new General Comment on State Obligations regarding the Impact of the Business Sector on Children’s Rights\(^{779}\) which denotes that States have the obligation to ensure that all actors respect children’s rights ‘by adopting transparent business-related policies and legislative or administrative acts that consider the impact on the rights of the child’\(^{780}\). The CRC also highlights that a sufficient investigative procedure requires the adoption of child-sensitive mechanisms; civil criminal or administrative\(^{781}\). Therefore, human rights bodies are engaged with the challenge to deepen in States’ procedural obligations regarding the prevention of fundamental human rights abuses by PMSCs’ employees.

Furthermore, human rights law imposes duties not only on States, but also on individuals and business entities\(^{782}\). Therefore, both States and PMSCs have the obligation to take appropriate steps to prevent the commission of human rights violations by PMSCs and vice versa. As a result, in the absence of a national regulatory framework, States still have to

\(^{779}\) See CRC, General Comment No. 16 on State Obligations regarding the Impact of the Business Sector on Children’s Rights, UN Doc. CRC/C/GC/16, 17/04/2013.


\(^{781}\) *Ibid*, para. 30.

\(^{782}\) This is one of the fundamental principles that were set out in Art.29 of the Universal Declaration on Human Rights. (‘everyone has duties to the community’).
establish an independent institutional body under which the government coordinates with and the PMSCs’ industry will be sufficient in investigating and punishing violations of human rights by PMSCs’ employees.

Similarly, the present research illustrates that the European States -or much properly individuals within the territory and jurisdiction of the CoE- could bring a case in front of the ECtHR by claim human rights violation committed by PMSCs and their employees. Both CoE and the ECtHR had demonstrate the emerged need for regulation of the PMSCs’ activities. To be more precise, the CoE adopted a wide range of recommendations regarding the obligations of States to protect human rights within their jurisdiction from activities of private legal entities.

Relying on the extensive and in-depth analysis of the jurisprudence of the ECtHR, the thesis concludes that States have the positive obligation to prevent human rights abuses that committed by ‘other agents’. Thus, I strongly believe that within the next five years, the State Parties to the ECHR are able to adopt adequate measures in order to prevent human rights violations, performed inside or outside of their territory by PMSCs. The present thesis also proposed that the bottom line for the ECtHR over PMSCs is the case Avsar v. Turkey, the

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783 McCann and Others v. the United Kingdom, Appl. 18984/91, ECtHR Judgment (27 September 1995), para. 151.


785 Kovačić v. Slovenia, Appl. No. 24376/08, ECtHR Judgment (18 April 2013). See also Ranstev v. Cyprus and Russia, Appl. No. 25965/04, ECtHR Judgment (7 January 2010).
ECtHR argued that a State has obligation to protect the rights of its individuals for security operations carried out by both State agents and/or civilians in quasi-security operations.\footnote{Avsar v. Turkey, Appl. No. 25657/94, ECtHR Judgment (10 July 2001). Moreover, the ECtHR in McCann and Others v. the United Kingdom used the word of “other agents” in order to describe those are taking part in a security operation. See McCann and Others v. the United Kingdom, Appl. 18984/91, ECtHR Judgment (27 September 1995), para. 151.}

Therefore, the ECtHR aims to harmonize the national laws and to create common regulatory standards regarding the protection of human rights and fundamental freedoms among Europe. It is vital for the ECtHR to engage with a more decisive approach over the regulation of PMSCs’ contractors and their prosecution for human rights’ abuses. So as, the CoE has to put forward such initiatives, as for example the adoption of a new convention or even an additional protocol to the ECHR with respect to prevent human rights’ abuses by PMSCs. Consequently, the ECtHR will be the accountability mechanism not only for securing the human rights respect by PMSCs, but also specifying and clarifying that PMSCs’ activities do not contravene the norms of human rights law.

At the same time, the Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes emphasized that \textit{“the rapid increase of private military companies and private security companies operating in areas of armed conflict is one example of how companies work in situations where they may become implicated in the perpetration of war crimes”}. This means that the absence of a coherent international legal framework of regulation PMSCs’ activities and adjudicating their personnel for their misconduct, in conjunction with the lack of national laws that are directly applied over private contractors help them to enjoy a kind of immunity for their involvement in the commission of international crimes.
In conclusion, following the establishment of common regulation with regards to PMSCs under human rights law, the international community has also to elaborate towards the establishment of criminal liability of PMSCs and their employees. It means that States have to cooperate in order to advocate of individual criminal responsibility for private contractors as perpetrators, as instigators and/or persons who aid and assist the commission of an international crime and as commanders for the commission of war crimes and acts of aggression.
BIBLIOGRAPHY

1. BOOKS


Buzatu, A.-M., European Practices of Regulation of PMSCs and Recommendations for Regulation of PMSCs through International Legal Instruments (Geneva: the Geneva Centre for the Democratic Control of Armed Forces, 2008)


Cameron, L. and Chetail, V., Privatizing War: Private Military and Security Companies under Public International Law (Cambridge: Cambridge University Press, 2013)


Carmola, K., Private Security Contractors and New Wars: Risk, Law and Ethics (London: Routledge, 2010)


Dul, J. and Hak, T., Case Study Methodology in Business Research (Oxford: Elsevier, 2008)


Evertz, R., Regulation of Private Military, Security and Surveillance Services in Germany (PRIV-WAR Report Germany, National Reports Series 16/09, 2009)


Isenberg, A. D., Soldiers of Fortune Ltd.: A Profile of Today’s Private Sector Corporate Mercenary Firms (Centre for Defense Information, 1997)


Krahmann, E., Private Security Companies and the State Monopoly on Violence: A Case of Norm Change?, (Frankfurt: Peace Research Institute, 2009)


MacLeod, S., ‘The Role of International Regulatory Initiatives on Business and Human Rights for Holding Private Military and Security Contractors to Account’, in Francioni, F. and


Schawartz, M., *Department of Defence Contractors in Iraq and Afghanistan: Background and Analysis* (Congressional Report Services, 2 July 2010)

Schawartz, M. and Swain, J., *Department of Defence Contractors in Iraq and Afghanistan: Background and Analysis* (Congressional Research Service, 13 May 2011)


Seiberth, C., Private Military and Security Companies in International Law (Cambridge/Antwerp/Portland: Intersentia, 2014)


Singer, W. P., Can't Win with 'Em, Can't Go to War without 'Em: Private Military Contractors and Counterinsurgency, (Foreign Policy at Brookings, 2007)


Swisspeace, The Impact of PMSCs on the Local Population in Post – Conflict Countries: A Comparative Study for Afghanistan and Angola (Bern, 2007)


Tonkin, H., State Control over Private Military and Security Companies in Armed Conflict (Cambridge University Press, 2013)


Vibhute, K. and Aynalem, F., Legal Research Methods (Justice and Legal System Research Institute, 2009).


Wilson, J. and Maguire, K., *American Firm in Bosnia Sex Trade Row Poised to Win MoD Contract*, (November 2009)


Yin, R., *Case Study Research: Design and Methods* (London: SAGE Publication, 1984),


2. **JOURNALS**


Gómez del Prado, J. L., ‘The Privatization of War: Mercenaries, Private Military and Security Companies (PMSC)’, (Global Research, 1 of July 2014)


Lee, T., MEJA for Street Crimes, NOT for War Crimes’ [2009] DePaul Rule of Law Journal 1


Perry, M. C., ‘Inductive vs. Deductive Method in Social Science Research’ [1927] 8 (1) The Southwestern Political and Social Science Quarterly 66


Pinzauti, G., ‘The Blackwater Scandal: Legal Black Hole or Unwillingness to Prosecute Private Military Contractors?’ [2007] 17 Italian Yearbook of International Law 125


Tellis, W., ‘Introduction to Case Study’ [1997] 3 (2) The Qualitative Report 4


3. OTHER DOCUMENTS

UNITED NATIONS DOCUMENTS

UNITED NATIONS SECURITY COUNCIL


HUMAN RIGHTS COUNCIL


3.


HUMAN RIGHTS COMMITTEE

Consideration of Reports Submitted by States Parties under Article 40 of the Covenant:
Concluding Observations of the HRC: Belgium, UN CCPR/CO/81/BEL, 21/08/2004


Consideration of Reports Submitted by States Parties under Article 40 of the Covenant:

Comments of the HRC: Cyprus, UN CCPR/C/79/Add.39, 03/08/1994

General Comment 6: Article 6: The Right to Life, U.N. Doc. HRI/GEN/1\Rev.1 at 6, 27/05/2008

General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, UN Doc CCPR/C/GC/32, 23/08/2007


General Comment 20: Article 7: Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994)
General Comment 24, Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 11/11/1994

COMMITTEE AGAINST TORTURE
Concluding observations on the second periodic report of the Pluri-national State of Bolivia as approved by the Committee at its fiftieth session (6–31 May 2013), CAT/C/BOL/CO/2, 14 Jun. 2013

COMMITTEE ON THE RIGHTS OF THE CHILD
General Comment No. 16 on State Obligations regarding the Impact of the Business Sector on Children’s Rights, UN Doc. CRC/C/GC/16, 17/04/2013.

INTERNATIONAL LAW COMMISSION

INTERNATIONAL COMMITTEE OF RED CROSS


INSTITUTE FOR HUMAN RIGHTS AND BUSINESS


COUNCIL OF EUROPE

Committee of Ministers, Declaration of the Committee of Ministers on the United Nations Guiding Principles on Business and Human Rights, 16/04/2014

The Recommendation 1858 (2009) on Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force adopted at the 8\textsuperscript{th} Sitting of Parliamentary Assembly of CoE on 29\textsuperscript{th} of January 2009

The Resolution 1757 (2010) on Human Rights and Business adopted at the 32\textsuperscript{nd} Sitting of the Parliamentary Assembly of CoE on 6\textsuperscript{th} of October 2010

Recommendation 1363 (2010) on Human Rights and Business

Recommendation 1363 (2010) on Human Rights and Business

ORGANISATION FOR THE SECURITY AND COOPERATION IN EUROPE

OSCE, Private Security Companies in Serbia: Friend or Foe? (Belgrade: GORAGRAF) 74.

Panoramic Overview of Private Security Industry in the 25 Member States of the European Union,


NATIONAL DOCUMENTS

GERMANY

Answer by the German Government to Parliament, Bundenstag printed paper 15/5824, preliminary remarks, Answer No. 1a, access on May 2016.

Germany, Lower House Federal Parliament (Bundestag). Reply by the Federal Government to the Minor Interpellation by Members Inge Hoger, Jan Aken, Christine Buchholz,
further Members and the Parliamentary Group Die linked, BT-Drs, 17/4012, 1 November 2010.

UNITED KINGDOM


HM Government, Good Business: Implementing the U.N. Guiding Principles on Business and Human Rights, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, Cm 8695 (September 2013).

UNITED STATES OF AMERICA


U.S. Department of Defense, Procedures Guidance and Information § 225.7401.


4. OTHER ONLINE SOURCES


5. INTERNATIONAL TREATIES


6. **NATIONAL LEGISLATION**

**GERMANY**

German Law on International Legal Assistance in Criminal Matters (IRG) of December 23, 1982.

**SOUTH AFRICA**


Republic of South Africa, Private Security Industry Regulation Act (No. 56 of 2001), Section 14


UNITED KINGDOM


UK Private Security Industry Act 2001


UK Foreign Enlistment Act 1870.

7. TABLE OF CASES

INTERNATIONAL COURT OF JUSTICE

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), ICJ, 1986


INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA


HUMAN RIGHTS COMMITTEE


_Maria Fanny Suarez de Guerrero v. Colombia_ (Communication No. 45/1979) CCPR/C/15/D/45/1979 (Jurisprudence), 31 March 1982


**COMMITTEE AGAINST TORTURE**

INTER-AMERICAN COURT OF HUMAN RIGHTS

Durand and Ugarte case (2000) IACtHR, Series C, No. 68
Godínez Cruz case (1989) IACtHR, Series C, No. 5
Juan Humberto Sanchez case (2003) IACtHR, Series C, No. 99
Pueblo Bello Massacre case (2006) IACtHR, Series C, No. 140
Servellón-García et al. case (2006) IACtHR, Series C, No. 152
Valle Jaramillo and Others case (2008) IACtHR, Series C
Vargas Areco case (2006) IACtHR, Series C No. 155
Velasquez Rodriguez case (1988) IACtHR, Series C, No. 4

AFRICAN COMMISSION OF HUMAN AND PEOPLES RIGHTS

Decision Regarding Communication No. 245/02 (Zimbabwe Human Rights NGO Forum v. Zimbabwe) (AComHPR, 15 May 2006)
Decision Regarding Communication No. 155/96 (Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1 (AComHPR, 27 October 2001)
Decision Regarding Communication No. 74/92 (Commission Nationale des Droits de l'Homme et des Libertés v. Chad) (AComHPR, 11 October 1995)

EUROPEAN COURT OF HUMAN RIGHTS

97 members of the Gldani Congregation of Jehovah’s Witnesses and 4 Others Case v. Georgia
App no 71156/01 (ECtHR, 3 May 1997)

Akkoc v. Turkey Appls nos 2947/93 and 22948/93 (ECHR, 10 October 2000)

Aksoy v. Turkey App no 21987/93 (ECHR, 18 December 1996)

Al-Saadoon and Mufdhi v. the United Kingdom Appl no 61498/08 (ECHR, 2 March 2010)

Al-Skeini v. the United Kingdom Appl no 55721/07 (ECHR, 07 July 2011)

Andronikou and Constantinou v. Cyprus App no 25052/94 (ECHR, 9 October 1997)

Angelova and Iliev v. Bulgaria App no 55523/00 (ECHR, 2007)

Anghelescu v. Romania App no 46430/99 (ECHR, 23 October 2004)

Assanidze v. Georgia Appl no 71503/01 (ECHR, 8 April 2004)


Avsar v. Turkey App no 25657/94 (ECHR, 10 July 2001)

Banković and Others v. Belgium and 16 Other Contracting States Appl no 52207/99 (ECHR Decision on the Admissibility, 12 December 2001)

Batti and Others v. Turkey Apps nos 33097/96 and 57834/00 (ECHR, 3 June 2004)

Bazorkina v. Russia App no 69481/01 (ECHR, 27 July 2006)

Ben El Mahi and Others v. Denmark Appl no 5853/06 (ECHR, 11 December 2006)

Costello-Roberts v. the United Kingdom App no 13134/87 (ECHR, 25 March 1993)

Drozd and Janousek v. France and Spain Appl no 12747/87 (ECHR Merits and Just Satisfaction, 26 June 1992)


Ergi v. Turkey App no 23818/94 (ECHR, 28 July 1998)

Ertak v. Turkey App no 20764/92 (ECHR, 9 May 2000)

Fadeyeva v. the Russian Federation Appl no 55273/04 (ECHR, 9 June 2005)

Gezici v. Turkey App no 34594/97 (ECHR, 17 March 2005)

HLR v. France App no 24573/94 (ECHR, 29 April 1997)
Ilascu and Others v. Moldova and Russia Appl no 48787/99 (ECtHR, 8 July 2004)

Ireland v. the United Kingdom Appl no 5310/71 (ECtHR, 18 January 1978)

Islamic Republic of Iraq v. Turkey Appl no 40998/998 (ECtHR, 13 December 2007)

Issa and Others v. Turkey Appl no 31821/96 (ECtHR, 19 November 2004)

Jordan v. United Kingdom Appl no 24746/94 (ECtHR, 4 May 2001)

Kaya v. Turkey App no 22535/93 (ECtHR, 28 March 2000)

Kelly and others v. the United Kingdom Appl no 30054/96 (ECtHR, 4 August 2001)

Kilic v. Turkey Appl no 22492/93 (ECtHR, 28 March 2000)

Klass and Others v. Germany Appl no 5029/71 (ECHR) Ser. A. No. 61 (1983)

Kolevi v. Bulgaria App no 1108/02 (ECtHR, 5 November 2009)

Kovačić v. Slovenia Appl no 24376/08 (ECtHR, 18 April 2013)

Kurt v. Turkey App no 24276/94 (ECtHR, 25 May 1998)


Libita v. Italy App no 26772/95 (ECtHR, 12 February 2000)

Loizidou v. Turkey (preliminary objections) Appl no 15318/89 (1995), ECtHR series A No. 310

López Ostra v. Spain Appl no 16798/90 (ECtHR, 9 December 1994)

M. C. v. Bulgaria App no 39272/98 (ECtHR, 4 December 2003)

Mastromatteo v. Italy Appl no 37703/97 (ECtHR, 24 October 2002)

McCann and Others v. the United Kingdom App no 18984/91 (ECtHR, 27 September 1995)

McKerr v. the United Kingdom App no 28883/95 (ECtHR, 4 May 2001)

Opuz v. Turkey Appl no 33401/02 (ECtHR, 9 June 2009)

Osman v. Bulgaria App no 43233/98 (ECtHR, 16 February 2006)

Osman v. the United Kingdom App no 87/1997/871/1083 (ECtHR, 28 October 1998)

Osmanoglu v. Turkey App no 48804/99 (ECtHR, 24 January 2008)
Pla and Puncernau v. Andorra Appl no 69498/01 (ECtHR, 13 July 2004)

Powell and Ryaner v. the United Kingdom Appl no 9310/81 (ECtHR, 21 February 1991)

Ranstev v. Cyprus and Russia Appl no 25965/04 (ECtHR, 7 January 2010)

Secic v. Croatia App no 40116/02 (ECtHR, 31 May 2007)

Stephens v. Malta (no. 1) Appl no 11956/07 (ECtHR, 21 April 2009)

Tanlı v. Turkey Appl no 26129/95 (ECtHR, 10 April 2001)

Tanrıkuşlu v. Turkey Appl no 23763/94 (ECtHR, 8 July 1999)

Taşkin and Others v. Turkey Appl no 46117/99 (ECtHR, 10 December 2004)

Timurtas v. Turkey Appl no 23531/94 (ECtHR, 13 June 2000)

Treska v. Albania and Italy Appl no 26937/04 (ECtHR Decision of Admissibility, 29 June 2006)

Valasinas v. Lithuania Appl no 44558/98 (ECtHR, 24 July 2001)

Varnava and Others v. Turkey Apps nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009)

X and Y v. Netherlands Appl no 8978/80 (ECtHR (Merits and Just Satisfaction), 26 March 1985)

Young, James and Webster v. the United Kingdom Appl no 7601/76 and 7806/77 (ECtHR, 13 August 1981)

Z. And Others v. the United Kingdom App no 29392/95 (ECtHR, 10 May 2001)

EUROPEAN COMMISSION OF SOCIAL RIGHTS

NATIONAL COURTS

UNITED STATES OF AMERICA


Ibrahim vs. Titan Corp 556 FSupp2d 1 (DDC 2007) (Ibrahim II),

Kinsello vs. Singleton, 361 U.S.A. 234 [1960].


Reid v. Covert 354 U.S.A. 1 39-41 [1957].

aff’d Saleh vs. Titan 580 F3d 1 14-16 (DC Cir 2009) (Saleh II).

Solorio v. United States 483 U.S. 435 450-51 [1987]


U.S.A. v. David Passaro, U.S.A. District Court for the Eastern District of North Carolina, Western Division, Case No.: 5:04-CR-211-(BO)-1 [2004].


SOUTH AFRICA

Case No 12967/2004 Kaunda and Others v. President of the Republic of South Africa and Others 2004 (5) SA 191 (T),

Case No CCT 23/04 Kaunda v. President of the Republic of South Africa 2005 (4) SA (CC).

**GERMANY**

*Germany, Federal high Court of Justice, 35 Citizens of the Former Yugoslavia v. Germany.*


**UNITED KINGDOM**


APPENDICES

APPENDIX 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 (17 September 2008)

Preface

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

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

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

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

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

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

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

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

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

9. That for the purposes of this document:

a) “PMSCs” are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

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

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

d) “Territorial States” are States on whose territory PMSCs operate.
Part One Pertinent international legal obligations relating to private military and security companies

Introduction

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

A. Contracting States

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Territorial States

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

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

b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

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

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

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

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

C. Home States

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

a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;

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

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

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

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

**D. All other States**

18. All other States have an obligation, within their power, to ensure respect for international humanitarian law. They have an obligation to refrain from encouraging or assisting in violations of international humanitarian law by any party to an armed conflict.
19. All other States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.

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

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

E. PMSCs and their personnel

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

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

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

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

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

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

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

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

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

F. Superior responsibility

27. Superiors of PMSC personnel, such as:

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

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

Part Two

Good practices relating to private military and security companies

Introduction

This Part contains a description of good practices that aims to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law and
otherwise promoting responsible conduct in their relationships with PMSCs operating in areas of armed conflict. They may also provide useful guidance for States in their relationships with PMSCs operating outside of areas of armed conflict. The good practices do not have legally binding effect and are not meant to be exhaustive. It is understood that a State may not have the capacity to implement all the good practices, and that no State has the legal obligation to implement any particular good practice, whether that State is a Contracting State, a Territorial State, or a Home State. States are invited to consider these good practices in defining their relationships with PMSCs, recognizing that a particular good practice may not be appropriate in all circumstances and emphasizing that this Part is not meant to imply that States should necessarily follow all these practices as a whole. The good practices are intended, inter alia, to assist States to implement their obligations under international humanitarian law and human rights law. However, in considering regulation, States may also need to take into account obligations they have under other branches of international law, including as members of international organizations such as the United Nations, and under international law relating to trade and government procurement. They may also need to take into account bilateral agreements between Contracting States and Territorial States. Moreover, States are encouraged to fully implement relevant provisions of international instruments to which they are Parties, including anti-corruption, anti-organized crime and firearms conventions. Furthermore, any of these good practices will need to be adapted in practice to the specific situation and the State’s legal system and capacity.

A. Good practices for Contracting States

States contemplating to contract PMSCs should evaluate whether their legislation, as well as procurement and contracting practices, are adequate for contracting PMSCs. This is particularly relevant where Contracting States use the services of a PMSC in a State where law enforcement or regulatory capacities are compromised. In many instances, the good practices for Contracting States may also indicate good practices for other clients of PMSCs, such as international organizations, NGOs and companies. In this sense, good practices for Contracting States include the following:

I. Determination of services

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

II. Procedure for the selection and contracting of PMSCs

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

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

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

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

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

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

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

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

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

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

III. Criteria for the selection of PMSCs

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

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

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

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

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

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

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

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

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

a) rules on the use of force and firearms;
b) international humanitarian law and human rights law;

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

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

e) measures against bribery, corruption, and other crimes. Contracting States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

11. To take into account whether the PMSC:

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

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

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

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

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

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

i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;

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

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

iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC’s management or a competent authority.
13. To consider the respect of the PMSC for the welfare of its personnel, as protected by labour law and other relevant national law. Relevant factors may include:

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

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

c) adopting operational safety and health policies;

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

e) preventing unlawful discrimination in employment.

**IV. Terms of contract with PMSCs**

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

a) past conduct (good practice 6);

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

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

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

e) training (good practice 10);

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

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

h) welfare of personnel (good practice 13);

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

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

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

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

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

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

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

b) allow for a clear distinction between a PMSC’s personnel and the public authorities in the State where the PMSC operates. The same should apply to all means of transport used by PMSCs.

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

a) securities or bonds for contractual performance;

b) financial rewards or penalties and incentives; c) opportunities to compete for additional contracts.

18. To require, in consultation with the Territorial State, respect for relevant regulations and rules of conduct by PMSCs and their personnel, including rules on the use of force and firearms, such as:
a) using force and firearms only when necessary in self-defence or defence of third persons; b) immediate reporting to and cooperation with competent authorities, including the appropriate contracting official, in the case of use of force and firearms.

V. Monitoring compliance and ensuring accountability

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

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

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

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

a) contractual sanctions commensurate to the conduct, including:
   i. immediate or graduated termination of the contract;
   ii. financial penalties;
   iii. removal from consideration for future contracts, possibly for a set time period;
   iv. removal of individual wrongdoers from the performance of the contract;

b) referral of the matter to competent investigative authorities; c) providing for civil liability, as appropriate.

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

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

b) provide Contracting State government personnel on site with the capacity and authority to oversee proper execution of the contract by the PMSC and the PMSC’s subcontractors;
c) train relevant government personnel, such as military personnel, for foreseeable interactions with PMSC personnel;
d) collect information concerning PMSCs and personnel contracted and deployed, and on violations and investigations concerning their alleged improper and unlawful conduct;
e) establish control arrangements, allowing it to veto or remove particular PMSC personnel during contractual performance;
f) engage PMSCs, Territorial States, Home States, trade associations, civil society and other relevant actors to foster information sharing and develop such mechanisms.

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

a) to consider the impact of the agreements on the compliance with national laws and regulations;
b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.

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

B. Good practices for Territorial States

The following good practices aim to provide guidance to Territorial States for governing the supply of military and security services by PMSCs and their personnel on their territory. Territorial States should evaluate whether their domestic legal framework is adequate to ensure that the conduct of PMSCs and their personnel is in conformity with relevant national law, international humanitarian law and human rights law or whether it needs to establish further arrangements to regulate the activities of PMSCs. Acknowledging the particular challenges faced by Territorial States in armed conflict, Territorial States may accept information provided by the Contracting State concerning the ability of a PMSC to carry out its activities in conformity with international humanitarian law, human rights law and relevant good practices. In this sense, good practices for Territorial States include the following:

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

II. Authorization to provide military and security services

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

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

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

III. Procedure with regard to authorizations

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

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

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

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

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

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

29. To ensure transparency with regard to authorizations. Relevant mechanisms may include:
a) public disclosure of authorization regulations and procedures;

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

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

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

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

IV. Criteria for granting an authorization

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

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

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

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

c) the subcontractor is in possession of an authorization;

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

32. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:
a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;

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

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

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

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

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

a) rules on the use of force and weapons;

b) international humanitarian law and human rights law;

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

d) complaints handling;
36. Not to grant an authorization to a PMSC whose weapons are acquired unlawfully or whose use is prohibited by international law.

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

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

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

i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;

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

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

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

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

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

V. Terms of authorization

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

a) past conduct (good practice 32);
b) financial and economic capacity (good practice 33);

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

d) training (good practice 35);

e) lawful acquisitions (good practice 36);

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

g) welfare of personnel (good practice 38);

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

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

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

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

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

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

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

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

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

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

d) limiting the number of employees allowed to carry weapons in a specific context or area;
e) requiring the storage of weapons and ammunition in a secure and safe facility when personnel are off duty;

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

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

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

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

b) allow for a clear distinction between a PMSC’s personnel and the public authorities in the State where the PMSC operates. The same should apply to all means of transportation used by PMSCs.

VII. Monitoring compliance and ensuring accountability

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

a) establish or designate an adequately resourced monitoring authority;

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

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

d) investigate reports of wrongdoing.

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

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

a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
b) removing specific PMSC personnel under the penalty of revoking or suspending the authorization;

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

d) forfeiture of bonds or securities; e) financial penalties.

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

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

a) providing for civil liability;

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

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

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

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

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

C. Good practices for Home States

The following good practices aim to provide guidance to Home States for governing the supply of military and security services by PMSCs and their personnel abroad (“export”). It is recognized that other good practices for regulation – such as regulation of standards through trade associations and through international cooperation – will also provide guidance for regulating PMSCs, but have not been elaborated here. In this understanding, Home States
should evaluate whether their domestic legal framework, be it central or federal, is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel, or whether, given the size and nature of their national private military and security industry, additional measures should be adopted to encourage such respect and to regulate the activities of PMSCs. When considering the scope and nature of any licensing or regulatory regime, Home States should take particular notice of regulatory regimes by relevant Contracting and Territorial States, in order to minimize the potential for duplicative or overlapping regimes and to focus efforts on areas of specific concern for Home States. In this sense, good practices for Home States include the following:

I. Determination of services

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

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

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

56. To harmonize their authorization system and decisions with those of other States and taking into account regional approaches relating to authorization systems. III. Procedure with regard to authorizations

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

a) acquiring information relating to the principal services the PMSC has provided in the past;
b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;

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

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

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

   a) public disclosure of authorization regulations and procedures;

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

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

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

**IV. Criteria for granting an authorization**

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

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

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

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

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

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

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

a) rules on the use of force and firearms;

b) international humanitarian law and human rights law;

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

d) complaints handling;

e) measures against bribery, corruption and other crimes.

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

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

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

a) the existence and implementation of policies relating to international humanitarian law and human rights law;
b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:

i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;

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

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

V. Terms of authorization granted to PMSCs

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

a) past conduct (good practice 60);

b) financial and economic capacity (good practice 61); c) personnel and property records (good practice 62);

d) training (good practice 62);

e) lawful acquisitions (good practice 64);

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

g) welfare of personnel (good practice 66).

VI. Monitoring compliance and ensuring accountability

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

69. To impose sanctions for PMSCs operating without or in violation of an authorization, such as:
a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;

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

c) civil and criminal fines and penalties.

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

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

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

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

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

a) providing for civil liability;

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

73. To cooperate with investigating or regulatory authorities of Contracting and Territorial States, as appropriate, in matters of common concern regarding PMSCs.
APPENDIX 2

The International Code of Conduct for Private Security Service Providers (September 2010)

A. Preamble

1. Private Security Companies and other Private Security Service Providers (collectively “PSCs”) play an important role in protecting state and non-state clients engaged in relief, recovery, and reconstruction efforts, commercial business operations, diplomacy and military activity. In providing these services, the activities of PSCs can have potentially positive and negative consequences for their clients, the local population in the area of operation, the general security environment, the enjoyment of human rights and the rule of law.

2. 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 recognizes that well-established rules of international law apply to States in their relations with private security service providers and provides for good practices relating to PSCs. The “Respect, Protect, Remedy” framework developed by the Special Representative of the United Nations (UN) Secretary-General on Business and Human Rights, and welcomed by the UN Human Rights Council, entails acting with due diligence to avoid infringing the rights of others.

3. Building on these foundations, the Signatory Companies to this International Code of Conduct for Private Security Service Providers (the “Code”) endorse the principles of the Montreux Document and the aforementioned “Respect, Protect, Remedy” framework as they apply to PSCs. In so doing, the Signatory Companies commit to the responsible provision of Security Services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients.

4. The Signatory Companies affirm that they have a responsibility to respect the human rights of, and fulfil humanitarian responsibilities towards, all those affected by their business activities, including Personnel, Clients, suppliers, shareholders, and the population of the area in which services are provided. The Signatory Companies also recognize the importance of
respecting the various cultures encountered in their work, as well as the individuals they come into contact with as a result of those activities.

5. The purpose of this Code is to set forth a commonly-agreed set of principles for PSCs and to establish a foundation to translate those principles into related standards as well as governance and oversight mechanisms.

6. Signatory Companies commit to the following, as set forth in this Code:

a) to operate in accordance with this Code;

b) to operate in accordance with applicable laws and regulations, and in accordance with relevant corporate standards of business conduct;

c) to operate in a manner that recognizes and supports the rule of law; respects human rights, and protects the interests of their clients;

d) to take steps to establish and maintain an effective internal governance framework in order to deter, monitor, report, and effectively address adverse impacts on human rights;

e) to provide a means for responding to and resolving allegations of activity that violates any applicable national or international law or this Code; and

f) to cooperate in good faith with national and international authorities exercising proper jurisdiction, in particular with regard to national and international investigations of violations of national and international criminal law, of violations of international humanitarian law, or of human rights abuses.

7. Those establishing this Code recognize that this Code acts as a founding instrument for a broader initiative to create better governance, compliance and accountability. Recognizing that further effort is necessary to implement effectively the principles of this Code, Signatory Companies accordingly commit to work with states, other Signatory Companies, Clients and other relevant stakeholders after initial endorsement of this Code to, within 18 months:

a) Establish objective and measurable standards for providing Security Services based upon this Code, with the objective of realizing common and internationally-recognized operational and business practice standards; and
b) Establish external independent mechanisms for effective governance and oversight, which will include Certification of Signatory Companies’ compliance with the Code’s principles and the standards derived from the Code, beginning with adequate policies and procedures, Auditing and Monitoring of their work in the field, including Reporting, and execution of a mechanism to address alleged violations of the Code’s principles or the standards derived from the Code; and thereafter to consider the development of additional principles and standards for related services, such as training of external forces, the provision of maritime security services and the participation in operations related to detainees and other protected persons.

8. Signature of this Code is the first step in a process towards full compliance. Signatory Companies need to: (1) establish and/or demonstrate internal processes to meet the requirements of the Code’s principles and the standards derived from the Code; and (2) once the governance and oversight mechanism is established, become certified by and submit to ongoing independent Auditing and verification by that mechanism. Signatory Companies undertake to be transparent regarding their progress towards implementing the Code’s principles and the standards derived from the Code. Companies will not claim they are certified under this Code until Certification has been granted by the governance and oversight mechanism as outlined below.

B. Definitions

These definitions are only intended to apply exclusively in the context of this Code.

**Auditing** – a process through which independent auditors, accredited by the governance and oversight mechanism, conduct on-site audits, including in the field, on a periodic basis, gathering data to be reported to the governance and oversight mechanism which will in turn verify whether a Company is meeting requirements and if not, what remediation may be required.

**Certification** – a process through which the governance and oversight mechanism will certify that a Company’s systems and policies meet the Code’s principles and the standards derived from the Code and that a Company is undergoing Monitoring, Auditing, and verification, including in the field, by the governance and oversight mechanism. Certification is one element of a larger effort needed to ensure the credibility of any Implementation and oversight initiative.
**Client** – an entity that hires, has formerly hired, or intends to hire a PSC to perform Security Services on its behalf, including, as appropriate, where such a PSC subcontracts with another Company.

**Company** – any kind of business entity or form, such as a sole proprietorship, partnership, company (whether public or private), or corporation, and “Companies” shall be interpreted accordingly.

**Competent Authority** – any state or intergovernmental organization which has jurisdiction over the activities and/or persons in question and “Competent Authorities” shall be interpreted accordingly.

**Complex Environments** – any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent.

**Implementation** – the introduction of policy, governance and oversight mechanisms and training of Personnel and/or subcontractors by Signatory Companies, necessary to demonstrate compliance with the Code’s principles and the standards derived from this Code.

**Monitoring** – a process for gathering data on whether Company Personnel, or subcontractors, are operating in compliance with the Code’s principles and standards derived from this Code.

**Personnel** – persons working for a PSC, whether as employees or under a contract, including its staff, managers and directors. For the avoidance of doubt, persons are considered to be personnel if they are connected to a PSC through an employment contract (fixed term, permanent or open-ended) or a contract of assignment (whether renewable or not), or if they are independent contractors, or temporary workers and/or interns (whether paid or unpaid), regardless of the specific designation used by the Company concerned.

**Private Security Companies and Private Security Service Providers** (collectively “PSCs”) – any Company (as defined in this Code) whose business activities include the provision of Security Services either on its own behalf or on behalf of another, irrespective of how such Company describes itself.

**Reporting** – a process covered by necessary confidentiality and nondisclosure arrangements through which companies will submit to a governance and oversight mechanism a written
assessment of their performance pursuant to a transparent set of criteria established by the mechanism.

**Security Services** – guarding and protection of persons and objects, such as convoys, facilities, designated sites, property or other places (whether armed or unarmed), or any other activity for which the Personnel of Companies are required to carry or operate a weapon in the performance of their duties.

**Signatory Companies** – are PSCs that have signed and agreed to operate in compliance with the Code’s principles and the standards derived from the Code and “Signatory Company” shall be interpreted accordingly.

### C. Implementation

9. In recognition of the additional steps to be taken to support the Implementation of this Code – in particular the development of standards based on the Code (“standards”) and an independent governance and oversight mechanism (“the mechanism”) as outlined in the Preamble – Signatory Companies intend to, along with other interested stakeholders, convene regularly to review progress toward those steps.

10. Upon signature of the Code, Signatory Companies and other stakeholders will undertake to work with national standards bodies as appropriate to develop standards, with the intent that any national standards would eventually be harmonized in an international set of standards based on the Code.

11. Upon signature of the Code, Signatory Companies and other stakeholders will appoint a multi-stakeholder steering committee of 6-9 members who will function as a “temporary board”. This steering committee will be responsible for developing and documenting the initial arrangements for the independent governance and oversight mechanism, including by-laws or a charter which will outline mandate and governing policies for the mechanism. The Steering Committee will endeavour to complete a work plan for constituting the mechanism before the end of March 2011, and further to develop the bylaws/charter by the end of July 2011 and an operational plan before the end of November 2011.

12. After the independent governance and oversight mechanism has been constituted (by the adoption of bylaws/charter), the governance and oversight mechanism shall accept
responsibility for maintenance and administration of the Code, and shall determine whether and how it is appropriate for the mechanism and standards to be reflected in the text of the Code itself.

D. General Provisions

13. This Code articulates principles applicable to the actions of Signatory Companies while performing Security Services in Complex Environments.

14. This Code complements and does not replace the control exercised by Competent Authorities, and does not limit or alter applicable international law or relevant national law. The Code itself creates no legal obligations and no legal liabilities on the Signatory Companies, beyond those which already exist under national or international law. Nothing in this Code shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

15. This Code may be modified in accordance with procedures to be established by the governance and oversight mechanism.

E. General Commitments

16. Signatory Companies agree to operate in accordance with the principles contained in this Code. Signatory Companies will require that their Personnel, and all subcontractors or other parties carrying out Security Services under Signatory Company contracts, operate in accordance with the principles contained in this Code.

17. Signatory Companies will implement appropriate policies and oversight with the intent that the actions of their Personnel comply at all times with the principles contained herein.

18. Signatory Companies will make compliance with this Code an integral part of contractual agreements with Personnel and subcontractors or other parties carrying out Security Services under their contracts.

19. Signatory Companies will adhere to this Code, even when the Code is not included in a contractual agreement with a Client.
20. Signatory Companies will not knowingly enter into contracts where performance would directly and materially conflict with the principles of this Code, applicable national or international law, or applicable local, regional and international human rights law, and are not excused by any contractual obligation from complying with this Code. To the maximum extent possible, Signatory Companies will interpret and perform contracts in a manner that is consistent with this Code.

21. Signatory Companies will comply, and will require their Personnel to comply, with applicable law which may include international humanitarian law, and human rights law as imposed upon them by applicable national law, as well as all other applicable international and national law. Signatory Companies will exercise due diligence to ensure compliance with the law and with the principles contained in this Code, and will respect the human rights of persons they come into contact with, including, the rights to freedom of expression, association, and peaceful assembly and against arbitrary or unlawful interference with privacy or deprivation of property.

22. Signatory Companies agree not to contract with, support or service any government, person, or entity in a manner that would be contrary to United Nations Security Council sanctions. Signatory Companies will not, and will require that their Personnel do not, participate in, encourage, or seek to benefit from any national or international crimes including but not limited to war crimes, crimes against humanity, genocide, torture, enforced disappearance, forced or compulsory labour, hostage-taking, sexual or gender-based violence, human trafficking, the trafficking of weapons or drugs, child labour or extrajudicial, summary or arbitrary executions.

23. Signatory Companies will not, and will require that their Personnel do not, invoke contractual obligations, superior orders or exceptional circumstances such as an armed conflict or an imminent armed conflict, a threat to national or international security, internal political instability, or any other public emergency, as a justification for engaging in any of the conduct identified in paragraph 22 of this Code.

24. Signatory Companies will report, and will require their Personnel to report, known or reasonable suspicion of the commission of any of the acts identified in paragraph 22 of this Code to the Client and one or more of the following: the Competent Authorities in the country where the act took place, the country of nationality of the victim, or the country of nationality of the perpetrator.
25. Signatory Companies will take reasonable steps to ensure that the goods and services they provide are not used to violate human rights law or international humanitarian law, and such goods and services are not derived from such violations.

26. Signatory Companies will not, and will require that their Personnel do not, consistent with applicable national and international law, promise, offer, or give to any public official, directly or indirectly, anything of value for the public official himself or herself or another person or entity, in order that the public official act or refrain from acting in the exercise of his or her official duties if such inducement is illegal. Signatory Companies will not, and will require their Personnel do not, solicit or accept, directly or indirectly, anything of value in exchange for not complying with national and international law and/or standards, or with the principles contained within this Code.

27. Signatory Companies are responsible for establishing a corporate culture that promotes awareness of and adherence by all Personnel to the principles of this Code. Signatory Companies will require their Personnel to comply with this Code, which will include providing sufficient training to ensure Personnel are capable of doing so.

F. Specific Principles regarding the Conduct of Personnel

General Conduct

28. Signatory Companies will, and will require their Personnel to, treat all persons humanely and with respect for their dignity and privacy and will report any breach of this Code.

Rules on the Use of Force

29. Signatory Companies will adopt Rules for the Use of Force consistent with applicable law and the minimum requirements contained in the section on Use of Force in this Code and agree those rules with the Client.
Use of Force

30. Signatory Companies will require their Personnel to take all reasonable steps to avoid the use of force. If force is used, it shall be in a manner consistent with applicable law. In no case shall the use of force exceed what is strictly necessary, and should be proportionate to the threat and appropriate to the situation.

31. Signatory Companies will require that their Personnel not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life.

32. To the extent that Personnel are formally authorized to assist in the exercise of a state's law enforcement authority, Signatory Companies will require that their use of force or weapons will comply with all national and international obligations applicable to regular law enforcement officials of that state and, as a minimum, with the standards expressed in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

Detention

33. Signatory Companies will only, and will require their Personnel will only, guard, transport, or question detainees if: (a) the Company has been specifically contracted to do so by a state; and (b) its Personnel are trained in the applicable national and international law. Signatory Companies will, and will require that their Personnel, treat all detained persons humanely and consistent with their status and protections under applicable human rights law or international humanitarian law, including in particular prohibitions on torture or other cruel, inhuman or degrading treatment or punishment.

Apprehending Persons

34. Signatory Companies will, and will require their Personnel to, not take or hold any persons except when apprehending persons to defend themselves or others against an imminent threat of violence, or following an attack or crime committed by such persons against Company
Personnel, or against clients or property under their protection, pending the handover of such detained persons to the Competent Authority at the earliest opportunity. Any such apprehension must be consistent with applicable national or international law and be reported to the Client without delay. Signatory Companies will, and will require that their Personnel to, treat all apprehended persons humanely and consistent with their status and protections under applicable human rights law or international humanitarian law, including in particular prohibitions on torture or other cruel, inhuman or degrading treatment or punishment.

**Prohibition of Torture or Other Cruel, Inhuman or degrading Treatment or Punishment**

35. Signatory Companies will not, and will require that their Personnel not, engage in torture or other cruel, inhuman or degrading treatment or punishment. For the avoidance of doubt, torture and other cruel, inhuman or degrading treatment or punishment, as referred to here, includes conduct by a private entity which would constitute torture or other cruel, inhuman or degrading treatment or punishment if committed by a public official.

36. Contractual obligations, superior orders or exceptional circumstances such as an armed conflict or an imminent armed conflict, a threat to national or international security, internal political instability, or any other public emergency, can never be a justification for engaging in torture or other cruel, inhuman or degrading treatment or punishment.

37. Signatory Companies will, and will require that their Personnel, report any acts of torture or other cruel, inhuman or degrading treatment or punishment, known to them, or of which they have reasonable suspicion. Such reports will be made to the Client and one or more of the following: the competent authorities in the country where the acts took place, the country of nationality of the victim, or the country of nationality of the perpetrator.

**Sexual Exploitation and Abuse or Gender-Based Violence**

38. Signatory Companies will not benefit from, nor allow their Personnel to engage in or benefit from, sexual exploitation (including, for these purposes, prostitution) and abuse or gender-based violence or crimes, either within the Company or externally, including rape, sexual harassment, or any other form of sexual abuse or violence. Signatory Companies will, and will
require their Personnel to, remain vigilant for all instances of sexual or gender-based violence and, where discovered, report such instances to competent authorities.

**Human Trafficking**

39. Signatory Companies will not, and will require their Personnel not to, engage in trafficking in persons. Signatory Companies will, and will require their Personnel to, remain vigilant for all instances of trafficking in persons and, where discovered, report such instances to Competent Authorities. For the purposes of this Code, human trafficking is the recruitment, harbouring, transportation, provision, or obtaining of a person for (1) a commercial sex act induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or (2) labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, debt bondage, or slavery.

**Prohibition of Slavery and Forced Labour**

40. Signatory Companies will not use slavery, forced or compulsory labour, or be complicit in any other entity’s use of such labour.

**Prohibition on the Worst Forms of Child Labour**

41. Signatory Companies will respect the rights of children (anyone under the age of 18) to be protected from the worst forms of child labour, including:

a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in provision of armed services;

b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs;
d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Signatory Companies will, and will require their Personnel to, report any instances of the activities referenced above that they know of, or have reasonable suspicion of, to Competent Authorities.

**Discrimination**

42. Signatory Companies will not, and will require that their Personnel do not, discriminate on grounds of race, colour, sex, religion, social origin, social status, indigenous status, disability, or sexual orientation when hiring Personnel and will select Personnel on the basis of the inherent requirements of the contract.

**Identification and Registration**

43. Signatory Companies, to the extent consistent with reasonable security requirements and the safety of civilians, their Personnel and Clients, will:

a) require all Personnel to be individually identifiable whenever they are carrying out activities in discharge of their contractual responsibilities;

b) ensure that their vehicles are registered and licensed with the relevant national authorities whenever they are carrying out activities in discharge of their contractual responsibilities; and

c) will ensure that all hazardous materials are registered and licensed with the relevant national authorities.

**G. Specific Commitments regarding Management and Governance**

Incorporation of the Code into Company Policies

44. Signatory Companies will incorporate this Code into Company policies and internal control and compliance systems and integrate it into all relevant elements of their operations.
Selection and Vetting of Personnel

45. Signatory Companies will exercise due diligence in the selection of Personnel, including verifiable vetting and ongoing performance review of their Personnel. Signatory Companies will only hire individuals with the requisite qualifications as defined by the applicable contract, applicable national law and industry standards, and the principles contained in this Code.

46. Signatory Companies will not hire individuals under the age of 18 years to carry out Security Services.

47. Signatory Companies will assess and ensure the continued ability of Personnel to perform their duties in accordance with the principles of this Code and will regularly evaluate Personnel to ensure that they meet appropriate physical and mental fitness standards to perform their contracted duties.

48. Signatory Companies will establish and maintain internal policies and procedures to determine the suitability of applicants, or Personnel, to carry weapons as part of their duties. At a minimum, this will include checks that they have not:

   a) been convicted of a crime that would indicate that the individual lacks the character and fitness to perform security services pursuant to the principles of this Code;

   b) been dishonourably discharged;

   c) had other employment or engagement contracts terminated for documented violations of one or more of the principles contained in this Code; or

   d) had a history of other conduct that, according to an objectively reasonable standard, brings into question their fitness to carry a weapon.

For the purposes of this paragraph, disqualifying crimes may include, but are not limited to, battery, murder, arson, fraud, rape, sexual abuse, organized crime, bribery, corruption, perjury, torture, kidnapping, drug trafficking or trafficking in persons. This provision shall not override any law restricting whether a crime may be considered in evaluating an applicant. Nothing in this section would prohibit a Company from utilizing more stringent criteria.
49. Signatory Companies will require all applicants to authorize access to prior employment records and available Government records as a condition for employment or engagement. This includes records relating to posts held with the military, police or public or Private Security Providers. Moreover, Signatory Companies will, consistent with applicable national law, require all Personnel to agree to participate in internal investigations and disciplinary procedures as well as in any public investigations conducted by competent authorities, except where prohibited by law.

**Selection and Vetting of Subcontractors**

50. Signatory Companies will exercise due diligence in the selection, vetting and ongoing performance review of all subcontractors performing Security Services.

51. In accordance with principle 13 of this Code, Signatory Companies will require that their Personnel and all subcontractors and other parties carrying out Security Services under the contract, operate in accordance with the principles contained in this Code and the standards derived from the Code. If a Company contracts with an individual or any other group or entity to perform Security Services, and that individual or group is not able to fulfil the selection, vetting and training principles contained in this Code and the standards derived from the Code, the contracting Company will take reasonable and appropriate steps to ensure that all selection, vetting and training of subcontractor’s Personnel is conducted in accordance with the principles contained in this Code and the standards derived from the Code.

**Company Policies and Personnel Contracts**

52. Signatory Companies will ensure that their policies on the nature and scope of services they provide, on hiring of Personnel and other relevant Personnel reference materials such as Personnel contracts include appropriate incorporation of this Code and relevant and applicable labour laws. Contract terms and conditions will be clearly communicated and available in a written form to all Personnel in a format and language that is accessible to them.

53. Signatory Companies will keep employment and service records and reports on all past and present personnel for a period of 7 (seven) years. Signatory Companies will require all Personnel to authorize the access to, and retention of, employment records and available
Government records, except where prohibited by law. Such records will be made available to any compliance mechanism established pursuant to this Code or Competent Authority on request, except where prohibited by law.

54. Signatory Companies will only hold passports, other travel documents, or other identification documents of their Personnel for the shortest period of time reasonable for administrative processing or other legitimate purposes. This paragraph does not prevent a Company from co-operating with law enforcement authorities in the event that a member of their Personnel is under investigation.

Training of Personnel

55. Signatory Companies will ensure that all Personnel performing Security Services receive initial and recurrent professional training and are also fully aware of this Code and all applicable international and relevant national laws, including those pertaining to international human rights, international humanitarian law, international criminal law and other relevant criminal law. Signatory Companies will maintain records adequate to demonstrate attendance and results from all professional training sessions, including from practical exercises.

Management of Weapons

56. Signatory Companies will acquire and maintain authorizations for the possession and use of any weapons and ammunition required by applicable law.

57. Signatory Companies will neither, and will require that their Personnel do not, possess nor use weapons or ammunition which are illegal under any applicable law. Signatory Companies will not, and will require that their Personnel not, engage in any illegal weapons transfers and will conduct any weapons transactions in accordance with applicable laws and UN Security Council requirements, including sanctions. Weapons and ammunition will not be altered in any way that contravenes applicable national or international law.

58. Signatory Company policies and procedures for management of weapons and ammunitions should include:

a) secure storage;
b) controls over their issue;

c) records regarding to whom and when weapons are issued;

d) identification and accounting of all ammunition; and

e) verifiable and proper disposal.

**Weapons Training**

59. Signatory Companies will require that:

a) Personnel who are to carry weapons will be granted authorization to do so only on completion or verification of appropriate training with regard to the type and model of weapon they will carry. Personnel will not operate with a weapon until they have successfully completed weapon-specific training.

b) Personnel carrying weapons must receive regular, verifiable and recurrent training specific to the weapons they carry and rules for the use of force.

c) Personnel carrying weapons must receive appropriate training in regard to rules on the use of force. This training may be based on a variety of relevant standards, but should be based at a minimum on the principles contained in this Code and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), and national laws or regulations in effect in the area duties will be performed.

**Management of Material of War**

60. Signatory Companies will, and will require that their Personnel to, acquire and maintain all authorizations for the possession and use of any materiel of war, e.g. hazardous materials and munitions, as required by applicable law.

61. Signatory Companies will neither, and will require that their Personnel will neither, possess nor use any materiel of war, e.g. hazardous materials and munitions, which are illegal under any applicable law. Signatory Companies will not, and will require that their Personnel not
engage in any illegal material transfers and will conduct any materiel of war transactions in accordance with applicable laws and UN Security Council requirements, including sanctions.

62. Signatory Company policies or procedures for management of materiel of war, e.g. hazardous materials and munitions, should include:

a) secure storage;

b) controls over their issue;

c) records regarding to whom and when materials are issued; and

d) proper disposal procedures.

**Incident reporting**

63. Signatory Companies will prepare an incident report documenting any incident involving its Personnel that involves the use of any weapon, which includes the firing of weapons under any circumstance (except authorized training), any escalation of force, damage to equipment or injury to persons, attacks, criminal acts, traffic accidents, incidents involving other security forces, or such reporting as otherwise required by the Client, and will conduct an internal inquiry in order to determine the following:

a) time and location of the incident;

b) identity and nationality of any persons involved including their addresses and other contact details;

c) injuries/damage sustained;

d) circumstances leading up to the incident; and

e) any measures taken by the Signatory Company in response to it.

Upon completion of the inquiry, the Signatory Company will produce in writing an incident report including the above information, copies of which will be provided to the Client and, to the extent required by law, to the Competent Authorities.
Safe and Healthy Working Environment

64. Signatory Companies will strive to provide a safe and healthy working environment, recognizing the possible inherent dangers and limitations presented by the local environment. Signatory Companies will ensure that reasonable precautions are taken to protect relevant staff in high-risk or life-threatening operations. These will include:

a) assessing risks of injury to Personnel as well as the risks to the local population generated by the activities of Signatory Companies and/or Personnel;

b) providing hostile environment training;

c) providing adequate protective equipment, appropriate weapons and ammunition, and medical support; and

d) adopting policies which support a safe and healthy working environment within the Company, such as policies which address psychological health, deter workplace violence, misconduct, alcohol and drug abuse, sexual harassment and other improper behaviour.

Harassment

65. Signatory Companies will not tolerate harassment and abuse of co-workers by their Personnel.

Grievance Procedures

66. Signatory Companies will establish grievance procedures to address claims alleging failure by the Company to respect the principles contained in this Code brought by Personnel or by third parties.

67. Signatory Companies will:

a) establish procedures for their Personnel and for third parties to report allegations of improper and/or illegal conduct to designated Personnel, including such acts or omissions that would violate the principles contained in this Code. Procedures must be fair, accessible and offer effective remedies, including recommendations for the prevention of recurrence. They shall
also facilitate reporting by persons with reason to believe that improper or illegal conduct, or a violation of this Code, has occurred or is about to occur, of such conduct, to designated individuals within a Company and, where appropriate, to competent authorities;

b) publish details of their grievance mechanism on a publically accessible website;

c) investigate allegations promptly, impartially and with due consideration to confidentiality;

d) keep records about any such allegations, findings or disciplinary measures. Except where prohibited or protected by applicable law, such records should be made available to a Competent Authority on request;

e) cooperate with official investigations, and not participate in or tolerate from their Personnel, the impeding of witnesses, testimony or investigations;

f) take appropriate disciplinary action, which could include termination of employment in case of a finding of such violations or unlawful behaviour; and

g) ensure that their Personnel who report wrongdoings in good faith are provided protection against any retaliation for making such reports, such as shielding them from unwarranted or otherwise inappropriate disciplinary measures, and that matters raised are examined and acted upon without undue delay.

68. No provision in this Code should be interpreted as replacing any contractual requirements or specific Company policies or procedures for reporting wrongdoing.

Meeting Liabilities

69. Signatory Companies will ensure that they have sufficient financial capacity in place at all times to meet reasonably anticipated commercial liabilities for damages to any person in respect of personal injury, death or damage to property. Sufficient financial capacity may be met by customer commitments, adequate insurance coverage, (such as by employer’s liability and public liability coverage appropriately sized for the scale and scope of operations of the Signatory Company) or self-insurance/retention. Where it is not possible to obtain suitable insurance cover, the Signatory Company will make alternative arrangements to ensure that it is able to meet such liabilities.
H. Review

70. The Swiss Government will maintain a public list of Signatory Companies and convene an initial review conference with a view to reviewing the Code after governance and oversight mechanisms (as referenced in the Preamble and Section C “Implementation” to this Code) are developed.
~ENDS~

{62,171 words, excluding Bibliography & Appendices}

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