



Montreux Five Years On:

An analysis of State efforts to implement Montreux Document
legal obligations and good practices

**Related to
operations of
private military
and security
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EXECUTIVE SUMMARY

This year marks the fifth anniversary of 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* (Montreux Document). Supported by 46 States and the European Union, the Montreux Document restates existing international humanitarian and human rights law obligations of States, private military and security companies (PMSCs), and PMSC personnel during armed conflict. It also details Good Practices designed to help Contracting, Territorial, and Home States implement their legal obligations through national measures. Additionally, the Montreux Document suggests that the existing legal obligations and Good Practices may be instructive for States, PMSCs, and other clients and stakeholders of the private military and security industry (PMSI) beyond the context of armed conflict.

With the unprecedented expansion of the PMSI, primarily in conjunction with the wars in Iraq and Afghanistan, a number of high profile incidents of alleged misconduct drew attention to the limitations of existing legal and regulatory frameworks to ensure adequate control of PMSCs and their personnel. The Montreux Document, drafted under the leadership of the Swiss government's Federal Department of Foreign Affairs and the International Committee of the Red Cross, addressed the prevailing concern at the time that PMSCs operated in a potential legal vacuum. It reaffirms, for example, that international humanitarian law and human rights apply during armed conflict, and that States do not avoid their obligations when they contract out activities to PMSCs. It clarifies that States have an obligation to ensure respect for international humanitarian and human rights law by PMSCs and their personnel, and to adequately regulate and hold them accountable for their conduct. The Montreux Document also set the stage for other regulatory efforts, such as the development of the multi-stakeholder International Code of Conduct for Private Security Service Providers (ICoC), which is directed at PMSCs and lays out their responsibilities to respect human rights and comply with humanitarian law when providing security services.

For the first time in the five years since the completion of the Montreux Document, participating States in the Montreux process and other stakeholders will convene from December 11-13, 2013 in Montreux, Switzerland to share experiences, discuss best practices, identify implementation challenges, and find ways to support wider endorsement of the Montreux Document. This report, "Montreux Five Years On," which was drafted by a global team of academics, experts, and activists, utilizes this opportunity to provide an assessment of participating States' efforts to meet their legal obligations and implement the Good Practices. It identifies where participating States have faced challenges in meeting their commitments, and it provides a set of country specific and general recommendations that highlight means to improve implementation, as well as noting issues that remain unaddressed by the Montreux process.

The report focuses on a subset of participating States: two Contracting and Home States (the United States and the United Kingdom), two Territorial States (Iraq and Afghanistan), and a special feature on one region (Latin America and the Caribbean). The report goes on to detail and assess the U.S., U.K., Iraq, and Afghanistan's efforts to meet their Montreux Document

commitments as captured in five categories: 1. Determination of services; 2. Due diligence in selecting, contracting, and authorizing PMSCs; 3. Due diligence in monitoring PMSC activities; 4. Ensuring accountability; and 5. Providing access to effective remedy. In addition, two side bars assess two African participating States' – South Africa and Sierra Leone – commitment to, and implementation of, the Montreux Document. A third side bar examines the UN's use of PMSCs.

Among the main findings for the four States examined in-depth are the following:

UNITED STATES:

Outsourcing: The U.S. government has undertaken a number of legal and regulatory efforts to define inherently governmental functions that should not be outsourced to companies. However, those efforts have suffered from inconsistent application. U.S. agencies should conduct human rights risk analyses when deciding whether to contract for PMSC services.

Licensing: With regards to authorizing, the U.S. has a fairly restrictive procedure for issuing licenses to entities that export military or defense services overseas but has done very little to revise its current system to reflect the Montreux Document's commitment to preventing violations of and ensuring compliance with international humanitarian and human rights laws.

Contracting: With respect to selecting and contracting, the U.S. has a rather robust regulatory system, to include agency guidelines, throughout which much of the Montreux Good Practices are evident. However, the actual selection procedure, specifically the "past performance" criteria, could include more indicators that capture PMSCs' approach to international humanitarian and human rights laws and norms.

Monitoring: The U.S. has a complex system for overseeing and monitoring PMSCs and their personnel that reflects many of the Montreux Document's Good Practices for Contracting States. The U.S. needs to improve, however, in its implementation of applicable statutes, regulations, and guidelines. The U.S. also needs to augment its reporting system for serious incidents to include training on procedures not only for PMSCs, but also for the government officials responsible for ensuring PMSC compliance with the reporting of such incidents and the monitoring of contracts, in general. Moreover, agencies that rely heavily on contractors in contingency operations should elevate contracting as a core function and provide appropriate resources and expertise.

Accountability: The U.S. has not enacted a comprehensive system of laws and regulations to hold PMSCs and their personnel criminally accountable for violations of national and international law, to include crimes committed abroad. What currently exists is a patchwork of statutes that allows, in some instances, for the possibility of prosecution of PMSC personnel, but not PMSCs, either in federal civilian or military courts. However, each of these statutes has certain limitations in terms of scope, reach, and applicability, which create legal barriers to accountability. Passage of the Civilian Extraterritorial Jurisdiction Act would be one step towards closing gaps in the law.

The U.S. provides avenues of civil compensation for victims of PMSC misconduct outside the tort system as well as through tort litigation, although the legal framework for tort liability is

in considerable flux. If the courts limit such liability, the U.S. Congress should enact legislation to clarify that such cases may proceed when significant human rights and humanitarian law violations are at stake.

Remedies: While the U.S. is meeting its Montreux Document obligations for the provision of access to non-judicial remedies, these remedies suffer from problems such as inaccessibility as well as a lack of transparency and predictability. Moreover, the non-judicial remedies are presented as alternatives rather than complements and or supplements to judicial remedies. In response to such problems we recommend the establishment of a military ombudsman with frameworks similar to Special Inspector Generals.

UNITED KINGDOM:

Outsourcing: There remains little clarity over which functions are inherently governmental in the British context. Resolving this issue is important in light of the increasing privatization of governmental functions, including plans to semi-privatize defense procurement.

Licensing: The U.K. government is pursuing a policy of voluntary self-regulation of the PMSC industry through which it hopes to raise standards for PMSCs globally. While it is too soon to tell whether self-regulation will be successful in raising standards, this approach may not be effective because it leaves the U.K. government with little ability to influence PMSCs with whom it has no contractual relationship. Another concern is that the U.K. government has not fully articulated how it plans to monitor the efficacy of voluntary self-regulation.

Contracting: In the absence of a licensing regime, government contracts become one of the most important tools for raising industry standards, at least among the PMSCs with which the U.K. government contracts. At present, the government is not making enough use of its contracts to raise industry standards and thus meet its Montreux Document commitments.

Monitoring: The absence of a licensing regime makes monitoring the industry particularly difficult as there is no complete register of British PMSCs. In addition, the Ministry of Defence's plan to move to a semi-privatized procurement model could have negative implications for contract oversight.

Accountability: Without legislative action, significant accountability gaps will persist. Of particular concern is the fact that criminal jurisdiction does not extend to misconduct abroad that does not constitute one of the limited number of offences over which extra-territorial jurisdiction exists.

Remedies: Few formal mechanisms exist for persons adversely affected by British PMSC operations to access remedies, which poses a challenge for the U.K. government providing and facilitating access to remedies. In particular, the lack of mandatory grievance mechanisms at the industry and government levels that meet basic standards could further significantly limit access to effective remedies. While the recent release of the U.K. government's "action plan on business and human rights" is a positive development, the action plan does not mandate that companies provide mechanisms facilitating more effective access to remedies; therefore, the U.K. government should take further action on this issue, particularly in the context of the PMSI.

IRAQ:

Outsourcing: The Iraqi government has still not passed comprehensive legislation to regulate PMSCs operating within its territory. The Iraq government should establish, through national legislation, which types of military and security services are permissible for PMSCs to perform.

Licensing: The licensing system for PMSCs initially created by the Coalition Provisional Authority (CPA) appears to still be in use in Iraq, despite a lack of clear legal authority. While the system does elaborate criteria for, among other things, vetting personnel, registering vehicles and weapons, on-site audits by the Ministry of the Interior, and the refusal, suspension, and revocation of licenses, it does not meet all the criteria laid out in the Montreux Document.

Monitoring: While the current licensing system allows for some limited on-site visits and audits of PMSCs, oversight of PMSCs that have been licensed to operate on Iraqi territory is inadequate. National legislation for the comprehensive regulation of PMSCs should be passed, and a well-resourced and independent central licensing and monitoring authority should be created with the ability to receive and investigate complaints about PMSC misconduct.

Accountability: The 2009 Status of Forces Agreement between Iraq and the U.S. partially removed the immunity of some foreign PMSC personnel in Iraq that had been granted to them under CPA Order 17. However, due to its ambiguous wording, it is unclear whether this removal of immunity covered all contractors employed by the U.S. government, and whether it fully applied in Iraqi courts. National legislation should clarify the issue of immunity and put effective measures in place for holding contractors accountable for criminal misconduct and violations of human rights in domestic courts.

Remedies: Due to the immunity granted to PMSCs, grievances concerning human rights and humanitarian law violations, and other abuses, arising out of conduct between 2003 and 2009 were never addressed by the domestic judicial system. Efforts should be made to address these historical grievances. Moving forward, the government should establish an independent, public and easily-accessible complaints mechanism, through which the local population can report misconduct involving PMSCs.

AFGHANISTAN:

Outsourcing: While initial regulations limited the outsourcing of certain security functions, such as those related to the protection of public places and the performance of law-enforcement functions, the current dissolution strategy for private security companies (PSCs) prevents the provision of private security services by entities other than the Afghan Public Protection Force (APPF). However, exceptions remain for private companies performing risk management services and security services for diplomatic entities. No limitations have been placed for the outsourcing of private military services.

Licensing: At first, licensing processes for PMSCs in Afghanistan were driven more by political, rather than human rights, considerations and they were not properly implemented or enforced. It remains to be seen how procedures for authorizations to contract with the APPF and Risk

Management Companies (RMCs) will function in practice. Currently, deficiencies persist regarding human rights criteria required for armed personnel of RMCs. Moreover, there remains little clarity over the contents of the operating license for companies providing protective services to diplomatic entities and companies providing military services.

Monitoring: Due to the absence of regulation for private military services (PMSs), monitoring of the industry has been partial. Additionally, despite the initial establishment of a central authority with the capacity to process public complaints and undertake investigations of violations by PSCs, its monitoring and investigative functions were inoperative due to a lack of due diligence and generally improper implementation and enforcement of procedures. Concerns exist with how monitoring is exercised over the APPF, RMSCs and remaining PSCs working for diplomatic entities.

Accountability: Significant shortcomings remain in Afghan legislation and in the operation of the judicial system for prosecuting human rights and humanitarian law abuses by contractors, particularly crimes under international law. Lack of clarity persists regarding the jurisdiction applicable to PMSCs in general, and particularly to certain categories of contractors, leading to an accountability gap *de jure* or *de facto*.

Remedies: The government of Afghanistan has not taken serious action to seek redress for victims of contractors' abuses. The role and capacity of the Afghanistan Independent Human Rights Commission can be notably improved in this regard. Legal and practical obstacles of victims to access to courts may prevent existing compensation mechanisms, such as *ibra* (the traditional Sharia practice of perpetrators of crimes compensating victims as a form of punishment), from fully functioning.

As this report demonstrates in greater depth, some States have had more success than others in adhering to the Montreux Document's legal obligations and realizing the Good Practices. Ultimately, we hope that by exposing the successes and challenges that States face in meeting their Montreux Document commitments, we can contribute to identifying ways to ensure better oversight and regulation of the PMSI. PMSCs and their personnel should be held accountable when they engage in misconduct. Victims of abuse should have access to justice and remedy. We hope that this information will assist in driving the needed change to make this a reality.

THE MONTREUX PROCESS FIVE YEARS ON

Background

On September 17, 2008, 17 States endorsed 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 (Montreux Document).¹ Today 46 States and the European Union support the Montreux Document.² The Montreux Document is divided into two main parts. The first part is a restatement of existing international humanitarian and human rights law obligations of States, private military and security companies (PMSCs), and their personnel during armed conflict.³ The second part details Good Practices designed to help Contracting, Territorial, and Home States implement their legal obligations through national measures.⁴ In addition, the Montreux Document suggests that the existing legal obligations and Good Practices may be instructive for States and PMSCs beyond armed conflict, and that the Good Practices may be of value for other clients and stakeholders of the private military and security industry (PMSI).

Readers of the Montreux Document are repeatedly reminded that it is not a legally binding instrument, merely recalls existing legal obligations, does not affect those existing obligations, and creates no new obligations under international law.⁵ Yet, the Montreux Document is significant for a number of reasons.⁶ First, **the Montreux Document clearly addressed the prevailing concern at the time that PMSCs operated in a potential legal vacuum.** It reaffirms, for example, that international humanitarian law (IHL) and human rights apply during armed conflict and that States do not avoid their obligations when they contract out activities to PMSCs. Second, the Montreux Document clarifies that States have an obligation to ensure respect for international humanitarian and human rights law. PMSCs should be adequately regulated and held accountable for their conduct. Good Practices for States include recommendations to address the extraterritorial conduct of PMSCs. Finally, the Montreux Document set the stage for other regulatory efforts, such as the development of the multi-stakeholder International Code of Conduct for Private Security Service Providers (ICoC),⁷ which reflects the second phase of the Montreux process and is directed at companies, laying out their responsibilities to respect human rights and comply, during armed conflict, with humanitarian law when providing security services.

The Montreux Document benefitted from the input of an array of stakeholders. It was the culmination of nearly three years of intergovernmental negotiations that began in 2005 under the leadership of the Swiss government's Federal Department of Foreign Affairs and the International Committee of the Red Cross (ICRC), and throughout the process extensive consultation was undertaken with industry and civil society actors.⁸ Since its inception, the Swiss government has moved to disseminate the Montreux Document to various United Nations (UN) bodies and international organizations.⁹ The Swiss non-governmental organization (NGO) DCAF¹⁰ held two regional workshops, in Latin America and Asia, in 2011 in an effort to involve more States.¹¹ In addition, the Montreux Document is cited in the Preamble of the ICoC, and it and the ICoC are listed as "normative references," in the ANSI/ASIS PSC.1-2012 Management System for Quality of Private Security Company Operations – Requirements with Guidance (PSC1).¹² PSC1

is a management system standard for private security companies (PSCs) developed by ASIS International, and recognized as an American National Standards Institute (ANSI) U.S. national standard.

Purpose of “Montreux Five Years On”

This year marks the fifth anniversary of the Montreux Document. The Swiss government together with the ICRC, and with the support of DCAF, will hold a conference, Montreux +5, from December 11-13 in Montreux, Switzerland. Participating states in the Montreux process and other stakeholders from business and civil society will come together to share experiences, discuss good practices, identify implementation challenges, and find ways to support wider endorsement of the Montreux Document. The conference will also address the relationship between the ICoC and Montreux Document and the need for further guidance and dialogue on ensuring respect of international law in relation to PMSC activities. A report, being written by DCAF and academics and researchers at the Private Security Monitor project at the University of Denver Sie Center for International Security and Diplomacy, will examine implementation and good practices among Montreux Document supporting states, and will provide an important basis for the conference discussion. The data for assessing implementation efforts of States and compiling examples of best practices come, in part, from a questionnaire that all participating States were asked to complete.¹³

“Montreux Five Years On,” which was drafted by a global team of academics, experts, and activists with tremendous collective expertise in the private military and security industry, international and domestic law, human rights, and business regulation, provides a critical counterpoint by highlighting the significant and ongoing challenges that participating States face in meeting their legal obligations and implementing the Good Practices. Since at the time of publication the official State responses to the questionnaire are not publicly available, and we were only able to receive one response, from the U.K., through a freedom of information request, this report is a “shadow report” in spirit, choosing to focus on where there are shortcomings in meeting commitments and providing recommendations for addressing those gaps and taking the Montreux process to the next level.

For each of the participating States examined in this report, we pose some broad framing questions.

- Is the Montreux Document, in terms of demonstrated compliance with legal obligations and implementation of Good Practices, operative in the State?
- What is the State’s degree of compliance, and are there indications that it is having the desired impact?
- What steps can be taken to strengthen national measures to meet Montreux Document commitments?
- Based on States’ experiences, what can be improved in the Montreux Document so that it can become a more effective instrument?
- Finally, what are the next steps forward for the Montreux process, and how does it connect with other types of regulatory efforts?

We focus on a subset of participating States: two Contracting and Home States (the United States and the United Kingdom), two Territorial States (Iraq and Afghanistan), and a special feature on one region (Latin America and the Caribbean), although, as will be discussed, the distinctions between these State designations are not sharp. We then go on to detail and assess the U.S., U.K., Iraq, and Afghanistan's efforts to meet their Montreux Document commitments as captured in five categories: 1. Determination of services; 2. Due diligence in selecting, contracting, and authorizing PMSCs; 3. Due diligence in monitoring PMSC activities; 4. Ensuring accountability; and 5. Providing access to effective remedy.

In addition, the report offers three interesting side bars. Two address issues in the region of Africa. One discusses why so few African states have joined the Montreux process, and in particular why in the case of two similarly situated states that have both experienced a strong presence of PMSCs on their territories, one supports the Montreux Document (Sierra Leone), while the other does not (Liberia). The other side bar highlights the unique status of South Africa, which has sought to regulate in a stringent fashion the domestic provision of security services and limit the export of security services outside its borders. South Africa has opted out of the Montreux process in favor of supporting a binding international convention for PMSCs as proposed by the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (UN Working Group on use of mercenaries). Finally, a third side bar delves into the UN's growing reliance on PMSCs and examines whether its recently adopted guidelines on the use of armed security meet the standards laid out in the Montreux Document.

Ultimately, with this report we hope to expose the challenges and limitations of current State efforts to oversee and regulate the industry, hold companies and their personnel accountable, and ensure justice and remedy for victims of abuses. More broadly, we want to provide an opportunity to address larger questions about the very nature and impacts of privatized security and military services, something that was precluded in the Montreux process when it was decided that no stance would be taken on "the much broader question of the legitimacy and advisability of using PMSCs."¹⁴ We also hope that this report will serve to educate the public, legislators, and other potential change agents about the PMSI, its ongoing significance in complex environments, even as Iraq and Afghanistan enter new stages, and the need for continued public scrutiny. Finally, for civil society organizations (CSOs) and activists who want to mobilize to pressure government officials and business leaders on various fronts – to support and pass needed laws, enhance regulatory and contractual oversight, exercise due diligence to ensure respect for human rights, and create needed grievance mechanisms – we seek to offer the evidence that can drive change.

THE PRIVATE MILITARY AND SECURITY INDUSTRY IN SIGNATORY STATES

United States of America

Overview

The United States is both a Contracting and Home State of PMSCs. The U.S. is headquarters to some of the largest PMSCs and the U.S. government is the single biggest government user of PMSC services. That being said, it is remarkably difficult to find accurate and comprehensive information about the PMSI in terms of the clients of the industry and their spending on PMSC services, the size of the industry, including the number of companies, annual revenues, and number of employees, and a complete breakdown of the types of services provided and the revenues for those service lines.

Part of the problem is a definitional issue. While it is fairly clear what is meant with private security companies (PSCs), and the term security services has been defined in a widely accepted fashion in the ICoC,¹⁵ it is less agreed upon what a private military company (PMC) is, and no widely accepted definition is available. It is also a matter of discussion as to where the boundaries around the term PMSC should be drawn, although for purposes of this report we are utilizing the definition of PMSC agreed upon in the Montreux Document.¹⁶ Companies, and their clients, such as the U.S. government, do not always follow these particular definitional boundaries when providing statistics.

As has been discussed elsewhere, there have been three drivers explaining the growth of the PMSI: the end of the Cold War, transformations in the nature of warfare, and the “privatization revolution.”¹⁷ In terms of the U.S. government’s growing use of PMSC services, a number of reasons have been provided, including the speed with which they can be hired and deployed, the capabilities they provide federal agencies to adapt to changing environments around the world, security personnel’s ability to serve as a force multiplier, the unique skill sets PMSCs can provide, and cost savings.¹⁸ With regards to the latter, the Commission on Wartime Contracting found in its final report to Congress that “it depends upon a whole range of factors” whether or not using contractors is more cost efficient.¹⁹

While we cannot explore these drivers in-depth here, needless to say the sheer volume and variety of PMSC services used and the number of contractors employed reached an all-time high with the wars in Iraq and Afghanistan. **As the Congressional Research Service has reported, from FY2007 to FY2012, the Department of Defense (DoD) alone had contract obligations in the Iraq and Afghanistan areas of operations of approximately \$160 billion, which was higher than the total contract obligations of any other U.S. federal agency.**²⁰ The types of services run the gamut, everything from logistics and base support services to services that are more closely linked to the warfighting efforts such as security provision for sites, personnel, and convoys, weapons maintenance and operation, intelligence, interrogation, detention related services, and training of domestic military and police security forces. The use of contractors

for intelligence purposes is extensive although largely non-transparent and highly secretive.²¹ Although the DoD insists that PSCs are not used in a combat role,²² as discussed below in the sections on Iraq and Afghanistan, there were instances when the line between defensive and offensive operations became blurred. Contractors are also widely used in various aspects of the development projects which are part of stability and reconstruction operations.

In both the Iraq and Afghanistan areas of operation, contractors accounted for more than 50% of the total military force, with the peak number of DoD contractors (U.S. nationals, Third Country Nationals and Local Nationals) in Iraq reaching 163,591 in December 2007 and the peak in Afghanistan reaching 117,227 in March 2012.²³ The sections below on Iraq and Afghanistan contain more detailed statistics by country. However, as will be discussed, there are no statistics that can provide a complete picture. The DoD only began to publicly provide data on contractors in CENTCOM (Central Command) beginning in the second half of 2007. The Department of State (DoS) and U.S. Agency for International Development (USAID) have not provided similar regular public reports on their number of contractors, and while all three began feeding data about their contracts and contractors into the Synchronized Pre-deployment Operational Tracker (SPOT) database because of new regulations established by the National Defense Authorization Act (NDAA) of FY2008, that database has been criticized for its shortcomings, as detailed below in the section on the U.S. government's monitoring of PMSC activities. The latest CENTCOM quarterly report from October 2013 breaks down the types of services provided in Afghanistan, but not for Iraq, however security services, armed and unarmed combined as one figure, are broken out for both countries.²⁴ The DoD stopped differentiating armed from unarmed security in September 2010.

While there are some, if incomplete, data available on the U.S. government's use of PMSCs, similar data for other state and non-state clients of the industry do not exist. Similar to the British PMSI, as discussed in the next section, American PMSCs' clients include other governments, international organizations, other companies, such as extractives and shipping companies, and humanitarian organizations. Some have calculated that over 80% of PMSCs are hired by private actors, such as NGOs and corporations.²⁵ However, none of these entities release comprehensive data on their use of such services.

For an industry that has become well-established, data on the industry's annual revenues are remarkably sparse and inconsistent. Doug Brooks, former President of the U.S. PMSI trade association International Stability Operations Association, admitted in an interview the challenges of defining the industry and attaching a value to it, but his estimates ranged anywhere from \$20 billion to \$100-\$200 billion, if one includes logistical and base support.²⁶ A Financial Times' analysis stated that the U.S. government has spent \$138 billion in Iraq on private security, logistics and reconstruction.²⁷ That same article noted that the DoS estimated in 2011 that it would spend \$3 billion over five years for security for the embassy in Baghdad alone. Citing statistics from a Freedonia, World Security Services study, the UN Working Group on the use of mercenaries reported that the "the global demand for private contract security services is increasing and will increase 7.4 per cent annually to \$244 billion in 2016."²⁸ However, the Freedonia study includes domestic security markets; this raises questions about the figures

in the study since the U.S. trade association of security professionals, ASIS International, found in its 2013 study that the U.S. domestic security market was valued at \$350 billion.²⁹

However large the PMSI may really be, it is facing a changing market with the drawdown in Iraq and Afghanistan. Maritime security is expected to be one area of growth, indicating the trend of increased reliance on the security industry by private sector clients operating in unstable environments.

Human Rights Impact

Whether the PMSI is growing or shrinking, the transition in Iraq and Afghanistan provides an opportunity to assess the challenges it has faced, in particular in terms of ensuring respect for human rights and humanitarian law. The sections describing the PMSI in Iraq and Afghanistan provide categories of human rights violations and examples of alleged and known human rights abuses, many of which involve U.S.-based companies. They indicate that the PMSI has undoubtedly had numerous direct human rights impacts. However, as evidenced in the sections on State efforts' to meet their Montreux Document commitments with regards to ensuring accountability and access to remedy to victims of misconduct, those direct human rights impacts are often not adequately addressed.

Beyond its direct human rights impacts, the PMSI has a number of indirect societal impacts, which were not fully considered before the decision to use so many PMSCs in Iraq and Afghanistan, but which we are better positioned to consider now. While not addressed within the framework of the Montreux Document, they are issues that should be discussed as part of this five year review process. For example, as the section on decisions to outsource suggests, a more public discussion needs to occur as to what functions are or are not inherently governmental. Tied to this is the question of security as a right, and what happens to the universal enjoyment of that right should provision of security become increasingly privatized, and potentially less equally accessible to all citizens. More broadly some have argued that the State's reliance on PMSC to conduct warfare could have unintended impacts on core democratic values like constitutionalism, transparency, and public consent.³⁰ The growth of the industry, and its centrality to U.S. overseas military, diplomatic, and development efforts, also surfaces the issue of possible industry influence over foreign policy decision-making. These are the types of indirect impacts of the industry that are often given short shrift, but raise questions about the industry's very legitimacy. The Montreux process effectively normalizes the contracting trends of recent years, but space should be created for public discussion of these deeper issues.

United Kingdom

Overview

Under the Montreux Document framework, the U.K. is both a Home State and a Contracting State. It is significant State in both categories. While there is no official list of PMSCs in the U.K.,³¹ a number of the world's foremost PMSCs are U.K. companies – the Aegis Group and G4S Solutions

are both headquartered there. **From 2010 through 2013, the U.K. Foreign & Commonwealth Office (FCO) anticipates spending almost £161 million on PMSC services in conflict zones.**³²

The vast majority of this money is spent on services provided by Garda World and G4S,³³ the latter of which is well known as also being one of the largest private providers of public services in the U.K.³⁴

As a Contracting State, the U.K. government outsources a number of security and military (but not combat³⁵) functions to PMSCs, as illustrated by its contracts with PMSCs in Afghanistan and Iraq.³⁶ From 2007 to 2012, for instance, the U.K. government engaged PMSCs to provide the following services: police mentors and advisers, mobile guarding, static guarding, security managers, intelligence analysts, vehicle maintenance, and healthcare.³⁷ As discussed in greater detail in Section 3 below, the U.K. government plans on using its role as a Contracting State as leverage to ensure that PMSCs respect international law, including international humanitarian law and human rights law under a voluntary regime of self-regulation.³⁸

The U.K. government utilizes PMSCs to provide security and military services that would otherwise be provided by its own military. As far back as 2002, the Secretary of Foreign Affairs at the time, Jack Straw, observed in his foreword to the *Green Paper on Private Military Companies* that governments including that of the U.K. were turning to the private sector for services that would once have been the exclusive territory of the military because it is considered to be cost effective.³⁹ A later government also observed that PMSCs “provide a vital and necessary role in hostile environments, and enable the Government to fulfill its policy objectives in Iraq and Afghanistan by providing essential security services, as well as ensuring operational NGOs are able to carry out important humanitarian work.”⁴⁰

Another factor driving the government’s use of PMSCs could be the public’s aversion to making use of armed forces. A 2012 study commissioned internally for the Ministry of Defence (MoD) noted:

The growth of the private security company (PSC) has proceeded at a spectacular rate during the last ten years. The employment of such companies raises a series of complex issues which are not relevant here save the peculiar mindset prevalent among the general public towards casualties among the staff of PSCs. Neither the media nor the public in the West appear to identify with contractors in the way that they do with their military personnel. Thus casualties from within contractorised force are more acceptable in pursuit of military ends than those from among our own forces. This process is well advanced and in recent campaigns, notably Iraq and Afghanistan, contractors have consistently outnumbered troops in the battlespace with no adverse public comment.⁴¹

Inaccurate though the observation that there has been no adverse comment may be, the author plainly and clearly expresses one of the most concerning possible drivers behind the growth of the industry: the perception of the relative expandability of PMSC personnel.

The U.K. ranks second behind the U.S. as the largest Home State for PMSCs. Of the foreign PMSCs active in Iraq between 2003 and 2011, for example, 45 were based in the U.S., while the

U.K. followed with 18.⁴² Comprehensive information regarding the British PMSI is not readily available, however, the Security in Complex Environments Group (SCEG) (an industry group which has a close relationship and has partnered with the U.K. government for the development and accreditation of voluntary standards for the British PMSI⁴³) currently has 64 members.⁴⁴ In addition, at the time of writing, 208 of the 708 Signatory Companies to the ICoC were British.⁴⁵ It is unknown how much foreign governments, NGOs, and the private sector have spent in recent years retaining British PMSC services. However, the FCO's spending on PMSCs alone shows that revenues for the British PMSI are substantial: from 2007 through 2013, the FCO will have spent approximately £313 million on PMSC services.⁴⁶ The U.K. government as a whole will have spent additional amounts on PMSC services through other government departments and agencies, including the MoD and the Department for International Development.

“from 2007 through 2013, the FCO will have spent approximately £313 million on PMSC services”

Aside from the U.K. government, buyers of British PMSC services include foreign governments, including the U.S., Afghanistan, Iraq, Sierra Leone, and Angola; British and international NGOs; the UN and other international organizations; corporations (e.g., mining companies); and the maritime shipping industry.⁴⁷

The services of British PMSCs are being exported for a variety of reasons, of which providing security and military services to governments in situations of conflict and instability is just one. British PMSCs are also used to protect interests related to the extractive and other industries,⁴⁸ to provide security services for maritime operations in areas prone to piracy, and to protect NGOs that operate in unstable situations, including situations of armed conflict, such as in Iraq and Afghanistan.⁴⁹ British PMSCs provide a wide range of services overseas that are not core military functions; as Andrew Bearpark, Honorary Director of the British Association of Private Security Companies has noted, British PMSCs, unlike some of their American counterparts, “refrain from services at the frontline of hostilities in conflict zones.”⁵⁰ These services have included:

- Strategic and operational risk management for companies operating in conflict, post-conflict or risk-prone areas, as well as security, business and investigation services;
- Support for post-conflict reconstruction efforts (e.g., in Afghanistan and Iraq), including personal and on-site security services to non-military actors;
- Support for humanitarian missions, disaster relief and development, including assistance with building infrastructure, redevelopment and communications; and
- Outsourced national military functions, such as personal security for senior civilian officers in post-conflict environments; military and non-military site and convoy security; training of non-military and military personnel; and surveillance, intelligence gathering, aviation security, public security, technical support and maintenance, operation of weapons systems, and mine clearance.⁵¹

While current figures regarding the use of British PMSC services by humanitarian organizations, including the UN and NGOs, are not readily available, it has been reported that the use of

PMSCs by humanitarian organizations generally increased from 2003 to 2008, and was, understandably, greater in States experiencing or recovering from a recent armed conflict or other humanitarian disaster.⁵² As the European Interagency Security Forum has recently noted, humanitarian agencies have, over the last decade increasingly relied upon PMSCs "to support their security requirements" due to the "real and perceived growth in insecurity."⁵³ Such use has generally been kept "'low profile' to avoid public scrutiny" due to the "widely held (if unproven) perception of security companies as shady organizations composed of ex-military personnel" and the "impression that [PMSCs] do not sufficiently understand – and share – the principles that drive the humanitarian mission and that the concepts of security that prevail in the commercial sector clash with those of the humanitarian sector."⁵⁴ Humanitarian organizations generally rely on local companies for armed protection services and turn to international, including British, for unarmed security functions such as security training, security management consulting and risk assessments.⁵⁵

The extent of the private sector's reliance on British PMSCs is unclear. However, it may be presumed that, like humanitarian agencies, as companies in industries such as the extractive sector increasingly operate in less stable regions of the world, their use of the PMSI will continue to increase.

The larger British PMSCs have been awarded significant contracts from governments and corporations. U.K. government figures, for example, indicate that G4S had contracts with the FCO worth about £36 million in 2012 and £27 million in 2013, primarily for guarding services.⁵⁶ Further, G4S's 2012 annual report indicates that, of its "secure solutions"⁵⁷ revenue (which itself accounted for 82% of the G4S group's total revenue), 27% came from government contracts, 32% from major corporations and industrials, while financial institutions and private energy and utilities accounted for 9% of the total of revenues.⁵⁸

The U.K. government has recognized the PMSI to be a valuable export.⁵⁹ Further, as Clive Walker and Dave Whyte have noted, "the private defence industry as a whole remains one of the United Kingdom's most important in terms of generating external revenue. Promotion of British [PMSCs] in a competitive world market is likely to contribute to the good fortunes of military exports."⁶⁰ This factor may support the government's decision to opt for voluntary regulation of British PMSCs, as **the government has noted that, when working with the international community toward international regulation of PMSCs, it wants to ensure that "UK companies are not unfairly disadvantaged by raising their standards."**⁶¹

Human Rights Impact

Generally speaking, British PMSCs have a good reputation in the industry, but a series of incidents involving one company in particular, G4S, is concerning, and raises questions about the government's decision to outsource so many of its functions to this one particular company.⁶²

In Australia in 2007, G4S drivers left detainees locked in a scorching van. One man was so dehydrated that he drank his own urine. The Human Rights Commission of Western Australia

ordered G4S to pay \$500,000 in compensation, though 3 of the 5 victims had already been deported by the time the order came through.⁶³ The following year, also in Australia, a man died after being “cooked to death” while being transported to face drunk driving charges by GLS employees (GLS is a G4S subsidiary).⁶⁴

In Iraq in 2009, a British ex-Royal marine called Paul McGuigan and an Australian called Darren Hoare were shot and killed by Danny Fitzsimons in the Green Zone in Baghdad, while a third man, an Iraqi national, was able to escape the attack. All worked as contractors for ArmorGroup,⁶⁵ which is owned by G4S.⁶⁶ Fitzsimons was sentenced to over 20 years in prison for killing McGuigan and Hoare and attempting to kill the Iraqi national, making him the first Westerner to be convicted in Iraq since the 2003 invasion (this was made possible by a 2009 agreement lifting immunity for foreigners in Iraq).⁶⁷ In 2012, it emerged that there had been various warning signs regarding Fitzsimons’ behavior prior to the shooting. Not only had he been fired from his previous PMSC for assaulting a client, he had prior convictions in the U.K. for arms possession and robbery and was facing charges of assault and another incident of arms possession. At time of the murders in Iraq he was on bail and suffering from PTSD.⁶⁸ It was further alleged that G4S was sent warnings in days leading up to the killings, among which an e-mail that read, “Surely you must have some duty of care to not allow this to happen.”⁶⁹ G4S issued a statement which (1) acknowledged that his screening had not been completed in line with the company’s procedures; (2) stated that it was a matter of speculation whether if the screenings processes had been better implemented in this situation, it would have played a role in the incident; and (3) claimed that the e-mails had not been received by the human resources department prior the incident.⁷⁰

G4S policies came under scrutiny again following the inquest into the death of Jimmy Mubenga, a 46-year-old Angolan deportee, who died after being restrained by three G4S guards on board a plane at Heathrow airport that was bound for Angola in October 2010.⁷¹ It emerged that G4S had received repeated warnings from its own staff over a series of years that the restraint techniques involved excessive use of force and were extremely dangerous.⁷² An inquest verdict in July 2013 found that he had died on the plane and that “the guards, we believe, would have known that they would have caused Mr Mubenga harm in their actions, if not serious harm.”⁷³ The coroner raised further concerns about whether some of them were officially accredited.⁷⁴ Although it did not take place within an armed conflict, this incident and others raise concern about G4S’s training and oversight functions generally. Amnesty said that “If the UK government continues to outsource vital jobs like this to security firms, which other European countries don’t, then it must improve the training given to employees and independently monitor their conduct.”⁷⁵ The family is pursuing civil litigation against G4S.⁷⁶

In 2011, it was reported that G4S had provided services to Israeli detention facilities where prisoners were beaten, deprived of sleep, shackled in painful conditions; and children were held in solitary confinement.⁷⁷ This and other allegations caused G4S to carry out a review of its engagement in the West Bank, following which it concluded that a number of its contracts there were not in keeping with its business ethics policy. G4S determined, however, that withdrawal from these contracts prior to their expiry would not be possible.⁷⁸ More recently, an independent U.K. watchdog also found that G4S that of basic healthcare and sanitation in the U.K. prisons that it runs.⁷⁹

It must be acknowledged that G4S is not the only company that has been implicated in human rights violations. Erinyes,⁸⁰ KBR,⁸¹ and Aegis⁸² are all companies either based in the U.K. or contracted to work for the U.K. government which have been implicated in potentially serious human rights violations in recent years. And information on the involvement of smaller PMSCs in human rights violations is much more difficult to come by.⁸³ But what is particularly concerning about the G4S cases is that they constitute the pattern of human rights abuse, both before and after the Montreux Document, to which the U.K. government has failed to adequately respond.

Iraq

Overview

Iraq, which was one of the original supporters of the Montreux Document, has been foremost thought of as a Territorial State, but it is also Contracting and Home State. In terms of Iraq as a Territorial State, the large scale presence of private military and security personnel inside the country began with the military invasion in 2003, when the coalition powers, principally the U.S. and the U.K., brought contractors along with their military forces.⁸⁴ As the war continued, PMSC presence reached enormous levels as administrative failures of the occupying powers provoked resistance, and unleashed sectarian conflict and terrorist activity that some described as full-blown civil war in 2007 and 2008.⁸⁵ During the years of war, occupation, and reconstruction, the majority of PMSCs in Iraq have been reported to be non-Iraqi companies, mainly from the U.S. and U.K., although the nationality of PMSCs during this period is difficult to verify, and they came from many Home States.⁸⁶

In an unprecedented scope, PMSCs in Iraq performed a wide range of services that would traditionally have been carried out by the military, in addition to being hired to provide security for foreign nationals and Iraqi officials, foreign installations, and Iraqi institutions, and to train Iraqi security and police forces.⁸⁷ The services for which PMSCs were utilized included construction and protection of military bases and other facilities, transportation security, vulnerability assessments, antiterrorism/force protection, fire and life safety, and life support operations. Some services were highly technical, such as precision aerial mapping, high definition photography, video and data downlinks, and secure video/data distribution networks. Many were of strategic importance, including information technology solutions in areas of defense, intelligence, homeland security, force modernization for military and police organizations, and government transformation.⁸⁸

In terms of the U.S.' use of PMSCs, from 2003 to 2008 the DoD, DoS, and USAID were the largest contractors of PMSC services in Iraq. According to the Special Inspector General for Iraq Reconstruction (SIGIR), an independent federal agency, in those years 77 PMSCs had direct contracts or subcontracts with these agencies, and another 233 PMSCs were contracted to provide other security services.⁸⁹ In total, these 310 companies held contracts valued at almost \$6 billion, with the top ten contractors accounting for about 75 per cent of that total.⁹⁰ When the SIGIR released its 2008 report, "the Pentagon disputed some of the inspector general's findings, saying it could confirm only 77 of the entries, involving about \$5.3 billion in contracts."⁹¹ The

challenge the SIGIR faced in computing a total was that the many databases of PMSC contracts were incomplete, however, they significantly overlapped with one another.⁹²

The SIGIR report was not the last U.S. government report to point out the difficulty of getting accurate statistics about U.S. government contracts with PMSCs operating in Iraq. Records of the number of personnel were particularly unreliable. “In August 2008, the Congressional Budget Office estimated that number to be 25,000–30,000. But an October 2008 Government Accountability Office report stated that complete and reliable data was unavailable, and thus it was impossible to determine the precise number.”⁹³ In April of 2012, the DoS reported that 12,755 personnel, 2,950 of whom provided security services, worked for it in Iraq.⁹⁴ But according to SIGIR, the DoS tended consistently to undercount the number of contractors working in Iraq; for example, their numbers for 2012 seemed to omit contractors working for the Police Development Program, a very large initiative, and the missions of OSC-I, and those working for USAID.⁹⁵ According to one analyst, “The takeaway is that after all these years the U.S. government still has problems tracking the number of contractors working in Iraq.”⁹⁶

The security situation in the country improved after 2008, leading up to the departure of the occupation forces in 2011, but since 2012 Iraq has experienced a devastating resurgence of terrorist activity. The June 2013 report of the UN Assistance Mission for Iraq (UNAMI) Human Rights Office found,

[T]he trend of recent years of a reduction in the numbers of civilian casualties has reversed and... the impact of violence on civilians looks set to increase in the near to medium future. Terrorists and armed groups continued to favour asymmetric tactics that deliberately target civilians or were carried out heedless of the impact on civilians.⁹⁷

In part due to this instability, Iraq is today also a Contracting State and a Home State. According to some reports, as of 2011 “at least 66 PMSCs have their headquarters in Iraq or are ‘categorized’ as Iraqi PMSCs,”⁹⁸ while in its last visit to the country in June 2011 the UN Working Group on the use of mercenaries was informed by the Iraqi Ministry of Interior (MoI) that 89 out of the 117 PMSCs currently licensed were Iraqi companies.⁹⁹ The UN Working Group also noted that it is not altogether clear to what extent the companies registered and categorized as Iraqi are in fact owned and managed by Iraqis, and one report found that some Iraqi PMSCs were actually managed by foreign nationals.¹⁰⁰ **In the face of the current Iraqi government’s inability to guarantee security, employment of PMSCs remains high.** Protecting the oil and gas fields, which are the primary sources of Iraq’s wealth, remains a principal activity, although there is a new effort to train and deploy a state-supported “Oil Police” force.¹⁰¹ Individual members of the Iraqi government routinely contract for private security services.¹⁰² Domestic and international businesses, foreign governments, and NGOs also hire PMSCs.

The Iraqi government contracts for PMSCs’ services, and appears to be trying to hire more services from Iraqi companies. For example, in January of 2010, the Iraqi Ministry of Transport selected G4S, one of the largest global security companies, to provide security at Baghdad International Airport.¹⁰³ When the contract was renewed in September of 2013, however, G4S began operating

in partnership with Al-Burhan Group.¹⁰⁴ Babylon Eagles Security Company, which calls itself “Iraqi-owned and managed” since 2003, has an endorsement on its website from the Mol recognizing the company “for its cooperation in delivering very important secret information, that has led to the capture of many terrorist networks.”¹⁰⁵ The Iraqi Ministry of Public Works hired Falcon Security, a “100% Iraqi-owned and operated Registered Security Compan[y]” to provide fixed site security from 2003 to 2005.¹⁰⁶ However, comprehensive statistics on the ownership, size, and annual revenues of Iraqi PMSCs is not readily available.¹⁰⁷ Likewise, a comprehensive inventory of the types of and expenses for security services contracted for by the Iraqi government, whether with international or domestic companies, does not exist.

Many Iraqi-based PMSCs are subcontracted by international PMSCs. Some Iraqi-based PMSCs have subsidiary offices outside of Iraq and work in other countries – mostly in the Middle East region – usually related to the oil industry and/or transportation. For example, Sabre International has headquarters in Baghdad, and offices in Afghanistan, Pakistan, South Africa, Kenya, Uganda, New Zealand, Germany, the U.K., and the U.S.¹⁰⁸

It remains difficult to quantify total PMSC activity (the number of companies, the number of their personnel, and their annual revenues) in Iraq today. The Ministries of the Interior in Central Iraq and in the semi-autonomous Kurdistan Region, which are charged with registering all PMSCs, do not have fully transparent, centralized reporting systems.¹⁰⁹ In 2011, the Iraqi Mol told UN officials that 117 PMSCs were then licensed (or in the process of renewing their licenses) to operate in Iraq; of these companies, 89 were Iraqi and 28 were foreign. The total number of armed employees of the licensed PMSCs was about 35,000, and they included 23,160 Iraqis and 12,672 foreigners.¹¹⁰ UN

officials were also told there was a trend toward “Iraqi” PMSCs taking over from PMSCs based in the U.S. or the U.K. UN officials questioned this, however,

“This underreporting and failure to document alleged serious incidents has implications for the possibility of accountability for the PMSCs and their personnel and access to remedy for victims.”

saying, “It is not clear to what extent the companies categorized as Iraqi are in fact owned and managed by Iraqi [sic]. For instance, some of these companies, such as Sabre International, present themselves as ‘Iraq-registered, foreign-owned and managed’. Others do appear to be owned and managed by Iraqi nationals.”¹¹¹

Security companies that identify themselves as “Iraqi” and that advertise on the Internet generally describe themselves as full-service companies.¹¹² Most emphasize their work in the oil and gas industry, often offering construction and engineering services, along with their security work. Risk assessment, security during transportation of personnel and goods, site protection, unexploded ordinance management, personal bodyguards, escorting VIPs (businessmen and journalists), communications services, secure meeting facilities, and life support are also among the specific services they most commonly advertise.

Undeniably, there was a desire as soon as U.S. troops left Iraq, to also rid the country of foreign PMSCs. On February 29, 2012, for example, Iraq's Oil Ministry issued an order banning foreign security contractors from the twelve major oil fields, mainly in southern Iraq, that are being developed by international companies.¹¹³ The ban was said to be part of a larger drive by Prime Minister Nouri al-Maliki's government to impose restrictions on foreign private security personnel working in Iraq, and simultaneously with the ban, the government introduced a bill in Parliament to limit the number of foreign security contractors operating in Iraq.¹¹⁴ While the bill was never passed, it was reported at the time that "[s]ome of the 109 security companies registered in Iraq say they're already having problems," including not being able to obtain operating permits and visas for foreign employees, which they viewed as "a government drive to impose administrative roadblocks to make things difficult for foreign contractors."¹¹⁵ Although the government of Iraq gave slightly higher numbers for security contractors "registered to work for foreign government entities and private firms engaged in activities in Iraq," saying there were 124 in February of 2012, the government also stated that its goal was to reduce the total numbers of these contractors to 63, with no more than 20 being foreign firms.¹¹⁶

Human Rights Impact

Iraq's recent attempts to improve state practices for controlling PMSCs can be attributed to misconduct by PMSCs and their personnel, including in some instances violations of human rights and international humanitarian law, which have been documented by human rights organizations, the media, and academics.¹¹⁷ Some of these incidents became major news stories, the two most infamous being the involvement of Titan and CACI contractors in the abuses at Abu Ghraib prison¹¹⁸ and the Blackwater shooting incident at Nisour Square.¹¹⁹ Alleged misconduct by Blackwater received a great degree of media coverage, and consequently Congressional scrutiny. Allegations against the company are detailed at the end of Appendix A.

Beyond these infamous incidents, PMSCs were also reportedly involved in other lesser known incidents. They fall into two large categories: (1) Alleged human rights violations against local population, mainly encompassing escalation of force incidents; and (2) Alleged abuses against PMSC personnel, including restrictions of their labor rights and the right to non-discrimination.¹²⁰ Examples of these alleged violations and abuses are detailed in Appendix A. In the early years of the war and occupation, PMSC personnel responsible for mobile security and security checkpoints were involved in the majority of reported incidents, often involving firing at civilians and traffic accidents.¹²¹ The UN Working Group on the use of mercenaries, Mission to Iraq (UNWGM - Iraq) in its 2011 report stressed that the incidents that were reported and documented were far fewer than the number of incidents that occurred.¹²² This underreporting and failure to document alleged serious incidents has implications for the possibility of accountability for the PMSCs and their personnel and access to remedy for victims. As will be discussed below, efforts to ensure accountability and grant remedy were further hampered by immunity provisions for PMSCs put in place by the Coalition Provisional Authority (CPA), the first transitional government established by the coalition forces following the fall of Saddam Hussein.

UNWGM-Iraq reported that another impact of unaddressed misconduct by PMSCs was the belief by many Iraqi citizens that PMSCs and their personnel operate within a culture of impunity, suggesting that violations of Iraqis' human rights were of little significance.¹²³ Negative perceptions of PMSCs were also prevalent among U.S. military and diplomatic personnel, who, according to the UNWGM-Iraq, viewed PMSC personnel as "threatening," "arrogant," and "insensitive to Iraqis and their culture."¹²⁴ Incidents involving PMSC personnel and these perceptions prompted Iraqi authorities to take measures to improve oversight and regulation, as discussed below.

Afghanistan

Overview

Afghanistan is first and foremost a Territorial State on which PMSCs have operated and continue to operate. PMSCs began arriving in Afghanistan in 2001, accompanying the U.S.-led Coalition Forces and, subsequently, the North American Treaty Organization (NATO)-led International Security Assistance Force (ISAF) intervening in the country. In 2010 President Karzai ordered¹²⁵ the disbandment of all PSCs,¹²⁶ a process which is still ongoing. As the program executing the transition (2011 Bridging Strategy)¹²⁷ allowed for several exceptions to dissolution, Afghanistan is still properly categorized as a Territorial State for: a) PSCs working for diplomatic entities or engaged in police training missions (they are allowed to operate indefinitely); b) PSCs that have transformed into Risk Management Companies (RMCs), mainly providing security advisory services; c) PSCs that have not yet been dissolved; and, d) PMSCs that do not fall into the scope of applicability of PSCs regulations and are therefore under no obligation to disband (mainly, those working exclusively in military functions and intelligence).

On the other hand, public institutions and officials within the Afghan government have also used PMSCs for self-protection and to protect the perimeter of strategic government buildings, mainly in Kabul. In this regard, however, insufficient information exists to determine whether Afghanistan can be considered a Contracting State as well. In particular, field research conducted for this report suggests the PMSCs providing this protection are in fact subcontractors from a large U.S. PMSC that also protects foreign diplomatic entities,¹²⁸ so it is unclear whether the large PMSC has been directly contracted out by the Afghan government, or whether it has been contracted out by foreign entities and then, in turn, its services have been extended to Afghan buildings through State contracts. To increase transparency, the government of Afghanistan should clarify this relationship.

Finally, there are a number of PMSCs in Afghanistan that have been registered and licensed only in Afghanistan, and for whom Afghanistan is the Home State. However, **due to the absence of specific regulations on PMSCs between 2001 and 2008, there was a lack of transparency regarding the ownership structure and management of many PMSCs operating in Afghanistan.** Reported cases include: PMSCs that have Afghan co-ownership and management with foreign companies; PMSCs that are foreign-owned but have Afghan partners involved in management; and PSCs that are foreign-owned but used foreign ownership "as a front for Afghan powerbrokers who do not want their involvement known."¹²⁹ These circumstances

distort the question of nationality of PMSCs, and it is recommended that the term Home State in the Montreux Document take this into account.

Afghanistan has endured over thirty five years of war and conflict. The last one started with the U.S.-led Coalition Forces intervention in October 2001 following the 9/11 terrorist attacks – Operation Enduring Freedom (OEF) – in order to combat Al-Qaeda and prevent the Taliban regime from providing it with safe harbor. Although the Taliban regime was overthrown by the end of 2001 and replaced with a new Afghan government by 2002, the initial phase of the international armed conflict paved the way for an “internationalized” non-international armed conflict between the new Afghan government (supported by OEF and the NATO-led ISAF forces), and non-State armed opposition groups, particularly the Taliban.¹³⁰ This armed conflict persists today, yet, a transition process has been agreed upon, under which Afghanistan will assume full responsibility for security in the country and international assistance forces will be gradually withdrawn by the end of 2014 (*Inteqal* process).

Against this background, PMSI services have been used in Afghanistan in connection with both the intelligence and military/stabilization operations by international forces, as well as with the internationally-backed reconstruction and development assistance programs. Private security services have also been contracted out on an individual basis by humanitarian actors, journalists, and commercial individuals and entities in need of protection or requiring security assessments, due to the lack of capacity of Afghan public forces to provide security across the country. Simultaneously, in the long process towards rebuilding the Afghan National Police and the Afghan National Army, PMSCs have conducted training courses for local troops and security forces, on behalf of the U.S. and ISAF forces, and provided security for certain Afghan national institutions.¹³¹

Generally, the majority of PMSC clients agree that they would not have been able to operate throughout Afghanistan without the assistance of PMSCs.¹³² Even the local population, which has suffered the adverse effects of PMSC activities and generally views the private security industry in a negative light, often consider them a ‘necessary evil’ in an insecure environment.¹³³ Finally, with the ongoing *Inteqal* process and the Afghan Public Protection Force (APPF) assuming responsibility for commercial security services in the country, PMSCs – or their replacement entities, the RMCs – remain critical players in the security scenario of the country.¹³⁴

It should be noted that not all private military and security services carried out in Afghanistan are justified solely on the basis of security needs. The initial reliance on PMSCs by international military forces was based on a privatized model of military contracting that took into account operational needs (lack of sufficient forces and specialized personnel), a military strategy (based, among other things, on the use of PMSCs as intelligence ‘gatekeepers’¹³⁵), and a long-standing policy of force reduction and transformation of the military.¹³⁶ Thus, an important distinction must be made between the use of PMSCs pursuant to a policy of security privatization in the context of an insecure environment and the public authority’s inability to guarantee security, on the one hand, and the use of PMSCs as a policy and strategy for military contracting, on the other hand.

As a whole, PMSCs have been hired in Afghanistan to provide both military and security services. Although there is still debate on the definition of these terms, private military services provided by PMSCs in Afghanistan have included the following:

- Intelligence services: including reconnaissance, translation services, gathering information and interrogation of detainees.
- Military assistance: including training and consulting of national armed forces;
- Operational support services: including maintenance and operation of combat-related goods (satellites, military software, and weapons systems including the operation of drones, especially in surveillance operations), raids assistance, command and control functions;
- Military logistic support;
- De-mining; and
- Poppy eradication.¹³⁷

With regard to private security services, Afghan government regulations have defined this term as “activities which provide security of real and natural persons, logistics, transportation, goods and equipment, training of security employees [and] warning services.”¹³⁸ Regulations have further classified security services into five different categories:¹³⁹ a) area security,¹⁴⁰ b) convoy security,¹⁴¹ c) fixed-site security,¹⁴² d) mobile security,¹⁴³ and e) police training missions.¹⁴⁴ The specific description provided for each category gives an accurate idea of the type of security activities performed by PMSCs in Afghanistan. Risk management and security warning services should also be added to this list of categories, particularly for the period since 2011 (when the Bridging Strategy took effect).¹⁴⁵

The extension of private military company activities to the realm of security inaugurated a PMSI unprecedented in size and scope in Afghanistan, as private military companies have quickly adapted to the new demand and began to offer and perform both military and security services at the same time. Further, the large variety of security services on offer gave rise, in turn, to a great diversity of new clients contracting PMSCs in Afghanistan. In addition to international military forces and other public customers such as diplomatic missions, reconstruction agencies, and international organizations like the UN, private entities and individuals such as journalists and academic researchers, reconstruction implementing partners, NGOs, commercial enterprises, and foreign and Afghan individuals have turned to private security contractors for protection and/or security-related support services.¹⁴⁶ On the whole, however, the evolution of the PMSI has essentially followed the surge and geography of the international military presence and the associated development and stabilization projects.¹⁴⁷ International military actors, in general, and U.S. agencies in particular, have been the primary users of PMSI services in Afghanistan.¹⁴⁸

For most of the period under consideration, determination of the exact number and nationality of PMSCs operating in Afghanistan has been a difficult task. The government of Afghanistan did not start an official licensing process until 2008, and this process lasted only two and a half years before the Presidential Decree 62 and the consequent dissolution strategy took effect. It is estimated that during the first seven years of conflict the number of PMSCs varied

between 60 to 140 companies, with approximately 18,000 to 28,000 personnel.¹⁴⁹ The 2008 licensing process led to the formal licensing of 39 private security companies, later extended to 52 PSCs in 2009 (27 national and 25 international PSCs) with approximately 30,000 employees.¹⁵⁰ However, as discussed below, these numbers fall short of representing the true size of the PMSI as a number of PSCs were reported to have operated without a license and to have maintained a larger number of personnel than they registered or reported. At present, out of the 52 legal PSCs, 18 have already been terminated pursuant to the dissolution strategy – and their guards transferred to the Afghan Public protection Force (APPF) – and 19 have obtained an extension of their license to serve diplomatic missions in Kabul. Finally, 35 PSCs have been granted an RMC license, while an additional 11 have applied for the license and are waiting for it to be granted.¹⁵¹

The PMSI in Afghanistan can be described as a complex business phenomenon integrating a mosaic of companies (foreign/national/hybrid), personnel (U.S. nationals/Afghans/third-country nationals (“TCNs”)), and forces (regular/irregular). In the simplest terms, the PMSI in Afghanistan can be assessed as an industry that has an important national component and that is deeply involved in the country’s politics and local economy. The majority of registered PMSCs has been Afghan-owned and most PMSC employees, even when the PMSC is foreign-owned, have been Afghan nationals. A significant particularity of the PMSI in Afghanistan is the relationship between PMSCs and local militias affiliated with Afghan power-brokers and commanders. These local militias, which initially emerged during the Soviet intervention in 1979 and then were

“In the simplest terms, the PMSI in Afghanistan can be assessed as an industry that has an important national component and that is deeply involved in the country’s politics and local economy”

reborn under U.S. patronage as part of the larger counter-terrorism strategy since 2001, have both been employed by international PMSCs and have registered as PSCs in their own right.¹⁵² Similarly, the public security forces have also been corrupted over time, as many have begun to work as private

security guards, resulting in an overlap between their public service employment and their private security jobs. In some cases, the same individuals are also found to be acting as militia leaders.¹⁵³ The resulting situation was one where a symbiosis of private and irregular security forces emerged, creating a parallel local security structure outside of government control. This hindered international and Afghan efforts to disarm irregular armed groups and, has instead vested militias with legitimacy and *raison d’être*.¹⁵⁴ The 2010 Presidential order to disband PSCs in the country and the consequent nationalization of the PMSI through the establishment of the APPF must be understood in this context.

Human Rights Impact

In addition to the political, economic and strategic implications, the activities of PMSCs in Afghanistan have impacted the human rights of the local population. In broad terms, PMSC activities have had both a direct and an indirect impact on human rights. Yet, it has to be noted from the outset that, when dealing with the issue of the direct impact of PMSC activities on human

rights, there is a deficit of information and analysis on this topic. This deficit can be attributed to several factors: (1) difficulty in distinguishing contractors from other armed actors, such as militiamen and international forces, which complicates the process of reporting incidents; (2) lack of and/or unworkability of specific monitoring and oversight mechanisms; and (3) absence of official statistics on human rights incidents by PMSCs recorded by the relevant national and international bodies that, although tasked with monitoring the human rights impact and reporting on civilian casualties arising from armed operations, do not specifically deal with violations by PMSCs as a separate category.¹⁵⁵

Direct impact on human rights encompasses a series of incidents and instances of abuses involving private military and security contractors. In particular, according to the information available,¹⁵⁶ such incidents include grave human rights violations such as the mistreatment of detainees, unlawful killings (both of civilians and fellow contractors), disproportionate and indiscriminate use of force against local populations, as well as high profile incidents of direct participation in hostilities resulting in civilian casualties. Additionally, cases have been reported of abuse of power particularly in night raids and house inspections, leading to arbitrary detentions, destruction and theft of property, intimidation, and obstruction of access to public places. Reports have also noted PMSCs' questionable labor practices and contractual irregularities, including sleep deprivation, lack of proper training, and mistreatment of Afghan national staff.¹⁵⁷ Tentatively, considering the armed conflict context some of these incidents involve actions that may also rise to the level of "cruel treatment and torture," or "outrages upon personal dignity, in particular humiliating and degrading treatment" in contravention of Common Article 3 of the Geneva Conventions.

The human rights impact of PMSCs can also be observed in the indirect effect of PMSC activities on the general security environment and human security in Afghanistan. In this regard, several field-research studies provided reliable information showing that, **while PMSCs are generally linked to security, their use and activities have not resulted in a positive spillover effect in the general security environment of the country.**¹⁵⁸ On the contrary, studies have noted that the large number of armed individuals, vehicles and weapons, and the links between PMSCs and militias, created a feeling of distrust, fear and insecurity among local population and sends the message that security is not a public good, but a commodity for foreigners and wealthy Afghans.¹⁵⁹

As noted, the 2011 Bridging Strategy required that private security services formerly provided by PSCs were to be progressively transferred to the APPF. According to information provided by the Afghan Ministry of Interior (MoI),¹⁶⁰ the APPF would not be a "private business entity" in the sense of the Montreux Document's PMSC definition, but a State-owned-and-run entity (State Owned Enterprise – SOE) that, nevertheless, provides security services on a commercial basis to domestic and international customers.¹⁶¹ The APPF personnel are meant to be neither public military nor police forces, but rather, to operate in cooperation with RMCs and probably in coordination with remaining PSCs. The question of the status of the APPF should be clarified and framed within the Montreux Document's categories of States and generally its State obligations and Good Practices.

Special Feature: Latin American and the Caribbean

The use of PMSCs is a growing phenomenon in Latin America and it is possible to identify five situations of PMSC-related work in Latin America and the Caribbean.¹⁶² First, Latin American contractors are hired by international PMSCs to work in other countries, such as Iraq and Afghanistan. Second, PMSCs are active in conflict situations in the region, specifically in Colombia where they offer several services to the police and the army in their fight against drug trafficking and illegal groups through the cooperation framework “Plan Colombia” between the U.S. and Colombia. A third situation where PMSCs are active is during peacekeeping operations. For example, in Haiti PMSCs were contracted by international organizations and States to provide humanitarian and security services after the 2010 earthquake. Fourth, PMSCs are active in urban wars, particularly in Mexico where PMSCs from the U.S. are contracted, in the framework of international cooperation between the U.S. and Mexico, to train local police. Finally, PMSCs are increasingly contracted by multinational corporations to protect people or assets in Latin America.

However, none of the countries mentioned above (Colombia, Mexico or Haiti) have endorsed the Montreux Document. In Latin America and the Caribbean region only four countries have endorsed the Montreux Document: Chile, Costa Rica, Ecuador, and Uruguay. **The lack of interest of the region in the Montreux process is surprising considering PMSCs in the region are the most armed in the world.**¹⁶³ The review of the situation in the Chile, Costa Rica, and Ecuador shows that the Montreux Document has not had real impact even in the countries that have endorsed it.

Chile

Chile does not fit clearly into one of the Montreux Document State categories. While Chile is a Home State to some PMSCs, it is not a Territorial State where they operate or a Contracting State that contracts for PMSC services. The strongest link to PMSCs is that U.S. companies have contracted for the services of its nationals to operate in the Territorial States of Iraq, Afghanistan, and Jordan.¹⁶⁴ In 2004, it was reported that the U.S. company Blackwater was recruiting about 60 former Chilean commandos to work in Iraq.¹⁶⁵

The UN Working Group on the use of mercenaries sent a delegation to Chile in 2007 to investigate the use of Chilean mercenaries in Iraq. The UN Working Group issued an extensive report detailing the contracting of security personnel in Chile. According to the report, starting in late 2003, the company Red Táctica began recruiting Chilean nationals for Blackwater. Red Táctica was incorporated in the U.S. in 2001, and the subsidiary Grupo Táctico Chile was established in Chile by José Miguel Pizarro Ovalle. Pizarro also established a company called Neskowin, based in Montevideo, Uruguay.¹⁶⁶

According to the UN Working Group report, the contracts between Chilean nationals and Blackwater were stated as being subject to Uruguayan, rather than Chilean or U.S., law.¹⁶⁷ Also, the hiring location for the contracts was North Carolina (where Blackwater was headquartered)

rather than Chile, Uruguay, or Iraq. At the same time, Pizarro contracted Chilean nationals through another one of his companies, Global Guards Corporation, for the U.S. company Triple Canopy. The Chilean security personnel were contracted to work in Iraq, Jordan, Afghanistan, and Kuwait through Red Táctica and Global Guards Corporation.¹⁶⁸

In addition, contracts signed between Chilean national guards and the two companies were subject to Uruguayan and Panamanian law. They were not subject to the law of the Home, Contracting, or Territorial State. **According to the UN Working Group report, “[b]y signing these contracts, Chileans were not only renouncing some of their most fundamental rights—such as the right to be subject to their country’s laws... but were also, in effect, incapacitating themselves in the event they had to file a claim against the company.”**¹⁶⁹

In 2005 the Chilean Military Prosecutor’s Office brought charges against Pizarro for establishing an armed forces group (which, under the Chilean Constitution, can only be done by the government). The prosecutor also charged Pizarro with violating domestic Chilean laws—article 8 of Act. No. 17.798 regulating firearms and article 5 of Decree Law No. 3.607 regulating private security firms. Pizarro was convicted and sentenced to 61 days in jail and ordered to pay a fine of \$7,530,400.¹⁷⁰ The Chilean Supreme Court upheld his conviction in 2011.¹⁷¹

Chile is not a signatory to the UN Convention Against the Use of Mercenaries, but responded to a survey from the UN Working Group in 2012.¹⁷² In the response, Chile stated that it was party to the Montreux Document, however, it further indicated that the document is the first attempt to regulate the private military industry and not currently adequate. Chile stated that it believed a more comprehensive and binding document was necessary to regulate private military companies. Chilean law recognizes a difference between private security companies and private military companies, the second of which is not currently regulated. As for private security companies, no single law regulates the industry; however, a number of national laws are applicable to the industry, according to the Chilean government in the survey. For example, Decree Law 3.607 (1981) and related articles regulate private security guards.¹⁷³ Furthermore, Chilean Law Number 17.798 regulates firearms and weapons. Under this law, individuals cannot possess automatic or semi-automatic guns.¹⁷⁴ Individuals may possess other firearms, however, they must undergo a registration process and are restricted from taking them from their home, without further approval.

There is an ongoing process in order to modify the domestic legislation in Chile. The House of Representatives passed a bill on private security (No 6639-25) on August 27, 2013.¹⁷⁵ However, the approval process is unfinished. The project is supposed to be a result of signing the Montreux Document, but the new bill does not refer to military companies. It only mentions security guards, private investigators, guards or bodyguards.¹⁷⁶ It defines the term private security companies as those who, having the material, technical, and human resources, aimed at continuously supplying services for the protection of persons and property.¹⁷⁷ There are no references to extraterritoriality or the possibility that these companies perform services outside of the national territory.

The legislature did not take into account the recommendation made by Chilean experts to include provisions relating to private military and security companies, nor to ban mercenaries or to include references to the Montreux Document.¹⁷⁸

Costa Rica

Costa Rica is a Home and Territorial State to PMSCs. It is a supporter of the Montreux Document and has ratified the UN Convention Against the Use of Mercenaries. According to the Small Arms Survey in 2011, there were 19,558 private security personnel in Costa Rica and 12,100 police officers.¹⁷⁹ **Costa Rica was one of only a few countries surveyed that has more private security personnel than police officers.** In addition, Costa Rica is one of only a few countries in the world that does not have a military; the 1949 Constitution prohibits establishing a standing military.¹⁸⁰

At the same time, security has become a greater concern in Costa Rica. According to one poll in 2011, half of Costa Ricans consider citizen security the worst problem the country faces.¹⁸¹ According to the World Bank, from 1997 to 2008 the percentage of Costa Ricans who were victims of crimes doubled.¹⁸² While crime in Costa Rica is not as severe as in other Central America nations, it has been increasing recently. Crime spilling over from neighboring countries could also increase the need for PMSCs operating in Costa Rica.

Law No. 8395, approved in 2003, regulates private military contractors in Costa Rica.¹⁸³ Individuals and organizations that provide private security services and their property are subject to the Act's requirements. These services can include training, transportation, custodial services, and surveillance. The Ministry of Public Security is charged with administering the Act's provisions.¹⁸⁴ Any private armed groups that are not authorized by the Ministry of Public Security are prohibited.¹⁸⁵ Security company staff are required to register with background and personal information, photographs, and fingerprints.¹⁸⁶ The company is also required to keep an inventory of its weapons and ammunition, and that it be updated every six months.¹⁸⁷

The Act also sets out specific requirements for security personnel, including that they be over 18 years old, Costa Rican nationals, or foreign nationals with residence and work permits.¹⁸⁸ They must also have completed the second level of primary education, and have no criminal record in the past ten years (foreign nationals must show no criminal record in Costa Rica in the past five years and no criminal record in their home country). Personnel must also take a course from the National Police School and pass a psychological evaluation.

The Act limits the growth of private security forces to no more than 10 percent of the number of state security agents.¹⁸⁹ Also the Ministry of Public Security will inspect the facilities of private security companies at least once a year.¹⁹⁰ Private security personnel that provide physical security are required to wear a uniform, which is registered with the government, and individual security contractors are required to identify themselves on their clothing.¹⁹¹

Another Costa Rican law (No. 7530) enacted in 1995 regulates explosives and firearms.¹⁹² According to the law, to be permitted to bear arms, a person must not be under 18 years of

age, cannot be an inmate, cannot have mental or physical impairment, and cannot have been convicted of a crime involving the use of weapons.¹⁹³ The law also regulates the sizes of pistols and revolvers and requires all firearms to be registered with the government.¹⁹⁴

Ecuador

Ecuador is a Home State to PMSCs and also a Territorial State where foreign PMSCs operate. PMSCs employed Ecuadorian and U.S. staff at the Manta air force base in the recent past.¹⁹⁵ PMSCs currently provide protection to oil and mining companies in Ecuador.¹⁹⁶ They are also involved in the aerial eradication of illicit crops under “Plan Colombia,”¹⁹⁷ a joint U.S.-Colombian narcotics eradication program that operates along the border with Ecuador.

“The result is that there is no real integrated system for the supervision of PMSCs, which hinders proper monitoring of private security activities”

Ecuador is not a signatory to the UN Convention Against the Use of Mercenaries, but is a supporter of the Montreux Document. A 2003 law regulates PMSCs in Ecuador.¹⁹⁸ The law sets out a list of persons that cannot be employed by PMSCs, including people who have been convicted of a crime, members of the armed forces, or police officers, those who have worked for PMSC companies that have had their licenses revoked, and former members of security forces who have been dismissed for offenses.¹⁹⁹ The law establishes requirements for employment with PMSCs, including that personnel be Ecuadorian citizens and have completed basic education.²⁰⁰ PMSCs are prohibited from recruiting active members of the armed forces or police officers.²⁰¹ PMSCs are also subject to Ecuador’s labor code.²⁰² Several provisions regulate the storage of firearms by PMSCs, and require regular reporting on weapons arsenals.²⁰³

A 2007 Ecuadorian law established a Private Security Companies Chamber (CASEPEC) to defend and promote PMSCs in Ecuador.²⁰⁴ The organization’s website lists a number of affiliated companies including G4S Holding, Prosevip, Segope Seguridad, and other companies in Quito, Guayaquil, and other Ecuadorian cities.²⁰⁵

Until 2010, the Joint Command of the Armed Forces was the only entity that controlled and recorded weapons; it was also in charge of overseeing operation of PMSCs (without any transparency). The entity was replaced in 2010 by the National Police which established the Department of Control and Supervision of Private Security Organizations (COSP),²⁰⁶ and initiated a campaign to monitor PMSCs. At that time, COSP counted 53,000 private guards in Ecuador;²⁰⁷ however, the current estimate is 80,000.²⁰⁸

In 2010, operations, such as training, are supervised by the Security Department (Ministerio Coordinador de Seguridad). In practice the GYPACEC (Guardas y Policías en Alerta por la Seguridad Ciudadana) operated as a sort of franchise that allowed private institutions, police, and military organizations to receive training.

But also in 2010, following an attempted coup d’état, involving members of the police forces against President Correa, there were changes to the distribution of powers of this institution.

The monitoring of private security went back to the Joint Command of the Armed Forces.

The Security Department continues to assume responsibility for ensuring compliance with the training regulations. The result is that there is no real integrated system for the supervision of PMSCs, which hinders proper monitoring of private security activities. The 2003 law and the regulatory updates in 2010 are affected by frequent administrative changes.

In July 2012, the CASEPEC reported that the new system for training private guards, supervised by the Security Department at a cost of \$12 million USD and targeting some 20,000 guards. The process was not sufficiently transparent. There was no public information about the content of the classes, which are supposed to give human rights training to private guards.²⁰⁹

In Ecuador, the armed forces have a private security company, SEPRIV, which provides private security to oil companies in the region. It is part of the holding DINE, which is itself part of the Armed Forces. A current advertisement by CASEPEC, which offers training courses for private security, illustrates the type of training it provides. The advertised course, entitled “Course to Protect Dignitaries and Businessmen,” offers training on protecting dignitaries, authorities, and members of the armed forces and national police.²¹⁰

The U.N. Working Group on the use of mercenaries travelled to Ecuador in 2006 and issued a report in 2007.²¹¹ The Working Group reported that in 2001, oil companies signed a cooperation agreement with the Ecuadorian military to provide security to oil installations, effectively turning the national military into private military contractors for foreign multi-national companies. Oil companies reportedly face kidnapping threats and protesters, who have entered oil facilities and destroyed oil equipment.²¹² The agreement was called the “Military Security Cooperation Agreement between the Ministry of Defense and the Oil Companies that Operate in Ecuador,”²¹³ and was signed with 16 oil companies including the U.S. company Occidental and Spanish company Repsol. The agreement was valid for five years. In 2005, the Ministry of Defense reported that the contracts with the oil companies would be suspended.

In addition to issues related to oil companies operating in Ecuador, there were legal actions concerning the effect of the fumigation of coca plants in Colombia on Ecuadorian population on the border. DynCorp, a U.S.-based PMSC contracted by the U.S. DoS in the framework of Plan Colombia, conducts aerial spraying since 2001. The fumigation has been under criticism because of its human and environmental impacts. First, in 2001 a class action lawsuit was filed against Dyncorp, which was dismissed in February 2013 on grounds of insufficient evidence, although plaintiffs said they would appeal the verdict.²¹⁴ Second, in 2008, Ecuador brought a claim against Colombia at the International Court of Justice (ICJ), claiming “the spraying has already caused serious damage to people, to crops, to animals, and to the natural environment on the Ecuadorian side of the frontier, and poses a grave risk of further damage over time.”²¹⁵ However, in August 2013, the governments of Colombia and Ecuador announced an agreement ending the dispute caused by the fumigation of coca plants. The agreement requires that Colombia notify Ecuador before spraying on a 10-km border area, and provide a financial contribution for social and economic development of the border areas.

Recommendations

- *Supporting States should promote the Montreux Document in Latin America and the Caribbean.*

There is a need for stronger promotion of the Montreux Document in the region. Only a handful of countries have signed the Document, and those with the greatest security threats, including Mexico and Colombia, have not yet signed. The U.S. government, which has significant military cooperation programs with countries like Mexico, Colombia, and El Salvador through the Merida Initiative, Plan Colombia, and the Central American Regional Security Initiative, should use its engagement in the region to promote the Montreux Document, especially since U.S.-based PMSCs are hired to implement aspects of these programs, and respect of human rights has been an issue.

- *Supporting States should modify the Montreux Document to address State responsibilities for PMSC personnel contracted from States that are neither Contracting, Territorial, nor Home States.*

The Montreux Document should be modified to include new categories that address the responsibilities of States for PMSC personnel that are commonly referred to as Third Country Nationals. Their States of origin may not fall under the current categories of Contracting, Territorial, or Home States. For example, in Chile's situation, some of its citizens were contracted by U.S. companies through non-U.S. based hiring firms under contracts that referenced neither Chilean nor U.S. law. The Montreux Document's State categories do not directly address this situation.

- *Regional human rights bodies should reference the Montreux Document.*

Participants in the Montreux process should consider utilizing existing human rights mechanisms to improve control of PMSCs by identifying means to reference and incorporate the Montreux Document in jurisprudence. For instance, in the Inter-American System of Human Rights, an advisory opinion could elaborate on States' obligations for regulating and holding accountable PMSCs under the American Convention on Human Rights. In previous jurisprudence the Inter-American Court of Human Rights has used external sources, such as international humanitarian law, to interpret the Convention. The Montreux Document could be used by the Court to interpret the Convention and identify States' obligations relevant to the activities of PMSCs.



MEETING THE LEGAL OBLIGATIONS AND GOOD PRACTICES OF THE MONTREUX DOCUMENT

1. *Determination of services*

With regards to the determination of services that may or may not be outsourced, the Montreux Document stipulates both legal obligations and Good Practices for Contracting States, Territorial States, and Home States. In terms of legal obligations, the Montreux Document highlights that Contracting States are prohibited from contracting PMSCs to participate in activities that international humanitarian law “explicitly assigns to a State agent or authority.”²¹⁶

The Montreux Document recommends that States, when determining which services may or may not be contracted, consider whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.²¹⁷ For Territorial States, the same provision applies; however, as a function of their sovereignty, Territorial states can, of course, determine which services may or may not be carried out lawfully on their territory.²¹⁸ Similarly, Home States may determine which “services of PMSCs may or may not be exported,” and like both Contracting and Territorial States, should take into account whether a “particular service could cause PMSC personnel to become involved in direct participation of hostilities.”²¹⁹

United States of America

There have been a number of legal and regulatory efforts to define inherently governmental functions that should not be outsourced to companies. However, those efforts have suffered from definitional vagueness, a failure to adequately take risks associated with privatization into account, and inconsistent application. With regards to the use of PMSCs in Iraq and Afghanistan, the Commission on Wartime Contracting (COWC) found in its final report to Congress that:

The inherently governmental standard is insufficient, offering little or no useful guidance for deciding whether contracting for non-governmental functions is *appropriate* or prudent in contingency operations. After determining whether the inherently governmental prohibition applies, decisions to contract still need a context- and risk-sensitive consideration of appropriateness for contingency operations. Events in Iraq and Afghanistan have shown that systematic consideration of operational, political, and financial risks must be a factor in judging appropriateness. All too often, officials assume that any task deemed not inherently governmental is therefore automatically suitable for performance by contractors.²²⁰

Examining official definitions of inherently governmental functions confirms the vagueness of the term. In the Federal Activities Inventory Reform Act (FAIR) of 1998, an inherently governmental function is defined as on “so intimately related to the public interest as to require performance by Federal Government employees,” specifically if it can “significantly affect the life, liberty, or property of private persons.”²²¹ The Office of Management and Budget

(OMB) Circular A-76 which details U.S. policy prohibiting outsourcing of inherently governmental functions picks up on this language advising against outsourcing, if doing so will “significantly and directly affect the life, liberty, or property of individual members of the public” and increase the “likelihood of the provider’s need to resort to force, especially deadly force, in public or uncontrolled areas.”²²² However, as Huskey and Sullivan note “neither the OMB Circular nor accompanying interpretation provides governing principles useful in illuminating how or why certain functions obtain ‘inherently governmental’ status.”²²³ This vagueness may have been what led to the 2008 Presidential Memorandum on Government Contracting directing the Office of Federal Procurement Policy (OFPP) of the OMB to issue a policy letter to provide guidance to government agencies on circumstances when work must be performed by federal government employees. The final guidance was released in September 2011 and, with regards to security, establishes that security providers should not participate in combat or operations in certain situations connected with combat or potential combat.²²⁴

These prohibitions are similar to the DoD Instruction 1100.22, which reflects the FAIR language and states that “a function is IG [inherently governmental] if it is so intimately related to the public interest as to require performance by Federal Government personnel.”²²⁵ Among the key activities defined as inherently governmental are the direction and control of combat and crisis situations, DoD civilian authority direction and control, military unique knowledge and skills, and military augmentation of the infrastructure during war. The Instruction also contains specific language about what types of security services are inherently governmental.²²⁶ Similar to the COWC report’s recommendations on taking risk factors into account, the Instruction states that “risk mitigation shall take precedence over cost savings when necessary to maintain appropriate control of Government operations and missions.” In addition, the National Defense Authorization Act (NDAA) of FY2009 established that interrogation is an inherently governmental function, although the DoD can waive this prohibition in certain instances.²²⁷

Problematic is also the fact that different government agencies have reached very different conclusions as to what is inherently governmental. Whereas the DoD Instruction states that “assisting, reinforcing, or rescuing PSCs or military units who become engaged in hostilities are IG because they involve taking deliberate, offensive action against a hostile force on behalf of the United States,”²²⁸ the DoS uses private contractors for standard security and quick-reaction-force duties in Iraq and does not view those activities as inherently governmental.²²⁹

The COWC surmises of these laws, policies, and guidance that although they reflect “much thought and effort... the overall result is muddled and unclear. It is riddled with exceptions, ambiguities, and ad hoc legislated interventions.”²³⁰ The COWC adds that it does not consider these laws, policies, and guidance “a sound platform from which to make risk-based or other decisions, beyond those driven by statutory or policy mandates, on what functions are appropriate to contract.”²³¹ Furthermore, COWC notes that there is evidence that agencies violate inherently governmental standards, which is why, for example, provisions in NDAA FY2008 require that the DoD survey and report on their services contracting.²³²

While some commentators have argued that security provision, especially mobile security provision is an inherently governmental function,²³³ U.S. agencies in combat and contingency operations are unlikely to stop using armed security any time soon. As such, it may be more practical for U.S. agencies to be aware of and mitigate potential risks. Risk exists at two levels. First, there is the risk that PMSCs may be put into offensive combat or command roles for which they are not trained, which could lead to human rights or humanitarian law violations. Second, it puts the contractors themselves at risk because, if they directly participate in hostilities, they could lose protections otherwise afforded to them as civilians accompanying the forces, and forfeit their rights and protections, such as to prisoner of war status.²³⁴

Recommendations

- *U.S. government agencies should conduct, and make publicly available, analyses of whether outsourcing of functions to PMSCs is inherently governmental and the potential risks involved. They should identify human rights risks by undertaking human rights risk analyses.*

When determining whether to utilize PMSCs in particular capacities, government agencies should closely adhere to guidance on what constitutes inherently governmental functions. In addition, government agencies should conduct, and publicly provide, an assessment as to whether or not the use of PMSCs for those activities is likely to increase other risks, such as operational, political, and financial risks, but also risks associated with a) the potential commission by and complicity of PMSCs in human rights and humanitarian law violations and b) the inadequacy of mechanisms for legal accountability for PMSCs and their personnel.²³⁵ Conducting human rights risk analyses can aid in identifying risks to human rights associated with outsourcing.

- *U.S. government agencies should publicly state what steps they are taking to address risks associated with outsourcing to PMSCs.*

When the decision is made to utilize PMSCs despite identified risks, agencies should clarify what steps are being taken to manage and mitigate those risks.

As the COWC rightly notes in its report to Congress:

Determining that a task is not inherently governmental does not mean that it is a good idea to have contractors perform that task in a contingency operation. 'Permissible' is not a synonym for 'appropriate'... [It must] involve more than applying a binary, yes-or-no filter like 'inherently governmental.' For a function to be both permitted *and* appropriate for contingency contracting, the baseline inherently governmental test must be followed by consideration of other factors, the most important of which is risk.²³⁶

United Kingdom

The last twenty years have seen more and more outsourcing of traditionally governmental services in the United Kingdom.²³⁷ As one author noted, the U.K. appears to have almost "abandon[ed] the notion that there are core state functions that cannot be outsourced to private actors."²³⁸

Services that successive U.K. governments have outsourced to PMSCs in conflict and post-conflict zones in recent years include: police mentoring and advising, field training, mobile and static security guarding (such as close protection and embassy guarding), security management and intelligence analysis and advising, healthcare, vehicle maintenance military base management, and the recovery and resale of assets.²³⁹

The government is currently embarking on plans to further privatize the defense sector and as yet there appears to have been no serious discussion as to the implication that this move or privatization generally will have for security, human rights, and the notion of inherently governmental functions. The U.K. is generally compliant with the Geneva Conventions, and domestic rules prohibit civilians from engaging in armed conflict, but other than this, much of the domestic legal terrain surrounding the issue of non-delegable state functions remains undefined. As such it is not clear where the line will be drawn.

“What appears on paper to be a contract for purely defensive services could in practice result in conduct amounting to direct participation in hostilities”

Defining Inherently Governmental Functions

Unlike in the U.S., where there have been efforts to define the term “inherently governmental function,”²⁴⁰ this term typically is not used in British governance discourse²⁴¹ and there is a general absence of public discourse on the matter. A recent policy proposal may change this. In June 2013, the MoD announced plans to move to a Government Owned Contractor Operated (GOCO) company model for the procurement of Defence Equipment and Support (DE&S). Pursuant to the proposed model, the GOCO company may be authorized for a period of 9 years to negotiate and sign new contracts on behalf of the Secretary of State as the Principal.²⁴² The MoD notes that “Departmental and wider Governmental roles that are *inherently governmental* or pan-MoD are currently not expected to be transferred to a Contracting Entity or Operating Company.”²⁴³ Even if inherently governmental functions are not outsourced – which in any event, it is conceded, is a position that may change – it is clear that the adoption of this proposal would mark a very significant privatization of U.K. governmental functions. For this reason, it is important that any changes in law are preceded by a meaningful discussion on what outsourcing these functions would mean, and where the line should be drawn. Although the proposal reportedly came about following a formal public consultation,²⁴⁴ it appears that engagement with this consultation may have been largely limited to suppliers of PMSC services.²⁴⁵ It would be useful to engage a broader section of civil society that goes beyond directly interested parties to obtain their input on important issues such as the meaning of inherently governmental functions and the implications of this approach for security and human rights more broadly.

Interpreting Direct Participation in the Hostilities

As noted, Good Practices 1 and 53 advise that, when determining whether a service should be contracted out, governments take into account whether the service could result in direct participation in the hostilities. Civilian participation in the hostilities is unlawful under U.K. legislation.²⁴⁶ The U.K. Law of Armed Conflict Manual further provides that:

Taking a direct part in hostilities is more narrowly construed than simply making a contribution to the war effort. Thus working in a munitions factory or otherwise supplying or supporting the war effort does not justify the targeting of civilians so doing.... Civilians manning an anti-aircraft gun or engaging in sabotage of military installations are doing so. Civilians working in military vehicle maintenance depots or munitions factories or driving military transport vehicles are not...²⁴⁷

The U.K. is not party to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries²⁴⁸ due to a long-standing concern with the treaty's definition of mercenaries,²⁴⁹ but it endorses the view that PMSCs should only be used for defensive purposes and should not participate in hostilities,²⁵⁰ and does not contract PSCs to perform combat or offensive activities.²⁵¹ The U.K. government requires that PSCs with which it contracts shall provide their services "in full accordance" with the ICoC and PSC1.²⁵² Neither the ICoC nor PSC1 contains detailed provisions on the actual services that can and cannot be offered by PSCs, but both provide that firearms may only be used against persons in self-defense or defense of others.²⁵³ However, both also allow that firearms may be used to "prevent the perpetration of a particularly serious crime involving grave threat to life,"²⁵⁴ which could, theoretically, be construed as allowing some forms of pre-emptive action to be classed as technically defensive in nature.²⁵⁵

Some would say that regardless of the purpose or intent of a contract, direct participation can end up happening anyway; it has been observed that in Iraq that "[k]eeping operations defensive in a setting where there are no front lines or combat zones is a virtually impossible task."²⁵⁶ Thus, when British PMSC Aegis claims that its security services are "uniquely for defensive purposes and this activity is always overseen and regulated by the most stringent procedures and oversight,"²⁵⁷ it is worth bearing in mind both the realities of the environment in which PMSCs operate, and the potential for some forms of pre-emptive action to be classed as defensive in nature. What appears on paper to be a contract for purely defensive services could in practice result in conduct amounting to direct participation in hostilities.

Recommendations

- *The U.K. government needs to engage in a broad-based public discussion about what constitutes an inherently governmental function, and whether such functions ought to be outsourced.*

One forum for this discussion is the on-going parliamentary debate on the Defence Reform Bill.²⁵⁸ The government and in particular the MoD should also make efforts to engage the civil society organizations and other individuals and organizations with relevant expertise to ensure that the attendant issues are properly understood before the Defence Reform Bill is passed into law.

- *The U.K. government and bodies certifying PSCs should strictly interpret definitions of defensive action in the ICoC and PSC1 to avoid an overly broad interpretation which would legitimize direct participation in hostilities.*

The U.K. government, as a Contracting State, and those involved in certifying British PSCs to the

PSC1 standard should be careful to avoid any interpretation of the ICoC and PSC1 which would legitimize participation in the hostilities by PSC personnel under the guise of pre-emptive action taken to avoid “grave threat to life,” as this would be contrary to British policy.

Iraq

Determination of Services and “Outsourcing”

As discussed above, with the end of foreign occupation, the Iraqi authorities appeared intent on ridding their country of foreign PMSCs, reducing domestic PMSCs, and putting effective regulation in place for the PMSCs that remained. Since 2011, however, escalating violence, widespread corruption, and a national government that some have described as a failed state²⁵⁹ have together prevented Iraq from erecting a comprehensive legal and administrative structure for controlling the PMSI. **At the same time, ensuring all citizens’ security – a fundamental responsibility of the state – has become increasingly unachievable.**

Unless rescinded or amended by legislation, CPA regulation issued prior to the transfer of sovereignty to the Iraqi government in June 2004 still remains in many aspects the central legal basis for the regulation of PMSCs in Iraq.²⁶⁰ In February 2008, a law on PMSCs was drafted and transmitted to the Council of Representatives, but the draft law has been pending for discussion in the Iraqi parliament since then. Specifically on the issue of determination of services, CPA Memorandum 17, dated June 26, 2004, is relevant. In particular, Section 9 set forth some limitations on PMSCs’ activities, and provided that “1. The primary role of PSC is deterrence. No PSC or PSC employee may conduct any law enforcement functions.” However, as noted by some commentators, Section 9 suffered from certain contradictions; for instance, “while paragraph 1 prohibits PSC employees from conducting law enforcement functions, Section 5 of Annex A allows them to stop, detain, search, and disarm civilian persons if their safety so required or if specified in their respective contracts.”²⁶¹ Commentators also conclude that “some of these actions, especially detention and searching of civilians, could be certainly considered among police powers and as such law enforcement functions”²⁶² – and they further noted that they found evidence of PMSCs engaging in law enforcement functions.²⁶³

Going forward, however, the Iraq government should determine and clearly promulgate, through national legislation, laws detailing what services it is permissible for PMSCs to offer. Clarity on what types of services are permitted is important in light of the extremely poor security situation in Iraq today and the government’s extraordinary reliance on private contractors to ensure public safety. Indeed, the government may need ultimately to question whether its outsourcing of security constitutes the outsourcing of what is an inherently governmental function. As the UN Working Group observed:

[P]roviding security to its people is a fundamental responsibility of the State. Outsourcing security creates risks for human rights and the Government of Iraq must remain vigilant and devote the necessary resources to ensure that PMSCs – whether international or Iraqi – are stringently regulated and that they respect the human rights of the Iraqi people.²⁶⁴

Recommendations

- *The government of Iraq should pass national legislation to determine which services may or may not be carried out by PMSCs.*
- *In Territorial States, such as Iraq, where there is a foreign military presence, the issue of “determination of services” should include private military services.*
- *In determining which services may not be carried out by PMSCs, the Iraqi government should take into account, in addition to the probability of direct participation in hostilities, factors such as whether a particular service could have a grave impact on the human rights of the civilian population.*

Afghanistan

The Afghan Constitution of 2004 and other laws contain provisions which can be understood as imposing restrictions as to the sort of services that can be outsourced to PMSCs. For example, the Constitution grants the State monopoly over the use of force,²⁶⁵ and the 2005 Police Law stipulates that among the duties and obligations of the police is the obligation to fight against organized crime and terrorism and to protect properties and assets of the public and private sector as well as of those of the domestic, foreign, and international institutions and organizations.²⁶⁶ However, **Afghanistan has not enacted specific national legislation regulating the activities of PMSCs, so no such a “determination of services” exists as a matter of law.**

As a matter of policy, the government of Afghanistan gave conditional permission for PSCs to provide security to the ISAF military bases, embassies, and large economic projects so that Afghanistan’s reconstruction process was not disrupted. Implicitly, it also agreed to PMSCs providing military services as a part of the international military establishment. Yet, government regulations implementing these policies have only partially resulted in rules determining which services the PMSCs’ are or are not permitted to carry out in Afghanistan.

Regarding military services, the content of the two Status of Forces Agreements (SOFAs) in force, which extend to contractor personnel, gives international military authorities wide discretion to import and contract directly with suppliers for services in Afghanistan and makes no reference to the sort of military-type services that may or may not be carried out by PMSCs.²⁶⁷

With regards to security services, the 2008 administrative regulation limited the activities of PSCs to security of real and natural persons in the area of logistics, transportation, goods and equipment, training of security employees, and warning services.²⁶⁸ Specifically, it allowed PSCs to conduct body searches, to stop civilians, and to stop vehicles in order to search passengers, but only if this was permitted by the PSC contract.²⁶⁹ In contrast, the Procedure prohibited PSCs from performing so-called “illicit activities,” in particular: protecting the borders of the country; providing the security of government offices, properties, and facilities; providing the security of highways (private road constructions companies, convoys of companies, international

organizations, official delegations and political agencies of the foreign States were exempted); providing the security of holy places; and providing the security of historical areas, mines, and forest unless such areas are transferred to the private sector.²⁷⁰

Since 2010, as a result of the President Decree ordering the dissolution of all PSCs in the country and the subsequent 2011 Bridging Strategy, the provision of many private security services has been drastically restricted, but only for some categories of PSCs and with regard to some types of security services. Permitted contracted security services in Afghanistan are security services for the internal and external security of compounds of embassies, entities with diplomatic status, and police training missions. The rest, including military and reconstruction entities, should contract security services through the APPF (even though the capability of the APPF is still in the process of being developed). Risk management services are permitted only by licensed RMCs. The 2012 Procedure for RMC describes these services as:

Advisory, contracting and training services pertaining to security of individuals, and private, governmental, and non-governmental organizations that include, but are not limited to:

- Threat and risk assessment
- Audit of security operations
- Emergency response procedures
- Evacuation planning procedures
- Project management
- Site security assessment and staffing scales
- Security Plan development
- Security contract assessment
- Development of standard operating procedures
- Contingency planning
- Personal protection planning and management.²⁷¹

Generally, based on the political context under which the aforementioned regulations were adopted and their intended scope, it can be fairly concluded that the determination of permissible services that PMSCs can provide in Afghanistan has been driven more by sovereignty concerns and the need for government legitimacy, rather than on the basis of humanitarian criteria such as whether the activity would cause the PMSC to become directly engaged in hostilities. Indeed, private military services, which are by their very nature related to the application of IHL, have not even been subject to specific domestic regulation.

Recommendations

- *The government of Afghanistan should establish by law which services may or may not be carried out by PMSCs.*

The determination of the services that may or may not be carried out by PMSCs should be established by law, and not by administrative regulations adopted only by the government, as private military and security services may often be implicated in the use of armed, deadly force.

The monopoly over the use of force is a State's prerogative and responsibility. Afghanistan is encouraged to pass national legislation as soon as possible.

- *The government of Afghanistan should include a determination of which military services can be outsourced when it negotiates future agreements on the status of foreign forces post-2014.*

In Territorial States when there is a foreign military presence, the issue of "determination of services" should include private military services as well. Contracting States and Territorial States may negotiate the determination of military services that can be carried out by PMSCs through bilateral military agreements, particularly if contractor personnel fall under the scope of these agreements. Afghanistan is encouraged to take existing private military services into account when it negotiates military agreements for the future presence of troops post-2014.

- *The government of Afghanistan should utilize human rights risk analyses when determining which service can be carried out by PMSCs.*

In determining which services may or may not be carried out by PMSCs, Territorial States should take into account, in addition to the probability of direct participation in hostilities, factors such as whether a particular service could have a grave impact on the human rights of the civilian population based on human rights risk assessments.



2. *Due diligence in selecting, contracting, and authorizing PMSCs*

While Part One of the Montreux Document recalls that Contracting, Territorial, and Home States all have international legal obligations in relation to the activities of PMSCs, international law is silent on the specifics of how governments select, contract, or authorize PMSCs. Therefore, the Good Practices in Part Two, the greatest number of which address these issues, are very important in order to enable governments to ensure that their use or authorization of PMSCs does not undermine international human rights and humanitarian law norms. **The Good Practices also maintain relevance beyond armed conflict, and needed contracting and authorization systems should be established during peace times ahead of any armed conflict.**

The Montreux Document suggests that Contracting States establish adequately resourced procedures for selecting and contracting with PMSCs in order to assess their capacity to operate in conformance with relevant national and international law. Such measures include acquiring information on past performance and ensuring transparency and supervision in the selection process through means such as public disclosure of contracting regulations and information about contracts, the publication of incident reports, complaints, and sanctions, and oversight by parliamentary bodies.²⁷² The Montreux Document also advises Contracting States to adopt selection criteria that contain quality indicators related to ensuring respect for national and international law, rather than allowing the lowest price to be the sole criterion for selecting a PMSC. These criteria, laid out in Good Practices 6-13, include:

- past conduct of the PMSC and its personnel, and specifically where there has been past unlawful conduct, the remedy of the conduct, for example by providing individuals harmed with appropriate reparations;
- financial and economic capacity of the PMSC for liabilities that may be incurred;
- possession of required registration, licenses, or authorizations;
- accurate and current personnel and property records, in particular for weapons and ammunition;
- sufficient training in a number of areas, including on respect for national law and international humanitarian and human rights law, rules on the use of force, cultural training, complaints handling, and measures against bribery and corruption;
- lawful acquisition and use of equipment, in particular weapons;
- internal organization and regulations, such as the existence and implementation of policies relating to international humanitarian and human rights law and the existence of monitoring, supervisory, and accountability mechanisms, including internal investigation and disciplinary arrangements, third party complaint and whistleblower mechanisms, and regular reporting of incidents;
- and, finally, respect for the welfare of personnel, to include adequate pay and remuneration, health and safety policies, ensuring personnel's access to travel documents, and preventing discrimination.

In addition to contractual clauses requiring that the PMSC respect relevant national and international humanitarian and human rights law, these criteria should be explicitly referenced

in the terms of the contract. Good Practice 14 also suggests that the Contracting State include contractual provisions requiring appropriate reparations to those harmed by misconduct, and retain for itself the ability to terminate the contract for failure to comply with its provisions. Additional terms of the contract should include, whenever possible, the ability to identify PMSC personnel and their vehicles and, in consultation with the Territorial State, rules of conduct for PMSCs and their personnel including on the use of force and firearms and reporting of incidents to appropriate authorities. Good Practice 15 suggests that these contractual terms be extended to all subcontracted PMSCs and Good Practice 17 advises Contracting States to use pricing and duration incentives to promote compliance with the terms of the contract.

For Territorial States, it is suggested that PMSCs and/or their personnel be required to obtain an authorization, such as licenses or registrations, to provide services. Procedures for authorizations are laid out.²⁷³ Key among them are the designation of an adequately resourced central authority to handle authorizations; transparency of the authorization process (through public disclosure of authorization procedures, non-discriminatory fee schedules, and granted authorizations, publication of information on incident reports, complaints, and sanctions, and oversight by parliamentary bodies); and consideration of a PMSC's ability to conform to national and international law and the inherent risks associated with service provision, as indicated by past performance, background checks, and corporate structures. Similar to the Good Practices for Contracting States, criteria and terms are laid out on which to base the granting of authorizations to PMSCs and their subcontractors so as to ensure that they respect relevant national and international law. The criteria, which serve as quality indicators and are to be embedded into the terms of authorization, are laid out in Good Practices 32-38 and mirror those detailed for the Contracting State.²⁷⁴ In addition, it is suggested that Territorial States require that a bond be posted that could be forfeited in the case of misconduct or noncompliance, and consider establishing a maximum number of personnel and equipment necessary to provide the services. Finally, additional rules on the provision of services are enumerated relating to rules and reporting on the use of force and firearms, rules on the possession of weapons, and identification of PMSC personnel and vehicles.²⁷⁵

For Home States, it is recommended that they consider establishing an authorization system through means such as operating licenses for companies, licenses for particular services, or export authorizations.²⁷⁶ Home States are advised to place rules on the accountability, export, and return of weapons and ammunition, and to harmonize authorization systems with those of other States. Good Practices 57-67 set out procedures, criteria and terms for such a system. Again, the procedures (assessing capacity to ensure adherence to national and international law and risk associated with services as indicated by past performance, adequately resourced authorization authorities, and transparency of authorization procedures), criteria, and terms of authorization mirror those laid out for Contracting and Territorial States.

The Montreux Document and the Ruggie Framework and Guiding Principles

Although we use the term due diligence throughout this report, the term does not actually appear in the Montreux Document, and, in fact, during negotiations, a number of States, with

the U.S. at the forefront, ensured that the terminology of due diligence was removed from the final document.²⁷⁷ **In a 2008 statement, Amnesty International remarked that one of the shortcomings of the Montreux Document was its failure to explicitly reference States' due diligence obligations.**²⁷⁸ The organization felt that another shortcoming was the failure to reflect the Protect, Respect, and Remedy Framework, which had been developed by UN Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, and adopted by the UN Human Rights Council in June 2008.²⁷⁹ The framework is based on three pillars. States have a duty to protect all human rights from abuses by, or involving, transnational corporations and other business enterprises through appropriate policies, regulation, and adjudication. Businesses have the responsibility to respect human rights, which entails acting with due diligence to avoid infringing on rights and addressing adverse impacts on rights when they are involved. States and companies need to ensure access to appropriate and effective remedies, both judicial and non-judicial. **Amnesty International noted that the standard language of "duty to protect" and "responsibility to respect" does not appear in the Montreux Document, "even though this construction constitutes the consensus formulation in relation to the standard governing business and human rights."**²⁸⁰

In June 2011, Special Representative Ruggie presented to the Human Rights Council the result of the final phase of his mandate, the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework (Guiding Principles).²⁸¹ The Guiding Principles reflect an effort to operationalize the Framework and provide concrete and practical recommendations on how to implement it. Much like the Montreux Document, the Guiding Principles do not create new international law obligations, rather their contribution lies in "elaborating the implication of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved."²⁸² As reflective of the current international consensus on business and human rights, it is valuable to assess how the Montreux Document's provisions measure up against the Guiding Principles.

The Montreux Document Good Practices on selecting, contracting, and authorizing PMSCs, and monitoring adherence to the terms of contracts and authorizations, dealt with in the next section, reflect key elements of the two foundational Guiding Principles with regards to States' duty to protect human rights – although the Guiding Principles do not approach the level of specificity of the Good Practices. The first Guiding Principle stresses that States must protect against rights abuses by business enterprises within their territory and/or jurisdiction, including through steps to prevent, investigate, punish, and redress abuses. **In this regards, the Montreux Document's Good Practices are very strong, since they clearly establish Contracting and Home States responsibilities for regulating and overseeing PMSCs' activities abroad through the contracting and authorization procedures and accompanying monitoring mechanisms, including sanctions.** The second foundational Guiding Principle establishes that States should set out the expectation that business enterprises respect human rights throughout their operations, and the commentary notes that this includes business operations abroad, "especially where the State itself is involved in or supports those businesses."²⁸³

The operational Guiding Principles in the first pillar elaborate on this idea by laying out the significance of the “State-business nexus” for ensuring rights protections. The fourth and fifth operational Guiding Principles are especially relevant with regards to States’ contracting with PMSCs. The fourth notes that States should take “additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies.”²⁸⁴ As will be addressed in the section on ensuring accountability, this is particularly important in the case of Contracting States since, as suggested in the commentary to the fourth principle, there is a greater likelihood that the acts of a contracted PMSC may be attributed directly to the State and entail a violation of the State’s international law obligations. The Montreux Document’s emphasis on the role of the Contracting State in exercising oversight and control of PMSCs recognizes that the Contracting State in times of conflict has a disproportionate role to play relative to Territorial and Home States in ensuring PMSCs’ respect for human rights.²⁸⁵ More poignantly, the fifth principle establishes that “States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.”²⁸⁶ Much as the Montreux Document states that Contracting States continue to have international law obligations even when contracting with PMSCs, the commentary to the fifth Guiding Principle remarks that States retain their international human rights law obligations when they source services privately that can affect the enjoyment of human rights. Again, the commentary stresses that State failure to ensure that business enterprises providing services respect human rights could result in legal consequences for the State. It is recommended that contracts “clarify the State’s expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises’ activities, including through the provision of adequate independent monitoring and accountability mechanisms.”²⁸⁷ The Montreux Document’s good practices provisions on contracting and authorizing and monitoring of contracts and authorizations clarify these expectations and call for the necessary monitoring and accountability measures, as already detailed.

The seventh Guiding Principle is apropos in the case of the PMSI as it addresses States’ responsibility to ensure business respect for human rights in conflict-affected areas through measures such as engaging with business enterprises “to help them identify, prevent, and mitigate human rights-related risks,” “providing adequate assistance to business enterprises to assess and address the heightened risk of abuses,” “denying access to public support and services for a business enterprise that is involved in gross human rights abuses and refuses to cooperate in addressing the situation,” and ensuring that “policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.”²⁸⁸ The commentary to this principle, like the Montreux Document, recognizes that in conflict-affected areas Territorial States (“host” States in the language of the Guiding Principles) may be unable to protect human rights adequately, in which case Home States, and presumably Contracting States, have an important role to play “in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse.”²⁸⁹ That being said, the Montreux Document’s Good Practices do not specify any form of ongoing state engagement with PMSCs

to assess and address human rights risks related to their operations. It may be assumed that human rights risk analysis is to fall to the PMSCs to undertake, but the Montreux Document does not require human rights due diligence by PMSCs as a good practice for contracting or authorizations, and language relating to human rights impact assessments was intentionally removed from the final draft with the explanation that it was too vague.²⁹⁰

The Montreux Document Good Practices do detail that PMSCs' past performance should factor into contracting and authorizations decisions, and that administrative, contractual, civil, and criminal sanctioning mechanisms be put in place for failure to comply with the terms of contracts and authorizations. However, the Montreux Document itself does not state that a process

“the Montreux Document does not require human rights due diligence by PMSCs as a good practice for contracting or authorizations, and language relating to human rights impact assessments was intentionally removed from the final draft with the explanation that it was too vague”

should be established for assessing and ensuring that laws, regulations, and enforcement measures are effective in addressing human rights risks, nor does it declare that there should be policy coherence across governmental departments, agencies,

and other-State based institutions that shape business practices, as recommended in the eighth Guiding Principle. One could assume that this fifth year review of government efforts to meet their Montreux Document commitments is an attempt to assess effectiveness of policies, laws, and regulations, and foster policy coherence, but it is questionable if the review meets the Guiding Principles recommendation for a sustained and regularized impact assessment and policy coherence processes.

United States of America

Authorizing and Licensing

Receiving much less scrutiny than its role as a Contracting State, the United States is also a Home State to numerous private military and/or security contractors. Montreux Document Good Practices suggest Home States have an important role to play in the respect for international humanitarian and human rights laws, including generally determining which services are or are not for export and establishing a robust authorization system that includes criteria addressing training, monitoring, and compliance mechanisms. Many of the detailed Good Practices falling within these areas are similar to, or the same as, the Good Practices for Contracting States, such as training on laws of war, weapons, and human rights law. Because these issues are discussed at length below with respect to the U.S. as Contracting State, this section addresses U.S. authorizing and licensing statutes more broadly.

The Arms Export Control Act of 1968 (AECA) is the cornerstone of U.S. defense articles and services export control law.²⁹¹ The DoS implements this statute through the International Traffic in Arms

Regulations (ITAR), which are administered by the DoS Office of Defense Trade Controls.²⁹² Under ITAR, all persons or entities that engage in the manufacture, export, or brokering of defense articles and services must be registered with the U.S. government.²⁹³ The ITAR sets out the requirements for licenses or other authorizations for specific exports of defense articles and services.²⁹⁴ Contractors wishing to provide defense services must engage in a fairly burdensome process in order to receive a license from the DoS. For example, there is a “presumption of denial” for the licensing of military services where a lethal outcome is considered likely.²⁹⁵

Though complex, the ITAR contains no explicit references to humanitarian or human rights law or norms, or training on rules on the use of force or religious and cultural issues, or other specific criteria listed in the Montreux Document. For U.S. contractors that export defense services under contracts with States that have limited selection and contracting procedures, this makes ensuring respect of human rights norms all the more challenging.

Selecting and Contracting

During the selecting and contracting phase, Contracting States have the opportunity to imbue such processes with due diligence standards that can greatly enhance the enjoyment of rights under international law. The Montreux Document recognizes this potential and sets forth numerous Good Practices to that end. In reviewing whether Contracting States are adhering to such practices, the United States continues to draw intense focus. Such concern is appropriate given the sheer number of contractor personnel working under U.S. contracts and the dollar amount of U.S. contract obligations in conflict and post-conflict areas. For example, in Iraq during a three-year period, DoD contractor personnel numbered 165,000 at its apex in 2007, and 74,000 in 2010.²⁹⁶ In 2011, there were approximately 24,000 personnel and by 2012, almost 11,000 contractor personnel were still in Iraq.²⁹⁷ In Afghanistan, DoD contractor personnel numbered 36,000 at the end of 2007 and hovered near or over 100,000 for the last four years.²⁹⁸ Over the last five fiscal years, the DoD alone has had \$26-29 billion *annually* in contract obligations in the Iraq and Afghanistan theaters of operation.²⁹⁹

The United States has an extraordinarily complex system for selecting and contracting with private companies to carry out government services. As a starting point, private military and/or security companies are subject to the same set of statutes, regulations, and guidelines for selection and contracting that govern non-military/security contracts.³⁰⁰ Additionally, there exist supplemental regulations which guide the procurement process for defense contracts and any contracts performed outside the U.S. in a “designated operational area or supporting a diplomatic mission” or performing security functions.³⁰¹ On the one hand, having a uniform contracting process for *all* contractors seems fair and appropriate, yet factors that represent a “good value” for the government in the traditional contracting sense may have little meaning in the context of foreign affairs in a post-conflict scenario where military and security contractors are found. Concomitantly, having supplemental regulations that are tailored to the defense or security context overseas can be positive, but only to the degree that the complexity of overlapping regulations does not undermine selection criteria and contracting requirements or either process all together. As discussed below, **the U.S. regulatory system governing the selection**

of and contracting with PMSCs has evolved to respond to the concerns that motivated the Montreux process, but not without many challenges in the actual implementation of such regulations.

In general, a prospective contractor must satisfy certain standards to be determined “responsible” and therefore eligible to receive a contract award. In fact, agencies are prohibited from awarding a contract to a contractor that has not received an affirmative “responsibility” determination.³⁰² These standards include having:

- financial resources to perform the contract and ability to comply with the delivery or performance schedule;
- satisfactory performance record and satisfactory record of integrity and business ethics;
- necessary organization, experience, accounting and operation controls, and technical skills;
- necessary production, construction and technical equipment and facility; and
- be otherwise qualified and eligible to receive an award under applicable laws and regulations.³⁰³

In determining whether a prospective contractor has a “satisfactory performance record,” a contracting officer is required to consider all information in the Federal Awardee Performance and Integrity Information System (FAPIS) and other “past performance” information.³⁰⁴ Such “past performance information” *may* include the contractor’s record of: conforming to requirements; controlling costs; adherence to schedules; reasonable and cooperative behavior; integrity and business ethics; and business-like concern for the interest of the customer.³⁰⁵ Further, evaluation factors *shall* include, at a minimum, the following: technical, cost control, schedule, management or business relations, small business subcontracting, and “other” (e.g. late payment to subcontractors, trafficking violations, tax delinquency).³⁰⁶ Among other items, FAPIS may contain “brief descriptions of civil, criminal, and administrative proceedings involving federal contracts that resulted in a conviction or finding of fault, as well as all terminations for default, administrative agreements, and non-responsibility determinations relating to federal contracts within the past five years worth \$500,000 or more.”³⁰⁷

At the outset, the criteria for contractor qualifications seem plentiful. Yet, in the context of the requirements of the Montreux Document, there are some shortcomings. For example, the Montreux Document states that the selection of contractors take into account some of the following factors, among others: no reliably attested record of involvement in a serious crime (also applicable specifically to personnel carrying weapons), financial capacity for liabilities, measures against bribery, internal mechanisms for monitoring and supervising, external and internal complaint mechanisms, and the existence of policies relating to international humanitarian and human rights law. The criteria and standards set forth in the Federal Acquisition Regulation System (FARS) are largely concerned with technical ability, cost, schedule, and cooperative behavior with the client. There are, however, profound distinctions between performing a contract in a contingency operation environment versus in peace time. The Congressional Research Service remarks that:

[I]n an expeditionary or counterinsurgency environment—cost, schedule, and performance are often secondary to the larger strategic goals of achieving military objectives or denying popular support for the insurgency... [I]n a counterinsurgency, winning the support of the local village is often more important than staying on schedule; in responding to a humanitarian crisis, rapidly providing critical supplies may be more important than an increase in cost or meeting some technical specifications.³⁰⁸

Moreover, though past performance criteria include “integrity and business ethics” – such concepts are vague and arguably may not specifically include, for example, a policy on human rights law or an external complaint mechanism; nor are such concepts further explained in the regulations. Also striking is that FAPIIS includes criminal or civil proceedings but *only* where there are “convictions or findings of fault” involving the offeror or its principals.³⁰⁹ The Montreux Document suggests there be no reliably attested record of involvement in serious crime. A case in point is the contractor, Armor Group North America Inc (AGNA) – contracted to guard the U.S. embassy in Kabul, Afghanistan – that was accused by a former employee of sexual hazing, throwing drunken parties, and attending brothels, and settled a 7.5 million dollar lawsuit with the DoJ.³¹⁰ As there was no actual finding of guilt or fault, AGNA was not required to self report the settlement in FAPIIS. Further, while “serious incidents” involving weapons discharge, injury to persons or property, or misconduct by personnel should be reported (as will be discussed below in the U.S. Monitoring section), it is unclear whether such incident reports are required to be entered into FAPIIS, and if not, how the incident reports are factored into the past performance evaluation during the selection process. Finally, FAPIIS is a *self-reporting* system and generally unavailable to the public.³¹¹ This falls short of Montreux Document Good Practices, which emphasize public disclosure and transparency in the selection process, to include publication of incident reports or complaints, and sanctions where misconduct was proven.

Even with seemingly robust procedures in place, government auditing bodies have found lapses in the selection process. Audits performed in 2009 revealed a lack of standard evaluation factors and that “past performance” was rarely a deciding factor in awarding contracts.³¹² An audit performed two years later demonstrated that while some previous recommendations had been implemented, “weaknesses continue.”³¹³ For example, in December 2011, an audit of the DoS selection process to award contracts for security services in areas such as Iraq and Afghanistan was conducted at the request of the U.S. Senate Committee on Homeland Security and Governmental Affairs.³¹⁴ The Committee had expressed grave concern because it discovered that a five-year \$275 million contract had been awarded to EOD Technologies (EODT) despite the Committee’s earlier investigation which revealed that EODT and other PSCs working for the DoD had funneled U.S. tax dollars to Afghan warlords and that EODT’s performance under the DoD contract had been so inadequate as to “directly affect the safety of U.S. military personnel.”³¹⁵ The 2011 audit revealed that while the contracting officer supervising the award process had gathered past performance information on EODT, it did not include the negative performance issues identified in the Senate Committee investigation. No reason was provided as to how this could have occurred. The audit also revealed that the evaluation panel initially gave EODT an “unacceptable” past performance rating, but revised it to “marginal” after receiving EODT’s explanations.³¹⁶ Beyond that, the audit does not explain the basis for the revision. Less than six

months after awarding the contract to EODT, the DoS assured the Committee that its report would be provided to future evaluation panels of security service contracts.³¹⁷ EODT's task order for providing security services at the U.S. Embassy Kabul was ultimately terminated, however, the DoS did not terminate EODT's Worldwide Protective Services (WPS) contract (an umbrella contract to provide security services to the DoS in critical areas), which was awarded at the same time as the embassy task order, and EODT is still permitted to compete for future task orders under the WPS umbrella contract.³¹⁸

The Montreux Document also emphasizes taking into account during the selection process that contractor personnel are sufficiently trained on, among other issues, rules on the use of force and firearms, international humanitarian and human rights law, religious, gender and cultural issues, and respect for the local population, handling complaints by the civilian population, and measures against bribery, corruption and other crimes. Under FARS and DFARS, however, such items are not specifically criteria in the selection process, but rather are incorporated into the contracting process, as part of the contract.

Generally, for contracts performed outside of the United States, the contract contains, among others, the following requirements for which the contractor is responsible:

- Contractor compliance with and assurances that its personnel comply with—
 - U.S., host country, and third country national laws
 - Treaties and international agreements
 - U.S. regulations, directives, instructions, policies and procedures, and
 - Force protection, security, health, or safety orders, directives, and instructions issued by the Chief of Mission or the Combatant Commander
- Preliminary personnel assurances—
 - Security and background checks and medical and physical fitness
- Notice to personnel that they are subject to U.S. criminal and civil jurisdiction
- Establishment and maintenance of a list of personnel
- If weapons are authorized, the contractor must provide a list of personnel so authorized, and ensure that its personnel are adequately trained to carry and use them, and are not barred from possession of a firearm by U.S. law³¹⁹

For contracts performing private security functions outside of the United States, contractors are generally required to ensure the above criteria, as well as meet further requirements, such as “registering, processing, accounting for, managing, overseeing, and keeping appropriate records” of personnel performing private security functions, and the registration of weapons, armored vehicles, and other military-like vehicles in the Synchronized Pre-deployment Operational Tracker (SPOT).³²⁰

As to training on international humanitarian and human rights laws and cultural and religious issues, the regulations require a contract clause that includes specific reference to such issues for contractor personnel accompanying the armed forces deployed outside the U.S. and those performing security functions outside of the U.S. Contractors must ensure that their personnel

comply with all orders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals.³²¹ In the case of security contractors, weapons and equipment are included.³²² Additionally, the contract requires personnel be processed through a DoD pre-deployment center, to include training specifically on the Geneva Conventions, law of armed conflict, use of force, use of weapons, and country and cultural awareness.³²³ The regulations also specifically cover training for contractor personnel who will be interacting with detainees, which must address the international obligations and laws of the U.S. applicable to detainees, including the Geneva Conventions.³²⁴

There are no regulations, or DoD directives or instructions that refer explicitly to training on human rights law (excepting references to the Geneva Conventions, which embody human rights principles). However, pursuant to the National Defense Authorization Act for 2011, which required DoD to implement standards for private security contractors,³²⁵ since May 2012, DoD contracts for security services in areas of combat operations, contingency operations, or other military operations or exercises require conformance with PSC1.³²⁶ As already noted, PSC1 is shorthand for the ANSI/ASIS PSC.1-2012 American National Standard on Management System for Quality of Private Security Operations—Requirements with Guidance.³²⁷ PSC1 specifically incorporates the Montreux Document into its framework. For example, contractors must ensure training and awareness on international human rights law (to specifically include prohibitions on torture and trafficking) and relevant culture and religion,³²⁸ and contractors must establish, implement, and maintain procedures to ensure respect for human rights.³²⁹ The PSC1 Guidance then further elucidates the norms of international human rights law.³³⁰

While this section raises particular aspects of U.S. law and policy that do not measure up to Montreux Document Good Practices, as well as those regulations, directives, instructions and guidelines that do demonstrate a commitment to the Good Practices (though more so in the contracting phase rather than in selection criteria), set forth below are recommendations for the United States.

Recommendations

- *The U.S. government should develop specific authorization and licensing standards for U.S. contractors that export security services, which conform to Montreux Document Good Practices for Home States.*
- *The U.S. government should revise the criteria for a “responsibility” determination to incorporate specific reference to human rights norms.*

“Integrity and business ethics” as factors in past performance evaluations should be expanded upon to include demonstrated respect for human rights in business operations and by its personnel, existence of procedures that aim to prevent human rights abuses, and external and internal complaint mechanisms. Such human rights norms would include cultural and religious issues.

- *The U.S. government should amend selection criteria for contractors performing private security functions outside the United States and for those accompanying the armed forces outside of the U.S. to include specific indicators addressing training in the laws of war, the Geneva Conventions, and applicable human rights laws and norms.*

While training in the laws of war and the Geneva Conventions are incorporated into the contract for these two types of contractors, they are not specifically addressed in the selection process. Given the circumstances in which such contracts are performed, selection criteria for these two types should be developed to specifically include that the contractor have procedures in place to adequately train its personnel on laws of war, Geneva Conventions, and applicable human rights law and norms, in the same manner that a contractor must have the “necessary organization, experience, accounting and operation controls, and technical skills” to merit a “responsibility” determination.

- *The Federal Awardee Performance and Integrity Information System should include information regarding contractor and personnel misconduct beyond convictions and findings of fault.*

FAPIS or other database should incorporate or contain references to information gathered in the serious incident reports (SIRs), and pending investigations and settlements that involve allegations of misconduct by personnel.

- *The selection process for contractors should be more transparent and public. The U.S. government should make the Federal Awardee Performance and Integrity Information System available to the public, as well as past performance ratings and evaluations.*

This section also reiterates the relevant recommendations of the U.S. Commission on Wartime Contracting in Iraq and Afghanistan, including:

- *Improve contractor past-performance data recording and use by allowing contractors to respond to, but not appeal, past performance ratings, aligning past performance assessments with contractor proposals, and requiring agencies to certify use of the past performance database.³³¹*

United Kingdom

Authorizing and Licensing

The U.K. government has opted for a system of voluntary self-regulation in order to promote higher standards in the PMSI.³³² British PMSCs do not need an authorization or license from the U.K. government to operate abroad or to provide services to the U.K. government, although a license from the government of the State in which the PMSC operates may still be required. British PMSCs operating abroad are also subject to arms export control legislation and any arms embargoes that might be relevant to their operations.³³³

There are at least two reasons for the U.K. government’s preference for voluntary self-regulation: first, it avoids the difficulties inherent in investigating and enforcing orders in relation to PMSC

conduct abroad,³³⁴ even though it is acknowledged that outsourcing regulation does little more than shift the burden to the relevant trade association.³³⁵ Second, voluntary self-regulation makes financial sense. **By legitimizing the industry, it is believed that self-regulation is stimulating the defense industry generally.**³³⁶ By outsourcing legitimization to a voluntary, privately funded organization, the government evades the costs normally associated with regulation.³³⁷

The voluntary self-regulation approach has its roots in the FCO's 2002 Green Paper, which set out six options for PMSI regulation. Two of these involved bans on PMSCs: (1) a ban on privately contracted military activity abroad, or (2) a ban on the recruitment for military action abroad. Three options involved some sort of licensing regime. Option (3) would have required licenses to be obtained for contracts that involved certain services. Under option (4), PMSCs would have been registered with the government and required to notify them of their bids for PMSC contracts. The government would have retained the right to effectively veto any contracts that were found to be contrary to U.K. interests. Option (5) would have required PMSCs to be generally licensed to provide a range of services in a specified list of countries.³³⁸ The last option (6), proposed a form of self-regulation based on a voluntary code of conduct, and was lauded for being less burdensome than the other options and not involving government in unenforceable legislation. The drawbacks noted were the government's inability to act in the face of PMSC conduct that could damage U.K. interests, and the challenges that an industry association would likely face in attempting monitor its members conduct and ensure accountability and redress.³³⁹

In 2009, the FCO launched a public consultation to test option (6).³⁴⁰ Following the consultation the FCO determined that, "no conclusive evidence was provided to demonstrate that the Government's preferred option of a three part package of a domestic code of conduct agreed with the Government, using our leverage as a key buyer to raise standards and an international approach was not the best way of meeting the objective of promoting high standards of conduct by the PMSC industry internationally."³⁴¹ (Of course, no conclusive evidence was provided to demonstrate its preferred option *was* in fact the best way, either, it being an impossibly speculative task to prove definitively one way or the other which was the best policy option.) Ultimately, what it seemed to come down to was that a Government-led, mandatory licensing regime would be "unrealistic in the current financial climate,"³⁴² particularly as the PMSC industry was "not currently a priority."³⁴³ Voluntary self-regulation thus became official government policy for the PMSI.³⁴⁴ The main pieces of this system are the ICoC, and the ICoC Association (ICoCA), and the PSC1 standard.

The PSC1 standard was unveiled as the applicable standard for all British PMSCs working in complex environments on land overseas in December 2012.³⁴⁵ (A different voluntary standard is envisaged for maritime security operations.³⁴⁶) PSC1 is a national management system standard, which was negotiated by an international multi-stakeholder forum in which many U.K. stakeholders participated. The standard is designed to give effect to the ICoC – a code that lays out companies' responsibilities to respect human rights and IHL³⁴⁷ – through a set of auditable standards. It is hoped that PSC1 will eventually be the applicable standard at the international level as well, i.e. for receiving ICoCA certification, and through its development into

an International Organization for Standardization (ISO) standard. The UK Accreditation Service (UKAS) is currently working with independent auditors and a number of British PMSCs to test the accreditation and certification process, and the industry's SCEG is developing guidance in consultation with the U.K. government for British PMSCs to meet the requirements of PSC1.³⁴⁸

The ICoCA is supposed to provide independent certification and monitoring of PSCs. It is comprised of three pillars: a government pillar; a civil society organization pillar and a PSC pillar.³⁴⁹ The U.K. was a founding member of the ICoCA and committed £300,000 to its launch in September 2013. The ICoCA is not yet fully functioning.

Some commentators have voiced concerns regarding the efficacy of the ICoCA, particularly surrounding its ability to deliver real accountability, as it is feared that it does not have sufficient powers to effect real change in the industry. As Professor Nigel White has observed, "in reality the main sanction is likely to be the naming and shaming of companies who regularly violate the codes of conduct. Certainly evidence of compliance with international codes of conduct by companies in other areas is sparse."³⁵⁰ In the event of a serious violation, all that the Association can do is suspend or terminate the company's membership of the ICoCA³⁵¹ which, depending on the currency that the Association gains, may have little or no impact. Monetary penalties would arguably demonstrate that the Association is serious about ensuring respect of international humanitarian and human rights law.

But even if the ICoCA is a success, it alone is not a substitute for the Montreux Document. Despite claims to the contrary by the U.K. government,³⁵² the Montreux Document clearly recommends an authorization system based on operating and export licenses and devotes no fewer than twelve Good Practices to setting out guidelines for how a Home State should establish such an authorization system.³⁵³ That recommendation appears to be based on the very plausible assumption that legislation is the most effective means of achieving greater transparency, compliance with international and domestic law, centralization of information, and redress for victims.

Also of concern is that the U.K. government has not said what it will do in the event that voluntary self-regulation fails, or how and when it will determine if voluntary self-regulation is succeeding. The criteria against which the ICoCA are to be judged are unknown, and no plan appears to have been put in place in the event that it proves unable to raise industry standards. All that the government has publicly said is that it is willing to consider legislation if voluntary self-regulation fails.³⁵⁴ This is concerning because a return to the consultation could stall progress and jeopardize any gains that have been made in the interim.

Selecting and Contracting

The FCO's response to the Montreux+5 questionnaire as regards contracting practices is brief and lacking in specificity. It states that a copy of the ICoC is included in their tender documentation, and that it has been referencing the Montreux Document in all PSC contracts for the last 4 years. While this appears to be true, there is no reference to the Montreux Document in the

standard FCO Service Contract Conditions available online; these ought to be updated to reflect current practices.³⁵⁵ The FCO's response further states that the ICoC, the Montreux Document, and human rights are reflected "more widely" in their procurement processes.³⁵⁶ It is noted that Pre-Qualification Questionnaires (PQQ) are "particularly relevant" and that Key Performance Indicators (KPI) are used to monitor compliance with "detailed specifications for services required,"³⁵⁷ but neither are publicly available.³⁵⁸ Additionally, it is said that PSC contracts include "high-level operating procedures, service levels, training requirements and Rules on the Use of Force"³⁵⁹ but these are not further elaborated upon.

Some U.K. government PSC contracts are available online in redacted form, and these provided a useful source of information for this study. Two such FCO contracts examined for this report contained a single standard clause referring to the Montreux Document that reads:

Where the Contractor is either a Private Security Company and/or Private Security Service Provider the Contractor shall provide the Services in full accordance with the Code of Conduct for private Security Companies and Private Security Service Providers and the Montreux Document as detailed in Section 5, and any standards which follow there from e.g. such as the ASIS PSC1 standards for land based PSCs.³⁶⁰

It should be stressed that the contracts do not (and, it is believed, legally cannot under EU procurement rules³⁶¹) require that companies actually join the ICoCA, which weakens the government's ability to rely on this clause in order to demonstrate Montreux compliance somewhat. However, because joining the ICoCA and being PSC1 certified would in practice be the easiest way to demonstrate a company's ability to provide its services in full accordance with all these rules, it is hoped that this will be sufficient incentive for those wanting to do business with government. And, the government would point out, all of the PMSCs that the U.K. centrally contracts with are already ICoCA members.³⁶²

A review of the remainder of the contracts reveals an apparently standard clause requiring that companies and their staff "comply at all times with the Law"³⁶³ (defined as any applicable law, statute, bye-law, regulation, order, regulatory policy, guidance or industry code, rule of court or directives or requirements of any Regulatory Body, delegated or subordinate legislation or notice of any Regulatory Body.³⁶⁴) The contracts also reflect a number of the Good Practices, if imperfectly, such as: Good Practice 6 on vetting personnel, but it is not clear how rigorous this process is or whether it serves the Montreux Document's ends; Good Practice 8 relating to weapons registrations; Good Practice 9 relating to property records; Good Practice 10 relating to training, though it is not stated what such training should consist of, beyond any such security training deemed necessary by the Contracting Authority; Good Practice 11 relating to lawful acquisition of weapons and other equipment; and Good Practice 13 on personnel welfare.³⁶⁵ However, none of the terms are explicitly linked to the Montreux Document, which sometimes makes it difficult to determine whether they are truly applicable.

It is unclear which steps the U.K. government takes to comply with Good Practice 7, which advises that the PSC's financial and economic capacity are taken into account, though it can reasonably

be assumed that the government does this. As regards Good Practice 12, on taking into account existing policies on IHL and human rights and internal monitoring and accountability mechanisms, the contracts are lacking. Provisions on contract oversight are also lacking in specificity. The FCO requires periodic meetings between the Authority and the Contractor,³⁶⁶ but does not state how frequently they are to meet or how rigorous the review process would be.

Another issue that remains unclear is whether the government excludes companies from the bidding process on account of past human rights or IHL violations. The U.K. government has recently said that human rights is to be treated as a legal compliance issue and that public bodies *may* exclude tenderers from bidding on a contract where there is evidence of grave misconduct,³⁶⁷ but it does not require them to do so; nor has the government stated what standard of proof will be employed in such circumstances.³⁶⁸ The government's continued relationship with G4S despite a series of concerning incidents shows that the policy is not a zero-tolerance one, but the actual threshold for discontinuing a contractual relationship remains unknown.

Private Contracts

Researchers working on this report sent requests to several PMSCs and large multinational corporations, who purchase PMSC services, to review copies of their contracts for the purposes of this report. At the time of writing, none of the companies we approached had agreed to supply us with copies of their contracts. A PMSC industry representative who spoke to our researchers indicated that more companies are beginning to reference human rights in their contracts, but to a lesser degree than government and usually with respect to the Voluntary Principles on Security and Human Rights, as opposed to the Montreux Document.³⁶⁹ This was confirmed by BP, a representative of which informed us that although they were unwilling to disclose any contracts, he could confirm that BP referenced the Voluntary Principles in standard contract clauses.³⁷⁰

Recommendations

- *The U.K. government should utilize performance indicators to measure the success of voluntary self-regulation to show that it is serious about raising industry standards.*

Given that U.K. government has placed significant weight on voluntary self-regulation as a means of raising industry standards it should put in place a plan to measure the success of voluntary self-regulation. It should do so by making public a set of clear criteria, along the lines of Key Performance Indicators, which would define success at the domestic and international levels. This would include a series of deadlines by which time ICoCA must be shown to be succeeding in each key area.

- *The U.K. government should reconsider introducing a mandatory licensing regime for British PMSCs.*

As the Montreux Document gave clear preference to a centralized authorization/licensing regime, the U.K. government should reconsider its licensing options, particularly in the event that voluntary self-regulation fails to significantly raise industry standards. The details of such

a licensing scheme are largely beyond the scope of this Report, however, it could involve a combination of Green Paper options (3), (4), and (5) such that:

- The PMSC would be generally licensed to perform a range of services in certain countries. This would involve auditing to a standard similar to PSC1 but strengthened in certain respects (See Green Paper Option (5));
- A license would also be required for contracts to provide certain services (Green Paper Option (3)), similar to the current arms export licensing regime;
- Companies would be required to notify the U.K. government of bids (See Green Paper Option (4)), enabling the U.K. government to take action where British PMSCs pursued contracts contrary to British interests;
- In connection with such a licensing regime, the government could appoint an Ombudsperson to receive complaints about PMSC conduct in the field³⁷¹ and/or a designated public authority with responsibility for investigating alleged crimes for potential prosecution.³⁷²

- *The U.K. government should make greater efforts to ensure that as much information as feasible, pertaining to its contracting practices, is made available to the public.*

Providing publicly available information about contracting practices would be in keeping with Good Practice 4, which recommends transparency in contracting of PMSCs, to include public disclosure of PMSC contracting regulations, practices, and processes.

- *The links between existing contract provisions and the Montreux Document should be clarified and, in particular, new provisions on incident reporting and grievance procedures should be added. By clarifying existing terms and adding new ones to their contracts, the U.K. can set an example for the rest of the industry and other States to follow.*

Iraq

Challenges Licensing and Regulating the PMSI

Despite the dissolution of the CPA in 2004, the election of a National Assembly (Iraqi Parliament) in 2005, and the departure of foreign troops in 2011, the licensing system for PMSCs initially created by the CPA appears to still be in use in Iraq, however, with unclear legal authority. Based on the contents of CPA regulations, the Public Security Company Association of Iraq (PSCAI) published a guide to the PMSC licensing process that detailed the authorization and information companies needed to provide to the Mol.³⁷³ A similar process was set forth for the Kurdistan region.³⁷⁴

As noted above, CPA Memorandum 17 (2004) has been the regulation providing guidance for the registration, licensing and regulation of private security companies (PSC) in Iraq. In particular, according to Section 2 of the regulation, PSCs may not operate in Iraq without a valid “business license” and an “operating license” obtained - as specified in the Memorandum - from the MOT and Mol respectively for a period of one year.³⁷⁵ Furthermore, according to some commentators, the regulation provided a definition of the term “private security companies” which appeared to

exclude from its scope private companies providing military services, while it extended the term to Iraqi companies as well as to foreign companies providing security services for any employer in Iraq.³⁷⁶ CPA Memo 17 (Definitions) defined PSCs as “a private business, properly registered with the Ministry of Interior (MOI) and Ministry of Trade (MOT) that seeks to gain commercial benefits and financial profit by providing security services to individuals, businesses and organizations, governmental or otherwise.”³⁷⁷

CPA Memorandum 17 set forth the requirement that all PSCs must be registered with the Mol by June 1, 2005. According to the regulation, in the process of registration and licensing, PSCs, their officers and personnel will be vetted by Mol according to certain criteria, including that the personnel of PSCs be older than 20; be mentally and physically fit for duties; be willing to respect the law and all human rights and freedoms of all citizens of the country; and pass a security/background check which confirms that there is no prior felony or history of involvement in terrorist activity (Section 2.5-6). These and other criteria have been sometimes supplemented by instructions issued by the Mol, including the requirement that each PSC display an official badge of the company on all its vehicles, and that all PSC employees wear the uniform of the company and carry a valid ID card issued by the Mol.³⁷⁸ Furthermore, according to the PSCAI, which at the time assisted PSCs during their license application process, at least two on-site visits are made by the Mol “to check, among other things, weapons and vehicles, and undertake a personnel database check.”³⁷⁹ However, notwithstanding these guidelines certain failures in the vetting process have been identified when considering how this regulation has been applied in practice, including incidents involving PSCs employees with mental illnesses and alleged cases of the use of employees with past criminal records.³⁸⁰

Section 4 dealt with the refusal, suspension or revocation of licenses. In particular, licenses are subject to revocation and suspension where a PSC or an employee breaches the Memorandum or any other law in force in Iraq, which seems to include the *Rules for the Use of Force* and the *Code of Conduct* annexed to the Memorandum. Furthermore, PSCs found in breach of the regulation will lose the refundable bond of US\$25,000 which must be submitted by the PSC before commencing operations – as provided in Section 3. Generally, official information regarding suspended companies has been scarce but the UNWGM-Iraq noted in 2011 that “[a]pproximately 30 PMSCs have either had their license revoked, let their license lapse or have gone out of business.”³⁸¹ According to some reports, “this was the case of the PMSC Blackwater which saw its license lapsed without chance of renewal after the 2007 Nissour Square incident [... however] some of the company employees remain in Iraq and might have been employed by other companies.”³⁸²

Under Section 5 of the regulation, the possibility of periodic audits by the Mol regarding PSCs’ operation was also set forth, whereas Section 8 appears to articulate this mechanism by providing for the establishment of an independent PSC Oversight Committee responsible for the inspection and auditing of the implementation of the Memorandum, including assessing enforcement of the standards set forth therein. Commentators have noted, however, that there were apparently some differences between the Arabic and English versions of CPA Memorandum in relation to Section 8, as the Arabic text does not refer to the establishment of such an Oversight

Committee.³⁸³ Furthermore, this author has been unable to verify whether the PSC Oversight Committee was ever actually established – although the UNWGM reported that “a Directorate of Registration and Evaluation of Security Companies was established within the Ministry of the Interior according to ministerial order no.9887 on 27 September 2004 in order to examine applications for licensing.”³⁸⁴

After the initial registration process, the second step in the licensing process was to submit the information to the Mol, appearing in person with an attorney (and an interpreter, if necessary). The Mol would then make at least two site visits – at least one conducted by an officer of the Mol Office of PSC Registration and at least one conducted by a staff member in the Mol Intelligence Office; applicants were told that some visits would be scheduled, others might be unscheduled and unexpected.³⁸⁵ Following investigation and background checks, if the Mol found all to be satisfactory, the applicant would receive a one-year license.³⁸⁶ The company was then responsible for making quarterly updates to their Iraqi liaison that detailed any changes in personnel, weapons, or vehicles.³⁸⁷

As noted, these provisions appear to largely remain in place, as Iraqi officials have drafted national legislation concerning PMSCs that the Iraqi Parliament has not yet adopted. It is difficult to assess the potential impact the draft legislation might have if adopted, as it has not been posted on the Parliament’s website, which is the usual procedure for legislation that is under consideration.³⁸⁸ **According to the UNWGM - Iraq, which saw some version of the draft law, it would, if passed, introduce important improvements.** Significantly, it establishes a new requirement that PMSCs organize trainings for employees on respect for human rights. It also prohibits PMSCs from taking any actions that would violate the rights and freedoms of Iraqi citizens, the penalty for which would be withdrawal or suspension of a PMSC’s license to operate in Iraq. The draft legislation would definitively clarify that PMSCs and their employees do not enjoy immunity from Iraqi law for their work. It would incorporate all the elements of licensing that were put in place by the CPA and later expanded and refined. It introduces limits on foreign PMSCs, saying they would only be granted licenses “in cases of extreme security necessities with the approval of the Council of Ministers based on a proposal from the Minister of Interior.”³⁸⁹ To ensure accountability, PMSCs would need to guarantee that their employees are available to appear upon request before the relevant Iraqi authorities. It also makes PMSCs jointly responsible with their employees for acts committed in Iraq, and requires them to inform the Mol of any crime committed in the course of their activities.”³⁹⁰

Legislation on PMSCs, and many other critical issues, has not moved through the Iraqi Parliament, which some view as dysfunctional and ridden with corruption.³⁹¹ Indeed, the issue of private security is deeply intertwined with the larger problem of government corruption, especially the exorbitant salaries and benefits that Iraqi government officials receive. Members of Parliament, for example, receive a base salary of about \$10,000 (U.S.) per month on top of which they have a monthly budget of more than \$20,000 (U.S.) for rent, expenses, and personal security.³⁹² After serving one term in office, they receive a pension of 80% of their salary, plus a continuing allocation for security.³⁹³ There is cause for concern that government officials understand “security” as a good, rather than a rights of all Iraqi people. In light of the rapidly

declining security situation, Iraq risks becoming a nation where security is privatized and only those businesses, institutions, and individuals who can afford to pay for protection will be safe.

Recommendations

- *The government of Iraq is encouraged:*
 - *To pass national and regional legislation on the licensing of all PMSCs and to publicize this legislation widely.*
 - *To ensure the full implementation of this legislation, once it is adopted.*
 - *To ensure that the process of licensing is open and transparent, and free of any political interests.*
 - *To ensure licensing requirements for PMSCs meet the Montreux Document Good Practices, including on human rights and other relevant trainings.*
 - *To create a database of all registered and licensed PMSCs.*

Afghanistan

From 2001-2007, PMSCs present in Afghanistan operated under investment licenses and permits issued by the AISA (Afghanistan Investment Support Agency). The AISA license is a business license required to operate any business legally in Afghanistan and was not specifically designed for PMSCs. Investment permits from AISA³⁹⁴ functioned in practice as a procedure for the registration of private security guards and their weapons and, to the best of the author's knowledge, they did not seriously take into account human rights considerations for granting the licenses. Although the AISA license and the AISA investment permit for PSCs predated the Montreux Document,³⁹⁵ strictly speaking they cannot be considered a "corporate/specific operating license" that meets the requirements set out in the Montreux Document's Good Practice 25.

Since February 2008, possession of an investment permit from AISA alone was considered insufficient to operate in the security sector. Accordingly, PSCs have been required to obtain an additional license, first under the 2008 Procedure for Regulating Activities of Private Security Companies, and since the 2010 Presidential Decree No 62 ordering the dissolution of all PSCs in the country, under the 2012 Procedure for Regulating Activities of Risk Management Companies for those PSCs wanting to become RMCs.

As a general note, the main shortcoming of the aforementioned license procedures with regards to the Montreux Document Good Practices is their scope of applicability. First, neither the 2008 Procedure, the 2012 Procedure, nor the AISA investment permit extended their scope to PMSCs providing military services in Afghanistan, rather they are limited to private security services and risk management services. It is likely that, since many PMSCs were providing military and security services at the same time, some of them may have been operating in Afghanistan under PSC licenses or were licensed as logistic companies. However, individuals carrying out military services, self-employed or for PMSCs working for the international forces, particularly those

providing intelligence services, seem to have been considered part of the international military establishment and were not required to register or obtain a specific license for operating in Afghanistan.

Second, the 2012 Procedure only applies to those PSCs that wish to avoid disbandment and instead qualify as RMCs. However, the 2011 Bridging Strategy allows PSCs working with embassies, entities with diplomatic status and police training missions to operate indefinitely on the basis of provisions of the 1961 Vienna Convention. These PSCs benefit from diplomatic status as of members of the administrative and technical staff of the missions and are only required to be licensed PSCs 'in good standing' with the Afghan government (GIROA), according to an evolving "PSCs-list" maintained by the MoI and the APPF.³⁹⁶ According to the terms of the Bridging Strategy, "the relevant GIROA ministries will expedite the issuance of any... registration or licensing documents necessary for PSCs engaged to protect"³⁹⁷ the abovementioned entities, however, details of this procedure as well as the criteria and the terms of authorization remain unclear.

With regards to private security services, the content of the 2008 Procedure for PSCs met a number of the Montreux Document Good Practices regarding authorizations. For instance, it designated a central authority, the High Commission Board (HCB), which was made responsible for licensing and giving advice on the quality of services of PSCs. It also contained many of the quality criteria recommended in the Good Practices for granting the license, such as requiring the PSC to present a legitimate bank guarantee that would be forfeited, as a last resort, in case of unlawful acts by PSCs. It determined a maximum number of PSC personnel of 500 people, and it limited the use of force to cases of self-defense, defense of the clients, or "when defenseless civilian people get threatened or attacked and there are no any other responsible organizations in the area to help or rescue [them] (sic)." **At the same time, however, the implementation of the Procedure has suffered from several irregularities and has generally lacked proper enforcement in practice.** In particular:

- It is uncertain whether the HCB was ever functional before the Presidential Decree that ordered the disbanding of the PSCs came into force in 2010. No information has been found on the HCB's activities and the population seems to be generally unaware of its role. Furthermore, even though the HCB was meant to be represented at the regional level, it had no interaction or coordination with provincial and local authorities, who, in turn, had no access to the contracts signed by the PSCs operating in their territories and lacked the capacity to disband companies operating without a license.³⁹⁸
- With regards to the licensing procedure, concerns were raised about the subjectivity and lack of transparency regarding the licensing process. According to the UN Working Group on the use of mercenaries report on Afghanistan, "the process of selection and registration of a limited number of 39 PMSCs seemed to be responding more to commercial and personal interest than a competitive process taking into account human rights considerations, including individually issued permissions for some companies to exceed

the established limit of 500 employees, and involving attempts by previously registered Afghan companies to exclude their competitors for registration.”³⁹⁹ Furthermore, there were reports of a number of PSCs operating without licenses across the country and a lack of measures taken by the government to ensure that such companies ceased their activities. Indeed, several analysts noted that regulations governing PSCs were only enforced in Kabul, while outside Kabul local governors, chiefs of police, and politicians ran their own illegal PSCs.⁴⁰⁰

- Similarly, despite the inclusion of quality criteria requirements and rules for the provision of services in the Procedure very few measures seem to have been adopted by Afghan authorities to ensure that these criteria and rules were properly fulfilled by the PMSCs and their staff in practice. Worse, in some cases, the description of the quality criteria is insufficiently concrete. For example, while the Procedure provides for the involvement of Afghanistan Independent Human Rights Commission (AIHRC) in the vetting process of local PSCs employees in order to ensure that they have been not suspected or accused of human rights violations, this organization, as well as the PSCs themselves, reported the difficulty of vetting Afghan personnel due to the lack of accurate police records. Similarly, the procedure requires that companies commit to observing the standards laid out in the International Peace Operations Association (IPOA, renamed the International Stability Operations Association) code of conduct, however, no substantial guidance was provided to applicant PSCs (particularly local companies unfamiliar with the standards) on how the standards were expected to be applied in practice, and no reference was made in the document regarding measures in cases of non-compliance. Thus, the inclusion of a commitment to the IPOA code seems to have been a mere formality that, in practice, left the implementation and enforcement of the standards to each company. In addition, the Procedure requires PSCs personnel to have gone through previous military training, but no specific guidance is included regarding the content of the training programs. For instance, there is no added guidance on training on such significant issues as human rights, the use of force, and the carrying and use of weapons. In this regard, several NGOs have reported that PSC personnel are generally not well trained, and field research conducted for this report further confirms that PSCs did not customarily give employees formal training on international humanitarian and human rights law, but rather that their training and experience was obtained, in the best of cases, when they were regular soldiers. The UN Working Group on the use of mercenaries concluded that “PMSCs operating in Afghanistan do not have systematic vetting and training procedures.”⁴⁰¹
- No reference was made in the Procedure to the use of sub-contractors or the responsibility of the PMSCs for their conduct, despite the sub-contracting practices reported in the country. Yet, the Procedure prohibited the recruiting of people collectively from one tribe or party, apparently in reference to the use of irregular militiamen by PMSCs.

The implementation of the 2012 Procedure for RMCs is currently underway, so only preliminary comments can be offered here. According to the terms of the Procedure and additional information

stated in the Mol's official website, "RMCs will not provide security services but provide training and security advisory services to, and/or contract for such services with the APPF on behalf of, organizations and persons requiring security services."⁴⁰² Yet, RMC personnel are allowed to keep their weapons (which must be registered and licensed) and can use deadly force for the purpose of self-defense and defense of others. However, **with the exception of the requirement of certification of the non-existence of a criminal record for RMC personnel and a few simple rules for the use of force, the Procedure omits any human rights considerations when providing the criteria for granting or renewing licenses, and does not include such considerations in the terms of the licenses themselves.**⁴⁰³ The document simply states that "RMCs must employ personnel already professionally trained and qualified to deliver security advisory services or provide them with full proficient training prior to their employment," and that periodic refresher training is mandatory for all armed personnel.⁴⁰⁴ The section of the APPF official website for PSC/RMCs further states that the RMCs is "an organization that advises on the security of sites, buildings, persons [...] on the basis of professional norms derived from industry best practices,"⁴⁰⁵ without providing an explanation of the rules themselves or their specific content.

Regarding the implementation and enforcement of the 2012 Procedure, as already noted, at the time of this writing, 35 companies had been granted an RMC license, while 11 have applied for it and await a decision.⁴⁰⁶ However, there have been reports regarding the use of unlicensed PSCs and improper use of RMCs by implementing partners engaged in reconstruction projects, including exceeding the maximum number of allowable armed RMC personnel.⁴⁰⁷ Regulatory and monitoring bodies from Contracting States have noted that government regulations on RMCs are unclear and can be interpreted in different ways. Accordingly, they recommend that contracting agencies develop their own guidance on the proper use of RMCs.⁴⁰⁸

Recommendations

- *The government of Afghanistan should ensure that regulations regarding registration and licensing cover all types of de facto activities of PMSCs and extend to both military and security services.*
- *The government of Afghanistan should ensure that the process of licensing remaining PSCs and RMCs uses open and transparent procedures.*
- *The government of Afghanistan should adequately implement and enforce licensing procedures, including by providing oversight of the process by parliamentary bodies.*
- *The government of Afghanistan should clarify the licensing regulations for PMSCs and RMCs, in particular by adding more specific criteria related to human rights in accordance with the Montreux Document Good Practices. This may include, among other things,: 1) within sections on rules for the use, making reference to the human rights standards set out in the*

International Code of Conduct for Private Security Providers; and 2) requiring that specific training on human rights and humanitarian law be included in the training programs for PMSCs and RMCs.



3. Due diligence in monitoring PMSC activities

This section focuses on the human rights due diligence obligations of States to prevent rights abuses by exercising adequate oversight of PMSCs' activities specific to their roles as Contracting, Territorial, and Home States. Criminal and non-criminal accountability and sanction mechanisms are dealt with in the next section. According to Good Practice 21, Contracting States are called upon to establish administrative and other monitoring mechanisms that ensure the proper execution of the contract and accountability of PMSCs and their personnel for their improper and unlawful conduct. To be effective such mechanisms must be well resourced and possess independent auditing and investigative capacities. This is in keeping with the fifth Guiding Principle that States should exercise adequate oversight in order to meet their international human rights obligations when they contract with business enterprises, in part through the provision of independent monitoring and accountability mechanisms, as the commentary to the principle elaborates. The Good Practices go on to state that government personnel interacting with PMSCs must be trained and have the capacity to oversee execution of the contract by PMSCs and their subcontractors. This is reflective of the eighth Guiding Principle's recommendation that governmental departments and agencies which shape business practices be adequately informed, trained, and supported so that they observe the State's human rights obligations when fulfilling their mandates. The Good Practices also note that adequate oversight necessitates the collection of information on contracted PMSCs and their personnel, in particular with regards to any violations or investigations concerning their conduct. To this end, relevant stakeholders, such as PMSCs, other States, and civil society, should be engaged to foster information sharing and to participate in creating the appropriate oversight and accountability mechanisms.⁴⁰⁹ Finally, government personnel should be empowered to "veto or remove" particular PMSC personnel whose conduct has become an issue. Good Practice 20 elaborates some of the contractual sanctions that Contracting States have at their disposal in cases of misconduct, including immediate or graduated contract termination, financial penalties, removal from consideration for future contracts, and removal of specific personnel. This is in keeping with Guiding Principle 7(d) which recommends that States deny access to public services to business enterprises involved with gross human rights abuses, although the language of gross human rights abuses may be too limiting and may not capture the range of rights impacts that PMSCs can have.

Territorial and Home States authorizing PMSCs should also adequately monitor compliance with the terms of any authorization. This includes establishing an adequately resourced monitoring authority; providing the civilian population in areas of operation information about the rules PMSCs are to follow and available complaints mechanisms; engaging with local authorities to encourage reporting of any misconduct; and investigating reports of misconduct. Home States are encouraged to monitor compliance with authorizations, in particular by establishing close links between their authorization-granting authorities and their representatives abroad and other States, and by supporting Territorial States in their efforts to establish effective monitoring over PMSCs.⁴¹⁰ Similarly the commentary to the seventh Guiding Principle also recommends cooperation between home and host States' government agencies to achieve greater policy coherence and assist host states and business enterprises in meeting their human rights responsibilities. Good Practices 48 and 69 encourage Territorial and Home States

to impose administrative measures or sanctions, if a PMSC has operated without or in violation of an authorization. For Territorial States such measures may include revoking or suspending an authorization, removing specific PMSC personnel, prohibiting a re-application for authorization, forfeiture of bonds or securities, or financial penalties. Home States have similar sanctions at their disposal for violation of an authorization, such as revoking or suspending the authorization, prohibiting re-application, and civil and criminal fines and penalties.

United States of America

Monitoring

Like those addressing the contracting process, U.S. statutes, regulations, and agency instructions and directives addressing oversight and monitoring of PMSCs and their personnel are extraordinarily complex as well as convoluted. Provisions detailing responsibility for monitoring and what is to be monitored are spread throughout the entire framework of the contracting process and the regulatory system. Thus, numerous government departments, agencies, and commands seem to have the responsibility to establish and maintain procedures to “ensure” that PMSCs and their personnel are monitored and are in compliance with contract requirements. The burden of real-time monitoring and reporting, however, seems to fall more heavily on the contractor.⁴¹¹ **In this sense, oversight of PMSCs seems to be viewed not only as a means of ensuring compliance with U.S. laws and regulations, and international law (e.g. the Geneva Conventions or the UN Convention Against Torture) in order to minimize external harms, but primarily as basis for gathering data to inform agency decisions about future contract awards.** Further, the concerns of “contractor oversight” and “contractor management” seem to be largely focused on stemming contractor waste, fraud and corruption.⁴¹² The Montreux Document, however, is less concerned with contractor fraud and more with compliance with international law, particularly international humanitarian and human rights law. For example, in the Montreux Document, “monitoring compliance” is parceled with “ensuring accountability” – in the context of providing for criminal jurisdiction and non-criminal accountability for improper and unlawful conduct of PMSCs and their personnel. While “oversight” of PMSCs may cover fraud and waste concerns as well as international law compliance, there is a substantial distinction between the two goals. Therefore, the following discussion addresses oversight and monitoring of PMSCs only to the degree they address the Good Practices and general spirit of the Montreux Document.

As discussed above, all contractors are required by contract to ensure that their personnel comply with all U.S. laws, regulations, directives, policies, and, procedures, host country and third country laws, and international treaties and agreements.⁴¹³ However, how the contractor “monitors” its personnel to ensure that compliance occurs may, in most cases, be largely up to the contractor.

At a minimum, contractors operating outside the United States in critical areas are required to maintain with the designated government official a current list of all of their contractor personnel in the areas of performance as well as a specific list of those personnel authorized to

carry weapons.⁴¹⁴ For those performing private security functions, contractors are required to report incidents (known as “serious incidents”) in which:

- a weapon is discharged by PSC personnel;
- PSC personnel are attacked, killed or injured;
- persons are killed or injured or property is destroyed as a result of conduct by PSC personnel;
- a weapon is discharged against PSC personnel; and
- active, non-lethal countermeasures are employed by PSC personnel in response to a perceived immediate threat.⁴¹⁵

Department of Defense Instruction 3020.50, which is the primary governing instruction applicable to the DoD, DoS, USAID, and all U.S. federal agencies using private security contractors in contingency operations, humanitarian or peace operations, or other military operations or exercises, places responsibility upon the geographic Combatant Commander to implement and manage procedures in order to:

- keep appropriate records of PSCs and PSC personnel;
- verify that PSC personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon;
- establish a weapons accountability procedure;
- report incidents [as listed above];
- ensure an “independent review and, if practicable, investigation of incidents [as listed above] and incidents of alleged misconduct by PSC personnel.”⁴¹⁶

In June 2013, DoD revised the format of contract clauses to cover separately “contractors authorized to accompany U.S. armed forces deployed outside the U.S.” and “contractors performing in the U.S. Central Command [(CENTCOM)] Area of Responsibility.”⁴¹⁷ The contract clauses carry heightened monitoring standards. In the instance of PMSCs accompanying deployed forces, contractors are required to “implement an effective program to prevent violations of the law of war by its employees and subcontractors, including law of war training” and report any alleged offenses under the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act.⁴¹⁸ Contractor personnel are required to report suspected or alleged conduct where there is reliable information that the conduct violated the laws of war.⁴¹⁹ Oddly, neither contract clause requires the contractor to report incidents such as those listed above. Though, of course, DoDI 3020.50, which governs combatant commander reporting of such incidents, is still applicable. Further, a general DoD Directive sets forth an umbrella policy requiring the reporting of law of war violations committed by or against U.S. personnel, enemy persons, or any individual.⁴²⁰

The reporting of serious incidents (SIRs) has been the subject of several reports due to the concern that such incidents are not being reported accurately, or at all, that incidents are not being investigated, or that agencies are failing to coordinate SIR information and procedures effectively.⁴²¹ In response to legislative requirements to monitor PMSCs, DoD, DoS, and USAID individually set up procedures for the reporting, tracking, and investigation of SIRs.⁴²²

Some portions of DoS and USAID's reporting systems, however, are coordinated through DoD, which in addition to establishing Contractor Operations Cells (CONOC) in Iraq and Afghanistan, also established the Armed Contractor Oversight Division in Iraq (later renamed the Armed Contractor Oversight Branch/Bureau) and the Armed Contractor Oversight Directorate in Afghanistan.⁴²³ There are obvious operational difficulties inherent in having three individual agencies in the same theatre of operation whose reporting systems are simultaneously independent, overlapping, and partially integrated with or dependent on each other's system of reporting. Moreover, DoD and USAID rely on private contractors to provide oversight, receive, and respond to SIRs reported by other PMSCs. The potential for inaccurate reporting, conflict of interests,⁴²⁴ and malfunction is great. For example, some of the findings by auditors include: the databases do not capture all serious incidents or present a complete picture;⁴²⁵ not all incidents are tracked even though all incidents are required to be reported, tracked and investigated;⁴²⁶ failure to establish or understand procedures for monitoring SIRs;⁴²⁷ and failure to track subcontractor activity altogether.⁴²⁸

For both contractors accompanying deployed forces and those in CENTCOM, contractors are specifically required to use the Synchronized Pre-deployment and Operational Tracker (SPOT) to maintain data for all contractor personnel and continue to use SPOT to maintain "accurate, up-to-date information."⁴²⁹ By statute, the DoD-managed SPOT serves as the common database for DoD, DoS, and USAID.⁴³⁰ SPOT requires each agency to input various data for the purpose of tracking information relating to contracts and associated personnel. The agencies are further required to submit joint reports addressing the number and value of contracts, number of contractor personnel, number of contractor personnel performing security functions, and plans for strengthening the collection and coordination of contract information.⁴³¹ Though the three agencies are required to use SPOT, in fact, the Government Accountability Office (GAO) concluded that DoD, State, and USAID officials relied on other data sources to prepare their joint report.⁴³² The GAO report concluded overall that while each agency uses some type of database to track personnel information, it is not possible to obtain accurate total numbers because the methodologies are different. As a result, decision makers are prevented from obtaining an overall accurate picture of contracting activities in contingency operations.⁴³³

The Montreux Document suggests that Contracting States "collect information concerning PMSCs and personnel and on violations and investigations concerning their alleged improper and unlawful contract." In theory, the U.S. regulatory framework is exemplary of this Good Practice as there are numerous requirements regarding recording, monitoring, reporting, tracking, and investigating of PMSCs embedded in regulations, contract clauses, and agency guidelines, directives and instructions. However, it is clear problems continue to exist as illustrated above. Additionally, given the complexity of the reporting systems and that different agencies all have responsibility for monitoring, it is extremely unclear which agency will have responsibility for monitoring when U.S. forces leave Iraq but private contractors stay or how monitoring will be coordinated with the Territorial State.⁴³⁴ Importantly, it is also difficult to discern what impact such reporting requirements have had on overall compliance with domestic and international law.⁴³⁵

Recommendations

- *The U.S. government should establish and/or improve procedures for training the individuals and entities that are directly responsible for SIRs (reporting, tracking, and investigating) or have oversight responsibilities for such SIRs, to include the military command and PMSCs and their personnel.*
- *The U.S. government should improve coordination between DoD, DoS, and USAID for effective monitoring of PMSCs and their personnel.*
- *The U.S. government should improve its general approach to oversight of PMSCs by elevating the importance of contracting for contingency operations.*

“The U.K.’s ability to monitor the conduct of British PMSCs abroad is severely limited by the absence of government regulation”

to institutionalize contracting as a core function because “[a]gencies engaged in contingency contracting are not organized to promote cross-agency communication, to accommodate contractor support in strategic and operational force planning and preparation, to foster cost consciousness, or to address acquisition issues and challenges at the highest leadership levels.”⁴³⁶ In 2013, GAO concluded that DoD has not fully institutionalized planning for operational contract support throughout the military services.⁴³⁷ Without substantial resources for and importance paid to contractor support within government operations, effective oversight of PMSCs will remain elusive.

For effective monitoring of PMSCs and their personnel, the U.S. government needs to comprehensively improve upon the coordination and integration of contracting across and into government operations in contingency operations. The Commission on Wartime Contracting concluded that agencies need

United Kingdom

Monitoring PMSCs

The U.K.’s ability to monitor the conduct of British PMSCs abroad is severely limited by the absence of government regulation. For instance, the U.K. government cannot comply with Good Practice 68 applicable to Home States, which requires the government to monitor compliance with authorizations, or Good Practice 69, which imposes sanctions on PMSCs operation without or in violation of an authorization. Its only real means of monitoring whether Montreux Document commitments are being met is via the contracts that it enters into with PSCs for the provision of services abroad. As the government contracts with relatively few PSCs – the FCO currently has centrally awarded contracts with just 5 different PSCs⁴³⁸ – its influence is correspondingly limited.

For all other British PSCs with which the U.K. government does not contract, monitoring will be carried out by the PMSCs themselves, their clients, and the ICoCA, the latter of which the U.K.

government has repeatedly endorsed as one of the principal means of regulating the industry.⁴³⁹ It is intended that the ICoCA will function as an oversight and monitoring mechanism, but the procedures according to which it will carry out its work are still not developed. And concern has been expressed that the monitoring mechanism will not be sufficiently robust.⁴⁴⁰ In addition, it should be noted that currently governments are the only clients of the industry participating as members in the ICoCA,⁴⁴¹ and there is no evidence that private sector clients are, or plan to, require adherence to the ICoC by the PSCs they use. Thus, the U.K. government's reliance on the ICoCA to monitor PSCs' activities may have limited reach.

Monitoring Government Contracts: FCO

There is no centralized authority in the U.K. government for the receipt of complaints about PMSC conduct,⁴⁴² however, the FCO monitors its own contracts through random inspections, regular meetings of representatives of the parties to the contract, and periodic written reports.⁴⁴³ There is evidence that they have responded to criticisms based on poor monitoring practices in specific instances (explained below), but it is less clear whether this resulted in changes to monitoring practices generally as the overall content of their monitoring policy remains opaque. The UK's response to the Montreux+5 questionnaire did not help to clarify matters:

Our key security contracts with PSCs provide detailed specifications for the services required, which are then monitored closely against service levels and key performance indicators. These are managed day to day by the local Overseas Security Managers, working with the local Post Security Committees, and in liaison with the appropriate London Operations teams/Desks. In turn, this operation is overseen by the FCO's Estates and Security Directorate and subject to regular reviews and reporting by the Overseas Security Advisers.

In terms of encouraging other states in their efforts to effectively monitor PSC activity, in addition to using our own position as a buyer of PSC services to promote compliance with ICoC, we are also encouraging other state and non-state security sector clients to do likewise.⁴⁴⁴

This offers no clarification as to what the procedures for monitoring Montreux Document commitments might be. Without knowing what key performance indicators are (they are not included in publicly available contracts, but researchers working on this Report requested access to them – see above), it is impossible to assess whether these procedures are adequate.

The FCO maintains that its monitoring procedures of PMSCs are continuously improved on the basis of past experience,⁴⁴⁵ but evidence of any concrete measures is sparse. For example in 2007, the U.K. parliament received a complaint that British KBR managers fired an Iraqi woman working at the embassy after she did not perform sexual favors. Following a preliminary investigation, the Deputy Ambassador found the allegations credible but delegated follow-up investigations to KBR who, it is then claimed, carried out a sub-standard investigation and fired other local staff members who had spoken out in support of their female colleague. A high-

ranking FCO officer explained to the Parliamentary Committee that “it remains the obligation of the contractors [and not the FCO] to manage their staff.”⁴⁴⁶ The Parliamentary Report concluded that it was not appropriate to delegate investigation solely to KBR, and that more effective monitoring needed to be introduced “including through the inclusion of relevant provisions in its contractual agreements.”⁴⁴⁷ In response, the FCO defended its conduct in relation to the sexual harassment case and subsequently refused to re-open it on a number of occasions. It eventually accepted that in some instances joint investigation teams were appropriate and in fact opened a joint FCO/KBR investigation into a subsequent incident at the same embassy,⁴⁴⁸ but as investigations joint or otherwise are still not provided for contractually, it is unknown how engrained they are as a matter of policy.

An examination of an FCO PSC contract reveals that the only provision even relevant to incidents and investigations relates to discrimination. The provision requires the Contractor to assist the Contracting Authority with any request necessary to meet its obligations under the Equality Act 2010,⁴⁴⁹ which could theoretically include joint investigations. But this is inadequate to meet Montreux Document commitments because it is too vague and too narrow, in that it does not explicitly require PMSCs to investigate and does not extend to other forms of international humanitarian or human rights law incidents. This is further evidence that the U.K. government continues to under-utilize contracts as a means of ensuring adequate monitoring of PMSC conduct, in particular as it impacts on respect for international humanitarian and human rights law.

MoD

Alongside the FCO, the MoD is one of the most significant government purchasers of PMSC services. In 2013, the MoD announced its decision to move to a semi-privatized procurement model.⁴⁵⁰ The new legislation could mean that monitoring and oversight functions are substantially outsourced to the company,⁴⁵¹ which would be a significant privatization of sovereign functions. (Contract oversight/monitoring has even been characterized as an inherently governmental function.⁴⁵²) The impact this would have on the government’s ability to meet its Montreux Document commitments is not clear. The Bill is still being debated (at the time of writing it was still within the House of Commons) and this issue should be addressed before it is passed into law.

ICoCA

The rules and procedures that would govern ICoCA auditing have not yet been established; thus, it is difficult to assess whether it will be able to contribute meaningfully to PMSC monitoring. However, if the Articles of Association are to serve as a guide, there may be cause for concern, where the Articles of Association further specify that:

The Executive Director *may* initiate a field based review, unless the Board decides otherwise, (i) where the review of available information or a human rights risk assessment has identified a need for further monitoring within an area of one or more Member

companies' operations, or (ii) on request from a Member of the Association. In each case such field base review shall be aimed at improving performance or addressing specific compliance concerns.⁴⁵³

This suggests that field investigations likely would be a last resort, granted only when it is deemed appropriate by both the Board *and* the Executive Director, as opposed to being a routine part of monitoring the PMSI. Another potential concern is that it is currently envisaged that monitoring missions would be staffed largely by external experts. The absence of a significant permanent staff could mean that institutional knowledge does not build-up over time because those carrying out the monitoring would not be actually be a part of the organization.⁴⁵⁴ These and other questions ought to be addressed before the monitoring procedure are finalized.

Recommendations

- *The U.K. government should ensure the collection and public availability of more information about the activities of British PSCs and PSCs with which the U.K. government contracts.*

This recommendation is in accordance with Good Practice 21, which recommends appropriate administrative and other monitoring mechanisms to ensure contract compliance and accountability of PMSCs and their personnel for their conduct. In particular, 21 (d) suggests collecting information on contracted PMSCs and personnel, to include on violations and investigations of misconduct.

- *The U.K. government should consider means for ensuring that information on PMSCs is collected and made available on a global level, potentially via the ICoCA.*

Good Practice 21(f) encourages PMSCs, States, civil society, and other relevant actors to foster information sharing. As a multi-stakeholder forum, the ICoCA is well positioned to serve in an information collection and sharing capacity. The U.K. government, as a founding member and financial supporter of the ICoCA, could use its influence to further this recommendation.

- *The U.K. government should use its contracts to require PMSCs to put in place incident reporting, incident investigating, and grievance procedures, which are fair, transparent, understandable, well-publicized, and accessible. The U.K. government should be more transparent about what existing contract terms on monitoring mean in practice.*
- *The U.K. government should clarify what impact, if any, the proposed Defence Reform Bill will have on its ability to monitor PMSC contract compliance.*
- *Since it intends to rely almost exclusively on the ICoCA to monitor the British PMSC industry, the U.K. government must make efforts to ensure that the procedures are sufficient to facilitate rigorous, independent, and effective monitoring. It should consider supporting the ICoCA's monitoring mechanism financially and through the provision of research and technical assistance.*

Good Practice 21(a) recommends that monitoring mechanisms for the PMSI be adequately resourced and have independent auditing and investigative capacities. The U.K. government can use its role within the ICoCA to ensure ICoCA monitoring procedures meet these criteria.

Iraq

Inadequate monitoring of the PMSI

As the Iraqi government asserted controls over the PMSI, after 2009, there were attempts to improve oversight and monitoring, but like licensing, the efforts are hampered by lack of comprehensive PMSC legislation. As already described in the previous section, licensing procedures initially put in place by the CPA and later carried forth by the Mol, did have some elements of monitoring included in them. Memorandum 17 involved the Mol in vetting of PMSC personnel, allowed for announced and unannounced on-site visits and periodic audits, and required quarterly updates on changes to personnel, weapons, and vehicles.⁴⁵⁵ While PMSCs were required to report serious incidents to the Mol, in 2011 the UNWGM - Iraq was unable to obtain what it called “sufficient information” about the content or number of such reports.⁴⁵⁶

Additionally, starting in March of 2010, the Iraqi Mol required all PMSC vehicles to have monitoring cameras installed; companies were required to save footage of any incident so that it could be viewed by the Mol. However, the UNWGM - Iraq learned, in 2011, that the Mol was not yet actually checking video records.⁴⁵⁷ The Mol was also considering a system to monitor PMSC vehicles by satellite and GPS equipment, so that vehicles’ locations would be known and they could be contacted from a centralized control room; this may still happen.⁴⁵⁸

Recommendations

- *The government of Iraq is encouraged:*
 - *To pass national legislation on the regulation of PMSCs that includes designation of an adequately resourced and independent central authority to monitor licensed PMSCs.*
 - *To ensure that PMSCs are required to regularly report serious incidents to the monitoring authority, and that those incidents are investigated.*

Afghanistan

The Afghanistan Independent Human Rights Commission (AIHRC) has expressed the lack of capacity within the Government to properly monitor the activities of PMSCs.⁴⁵⁹ With regard to military activities of private contractors, this assertion is particularly true as no comprehensive legislation has been adopted for PMSCs in the country and PSC regulations (which establish administrative monitoring authorities) do not apply to private military services. Under the terms of the US-Afghanistan SOFA, the government of Afghanistan explicitly recognized “the particular importance of disciplinary control by the US military authorities over United States personnel;” yet, the government seems to have considered private military contractors as part of the international military establishment. As such, it has left the administrative control over the proper execution of contracts and the oversight of military contractors to the international military authorities and their respective regulatory and monitoring bodies.⁴⁶⁰

As regards security services, no monitoring mechanism was established until 2008. With the adoption of the 2008 Procedure for PSCs, however, the Afghan government took positive steps in this regard and designated the High Commission Board (HCB) as the authority responsible, among other things, for monitoring operations and structure of PSCs, verifying and investigating any violations committed by PSCs (as reported by the police headquarters and department of national security), and accordingly, deciding on the suspension and/or license cancellation of the company. The HCB was also given the authority to process public complaints of violations by PSCs and to undertake investigations.⁴⁶¹ In practice, however, the monitoring and investigation functions of the HCB were highly inoperative. The HCB had poor coordination with police headquarters and authorities at the local level, who seemed to be unaware of their duty to report on misconduct by PSC contractors to the HCB, and instances of corruption were also reported in areas such as Kandahar.⁴⁶² In addition, the role of the HCB and the associated complaint mechanism lacked proper dissemination among the civilian population, which was generally uninformed about the new rules imposed on private security contractors and the possibility of reporting incidents to a specific body.⁴⁶³ As a result, during the period the 2008 Procedure was in force, human rights incidents by PSCs were not properly identified or investigated.⁴⁶⁴ It is unclear, whether the lack of operational capacity of the HCB can be attributed to lack of sufficient resources, limited political control of the government areas outside Kabul, or obstructionism by commercial and political interests surrounding the PSC industry in provincial politics.

Since the 2010 Presidential Decree and the subsequent 2011-2013 Bridging Strategy, there has been uncertainty about who will monitor and control each private and commercial security activity. PSCs with diplomatic contracts or those engaged in police training have to be “in good standing” with the Mol, according to an evolving “PSCs-list” maintained by the Mol and the APPF,⁴⁶⁵ but it is unclear what this means and how it will be measured in practice. All evidence seems to indicate that no specific monitoring mechanisms have been put in place and that the command and control of diplomatic PSCs will remain subject to the contractual policies of Contracting States according to diplomatic regulations.

RMCs operations will be monitored, and in case of violations, investigated by the Mol’s PSC/RMC office, according to the 2012 Procedure. Violations of provisions of the Procedure will be resolved through a ‘grievance resolution procedure’ which will ultimately be decided in appeal by the High Council and may result in either the payment of a fine or the cessation of RMC operations.⁴⁶⁶ This process is exclusively internal and does not appear to allow for public complaints. At the time of writing, however, there are serious doubts that the monitoring function of the PSC/RMC office is fully operational. The PSC/RMCs office appears to be linked to the APPF machinery, and there have been allegations of RMC personnel performing supervisory functions that are properly the responsibility of APPF officers due to the lack of the latter’s capabilities.⁴⁶⁷

APPF guards will be monitored by APPF officers or non-commissioned officers (one APPF officer for every ten APPF guards) though in some areas, such as reconstruction, RMC personnel are partially performing these functions due to the lack of APPF capabilities.⁴⁶⁸

Recommendations

- *The government of Afghanistan should ensure that its monitoring mechanisms cover all types of de facto activities of PMSCs and have the authority to receive public complaints. A requirement to periodically report incidents of misconduct and wrongdoing of PMSCs should be included as a criterion for testing its adequate functioning in practice.*
- *Adequate regulation of PMSC activities may require coordination between national and international monitoring mechanisms. The government of Afghanistan should establish coordination between its national monitoring mechanisms and existing and prospective international monitoring mechanisms so that, in cases where national procedures fail or are demonstratively inoperative, victims have recourse to international independent oversight mechanisms.*



4. Ensuring accountability

In addition to the monitoring mechanisms related to effective oversight in contracting and the granting of authorizations, the Montreux Document spells out legal obligations and Good Practices for criminal and non-criminal accountability. These are essential for ensuring that PMSCs and their personnel are held to account for wrongdoing, and that those who have been harmed by misconduct are granted justice and access to remedy. Access to effective remedy will be discussed more in the next section. **Ultimately States are obligated to protect human rights, including from violations by non-state actors. However, this has proven particularly challenging for the PMSI, since Territorial States often have compromised rule of law and weak or inadequate judicial systems and Contracting and Home States often lack laws establishing sufficient extraterritorial criminal and civil jurisdiction.**

The first part of the Montreux Document is explicit about the legal obligations that Contracting, Territorial, and Home States have to ensure respect for international humanitarian and human rights law, especially during armed conflict in the case of the former.⁴⁶⁹ The very first statement makes it clear that there are certain non-transferable responsibilities of the Contracting State and that it retains its obligations under international law even if it utilizes PMSCs for certain activities.⁴⁷⁰ This includes, if the Contracting State is an occupying power, ensuring public order and safety and preventing violations of international humanitarian and human rights law. States' general obligations to ensure respect for international humanitarian law under Article 1 common to the four 1949 Geneva Conventions are enumerated in statements 3, 9, 14, and 18. Not only are States to refrain from committing or abetting violations of international humanitarian law, but they also must take steps to prevent violations and ensure respect by PMSCs. Contracting States must also ensure that in contracts PMSCs are made aware of their obligations and trained accordingly. Statements 4, 10, 15, and 19 lay out States' general obligations to protect human rights, in particular to protect individuals from the misconduct of PMSCs and their personnel that could infringe on their rights. It is incumbent upon States to adopt legislative and other measures to meet their obligations under international human rights law and take steps to prevent, investigate, and provide effective remedies for misconduct. As noted, this is reflective of the very first Guiding Principle, which states that States must take "appropriate steps to prevent, investigate, punish and redress such [human rights] abuse through effective policies, legislation, regulation, and adjudication."⁴⁷¹

States' obligations to ensure criminal accountability are also enumerated. Statements 5, 11, 16, and 20 are based on the text of the Geneva Conventions and reiterate that States have an obligation to provide for effective penal sanctions for PMSC personnel committing grave breaches of the Conventions. When an individual commits a grave breach, s/he must be brought to trial at home, through extradition to another country, or through transfer to an international criminal tribunal. Statements 6, 12, 17, and 21 recall that States are required to ensure criminal accountability for all international crimes, such as war crimes and offences like torture. Statements 7 and 8 remind Contracting States in particular that they can be responsible for violations of international law committed by PMSCs and their personnel if those violations are attributable to the Contracting State, consistent with customary international law,⁴⁷² and that in such instances the Contracting

State is obligated to provide reparations to those harmed.⁴⁷³ Statement 27, entitled “superior responsibility,” reminds government officials and directors and managers of PMSCs alike that they may be liable for crimes under international law committed by PMSC personnel under their effective authority and control.

In its 2008 statement Amnesty International, while recognizing that the Montreux Document references the responsibility of the Contracting State for acts of PMSCs’ attributable to it, critiqued the text for not specifying that “the State may also have responsibilities in respect of the conduct of PMSCs with which it contracts, independent of whether or not the contractual relationship creates any level of State attribution.”⁴⁷⁴ Citing the UN Human Rights Committee, the human rights organization stressed that under some circumstances States’ failure to ensure rights under article 2 of the International Covenant on Civil and Political Rights “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.”⁴⁷⁵ As noted, this perspective is in keeping with the commentary to the first, fourth, and fifth Guiding Principles, which raise the issues of States’ potential liabilities for abuses by private actors when failing to ensure those actors respect the human rights of others, and the possible legal and reputational liabilities arising for States because of the “State-business nexus.”⁴⁷⁶

More generally, Amnesty International remarked that there were a number of “substantive gaps” in the first section of the Montreux Document on international law, which could compromise the effectiveness of the document.⁴⁷⁷ The human rights organization critiqued the section for lacking enough “detail and precision [on] the applicable international law” and for missing “a number of key relevant propositions of international law,” which could limit the Montreux Document’s “utility either as guidance to States and PMSCs on their existing legal obligations or as a solid legal framework within which to implement the Good Practice guidelines.”⁴⁷⁸

The Good Practices with regards to accountability in the second section of the Montreux Document encourage Contracting, Territorial, and Home States to provide criminal jurisdiction over crimes under national and international law committed by PMSCs and their personnel. Good Practices 19 and 71 explicitly call for Contracting and Home States to ensure extraterritorial criminal jurisdiction over serious crimes committed abroad. All three types of States are encouraged to establish corporate, not just individual, criminal responsibility – with the caveat as consistent with the State’s national legal system.⁴⁷⁹ In addition to the administrative and contractual measures and sanctions discussed in the previous section, all States are called on to provide for non-criminal accountability mechanisms in the case of improper or unlawful conduct by PMSCs and their personnel, including civil liability. For Contracting and Home States this entails extraterritorial civil liability.⁴⁸⁰ It is also recommended that Territorial and Home States require PMSCs, or their clients, to provide reparations to those harmed by misconduct.⁴⁸¹

Finally, the Good Practices in the Montreux Document encourage States to cooperate with each other’s investigating or regulatory authorities in matters of common concern.⁴⁸² Specific to Contracting and Territorial States, and likely stemming from experiences in Iraq and Afghanistan

regarding the immunities granted PMSCs and the challenges in negotiating a Status of Forces Agreement between the U.S. and Iraq,⁴⁸³ the Good Practices advise, that when negotiating agreements, that affect the legal status of and jurisdiction over PMSCs and their personnel, both States should consider the possible impact of those agreements on compliance with national laws and regulations, and ensure proper jurisdictional coverage and appropriate civil, criminal, and administrative remedies for misconduct.⁴⁸⁴ **Amnesty International criticized these Good Practices for not providing “sufficient clarity in respect of several jurisdictional difficulties that may arise when multiple States have responsibilities relating to PMSC conduct.”**⁴⁸⁵ As an example the organization noted that while the Good Practices encourage Territorial States to negotiate agreements so as to avoid jurisdictional lacunae, the Territorial State is likely to be a “State in conflict” and “may not be in a position either to negotiate with other States or to have in place a justice system to deal with accountability of PMSCs.”⁴⁸⁶

Comparing the Accountability Provisions of the Montreux Document and Guiding Principles

A comparison of the accountability provisions of the Montreux Document to those of the Guiding Principles on Business and Human Rights provides a sense of the strengths and weaknesses of the Montreux Document. In addition to the first foundational principle of the Guiding Principles requiring that States protect human rights from abuse by business enterprises with their territory and/or jurisdiction by, among other things, investigating and punishing such abuses, the second foundational principle establishes that States must set out for business enterprises the expectation that they respect human rights in their operations, including abroad. The commentary notes that while international human rights law does not generally require States to regulate extraterritorial activities of businesses domiciled in their territory and/or jurisdiction (nor prohibits them from doing so), there are strong reasons to do so. Similarly, the commentary to Guiding Principle 7 advises States that they should take steps to identify and address gaps in policies, legislation, regulations, and enforcement measures meant to address business enterprises’ heightened risk of becoming involved in human rights abuses, to “include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses.”⁴⁸⁷ The commentary to operational Guiding Principle 26, which details possible legal and other barriers to effective State-based judicial mechanisms that provide access to remedy, remarks that victims of abuse may “face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim.”⁴⁸⁸ However, unlike the Montreux Document, the Guiding Principles do not explicitly recommend that States should establish extraterritorial criminal and civil liability or corporate criminal responsibility. While the principles speak broadly of the need to punish business enterprises who are involved in rights abuses, and, as will be discussed in the next section, the third pillar addressing access to remedy notes the importance of punitive sanctions as one substantive form of remedy, **the Guiding Principles are more weighted towards providing remedy to victims, while the Montreux Document stresses more heavily legal accountability for abusers rather than justice for victims.**

United States of America

Criminal Accountability

The U.S., as a Contracting and Home State, has not been able to create a fully functional and comprehensive system of laws and regulations to hold PMSCs and their personnel criminally accountable for violations of national and international law, to include crimes committed abroad. The U.S., therefore, has not fully met its Montreux Document obligations to provide the capability of prosecuting grave breaches of international humanitarian law and exercising criminal accountability for international crimes. It has also not adopted the Good Practices to provide for criminal jurisdiction over crimes under international law and national law committed by PMSCs and their personnel, to include establishing corporate criminal responsibility for PMSCs.

What currently exists is a patchwork of statutes that allows, in some instances, for the possibility of prosecution of PMSC personnel, but not PMSCs, either in federal civilian or military courts. However, each of these statutes has certain limitations in terms of scope, reach, and applicability, which create legal barriers to accountability that have been compounded by the failure to implement Montreux Document Good Practices 21 and 22. The former recommends that appropriate administrative and monitoring mechanisms be put in place to ensure accountability of PMSCs and their personnel, and the latter recommends that any agreements negotiated with Territorial States, which affect the legal status of and jurisdiction over PMSCs and their personnel, ensure proper jurisdictional coverage and appropriate criminal remedies.

Failure to adopt these and other Good Practices has perpetuated numerous practical and procedural barriers that limit the effectiveness of judicial mechanisms and do not allow for accountability and sufficient access to remedy. These include the granting of immunity to PMSC personnel; inadequate coordination among government agencies utilizing and overseeing PMSCs with regards to tracking, sharing information, and investigating and prosecuting serious incidents; almost complete lack of transparency around records of serious incident reports, investigations underway, and the status of cases; and practical and resource challenges associated with carrying out investigations, bringing charges, and trying cases in federal courts for crimes occurring abroad.

To date there have been only a handful of successful convictions of PMSC personnel for criminal conduct. This would indicate that the system for criminal accountability is not working effectively considering the lack of prosecutions in known serious incidents of alleged human rights violations and anecdotal evidence in media and other sources of various incidents of the misuse of force and other types of rights violations on which no action is taken, as detailed in the Iraq and Afghanistan sections. Statistical comparisons support the conclusion that “PMSCs and their members are not being held adequately accountable.”⁴⁸⁹

Patchwork of Statutes

There have been many in-depth analyses of the statutes that establish criminal accountability for PMSC personnel, and we will not replicate that work here.⁴⁹⁰ Rather, we will highlight limits in scope, reach, and applicability, and give examples of whether and how the statutes have been used to date. In addition to the 2007 amendment to the Uniform Code of Military Justice, which establishes jurisdiction over some PMSC personnel in military courts, there are four statutes establishing jurisdiction in U.S. federal civilian courts: the Anti-Torture Statute (18 U.S.C. § 2340), the War Crimes Act (18 U.S.C. § 2441); the Special Maritime and Territorial Jurisdiction (18 U.S.C. § 7); and the Military Extraterritorial Jurisdiction Act (18 U.S.C. § 3261-3267).

The *Uniform Code of Military Justice* (UCMJ) was enacted in 1950 to provide a uniform code for all substantive and procedural criminal matters applicable to the U.S. military. The UCMJ applies globally and is not limited territorially to the United States. However, prior to its 2007 amendment through the National Defense Authorization Act, the UCMJ applied to service members and “civilians serving with Armed Services in the field only in ‘time of war,’” which courts have interpreted as wars declared by Congress.⁴⁹¹ The amended UCMJ extends military jurisdiction in “‘time of declared war or a contingency operation,’ to ‘persons serving with or accompanying an armed force in the field,’” although what that means in practice is open to interpretation.⁴⁹² In March 2008, the Secretary of Defense released implementation guidance, which made it clear that application of the UCMJ “must be based on military necessity and supported by circumstances that meet the interests of justice.”⁴⁹³ Military commanders are given “the authority to ‘respond to an incident, restore safety and order, investigate, and apprehend suspected offenders’ in circumstances where a criminal act falling under the expanded UCMJ jurisdiction is suspected.”⁴⁹⁴ However, the Department of Justice (DoJ) is given a sort of right of first refusal in that it must be notified and offered the chance to pursue prosecution of the case in federal civilian courts. Trying civilians in military courts has largely been viewed by U.S. courts as a violation of constitutional rights to due process and trial by jury;⁴⁹⁵ therefore, using the UCMJ to hold civilians liable for criminal acts abroad has not been, and is unlikely to be, heavily utilized. To date there has been one reported use of the 2007 amendment to prosecute a civilian; an Iraqi-Canadian interpreter pleaded guilty to stabbing another contractor at a court-martial and was sentenced to five months confinement.⁴⁹⁶

The *Anti-Torture Statute*, which implements the obligation to criminalize torture under Article 5 of the UN Convention Against Torture and Cruel, Inhuman and Degrading Treatment, creates criminal liability for anyone outside the United States who commits or attempts to commit torture. U.S. nationals and foreign nationals can be prosecuted; the foreign nationals need only be found in the U.S.⁴⁹⁷ It has not been used to date against PSMC personnel, nor has the *War Crimes Act*, which implements U.S. obligations under the Geneva Conventions and imposes a criminal penalty on any U.S. national or member of the Armed Forces who commits war crimes domestically or abroad. It also covers offenses by perpetrators of different nationalities when the victim is a U.S. national.⁴⁹⁸ The War Crimes Act does not seem to apply to crimes committed during contingency operations involving foreign nationals as perpetrators, even if they are employed by the U.S. government or U.S. contractors.⁴⁹⁹

The USA PATRIOT Act of 2001 amended the *Special Maritime and Territorial Jurisdiction* (SMTJ) and makes portions of the criminal code applicable for offences committed by or against U.S. nationals on U.S. military bases and embassies located abroad as well as any place used by entities of the U.S. government.⁵⁰⁰ Crimes that are applicable include maiming, kidnapping, assault, murder, manslaughter and sexual abuse, assault or contact.⁵⁰¹ So far one contractor has been successfully prosecuted for assaulting a detainee in Afghanistan; the detainee, Abdul Wali, died from his injuries. David Passaro, a CIA contractor, was found guilty of assault and was sentenced initially to 100 months. His effort to appeal federal courts' jurisdiction over a military base in Afghanistan failed, but his sentence was reduced to 80 months.⁵⁰²

The statute most frequently used to date is the *Military Extraterritorial Jurisdiction Act* (MEJA), which applies to certain felonies, punishable by more than one year in prison under the SMTJ, committed by those employed by or accompanying the armed forces as well as former service members after their separation from service.⁵⁰³

In 2004, MEJA was amended to include "individuals 'employed by or accompanying the Armed Forces outside the United States,'" which encompasses civilian employees and contractors and subcontractors of the DoD, as well as other federal agencies and provisional authorities; however in the latter case only "to the extent such employment relates to supporting the mission of the Department of Defense."⁵⁰⁴ This represents a significant gap in

prosecution capabilities, since a civilian government contractor whose employment is unrelated to the mission of the DoD cannot be prosecuted under MEJA. Additionally, those residing in or nationals of the Territorial State cannot be prosecuted under MEJA, although it can be applied to other foreign nationals working under covered government contracts.⁵⁰⁵ In 2005, the DoD issued implementing regulations, under which the DoD's Inspector General has the responsibility to inform the Attorney General of the DoJ of a "reasonable suspicion" that a federal crime has been committed, and must implement "investigative policies" to bring MEJA into effect.⁵⁰⁶ The regulations indicate that the Domestic Security Section of the DoJ Criminal Division will liaise with the DoD and other federal entities and designate appropriate U.S. Attorney's Offices to handle the case.⁵⁰⁷

"There are a number of practical and procedural barriers to prosecuting extraterritorial crimes under MEJA, including issues related to utilizing witnesses, the collection and use of evidence, conducting investigations, and costs"

As of 2012, the DoJ has filed charges in 14 cases using MEJA.⁵⁰⁸ Based on our research – the DoJ does not provide comprehensive and detailed data on MEJA charges filed and the status of cases – we identified seven successful MEJA cases that have been brought to date involving contractors: (1) In *United States v. Maldonado*, a contractor was prosecuted for abusive sexual conduct with a female soldier in Iraq that occurred in 2004.⁵⁰⁹ (2) In May 2007, Ahmed Hasan Khan, a military contractor in Afghanistan was sentenced in the Eastern District of Virginia to 41 months in prison after being convicted of possession of child pornography.⁵¹⁰ (3) In January 2009, Ronald Lee Thames, a military contractor working for AGS/AECOM in Afghanistan, pleaded guilty before the federal court in the Western District of Texas to possession of child pornography.⁵¹¹ (4) In

February 2009, Don Michael Ayala, a civilian contractor stationed in Afghanistan, pleaded guilty to voluntary manslaughter in U.S. District Court for the Eastern District of Virginia for shooting a detainee who had set fire to another contractor.⁵¹² (5) A BlackHawk Management contractor working for the U.S. Army in Iraq, Jorge Thorton, was successfully convicted in a Western District of Texas Court of abusive sexual contact.⁵¹³ (6) In *United States v. Christopher Drotleff and Justin Cannon*, two DoD contractors working for Paravant, a subsidiary of Blackwater at the time, were convicted for involuntary manslaughter of a civilian in Afghanistan after shooting at a car and killing its passengers. In March 2011, Drotleff was sentenced to 37 months while fellow contractor, Justin Canon, was sentenced to 30 months imprisonment.⁵¹⁴ (7) In *United States v. Sean T. Brehm*, a South African contractor working for DynCorp International under a U.S. Army contract in Iraq was sentenced in July 2011 to 42 months in prison for assault with a deadly weapon after stabbing a USAID contractor with a knife.⁵¹⁵

Blackwater and the Nisour Square Shootings

On September 16, 2007, DoS security contractors from Blackwater (now called Academi) became involved in a firefight in a public square while securing an evacuation route for a convoy of U.S. officials. The contractors killed 17 civilians and injured over 24.⁵¹⁶ A subsequent investigation by the FBI and federal prosecutors concluded that the shooting was an “unprovoked illegal attack” on civilians.⁵¹⁷ Charges were brought against six Blackwater contractors in December 2008 under MEJA, but were subsequently thrown out by U.S. District Judge Ricardo Urbina, who held that the government improperly used compelled statements entitled to immunity made by the contractors in the hours and days after the event.⁵¹⁸ In April 2011, on appeal, the DC Circuit vacated the dismissal and revived the prosecution against the Blackwater contractors finding that the Judge Urbina had misinterpreted the law.⁵¹⁹ This September, U.S. District Judge Royce Lamberth ordered the DoJ to speed up its criminal case against the Blackwater contractors.⁵²⁰ On October 17, 2013, the DoJ brought charges for varying accounts of voluntary and attempted manslaughter against 4 former Blackwater contractors, Paul A. Slough, Nicholas A. Slatten, Evan S. Liberty, and Dustin L. Heard.⁵²¹ Prosecutors agreed to drop charges against a fifth contractor, Donald Ball, and Jeremy Ridgeway, a sixth contractor, pleaded guilty and is awaiting sentencing.⁵²²

Barriers to Criminal Accountability

In addition to the fact that MEJA only covers civilians and contractors working for the U.S. government, whereas PMSCs are also hired by private actors such as NGOs and corporations (some of which may be covered if they are subcontractors to U.S. government prime contractors), there are a number of practical and procedural barriers to prosecuting extraterritorial crimes under MEJA, including issues related to utilizing witnesses, the collection and use of evidence, conducting investigations, and costs. These challenges can act as a major barrier to prosecuting contractors.

- Federal courts have the power to depose U.S. citizens and nationals but may not subpoena foreign witnesses located in another country.⁵²³ However, under exceptional

circumstances the courts may take into evidence the depositions of foreign witnesses.⁵²⁴ If a deposition is taken, the defendant must be given an opportunity to attend, although this is not considered an absolute right.⁵²⁵

- The use of classified evidence may be another barrier. At times a defendant's constitutional rights may be at odds with national security.⁵²⁶ The Classified Information Procedures Act (CIPA) was enacted to provide balance between national security and the defendant's rights.⁵²⁷ "CIPA permits the court to approve prosecution prepared summaries of classified information to be disclosed to the defendant and introduced in evidence, as a substitute for the classified information."⁵²⁸ However, the summarized information may not be strong enough to prove guilt beyond a reasonable doubt to the jury.⁵²⁹

In addition, with regards to establishing jurisdiction under MEJA, Attorney General Lanny Breuer has remarked that in some cases relevant information about how a defendant's employment relates to the DoD's mission may be classified, and although the DoJ can use procedures set out under CIPA, the procedures "may not be adequate to protect national security information" and also establish that "a defendant is subject to MEJA."⁵³⁰ Breuer added that such "inquiries about the scope of a particular defendant's employment can be extremely challenging and resource-intensive, given that they often need to be conducted in war zones or under other difficult circumstances."⁵³¹

- Investigating a possible criminal act that occurred abroad also poses significant obstacles. Generally, a nation must seek permission from the nation where the incident occurred before investigation.⁵³² An investigation without permission may have grave diplomatic consequences and even criminal prosecution for the investigating officers.⁵³³ There is also the challenge of coordinating investigations and sharing information between multiple investigatory and judicial bodies (although typically there is a delineation of authority established), such as the various military service components' investigative commands, the DoS's Regional Security Officer, the DoJ, and potentially Territorial State investigatory authorities as well.⁵³⁴ If crimes occur in an active conflict zone, this may too pose constraints on carrying out investigations. Currently, there is no single U.S. government bureau in areas of contingency operations tasked with conducting investigations of crimes for possible prosecution in federal courts.
- MEJA cases are distributed to various U.S. Attorneys' Offices based on factors such as the district in which the arrest occurred or the defendant's last place of residence. However, many of these prosecutors' offices have limited experience and resources to try cases for extraterritorial acts. The 2004 amendment to MEJA was not accompanied by sufficient resources for the DoJ to engage in meaningful investigation of alleged crimes occurring overseas.⁵³⁵ In fact, in 2007 the Bush administration opposed measures to further expand MEJA's jurisdiction, arguing that investigating suspected felonies, and a greater number of them, overseas would take resources away from important investigations domestically.⁵³⁶

Beyond the challenges of applying MEJA in its current amended form, there remain other barriers to criminal accountability.

- PMSCs operating in Iraq and Afghanistan have been granted immunity for acts as long as they were in the scope of their contractual employment with the U.S. government, but the “contours of each immunity grant also created confusion as to what acts were covered and, as a result, put into question where the ultimate responsibility for prosecution rested.”⁵³⁷
- Transparency has also been lacking. As Dickinson has argued, transparency is a core public value, which must be upheld in particular when services traditionally provided by governments are outsourced.⁵³⁸ Not only is transparency a public value onto itself, it also is essential to key accountability mechanisms, such as increasing compliance by improving contract oversight and enforcement systems and fostering public participation; in fact, “transparency is a necessary condition for vital democracy, because transparency is what makes public participation possible.”⁵³⁹ Thus, in order to ensure oversight by parliamentary bodies⁵⁴⁰ and to foster information sharing between States, civil society, and other relevant actors so they can contribute to developing effective administrative and monitoring mechanisms to improve accountability,⁵⁴¹ **there must be greater transparency and public information available about the conduct of PMSCs.** This would include information such as records of serious incident reports,⁵⁴² investigations underway, referrals to military or federal judicial authorities, indictments filed, and the status of cases. The DoD, DoS, USAID, and DoJ have not made this type of comprehensive, or even summarized, data publicly available.

Recommendations

- *Congress should remove the jurisdictional gaps and practical barriers associated with MEJA by passing the Civilian Extraterritorial Jurisdiction Act. Agencies involved in MEJA investigations should better coordinate their investigations.*

The Civilian Extraterritorial Jurisdiction Act (CEJA), versions of which were submitted in the 112th Congress, would supplement (rather than replace) MEJA and fill gaps by extending the jurisdiction of federal courts to anyone “‘employed by or accompanying any department or agency of the United States other than the Department of Defense,’ when the conduct would be criminal if committed with the United States or within its special maritime and territorial jurisdiction.”⁵⁴³ The Attorney General would be responsible for providing personnel and resources for investigation and prosecution of offenses, and could request the assistance of other government agencies operating overseas, such as the DoD and DoS.⁵⁴⁴ Importantly, Congress should allocate the DoJ the funds to make this possible.⁵⁴⁵

- *Government agencies contracting with PMSCs must increase transparency on matters relating to alleged misconduct of PMSCs and their personnel.*

The U.S. government is not adopting Good Practice 4(c) which recommends the “publication of an overview of incident reports or complaints and sanctions taken where misconduct [by PMSCs and their personnel] has been proven.” Currently, there is no single government agency or database which aggregates data on PMSCs involvement in serious incidents. PMSCs

report incidents to whichever government agency they are contracted and it is not clear that agencies share this information with each other. Reports of serious incidents are not made publicly available. The DoD, DoS, and USAID are already entering extensive information about contracted PMSCs and their personnel into the Synchronized Pre-deployment and Operational Tracker (SPOT) database. While there have been some criticisms around the inadequate use and shortcomings of the database,⁵⁴⁶ it would be conceivable to expand it to collect information on PMSCs' conduct and actions taken. Whether in a coordinated fashion or individually, all government agencies employing PMSCs should publicly release aggregated data on serious incident reports, investigations, and referrals for prosecution to either federal or military judicial authorities. The DoJ should share information – in a redacted and aggregate form if necessary – on investigations, indictments, and the status and outcomes of cases.

- *The U.S. government must ensure that negotiated agreements with Territorial States address jurisdictional coverage of PMSCs and their personnel.*

As already noted, past and current agreements with Iraq and Afghanistan have led to much confusion over what exact immunities government contractors may or may not enjoy, what types of acts are covered, and who has ultimate responsibility for prosecution in cases of misconduct. Lessons should be drawn from these experiences to ensure full jurisdictional coverage over PMSCs and their personnel in future agreements with Territorial States.

- *Congress should examine shortcomings in U.S. criminal law to ensure extraterritorial accountability for PMSCs, and for PMSCs and their personnel contracted to non-State actors.*

Currently, there are no provisions criminalizing the extraterritorial conduct of PMSCs as organizations. At a minimum, provisions for mandating corporate due diligence in identifying, mitigating, and addressing human rights and humanitarian law risks and impacts should be explored. While provisions of the Anti-Torture Statute, War Crimes Act, and Special Maritime and Territorial Jurisdiction may apply to the acts of PMSC personnel contracted to private entities, possible gaps in these laws should be examined and proposals formulated to address them.

Civil liability

This section of the report evaluates the extent to which the United States has fulfilled its commitment, articulated in the Montreux Document, to “provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel, including ... (c) providing for civil liability, as appropriate.”⁵⁴⁷ Part I evaluates the status of tort liability. Part II evaluates alternative compensation schemes for those who have been injured by contractors. Part III assesses the viability of civil claims to enforce contractual terms. And Part IV discusses the suspension and debarment process. **Taken together, these avenues do constitute “non-criminal accountability mechanisms” for improper or unlawful conduct committed by contractors working under agreement with the United States. Yet, for each avenue, significant hurdles exist.** Thus, while the current system does permit possibilities for vindicating the Montreux obligations and Good Practices, further reforms would be needed to make such possibilities even more robust.

I. TORT LIABILITY

Tort law in the U.S. provides for the possibility of imposing civil liability on PMSCs. While the legal doctrine in this area remains in considerable flux, plaintiffs have gained access to the court system and have been able to litigate claims and negotiate settlements under the existing legal framework. Of the 27 civil cases brought against PMSCs in the U.S., 11 have been settled, 11 have been dismissed, 2 have been preempted by a specialized alternative compensation regime (the Defense Base Act, which is also discussed in Part II), 2 are pending trial, and 1 was moved to arbitration. See Appendix B for more details.

Nevertheless, the various categories of plaintiffs have each faced significant challenges in litigation. Military service members have encountered difficulties involving the justiciability of their claims, while contractor employees have often found their claims to be preempted by the Defense Base Act. Meanwhile, civilians injured by PMSCs face unsettled law related to the combatant activities exception to the Federal Tort Claims Act, a legal doctrine that restricts the scope of tort liability for conduct related to combatant or battlefield activities. **Thus, it is too soon to say precisely how robust tort liability is for these different categories of plaintiffs,** though at least the possibility for PMSC civil liability does exist, is being tested, and is even proving successful in some instances.

This part is divided into two subsections. The first outlines the three classes of plaintiffs who have brought claims against PMSCs in courts within the United States, describing the legal theories and statutes underpinning the claims and highlighting challenges faced in making each claim. The Montreux Document defines “PMSCs” as “private business entities that provide military and/or security services.”⁵⁴⁸ We selected cases for review based on whether the contracted activities were consistent with the Montreux Document’s description of military and security services activities.⁵⁴⁹

The second subsection examines two broad categories of barriers to civil liability of PMSCs. The first barrier is justiciability, specifically the question of whether the actions of PMSCs fall within the political question doctrine. Under this doctrine, if a court determines that a claim implicates the exercise of discretion by a political department of the U.S., the court may decline to hear the case, effectively barring the plaintiff from seeking relief in U.S. courts. The second of these barriers is the doctrine of preemption as it applies to sovereign immunity. The Federal Tort Claims Act waives sovereign immunity, normally a bar to litigation, to allow a limited class of tort claims to proceed against the U.S. government. However, state law tort claims that do not fit within the category of claims permitted by federal law are preempted and may not proceed. The extent to which claims against contractors are preempted under this framework is an unsettled area of law. In addition, the possibility of limited compensation under the Defense Base Act (discussed in more detail in Part II) also may be deemed to preempt broader state law tort claims. Overall, we conclude that while the U.S. does provide avenues for PMSC liability, it could do more to provide plaintiffs appropriate opportunities for relief.

A. Overview of Types of Claims and Claimants

This section provides an overview of the three types of claimants who generally bring tort suits against PMSCs in the U.S., and the types of claims they have typically brought. These three categories of claimants are: (1) military service members, (2) contractor employees, and (3) civilians. Thus far, military and contractor employee claimants have faced more challenges when bringing tort suits. Civilian claimants have had greater success in keeping their cases in the courts for longer, although they have faced substantial hurdles as well.

Military claimants usually have brought state law tort claims against PMSCs after suffering grave, permanent injuries or death as a result of the contractor's actions.⁵⁵⁰ Negligence is the most common claim, and the suits often have arisen from accidents involving PMSCs transporting troops.⁵⁵¹ Military claimants have also brought negligence claims for failure to maintain necessary security at military facilities,⁵⁵² as well as tort actions for wrongful death against PMSCs.⁵⁵³

Contractor employees have brought tort suits against PMSCs in courts within the U.S., primarily under state law,⁵⁵⁴ for negligence or gross negligence, depending on the degree of the harm alleged, and their negligence claims usually have been coupled with wrongful death or intentional infliction of physical and emotional distress.⁵⁵⁵ Some tort claims have been brought under federal statutes as well.⁵⁵⁶ In addition to the tort claims, contractor employees have brought claims for breach of contract,⁵⁵⁷ alleging fraud, deceit, fraudulent inducement, concealment, and intentional misrepresentation because the employees were placed in situations to which they had not consented as part of their employment contract.⁵⁵⁸ Finally, contractor employees have brought common law tort claims related to allegations of civil conspiracy and conspiracy to commit fraud in conjunction with the aforementioned state law fraud and misrepresentation suits.⁵⁵⁹ These claims involve an allegation that the fraudulent inducement and misrepresentation of the employment was part of a broader conspiracy to recruit employees under false pretenses.⁵⁶⁰

Civilians have initiated claims against PMSCs as a result of PMSC treatment of detainees,⁵⁶¹ participation in extraordinary rendition,⁵⁶² firing on vehicles,⁵⁶³ firing into crowds,⁵⁶⁴ and engaging in physical attacks against civilians.⁵⁶⁵ In these cases, civilian plaintiffs have brought multiple types of tort claims, including assault and battery, sexual assault and battery, wrongful, death, intentional infliction of emotional distress, false imprisonment, and negligence.⁵⁶⁶ In addition, they have often asserted claims under the Alien Tort Statute (ATS),⁵⁶⁷ and the Torture Victim Protection Act (TVPA)⁵⁶⁸ which allow aliens to bring claims for torts committed in violation of international law.⁵⁶⁹ The U.S. Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum* left open the door for corporate liability under the ATS,⁵⁷⁰ but limited ATS jurisdiction for conduct occurring abroad.⁵⁷¹ Thus, in order to succeed plaintiffs are required to show that the "acts giving rise" to the complaint are sufficiently linked to the U.S.⁵⁷² One court has already applied *Kiobel* to dismiss an ATS claim against a PMSC, but this decision is on appeal as of November 2013.⁵⁷³ Beyond the territoriality requirement, courts have also often required that, for certain categories of claims such as torture, the defendant PMSC must be deemed to be engaging in official state action.⁵⁷⁴ Likewise, courts have interpreted civilian claims brought against PMSCs under the TVPA as requiring official action.⁵⁷⁵ This requirement has turned out to be a significant barrier in the context of ATS and TVPA claims, as courts have generally declined to conclude that PMSCs

were engaged in state action.⁵⁷⁶ Thus, plaintiffs have had difficulty surviving early motions to dismiss on these claims, particularly given that courts now generally require complaints to satisfy a threshold plausibility standard in order to proceed.⁵⁷⁷

B. Overview of Defenses

In order to understand the possibility of holding PMSCs civilly liable in U.S. courts, we need to analyze the viability of two commonly-raised categories of defenses: the political question doctrine and preemption of state tort claims by the Federal Torts Claims Act (FTCA) or the Defense Base Act (DBA). **The political question defense has proven to be a significant barrier to suits by military service members, but less of an obstacle for contractor employees or civilian plaintiffs.** Civilian plaintiffs, for their part, have faced a significant hurdle in the FTCA preemption defense, though the precise contours of the doctrine remain to be worked out in the courts, and a number of cases have settled before final resolution. Meanwhile, the DBA preemption doctrine has barred most contractor employee claims.

1. Justiciability: The Political Question Doctrine

The political question doctrine analyzes whether the court system is the proper forum to hear a case, or whether it should more appropriately be decided by the political branches.⁵⁷⁸ Courts have deemed claims brought against PMSCs as non-justiciable under this doctrine when they have determined that the claims necessarily implicate military judgments.⁵⁷⁹ Nonetheless, most courts have refused to bar a plaintiff's claims as a political question in the early stages of litigation, generally allowing plaintiffs to defeat a motion to dismiss and proceed to discovery.⁵⁸⁰ The key then becomes the factual issue of whether or not the contractors were acting as part of a military chain of command,⁵⁸¹ thereby requiring the court to analyze military judgments.⁵⁸²

The political question doctrine has been most successful as a defense when a PMSC has asserted it against a military service member.⁵⁸³ In contrast, while courts have considered political question arguments against contractor employees, they have tended to set such defenses aside with regard to employee claimants and have adjudicated those claims on the basis of Defense Base Act arguments instead.⁵⁸⁴ Likewise, the political question defense has also generally been unsuccessful as a bar to civilian claims against PMSCs.⁵⁸⁵

2. Preemption Claims: The Federal Tort Claims Act and the Defense Base Act

The Federal Tort Claims Act (FTCA):

The FTCA⁵⁸⁶ waives the U.S. government's sovereign immunity and therefore permits litigants to bring some tort suits against the U.S.⁵⁸⁷ Nonetheless, Congress created certain explicit exceptions to the waiver of sovereign immunity. Most significant in this context is an exception that retains immunity for claims arising out of combatant activities. In addition to this statutory exception, the U.S. Supreme Court, in *Feres v. United States*, 340 U.S. 135 (1950), crafted a doctrine that retains sovereign immunity for claims brought by military service members against the U.S. The issue, therefore, is whether either or both of these exceptions apply to bar tort suits against contractors.

With regards to explicit statutory exception for combatant activities, the FTCA provides that the government's waiver of sovereign immunity⁵⁸⁸ does not apply to "[a]ny claim arising out of combatant activities of the military or naval forces, or of the Coast Guard, during time of war."⁵⁸⁹ This provision recognizes that different civil compensation rules apply for wartime activities, displacing normal tort duties of reasonable care.⁵⁹⁰

While PMSCs largely have failed in their efforts to assert this defense to bar civil claims brought by military service members or contractor employees, they have had some success in cases brought by civilian plaintiffs. Most notably, the D.C. Circuit in *Saleh* adopted a very broad interpretation of combatant activities, concluding that "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted."⁵⁹¹ The appellate court rejected a narrower approach articulated by the district court, which would have examined the degree of control the military had actually exerted over the contractors in question. Instead, *Saleh* adopts a conception of "battlefield preemption" under which all activities related to a military engagement would likely be covered.⁵⁹²

Other circuits have yet to determine their approach to this issue,⁵⁹³ but there are alternatives to the broad reading of the exception that was adopted by the DC Circuit. For example, courts could determine that the combatant activities exception does not apply to certain types of claims, such as torture. This is a position advocated by the Obama administration in a brief before the Fourth Circuit. The same argument was articulated by D.C. Circuit Judge Garland in his dissent in *Saleh*.⁵⁹⁴ Alternatively, courts could limit the defense only to situations where the PMSC personnel were acting under direct military control. This nuanced application of the combatant activities exception was advanced by the district court in *Saleh*, but was rejected by the appellate court.⁵⁹⁵ Even amidst the unsettled state of the law related to this particular defense, it is important to note that plaintiffs can be, and have been, successful, despite this potential defense.⁵⁹⁶

With regards to judicially crafted exceptions, such as *Feres* immunity, courts generally have not allowed PMSCs to assert *Feres* immunity. Because that immunity only bars service members from bringing tort suits against the U.S. government,⁵⁹⁷ courts have been reluctant to extend the immunity beyond the U.S. government and its individual employees to include contractor firms.⁵⁹⁸ One court has speculated that there might be situations where the *Feres* immunity could be extended to PMSCs if they were engaged in "sensitive military judgments."⁵⁹⁹ Nevertheless, even that court ultimately denied the application of *Feres* immunity to the case before it.

The Defense Base Act (DBA):

The DBA, which is discussed in more detail in Part II, provides a framework for compensation of contractor employees outside the tort system. Thus, courts have ruled that tort claims brought by employees based on injuries sustained within the scope of their employment are generally preempted by the DBA.⁶⁰⁰ Courts have not only focused on the fact that claimants already have a means of redress through the DBA, but they have emphasized the cost that ambiguous interpretations of DBA exceptions would have on employers.⁶⁰¹

Nonetheless, courts have recognized narrow exceptions to DBA preemption in cases where the incident that caused the claimant's injuries did not occur in the scope of employment, was expected or desirable, and was not caused by a third party.⁶⁰² In such cases, courts have analyzed the factual details that led to the claimant's injury in order to determine whether the DBA would apply.⁶⁰³

II. CIVIL COMPENSATION OUTSIDE THE CIVIL LITIGATION SYSTEM

In addition to tort liability, the U.S. provides three avenues of compensation outside the tort system for those injured by PMSCs: the DBA, the Foreign Claims Act (FCA), and solatia payments.

“Between the years 2001 and 2012, there have been 2,620 DBA claims for civilian contractor deaths and 68,869 more for civilian contractor injuries”

These three compensation mechanisms fulfill some of the Montreux obligations and Good Practices because they provide reparations to harmed victims of improper and unlawful conduct of PMSCs, as well as PMSC employees who have sustained injuries through their employment activities overseas. However, as

discussed above, these compensation mechanisms may preclude broader (and potentially more lucrative) tort litigation in cases where victims try to sue a contractor in a separate tort action after receiving compensation from statutes like the DBA and FCA. In addition, **because all three schemes ultimately involve the government compensating for the harms, rather than the PMSCs themselves, it is debatable how effective they are in providing accountability and disciplining contractor firms.**

A. Defense Base Act

The DBA covers U.S. employees at defense bases overseas, providing compensation to injured employees via their contractors' workers compensation insurance.⁶⁰⁴ Under the DBA, which extends the federal workers' compensation program that covers longshoremen and harbor workers,⁶⁰⁵ all U.S. contractors and subcontractors are required to maintain workers' compensation insurance for their overseas employees.⁶⁰⁶ Moreover, *any* employees of U.S. contractors (not just U.S. citizen employees) are eligible for compensation under the DBA.⁶⁰⁷

As the number of U.S. contract employees in Iraq and Afghanistan has increased, the number of DBA claims has risen from 170 claims in 2003, to 4617 claims in 2006, to 14,420 claims in 2007.⁶⁰⁸ Between the years 2001 and 2012, there have been 2,620 DBA claims for civilian contractor deaths and 68,869 more for civilian contractor injuries.⁶⁰⁹

The class of DBA claims that results in guaranteed benefits for employees is broader than in normal workers' compensation programs.⁶¹⁰ Nevertheless, as with general workers' compensation schemes, the DBA caps the dollar figure of the monetary payments available, thus arguably eliminating some of the disciplinary power the tort system might otherwise impose.⁶¹¹ In addition, as noted in Part I, PMSC employees who receive compensation under the DBA may find that their tort suit is barred (at least with regard to unintentional torts).⁶¹² Finally, under the War Hazards Compensation Act (WHCA), the U.S. government compensates the PMSCs for payments

made regarding employees' injuries and deaths from "war-risk hazards" arising from a war or armed conflict involving the U.S., thereby also reducing the exposure (and accountability) of PMSCs.⁶¹³ The DBA thus provides a viable form of civil compensation for contractor employees, although both the compensation to employees and the exposure of PMSCs are limited by the statutory scheme.

B. Foreign Claims Act

The FCA compensates inhabitants of foreign countries for any injury that results from noncombat activities of U.S. military personnel overseas.⁶¹⁴ Under the FCA, "if [there is] damage, loss, personal injury, or death [that] occurs outside the United States... and is caused by, or is otherwise incident to noncombat activities of... a civilian employee of the military department," a claim against the U.S. in an amount not more than \$100,000 may be settled and paid by the U.S. government, at its discretion.⁶¹⁵ In addition, the Secretary of Defense may also settle and pay claims for damage caused by a civilian employee of the DoD *other than* an employee of a military department.⁶¹⁶ The FCA is therefore likely applicable to those injured by PMSCs, at least those employed by the DoD.⁶¹⁷

The primary purpose of the FCA is to promote and maintain friendly relations with the host nation,⁶¹⁸ and the U.S. accepts responsibility for almost all non-combat damage caused by the members and employees of its armed forces.⁶¹⁹ Yet because of this focus on compensating third-party victims, the FCA does not compensate U.S. DoD personnel and their dependents.⁶²⁰ Thus, most U.S. PMSC employees are likely ineligible for compensation under the Act.⁶²¹

Moreover, although the FCA can provide compensation for both host nation employees of non-U.S. PMSCs and non-employee victims who end up being collateral damage to PMSC activity,⁶²² the FCA only covers claims arising from *non-combat* activities. Thus, the contractors' activities must not fall within the FCA's combat exclusion,⁶²³ which prohibits any claim that arises "from action by an enemy or result directly or indirectly from an act of the armed forces of the U.S. in combat."⁶²⁴ Recently, the American Civil Liberties Union (ACLU) submitted a Freedom of Information Act (FOIA) request for information relating to deaths and injuries of civilians in Iraq and Afghanistan.⁶²⁵ In response to this request, the government released information about approximately 500 claims, of which 204 (or about forty percent) were apparently rejected because the injury, death, or property damage had been "directly or indirectly" related to combat.⁶²⁶ Although some of these claimants ultimately may have received some form of condolence payment, such payments were likely far more limited in amount.⁶²⁷ Recent examinations of the claims database maintained by the U.S. Army Claims Service (USARCS) yield similar statistics.⁶²⁸ According to USARCS, 6,036 of the 13,319 claims submitted in Iraq between July of 2003 and 2010 – 45 percent of the total – were denied as a result of the combat exclusion.⁶²⁹

Unfortunately neither the information released in response to the ACLU nor the USARCS reports delineates those claims that have been brought concerning PMSC activity specifically. It is therefore impossible to determine precisely how many such claims have been filed or granted. Although the combat exception generally operates to bar FCA claims in a significant number of

cases, those cases may well not apply to PMSCs because contractors are not generally permitted to engage in direct combat activities anyway.⁶³⁰ In the end, whether the combat exception impacts accountability for PMSCs will depend on how the scope of the exception is applied. The Foreign Claims Commissions that rule on these claims are established in an ad hoc way by the military, and they do not use a uniform definition of what counts as sufficiently related to combat.⁶³¹ Likewise, there is no definitive guidance for courts.

In sum, although the FCA is unavailable for U.S. PMSC employees overseas, the Act has potential to compensate foreign civilians as well as non-U.S. PMSC employees, so long as the contractor activity escapes the combat exclusion. Nevertheless, it is important to note that, as with the DBA, payment under the FCA can bar subsequent civil tort claims.

C. Solatia Payments

Solatia payments are a form of condolence payments that may be made to foreign inhabitants who suffer collateral damage from PMSC activities in that country.⁶³² According to a recent report of the Government Accountability Office, there are two distinct solatia payment programs, one conducted by the DoS and one conducted by the DoD.⁶³³

The DoS's Claims and Condolence Payment Program in Iraq was initiated in 2005 and makes condolence payments, in accordance with local custom, to Iraqi civilians for death, injury, or damage resulting from harm caused in incidents involving DoS protective security details (PSD).⁶³⁴ PSDs can be made up of military personnel, private security contractors, or law enforcement agents. According to DoS officials, these payment amounts are based on the totality of facts surrounding the incident, such as degree of fault and the extent of the damage.⁶³⁵ Between the years 2006 and 2007, the DoS approved payment for 8 claims concerning PSD activity, totaling \$26,000.⁶³⁶

Separately, the DoD provides solatia and condolence payments to Iraqi and Afghan nationals who are killed, injured, or incur property damage as a result of U.S. or coalition forces' actions during combat.⁶³⁷ From fiscal years 2003 to 2006, DoD reported about \$1.9 million in solatia payments and more than \$29 million in condolence payments to Iraqi and Afghan civilians.⁶³⁸

While these payments express sympathy or remorse based on local culture and customs, they are not an admission of legal liability or fault.⁶³⁹ Commanders exercise broad discretion in determining whether a payment should be made and the appropriate payment amount.⁶⁴⁰ The DoD requires units to report to Congress summary levels of these payments.⁶⁴¹ Such reports include information on the unit that made the payment, the number of civilians killed or injured or whose property was damaged, the location of the incident, and the dollar value of the payment.⁶⁴² In reporting to Congress on the use of Commanders' Emergency Response Program (CERP) funds, the DoD provides summary data on the disbursements for the project categories, which include (1) condolence payments to individual civilians for death, injury, or property damage and (2) repair of damage that results from U.S., coalition, or supporting military operations that is not compensable under the FCA, known as battle damage payments.⁶⁴³ However, not all of the victims receiving payments are victims of PMSC activities specifically.

Moreover, these reports do not give a clear breakdown of which payments are in response to PMSC actions. Therefore it is difficult to know the extent of solatia compensation that is directly attributable to PMSCs.

III. PROCUREMENT OVERSIGHT: AN ALTERNATIVE MECHANISM FOR NON-CRIMINAL ACCOUNTABILITY

In addition to tort liability, civil enforcement through government procurement regimes is an alternative civil liability mechanism to hold private security contractors accountable for improper and unlawful conduct.⁶⁴⁴ In the U.S., the three potential avenues of non-criminal accountability under the procurement system are: claims disputes, bid protests, and the False Claims Act.⁶⁴⁵ Federal procurement claims are settled by the Armed Services Board of Contract Appeals (ASBCA), the Civilian Board of Contract Appeals (CBCA), and the Court of Federal Claims (COFC), although bid protests can be brought to the Government Accountability Office (GAO) or to the COFC. The False Claims Act is used to prosecute contractor fraud, which can include making false certifications, and these claims are brought in civil courts.

In theory, the U.S. government could use each of these procurement mechanisms to satisfy the Montreux Document's call for contracting states "to provide for non-criminal accountability mechanisms for improper or unlawful or conduct, including civil liability."⁶⁴⁶ It is true that, because the primary focus of these regimes is government best value, they cannot be exclusively relied upon for this purpose. However, if the government were to require that contracts incorporate terms that explicitly effectuated the substantive principles contained in the Montreux Document, these procurement system remedies could be more effective because a contractor who violated such terms could then face a price reduction penalty,⁶⁴⁷ or even a contract termination for default. The bid protest system would also allow other contractors to enforce solicitation evaluation requirements, if such evaluations were based on the principles.⁶⁴⁸ Similarly, if contractors were contractually required to certify compliance with principles based on the Montreux Document, the False Claims Act would permit both the government and non-government whistleblowers to bring fraud actions if those certifications were alleged to be false.

To date, however, neither the government nor private actors have fully deployed these contract mechanisms to implement the Montreux obligations and Good Practices. Critically, better acquisition planning and contract formation is needed because the principles first must be written into solicitations and contract clauses in order for these principles to become the basis for subsequent administrative or legal action. Despite frequent admonitions from procurement experts, enhancing the contracting corps has not been a U.S. government priority. In addition, other procedural hurdles may stand in the way of effectively using procurement law to enforce the Montreux obligations and Good Practices, such as jurisdictional constraints, standing requirements, and limitations on available relief.⁶⁴⁹

A. Claims

By including terms that would effectuate the substantive Montreux principles in all security contracts, the government could hold contractors accountable for breaches of those terms

through contract claims. Thus far, however, the contract claims mechanism has not been used for the purpose of enforcing the principles, and even if it were, its limitations make it inapt as a stand-alone Montreux enforcement mechanism. For example, only a narrow class of individuals

“To date, however, neither the government nor private actors have fully deployed these contract mechanisms to implement the Montreux obligations and Good Practices”

or entities may bring or appeal a claim, and only the contractor (not the government) may appeal a decision of the Contracting Officer per the Contract Disputes Act. In addition, the waiver of sovereign immunity for contract claims is limited to those in privity with the government (i.e. only prime contractors).⁶⁵⁰ Security is often subcontracted,⁶⁵¹ and therefore using contract claims to enforce principles contained in the Montreux Document will not reach the majority of PMSCs. Finally,

taxpayers or other interest groups have no standing, thereby limiting the ability of NGOs or watchdog groups to use contract claims to enforce the contracts.

B. Protests

The bid protest system provides a somewhat better mechanism than the claims system for upholding the Montreux obligations and Good Practices because it provides standing to a wider group. In particular, contractors who were not selected and who want to win the contracts for themselves can become de facto accountability agents. These excluded contractors have at least some incentive to enforce the substantive principles in the Montreux Document.⁶⁵² Thus, contractors can enforce the terms based on the principles in protests of past performance evaluations⁶⁵³ or technical evaluations of contractors' internal accountability systems. And successful protests could, in theory, block contractors who violate the terms based on the principles from retaining the awarded contract.

Significant hurdles remain in this area, however. To begin with, even if a contractor successfully argues that a past performance evaluation was flawed, a bid protest may nevertheless fail due to the discretion afforded to contracting officials. Furthermore, bid protests based on past performance would be unavailable to challenge a new contractor's failure to follow terms based on the Montreux principles because the new contractor would not have a past performance record.⁶⁵⁴ And, because of exceptions for national security that can arise for security contracts, successful protests may not actually result in termination of the contract.⁶⁵⁵

Standing and jurisdiction requirements further limit the oversight capability of the protest system. For example, in *Scott vs. United States*,⁶⁵⁶ the COFC dismissed a protest for lack of standing because the protestor failed to prove a direct economic interest by demonstrating that he had “a substantial chance of receiving award.” Thus, only other private security contractors have the potential standing to enforce terms based on the principles through the protest system, and, as with the claims system, third-party watchdogs are excluded from the process. In addition, the COFC cannot hear protests on task orders,⁶⁵⁷ which the U.S. continues to use extensively, though the GAO does hear some task order protests.

Finally, even when there is evidence of a procurement rule violation, a successful bid protest must demonstrate direct harm.⁶⁵⁸ Companies with more robust (and more costly) compliance programs may ultimately find themselves excluded and unable to argue that their compliance with terms based on the Montreux principles makes them a better value.

C. False Claims Act

The False Claims Act offers an even more promising, though still limited, potential avenue for accountability.⁶⁵⁹ The statute's *qui tam* provision envisions a wide range of "private attorneys general" (known as "relators") who can bring suit, thereby allowing a much broader class of individuals or entities to file claims than in the claims enforcement or bid protest systems. The statute's purpose is to thwart contractor fraud, and cases often turn in part on the content of the contractor's certifications to the government. Thus, the False Claims Act regime could be used to hold security contractors accountable for violations of the substantive principles of the Montreux Document if they had previously been required to certify compliance with these principles.

Nevertheless, proving a False Claims Act claim is not easy. For example, in *U.S. ex rel. Badr v. Triple Canopy, Inc.*,⁶⁶⁰ the complaint alleged the submission of fraudulent invoices for security guard services and false weapons qualifications certification. The court concluded, however, that the invoices submitted to the government made no mention of the quality of the guards, and therefore, despite the fact that the contract required certain training, those invoices contained no "objective falsehood" as required for an FCA claim to proceed.⁶⁶¹ Moreover, the contracting officer failed to review the certifications before any payment was made; thus, without any evidence that the government actually *relied* on the false certification, no False Claims Act violation was found.

In addition, because False Claims Act claims are actions for fraud, they must meet heightened pleading requirements under the Federal Rules of Civil Procedure.⁶⁶² These complaints must also establish independent personal knowledge of the fraud by the relator.⁶⁶³ This potentially poses a significant limitation to the effectuation of Montreux obligations and Good Practices because it will be rare that a single relator will have independent personal knowledge of more than anecdotal fraudulent violations of terms based on the principles.

Thus, although the False Claims Act offers a strong potential avenue of civil liability in the U.S., until the U.S. government clearly requires contractors to certify compliance with the substantive content of the Montreux principles, it will remain untapped. And even then, courts will need to be more flexible in interpreting the degree of knowledge a relator will need to provide in order to defeat a motion to dismiss and proceed to discovery.

IV. SUSPENSIONS, DEBARMENTS, AND COMPLIANCE AGREEMENTS

The U.S. system of suspensions, debarments and compliance agreements for contractors provides another mechanism of non-criminal accountability within the meaning of the Montreux Document. This system in theory would allow for sanctions to be imposed against PMSCs that

violate human rights, use-of-force rules, and related domestic and international substantive standards that are the subject of the Montreux Document,⁶⁶⁴ although the enumerated grounds for suspension and debarment are not currently clearly framed in these terms. Nevertheless, at least as currently constituted, the system lacks the transparency and differentiated data that would allow it to function as an effective accountability mechanism.

The U.S. uses its suspension and debarment enforcement mechanisms as sanctions in order to protect government interests from bad actors,⁶⁶⁵ rather than as punishment for contractors.⁶⁶⁶ Nevertheless, the system could potentially serve a strong disciplining role because, with limited exceptions,⁶⁶⁷ a contractor who is suspended or debarred is prohibited from obtaining future federal government contracts.⁶⁶⁸ Suspensions and debarments in the U.S. arise from either an agency's discretionary decision,⁶⁶⁹ a statutory mandate⁶⁷⁰ or, in some instances, an agency's conduct toward a PMSC resulting in a de-facto sanction.⁶⁷¹ With regard to discretionary suspensions or debarments, the terms of the Federal Acquisitions Regulation (FAR) would permit agency officials to effectuate the Montreux obligations and Good Practices by removing contractors from future competition who are not presently responsible, such as those who have a record of committing law of armed conflict and human rights abuses.⁶⁷² In addition, the U.S. has recently implemented special provisions for suspension and debarment for human trafficking.⁶⁷³ Terminations of existing PMSC contracts are also possible.

This framework gives the government the ability to ensure its PMSCs are complying with domestic laws and regulations, which would in theory encompass the Montreux Document's substantive concerns of ensuring contractor accountability for abuses of international humanitarian law and human rights law. In addition, currently all suspensions and debarments deriving from PMSC contracts in Iraq and Afghanistan with the U.S. Army, U.S. Air Force, U.S. Navy and U.S. Marine Corps are administered by the U.S. Army, which means that, consonant with Montreux implementation principles, there is a single executive agency responsible for enforcement and oversight of PMSC contracts. Yet, it is important to note that contractors' failure to follow human rights law or international humanitarian law would create grounds only for discretionary, rather than mandatory, action.⁶⁷⁴

Despite the fact that suspensions and debarments of PMSCs are under one military branch, tracking and transparency remain major obstacles. Indeed, the government does not publish or in some cases does not even collect data on particular PMSCs and any violations found, including specific information about whether a firm is a PMSC, whether the PMSC permits its employees to carry firearms, and what actions a PMSC may have taken to respond to alleged international humanitarian rights law violations and other disciplinary issues. Likewise, agency compliance agreements are not generally accessible to the public for open scrutiny and are not maintained in a uniform database that is searchable by the type of violation, the type of services provided by the firm giving rise to the sanction, or the type of rehabilitative action taken pursuant to the agreement.⁶⁷⁵ Without an orderly transparent record of data, oversight of the U.S.' PMSC contracts must rely upon individual anecdotal evidence and general contract oversight mechanisms.

A close review of a sampling of information the Army does maintain demonstrates the lack of useful statistical reporting that would be necessary to determine the adequacy of PMSC oversight according to the terms of the Montreux Document. For example, with regard to Iraq contracts, the Army reported that 718 contract individuals and firms working were either suspended, debarred or recommended for debarment from 2005 through September 13, 2013.⁶⁷⁶ Yet, the Army's data lack any specific information about PMSCs in particular (as opposed to non-security related contractors) because the Army does not maintain records searchable by category of contractor in this way. Without the maintenance of such critical information specific to PMSCs, the U.S. will have a hard time complying with the Montreux Document's core ethos of ensuring that PMSCs that commit violations are not permitted to continue to provide security services.⁶⁷⁷

Moreover, although a robust oversight network over contingency contracting exists—including the Special Inspector General for Iraq Reconstruction (SIGIR),⁶⁷⁸ and the Special Inspector General for Afghanistan Reconstruction (SIGAR),⁶⁷⁹ the U.S. Army Criminal Investigation Command's Major Procurement Fraud Unit (MPFU),⁶⁸⁰ Task Force 2010,⁶⁸¹ the Federal Bureau of Investigation's International Contract Corruption Task Force (ICCTF),⁶⁸² the Department of Justice's National Procurement Fraud Task Force (NPFTF),⁶⁸³ and the Offices of Inspectors' General within the DoD, DoS, and USAID⁶⁸⁴ – these agencies and units do not currently provide information specific to PMSCs that would permit review under the Montreux principles. Indeed, none of these investigatory bodies collects contractor information based on the type of services they provide, such as armed guard services, weapons maintenance operations services, detainee detention services, or consulting and training of local forces or security personnel services.⁶⁸⁵

Recommendations

Regarding tort liability, we make the following recommendations:

The court system within the U.S. is in the process of developing a variety of doctrines that will establish the contours of civil liability for PMSCs. All three types of claimants (military, contractor employee, and civilian) are at least formally able to initiate claims. While the applicable legal doctrines are unsettled and many cases are still pending, none of the cases thus far has resulted in an actual verdict in favor of the plaintiff. Nonetheless, some civilian plaintiffs have been able to achieve some redress through settlements. Likewise, though employee claimants have been unable to pursue tort claims because of DBA preemption, they do have limited avenues of redress available under the DBA itself (discussed below). Military claimants have faced more difficulty because of stricter applications of the political question doctrine when litigating their claims, but case law is still unsettled. In order to bring clarity and greater accountability to the civil remedies available in tort, the following reforms should be adopted:

- *The U.S. Congress should amend the FTCA:*
 - *to delineate the application of the combatant activities' exception to PMSCs and to adopt a narrow approach to this exception;*
 - *to specify that egregious violations of international human rights law, such as torture, do not fall within the FTCA's exemptions to the waiver of sovereign immunity;*
 - *to explicitly provide that Feres immunity does not apply to government contractors.*

Regarding civil compensation outside the civil litigation system, we make the following recommendations:

The DBA, FCA, and solatia compensation schemes can fulfill the Montreux obligations and Good Practices by providing compensation to PMSC victims and employees. While there are obstacles to bringing claims within each mechanism, the federal government has sought to strike a balance between providing some compensation and protecting the government (and its contractors) from potentially costly civil suits. Nevertheless, the following reforms would be beneficial:

- *The U.S. Congress should clarify that the “combat exclusion” should be defined narrowly to track US policies that already limit PMSCs to non-combat activity,⁶⁸⁶ so that PMSC activities are always potentially actionable under the FCA.*
- *The U.S. Congress should require the relevant agencies to provide more information about FCA claims and solatia payments, or the relevant agencies should provide this information without a congressional mandate. Specifically, reports should include a separate category listing those claims and payments that are related to PMSC activities (as opposed to activities of US military personnel).*

Such delineated reporting would allow greater transparency concerning both the harms allegedly caused by PMSCs and the extent of compensation being provided in order to track Montreux compliance.

Regarding procurement oversight, we make the following recommendations:

To maximize the potential of these procurement mechanisms, the U.S. should take the following actions:

- *Through executive branch action or Congressional mandate, the U.S. should ensure better contract formation and management by*
 - *incorporating terms based on the Montreux Document into all security contracts and requiring certifications of compliance;*
 - *requiring contracting officers always to consider the terms based on the Montreux Document in these contracts when making evaluations of contractor compliance.*

This reform would not only lead to greater compliance with the Montreux obligations and Good Practices, but would also ensure that any subsequent suit under the False Claims Act would not be dismissed merely because the contracting officer never considered the alleged false claim in the decision-making process.

- *The U.S. should remove privity requirements for claims enforcement*
 - *by directly entering into all security contracts rather than relegating them to the subcontracting level, or,*
 - *through Congressional action by amending the law to allow privity between the*

government and security subcontractors, and mandating that contract clauses related to the Montreux principles must flow down to all subcontracts from the prime contracts with the government.

- *The U.S. should consider terminations for default if there are breaches of terms effectuating Montreux principles once those terms are included in future contracts.*
- *The U.S. should elevate the weight of the principles in the solicitation evaluation criteria⁶⁸⁷ to provide better leverage for more conscientious firms to use protests as an enforcement mechanism.*
- *The U.S. Congress should amend the False Claims Act to allow broader claims to proceed, even if based only on anecdotal or representative evidence of violations.*

Regarding suspensions, debarments, and compliance agreements, we make the following recommendations:

In order to use the suspension and debarment system to effectuate the Montreux obligations and Good Practices, the U.S. should undertake the following reforms:

- *The U.S., through executive branch action or Congressional mandate, should provide specifically that contractors may be debarred for human rights or law of armed conflict abuses.*
- *U.S. federal agencies responsible for administering suspensions and debarments, as well as those with responsibility for contract oversight, should collect more specific data relevant to the type of contract and sanctioned firm.*
 - *For instance, agencies should maintain records denoting the type of contract and performance requirements resulting in a suspension or debarment action, as well as related ancillary administrative actions (e.g., administrative compliance agreements).*
- *U.S. federal agencies should maintain records on the type of services normally performed by the firm or individual recommended for the suspension or debarment action.*

These records are important because they provide the public with information about the types of firms, such as security firms, that the federal government has sanctioned.

United Kingdom

Since the Montreux Document was signed, the U.K. has made no substantial changes to the formal mechanisms available for holding PMSCs and their personnel accountable for misconduct overseas. Although the U.K. may be meeting its obligations to provide for criminal accountability with respect to certain international crimes and has legislation in place under which British personnel may be held accountable for some forms of misconduct overseas, the U.K. has not

taken steps to implement the majority of the Good Practices recommended in the Montreux Document. **Significant challenges remain to ensure that PMSCs and their personnel may be held accountable for misconduct abroad, and it is unclear whether the U.K. government is considering addressing these challenges.**⁶⁸⁸

Criminal Accountability

The U.K. has implemented legislation enabling it to prosecute individuals for serious international crimes and a limited number of domestic crimes committed abroad by nationals and/or residents, however, significant challenges remain with respect to holding PMSCs and their personnel accountable for unlawful conduct abroad.⁶⁸⁹

Of particular significance is the fact that British PMSC personnel can only be held criminally liable in the U.K. for a limited number of crimes committed abroad. The U.K. has legislation in force providing jurisdiction to prosecute grave breaches of the Geneva Conventions;⁶⁹⁰ genocide; war crimes; crimes against humanity;⁶⁹¹ and, provided that it is with the consent or acquiescence of a state official, torture⁶⁹² committed by U.K. nationals abroad. The U.K.⁶⁹³ has also extended domestic criminal jurisdiction for certain crimes committed by British nationals abroad, including murder and manslaughter,⁶⁹⁴ sexual offences against children,⁶⁹⁵ human trafficking,⁶⁹⁶ and bribery.⁶⁹⁷ Accordingly, British PMSC personnel may be prosecuted in the U.K., if they commit such crimes abroad.

Significant gaps remain regarding criminal accountability mechanisms, however, as jurisdiction is not extended to other crimes that PMSC personnel could commit (such as, for example, serious assaults and sexual offences against adults). Furthermore, since jurisdiction for these crimes is based on the nationality of the alleged perpetrator,⁶⁹⁸ non-British personnel of British PMSCs suspected of committing such crimes overseas cannot be prosecuted for these offences in the U.K.

Exacerbating the criminal liability gap is the fact that British PMSCs cannot be held criminally accountable in the U.K. for many crimes committed by their personnel abroad. While organizations⁶⁹⁹ may be held criminally liable for homicide and manslaughter within the U.K. in instances of death by gross breach of duty of care attributable to a failure in management, such criminal corporate accountability does not extend to PMSC operations abroad.⁷⁰⁰ In addition, although companies may be held liable for the criminal acts of their employees in certain circumstances,⁷⁰¹ companies can only be held criminally liable in the U.K. for crimes punishable by fines⁷⁰² (which excludes many sexual offences against children⁷⁰³) and generally cannot be held criminally liable when employees commit an offence that falls outside of the scope of their employment or authority.⁷⁰⁴ As such, the U.K. has not met – and there is no publicly available evidence that it has considered meeting – the Montreux Document’s recommended Good Practice of providing for criminal corporate accountability for British PMSCs⁷⁰⁵ or PMSCs with which it contracts.⁷⁰⁶

In addition to PMSCs and their personnel being held liable for crimes under domestic criminal law, in limited circumstances there is the potential for PMSC personnel accompanying the

U.K. military as contractors to be prosecuted for criminal offences under the Armed Forces Act 2006.⁷⁰⁷ In such cases, the individual would be tried before the Standing Civilian Court⁷⁰⁸ or, for more serious offences, by Court Martial.⁷⁰⁹

To date, there have been no reported prosecutions of PMSC personnel for alleged crimes committed abroad. As statistics regarding complaints are not readily available to the public,⁷¹⁰ it is not possible to determine if the lack of reported prosecutions is due to a lack of complaints, failure to enforce existing laws, or the significant difficulties inherent to investigating and prosecuting such cases. By not publishing incident reports or complaints regarding alleged misconduct of PMSCs and/or their personnel, the U.K. government is currently not meeting the Montreux Document's transparency Good Practice of a Contracting State.⁷¹¹

“To date, there have been no reported prosecutions of PMSC personnel for alleged crimes committed abroad”

Civil Accountability

The U.K. has made no changes to the mechanisms available for holding PMSCs and their personnel civilly accountable since it signed the Montreux Document. Under existing law, it is possible in some circumstances for foreign nationals affected by the operations of British PMSCs to bring civil claims against (1) PMSCs; (2) PMSC personnel; and/or (3) States or entities that have contracted with a PMSC, including multi-national corporations (MNCs) and NGOs. In addition to claims by foreign nationals affected by the activities of British PMSCs abroad, PMSC personnel could have civil claims against their PMSC employers, including claims based on damages allegedly suffered as a result of the PMSC's negligence.⁷¹² In some cases, employee claims could potentially be informed by the health and safety laws applicable in the U.K.; although U.K. health and safety laws do not apply abroad,⁷¹³ their standards could assist with informing the relevant standard of care with which the PMSC employer should treat its personnel abroad.⁷¹⁴

As Jan Wouters and Cedric Ryngaert note, although there have been few cases brought, existing EU law “opens up wide opportunities for suing EU-based [MNCs] in their home State for violations of human rights committed abroad.”⁷¹⁵ Accordingly, it may be possible for British PMSCs, like other British companies, to be sued in the U.K. based on the fact that national courts in the EU technically “have jurisdiction over any defendant corporation that is ‘domiciled’ in the EU, irrespective of where the harm occurred or the nationality of the plaintiffs.”⁷¹⁶ On this basis, foreign nationals may have standing to sue U.K.-domiciled corporations in the U.K. for alleged wrongs committed abroad.⁷¹⁷ It should be noted, however, that despite EU law permitting such claims, they might be difficult to sustain in the U.K. because civil suits are traditionally only actionable when there is a “territorial nexus” with the U.K. As such, claims of this nature must generally allege that the U.K.-based company has “neglected its statutory or unwritten duty of care *vis-à-vis* the operations of its overseas subsidiaries, branches or plants” based on the theory that, “while the harm itself may have occurred abroad, the wrongful behavior occurred within the territory” of the Home State.⁷¹⁸

Few cases alleging damage for extraterritorial activities of British companies have been brought, while those that have been brought tend to settle before trial.⁷¹⁹ To date, there have been two reported cases in which British personnel have sought compensation for damages suffered as a result of the alleged negligence of their British PMSC employers.⁷²⁰ There have been no reported civil claims brought by a foreign national against a British PMSC nor a British-domiciled MNC or NGO related to the activities of PMSC personnel abroad.

Significant challenges remain that could prevent civil claims against PMSCs from being successful. Of primary importance is the fact that U.K. courts could potentially stay proceedings on the basis of *forum non conveniens* where it is determined that (1) the claim should properly be brought in another jurisdiction (most often the State in which the alleged damage occurred), and (2) a stay would not result in substantial injustice to the plaintiff.⁷²¹ Highlighting the uncertainty surrounding transnational civil litigation, however, the ability for defendants to have transnational civil claims stayed on the basis of *forum non conveniens* could be subject to challenge due to a decision of the European Court of Justice which arguably “open[ed] a window of opportunity for transnational tort litigation”⁷²² when the Court held that, “an EU Member State’s court cannot stay proceedings against a defendant corporation registered in that State on the ground that another forum, either in another EU Member State or in a non-Member State, is more appropriate.”⁷²³

Practical considerations may also pose challenges to foreign claimants’ ability to bring claims against British PMSCs, including the cost of proceedings and the difficulty of obtaining evidence and reliable witnesses for a trial abroad.

Other Accountability Mechanisms

Although primarily of historical relevance, it should be noted that Britons, unless licensed, are prohibited under the Foreign Enlistment Act 1870⁷²⁴ from, among other things, enlisting, and recruiting individuals for enlistment, in the military or naval service of a State that is at war with another State that is at peace with the U.K.⁷²⁵ Although these prohibitions could potentially apply to prohibit PMSCs from contracting with States that are party to an armed conflict,⁷²⁶ no prosecutions have occurred under the Act.⁷²⁷ And, as the U.K. has determined that it will not prohibit PMSCs from operating from its territory,⁷²⁸ it is highly unlikely the Act would be applied in such a manner.

As noted above, while the U.K. government requires PMSCs with which it contracts to abide by applicable laws, including international law, in the execution of its contractual obligations,⁷²⁹ **there are no contractual mechanisms in publicly available contracts to hold PMSCs accountable for breaches of applicable laws (such as termination of the contract, financial penalties, and removal from consideration for future contracts) as recommended by the Montreux Document.**⁷³⁰ This is so despite the fact that such contractual accountability mechanisms would, in all likelihood, be required to meet the U.K. government’s stated intention of using its leverage as a Contracting State to ensure compliance with international law.⁷³¹

Although the Montreux Document was not the impetus for the change, one of the few changes to potential accountability mechanisms since the U.K. government signed the Montreux Document is the requirement as of October 1, 2013 for certain public companies⁷³² to report annually on human rights issues. As part of their annual “strategic reports”, public companies to which this obligation applies must report “to the extent necessary for an understanding of the development, performance or position of the companies’ business” information about the company’s “social, community and human rights issues,” as well as “information about any policies of the company in relation to [human rights] matters and the effectiveness of those policies.”⁷³³ Further, directors of companies are statutorily required to consider matters that may have a bearing on the success of their companies including, “the interests of the company’s employees and the impact on the community of the company’s operations.”⁷³⁴ While these requirements may not provide a direct mechanism for holding PMSCs accountable for human rights effects abroad they may assist with increasing the transparency of the operations of PMSCs to which the requirements apply. In addition, since the companies are required to report on the effectiveness of any human rights policies, the PMSCs to which the above reporting obligation applies would likely be required to conduct an annual review of their policies and their effects.

Although a full review of the U.K.’s arms export control regime is beyond the scope of this analysis, it should be noted that, depending on the services provided, arms embargoes and arms control export legislation may apply to British PMSCs. Accordingly, British PMSCs to which the arms control export regime applies would be required to comply with the export licensing program through which the U.K. government controls the export of strategic goods and technology.⁷³⁵ Such PMSCs are required to have “export control systems and procedures in place in terms of record keeping, training and lines of responsibility,” which are overseen by the Export Control Organization (ECO).⁷³⁶ The ECO enforces export controls by conducting compliance audits and has the power to impose penalties such as revocations of export licenses, fines, and prison sentences for failure to adhere to applicable obligations.⁷³⁷

Other Challenges

Additional challenges may exist for holding PMSCs and their personnel accountable for misconduct abroad. In some circumstances, for example, PMSCs may be granted immunity from prosecution under status of forces agreements with Territorial States. It should be noted, however, that rather than such immunity acting as a complete barrier to claims, there is the potential for these agreements to undermine arguments that British courts are not the proper forum for a claim, thereby increasing the potential that civil litigation in the U.K. could proceed.⁷³⁸

Depending on the circumstances, PMSC personnel could also potentially enjoy immunity from prosecution under the UK State Immunity Act 1978 in the event that the activity at issue could be classified as an act of a sovereign nature.⁷³⁹ Such immunity from prosecution may be unlikely, however, given that PMSC personnel are unlikely to be contracted with in a manner that would render them agents of the British Crown. In addition, British courts have jurisdiction over crimes committed by Crown employees abroad when the employees act or purport to act in the course of their employment.⁷⁴⁰

Recommendations

Without legislative action, the significant accountability gaps outlined above will persist.⁷⁴¹ As such, the U.K. should take steps to close some of the existing accountability gaps and better meet the Good Practices of the Montreux Document.

- *The U.K. government should extend the criminal liability regimes applicable to PMSCs and their personnel.*

This approach may be fairer to victims because state, rather than private, resources are used to fund investigation and prosecution.⁷⁴² Criminal sanctions may also send a stronger message and more effectively deter future abuses.⁷⁴³

- Of particular concern is the fact that criminal jurisdiction does not extend to misconduct abroad that does not constitute one of the limited number of offences over which extra-territorial jurisdiction exists.⁷⁴⁴ Although it may be impractical for the U.K. to extend extra-territorial jurisdiction over assaults committed abroad by any British national or resident, the U.K. could make a limited extension of jurisdiction to cover serious assaults committed by British PMSC personnel.
- The U.K. should also extend its existing corporate homicide and manslaughter legislation to apply extra-territorially, and provide for criminal corporate accountability in other circumstances. Such action could increase the potential for holding British PMSCs and their personnel criminally accountable for wrongdoing abroad, while at the same time providing incentives for British PMSCs to ensure that they have adequate vetting and training requirements and rules of conduct in place, as this would make a due diligence defense more tenable.⁷⁴⁵
- As there are significant practical difficulties with conducting investigations and prosecuting persons for actions abroad, a designated public authority (such as SO15⁷⁴⁶) should have responsibility for investigating alleged serious crimes committed abroad and be allocated sufficient resources to ensure that complaints are investigated properly and, if warranted, charges brought. (This authority could work in conjunction with an industry ombudsman person discussed in the Access to Effective Remedies section, below.) As a major Home State for PMSCs, the U.K. arguably has a normative, if not legal, obligation to ensure that British PMSCs are held accountable where feasible and it should look beyond its direct national interests when making this assessment.⁷⁴⁷

- *The U.K. government should provide increased access to U.K. courts for transnational civil claims.*

Providing U.K. courts with clear jurisdiction to hear civil claims against British PMSCs could remove the current disincentive for bringing claims that may arise from their uncertain legal basis. From a practical perspective (and in contrast to criminal proceedings), increasing the potential for civil claims being brought could be an effective method of holding British PMSCs to account

because, although court resources are used, the state is not responsible for investigating and prosecuting the cases.

- As part of this process, the U.K. could take steps to dispel uncertainty regarding the likelihood of civil claims against British PMSCs proceeding in U.K. courts. The U.K. could, for example, follow the lead of Belgium and adopt a “*forum conveniens*” rule that clarifies that U.K. courts have jurisdiction when there is some link to the U.K. and when proceedings abroad would be difficult or impossible.⁷⁴⁸
 - The U.K. could also facilitate access to civil remedies by individuals adversely affected by British PMSC activity abroad by adopting relaxed procedural rules for transnational claims, and permitting civil claims to be joined with criminal claims in transnational cases.⁷⁴⁹
- *The U.K. government should introduce legislated standards for the PMSI.*

The traditional requirement for a territorial nexus to exist for civil claims to be sustained in the U.K. highlights the importance – and potential effectiveness – of increased regulation of the PMSC industry in the U.K. Statutory minimum standards with respect to training, among other things, could support claims that British PMSCs failing to meet these standards have breached their duty of care to their personnel and/or individuals affected by the PMSCs operations. In addition to statutory minimum standards with respect to training that meet the recommendations of Good Practice 63 (e.g., mandatory training regarding human rights and international humanitarian law; rules on the use of force; weapons handling; cultural, religious, and gender issues; proper complaints handling; and anti-corruption requirements), additional legislated standards should address the other Montreux Document Good Practices for criteria for granting an authorization by Home States, among them background checks for personnel, fiscal soundness of the PMSC, record keeping, the existence of policies relating to IHL and human rights law, and the existence of internal monitoring and accountability mechanisms.⁷⁵⁰

Iraq

Accountability for PMSCs and their personnel

Section 4 of the CPA Order 17 (2003), as revised on June 27, 2004, gave PMSCs immunity from Iraqi law and legal processes for acts performed under their contracts.⁷⁵¹ The UNWGM - Iraq called attention to and strongly condemned this immunity, observing that up to the time of its mission to Iraq, all attempts to prosecute PMSC personnel in their home countries had failed.⁷⁵² Yet, a major decrease in alleged human rights abuses appeared to follow the 2009 Status of Forces Agreement between Iraq and the U.S., which partially removed the immunity of some foreign PMSC personnel in Iraq.⁷⁵³ Due to its ambiguous wording, however, commentators have sought clarification concerning whether this removal of immunity covered all contractors employed by the U.S. government and whether it fully applied in Iraqi courts.⁷⁵⁴ The Iraqi government drafted a law in 2008 to, among other things, clarify the immunity issue, but the law was never passed.

Given the immunity from prosecution granted under CPA Order 17, no private military and security contractor has been subjected to Iraqi jurisdiction from the period between 2003 and January 2009, the date of the adoption of the U.S.-Iraqi SOFA.⁷⁵⁵ As commentators have noted:

While it is noteworthy, and a welcome indicator, that since the coming into force of the SOFA very few incidents involving PMSCs have been reported in Iraq, in terms of accountability it means that most of the human rights incidents committed by PMSCs between 2003 and 2009 will presumably remain unprosecuted as a matter of Iraqi law, as neither the SOFA nor the proposed Iraqi draft legislation on PMSCs have retroactive effects. Consequently, if prosecutions against PMSCs employees do not take place in home States' courts this would lead to an impunity gap for these abuses.⁷⁵⁶

Since the coming into force of the SOFA in 2009, Iraqi courts have been used only in one instance to convict a British PMSC employee found guilty of killing two other PMSC employees (one British and the other Australian) and injuring an Iraqi guard (the Daniel Fitzsimons case discussed above).⁷⁵⁷ On February 2011, the Iraqi Supreme Court sentenced Mr. Fitzsimons to 20 years in prison.⁷⁵⁸ Although this author has been unable to access the text of the sentence, it is apparent that the Iraqi Penal Code of 1969 was the legal basis for prosecution, as it is the main criminal statute under Iraqi law, and there is no national legislation for PMSCs criminalizing certain types of conduct.⁷⁵⁹

Furthermore, in another incident that occurred after Iraqi courts had asserted control over PMSCs, the death of James Kitterman, an American contractor and president of a construction company, Iraqi authorities initially made arrests and questioned five suspects who were employees of the Fayetteville, N.C.-based security company, Corporate Training Unlimited. In the end, however, there were no charges and no trial.⁷⁶⁰

That there have not been more cases, especially for offenses less serious than murder, raises questions about the ability of Iraq's judicial institutions to address PMSC misconduct.

The lifting of PMSCs' immunity under the 2009 U.S.-Iraq SOFA clearly paved the way for holding private contractors responsible under Iraqi law in the future but, as analysts have noted:

It does not resolve key legal issues such as the liability of PMSCs themselves. Rather, Fitzsimons case reflects existing concerns remaining in Iraq about the fair trial guarantees and other standards of justice within the Iraqi judicial system. The imposition of the death penalty is one of them but outdated legislation, long pre-trial detention and lack of judicial oversight over conditions of prison and detention facilities – including allegations of torture and mistreatment – have also been identified by field organizations among shortcomings in the capacity of Iraqi justice system.⁷⁶¹

As a Territorial State, Iraq is in a strong position to ensure the gathering of evidence and access to witnesses in cases involving PMSCs, and it is therefore essential that the Iraqi government comply with the applicable international human rights standards of justice.

Finally, on a separate note, it is worth highlighting that, despite Iraq's inability to prosecute Blackwater personnel, Iraqi authorities did refuse to renew the company's license to operate and ordered the company to leave Iraq in February of 2010. The Mol kept a list of former Blackwater personnel and tried to ensure that they were not hired by other PMSCs and never returned to Iraq. However, the UNWGM - Iraq reported that perhaps as many as 250 former Blackwater employees did go to work for other companies in Iraq; it was unclear if any of them had been implicated in human rights violations.⁷⁶²

Again, it is important to emphasize that without clear laws, there are many options for accountability that are foreclosed in Iraq, to include administrative sanctions associated with the power of licensing authorities, such as immediate suspension, revocation, or cancelation of a PMSC's license, the application of monetary fines, or the forfeiture of licensing fees.

Recommendations:

- *The government of Iraq is encouraged:*
 - *To adopt comprehensive PMSC legislation that puts in place effective measures for holding contractors accountable for criminal misconduct and violations of human rights. In this respect, the Iraqi Penal Code should be updated. Those acts that are crimes under international law should be criminalized, and as appropriate those laws should also apply to corporate conduct. Available sanctions should include a wide range of measures, from censure and fines, up to criminal prosecution and expulsion from the country, in the case of foreign contractors.*
 - *To strengthen the investigative capacity of the Mol Office of PSC Registration.*
 - *To clarify in agreements with foreign forces the jurisdiction applicable to PMSCs and their personnel.*

Afghanistan

The legal system in Afghanistan is based on a mixture of statutory and Sharia law and courts apply both bodies of law in practice. Generally, Sharia law is derived from the interpretation of several religious writings, including the Koran. The analysis below is mainly limited to statutory law, with the exception of a Sharia law concept that has proved relevant in one of the legal cases studied here.

Human rights abuses committed by PMSCs in Afghanistan involving the use of force may be prosecuted as common crimes, some of which constitute felonies punishable by the death penalty. Afghan criminal legislation includes the concepts of principal, accomplice, and conspiracy, so besides contractors, PMSCs' directors and managers could also be held criminally responsible. Significantly for contractors' activities, a crime committed in self-defense is not considered a crime, and the legitimate right of defense also includes intentional murder, when it takes place due to certain specified acts, such as kidnapping and unauthorized entry at night into residential house.⁷⁶³ Moreover, despite the fact that Afghanistan has ratified the

main international human rights and humanitarian law treaties⁷⁶⁴ and is Party to the Statute of the International Criminal Court (ICC), those human rights violations by contractors that rise to the level of international crimes, such as war crimes in non-international armed conflicts, cannot be prosecuted as such because Afghanistan has not taken serious action regarding the implementation of the ICC Statute and has not criminalized most of the crimes under international law in its national legislation. In a similar vein, while the prohibition of torture is contained in Afghan Constitution⁷⁶⁵ the crime of torture has not been adequately incorporated into penal law. The Afghan Penal Code (1976) predates the ratification by Afghanistan of the 1984 UN Convention against Torture and criminalizes torture if committed by officials of public forces, or when accompanying domestic offences such as illegal arrest and detention, but the crime of torture itself is not defined, and there are no criminal provisions concerning offences such as attempted acts of torture, instigation, or consent of torture.⁷⁶⁶ Therefore, PMSC contractors may only be held criminally responsible for the crime of torture if they qualify as state agents, or otherwise could be prosecuted for domestic criminal offences. Similarly, accountability on the basis of military crimes, such as unlawful assaults in time of war, can only be applied to contractors if they are considered part of specific categories, such as that of “armed civilians accompanying the armed forces into combat.”⁷⁶⁷

In addition to individual responsibility, the Afghan legal system also opens up scope for the responsibility of PMSCs as corporations. The Afghan penal code (1976) provides for the criminal responsibility of legal persons.⁷⁶⁸ However, it only applies for crimes committed by their representatives, chiefs, and deputies, and thus it is not altogether clear whether this may cover abuses committed by PMSC personnel. Further, the legal provision in question excludes from its scope State institutions, departments and enterprises, therefore, the APPF (as a SOE currently in charge of most of the commercial security services in the country) cannot be held legally responsible for crimes committed by APPF guards.

With regards to non-criminal accountability, the 2008 Procedure specifically provided that PSCs are “responsible for compensation for losses resulting from unlawful acts of its staff” and, if authorized by a court order, compensation may also be taken from the licensee’s bank guarantee.⁷⁶⁹ The 2012 Procedure for RMCs does not include similar provisions, though allegations of violations are to be forwarded to the Prosecutor’s Office for investigation and appropriate action.⁷⁷⁰ Both the 2008 Procedure and 2012 Procedure impose administrative sanctions for PMSCs operating without a license, or in violation of provisions of their respective procedures. These sanctions include suspension, revocation, and cancelation of the PMSC/RMC license and the application of monetary fines, including the forfeiture of licensing fees.⁷⁷¹ Yet, there is no prohibition on PMSC/RMCs re-applying for a new license, or removal of specific PSC personnel involved in the alleged violation.

In sum, whereas Afghan legislation provides legal avenues for holding PMSCs and their personnel legally liable, significant deficiencies and uncertainties still impact Afghan laws and inhibit the proper prosecution of serious human rights violations by contractors. In practical terms, there are also major shortcomings to ensuring accountability for contractors’ abuses in Afghanistan due to jurisdictional issues and how Afghan jurisdiction is exercised in practice.

First and foremost, a lack of clarity persists regarding the jurisdiction applicable to PMSCs, although the following factors indicate that some PMSCs who have operated or are present in Afghanistan are not subject to Afghan jurisdiction due to the operation of diplomatic immunities or accords for the exercise of jurisdiction.

On the one hand, under the SOFA concluded with the U.S. (OEF mission) and the ISAF (NATO-ISAF Mission), U.S. “DoD military and civilian personnel” as well as “ISAF and supporting personnel” are accorded status equivalent to that of the staff of diplomatic entities, and accordingly, either enjoy total immunity with respect to Afghan laws or are immune from legal process with respect to acts performed in an official capacity (in case of local contractors hired by ISAF Forces).⁷⁷² Additionally, the SOFAs also provide that such personnel will not be surrendered to, or otherwise transferred to, the custody of an international court or any other entity or State without the explicit consent of the U.S. government or the contributing nation, thus provisionally preventing complementary prosecution by the ICC or by other States willing to exercise universal jurisdiction. In this regard, while it seems quite clear that the term “ISAF and supporting personnel” does include PMSCs’ contractors,⁷⁷³ some commentators have argued that the immunity clause under U.S.-OEF SOFA does not apply to U.S. contractors because they are specifically excluded from the definition of “US military and civilian personnel” under U.S. regulations.⁷⁷⁴ However, for now, the status of U.S. contractor personnel remains unclear as this interpretation has not been confirmed and Afghanistan has not yet exercised its jurisdiction over any U.S. contractor. What seems clear is that Afghanistan has relinquished its primary jurisdiction over crimes committed by U.S. personnel in favor of U.S. courts. This is evident from the terms of the military agreement between the two governments that explicitly “authorizes the US to exercise its criminal jurisdiction over US personnel,” and from which contractors are not specifically excluded, as well as from the fact that, most U.S. contractors involved in serious abuses in Afghanistan to-date are being tried in US courts, see the U.S. criminal accountability section.⁷⁷⁵ Unclear as it may be, this has led, in practice, to a *de facto* immunity from Afghan jurisdiction, while the U.S. exercises shared-but-primary jurisdiction over U.S. contractor personnel involved in abuses in Afghanistan.

On the other hand, as recognized by Presidential Decree 62 and reiterated by the 2011 Bridging Strategy, diplomatic entities are exempt from presidential decrees and associated regulations applicable to the PSCs, and instead remain regulated by rules for diplomatic operations in accordance with the principles of the 1969 Vienna Convention. This exemption also extends to police training missions.⁷⁷⁶ As a result, PMSCs guarding diplomatic entities or working in police training missions have been exonerated from dissolution, and it appears that they also benefit from the privileges and immunities accorded to members of the administrative and technical staff of diplomatic missions.⁷⁷⁷ Thus, they enjoy immunity from Afghan criminal, civil, and administrative jurisdiction (with the exception of all acts performed outside of their duties) and are subject to prosecution only in their home countries.

Secondly, procedural irregularities have also been reported in legal proceedings, including in cases for alleged violations committed by those contractors subject to the primary jurisdiction of Afghanistan (i.e., non-US personnel, non-ISAF personnel, non-diplomatic contractors). Extensive research has uncovered only four cases of PMSC contractors prosecuted in Afghanistan, one

for drug smuggling, one for bribery charges, and two for killing Afghan contractors.⁷⁷⁸ In one of these two last cases, concerning a South African contractor who killed an Afghan guard in self-defense and was originally sentenced to five years, reported irregularities included lack of consideration of exonerating circumstances such as self-defense, abuse of power by the court of appeal (by increasing the sentence on appeal),⁷⁷⁹ and a general lack of proper investigation and consideration of the evidences and facts.⁷⁸⁰ Other irregularities have also been reported in general regarding the functioning of the judicial system and due process guarantees, including ignorance of the presumption of innocence, lack of application of mitigating circumstances,

“Thirdly, investigative and prosecutorial activity has been and still remains scarce with regards to contractors’ violations committed against the local population”

carelessness in preserving evidence during police investigations, poor interpretation and translation services, and denial access to trial documents.⁷⁸¹ In the other case of a contractor prosecuted in Afghanistan, the contractor was sentenced to death in 2010 as the death penalty apparently applied under the circumstances of the killing,⁷⁸² but in 2011 the sentence was revised by the

Supreme Court and reduced to 20 years of jail presumably due to the application of certain concepts of Sharia law.⁷⁸³

Thirdly, investigative and prosecutorial activity has been and still remains scarce with regards to contractors’ violations committed against the local population. The unworkability of the HCB and a lack of proper monitoring have clearly prevented the reporting of incidents. However, even with those cases that have been identified or reported, there is a lack of public action, as incidents have not been fully investigated nor perpetrators prosecuted, and the implicated PMSCs have continued to operate.⁷⁸⁴ Lack of proper action has also included cases where investigative and prosecutorial authority is interwoven between Afghan authorities and foreign entities, but no co-operative efforts have been taken.⁷⁸⁵ That being said, any person whose fundamental rights have been violated can file a complaint with the AIHRC. The AIHRC can refer the cases to the relevant judicial and non-judicial authorities and assist in defending the rights of the complainant.⁷⁸⁶ It has been reported, however, the AIHRC “set up its own special investigation team, but is already busy investigating many human rights abuses and lacks the capacity to investigate allegation of incidents involving PMSCs.”⁷⁸⁷ On the other hand, practices of corruption within the police, the reported difficulty of assigning professional prosecutors to local areas where security is not guaranteed, and the lack of clear procedures for judicial communication and coordination between local and central jurisdictions are also factors influencing the inadequate exercise of prosecutorial authority.⁷⁸⁸ This impunity gap is particularly grave, as the local areas outside of Kabul is where monitoring and oversight has been especially poor and where most incidents seem to have occurred.

Recommendations

- *The government of Afghanistan should adopt legislative measures to criminalize those acts that are crimes under international law and the ICC Statute, including enacting legislation with the steps necessary for cooperation with the ICC.*

- *The government of Afghanistan should clarify the jurisdiction applicable to PMSCs in general, and particularly to contractors providing military and security services to the U.S., ISAF mission and diplomatic entities.*
- *The government of Afghanistan should incorporate into existing regulations for RMCs and PSCs other administrative sanctions for cases of non-compliance, such as a prohibition on a company reapplying for a new license within a set period of time.*
- *The government of Afghanistan should strengthen the investigative capacity of the AIHRC.*
- *The government of Afghanistan should immediately deal with those cases of contractor abuse that have been identified and/or reported, but have not yet been investigated, to include addressing the deficiencies identified in the functioning of the judicial system at the regional and local levels.*



5. Providing access to effective remedy

The Montreux Document is relatively scant in detail when considering the notion of ‘access to remedy’ and, where it does delve deeper, rather limited. Its provisions stipulate that States of all categories – Contracting, Territorial and Home – must provide effective remedies for conduct of PMSCs and their personnel where such conduct breaches the States’ obligation to ensure respect for international humanitarian law (IHL) and international human rights law (IHRL). It does not, however, clarify what an ‘effective remedy’ is. The document includes limited references to “reparations,” but with no further instruction. As such, there is a great degree of ambiguity as to what constitutes access to remedy, let alone access to an *effective* remedy.

Given the aim of producing more effective PMSC regulation, we propose that a suitable conceptualization of access to remedy should follow the Guiding Principles on Business and Human Rights⁷⁸⁹ and draw from the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (BPG).⁷⁹⁰ Both documents have won wide approval amongst States and UN bodies. While neither enounces new obligations for States nor constitutes a binding legal document, they codify existing international law and are aspirational in what they hope to achieve. Moreover, given that they take into consideration the remedial provisions of various international legal instruments, by using their conceptualizations, we avoid the varying interpretations that result from international law’s fragmentation.⁷⁹¹

For the purposes of this report, we adopt the following definitions:⁷⁹²

Remedy: “Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.”

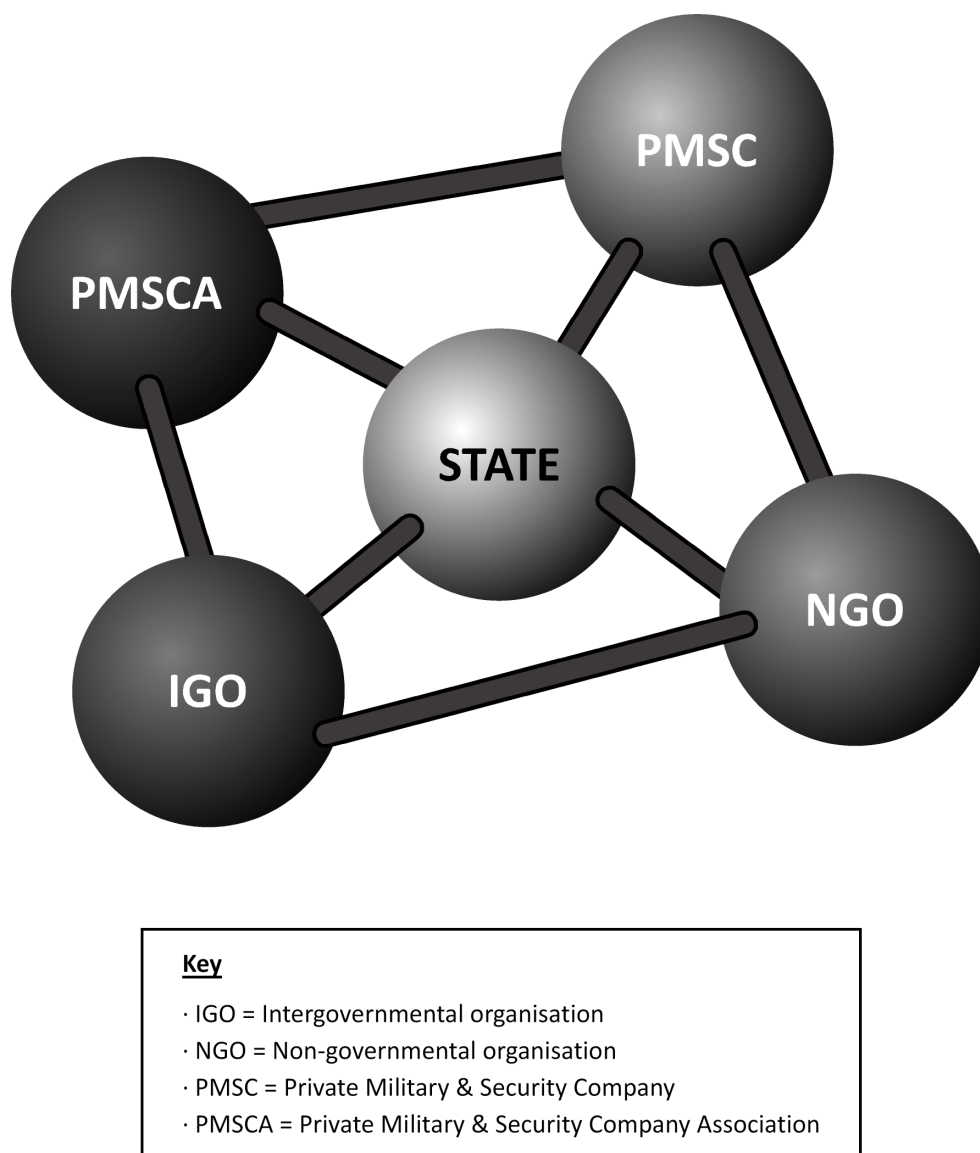
Grievance: “A grievance is understood to be a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.”

Grievance Mechanism: “[A]ny routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.”

Remedies must respond to grievances. Further, access to remedy is not dependent upon the liability of an actor. Rather, it is the provision of avenues where grievances are raised so as to facilitate their hearing, consideration and, if necessary, action upon.

Under our proposal and within the context of the PMSC industry, we situate all actors within a **remedial network** (Figure 1).

Figure 1



As reflected in the figure above, each actor connected to the PMSC is capable of facilitating or granting victims' access to a remedy, judicial or non-judicial in nature. Within this report, we focus on the State. To that end, in terms of providing access to a remedy, the State must provide sufficiently adequate and effective avenues for grievances to be heard, considered and, if necessary, acted upon. In so doing, the State works in collaboration with all actors in the PMSC industry to provide a tiered structure of remedies for victims – that is, remedies ranging from the operational level of PMSC activity to the recognition and enforcement of foreign judgments

and awards under international law. The State, therefore, is both a provider and facilitator of remedies. This reflects the foundational Guiding Principle 25:

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.⁷⁹³

The State, where it exercises jurisdiction or effective control, may provide both judicial and non-judicial grievance mechanisms. Both have procedural and substantive elements.

State-based judicial grievance mechanisms

As provided by the commentary to Guiding Principle 26, “[e]ffective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.”⁷⁹⁴

The substantive and procedural aspects of state-based judicial mechanisms are understood in the following manner:

- Substantive: the effective application of appropriate international law obligations that are, if necessary, reflected in national law. The law must be balanced in its prosecution of criminal actors and orientation towards the welfare and remediation of the victim.
- Procedural: a process that is legitimate, transparent, and fair. Further factors that may be considered in this determination are:
 - Cost
 - Availability of legal representation
 - Expertise (judges and lawyers)
 - Geographic location of the court (accessibility)
 - Court resources
 - Availability of consular & diplomatic channels
 - Cultural sensitivity
 - Sufficient funding for judicial & prosecutorial independence
 - Access to information

State judicial grievance mechanisms address both criminal and civil violations. See the previous section of this report. In the context of access to remedies it is important to consider not only the number of cases brought forward and the outcomes, but the surrounding factors that produce these statistics, and in particular may pose barriers to remedy. Such factors may be both legal and extralegal, thus of a social, economic, political or cultural nature.

State-based non-judicial grievance mechanisms

State-based non-judicial grievance mechanisms are more than alternatives to judicial mechanisms. While in some cases they may suffice on their own, from a systems-perspective

they supplement and help comprise an effective and efficient state-provided remedial system. This understanding reflects Guiding Principle 27, that:

States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.⁷⁹⁵

Unconstrained by the finite scope of the law, non-judicial grievance mechanisms provide several benefits. For example, non-judicial mechanisms can allow for a humanistic approach and unorthodox solutions. Further, if effectively utilized, non-judicial mechanisms can be more sensitive to issues of tradition, custom, and religion within an area, thus garnering greater legitimacy and trust within an affected population. This is particularly important during and after cases of armed conflict.⁷⁹⁶

There is a wide spectrum of non-judicial mechanisms, including corporate complaints mechanisms, mediation, ombudsmen, human rights commissions, religious tribunals, and chieftaincy councils. For these mechanisms to succeed, it is important for the procedures to be transparent, fair and efficient. Moreover, all parties participating in the process must feel equal otherwise inferiority may breed animosity and prevent a successful resolution of grievances. Guiding Principle 31 speaks further to the effectiveness criteria of non-judicial grievance mechanisms and reads:

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.⁷⁹⁷

In order to increase the effectiveness of State provided access to remedies, it is necessary to consider ways in which both judicial and non-judicial mechanisms may complement each other. Legal reform should consider the relationship between judicial and non-judicial mechanisms and how they can both be effectively employed so as to provide effective remedies. For example, can mediation be necessarily incorporated into civil and or criminal litigation? Can ombudsmen and national human rights commissioners have effective sanctioning powers? Questions of oversight, accountability and enforcement are of utmost importance in the design of such mechanisms. This is especially true of corporate-level grievance mechanisms which have predominated in voluntary regulatory initiatives for the PMSI, such as the ICoCA and PSC1.

In the sections that follow below, State evaluations will be presented regarding the overall provision of access to remedies by each State, as well as the means by which its performance could be improved.

United States of America

As described in the section above, access to remedies encompasses a wide ambit of both judicial and non-judicial remedies. The U.S., as the largest consumer of private military and security services, has a relatively developed regulatory framework. This is particularly the case within the realm of state-provided and/or facilitated judicial remedies, i.e. applicable civil and criminal law remedial avenues. Nevertheless, **there is much room for improvement in the efficiency of those avenues when assessed in light of the Montreux Document and its recommended Good Practices.** Areas where the U.S. can improve, such as legislative reform, management of cases, evidence, and witnesses, have already been extensively discussed in prior sections. Thus, rather than focus on the judicial aspect of remedies, this section will touch upon non-judicial avenues of remedial recourse.

Non-Judicial Remedies

It comes as no surprise that to a large extent access to remedies are more of a judicial, rather than non-judicial, nature. Indeed, violations of human rights and international humanitarian law can be so severe that judicial proclamations on the matter will be the clearly preferred route of restitution. Nevertheless, such proclamations should neither overshadow nor inhibit the development of non-judicial remedial avenues. In fact, given the time lags necessarily involved in the production of justice through judicial means, non-judicial avenues can take effect in a

quicker and more efficient fashion. To that extent, all States engaging with PMSCs, particularly Territorial and Contracting States, must ensure that they have an extensive range of non-judicial remedies available.

In the section on civil liability remedial avenues above, we detailed three kinds of non-judicial remedies available to victims: the Defense Base Act (DBA), the Foreign Claims Act (FCA), and solatia payments. While the existence of these avenues is commendable, there are several concerns pertaining to their effectiveness, particularly when considered in light of the effectiveness criteria outlined by the Guiding Principles. Below, we detail some issues common to these remedies where further improvement may be made.

- *Transparency.* All three instruments currently suffer from a lack of transparency in the processes of decision making. In the cases of the DBA, the FCA and the solatia payments, what are the processes behind which reparation monies sums are paid out? How are factors weighed and considered? On this matter, a Government Accountability Office (GAO) inquiry noted that commanders in charge of dispensing DoD solatia and compensation payments considered factors such as the severity of injury, the type of damage, and property values based on the local economy, as well as any other applicable cultural considerations.⁷⁹⁸ At the same time, however, the report also noted that “commanders exercise broad discretion for determining whether a payment should be made and the appropriate payment amount.”⁷⁹⁹ Such inconsistency in the application of remedial payments may be a denial of justice to victims of PMSC harm. The payments procedures, thus, are neither predictable nor transparent as provided for under Principles 31(c) and (d) of the Guiding Principles. Consequently, much would be gained from the publication and accessibility of notes pertaining to the awarding of compensation to PMSC victims. Further, publication of such notes could serve as a source of learning so as to maintain and or improve standards of delivery.
- *Legitimacy and Predictability.* In cases where there is discretion in the awarding of compensation, questions may arise about the legitimacy of the decision maker on the grounds of their expertise and consistency. This is particularly the case given the lack of transparency that currently exists in the processes of awarding compensation as noted in the previous point.
- *Publicity and accessibility.* It is currently unclear the extent to which the U.S. government publicizes the availability of these remedies or details on how they can be accessed. Moreover, there may be significant hurdles for victims to overcome in terms of accessing those remedies, even if they are aware of their existence. This may be due to factors such as geographic location, language barriers, etc. As has been noted, officials generally make payments to civilians at Civil Military Operations Centers. Getting to these centers may be difficult, particularly during times of armed conflict. Guiding Principle 31(b) provides that all stakeholders must know what is available to them should they find their person violated and or property damaged. The U.S. government should work hard to ensure that victims know what can be offered to them by whom and where.

Recommendations

Several further problems not pertaining specifically to the effectiveness of civil law remedies have previously been raised in the section on civil liability, such as that of preclusion and exceptions. These are significant issues. Victims should not have their range of remedial avenues limited if they decide to opt for one remedy over another, as is the case if PMSC employees choose to use their DBA insurance rather than take legal action against the PMSC. Moreover, victims should not have their range of remedial avenues curtailed by political determinations reflected in idiosyncratic legal exceptions, such as the *Feres* immunity that blocks U.S. service members from bringing tort suits against the U.S. government; the ‘political question’ doctrine, which precludes courts from ruling on a matter upon the determination of it being non-justiciable; and statutory exceptions such as the ‘combatant activities exceptions’ which grants the U.S. federal government immunity from claims arising out of combatant activities. An underlying rationale for these is the separation of powers, i.e. that the courts should not be dabbling in the legitimate affairs of the executive. This principle, however, has the potential to generate significant barriers to justice for victims having suffered harm at the hands of PMSCs or the military. In order to ensure adherence to a rights-compatible approach that guarantees the protection of and respect for international human rights and humanitarian law, we call for the introduction of a military ombudsman.

- *The U.S. government should introduce a military ombudsman.*

Military ombudsmen (MO) are widely used by several national armies, most notably and effectively by the Canadian and German military forces.⁸⁰⁰ MO can serve as effective and independent military oversight mechanisms. They can benefit from functioning outside of the formal judicial machinery, and thereby not be subject to the same strict constraints of the judiciary. Moreover, they can operate on the basis of published rules, transparent appointments, and predictable processes. To the extent that the U.S. government will continue to use PMSCs, the establishment of a MO could very well be tailored in a fashion that ensures adherence to the Montreux Document and the Guiding Principles.

In order to ensure adherence to a rights-compatible approach, we propose that elements of a military ombudsman be added to current oversight and monitoring entities. In the case of Iraq, the U.S. established the Coalition Provisional Authority Office of Inspector General (CPA-IG) which was succeeded by the Office of the Special Inspector General for Iraq Reconstruction (SIGIR). Such pre-existing institutions could effectively take on many of the positive elements of MOs.

- *The U.S. government should publicize to civilian populations the availability of the Military Ombudsmen, and take appropriate measures to ensure the public’s ability to access the ombudsmen.*

United Kingdom

By opting for voluntary self-regulation of PMSCs, the ability for the U.K. government to provide and facilitate access to remedies may be limited. It is, however, too early to assess whether self-regulation will result in increased access to remedies for persons affected by British PMSC operations abroad. **Currently, few formal mechanisms exist for persons affected by British PMSC operations to access remedies**, which poses a challenge for the U.K. providing and facilitating access to remedies. In particular, the U.K. does not have a designated authority or channel for receiving complaints regarding PMSCs with which it contracts, which fails to meet the Montreux Document's recommended Good Practice of having a central reporting agency.⁸⁰¹

As a Contracting State and a Home State, the U.K. government arguably has a dual role to both provide and facilitate access to effective remedies to persons affected by the activities of the PMSCs with which it contracts and those which it allows to operate from its territory. Since, as noted above, the U.K. government views PMSC services as a valuable export, the U.K. arguably has a normative obligation, in addition to a legal obligation,⁸⁰² to ensure that British PMSCs abide by all applicable laws and do not violate the rights of individuals affected by their operations.

The most substantial change that the U.K. government has made since endorsing the Montreux Document is the release of an "action plan" implementing the UN Guiding Principles on Business and Human Rights.⁸⁰³ Although this is a positive step toward providing and facilitating access to remedies, it is likely that further action by the U.K. government will be required to ensure that persons affected by British PMSC operations abroad have access to effective remedies.

Action Plan on Human Rights

On September 4, 2013, the U.K. government announced the launch of its "action plan on business and human rights," thereby "becoming the first country to set out guidance to companies on integrating human rights into their operations."⁸⁰⁴ The Action Plan, among other things, summarizes the actions the U.K. government has taken to assist businesses with fulfilling their responsibility to respect human rights.⁸⁰⁵ These actions include introducing the requirement, discussed above, for certain companies to include human rights issues in their annual strategic reports, and developing and updating a number of services and toolkits which provide country-specific information regarding human rights issues and the UN Guiding Principles to British companies operating overseas.⁸⁰⁶

In the Action Plan, the U.K. government acknowledges that its "provision of judicial remedy options [is] an important element" in the range of available remedies.⁸⁰⁷ It further notes that, "[n]on-judicial grievance mechanisms based on engagement between the parties involved are also an important option," which "can be done through an internal government grievance procedure or through arbitration, adjudication, mediation, conciliation and negotiation."⁸⁰⁸ The Action Plan details a number of activities that the U.K. government plans on undertaking to promote access to remedies (including "advis[ing] UK companies on establishing or participating

in grievance mechanisms for those potentially affected by their activities”).⁸⁰⁹ However, as these activities do not result in substantial obligations for U.K. businesses operating overseas, the potential effects on the overseas operations of British PMSCs – and that greater access to effective remedies will follow – is questionable.⁸¹⁰ The Action Plan, for example, “encourages,” rather than requires, “companies to review their existing grievance procedures to ensure they are fair, transparent, understandable, well-publicized and accessible by all, and provide for grievances to be resolved effectively without fear of victimization.”⁸¹¹ Critically, the Action Plan does not provide a mechanism for overseeing industry-level grievance processes. Echoing its concern that domestic over-regulation of the PMSI may make it uncompetitive internationally,⁸¹² the Action Plan expresses the U.K. government’s concern that U.K. companies should not face “unfair costs or unnecessary regulatory burden,”⁸¹³ which may have informed its decision to not impose new legal obligations on U.K. companies.

Annual Reporting Requirements

As noted above, a new requirement for certain public companies is the disclosure of human rights issues in the companies’ annual strategic reports. While this is a positive step toward providing increased transparency with respect to human rights effects of these companies’ operations, the reporting requirements are limited to human rights issues “to the extent necessary for an understanding of the development, performance or position of the company’s business.”⁸¹⁴ It is questionable whether this standard would require even those British PMSCs that would otherwise be required to issue annual strategic reports to disclose human rights issues, their policies, and the effectiveness of such policies. In addition, it should be noted that, reporting requirements, by themselves, are unlikely to increase access to remedies.

Human Rights Legislation

The Human Rights Act 1998⁸¹⁵ provides for remedies for breaches of rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as the European Convention on Human Rights or ECHR). Consistent with the fact that human rights treaties bind only States, the Act applies to U.K. public authorities and bodies performing public functions.⁸¹⁶ As such, unless the U.K. government contracts with British PMSCs such that the PMSCs could be considered agents of the State and performing public functions, individuals adversely affected by the operations of British PMSCs abroad are unlikely to be able to have recourse to remedies under the Act. In addition, even if British PMSCs were performing public functions, the obligations under the ECHR may not be triggered because the Convention has been interpreted to apply only to situations where the State in question exercises a high level of control,⁸¹⁷ and is therefore unlikely to apply in many situations where British PMSCs operate.

OECD National Contact Point

The U.K. is a member of the Organization for Economic Cooperation and Development (OECD), which has developed the OECD Guidelines for Multinational Enterprises.⁸¹⁸ The Guidelines are voluntary recommendations to multi-national enterprises regarding responsible business

conduct in areas including human rights. As a member of the OECD, the U.K. has a National Contact Point (NCP) responsible for “further[ing] the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances.”⁸¹⁹

The U.K.’s NCP procedures⁸²⁰ permit any “interested party,” including “a community affected by a company’s activities, employees... or an NGO”⁸²¹ to file a complaint with the NCP alleging that a British company has not adhered to the Guidelines. As such, **although no such cases have been brought to date,⁸²² the NCP complaint mechanism⁸²³ could provide access to remedies for individuals adversely affected by the activities of British PMSCs abroad.** It should be noted, however, that as the Guidelines are voluntary in nature, companies may refuse to participate in this process and, as the NCP may only issue non-binding recommendations, companies may refuse to implement the recommendations. In such cases, however, the NCP would generally still issue a report documenting the complaint and its outcome.⁸²⁴

Industry-Level Complaints

Individuals adversely affected by the activities of British PMSCs may also be able to access remedies through industry-level complaints. Although British PMSCs are not statutorily required to provide complaint mechanisms, under the PSC1 standard, certified PMSCs would be required to establish and communicate to external stakeholders the PMSC’s documented grievance mechanisms which must meet minimum standards;⁸²⁵ and establish, implement, and maintain procedures for communicating with “external stakeholders” and “receiving, documenting, and responding to communications from... external stakeholders.”⁸²⁶ PMSCs must also communicate to people working on their behalf their right to whistle-blow, either internally or externally, regarding perceived nonconformance with PSC1, and are forbidden from taking reprisals against persons who make such reports in good faith.⁸²⁷ Accordingly, individuals affected by the activities of British PMSCs certified under PSC1 in the future may have the potential to access a remedy from the PMSC itself – although the effectiveness of such complaint procedures would likely depend upon the existence of effective oversight mechanisms, which as of yet remains uncertain.⁸²⁸ A further potential weakness in this approach is the fact that victims may be reluctant to file complaints with a PMSC that was the alleged cause of harm.

Whistle-blower legislation may also present an opportunity for individuals, particularly employees affected by or with knowledge of potential wrongdoing by British PMSCs, to access remedies, as it is unlawful in the U.K. for employers to reprise against employees for reporting potentially unlawful activity in good faith.⁸²⁹ The protection provided to employees of British PMSCs by such legislation may be limited; although employees are protected from reprisals “even if they blow the whistle on something that happened abroad,” including “when a different country’s law has been or will be broken,”⁸³⁰ the protections do not apply where, “under the worker’s contract he ordinarily works outside Great Britain.”⁸³¹

Finally, it should be noted that, although its procedure has yet to be developed by the ICoCA’s Board and its effectiveness remains to be seen, the ICoCA’s future grievance mechanism will, as

mandated by the ICoCA Articles of Association, require Member PMSCs to the ICoC to “address claims alleging violations of the Code by establishing fair and accessible grievance procedures that offer effective remedies.”⁸³² Although the procedure will therefore primarily be focused on the PMSC providing an effective remedy, the Secretariat of the ICoCA will retain residual authority to oversee the resolution of complaints,⁸³³ and the ICoCA’s Board may take punitive action, such as suspension or termination of a PMSC’s membership, if it “considers that the Member company has failed to take reasonable corrective action within a specified period or cooperate in good faith.”⁸³⁴

Recommendations

Although it is too early to assess the effect of the U.K.’s proposed voluntary self-regulation regime on the ability for individuals to access effective remedies, challenges with respect to accessing remedies are likely to remain unless all PMSCs can be required to report complaints to the U.K. government pursuant to legislation and/or a licensing regime, as discussed more fully in the section on U.K. licensing above. Such a regime could involve the establishment of an independent ombudsperson, require PMSCs to provide access to remedies and report complaints, and could be enforced through fines and de-licensing.⁸³⁵

A licensing regime notwithstanding, in order to facilitate and provide access to effective remedies, it is recommended that:

- *The U.K. government should make amendments to the judicial accountability mechanisms as outlined in the accountability mechanisms section above.*
- *The U.K. government should ensure that adequately funded, independent, and appropriate administrative and other monitoring mechanisms are in place to ensure the accountability of PMSCs, and their personnel, for misconduct.*
 - This would meet the recommendations of Montreux Document Good Practice 21⁸³⁶ and UN Guiding Principle 31.⁸³⁷
 - Such monitoring mechanisms could involve the creation of an independent ombudsperson, similar to the NCP, who would be responsible for collecting and investigating complaints and could refer complaints to criminal investigative authorities (as discussed in the accountability mechanisms recommendations above). Creating such an office may assist with addressing the significant challenges individuals face when accessing remedies in the event of misconduct by British PMSCs abroad.⁸³⁸ (Although the PMSI in the U.K. has reportedly lobbied for the creation of such an office,⁸³⁹ and the U.K. government recognizes the importance of transparency and monitoring,⁸⁴⁰ the U.K. government has in the past rejected created such an office.⁸⁴¹)
- *The U.K. government should require all British PMSCs to implement grievance mechanisms that meet the effectiveness criteria detailed in the UN Guiding Principle 31, and to report periodically to the government regarding complaints received and their resolution.*

- *The U.K. government should take grievance mechanisms into consideration when contracting with PMSCs, and, where feasible, give preference to PMSCs that have appropriate mechanisms in place.*
 - This recommendation is in keeping with Good Practice 12(b), which, among other things, recommends third party complaints mechanisms and whistleblower arrangements.
- *The U.K. government should require all British PMSCs to report publicly regarding human rights issues, their policies with respect to human rights, and the effectiveness of such policies.*

Iraq

Continuing Challenges for Victims' Access to Remedy

Due to the immunity granted PMSCs under CPA regulations, Iraqi citizens' grievances concerning human rights and IHL violations, and other abuses, as a result of PMSC personnel's actions between 2003 and 2009 were not addressed by the domestic judicial system. At best, the victims can hope for criminal accountability or pursue civil remedy in Contracting and Home States, with all the limitations inherent to those mechanisms, as discussed in previous sections of this report. During these years, the U.S. DoD did request PMSCs to compensate victims and their families by making payments "as soon as possible."⁸⁴² The UNWGM - Iraq was told that the payments were \$10,000 for death, \$5,000 for injury, and \$2,500 for damage to property.⁸⁴³ However, it could not obtain records of how many payments were made.⁸⁴⁴ Furthermore, it has been reported that tribal councils were utilized to facilitate these payments, especially in places where police authority was absent.⁸⁴⁵

There is still the possibility of some progress on accountability and access to remedy for some victims of alleged, serious human rights violations by PMSCs as the civil litigation against CACI for abuses at Abu Ghraib and KBR for trafficking of Nepalese workers, as well as the criminal case against Blackwater contractors for the shootings at Nisour Square make their way through the courts. (These are discussed in the U.S. section, above.)

Providing access to remedy to the victims of other alleged human rights violations from the years 2003 to 2009 is an issue that must be addressed. However, there are serious barriers to accountability, such as whether incidents were adequately investigated and whether authorities, either Iraqi or of Contracting and Home States, retained sufficient records and evidence. While prosecution in Iraqi courts is precluded, the Iraqi Mol was notified of many, if not all, of these incidents. The Mol could conduct an investigation, even at this late date to reach out to victims, clarify facts, and identify responsible parties. A measure of acknowledgement and justice might be afforded by a commission or public hearings that provides opportunity for victims and their families to speak out and, if possible, hear responses from the PMSCs they hold responsible for abuses.

More importantly, as the UNWGM - Iraq pointed out, the MoI or other agencies of the Iraqi government could play an important role in spurring accountability efforts in Home and Contracting States by sharing any information that might be relevant for the prosecution of PMSC employees involved in human rights and IHL violations in Iraq.⁸⁴⁶ The Iraqi government could also pressure relevant national authorities to prosecute PMSC personnel responsible for human rights violations and regularly request information on the status of ongoing investigations and prosecutions.

As the UNWGM - Iraq observed, "While the Iraqi authorities have intervened with the American authorities in the Nissour square case, the Working Group did not receive any indication that they have systematically raised other cases with the United States authorities."⁸⁴⁷ Greater and more consistent intervention could send important signals to Iraqi citizens that their human rights do matter and to the worldwide PMSI that violations must be redressed.

In 2009, Iraqi legislation was adopted to compensate Iraqi victims of military operations, mistakes, and terrorist acts. State responsibility for caring for the families of those killed and injured is recognized in Article 132 of the Transitional Provisions of the Iraqi Constitution.⁸⁴⁸ The UNWGM - Iraq could not determine if the law, which applied retroactively to 2003, was being used to compensate individuals injured or the families of those killed by PMSCs.⁸⁴⁹

After 2009, as the Iraqi government tried to reassert control over the PMSI, there was only limited progress in creating a system for transmitting citizens' complaints to the authorities and assuring that they have access to remedy. Today, incidents are rarely reported to the police, apparently because people have little trust or confidence in the criminal justice system. The UNWGM - Iraq could not determine if there was any effective means of redress.⁸⁵⁰

Recommendations

- *The government of Iraq is encouraged:*
 - *To establish an independent, public and easy-to-access complaints mechanism through which the local population can report human rights violations involving PMSCs.*
 - *To widely publicize the existence of this mechanism.*
 - *To share with relevant countries any information that might lead to the prosecution of PMSC personnel who were involved in human rights violations in Iraq, especially in the years 2003-2009.*
 - *To request information on all prosecutions pending in the Home States and Contracting States that employed PMSCs in Iraq.*
 - *To pressure the relevant national authorities in order to encourage prosecution of PMSC personnel responsible for human rights violations in Iraq.*

Afghanistan

Under Afghan legislation, there are a number of crimes and felonies which result in a duty to compensate for inflicted loss and damages. Restitution is also contemplated in terms of the

return of property. Thus, in addition to the principal punishment, PMSCs contractors can also be sentenced to compensation for the damage and the loss caused, or to return the good illegally acquired.⁸⁵¹ Additionally, under Sharia law there is the concept of *ibra*, which functions as a monetary compensation offered by the family of the perpetrator to the family of the victim for a loss suffered as a result of a killing, be it accidental or intended; it can be applied against a foreigner or an Afghan national. The exact amount of the *ibra* is not set but is negotiated by the respective families once the sentence is pronounced by the court. While the idea behind the *ibra* is compensation for loss, its payment is also understood as an act of forgiveness to the defendant, which has an important legal effect: it influences the court's decision to commute the death penalty for a lesser punishment if the victim's family accepts compensation. To that end, once the amount of the *ibra* payment has been agreed upon and a document signed by all interested parties, the document will be submitted in appeal to the Supreme Court for their consideration.

As a whole, these rules open judicial avenues for victims of contractor abuse to obtain an effective remedy. However, as judicial mechanisms they are conditioned, first, on access to courts, and second, on the criminal liability of the contractor. As it has been noted above that not all PMSCs contractors present in Afghanistan are subject to primary Afghan jurisdiction, these remedies are not available for all potential victims of those contractors' abuses. As for those contractors that remain under the primary criminal jurisdiction of Afghanistan, research indicates that the concept of *ibra* has been applied in one of the two cases of killings that have been prosecuted before Afghan courts.⁸⁵² In January 2010, an Australian contractor, Robert Langdon, was sentenced to death for the murder of an Afghan colleague following a dispute in 2009. In January 2011, following the decision of the victim's family to accept the *ibra*, Langdon's sentence was revised by the Supreme Court and reduced to 20 years in jail. The amount of the compensation is unknown.⁸⁵³

In addition, the 2008 Procedure for PSCs has also opened up scope for victims to obtain reparation directly from PMSCs. The nature and the procedure of the mechanism envisaged therein are, however, unclear. The specific provision states that "[t]he security company is responsible for compensation for losses resulting from unlawful acts of its staff. In cases where the security company refuses to pay the compensation the amount shall be taken from the bank guarantee, based on the authorized court order."⁸⁵⁴ However, it is unclear whether compensation has to be based on a court order, so that victims should bring a claim against the PSC and obtain compensation accordingly, or whether the determination to provide compensation, as well as the amount of compensation, is a decision under the authority of the HCB, and court orders are only required in cases where the PSC has refused to pay and the complainant must be granted access to the bank guarantee. It is also unclear whether compensation can or should be accorded between the claimant and the PSC pursuant to an internal grievance procedure administered by the PSC in question. In the first case, a judicial mechanism for remedy may have been envisaged, with the HCB acting as a facilitator by identifying violations, however, to date there appear to be no civil claims against PMSCs in Afghanistan, and thus, the effectiveness of the mechanism cannot be tested. As for the second option, the mandate of the HCB included monitoring and investigating violations and was broad enough to include issues of compensation; however,

according to the 2008 Procedure the operation of the HCB has to be regulated under a separate law which has not yet been adopted. Furthermore, the HCB itself does not seem to have become operational in practice, or at least at the regional level, and the general population remained unaware of its role. Therefore, as a potential non-judicial grievance mechanism, the HCB was neither accessible, nor predictable, and consequently it did not fulfill effectiveness criteria, as for example laid out in the above mentioned Guiding Principle 31, in order to ensure an effective remedy for victims of PMSC's abuses. Regarding the third option (i.e. compensation through a PMSC's grievance mechanism), the possibility seems open, though remote, and no information has been found of its application in practice. It is foreseeable that, without mediation of the HCB or any other authority in the complaints process, questions of legitimacy as well as of lack of transparency of any corporate grievance mechanism may be raised in practice.

Uncertainties also remain regarding the grievance resolution procedures for RMCs. **According to the wording of the 2012 Procedure, the grievance procedure was established in order to resolve issues regarding alleged violations of the Procedure by RMCs. As it is described, however, it makes no reference to victims or to any sort of remedial measures,** and the main consequences arising from a grievance procedure appear to be the payment of a fine and/or cessation of operations of the company. Thus, it seems to have been envisaged as an administrative mechanism to resolve conflicts regarding the implementation of the Procedure, and not a mechanism designed to address the issue of human rights violations. In this regard, article 19 of the Procedure specifically provides that possible allegations of activities, which are punishable by applicable laws of Afghanistan, "will be forwarded to Prosecutor's Office for investigation and appropriate actions," and thus directly refers to State judicial mechanisms for seeking reparations.

To date, very few substantial efforts have been undertaken by the Afghan government to facilitate victims' access to an effective remedy other than judicial remedies. The establishment of the AIHRC was a positive step as it has the authority to assist in defending the rights of the complainant and thus mediate to obtain a potential remedy.⁸⁵⁵ Yet, as has been noted above, the Commission lacks sufficient resources to properly investigate allegations of incidents involving PMSCs and has even encountered serious difficulties in obtaining reparations in cases of abuses against its own staff.⁸⁵⁶ Similarly, the 2011 Bridging Strategy provided that PSCs (tentatively, those that are allowed to remain operative in the country, i.e. diplomatic PSCs) shall follow the ICoC, which since September 2013 is to be implemented through the ICoCA that will be responsible for, among other things, the establishment of a grievance procedure that offers effective remedies to victims alleging violations of the Code by its members. At this time, however, this is a prospective mechanism that has yet to be put in place.

Furthermore, a sort of operational-level mechanism has been identified that is associated with military operations, and through which victims have been referred to international military bases to report wrongful acts committed by regular military personnel or contractors in order to obtain compensation. The operative criteria of this mechanism are unknown to this author, though it seems to be implemented with the co-operation of Afghan authorities. It is unclear, in particular, whether the mechanism can be considered a measure implementing certain

provisions contained in the SOFAs in force. Generally, the contents of the SOFAs exclude the possibility of claims between parties arising out of activities in pursuit of the ISAF mission and U.S. military operations; however, the ISAF SOFA leaves room for claims to be submitted through Afghan government to the ISAF, while, according to the U.S.-Afghanistan SOFA, claims by third parties relating to harms caused by any U.S. personnel may, at the discretion of the U.S. government, be dealt with and settled in accordance with the U.S. law.⁸⁵⁷ In practice the operation of this mechanism has presented several irregularities and, at least in one instance, was abusively implemented.⁸⁵⁸

Recommendations

- *The government of Afghanistan should establish an independent and public complaint mechanism through which local populations or civil society organizations can submit their complaints regarding any past harms committed by PMSCs, or any harms committed by remaining PSCs and APPF guards.*
- *The government of Afghanistan should strengthen the capacity and provide sufficient resources to the AIHRC, and, if necessary, extend its mandate for it so that it can operate as a mediator between potential victims of abuse and PMSCs.*
- *The government of Afghanistan should clarify the procedure for submitting complaints to the grievance resolution procedures of RMCs, and, if necessary, extend its mandate so that it is able to receive public complaints regarding harms by RMCs.*

SIDE BAR: The United Nations: Standard setter in the use of PMSC services?

The United Nations is increasingly reliant on the services of PMSCs for its peacekeeping and political missions as well as its humanitarian and development activities. According to a recent UN report, the organization uses private guards in more than fifteen countries, including Iraq, Haiti, the Democratic Republic of Congo and South Sudan.⁸⁵⁹ In addition to armed and unarmed private security, the UN relies on PMSCs for logistical support, security training and risk assessment, among other services. The organization hires both large international companies (such as G4S) and smaller, local security firms. Although comprehensive system-wide data on UN use of PMSCs is not available, evidence points to a dramatic increase in the use of these companies in the past few years. Recorded spending on “security services” increased from \$44 million in 2009 to \$75 million in 2010 and \$114 million in 2011.⁸⁶⁰

Civil society organizations, UN staff and the UN’s own Working Group on the use of mercenaries have highlighted the challenges raised by the organization’s growing reliance on PMSCs.⁸⁶¹ These include inadequate procedures to select and hire PMSCs; the absence of mechanisms to hold companies accountable for potential misconduct and abuses; the impact of the use of private security services on the safety of UN staff and the perception of the UN by local populations; the influence of PMSCs on UN security policies; and the move to an increasingly “bunkerized” security approach.

In November 2012, the UN officially adopted guidelines, *Guidelines on the Use of Armed Security Services from Private Security Companies (UN Guidelines)*, that tackle some, but not all, of these challenges. Although the UN is not a signatory to the Montreux Document, the UN Guidelines for the use of armed private security companies (APSC) mention the definition of “Home” and “Territorial” State used in the Montreux Document,⁸⁶² as well as the ICoC,⁸⁶³ an initiative that emerged from the Montreux process. And, as the UN Working Group on the use of mercenaries has repeatedly pointed out, the UN should aspire to be a model when it comes to best practices for the use of PMSCs.⁸⁶⁴ For these reasons, UN regulations and practice should be examined against the Montreux Document’s standards.

Decision to outsource

The UN Guidelines determine that PMSCs can only be used if other options (armed security from the host government, alternate member State(s), or internal UN system resources) are not available.⁸⁶⁵ A procedure to determine when these other options have been exhausted is not provided, however, making the concept of “last resort” rather subjective.

Private guards can be used to “provide a visible deterrent to potential attackers and an armed response to repel any attack” in two cases: for static protection of UN personnel, premises and property, and for mobile protection of UN personnel and property.⁸⁶⁶ The UN Guidelines give an overview of the basic functions that these services encompass.⁸⁶⁷ They do not, however, specify which services cannot be outsourced to PMSCs.

Selection

The UN Guidelines lay out selection criteria for hiring PMSCs, which include being a member of the ICoC, having a five year history of providing armed security services, having current licenses to provide armed security services in the company's Home and Territorial State, and being a registered UN Procurement Division vendor.⁸⁶⁸ The UN Guidelines meet most of the Montreux Document's criteria for authorization or selection, with two noticeable omissions: past conduct and welfare of personnel. Although the guidelines require screening of employees, they are not concerned with the organizational performance history of the company.

Monitoring and oversight

The UN Guidelines establish a clear chain of responsibility for hiring PMSCs, as the Under-Secretary-General for Safety and Security must ultimately approve the use of armed private security services. This is in keeping with the "central authority" required by the Montreux Document.⁸⁶⁹ UN Guidelines provide that the UN will maintain oversight of the delivery of the contract by the APSC, through daily operations review and monthly review, which coheres with the due diligence suggested by the Montreux Document.⁸⁷⁰ The UN Guidelines adopt a more hands-off approach to screening and training. Although the APSC is required to conduct screening and training of all personnel who are to be employed for the UN contract,⁸⁷¹ the supervision of these processes by the UN itself is limited. The UN Guidelines only require the APSC to confirm in writing that it has conducted screening,⁸⁷² and to certify that personnel has undergone training according to the Guidelines' standards, but the form of "certification" that should be provided is not defined.⁸⁷³ This presents potential risks for the UN, if the APSC does not adequately perform these tasks.

Accountability and remedy

The UN Guidelines are surprisingly silent on accountability for human rights abuses and effective remedy in case of violations. The UN Guidelines' Statement of Works does stipulate that "the contractor commits itself to hold its employees accountable for any violations of the United Nations standards of conduct and to ensure referral for criminal prosecution of any actions which constitute criminal offences under the laws of the host country."⁸⁷⁴ This places the burden of accountability on the contractor, rather than the UN, and does not mention the role of the Home or Territorial States in holding the company and its personnel accountable.

The UN Guidelines bring unprecedented and welcome transparency to UN practices. However, their scope remains limited. They only deal with armed private security, leaving all other instances in which the organization is using PMSCs unaddressed.

Recommendations

- *The UN Guidelines should be extended to cover all uses of PMSCs, not just armed security.*
- *The UN should have clear policies to prevent the organization from using companies that have been or currently are responsible for human rights abuses and violations of international law.*⁸⁷⁵

- *The UN should establish clear mechanisms to ensure that companies and individuals responsible for misconduct and abuses while under UN contract are held accountable.*
- *The UN should reconsider the costs and benefits of outsourcing, especially when it comes to loss of control over the screening and training processes for PMSC employees and the potential operational and reputational risks this poses to the organization.*

SIDE BAR: South Africa

While South Africa supported the Montreux Document, this support only existed on paper. South Africa adopted an arguably more cautious approach in its implementation. The only document which links South Africa to the Montreux Document is the Department of International Relations and Cooperation (DIRCO) Strategic Plan 2010-2013 (Strategic Plan), which states that DIRCO will, among other things “consider, supporting and participating in the Swiss Government’s initiative to disseminate the Montreux Document on Private Military and security Companies.”⁸⁷⁶ Despite this statement, South Africa’s undertaking to consider supporting and participating in the initiative has thus far not been fulfilled. In fact, South Africa indicated that as a result of its laws on PMSCs, it is not keen on supporting the Montreux process as the Montreux Document is not a legally binding instrument, and that South Africa has in place legal instruments that are arguably adequate for addressing the PMSCs phenomenon.⁸⁷⁷

South Africa’s lukewarm support of the Montreux Document should be understood in context. South Africa is one of the countries advocating for a legally binding international instrument addressing the issue of PMSCs, under the auspices of the United Nations Working Group on the use of mercenaries as a means of violating human rights and impeding the rights of peoples to self-determination. South Africa, therefore, is in full support of the Working Group’s initiative as opposed to the Swiss Initiative’s Montreux Document. In its Report dated 2 July 2012, the Working Group stated that:

[It] welcome[d] efforts to clarify obligations under international law and identify good practices, such as the Montreux Document, in addition to industry self-regulation initiatives, such as the International Code of Conduct for Private Security Service Providers. The Working Group urge[d] States to recognize these initiatives as complementary to, but not substitutes for, strong international and national regulatory frameworks.⁸⁷⁸

In 2010, the Government of South Africa invited the Working Group to discuss the measures it had taken to address mercenary activities and to regulate the activities of PMSCs. During this visit, the Working Group commended South Africa for being one of the first countries to adopt legislation on the provision of foreign military assistance in 1998.⁸⁷⁹

On the domestic front, South Africa is still facing its own issues in terms of addressing the challenges posed by PMSCs, particularly beyond its own borders. Despite the fact that the Regulation of Foreign Military Assistance Act of 1998 remains in force, South Africa has not taken the necessary steps to effectively implement it. For instance, the National Conventional Arms Control Committee, which is supposed to play a central role in the regulatory framework established by the Regulation of Foreign Military Assistance Act, has not been effective in processing applications for those who wish to export their military skills.

The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006, which seeks to amend the Foreign Military Assistance Act of 1998, is still not yet in force. To date, there is no Proclamation in the Gazette, determining the commencement of

the Act, as provided for under section 16 of the Act. This is despite the fact that it was assented to in 2007 by the former President, Mr. Thabo Mbeki. The Regulations that are critical for the implementation of the Act, provided for under section 12 of the Act, have not been approved.

The South African Parliament, is currently considering a Bill, which seeks to amend the Private Security Industry Regulation Act of 2001, which established the Private Security Industry Regulatory Authority. Among other things, the Private Security Industry Amendment Bill of 2012 seeks to regulate services rendered outside South Africa. Accordingly, the Bill proposes that:

Any person who, within the Republic, recruits, trains, hires out, sends or deploys any other person to provide a security service outside the Republic must—

- (a) provide to the director on a quarterly basis such information as may be prescribed regarding such recruitment, training, hiring out, sending or deployment or nature of the security service within the prescribed time limits; and
- (b) comply with the provisions of this Act.⁸⁸⁰

The Bill further states that any person who undertakes the above activities may not engage in any activity, or render any assistance, that is prohibited in terms of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 or the Regulation of Foreign Military Assistance Act of 1998.

South Africa is also involved in another process aimed at addressing the issue of mercenaries and PMSCs, among other things, under the auspices of the Consultative Draft of the South African Review 2012 (Review).⁸⁸¹ According to the Review, “[a] clear distinction must be made between mercenaries, being individuals availing their military skills, and private security companies who provide their services to either governments or non state actors.”⁸⁸² The problem with the mercenaries description, defined as “an individual availing their military skills,” is that it is not found in international law, African Union law, or South African law. The other problem relates to the description of a PSC, which is said to “provide collective military services.” The Review, therefore, treats a person who “avail their military skills” as a mercenary and a company providing “collective military services” as a PSC.⁸⁸³

Further, the Review assumes that mercenaries “provide military services in violation of domestic and international law (in some instances they are used to sustain undemocratic states).”⁸⁸⁴ Technically speaking, a “mercenary” as defined under international law, African Union law, and South African law, cannot provide a “military service.” The Review also does not define a “military service.” A *modus operandi* for a mercenary is to fight and not to provide specialized services related to military actions, including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces, and other related activities as envisaged by the UN Working Group’s proposed definition.⁸⁸⁵

The Review further acknowledges the fact that several South African PSCs continue to be contracted by foreign countries to operate in conflict zones where they protect prominent individuals, critical infrastructure, property and strategic resources.⁸⁸⁶ Further also the Review makes a very important statement that,

It is very probable that the global involvement of South African private security companies or South African citizens, particularly in defence transformation, peacekeeping and peace building in conflict and post-conflict areas will continue into the foreseeable future.⁸⁸⁷

The importance of South Africa in implementing the Montreux Document cannot be overemphasized. To date, there is a considerable number of signatory companies to the ICoC with headquarters in South Africa. The ICoC aims at setting private security industry principles and standards based on international human rights and humanitarian law, as well as to improve accountability of the industry by establishing an external independent oversight mechanism. South Africa has also not been part of this process. The implementation of the ICoC must be complemented by the effective implementation of the Montreux Document commitments by States. As one of the States that participates in the Montreux Document, South Africa, therefore, is yet to play its part in so far as its implementation is concerned, if at all.

Recommendation

- *The government of South Africa should take steps to implement the legal obligations and Good Practices detailed in the Montreux Document.*

SIDE BAR: The Montreux Document and Sierra Leone, 2008-2013

PMSCs are involved in Africa in several ways. First, like in Latin America, African contractors are hired by international PMSCs to work in other countries.⁸⁸⁸ Second, local and international PMSCs protect resource extraction activities in a number of countries. Third, they participate in operations against terrorist or criminal organizations from the Sahara desert to Kenya. Fourth, they provide support to multi-lateral interventions led by the United Nations or the African Union.⁸⁸⁹

Three African States are supporters of the Montreux Document. South Africa,⁸⁹⁰ Sierra Leone, and Angola were among the original supporters, Uganda joined the process in July 2009. This side bar focuses on one of these countries, Sierra Leone, and discusses the following points: African participation and involvement in the Montreux process; a comparison between Sierra Leone and Liberia; and a description of recent security developments in Sierra Leone.

Participation and involvement of African governments

Arguably, African participation is particularly important to the Montreux process, and in general to global regulation of private security. Scholars, such as Mills and Stremlau,⁸⁹¹ write that Africa is the continent at greatest risk, and that regulation of private security in Africa is more problematic than elsewhere because of the nature of the State.

Herbst explains that attempts at regulation that circumscribe the power of African governments are doomed by the very nature of African sovereignty,⁸⁹² where the broadcasting power over sparsely populated lands has been the defining question for African rulers. In parts of Africa and the developing world, State institutions have been used as a mechanism for rulers to achieve personal gain, rather than ensure the security of the populace. Thus, striking the balance between State regulation and effective security is harder in Africa than elsewhere.

A survey of the participating States to the Montreux Document shows a surprising variation in the level of involvement: the greatest majority of African states did not participate. While every treaty or international initiative starts with less than all of the world's States, many African countries with direct experience of mercenarism, and with a large PMSC presence on their territories, are not participants in the Montreux process. As of 2013, Liberia, Congo, and Nigeria are not supporters. The cases of Sierra Leone and Liberia are informative for understanding why only a few African States have participated in the Montreux process to date.

Understanding divergence: Sierra Leone and Liberia

The contrasting trajectories of Sierra Leone and Liberia with regard to the Montreux process are worth closer examination. Sierra Leone joined as an initial participant; Liberia did not. Why is this the case? The question is relevant for a number of reasons. First, both countries had experience with combat private security companies. Sierra Leone President Strasser contracted Executive Outcomes which effectively helped train the loyalist army and push the rebels out of the capital,

retake the diamond-mining area, and destroy the rebel headquarters.⁸⁹³ Liberia also suffered under its mercenary experience. Since Charles Taylor's incursion in 1989, Liberia symbolizes the impact of the rise of violent organized transnational networks interested in exploiting minerals or timber, and control over these resources became key during the years of the civil war (1990-2005).⁸⁹⁴ Warlords rule operated through the control of commerce rather than mobilizing the bureaucracy. In Sierra Leone, while Executive Outcomes provided short-term stability to the government, it became deeply involved in the political arena by way of training the *Kamajors*, an ethnic group that rose in power as a result of this external support. Executive Outcomes created a parallel force and fragmented the political system.⁸⁹⁵ William Reno has termed this "warlord politics," where private interests of the ruler and the collective interest of the state are fused.⁸⁹⁶ In this context, politics is not based on elite accommodation, but rather on support and resources from highly mobile businessmen and commercial partners.

The work of such PMSCs as Executive Outcomes and Sandline International has made Sierra Leone something of a paradigm case of security privatization. Looking over a longer time horizon, the restructuring of police and military has remained weak in Sierra Leone. Later, the ratio of private to public security rose and reached a 1:2 level; with hybrid public/private units being created.⁸⁹⁷

There was a continuum that linked the two countries' patronage, finances, and violence across international borders:

Charles Taylor used his connections with the RUF to entrench his own position in the cross-border trafficking in diamonds that had been the preserve of members of the prewar government in Liberia. This relationship linked Sierra Leone rebels to the political and commercial interests of their patron in the neighboring country, and not to the productive energies and networks of the aggrieved Sierra Leoneans in areas that they controlled.⁸⁹⁸

Second, there is another conspicuous similarity between the two countries, in the distinctiveness of the experience of war that led to complete chaos. The collapse of the state and the deployment of means of violence reached unprecedented levels of brutality. The savagery was described for example in Stephen Ellis' *Mask of Anarchy*, a story of Liberia's descent into chaos. In the same way, Sierra Leone is the initial evidence used by Kaplan in the *Coming Anarchy*.⁸⁹⁹

Finally, there are several economic and geopolitical variables that make Sierra Leone and Liberia comparable, including mineral resources rents, membership in regional and continental unions, and being coastal states. See Table 1, comparing key World Development Indicators for Sierra Leone and Liberia.

TABLE 1: World Development Indicators: Sierra Leone and Liberia

World Development Indicators ⁹⁰⁰	Sierra Leone		Liberia	
	2012	2011	2012	2011
GDP per capita (constant 2005 US\$)	435	385	277	257
Grants and other revenue (% of revenue)		35.80		28.69
IBRD loans and IDA credits (DOD, current US\$)		187,932,000.00		13,723,000.00
IDA grants (current US\$)		25,358,425.55		48,474,555.55
Mineral rents (% of GDP)		1.035933289		2.323687276
Total natural resources rents (% of GDP)		3.615671922		11.02475959

Certainly, there are significant differences too. Elections, party-systems and legislatures differ, and Liberia had less years of experience with multiparty democracy, as well as a more ethnically fragmented political landscape. However, all of the similarities make the initial question all the more puzzling: Why did Liberia not join the Montreux process, whereas Sierra Leone did? What shaped their different position on global regulation? Arguably, both countries and both communities should share the same demand for regulation and yet, a discrepancy exists. On the one hand, it is reasonable to expect that Sierra Leone would become a supporter of the Montreux Document. Keen wrote that “in a sense, the Sierra Leonean war had been privatized twice – first through the descent into private violence and secondly through the hiring of mercenaries.”⁹⁰¹ The historical experience unequivocally created a demand for new institutions: after the war, the State produced the National Security and Intelligence Act of 2002, which has provided the basis for regulation of the private security industry. The experience in regulation even allowed Sierra Leone to contribute to the preparatory works for the Montreux process.⁹⁰²

Two other points make the puzzle more interesting. First, the Liberian state has been able to adopt laws in the contested field of private security. Between 2008-2011, given the increase in piracy attacks on commercial vessels around the world, and with the second largest Flag State for merchant shipping in the world, Liberia issued guidance for safely hiring and utilizing private security on the high seas.⁹⁰³ The Liberian Registry recommends a set of vague vetting procedures, skill sets, training, equipment, and management support for Liberian ships contracting maritime security companies. This document has a specific section whose title is: “What decisive factors should be considered in selecting a provider of armed security guards?” It states that Liberian laws and regulations do not prohibit the use of firearms or armed guards on board Liberian flagged vessels. Second, beyond the historical evidence, Liberia has a growing number of private security companies that are providing protection services to diplomatic missions or industries, such as rubber plantations and logging companies. The Plant Protection Departments (PPDs) of the rubber plantations run by Firestone, the Liberian Agriculture Company, and Cavalla employed a total of 738 private security officers in 2006.⁹⁰⁴

The two most plausible reasons for Liberia's failure to participate in the Montreux process appear to be the precariousness and instability of the State, after a long and debilitating war, and the external influence of the United States. With regards to the former, after fifteen years of civil war, the justice system was under total overhaul.⁹⁰⁵ Thus, according to a RAND report, in 2007 the principal concern was the inadequate oversight of security forces, although RAND recommended a focus on courts and prisons, rather than the oversight of private security companies.⁹⁰⁶ The report only briefly mentions that in the future, it would be important to accredit and monitor private security companies.

With regards to the latter, the external influence of the U.S. on the DDR process is significant. The Comprehensive Peace Agreement (2005) gave the U.S. a lead role in restructuring the Army of Liberia. The U.S. State Department provided support for recruiting and training about 2,100 soldiers. In addition, it hired two PMSCs to help the Government of Liberia in its reform process. DynCorp International provided facilities and training for the Army of Liberia, and Pacific Architects and Engineers built military bases and provided advanced training and mentoring to Liberian Army officers.⁹⁰⁷

According to the Geneva Centre for the Democratic Control of Armed Forces:

The United States took responsibility for supporting military reform – in particular the rebuilding of the Liberian national army. The implementation of this task, a first in Africa, was outsourced to a private contractor. This posed a number of problems in practice. The reform model initially proposed for the army was not grounded in Liberian realities, values and priorities. The process was de-linked from parallel efforts to reform the national police so coherence across the security sector was an issue. And finally, the lines of accountability for this work ran between the contractor and the US Government. National ownership of security reforms was undermined by the failure to provide accountability to the nascent Liberian executive, parliament or civil society.⁹⁰⁸

The same point was reiterated by Gumedze when analyzing the relation between Liberia and the United Nations; Dyncorp's involvement was a success story but questions remain regarding the lack of diversification and democratic accountability. "Dyncorps sees itself as an extension of the US interests; it is not responsible to the United Nations nor to Liberia."⁹⁰⁹ This second point poses a fundamental question in Liberia's security sector reform (SSR) process, whether democratic institutions responsive to civilian oversight can be built by private contractors and in an atmosphere of at least partial secrecy.⁹¹⁰ A Crisis Group report adds that:

If the day-to-day practices of PMC contracting contradict their given *raison d'être* can there be another explanation for them? One, already given, is that U.S. government involvement in undertakings like Liberian SSR might never happen if the contractor option did not offer a kind of "openly clandestine" approach to doing diplomatic and military work overseas.⁹¹¹

Security Developments Sierra Leone since Montreux

Sierra Leone is a Home State to some PMSCs, and it is a Territorial State where local and international PMSCs operate, but it is not a Contracting State that contracts for PMSC services. The research carried out for this report does not show a direct influence of the Montreux Document on the security developments in Sierra Leone in the selected timeframe (2008-2013).

While prior to the war there were only two PMSCs, nowadays, the estimated number is 30, perhaps as many as 50, with a total employment of 3,000.⁹¹² International PMSCs are present, like G4S, and former UN peacekeepers are engaged in the private security sector, as are former soldiers of Executive Outcomes and its offshoots Lifeguard and Southern Cross.

The SSR started in 1999 and ran until 2008. It was apparent that the armed forces, as exemplified by their role in Sierra Leonean politics (including two coups during the 1990s), were going to be a potentially destabilizing factor. As a consequence, it was assessed that appropriate actions, such as training the armed forces and building up civilian oversight, were necessary. At the core of the SSR is the Office of National Security (ONS) which has oversight on the private security sector.

According to Saferworld,

The Office of National Security became the central body for improving the co-ordination and effectiveness of the security sector. This was the result of it being empowered to possess many core executive functions. These included the preparation of joint assessments; oversight of security organisations; co-ordination of disaster management; co-ordination and implementation of a security sector review (published in 2005); and the provision of security policy advice to the President. By the time of the OPR produced in 2007, it was concluded that the 'Office of National Security (ONS) and associated British advisory support is a success story.'⁹¹³

While the SSR is hailed as a success, several issues can still be identified. First, the lack of a database for security guards or PMSCs is problematic, as mentioned by Ralby.⁹¹⁴ There is no official instance to record or investigate abuses by companies or their personnel. Second, grievances filed with Ministry of Labor do not result in any action. Investigation and interviews for this research confirm that new legislation regarding the private security sector took effect in early 2010, due to the support of the NGO community, but it is not clear if it has been implemented.⁹¹⁵ Finally, another problem that continues to challenge the country is the population's mistrust of the security forces.

Recommendation

- *The participating States currently supporting the Montreux Document should encourage greater participation by other African States, especially where there is no comprehensive legislation for PMSCs.*

RECOMMENDATIONS

Country specific recommendations for participating States in the Montreux Document – namely the United States, the United Kingdom, Iraq, Afghanistan, South Africa, and Sierra Leone, as well as supporting States in Latin America and the Caribbean, in addition to recommendations to the United Nations – are detailed in the relevant sections above. In this section, we draw on those recommendations to provide overarching recommendations, which should be addressed by the Montreux process. A fifth year review of efforts by participating States to implement the Montreux Document will take place in Montreux, Switzerland from December 11-13, 2013. It is unclear if that review will lead to a plan of action to promote implementation of best practices by States that are not fully meeting their legal obligations and the Good Practices detailed in the Montreux Document. We hope that these recommendations will shape the discussion in Montreux, and will be considered as one means of identifying and addressing shortcomings in implementation efforts. Furthermore, some of the recommendations raise issues not adequately addressed in the Montreux Document. Participating States should consider these issues through the Montreux process moving forward.

To that end, we recommend that there be a designated body – possibly housed within the Swiss government, DCAF, and/or the ICRC – that will receive regular reports from Montreux Document participating States on ongoing implementation efforts, share findings from those reports, and, more generally, identify and promote the Montreux Document and best practices for demonstrating adherence to it.

General recommendations

- *Participating States should promote the Montreux Document among Contracting, Territorial, and Home States that have not yet indicated support for the Montreux Document, particularly among those States that suffer from instability and have a large PMSC presence on their territories, contract with PMSCs, or are Home States to PMSCs and/or PMSC personnel that work overseas.*
- *Participating States should reexamine the current categories of Contracting, Territorial, and Home States for their comprehensiveness. In particular, the situation of personnel employed or contracted by PMSCs from States that either do not support the Montreux Document or that may not clearly fit into these categories should be addressed.*
- *Participating States should encourage regional and international human rights bodies to reference the Montreux Document as interpretive guidance in their jurisprudence.*

Recommendations regarding determination of services

- *Participating States that do not have clear national laws and policies determining which services may or may not be outsourced to, or carried out by, PMSCs should develop appropriate regulations. Discussions about defining inherently governmental services should be*

conducted in a public, consultative fashion.

- *Participating States that do have laws and policies defining inherently governmental functions should ensure that those regulations are being fully and consistently implemented.*
- *All participating States should ensure that regulations regarding inherently governmental functions, as well as any agreements with foreign forces, clarify which armed security and military services may or may not be privatized. The UN should extend the UN Guidelines to address military services.*
- *All participating States should conduct human rights risk analyses when deciding whether to contract for or authorize PMSC services, and should take into consideration not only the likelihood of direct participation in hostilities, but also the probability that a service could result in a grave impact on human rights.*

Recommendations regarding due diligence in selecting, contracting, and authorizing PMSCs

- *Contracting States as well as Territorial and Home States issuing authorizations and licenses should pay particular attention to the capacity of PMSCs to operate in conformance with relevant national and international law, including, but not limited to, indicators such as past conduct; provision of training that includes training on international humanitarian and human rights law and rules on the use of force; and company policies relating to international humanitarian and human rights law, such as the existence of internal investigation and disciplinary arrangements, third party complaint and whistleblower mechanisms, and procedures for incident reporting.*
- *Territorial and Home States that do not have an authorization and licensing regime for PMSCs should consider creating one.*
- *All participating States should ensure that procedures for contracting, authorizing, and licensing PMSCs are publicly available and transparent, and applied in a consistent and impartial fashion.*
- *All participating States and the UN should maintain central databases of past performance of PMSCs, which should include information on misconduct by PMSCs and their personnel. The information in these databases should be accessible to government and UN officials making determinations on the award of contracts and authorization and licensing of PMSCs based on past conduct and performance.*
- *Participating States that are relying primarily on voluntary industry self-regulation should use past conduct and performance as indicators in determining the efficacy of self-regulation.*

Recommendations regarding due diligence in monitoring PMSCs

- *All participating States and the UN should have an adequately resourced and independent authority in place to monitor whether the activities of PMSCs adhere to the criteria laid out in contracts, authorizations, and licenses. In instances where multiple government agencies*

function in a monitoring capacity, the activities of those agencies should be coordinated and relevant information about PMSC conduct shared across agencies.

- *Monitoring authorities should have the authority to receive and investigate public complaints.*
- *Monitoring authorities should collect, and where feasible, make publicly available, information on violations and investigations of misconduct.*
- *Participating States that are relying primarily on voluntary industry self-regulation should continually assess whether procedures are sufficient to facilitate rigorous, independent, and effective monitoring.*
- *Participating States should take measures to foster coordination among national and international monitoring bodies.*

Recommendations regarding accountability

- *Contracting and Home States should extend criminal liability regimes to ensure that their courts have jurisdiction to address alleged crimes committed abroad by PMSCs and PMSC personnel – at a minimum for violations of humanitarian law and gross human rights violations – regardless of whether PMSCs are clients of governments or private actors.*
- *When negotiating agreements on the status of foreign forces, Contracting and Territorial States should ensure that their courts have jurisdiction to hear both criminal and civil cases arising from the activities of PMSCs and their personnel.*
- *Contracting and Home State agencies should provide adequate resources to investigate alleged contractor misconduct overseas. Domestic agencies, as far as feasible, should coordinate with one another and with the agencies of Territorial States in conducting investigations.*
- *All participating States should take steps to adopt national laws that criminalize acts that would constitute crimes under international law.*
- *Contracting and Home States should remove barriers to civil suits in domestic courts to address contractor misconduct, in particular when such misconduct constitutes a violation of international human rights or humanitarian law.*
- *All participating States should remove barriers to civil compensation claims brought outside the civil litigation system, and should report transparently on the numbers of such claims brought and awarded for misconduct by PMSCs.*
- *All participating States should include Montreux Document principles in contracting, authorization, and licensing procedures and decisions. They should adopt and improve administrative and procurement measures to sanction misconduct by contracted, authorized, and licensed PMSCs if they do not adhere to these principles, and they should report transparently on the imposition of such sanctions.*
- *All participating States should immediately investigate, and, as needed, take action on, cases of alleged PMSC misconduct that have not been adequately resolved.*
- *All participating States should publicly report on a regular basis information about misconduct by PMSCs and their personnel, investigations, and actions taken.*

Recommendations regarding access to effective (non-judicial) remedy

- *Contracting States utilizing PMSC services in Territorial States should create ombudsmen capable of fielding, investigating, and directing complaints of misconduct to appropriate authorities. The Contracting State should publicize the existence of an ombudsmen's office. Ombudsmen should award compensation in a transparent, legitimate, and predictable fashion.*
- *Territorial States should establish an independent, public, and easily accessible complaints mechanism through which the local population can report alleged misconduct by PMSCs. Territorial States should widely publicize the available complaints mechanism, the procedures and decisions of which should be transparent.*
- *International bodies developing voluntary industry self-regulation should ensure, and all participating States should require as part of contracting, authorization, and licensing procedures, that PMSCs have grievance mechanisms in place that meet the effectiveness criteria laid out in Guiding Principle 31.*

CONCLUSION

This report has sought to contribute to the discussion of the progress of the Montreux process in the five years since the Montreux Document was launched. Based on the analysis of two Contracting and Home States (the United States and the United Kingdom) and two Territorial States (Iraq and Afghanistan) – as well as shorter assessments of a subset of participating States in the African, Latin American and Caribbean regions, it has become evident that, in terms of demonstrated compliance with legal obligations and the implementation of Good Practices, progress has been mixed. Some States have done well in some areas, whereas others lag behind. For example, the U.S. was found to have avenues of civil compensation for victims of PMSC misconduct outside the tort system as well as through tort litigation, but the legal framework for tort liability is in considerable flux. In terms of criminal accountability, the failure to pass the Civilian Extraterritorial Jurisdiction Act leaves a gap in U.S. law that makes it difficult to ensure that all PMSCs contracted to U.S. agencies overseas are subject to federal civilian courts. The U.S. also has a complex system for overseeing and monitoring PMSCs, but shortcomings arise in the implementation of applicable statutes, regulations and guidelines. The U.K., as the second largest Home State to PMSCs, has chosen not to license PMSCs in favor of industry self-regulation, a choice which impacts on its ability to regulate and monitor the industry. Territorial States, such as Iraq and Afghanistan, still struggle with the legacy of the large scale presence of PMSCs on their territories. Iraq has still not managed to pass legislation to regulate PMSCs that was first proposed in 2008. Afghanistan is seeking to transfer the provision of security back to the State through the Afghan Public Protection Force, but its licensing and monitoring procedures are still in development.

With mixed records of adhering to the legal obligations and implementing the Good Practices, it is nearly impossible to assess whether or not the Montreux Document is having the desired impact of improving human rights protections for people and communities affected by PMSCs' activities and ensuring accountability for misconduct of PMSCs and their personnel. The data-collection systems necessary to make such an assessment have not been put in place. As a result, it is clear that all the participating States examined here should take steps to create independent, transparent, and accessible mechanisms to receive and address complaints from affected populations. And while some States, such as the U.S., require the reporting of serious incidents, no participating State examined here makes comprehensive data on serious incidents, investigations, or actions taken publicly available. Without such data, impact cannot be tracked.

If successful criminal convictions, civil suits, or other forms of remedy such as reparations are a measure of impact, then cause for concern remains. For example, in the case of the U.S. there have been only a handful of criminal cases against PMSC personnel that resulted in conviction – this is so despite the numerous allegations of misconduct detailed in the Iraq and Afghanistan sections. As stated in the Iraq section, allegations of PMSC misconduct between 2003 and 2009 remain unaddressed. Overall, the report highlights that judicial and non-judicial, and state and non-state based mechanisms of remedy need to be strengthened; a mix of such mechanisms will increase the likelihood of individuals being able to access effective remedies.

A number of recommendations, both country-specific and general in nature, were provided to assist participating States in identifying where shortcomings persist and developing national measures to meet their Montreux commitments. The Montreux Document is an important contribution in clarifying that international humanitarian and human rights law applies to States relative to the activities of PMSCs, and that States must protect individuals' rights from violation by PMSCs. A balanced mix of State regulation of the PMSI and voluntary industry self-regulation will assist PMSCs in meeting their responsibility to respect human rights.

The Montreux Document is only useful if it is used. On the occasion of this fifth anniversary, participating States should honestly assess what they have done to meet their commitments, and should express a strong recommitment to implementing the Montreux Document legal obligations and recommended Good Practices. A regularized process for assessing progress should be created. This is an important next step in the Montreux process, but so is further dissemination to other States. As noted in the sections on Latin America and Africa, many States that are facing political instability and have a PMSC presence on their territories, or whose citizens are working for PMSCs around the world, have not yet committed to the Montreux process. Wider participation of States in the Montreux Document and its process will only enhance the authority of the Montreux Document and encourage even greater dissemination of its principles. Ultimately, however, only State adherence to these principles promises to assist with ensuring that the PSMI, on balance, makes a positive contribution to security globally.

APPENDIX A

Exemplary List of Alleged Rights Violations Involving PMSCs in Iraq

Alleged human rights violations against the local population.

- In May of 2004, two employees of U.K.-based PMSC Erinys accused a 16-year-old boy of stealing some cable and allegedly restrained him by placing six car tires around his body and then left him without food or water for more than four hours. The PMSC said the boy was released after three minutes when he broke down and began crying.⁹¹⁶
- On 22 December 2004, a Custer Battles convoy shot out the tire of a civilian car and then fired five shots into a crowded minibus in Umm Qasr. No one was hurt, the contractors handed out cash money to Iraqi civilians, and left.⁹¹⁷
- On 8 November 2004, a convoy of heavily armed contractors working for the American company Custer Battles that had been hired by the Pentagon to guard supply convoys allegedly smashed into and shot at civilian cars. A poorly trained young, subcontracted, Kurdish guard on the convoy shot a civilian in a traffic jam; later, the convoy came across two teenagers along the road and gunned down one of them. At another traffic jam, the contractor's pickup truck rolled over and smashed into the back of a Sedan full of Iraqis. Contractors working for Custer Battles reported the events and then resigned in protest and disgust.⁹¹⁸
- On 28 May 2005, sixteen employees of Zapata Inc. Subsidiary Security (eight of whom were former U.S. Marines) allegedly shot at civilians and Marines in Fallujah, Iraq. The PMSC was not registered with the PSCAI, nor at the Ministry of Interior of Iraq, so was operating illegally. In an extraordinary example of contractors being treated as criminals, the Marines jailed the security guards.⁹¹⁹
- In June of 2005 the contractor U.S. Investigations Services (USIS) was involved in alleged violations, including participation by USIS trainers in offensive military operations during the siege of Fallujah. Such involvement in combat by contractors is not allowed under DoD regulations or Iraqi law. In a second incident a USIS contractor apparently witnessed the killing of an innocent Iraqi and did not report it to any one higher up in the chain of command. In addition, the contractor allegedly reduced the number of trainers it provided to the Iraqi government in order to increase its profit margin. The allegations came to light in an anonymous, four-page letter sent to U.S. Army Colonel Ted Westhusing. Westhusing later committed suicide after denouncing the contractor he had been responsible for overseeing.⁹²⁰
- On 27 October 2005, a "trophy video" appeared on the Internet showing employees of the U.K. contractor Aegis Defence Services randomly shooting at civilian cars from the back of their vehicle while traveling on the road to the Baghdad International Airport. Aegis denied participating in the shootings, but other sources identified a South African Aegis employee as the shooter.⁹²¹

- In July of 2006 an employee of the U.S. contractor Triple Canopy opened fire on two Iraqi civilian vehicles in Baghdad for no apparent reason other than “for sport,” and then left the occupants of the vehicles for dead.⁹²²
- On 9 October 2007 guards from the Australian PMSC, Unity Resource Group working for RTI International in Baghdad fired 40 shots at a civilian car, killed two Iraqi women and then drove away from the scene.⁹²³
- On 10 November 2007 a Dyncorp International contractor shot and killed an Iraqi taxi driver and reportedly immediately left the scene.⁹²⁴
- On 8 July 2010 a team from a private security company opened fire on a vehicle on the road from the Baghdad airport to the city center. One Iraqi civilian died. (UNAMI, which reported the incident, did not name the company.)⁹²⁵

Alleged abuses against PMSC personnel:

- In 2004, 13 Nepali men were told they would earn \$500 a month working at a luxury hotel in Jordan. Instead, Daoud & Partners and KBR (a former Halliburton subsidiary previously known as Kellogg Brown & Root) took them to Al Asad Air Base in Iraq. The men were told they owed large brokerage fees and could not return home until they repaid them. In August of 2004, while traveling in an unsecured caravan of cars along the Amman-to-Baghdad highway in Iraq’s Anbar province, 12 of the men were captured and executed by insurgents from the Ansar al-Sunna Army. The 13th man, who was in a different car, was not captured. The families of the victims have sought justice in U.S. courts, but failed.⁹²⁶
- In 2005, 105 Chileans and 189 Hondurans were recruited and given military training in Honduras, including use of high-caliber weapons such as M-16 rifles or light machine guns. They left the country in several groups and were then smuggled into Iraq where they were engaged as security guards at fixed facilities. “They had been contracted by Your Solutions Honduras SRL, a local agent of Your Solutions Incorporated, registered in Illinois, United States of America, which in turn had been subcontracted by Triple Canopy, based in Chicago, United States of America. Some of the Chileans are presently working in Baghdad providing security to the Embassy of Australia under a contract by Unity Resources Group (URG).”⁹²⁷
- From 2005 on, First Kuwaiti Trading & Contracting (also known as First Kuwaiti Trading Company and FKTC), which is a construction and security company based in Kuwait that was contracted to build the U.S. Embassy in Baghdad in 2004, was accused by migrant workers from Nepal, India, and the Philippines of labor trafficking and other labor abuses. The workers claim they were pressured against their wishes by the company to work in Iraq under U.S. military contracts. Originally promised high-paying jobs in Dubai and Kuwait, the workers were flown instead to Baghdad where their passports

were confiscated, and they reportedly lived and worked in deplorable conditions, were underpaid, and received no healthcare.⁹²⁸

- In August of 2009, Daniel Fitzimons, a British ArmorGroup employee, was accused of shooting dead fellow contractors Paul McGuigan and Darren Hoare and injuring an Iraqi guard at a base inside Baghdad's Green Zone. Fitzimons became the first international contractor to stand trial in an Iraqi court; he received a sentence of 20 years.⁹²⁹

Another human rights concern emerged when the UNWGM - Iraq learned that the Iraqi Government had asked foreign companies to terminate employment of African and Asian personnel because levels of unemployment were so high in Iraq. Iraq threatened to revoke the licenses of all foreign companies, including PMSCs, which recruited foreign labor, if they did not comply. This could clearly lead to discrimination on the basis of race and the UNWGM - Iraq asked Iraq to recall its international obligations, most notably under the Convention on the Elimination of All Forms of Racial Discrimination.⁹³⁰

Alleged violations involving Blackwater:

One PMSC, Blackwater, whose employees stand accused of the Nisour Square incident, accumulated the longest list of alleged human rights abuses, violations of IHL, and incidents of escalation of force. It was singled out for criticism by the UN Working Group and became the subject of a U.S. Congressional investigation in 2007. The UN Working Group summarized the conclusions of the Democratic staff of the House Oversight and Government Reform Committee, "Between January 2005 and September 2007 alone, Blackwater employees were involved in 195 incidents involving firearms discharges. In the overwhelming majority of these incidents (84 per cent), they were the first to fire. These incidents resulted in significant Iraqi casualties and property damage."⁹³¹ Some of these incidents include:

- On April 4, 2004 in Najaf, eight Blackwater employees joined U.S. troops in a firefight defending the CPA headquarters from an attack by Moqtada al-Sadr's militia. The attack seems to demonstrate direct participation in hostilities by a PMSC.⁹³²
- On May 14, 2005 a Blackwater convoy driving down the road to the Baghdad airport shot at a civilian Iraqi vehicle, killing the driver and injuring his wife and daughter. Next the Blackwater employees fired shots over the heads of soldiers from the U.S. Army 69th Regiment and then sped away in their white armored truck.⁹³³
- On June 25, 2005 Blackwater employees on a mission in Al-Hillah fatally shot an Iraqi man in the chest. The victim's brothers told the DoS that their brother, the father of six, was just standing on the side of the street. An internal State Department document asserts that the personnel who fired the shots initially failed to report the shooting and sought to cover it up.⁹³⁴

- On November 28, 2005 a Blackwater motorcade traveling to official meetings at the Ministry of Oil collided with 18 different vehicles during the round trip journey (6 vehicles on the way to the ministry and 12 vehicles on the return trip).⁹³⁵
- On December 24, 2006, Andrew Moonen, a Blackwater employee, shot and killed the bodyguard of the Iraqi Vice-President, near the Prime Minister's compound in the Green Zone. Moonen, who was drunk at the time, was flown out of the country and fired by Blackwater. Moonen went to work for another PMSC. In 2010 a U.S. prosecutor ruled that there was insufficient evidence to prosecute him.⁹³⁶
- On February 7, 2007, a sniper employed by Blackwater opened fire from the roof of the Iraqi Justice Ministry. One of his bullets hit a 23-year old guard at the nearby Iraqi Media Network in the head. A second guard rushed to help his colleague and was fatally shot in the neck. A third guard was found dead more than an hour later. An Iraqi police report described the shootings as "an act of terrorism" and said Blackwater "caused the incident." The Media Network said the guards were killed "without any provocation."⁹³⁷

Such incidents were not unique to Blackwater. Two other U.S. State Department contractors were also responsible for a large number of escalation of force incidents. The Congressional oversight committee found that DynCorp personnel fired weapons in 102 incidents, firing first in 62%; Triple Canopy fired weapons in 63 incidents, firing first in 83%.⁹³⁸

Both the CPA and the DoD required PMSCs operating in Iraq from 2003 to 2011, to "immediately report incidents and request assistance."⁹³⁹ However, the Congressional oversight committee also observed, "In the vast majority of instances in which Blackwater fire[d] shots, Blackwater [was] firing from a moving vehicle and [did] not remain at the scene to determine if the shots resulted in casualties."⁹⁴⁰ Such incidents were unlikely to be investigated by competent authorities, and without investigation and proper documentation future legal proceedings or other attempts to find remedies for victims were essentially foreclosed.

APPENDIX B:

U.S. CIVIL CASES AGAINST PMSCS

Cases Dismissed

Al Shimari v. CACI Int'l, 2013 WL 3229720 (E.D. Va. June 25, 2013) *on appeal*, case no. 13-02162 (4th Cir.) (opening brief due Oct. 29, 2013).

Baragona v. Kuwait Gulf Link Transport Company, 691 F. Supp. 2d 1351 (N.D. Ga. 2009) *aff'd*, 594 F.3d 852 (11th Cir. 2010).

Carmichael v. Kellogg, Brown & Root Servs., 564 F. Supp. 2d 1363 (N.D. Ga. 2008), *aff'd*, 572 F.3d 1271 (11 Cir. 2009).

Deuley, et al., v. DynCorp Int'l, Inc., CIV.A. 06C-08-188 FS, 2010 WL 704895 (Del. Super. Feb. 26, 2010) *aff'd*, 8 A.3d 1156, 2010 WL 4970769 (Del. 2010) *cert. denied*, 131 S. Ct. 2119 (2011).

Estate of Manook v. Research Triangle Institute, International and Unity Resources Group, Case No. 10-CV-00072, Dkt. No. 116 (E.D.N.C. Aug. 12, 2012) (judgment dismissing for lack of subject matter jurisdiction and declining to exercise supplemental jurisdiction).

Nattah v. Bush, 541 F. Supp. 2d 223 (D.D.C. 2008) *aff'd in part, rev'g in part*, 605 F. 3d 1052 (D.C. Cir. 2010) (affirming dismissals on all claims except non-monetary claims); 770 F. Supp. 2d 193 (D.D.C 2011) (dismissing remaining claims); No. 12-05049, dkt. # 91 (D.C. Cir. Mar. 27, 2012) (order dismissing for lack of prosecution).

Parlin v. DynCorp Int'l, Inc., CIV.A. 08C-01-136FSS, 2009 WL 3636756 (Del. Super. Sept. 30, 2009).

Saleh v. Titan Corp., 556 F. Supp. 2d 1 (D.D.C. 2007) (granting summary judgment for Defendant Titan, denying summary judgment for CACI) *aff'g in part, denying in part*, 580 F. 3d 1 (D.C. Cir. 2009) (affirming judgment as to Titan, reversing as to CACI) *cert. denied*, 131 S. Ct. 3055 (2011).

Smith v. Halliburton, CIV.A.H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006).

Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277 (M.D. Ga. 2006).

Woodson v. Halliburton, CIV A H-06-2107, 2006 WL 2796228 (S.D. Tex. Sept. 28, 2006).

Cases Pending

Adhikari v. Daoud & Partners, No. 09-CV-01237 (S.D. Tex).

Lessin v. Kellogg Brown & Root, No. 08-CV-00563 (W.D. Pa.).

Cases Preempted by DBA

Fisher v. Halliburton, 667 F.3d 602 (5th Cir. 2012) *cert. denied*, 133 S. Ct. 427, 184 L. Ed. 2d 258 (U.S. 2012) and *cert. dismissed in part*, 133 S. Ct. 96, 183 L. Ed. 2d 735 (U.S. 2012).

Smith-Idol v. Halliburton, H-06-1168, 2010 WL 2196268 (S.D. Tex. May 27, 2010) (denying motion for reconsideration of summary judgment against plaintiff).

Cases Sent to Arbitration

Blackwater Sec. Consulting, LLC v. Nordan, 07-1508, 2008 WL 8884112 (4th Cir. Oct. 17, 2008) (granting defendant's arbitration request).

Cases Settled

Al-Quraishi v. Nakhla, No. 08-CV-01696, Dkt. Nos. 132-33 (Oct. 10, 2012) (notice of voluntary dismissal and marginal order approving notice of voluntary dismissal).

Estate of Ali Hussamaldeen Ibrahim Albazzaz, et al., v. Prince, et al., Case No. 09-CV-00616, Dkt. No. 102 (E.D. Va. Jan. 6, 2010) (order dismissing with prejudice upon withdrawal of plaintiff's motion for relief from judgment) (consolidated for purposes of discovery, *In re Xe Alien Tort Litigation*, 665 F.Supp. 2d 569 (E.D. Va. 2009)).

Estate of Husain Salih Rabea, et al., v. Prince, et al., Case No. 09-CV-00645, Dkt. No. 96 (E.D. Va. Jan. 6, 2010) (order dismissing with prejudice upon withdrawal of plaintiff's motion for relief from judgment) (consolidated for purposes of discovery, *In re Xe Alien Tort Litigation*, 665 F.Supp. 2d 569 (E.D. Va. 2009)).

Estate of Himoud Saed Abtan v. Prince, et al., Case No. 09-CV-00617, Dkt. No. 105 (E.D. Va. Jan. 6, 2010) (order dismissing with prejudice upon withdrawal of plaintiff's motion for relief from judgment) (consolidated for purposes of discovery, *In re Xe Alien Tort Litigation*, 665 F.Supp. 2d 569 (E.D. Va. 2009)).

Estate of Raheem Khalaf Sa'adoon, et al., v. Prince, et al., Case No. 09-CV-00615, Dkt. No. 139 (E.D. Va. Jan. 6, 2010) (order dismissing with prejudice upon withdrawal of plaintiff's motion for relief from judgment)(consolidated for purposes of discovery, *In re Xe Alien Tort Litigation*, 665 F.Supp. 2d 569 (E.D. Va. 2009)).

Estate of Sabah Salman Hassoon, et al., v. Prince, et. al., Case No. 09-CV-00618, Dkt. No. 98 (E.D. Va. Jan. 6, 2010) (order dismissing with prejudice upon withdrawal of plaintiff's motion for relief from judgment) (consolidated for purposes of discovery, *In re Xe Alien Tort Litigation*, 665 F.Supp. 2d 569 (E.D. Va. 2009)).

Lane v. Halliburton; *See Fisher v. Halliburton*, 667 F.3d 602, 606 (5th Cir. 2012) *cert. denied*, 133 S. Ct. 427, 184 L. Ed. 2d 258 (U.S. 2012) and *cert. dismissed in part*, 133 S. Ct. 96, 183 L. Ed. 2d 735 (U.S. 2012) ("The plaintiffs in *Lane* reached a settlement agreement with KBR while this appeal was pending, and the appeal has been dismissed as to all the *Lane* plaintiffs. The *Fisher* claims remain pending.").

Martin v. Halliburton, No. 09-CV- 00328, Dkt. No. 136 (order dismissing on the merits without prejudice within 90 days if settlement is not consummated).

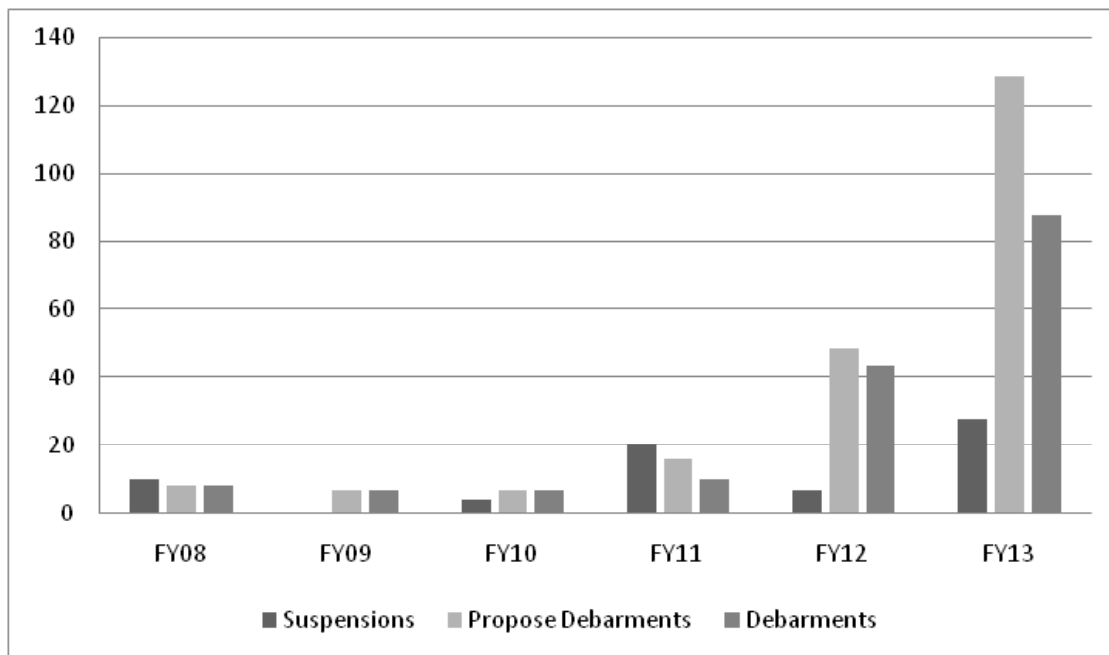
Potts v. Dyncorp, No. 06-CV-00124, Dkt. No. 61 (M.D. Ala. Apr. 16, 2007) (order granting joint stipulation of dismissal, dismissing with prejudice).

Shikhayiss, et al., v. Prince, et al., Case No. 09-CV-1017, Dkt. No. 36 (E.D. Va. Jan. 6, 2010) (order dismissing with prejudice upon withdrawal of plaintiff's motion for relief from judgment) (related to *In re Xe Alien Tort Litigation*, 665 F.Supp. 2d 569 (E.D. Va. 2009)).

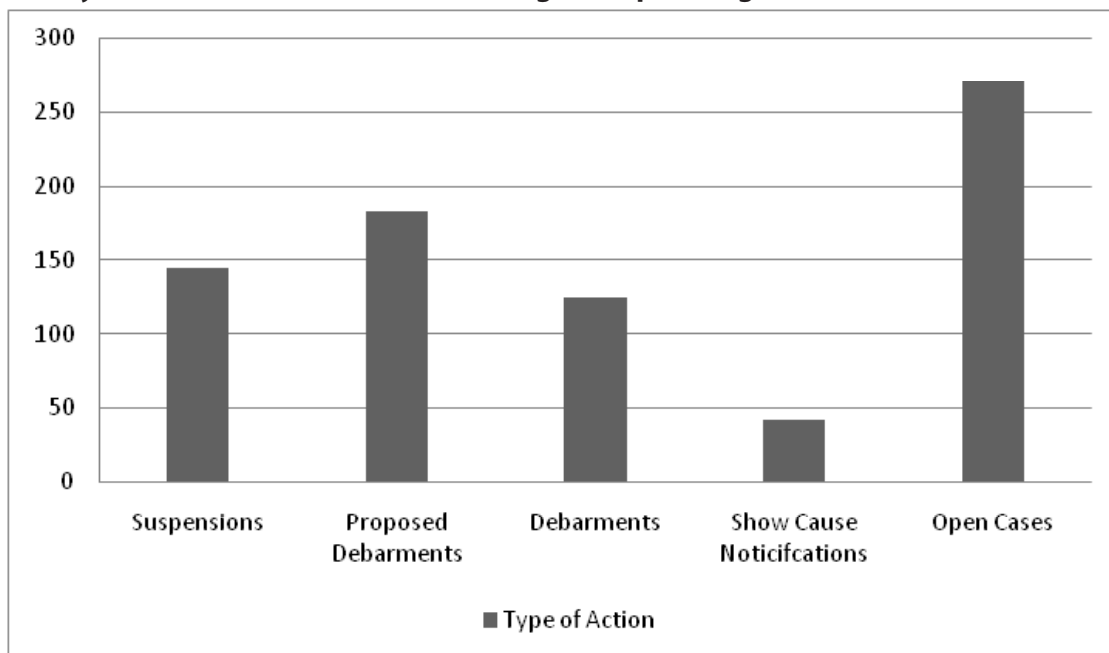
The Estate of Sa'adi Ali Abbas Husein, et al., v. Prince, et al., Case No. 09-CV-1048 (E.D. Va. Jan. 6, 2010) (order dismissing with prejudice upon withdrawal of plaintiff's motion for relief from judgment) (related to *In re Xe Alien Tort Litigation*, 665 F.Supp. 2d 569 (E.D. Va. 2009)).

APPENDIX C:

Department of Defense Suspensions and Debarments from Fiscal Year 2008 through September 2013 for Contracts Performing in Afghanistan⁹⁴¹



Department of Defense Suspensions and Debarments from Fiscal Year 2005 through February 28, 2011 for Contracts Performing in Iraq and Afghanistan⁹⁴²



ENDNOTES

¹ THE INT'L COMMITTEE OF THE RED CROSS, 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 (Sept. 16, 2008) [hereinafter MONTREUX DOCUMENT], available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (listing signatories as Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, United Kingdom, Ukraine, and United States of America).

² See SWISS FEDERATION, PARTICIPATING STATES OF THE MONTREUX DOCUMENT, available at <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (listing Montreux Document supporters).

³ *Preface to MONTREUX DOCUMENT*, *supra* note 1 at Preface, 9(a) (defining PMSCs based on the services they provide, including “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”).

⁴ MONTREUX DOCUMENT, at 9(a), (d), (e) (distinguishing between Contracting States that contract for PMSC services, Territorial States on whose territory PMSCs operate, and Home States which are the States in which a PMSC is incorporated or has its principal place of management).

⁵ See, e.g., *Preface to MONTREUX DOCUMENT*, *Introduction to THE MONROE DOCUMENT*, Pt. 1 & 2.

⁶ See, *Foreword and Explanatory Comments to the MONTREUX DOCUMENT*, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf; James Cockayne, “Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses, and Promise of the Montreux Document,” 13 J. CONFLICT & SEC. L. 403 (2009).

⁷ For the full text of the ICoC, see SWISS CONFEDERATION, INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (Nov. 9, 2010) [hereinafter ICoC-PSSP], available at http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.

⁸ Cockayne, *supra* note 6, at 402.

⁹ Cockayne, *supra* note 6, at 427.

¹⁰ DCAF was established in 2000 as the Geneva Centre for the Democratic Control of Armed Forces.

¹¹ See UNIVERSITY OF DENVER SIÉ CHÉOU-KANG CENTER, PRIVATE SECURITY MONITOR, available at http://psm.du.edu/international_regulation/global_standards_codes_of_conduct/montreux.html (last visited Nov. 16, 2014) for details about the regional workshops.

¹² ASIS Int'l., Management System for Quality of Private Security Company Operations-Requirements with Guidance, ANSI/ASIS PSC.1-2012 (Mar. 5, 2012) [hereinafter ANSI/ASIS PSC 1-2012], http://www.acq.osd.mil/log/PS/p_vault/Item_1997-PSC_1_STD.PDF for normative references containing information referenced in the standard and constituting foundational knowledge for the use of the standard.

¹³ INT'L COMM. OF THE RED CROSS, MONTREUX DOCUMENT+5 CONFERENCE AND QUESTIONNAIRE (Nov. 23, 2012), available at http://www.eda.admin.ch/etc/medialib/downloads/event/event1.Par.0001.File.tmp/Montreux5_Questionnaire_2013.pdf (last visited Nov. 16, 2013).

¹⁴ See, *Foreword to the MONTREUX DOCUMENT*, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

¹⁵ See, Kristine Huskey & Scott Sullivan, *United States: Law and Policy Governing Private Military*

Contractors after 9/11, in MULTILEVEL REGULATION OF REGULATION OF MILITARY AND SECURITY CONTRACTORS: THE INTERPLAY BETWEEN INTERNATIONAL, EUROPEAN AND DOMESTIC NORMS 338 (Kristine Bakker and Mirko Sossai, eds., Oxford: Hart Publishing 2012) (defining ICoC (4) security services as “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.” This mirrors how private security functions are defined in the FY 2008 National Defense Authorization Act as the guarding of personnel, facilities, or properties and other activity for which contractors are required to be armed).

¹⁶ MONTREUX DOCUMENT, *supra* note 1 at 9 (defining PMSCs as “private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, 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”).

¹⁷ PETER SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (Ithaca, N.Y.: Cornell University Press 2003).

¹⁸ MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40835, THE DEPARTMENT OF DEFENSE’S USE OF PRIVATE SECURITY CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS 5-6 (2011).

¹⁹ COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 39-40 (2011) [hereinafter TRANSFORMING WARTIME CONTRACTING].

²⁰ MOSHE SCHWARTZ & JENIFER CHURCH, CONG. RESEARCH SERV., R43074, DEPARTMENT OF DEFENSE’S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS 2 (2013).

²¹ See, Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, TOP SECRET AMERICA: A WASHINGTON POST INVESTIGATION, <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/> (last updated Sept. 2010) an in-depth series examining intelligence outsourcing in the U.S.

²² DEP’T OF DEF. OFF. PROGRAM SUPPORT, PRIVATE SECURITY COMPANIES (PSCs), <http://www.acq.osd.mil/log/PS/psc.html> (last visited Nov. 16, 2013).

²³ Schwartz & Church, *supra* note 20, at 2, 24, 25 (noting that these numbers include logistical support services not included in the Montreux Document definition of PMSCs).

²⁴ DEP’T OF DEF. OFF. PROGRAM SUPPORT, CENTCOM QUARTERLY CONTRACTOR CENSUS REPORTS, available at http://www.acq.osd.mil/log/PS/CENTCOM_reports.html (last visited Nov. 16, 2013) (containing all the CENTCOM quarterly reports).

²⁵ Willem van Genugten, Marie-Jose van der Heijden, & Nicola Jagers, *Protecting the Victims of Privatization of War*, in THE NEW FACES OF VICTIMHOOD 262 (Rianne Letschert & Jan Van Dijk, eds., New York: Springer 2011).

²⁶ Interview with Doug Brooks, Frontline, Private Warriors (2005), <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/brooks.html> (last updated June 21, 2005).

²⁷ Anna Fifield, *Contractors Reap \$138bn from Iraq War*, FIN.TIMES (Mar. 18, 2013), <http://www.ft.com/cms/s/0/7f435f04-8c05-11e2-b001-00144feabdc0.html#axzz2kLlQyHVs>.

²⁸ United Nations Office of the High Commissioner for Human Rights, Working Group on the Use of Mercenaries, Report to the 68th session of the General Assembly, U.N. Doc. A/68/339 (Aug. 20, 2013).

²⁹ See, News Release, ASIS Int’l, Groundbreaking Study Finds U.S. Security Industry to be \$350 Billion Market: ASIS Int’l and IOFM release First Comprehensive Security Market Study since 1990 (Aug. 12,

2013), available at [https://www.asisonline.org/News/Press-Room/Press-Releases/2013/Pages/Groundbreaking-Study-Finds-U.S.-Security-Industry-to-be-\\$350-Billion-Market.aspx](https://www.asisonline.org/News/Press-Room/Press-Releases/2013/Pages/Groundbreaking-Study-Finds-U.S.-Security-Industry-to-be-$350-Billion-Market.aspx).

³⁰ Deborah Avant & Lee Sigelman, *Private Security and Democracy: Lessons from the US in Iraq*, 19 SECURITY STUDIES 230 (2010).

³¹ See MARK SIMMONDS, PARLIAMENTARY UNDER SEC'Y OF STATE FOR THE FOREIGN & COMMONWEALTH OFFICE, WRITTEN ANSWERS TO QUESTIONS, FOREIGN & COMMONWEALTH OFFICE, HOUSE OF COMMONS HANSARD DEBATES, COL. 1W (Feb. 4, 2013), available at <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130204/text/130204w0001.htm> (responding to the Written Question, "how many private military companies are based in the UK", the U.K. government answered that, "There is no definitive official register of British companies offering private security services. The British Government maintains a regular dialogue with the British industry through the Security in Complex Environments Group and other appropriate forums").

³² FOREIGN & COMMONWEALTH OFFICE, RESPONSE TO FREEDOM OF INFORMATION ACT 2000 REQUEST REF: 0669-12 (Sept. 6, 2012) [hereinafter Sept. 6, 2012 FOIA], available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35502/0669-12.pdf & FOREIGN & COMMONWEALTH OFFICE, RESPONSE TO FREEDOM OF INFORMATION ACT 2000 REQUEST REF: 0949-13 & 0950-13 (Nov. 8, 2013) [hereinafter Nov. 8, 2013 FOIA] (on file with author).

³³ Sept. 6, 2012 FOIA, *supra* note 32.

³⁴ See, e.g., Alan Travis, *Two Private Prisons Among Worst Three Jails, Inspectors Find*, GUARDIAN (July 25, 2013), available at <http://www.theguardian.com/society/2013/jul/25/private-prisons-worst-jails-g4s-serco-reporting-on-the-jails> G4S runs in England and Wales).

³⁵ See, e.g., Nov. 8, 2013 FOIA, *supra* note 32 ("The FCO uses Private Security Companies (PSCs) rather than PMSCs. PSCs employed by the government do not have a combat or offensive role; they are employed to provide protection to government staff and property."); and see MINISTRY OF DEFENCE, CONTRACTOR SUPPORT TO OPERATIONS: TIGER TEAM FINAL REPORT, para. 5 (Mar. 16, 2010), available at http://psm.du.edu/media/documents/national_regulations/countries/europe/united_kingdom/united_kingdom_ministry_of_defence_tiger_team_report_2010.pdf for a discussion of the role of contractors, including PMSCs, supporting operation of the Ministry of Defence ("Historically, the majority of support provided was logistics-related consisting mainly of life support services and manufacturers' equipment support. Specific tasks have included: infrastructure build & property management, UOR embodiment, distribution and the delivery of the food supply chain. More recently, greater use across a wider spectrum of military tasks has taken place including aerial surveillance and the provision of communications support. This broadening has introduced more contractors into the operational space, with Sponsored Reserves (SR) and Private Military & Security Companies (PMSC) joining the traditional [Contractors on Deployed Operations] groups").

³⁶ Sept. 6, 2012 FOIA, *supra* note 32; FOREIGN & COMMONWEALTH OFFICE, RESPONSE TO FREEDOM OF INFORMATION ACT REQUEST REF: 0293-12 (Apr. 4, 2012) [hereinafter Apr. 4, 2012 FOIA], available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35480/0293-12.pdf (Oct. 24, 2013); FOREIGN & COMMONWEALTH OFFICE, RESPONSE TO FREEDOM OF INFORMATION ACT REQUEST (June 15, 2009) [hereinafter June 15, 2009 FOIA].

³⁷ Sept. 6, 2012 FOIA, *supra* note 32.

³⁸ PAUL MCGRADY, DEPUTY HEAD CONFLICT DEPARTMENT OF THE FOREIGN & COMMONWEALTH OFFICE, RESPONSE TO MR. ZELLWEGGER AND MR. SPOERRI REGARDING THE MONTREUX+5 QUESTIONNAIRE (June 13, 2013) [hereinafter UK MONTREUX+5 RESPONSE]; UN Human Rights Council, Report of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies on its second session, ¶ 53, UN Doc. A/HCR/22/41 (Dec. 24, 2012), available

at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/189/42/PDF/G1218942.pdf?OpenElement> (last visited Oct. 25, 2013); William Hague, Sec'y of State for Foreign & Commonwealth Affairs, *Written Ministerial Statement: Promoting High Standards of Conduct by Private Military and Security Companies Internationally*, Commons Hansard, vol. 515, pt. no. 47 (Dec. 17, 2012), available at, http://psm.du.edu/media/documents/national_regulations/countries/europe/united_kingdom/united_kingdom_written_ministerial_statement_standards_pmscs_2010.pdf (last visited Nov. 16, 2013). It is questionable, however, how effective such leverage will prove in light of the fact that the FCO has traditionally contracted with only a limited number of PMSCs: Aegis, Armour Group, Control Risks, Edinburgh International, G4S, Garda World, and Minimal Risk; see, Sept. 6, 2012 FOIA, *supra* note 32; Nov. 8, 2013 FOIA, *supra* note 32.

³⁹ U.K. FOREIGN & COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION 4 (Feb. 12, 2002) [hereinafter 2002 GREEN PAPER], available at <http://www.official-documents.gov.uk/document/hc0102/hc05/0577/0577.pdf> (last visited Nov. 16, 2013).

⁴⁰ FOREIGN & COMMONWEALTH OFFICE, PUBLIC CONSULTATION ON PROMOTING HIGH STANDARDS OF CONDUCT BY PRIVATE MILITARY AND SECURITY COMPANIES (PMSCS) INTERNATIONALLY, SUMMARY OF RESPONSES ¶ 1 (Dec. 16, 2009) [hereinafter FCO PUBLIC CONSULTATION SUMMARY], available at http://psm.du.edu/media/documents/national_regulations/countries/europe/united_kingdom/united_kingdom_fco_consultation_standards_conduct_pmsc_internationally_summary_2010.pdf (last visited Nov. 16, 2013); see Sept. 6, 2012 FOIA, *supra* note 32 for similar statements ("Private Security Companies (PSCs) are contracted to carry out a variety of important activities and duties including the static protection of premises and the close protection of personnel. They play a vital and necessary protective role in hostile environments, and enable the Government and partner organisations to carry out their work in countries such as Afghanistan, Iraq and Libya by providing essential security services, as well as ensuring operational Non- Governmental Organisations are able to carry out important humanitarian work."); November 8, 2013 FOIA, *supra* note 32 ("PSCs are contracted for a number of countries including Iraq, Afghanistan and Libya to carry out a variety of important activities and duties including the static protection of premises and the close protection of personnel. They play a vital and necessary protective role in hostile environments, and enable the Government and partner organisations to carry out their work by providing essential security services").

⁴¹ MINISTRY OF DEFENCE, RISK: THE IMPLICATIONS OF CURRENT ATTITUDES TO RISK FOR THE JOINT OPERATIONAL CONCEPT, ¶ 21 (citation omitted), available at <http://www.theguardian.com/uk-news/interactive/2013/sep/26/mod-study-attitudes-risk> (last visited Nov. 16, 2013). See also Ben Quinn, *MoD Study Sets Out How To Sell Wars to the Public*, GUARDIAN (Sept. 26, 2013), <http://www.theguardian.com/uk-news/2013/sep/26/mod-study-sell-wars-public> (last visited Nov. 16, 2013).

⁴² JORDI PALOU-LOVERDOS & LETICIA ARMENDÁRIZ, NOVA-INSTITUTE FOR ACTIVE NON-VIOLENCE, THE PRIVATIZATION OF WARFARE, VIOLENCE AND PRIVATE MILITARY & SECURITY COMPANIES: A FACTUAL AND LEGAL APPROACH TO HUMAN RIGHTS ABUSES BY PMSCS IN IRAQ 25 (2011), available at http://nova.cat/wp-content/uploads/2011/12/Informe_PMSC_Iraq_Nova_ok.pdf (last visited Nov. 16, 2013).

⁴³ SECURITY IN COMPLEX ENVIRONMENTS GROUP, ABOUT THE SCEG, [HTTPS://WWW.ADSGROUP.ORG.UK/PAGES/19813174.ASP](https://www.adsgroup.org.uk/PAGES/19813174.ASP) (last updated June 12, 2013).

⁴⁴ SECURITY IN COMPLEX ENVIRONMENTS GROUP, SCEG COMPANY MEMBERS, <https://www.adsgroup.org.uk/pages/93099176.asp> (last updated Aug. 27, 2013).

⁴⁵ INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, ICOC SIGNATORY COMPANIES, <http://www.icoc-psp.org/ICoCSignatoryCompanies.html> (last visited Nov. 16, 2013).

⁴⁶ Sept. 6, 2012 FOIA, *supra* note 32; November 8, 2013 FOIA, *supra* note 32.

⁴⁷ KERRY ALEXANDER & NIGEL WHITE, PRIV-WAR, PRIV-WAR REPORT – THE UNITED KINGDOM: THE REGULATORY CONTEXT OF PRIVATE MILITARY AND SECURITY SERVICES IN THE UK 11-13, 16 (National

Report Series 01/09, June 30, 2009) [hereinafter UK PRIV-WAR REPORT], available at http://psm.du.edu/media/documents/reports_and_stats/think_tanks/privwar_national-report_alexander-white.pdf (last visited Nov. 16, 2013).

⁴⁸ SIMMONDS, *supra* note 31 (responding to the Written Question, “what assessment [the Secretary of State for Foreign and Commonwealth Affairs] has made of the role of private military companies in helping British businesses establish themselves in hostile environments”, the U.K. government answered: “Private security companies play a key role for commercial operators, including British businesses, by providing essential protective services in complex and hostile environments, enabling them to safely carry out important humanitarian and development work, as well as wider business and economic activity. This important role applies equally in support of the work of governments and non-governmental organisations. This is one of the reasons why the Government has been at the forefront of efforts to raise UK and global standards in the private security service industry”).

⁴⁹ U.K. PRIV-WAR REPORT, *supra* note 47, at 7-13.

⁵⁰ Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 240 (Simon Chesterman & C. Lenhardt, eds., 2007) [hereinafter Bearpark & Schulz, *Future of the Market*].

⁵¹ *Id.* at 240-42.

⁵² ABBY STODDARD, ADELE HARMER & VICTORIA DiDOMENCIO, THE USE OF PRIVATE SECURITY PROVIDERS AND SERVICES IN HUMANITARIAN OPERATIONS 8-9 (Humanitarian Policy Group Report 27, Oct. 2008) [hereinafter HPG Report], <http://www.humanitarianoutcomes.org/sites/default/files/pdf/PrivateSecurity.pdf>.

⁵³ MAX GLASER, ENGAGING PRIVATE SECURITY PROVIDERS: A GUIDELINE FOR NON-GOVERNMENTAL ORGANISATIONS 3 (EISF Briefing Paper Dec. 2011) [hereinafter EISF Briefing Paper], <http://www.eisf.eu/resources/item/?d=6561>.

⁵⁴ *Id.*

⁵⁵ HPG Report, *supra* note 52, at 9.

⁵⁶ Sept. 6, 2012 FOIA, *supra* note 32.

⁵⁷ See G4S, SECURING YOUR WORLD: G4S PLC ANNUAL REPORT AND ACCOUNTS 2012 32 [hereinafter G4S ANNUAL REPORT], <http://www.annualreports.co.uk/Click/12533> (stating that the secure solutions business of G4S encompasses additional services in addition to private military and security services, as the report provides that, “the secure solutions businesses provide a broad range of solutions to both commercial and government customers” and addresses “the security needs of commercial and government facilities in markets such as ports, airports, retail, financial institutions and the oil and gas sector, and for government departments such as justice, police, health, foreign affairs and border control”).

⁵⁸ *Id.* 32-33.

⁵⁹ See, e.g., Henry Bellingham, Parliamentary Under-Sec. of State for Foreign & Commonwealth Affairs, Announcement: Promoting High Standards in the Private Military and Security Company Industry (July 21, 2011), available at <https://www.gov.uk/government/news/promoting-high-standards-in-the-private-military-and-security-company-industry--2> (considering regulation on the PMSI as part of its broader policy of “increasing the UK’s exports and attracting inward investment”); 2002 GREEN PAPER, *supra* note 39 at Annex B, ¶¶ 3, 8, 10-16 (discussing the costs of various forms of regulation, primarily in an annex: “Regulation would, however, place an administrative and financial burden on both government and the private sector. There are difficulties both for government and industry in seeking to arrive at precise estimates of the impact of the imposition of any controls. There is little hard data available about the likely impact on export businesses.... Many PMCs are small businesses with

few permanent employees; staff are contracted as required. A total ban on military activity overseas could lead to the demise of many of these companies. Any form of regulation would have a cost impact An outright ban on the provision of all military services would deprive British defence exporters of contracts for services of considerable value.... A ban on recruitment would incur costs to individuals who are potential recruits. Recruiting companies would either cease to exist or would move off-shore.... The regulatory impact of any new controls would be based on the requirement to obtain a licence for contracts for military and security services abroad and maintain records for inspection for the purpose of ensuring compliance.... Such a regime would impose a burden on companies; staff time would be needed to prepare and support licence applications. Delays in decisions to issue a licence would be expensive if they led to loss of contracts....The administrative burden to government of a licensing regime would be significant in terms of staff resources and IT investment, and may add to the work load of those operating the existing export licensing system.... The costs of self-regulation would fall entirely upon companies, since they would need to finance the industry association to oversee the scheme"); Clive Walker & Dave Whyte, *Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom* 54 INT'L & COMP.L.Q. 651, 660 (2005).

⁶⁰ *Id.*, at 660.

⁶¹ SIMMONDS, *supra* note 31.

⁶² In recent years G4S has been one of the largest beneficiaries of centrally awarded FCO overseas contracts for security guarding services. Domestically, U.K. governments have outsourced to G4S prisons management, National Health Care (NHS) related services and deportations, among other services.

⁶³ Nina Bernstein, *Companies Use Immigration Crackdown to Turn a Profit*, N.Y. TIMES (Sept. 28, 2011), <http://www.nytimes.com/2011/09/29/world/asia/getting-tough-on-immigrants-to-turn-a-profit.html?pagewanted=all&r=0>.

⁶⁴ Clare Sambrook, *Duty of Care: Beyond the Case of Mr. Ward, Cooked to Death by Gigantic Outsourcer G4S*, OUR KINGDOM (June 8, 2011), <http://www.opendemocracy.net/ourkingdom/clare-sambrook/duty-of-care-beyond-case-of-mr-ward-cooked-to-death-by-gigantic-outsourcer>.

⁶⁵ *Danny Fitzsimons Jailed for Iraqi Security Guard Murders*, BBC NEWS (Feb. 28, 2011, 2:04 PM), <http://www.bbc.co.uk/news/uk-england-manchester-12594245>.

⁶⁶ News Release, G4S Completes Acquisition of ArmorGroup International PLC, G4S (May 7, 2008), <http://www.g4s.com/en/Media%20Centre/News/2008/05/07/G4S%20Completes%20Acquisition%20of%20ArmorGroup%20International%20plc/>.

⁶⁷ *Danny Fitzsimons Jailed for Iraqi Security Guard Murders*, *supra* note 65.

⁶⁸ BBC Scotland Investigates, *Britain's Private War*, BBC ONE (2012), <http://www.bbc.co.uk/programmes/b01n7qx8> (last visited Nov. 16, 2013).

⁶⁹ Hannah Osborne, *G4S Warned of Risk of Hiring Danny Fitzsimons before he Murdered Two Colleagues in Iraq*, INT'L BUS. TIMES (Oct. 1, 2012, 10:19 AM), <http://www.ibtimes.co.uk/articles/389724/20121001/danny-fitzsimons-paul-mcguigan-darren-hoare-g4s.htm>

⁷⁰ BBC Scotland Investigates, *supra* note 68.

⁷¹ Matthew Taylor, *Jimmy Mubenga Coroner Issues Damning Report on Deportations*, GUARDIAN (Aug. 4, 2013, 9:50 AM), <http://www.theguardian.com/uk-news/2013/aug/04/jimmy-mubenga-coroner-report-deportations>.

⁷² Matthew Taylor & Paul Lewis, *G4S Security Firm Was Warned of Lethal Risk to Refused Asylum Seekers*, GUARDIAN (Feb. 8, 2011, 3:45 PM), <http://www.theguardian.com/uk/2011/feb/08/g4s-deportees-lethal-risk-warning-mubenga>.

⁷³ Matthew Taylor, *Jimmy Mubenga Case a Predictable Consequence of Deportation System*, GUARDIAN

(July 9, 2013, 9:08 AM), <http://www.theguardian.com/uk-news/2013/jul/09/jimmy-mubenga-case-deportation-system>; Matthew Taylor & Paul Lewis, *G4S Faces Damages Claim over Killing of Jimmy Mubenga*, GUARDIAN (July 9, 2013, 3:51 PM), <http://www.theguardian.com/uk-news/2013/jul/09/g4s-jimmy-mupenga-killing-damages>.

⁷⁴ Taylor, *supra* note 71.

⁷⁵ Press Release, Amnesty Int'l, Amnesty Responds to News that No Charges are to be Brought in Mubenga Removals Case (July 17, 2012, 11:00 PM), http://www.amnesty.org.uk/news_details.asp?NewsID=20236.

⁷⁶ Taylor & Lewis, *supra* note 73.

⁷⁷ The Coalition of Women for Peace & Who Profits: The Israeli Occupation Industry, The Case of G4S: Private Security Companies and the Israeli Occupation 13 (Mar. 2011), <http://whoprofits.org/sites/default/files/WhoProfits-PrivateSecurity-G4S.pdf>.

⁷⁸ *G4S Update*, G4S PLC (Apr. 2012), available at http://www.business-humanrights.org/media/documents/company_responses/g4s-israel-apr-24-2012.pdf (last visited Nov. 16, 2013).

⁷⁹ *Conditions at G4S-run UK prison 'very concerning' – report*, REUTERS, Oct. 8, 2013, available at <http://uk.reuters.com/article/2013/10/07/uk-g4s-prison-idUKBRE9960YU20131007>.

⁸⁰ ERINYS, RESPONSE TO ALLEGATIONS MADE BY WAR ON WANT AGAINST ERINYS, available at <http://www.waronwant.org/attachments/Erinys%20response%20to%20War%20on%20Wants%20allegations.pdf> (last visited Nov. 16, 2013).

⁸¹ See *infra* section on Monitoring.

⁸² Sean Rayment, *Trophy Video Exposes Private Security Contractors Shooting up Iraqi Drivers*, THE TELEGRAPH (Nov. 27, 2005, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1504161/Trophy-video-exposes-private-security-contractors-shooting-up-Iraqi-drivers.html>.

⁸³ Paul McGrade, Deputy Head, Conflict Dept., UK Foreign & Commonwealth Office, Private Military and Security Companies, Summary of the International Law Discussion Group Meeting Held at Chatham House 9 (June 14, 2013), [hereinafter Chatham House Meeting Summary], available at http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/140613summary_0.pdf.

⁸⁴ PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 35-36.

⁸⁵ David Barstow et. al., *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES (Apr. 19, 2004), <http://www.nytimes.com/2004/04/19/world/security-companies-shadow-soldiers-in-iraq.html?pagewanted=all&src=pm>; SCOTT HORTON, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY, A HUMAN RIGHTS FIRST REPORT (2008) available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf>; PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42.

⁸⁶ Because of conflicting statistics on the number of PMSCs, their countries of origin, and the number of their personnel, NOVA conducted an in-depth study of 84 non-Iraqi PMSCs operating in Iraq between 2003-2011 and found that the largest number (45) were U.S.-based, followed by 18 British companies. In addition, the report found 6 from the United Arab Emirates, 5 from France, 4 from South Africa, 2 from Canada, 2 from Germany, 2 from Israel, 1 from Kuwait, 1 from Australia, 1 from Barbados, 1 from the Czech Republic, and 1 from Spain. PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 35.

⁸⁷ Spencer E. Ante, *IRAQ: Private Contractors Train Much of the Fledgling Police Force*, BUSINESS WEEK ONLINE (Feb. 10, 2005), available at <http://www.corpwatch.org/article.php?id=11838>

⁸⁸ MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH. SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND AND ANALYSIS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 15-17 (2011).

⁸⁹ STUART W. BOWEN, JR., SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS 172 (Oct. 2008) [hereinafter SIGAR QUARTERLY REPORT], available at <http://www.sigir.mil/files/quarterlyreports/October2008/Report - October 2008.pdf>; U. N. Office of the High Commissioner for Human Rights, Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impending Exercise of the Right of Peoples to Self-Determination: Mission to Iraq (12-16 June 2011) 6 (Aug. 12, 2011) [hereinafter Working Group on Mercenaries Addendum: Mission to Iraq], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/154/62/PDF/G1115462.pdf?OpenElement>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² James Glanz, *Report on Iraq Security Lists 310 Contractors*, N.Y. TIMES (Oct. 28, 2008), available at http://www.nytimes.com/2008/10/29/world/middleeast/29protect.html?_r=0.

⁹³ STUART W. BOWEN, JR., LEARNING FROM IRAQ: A FINAL REPORT FROM THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION 44 (Mar. 2013), available at <http://www.sigir.mil/files/learningfromiraq/Report - March 2013.pdf>.

⁹⁴ SIGAR QUARTERLY REPORT, *supra* note 89, at 33.

⁹⁵ *Id.*

⁹⁶ *Id.*; David Isenberg, *SIGIR Speaks*, THE HUFFINGTON POST (Apr. 30, 2012), http://www.huffingtonpost.com/david-isenberg/sigir-speaks_b_1463451.html

⁹⁷ UN Assistance Mission for Iraq, Human Rights Report : 1 July -31 December 2007 vii [hereinafter UNAMI Report on Human Rights July-Dec, 2007] http://www.ohchr.org/Documents/Countries/IQ/double_quarterly_1july-31dec2007_engl.pdf (last visited Nov. 12, 2013).

⁹⁸ See PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 39.

⁹⁹ Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at 12.

¹⁰⁰ *Id.*, at 19; PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 39-40.

¹⁰¹ *Iraq Bans Security Firms on Oil Fields*, UNITED PRESS INTERNATIONAL (Mar. 19, 2012), http://www.upi.com/Business_News/Security-Industry/2012/03/19/Iraq-bans-security-firms-on-oil-fields/UPI-21471332177942/

¹⁰² One human rights defender has remarked that “most Iraqi members of parliament spend public money on private contractors who protect them. These substantial government budgets for security become ways to buy support, make bribes, and control people. And if there is violence, the government spends more on private security, in effect rewarding the PMSCs for their failures while further fuelling political corruption. See Ismaeel Dawood, *Stop Outsourcing Peace: Control the use of Private Military and Security Companies*, VOICES FROM THE SOUTH E-NEWSLETTER (Apr. 2013), <http://karibu.no/upload/voices/Voices%20from%20the%20South%20April%202013.pdf>.

¹⁰³ *G4S wins contract to secure Baghdad International Airport*, IRAQ-BUSINESS NEWS (Feb. 8, 2010), <http://www.iraq-businessnews.com/2010/02/08/g4s-wins-contract-to-secure-baghdad-international-airport/>

¹⁰⁴ *ABG/G4S Win Two-Year Contract extension for Baghdad Airport Security*, AL-BURHAN GROUP, **Sept. 16, 2013**, <http://www.alburhangroup.com/news/113-ABG-G4S-Win-Two-Year-Contract-extension-for-Baghdad-Airport-Security.html>

¹⁰⁵ BABYLON EAGLES, <http://www.besc.net/clients.htm> (last visited Nov. 7, 2013).

¹⁰⁶ FALCON SECURITY, <http://falconiraq.com/> (last visited Nov. 7, 2013).

¹⁰⁷ PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 39-40.

¹⁰⁸ Sabre International describes itself as evolving “into a worldwide infrastructure and support services company, providing operational logistics life support assistance in any areas experiencing natural

disasters, humanitarian crisis, or austere environments,” with government, corporate, humanitarian aid, and NGO clients. Sabre International’s “government advisory work” includes, “specialist military, surveillance or intelligence units.” SABRE INTERNATIONAL, <http://www.securitybysabre.com/index.php> (last visited Nov. 7, 2013).

¹⁰⁹ Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at 6.

¹¹⁰ *Id.*

¹¹¹ *Id.*, at 7.

¹¹² See, e.g., NIMROOD AL RAFEDAIN, http://www.nimrood.biz/index_eng.html (last visited Nov. 20, 2013); TAJ AL RAFIDAN, <http://www.taj-alrafidain.com/> (last visited Nov. 20, 2013); SABRE INT’L, <http://www.securitybysabre.com/index.php> (last visited Nov. 20, 2013); SMITH GROUP CORP., <http://www.southgroupco.com/> (last visited Nov. 20, 2013); Falcon Security, FALCON GROUP <http://falconiraq.com/falcon-security-services/> (last visited Nov. 20, 2013); BABYLON EAGLES, <http://besc.net/index.htm> (last visited Nov. 20, 2013); BAHEZ, SECURITY & GUARDING SERVICES, <http://bahezsecurity.com/> (last visited Nov. 20, 2013).

¹¹³ *Iraq Bans Security Firms on Oil Fields*, *supra* note 101.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Isenberg, *supra* note 96.

¹¹⁷ HORTON, PRIVATE SECURITY CONTRACTORS AT WAR, *supra* note 85; PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42; JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY (2007).

¹¹⁸ In the fall of 2003, prisoners at the Abu Ghraib prison were tortured, including being physically and mentally abused, during their detention. Personnel from the U.S.-based PMSCs Titan (now L-3 Services, part of L-3 Communications, and recently spun off as Engility) and CACI were implicated in the abuses. (Military personnel were also accused.) Iraqis who sued CACI and Titan in U.S. Federal Court on 9 June 2004, alleged that the companies directed and participated in the torture in their role of being responsible for interrogation and translation services under contract with the U.S. government. The plaintiffs listed 20 causes of action, including torture, cruel, inhuman, or degrading treatment, assault and battery, and intentional infliction of emotional distress. The outcome of this lawsuit raises important implications for accountability and access to remedy, see below the relevant sections in this report. *Abu Ghraib lawsuits against CACI, Titan (now L-3)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/AbuGhraiblawsuitsagainstCACITitannowL-3> (last visited Nov. 7, 2013).

¹¹⁹ On 16 September 2007, at a busy traffic circle in the Nisour Square neighborhood of Baghdad, personnel of the U.S.-based PMSC Blackwater (renamed Xe and now called Academi, but in this report consistently called Blackwater) were involved in a shooting incident in which 17 Iraqis were killed and more than 20 other civilians were wounded. Blackwater personnel claimed they came under small-arms fire, however other reports indicated they fired first and indiscriminately. Family members of the victims and survivors brought a civil suit against Blackwater in U.S. federal Court, which was ultimately settled. Terms of the settlement were not officially made public, however, one of the injured plaintiffs told the Associated Press that families of those whose relatives died were offered \$100,000 and the injured were offered \$30,000. Efforts to bring criminal charges against Blackwater were also made. They initially failed, but have recently been revived. See UNAMI Report on Human Rights July-Dec, 2007, *supra* note 97, at 11; David Zucchino, *Iraqis settle lawsuits over Blackwater shooting*, LOS ANGELES TIMES, (Jan. 8, 2010), <http://articles.latimes.com/2010/jan/08/nation/la-na-blackwater8-2010jan08>; Mike Baker, *Blackwater settles civil lawsuits over Iraq deaths*, USA TODAY (Jan. 7, 2010), <http://usatoday30>.

usatoday.com/money/companies/2010-01-07-blackwater-iraqi-deaths-settlement_N.htm; Tanya Roth, Esq., Some Plaintiffs in Blackwater Nisour Square Civil Suit Settle, FINDLAW (Jan. 11, 2010), <http://blogs.findlaw.com/decided/2010/01/some-plaintiffs-in-blackwater-nisour-square-civil-suit-settle.html>; Kevin Gosztola, *Justice Department Revives Case Against Former Blackwater Contractors Involved in Nisoor Square Massacre*, THE DISSENTER (Oct. 17, 2013), <http://dissenter.firedoglake.com/2013/10/17/justice-department-revives-case-against-former-blackwater-contractors-involved-in-nisoor-square-massacre/>; *Blackwater faces new charges in Iraq killings*, AL-JAZEERA (Oct. 18, 2013), <http://www.aljazeera.com/news/americas/2013/10/blackwater-faces-new-charges-iraq-killings-2013101805946849805.html>.

¹²⁰ PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 53-57.

¹²¹ Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at 14.

¹²² *Id.*

¹²³ *Id.*, at 18.

¹²⁴ *Id.*

¹²⁵ Decree of the President of the Transnational Islamic State of Afghanistan on the Dissolution of Private Security Companies, No. 62 (Aug. 17, 2008).

¹²⁶ The author of the Afghanistan portions of the report uses the abbreviation 'PSC' when referring to official documents and information. The government of Afghanistan only refers to private security companies (PSCs) and not to PMSCs. In the author's opinion, this goes beyond a mere terminological practice and indicates that the government has been unwilling to regulate private military services and has instead relinquished its primary jurisdiction in favor of Contracting States through the conclusion of military agreements (SOFAs). See LETICIA ARMENDÁRIZ, CORPORATE PRIVATE ARMIES IN AFGHANISTAN. REGULATING PRIVATE MILITARY AND SECURITY COMPANIES (PMSCs) IN 'TERRITORIAL STATES', NOVACT, http://novact.org/wp-content/uploads/2013/11/INFORME_AFG_FINAL-1.pdf.

¹²⁷ See Bismullah Khan Mohammadi & Ashrat Ghani, *The Bridging Strategy for Implementation of Presidential Decree 62 (Dissolution of Private Security Companies) Bridging Period Mar. 22, 2011 to Mar. 10, 2012* (Mar. 15, 2011) [hereinafter 2011 BRIDGING STRATEGY], available at http://psm.du.edu/media/documents/national_regulations/countries/asia_pacific/afghanistan/afghanistan_decree_bridging_strategy_2011-english.pdf (last visited Nov. 16, 2013).

¹²⁸ Information based on field work conducted by research assistant Fernando Brancoli. The PMSC in question seems to be DynCorp International, though the information is not altogether clear and there are other PMSCs providing guarding services for foreign embassies including U.K. firms such as ArmorGroup and Saladin Security Afghanistan, and the U.S. PMSC US Protection and Investigation (USPI).

¹²⁹ See LISA RIMLI & SUSANNE SCHMEIDL, SWISS PEACE, PRIVATE SECURITY COMPANIES AND LOCAL POPULATIONS: AN EXPLORATORY STUDY OF AFGHANISTAN AND ANGOLA 16 (Nov. 2007) [hereinafter SwissPeace report – Afghanistan], available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots777=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=55112> (last visited Nov. 16, 2013); see also MATTHIEU AIKINS, NEW YORK UNIV. CENTER ON INT'L COOPERATION, CONTRACTING THE COMMANDERS: TRANSITION AND THE POLITICAL ECONOMY OF AFGHANISTAN'S PRIVATE SECURITY INDUSTRY 15 (Oct. 2012), available at http://cic.es.its.nyu.edu/sites/default/files/afghan_private_security.pdf.

¹³⁰ The International Security Assistance Force (ISAF) was created in accordance with the Bonn Conference in December 2001 and its mandate was initially limited to providing security in and around Kabul. On 11 August 2003 NATO assumed the leadership of the ISAF operation, thereby becoming responsible for the command, coordination and planning of this force. In October 2003, the United Nations extended the ISAF's mandate to cover the whole of Afghanistan (UNSCR 1510), paving the

way for an expansion of the mission across the country. See generally, AFGHANISTAN INT'L SECURITY ASSISTANCE FORCE, [HTTP://WWW.ISAF.NATO.INT/](http://www.isaf.nato.int/); *The War in Afghanistan: A legal Analysis*, 85 INT'L LAW STUDIES (Michael N. Schmitt, ed., 2009); *Humanitarian Debate: Law, Policy, Action-Conflict in Afghanistan II: Law & Humanitarian Action*, 93 INT'L REV. RED CROSS, no. 881, Mar. 2011..

¹³¹ See Fernando Brancoli & Tomaz Paoliello, Private military and security companies in Afghanistan: nationality circumvention and intelligence gatekeeping 10-14 (2013) (on file with author).

¹³² See U.N. Office of the High Commissioner for Human Rights, Human Rights Council, Working Group on Mercenaries (UNWGM), *Report on the Mission to Afghanistan*, U.N. Doc. A/HRC/15/25/Add.2 ¶ 71 (June 14 2010) [Hereinafter *UNWGM Report on Afghanistan*].

¹³³ Swiss Peace report – Afghanistan, *supra* note 129, at 28-29.

¹³⁴ See Special Inspector General for Afghanistan Reconstruction (SIGAR), *Afghanistan Public Protection Force: Concerns Remain about Force's Capabilities and Costs*, SIGAR AUDIT 13-15 (July 2013) [hereinafter SIGAR AUDIT 13-15], available at <http://www.sigar.mil/pdf/audits/SIGAR%20Audit%2013-15%20APPF.pdf> ("WHAT SIGAR FOUND: [...] Without RMCs, the APPF would be unable to provide the full range of security services needed by U.S. Agency for International Development (USAID) implementing partners").

¹³⁵ See BRANCOLI & PAOLIELLO, *supra* note 131, at 14 (noting that "the concept [gatekeeping] is used in different field of studies, such as Journalism, Sociology and Political Science. In broad terms, it describes how information is filtered by different agents until it is effectively delivered to the expected audience").

¹³⁶ See HUSKEY & SULLIVAN, *supra* note 15.

¹³⁷ See THE PRIVATE SECURITY DATABASE (PSD) FOR AREAS OF LIMITED STATEHOOD, http://www.sfb-governance.de/teilprojekte/projekte_phase_1/projektbereich_c/c2/The_PSD/index.html (last visited Nov. 16, 2013) which was created by Zeljko Branovic of Freie Universität Berlin; see also Huskey & Sullivan, *supra* note 15 at 337-341; BRANCOLI & PAOLIELLO, *supra* note 131; *UNWGM Report on Afghanistan*, *supra* note 132; SwissPeace report – Afghanistan, *supra* note 129.

¹³⁸ See Islamic Republic of Afghanistan, Ministry of the Interior, 2008 Procedure for Regulating Activities of Private Security Companies in Afghanistan, art. 4 (2008) [hereinafter 2008 Procedure for PSCs], http://psm.du.edu/media/documents/national_regulations/countries/asia_pacific/afghanistan/afghanistan_draft_regulations_on_psc_2008-english.pdf.

¹³⁹ 2011 Bridging Strategy, *supra* note 127.

¹⁴⁰ *Id.* ("Area Security involved long linear development project sites such as road or power lines providing security over a large and changing area of land. Area security is a particularly complex and detailed operation that requires command and control of the forces executing it by the operation being protected. Area security may include [...]").

¹⁴¹ *Id.* ("Convoy security involves conducting security which ensures safe passage of equipment and personnel along a designated route. Convoy security may include [...]").

¹⁴² *Id.* ("Fixed site security involves the fixed and non-mobile provision of security of personnel and/or equipment at static locations. Locations may be semi-permanent (such as a road construction work-camp), or permanent (such as ISAF, Coalition forces or and implementer headquarters or project sites). Fixed site security is the most common form of security used by ISAF, Embassies, diplomatic entities, police training missions and implementing partners that PSCs provide nationwide. Fixed site security may include [...]").

¹⁴³ *Id.* ("Mobile security is the form of 'convoys' that Embassies, diplomatic entities, police training missions, implementing partners and international organizations utilize the most and involves the secure movement of personnel. Generally mobile operations originate at secure fixed sites, with

destinations or missions that are either secure, such as visiting a beneficiary community, or non-secure destinations, such as conducting construction site reconnaissance, bridge assessments, or visits to remote power switch stations. Mobile security may include [...]").

¹⁴⁴ *Id.* ("Police training missions: Specific, law enforcement-oriented activities that have been authorized by the Afghan Government and include personnel involved in mentoring, advising and training of police. [...]").

¹⁴⁵ See Islamic Republic of Afghanistan Ministry of Interior Affairs, Procedure for Regulating Activities of Risk Management Companies in Afghanistan art. 5 (Jan. 10, 2012) [hereinafter 2012 Procedure for RMCs], available at [http://www.appf.gov.af/downloads/documents/RMCProcedures--Final\(English\).pdf](http://www.appf.gov.af/downloads/documents/RMCProcedures--Final(English).pdf) (last visited Nov. 16, 2013).

¹⁴⁶ For a more specific account of the extent of the use of security contractors by US DoD, see SCHWARTZ, *supra* note 18; by the USAID; see, among others, SIGAR, PROGRESS MADE TOWARD INCREASED STABILITY UNDER USAID'S AFGHANISTAN STABILIZATION INITIATIVE - EAST PROGRAM BUT TRANSITION TO LONG TERM DEVELOPMENT EFFORTS NOT YET ACHIEVED. SIGAR AUDIT 12-11 (June 2012), available at <http://www.sigar.mil/pdf/audits/2012-06-29audit-12-11.pdf>; generally, by all U.S. agencies present in Afghanistan, SENATE COMM. ON ARMED FORCES, INQUIRY INTO THE ROLE AND OVERSIGHT OF PRIVATE SECURITY CONTRACTORS IN AFGHANISTAN, S. REP. NO. 111-345 (2010); by other clients such as the UN and NGOs, see UNWGM Report on Afghanistan, *supra* note 132; UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, Afghanistan: Security firm ban will not hurt us-NGOs, IRIN NEWS (Oct. 25, 2010), <http://www.irinnews.org/report/90879/afghanistan-security-firm-ban-will-not-hurt-us-ngos>.

¹⁴⁷ See AIKINS, *supra* note 129 at 7.

¹⁴⁸ By December of 2008, contractors made up 69% of the US DoD's workforce, which was the highest recorded percentage of contractors used by DoD in any conflict in the history of the U.S. Moreover, from December 2008 to March 2011, the number of DoD's security contractors increased from 3,689 to 18,971, an increase of over 400%. Huskey & Sullivan *supra* note 15; SCHWARTZ, *supra* note 18, at 8. Although similar estimates for PSC employment with ISAF members are unknown, commentators have reported 31 PSCs contracted by ISAF in February 2011 with around 31,250 guards. See Aikins, *supra* note 129, Appx 1, 16.

¹⁴⁹ SwissPeace report – Afghanistan, *supra* note 129, at 15.

¹⁵⁰ UNWGM Report on Afghanistan, *supra* note 132, at 8.

¹⁵¹ See AFGHAN PUBLIC PROTECTION FORCE (APPF), PSCs/RMCs STATUS [hereinafter APPF PSCs/RMCs Status], [HTTP://WWW.APPE.GOV.AF/PSCS_STATUS.HTM](http://www.appe.gov.af/pscs_status.htm) (LAST VISITED NOV. 16, 2013).

¹⁵² This is a very complex aspect of PMSCs' activities in Afghanistan. Due to limitations of space it cannot be described here, but see, e.g., SwissPeace report – Afghanistan, *supra* note 129, at 15 (mentioning for a better picture of the security landscape in Afghanistan, are three sets of non-state actors who also provide security, although information on these groups is even scarcer than on PSCs. First, the US military is working with an estimated 2-3,000 former Afghan militia fighters as auxiliaries in their war against terrorism. These individuals, engaged in combat duties, are not part of the ANA. Secondly, locally recruited former militiamen guard military compounds (incl. those of Provincial Reconstruction Teams - PRTs) and convoys by the Coalition Forces. Thirdly, the narcotics industry turns to the Taliban for security, and also hires for their protection and that of their drug convoys security guards, which are allegedly local militia leaders and former small-time warlords."), 3; AIKINS, *supra* note 129, at 7-10; BRANCOLI & PAOLIELLO, *supra* note 131. UNITED NATIONS ASSISTANCE MISSION AFGHANISTAN (UNAMA), AFGHANISTAN ANNUAL REPORT 2011, 31 n.76 (2012) ("ISAF identifies four categories of 'local defence forces' that operate outside the Afghan government's control. These include 'Community-Based Security Solutions (CBSS)', the Critical Infrastructure Protection (CIP) Program, Intermediate Security for Critical

Infrastructure (ISCI) and the Afghan Public Protection Program (AP3), and Local Security Forces (LSF). This last category, LSF, includes unlicensed private security companies, militias, and arbakai forces still in operation. The ISAF briefing stated that all such groups are either in the process of being disbanded, planning to be disbanded, planning to transfer to the Government's control or to transition to ALP").

¹⁵³ BRANCOLI & PAOLIELLO, *supra* note 131.

¹⁵⁴ E-Mail Text Message from Fernando Brancoli, Research Assistant, to author (Oct. 18, 2013, 9:00 AM EST) (on file with author) (revealing from Kabul that "Regarding local militia, there was an inflexion on the last two years. There is a crescent feeling that the country can only reach a basic level of security if local warlords are brought to the discussion table. Some of them had, in the 80s, links with the Taliban, so you can imagine the problem to this kind of approach. Right now, on the south, there are "joint programs" with PMSCs and local militia, but they are presented as a program with the army. What the Afghan government is doing is actually making some of these militiamen "instant military" just to give an aura of state control").

¹⁵⁵ This includes in particular reports published by the UNAMA and the Afghanistan Independent Human Rights Commission (AIHRC). See *UNAMA Reports on the Protection of Civilians in Armed Conflict*, UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN, <http://unama.unmissions.org/Default.aspx?tabid=13941&language=en-US> (last visited Nov. 20, 2013). The UNWGM has also reported the difficulty to verify human rights violations allegedly committed by PMSCs. See *UNWGM Report on Afghanistan*, *supra* note 132, at 15.

¹⁵⁶ Only general categories of violations are mentioned here. For a more specific account of particular violations illustrating these categories, and a compilation of incidents and documented cases, see ARMENDARIZ, *supra* note 126, Appendix.

¹⁵⁷ See Letter from Danielle Bryant, Executive Director, Project on Government Oversight's (POGO) to U.S. Sec'y of State Hillary Clinton (Sept. 1, 2009), available at <http://www.pogo.org/our-work/letters/2009/co-gp-20090901.html> (discussing U.S. Embassy in Kabul); Adam Zagorin, *A "Mutiny" in Kabul – Guards Allege Security Problems Have Put Embassy at Risk*, PROJECT ON GOVERNMENT OVERSIGHT (Jan. 18, 2013), <http://www.pogo.org/our-work/letters/2009/co-gp-20090901.html> (reporting similar allegations).

¹⁵⁸ SwissPeace report – Afghanistan, *supra* note 129, at 32-34.

¹⁵⁹ *Id.*, *UNWGM Report on Afghanistan*, *supra* note 132, ¶ 53.

¹⁶⁰ AFGHANISTAN PUBLIC PROTECTION FORCE (APPF), <http://moi.gov.af/en/page/5728> (last visited Nov. 16, 2013) (describing APPF as "a pay-for-service Afghan government security service provider underneath the Ministry of Interior that protects people, infrastructure, facilities, construction projects and convoys. It is organized as a State Owned Enterprise (SOE) in order to be able to contract with domestic and international customers for security services. APPF guards are not members of the Afghan National Army or Police and they have no mandate to investigate crimes or arrest suspects").

¹⁶¹ See The Charter of Security Enterprise (APPF Charter), available at http://www.appf.gov.af/downloads/documents/English_Charter_of_Security_Enterprise_updated_Dec_05.pdf (last updated Dec. 2005).

¹⁶² Antoine Perret, Geneva Center for the Democratic Control of the Armed Forces, Private Military and Security Companies in Latin America: the Relevance of the Montreux Document (2012).

¹⁶³ SMALL ARMS SURVEY 2011: STATES OF SECURITY, GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES (2011), available at <http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2011.html> (last visited Nov. 16, 2013).

¹⁶⁴ Chile National Regulations, PRIVATE SECURITY MONITOR, UNIVERSITY OF DENVER SIÉ CHÉOU-KANG CENTER, http://psm.du.edu/national_regulation/index.html (scroll down to "The Americas", choose

[“Chile” from the options](#)).

¹⁶⁵ Jonathan Franklin, *U.S. Contractor Recruits Guards for Iraq in Chile*, THE GUARDIAN (Mar. 4, 2013), <http://www.theguardian.com/world/2004/mar/05/iraq.chile>.

¹⁶⁶ Office of the High Commissioner for Human Rights [OHCHR], Human Rights Council, Report of the Working Group on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination : Mission to Chile, ¶ 17, U.N. Doc. A/HRC/7/7/Add.4 (Feb. 4, 2008).

¹⁶⁷ *Id.*, ¶ 15.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*, ¶ 17.

¹⁷⁰ Agencia UPI, *Ratifican Condena Contra Empresario Chileno que Recluto Mercenaries para Enviarlos A Irak*, ADN RADIO (Dec. 10, 2008), <http://www.adnradio.cl/noticias/nacional/ratifican-condena-contra-empresario-chileno-que-recluto-mercenarios-para-enviarlos-a-irak/20081210/nota/727879.aspx>.

¹⁷¹ Agencia UPI, *Suprema Ratifico Condena a Empresario Que Reclutaba Vigilantes para Enviralors a Irak*, ADN RADIO, (Jan. 28, 2011), <http://www.emol.com/noticias/nacional/2011/01/28/461126/suprema-ratifico-condena-a-empresario-que-reclutaba-vigilantes-para-enviarlos-a-irak.html>.

¹⁷² Mision Permanente de Chile Ante Las Organizaciones Internacionales en Ginebra, *Chilean Response to the UN Working Group survey*, MINUTA EMPRESAS MILITARES Y DE SEGURIDAD PRIVADAS (June 26, 2012), available at <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Chile.pdf>.

¹⁷³ *Id.*

¹⁷⁴ Law No. 17798, Ministerio de Defensa Nacional (Chile), available at http://psm.du.edu/media/documents/national_regulations/countries/americas/chile/chile_law_no17798_control_of_arms_and_similar_articles.pdf (last visited Nov. 16, 2013).

¹⁷⁵ Camara de Diputados, Legislature 361, Sesión 62 (Aug. 27, 2013), available at <http://www.camara.cl/pdf.aspx?prmID=10184&prmTIPO=TEXTOSesion> (last visited Nov. 16, 2013).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Email from Anonymous Chilean Experts, to Author (Sept. 15, 2013) (on file with author); See also Camara de Diputados, Legislature 361, Sesión 62, *supra* note 134.

¹⁷⁹ SMALL ARMS SURVEY 2011, *supra* note 122 at Annex 4.1, available at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2011/en/Small-Arms-Survey-2011-Chapter-04-Annexe-4.1-EN.pdf>

¹⁸⁰ *Costa Rica: Constitutions*, POLITICAL DATABASE OF THE AMERICAS, Constitutions, <http://pdpa.georgetown.edu/constitutions/costa/costa.html> (last updated July 6, 2008).

¹⁸¹ Alex Leff, *Crime comes to Costa Rica*, GLOBAL POST (Dec. 6, 2011, 10:39 AM), <http://www.globalpost.com/dispatch/news/regions/americas/costa-rica/110722/security-costa-rica-organized-crime-costa-rica-drug>.

¹⁸² *Central America's Rising Crime and Violence puts Region's Development at Risk*, THE WORLD BANK (Apr. 17, 2011), <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:22878371~pagePK:146736~piPK:146830~theSitePK:258554,00.html>.

¹⁸³ Asamblea Legislativa de la Republica de Costa Rica, Servicios de Seguridad Privados, Decreto Legislativo, no. 8395.

¹⁸⁴ *Id.*, at Art. 5.

¹⁸⁵ *Id.*, at art. 6.

¹⁸⁶ *Id.*, at art. 7.

¹⁸⁷ *Id.*, at art.7(c).

¹⁸⁸ *Id.*, at art. 14.

¹⁸⁹ Decreto Legislativo, no. 8395, at art. 19.

¹⁹⁰ *Id.*, at art. 21.

¹⁹¹ *Id.*, at art.25, 26.

¹⁹² Ministerio de Seguridad Publica, Costa Rica, Ley de Armas y Explosivos, no. 7530 (1995) (Costa Rica), available at http://psm.du.edu/media/documents/national_regulations/countries/americas/costa_rica/costa_rica_law_no7530_1995_law_of_arms_and_explosives.pdf (last visited Nov. 20, 2013).

¹⁹³ *Id.*, at art. 7.

¹⁹⁴ *Id.*, at art. 20, 32, 33

¹⁹⁵ The U.S. officially left the Manta base in September 2009, when the Ecuadorian government did not renew its lease, which began in 1999. See Gonzalo Solano, *U.S. Closes Military Post in Ecuador*, THE WASHINGTON POST (Sept. 19, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/18/AR2009091803407.html>.

¹⁹⁶ See United Nations Office of the High Commissioner for Human Rights [UNOHCHR], Human Rights Council Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Termination, *Mission to Ecuador*, U.N. Doc. A/HRC/A/42/Add.2 (Feb. 23, 2007) [hereinafter *Mission to Ecuador*]; A. Benavides de Perez, *Mercenarios, Mercenarismo y Privatizacion de la Seguridad en America Latina*, in *MERCENARIOS Y COMPAÑÍAS MILITARES Y DE SEGURIDAD PRIVADAS: DINÁMICAS Y RETOS PARA AMÉRICA LATINA*, 117-118 (Antoine Perret, ed. 2010).

¹⁹⁷ *Id.*, at 4 ¶ 2.

¹⁹⁸ CONGRESO NACIONAL, LEY DE VIGILANCIA Y SEGURIDAD PRIVADA, [HTTP://PSM.DU.EDU/MEDIA/DOCUMENTS/NATIONAL REGULATIONS/COUNTRIES/AMERICAS/ECUADOR/ECUADOR LEY012 2003 SURVEILLANCE AND PRIVATE SECURITY.PDF](http://psm.du.edu/media/documents/national_regulations/countries/americas/ecuador/ecuador_ley012_2003_SURVEILLANCE_AND_PRIVATE_SECURITY.PDF) (LAST VISITED OCT. 28, 2013).

¹⁹⁹ *Id.* art. 3.

²⁰⁰ *Id.* art. 4.

²⁰¹ *Id.* art 5.

²⁰² *Id.* art 13.

²⁰³ *Id.* art 15, 16.

²⁰⁴ Congreso Nacional, Ecuador, Proyecto de Ley de Creación de la Cámara de Seguridad Privada del Ecuador (2007) (Ecuador), available at http://psm.du.edu/media/documents/national_regulations/countries/americas/ecuador/ecuador_draft_bill_on_psc_chamber_2007-spanish.pdf.

²⁰⁵ *Empresas Afiliadas a Nivel Nacional*, CAMARA DE LA SEGURIDAD PRIVADA DEL ECUADOR, <http://casepec.ec/AFILIADOS.html> (last visited Nov. 16, 2013).

²⁰⁶ POLICIA NACIONAL DEL ECUADOR, <http://cosp.policiaecuador.gob.ec/> (last visited Nov. 20, 2013).

²⁰⁷ *Ecuador Cuenta con 52.300 Guardias de Seguridad Privada*, EL TELEGRAF (July 22, 2013), <http://www.telegrafo.com.ec/justicia/item/ecuador-cuenta-con-52-300-guardias-de-seguridad-privada.html>.

²⁰⁸ *Camara de Seguridad Privada del Ecuador Afirma Que Capacitacion a Guardas no Fue Socializada*, ECUADOR INMEDIATO (July 2, 2012, 9:10:22 AM), http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=176537.

²⁰⁹ *Id.*

²¹⁰ CURSO DE PROTECCION A DIGNATARIOS Y EMPRESARIOS, CENTRO DE CAPACITACIÓN Y ASESORAMIENTO INTEGRAL DE SEGURIDAD, available at <http://capaseg.com/images/curso%20dignatarios%20empresarios.pdf> (last visited Nov. 16, 2013).

²¹¹ *Mission to Ecuador*, supra note 155.

²¹² Kelly Hearn, *Woes Mount for Oil Firms in Ecuador*, CHRISTIAN SCIENCE MONITOR (Feb. 9, 2006), <http://www.csmonitor.com/2006/0209/p06s02-woam.html>.

²¹³ *Kichwa People of Sarayaku and its Members v. Ecuador*, Case 12.465, Application Filed by the Inter-American Comm'n on Human Rights with the Inter-American Court of Human Rights Against the Republic of Ecuador (Apr. 26, 2010), available at <http://www.cidh.oas.org/demandas/12.465%20Sarayaku%20Ecuador%2026abr2010%20ENG.pdf>.

²¹⁴ *Case profile: DynCorp lawsuit (re Colombia & Ecuador)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/DynCorplawsuitreColombiaEcuador> (last visited Nov. 16, 2013).

²¹⁵ Press Release, Int'l Court of Justice, Ecuador institutes proceedings against Colombia with regard to a dispute concerning the alleged aerial spraying by Colombia of toxic herbicides over Ecuadorian territory (Apr. 1, 2008), available at <http://www.icj-cij.org/docket/files/138/14470.pdf>.

²¹⁶ Montreux Document, *supra* note 1 at Part 1(A)(2). Such prohibited contracting activities include the exercise of power over prisoner of war camps or places of civilian incarceration.

²¹⁷ *Id.* pt. 2(A)(I)(1). Cockayne, *supra* note 6 at 412 (noting that the Good Practices do not proscribe PMSCs direct participation in hostilities per se, since it may "under certain limited circumstances be entirely lawful," but rather encourages States to consider in advance where direct participation is likely to result from the nature of the services provided in a particular setting).

²¹⁸ *Id.* pt. 2(B)(I)(24).

²¹⁹ *Id.* pt. 2(C)(I)(53).

²²⁰ TRANSFORMING WARTIME CONTRACTING, *supra* note 19 at 39.

²²¹ The Federal Activities Inventory Reform Act of 1998, Pub L No 105-270 § 5(2)(A), 112 Stat 2382 (1998) (codified at 31 USC, ¶ 501 note); *id.*, ¶ 5(2)(B)(iii)..

²²² Huskey & Sullivan, *supra* note 15 at 342.

²²³ *Id.*

²²⁴ The exact language in the guidance reads: 4. Combat; 5. Security provided under any of the circumstances set out below. This provision should not be interpreted to preclude contractors taking action in self-defense or defense of others against the imminent threat of death or serious injury. (a) Security operations performed in direct support of combat as part of a larger integrated armed force. (b) Security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat. Where the U.S. military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat. (c) Security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat. Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed.Reg. 56, 227 (Sept. 12, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf>.

²²⁵ Department of Defense Instruction 1100.22, Policy and Procedures for Determining Workforce Mix (Apr. 12, 2010) [hereinafter DoDI 1100.22], available at <http://www.dtic.mil/whs/directives/corresp/pdf/110022p.pdf>.

²²⁶ *Id.* Among inherently governmental security functions are: "(a) If security forces that operate in hostile environments as part of a larger, totally integrated and cohesive armed force perform operations in direct support of combat (e.g., battlefield circulation control and area security), the operations are IG... (b) Security is IG if it is performed in environments where there is such a high likelihood of hostile fire, bombings, or biological or chemical attacks by groups using sophisticated weapons and devices that, in the judgment of the military commander, the situation could evolve into combat.... (c) Security

actions that entail assisting, reinforcing, or rescuing PSCs or military units who become engaged in hostilities are IG because they involve taking deliberate, offensive action against a hostile force on behalf of the United States.... (d) Security is IG if, in the commander's judgment, an offensive response to hostile acts or demonstrated hostile intentions would be required to operate in, or move resources through, a hostile area of operation.... (e) Security is IG if, in the commander's judgment, decisions on the appropriate course of action would require substantial discretion, the outcome of which could significantly affect U.S. objectives with regard to the life, liberty, or property of private persons, a military mission, or international relations."

²²⁷ Huskey & Sullivan, *supra* note 15 at 343.

²²⁸ See DoDI 1100.22, *supra* note 184.

²²⁹ TRANSFORMING WARTIME CONTRACTING, *supra* note 19 at 47.

²³⁰ *Id.*, at 41.

²³¹ *Id.*, at 42.

²³² *Id.* (finding that [t]he COWC adds that a 2009 Army base-budget survey of service contracts found 2,000 contractor positions performing inherently governmental functions).

²³³ See, e.g., Allison Stanger, Transparency as a Core Public Value and Mechanism of Compliance, 31 CRIMINAL JUSTICE ETHICS, no. 3 at 293 (2012); Marcus Hedahl, Unaccountable: The Current State of Private Military and Security Companies, 31 CRIMINAL JUSTICE ETHICS, no. 3 at 182 (2012).

²³⁴ van Genugten, van der Heijden & Jagers, *supra* note 25 at 260-262.

²³⁵ This was apparently a consideration during the drafting of the Montreux Document. As Cockayne notes in relation to the proposal to include a recommendation to conduct human rights impact assessments, three draft provisions for each type of State suggested that it is good practice for states to consider the potential impact of hiring, licensing or permitting the activities of a specific PMSC on the operating environment. None of these proposals made it in to the final document. Cockayne, *supra* note 6 at 424.

²³⁶ TRANSFORMING WARTIME CONTRACTING, *supra* note 19 at 42-43.

²³⁷ Lucas Roorda, *Supervision without Vision: Risk Governance and PMSCs*, 8 UTRECHT L. REV. 200 (2012).

²³⁸ *Id.*

²³⁹ June 15, 2009 FOIA, *supra* note 36; Sept. 6, 2012 FOIA, *supra* note 32; Apr. 4 FOIA, *supra* note 36; Roorda, *supra* note 196 at 216; *Invitation to Tender for the Recovery and Sale of Surplus UK MoD Assets and Material from Op Herrick, Afghanistan* Ref. no. DSACOMDD/5015, CONTRACTS FINDER (July 17, 2012), <https://online.contractsfinder.businesslink.gov.uk/Common/View%20Notice.aspx?site=1000&lang=en¬iceid=592387&fs=true> (last visited Nov. 16, 2013).

²⁴⁰ See U.S. Section on Determination of Services, *supra*.

²⁴¹ TREVOR TAYLOR & JOHN LOUTH, WHAT THE GOVERNMENT MUST DO IN DEFENCE PROCUREMENT: THE INHERENTLY GOVERNMENTAL FUNCTION AND THE GOCO PROPOSAL FOR DEFENCE EQUIPMENT AND SUPPORT," (Royal United Services Institute Briefing Paper, Sept. 2013), <http://www.rusi.org/downloads/assets/GOCO.pdf>.

²⁴² RT. HON. PHILIP HAMMOND MP, SEC'Y OF STATE FOR DEFENCE, BETTER DEFENCE ACQUISITION: IMPROVING HOW WE PROCURE AND SUPPORT DEFENCE EQUIPMENT, ¶v (Executive Summary), CM 8626 (June 2013), available at <http://www.official-documents.gov.uk/document/cm86/8626/8626.pdf>.

²⁴³ TAYLOR & LOUTH, *supra* note 200 at 1 (emphasis added).

²⁴⁴ HAMMOND, *supra* note 201, at 17, ¶ 71.

²⁴⁵ *Id.* at xiii. Individual submissions are not available on the webpage of the DEFENCE CONSULTATIONS NATIONAL ARCHIVES, http://webarchive.nationalarchives.gov.uk/*/http://www.defenceconsultations.

org.uk/ (last visited Nov. 16, 2013).

²⁴⁶ Int'l Comm. of the Red Cross, *Practice Relating to Rule 6. Civilians' Loss of Protection from Attack*, CUSTOMARY IHL, available at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule6 (last visited Nov. 6, 2013).

²⁴⁷ THE JOINT DOCTRINE AND CONCEPTS CENTRE, THE JOINT SERVICE MANUAL ON THE LAW OF ARMED CONFLICT. JSP 383 (2004), §§ 2.5.2, 5.3.3, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf (last visited Nov. 16, 2013).

²⁴⁸ *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, G.A. Resolution 44/34, U.N. GAOR, 44th Sess., Supp. No. 43, UN Doc. A/RES/44/34, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001), available at <http://www.un.org/documents/ga/res/44/a44r034.htm>.

²⁴⁹ ALEXANDER & WHITE, *supra* note 47 at 23.

²⁵⁰ FCO PUBLIC CONSULTATION SUMMARY, *supra* note 40, ¶ 42.

²⁵¹ UK Montreux+5 Response, *supra* note 38; FOREIGN & COMMONWEALTH OFFICE, *Conditions of Contract for Services: Value over £80,000*, PROCUREMENT AT FCO (May 2013) [hereinafter FCO Conditions of Contract for Services], [HTTPS://WWW.GOV.UK/GOVERNMENT/ORGANISATIONS/FOREIGN-COMMONWEALTH-OFFICE/ABOUT/PROCUREMENT](https://www.gov.uk/government/organisations/foreign-commonwealth-office/about/procurement).

(located under the Terms and Conditions heading).

²⁵² See, e.g., *The Provision of Security Guarding Services in Iraq*, Ref. no. CPG01640-2 § 6, CONTRACTS FINDER, [hereinafter FCO-Control Risks Group Contract], <https://online.contractsfinder.businesslink.gov.uk/Common/View%20Notice.aspx?site=1000&lang=en¬iceid=1046839&fs=true> (last visited Nov. 16, 2013).

²⁵³ ICOC, *supra* note 7, at 31; ANSI/ASIS PSC1-2012, *supra* note § 9.2.5, http://www.acq.osd.mil/log/PS/p_vault/Item_1997-PSC_1_STD.PDF.

²⁵⁴ ICOC, *supra* note 7, at 31; ANSI/ASIS PSC1-2012, *supra* note 12, § 9.5.2.

²⁵⁵ E.g., U.S. DEPT. OF JUSTICE WHITE PAPER, *LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE*, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (last visited Nov. 16, 2013), which is generally agreed to articulate a much broader interpretation of imminent threat than exists under prevailing international law norms.

²⁵⁶ PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 27 (2007).

²⁵⁷ SYLVIA WHITE, DIRECTOR & GENERAL COUNSEL, AEGIS DEFENCE SERVICES LTD., REMARKS AT THE 35TH ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW: PRIVATE MILITARY AND SECURITY COMPANIES, San Remo (Sept. 6-8, 2012), available at <http://www.iihl.org/iihl/Documents/White.pdf>.

²⁵⁸ *Progress of the Bill: Defence Reform Bill 2013-2014*, U.K. PARLIAMENT, [HTTP://SERVICES.PARLIAMENT.UK/BILLS/2013-14/DEFENCEREFORM.HTML](http://services.parliament.uk/bills/2013-14/defencereform.html) (LAST VISITED NOV. 16, 2013).

²⁵⁹ Iraq ranked 11th on the Fund for Peace Failed States Index of 2013. See, *Failed State Index*, THE FUND FOR Peace, <http://ffp.statesindex.org/rankings-2013-sortable> (last visited Nov. 20, 2013).

²⁶⁰ See PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 84-85. The authors explained that: "Under Iraqi law, rules governing the activities of PMSCs are found, first and foremost, in the orders issued by the CPA prior to the transfer of sovereignty/authority to the Iraqi Interim Government in June 2004. According to the 2004 *Law on Administration for the State of Iraq during the Transitional Period* (TAL), CPA Orders, like other laws in force in Iraq on 30 June 2004, "shall remain in force until rescinded or amended by legislation duly enacted and having the force of law". Similarly, the 2005 Iraqi Constitution

states that “existing laws shall remain in force, unless annulled or amended in accordance with the provisions of this Constitution” (art. 130).

On October 30 2007, [...] Iraq’s cabinet drafted legislation for subjecting non-Iraqi private security companies to Iraqi law, but the final draft law, transmitted to the Council of Representatives (COR) on 11 February 2008, has been pending for discussion in the parliament since then.

Accordingly, unless rescinded, CPA Orders still remain in many aspects the central legal basis for the regulation of PMSCs in Iraq. In addition, however, the U.S-Iraq Status-of-forces Agreement (SOFA), in force since 1 January 2009, also provides a regulatory framework for PMSCs in certain relevant aspects such as the basis of jurisdiction over contractors.”

The full text of the March 8, 2004 Law for the Administration of the State of Iraq for the Transitional Period can be found at

LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD (Mar. 8, 2004), <http://www.law.case.edu/saddamtrial/documents/TAL.pdf> (last visited Nov. 20, 2013).

²⁶¹ PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 90.

²⁶² PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 90.

²⁶³ PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 47.

²⁶⁴ Working Group on Mercenaries Addendum: Mission to Iraq 19.

²⁶⁵ See The Constitution of Afghanistan, arts. 5, 75 (2004).

²⁶⁶ See Police Law art. 5, OFFICIAL GAZETTE No. 862 (Sept. 22, 2005).

²⁶⁷ See Military Technical Agreement: Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan (Jan. 4, 2002), available at http://psm.du.edu/media/documents/us_regulations/sofas/us_isaf_military_technical_agreement.pdf; Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, U.S.-Afg., May 23, 2003, State Dep’t No. 03-67, available at 2003 WL 21754316, 1-4 (entered into force May 28, 2003) [hereinafter U.S.-Afg. SOFA] (stating that “[i]n the event that the government of the United States of America awards contracts for the acquisition of articles and services, including construction, such contracts shall be awarded in accordance with the laws and regulations of the Government of the United States of America”).

²⁶⁸ 2008 Procedure for PSCs, *supra* note 138, art. 4.4.

²⁶⁹ *Id.*, Annex 1 – Law on Using of Force by Private Security Companies in Afghanistan, ¶ 7.

²⁷⁰ *Id.*, at art. 6.

²⁷¹ 2012 Procedure for RMCs, *supra* note 145, art. 5.

²⁷² MONTREUX DOCUMENT, *supra* note 1, Good Practices 2, 3 and 4.

²⁷³ *Id.*, Good Practices 26-29.

²⁷⁴ They are past conduct, financial and economic capacity, personnel and property records, training, lawful acquisitions, internal organization and regulation and accountability, and welfare of personnel.

²⁷⁵ MONTREUX DOCUMENT, *supra* note 1, Good Practices 43-45 (stating that with regards to rules on the possession weapons, good practices include limiting the type and quantity of weapons and ammunition, registration of weapons and ammunition, authorizations to carry weapons and limitations on the number of personnel allowed to carry weapons while on duty, and secure storage and proper disposal of weapons and ammunition).

²⁷⁶ According to Cockayne, *supra* note 6, at 413, due to positions taken by the U.K. and other governments, the Good Practice is to “consider establishing,” rather than just “establish” an authorization system.

²⁷⁷ *Id.*, at 421.

²⁷⁸ AMNESTY INT’L, PUBLIC STATEMENT ON THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL

LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO THE OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT, AI Index IOR 30/010/2008 (Oct. 14, 2008) [hereinafter AMNESTY INT’L, PUBLIC STATEMENT ON THE MONTREUX DOCUMENT].

²⁷⁹ UN HUMAN RIGHTS COUNCIL, PROTECT RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS, A/HRC/8/5, Apr. 7, 2008.

²⁸⁰ AMNESTY INT’L, PUBLIC STATEMENT ON THE MONTREUX DOCUMENT, *supra* note 231.

²⁸¹ John Ruggie, UN Special Representative, UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UN Guiding Principles].

²⁸² *Id.*, at 5.

²⁸³ *Id.*, at 7.

²⁸⁴ *Id.*, at 9.

²⁸⁵ As the commentary to Guiding Principle 4 states: “Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented.”

²⁸⁶ Ruggie, *supra* note 234, at 10.

²⁸⁷ *Id.*

²⁸⁸ *Id.*, at 10-11.

²⁸⁹ *Id.*, at 11.

²⁹⁰ Cockayne, *supra* note 6, at 424.

²⁹¹ Foreign Military Sales (Arms Export Control) Act of 1968, Pub.L. No. 90-629, 82 Stat. 1320 (codified as amended in scattered sections of 22 U.S.C.).

²⁹² International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130 (2013).

²⁹³ 22 C.F.R. § 122 (2013).

²⁹⁴ 22 C.F.R. §§ 123, 124, 125 (2013).

²⁹⁵ 22 C.F.R. § 126.7 (2013).

²⁹⁶ Schwartz & Church, *supra* note 20, at App’x A-2.

²⁹⁷ *Id.*

²⁹⁸ *Id.*, at App’x A-1.

²⁹⁹ *Id.*, at App’x B.

³⁰⁰ Federal Acquisition Regulation System (FARS), 48 C.F.R. Ch. 1 (2013).

³⁰¹ Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. §§ 225.3, 225.74 (2013).

³⁰² 48 C.F.R. § 9.103(b) (2013).

³⁰³ 48 C.F.R. § 9.104-1 (2013).

³⁰⁴ 48 C.F.R. § 9.104-6(b) (2013). *See* KATE M. MANUAL, CONG. RESEARCH SERV., R41562, EVALUATING THE “PAST PERFORMANCE” OF FEDERAL CONTRACTORS: LEGAL REQUIREMENTS AND ISSUES 15 (2013). In evaluating proposals by contractors (known as “source selection”), agency officials may look at “past performance information [a]s one indicator of an offeror’s ability to perform the contract.” 48 C.F.R. §§ 9, 15.305(a) (2) (2013) (supporting the fact that this assessment is separate from a responsibility determination). *Id.*

³⁰⁵ 48 C.F.R. § 42.1501(2013).

³⁰⁶ 48 C.F.R. § 42.1503(b)(2) (2013).

³⁰⁷ *Id.* (citing The National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417 § 872(b)

(1) & (c), 122 Stat. 4356 (Oct. 14, 2008).

³⁰⁸ Schwartz & Church, *supra* note 20, at 5-6.

³⁰⁹ 48 C.F.R. § 52.209-7(c).

³¹⁰ See Lee Ferran & Jack Cloherty, *Partying Security Contracting Group Pays 7.5 M Fine*, ABC NEWS (July 7, 2011), <http://abcnews.go.com/Blotter/armorgroup-kabul-contractor-group-settles-75-fine/story?id=14020453>.

³¹¹ 48 C.F.R. § 52.209-7(c) (2013). Despite many attempts to access www.fapiis.gov and the “FAPIIS Public” link within the www.ppris.gov site, this author was unable to do so. It appears such links do not work.

³¹² U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), *FEDERAL CONTRACTORS: BETTER PERFORMANCE INFORMATION NEEDED TO SUPPORT AGENCY CONTRACT AWARD DECISIONS*, GAO-09-374 (2009).

³¹³ U.S. OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF STATE & BROADCASTING BOARD OF GOVERNORS, *AUDIT OF THE DEPARTMENT OF STATE PROCESS TO AWARD THE WORLDWIDE PROTECTIVE SERVICES CONTRACT AND KABUL EMBASSY SECURITY TASK FORCE ORDER*, Rept. No. AUD/SI-12-17 (2011) [hereinafter AUD/SI-12-17].

³¹⁴ *Id.*

³¹⁵ *Id.* (attaching Letter from the Chairman of the Subcommittee on Contracting Oversight, U.S. Senate Committee on Homeland Security and Governmental Affairs, to Deputy Inspector General, U.S. Department of State, Office of Inspector General (Mar. 14, 2011)).

³¹⁶ AUD/SI-12-17, *supra* note 266, at 9.

³¹⁷ *Id.*, at 13.

³¹⁸ *Id.*, at 12.

³¹⁹ 48 C.F.R. §§ 52.225-19 (2013); 48 C.F.R. §§ 252.225-7995 (2013); Office of the Under Sec’y of Defense, *Class Deviation---Contractor Personnel Performing in the United States Central Command Area of Responsibility*, Deviation No. 2013-00015 (July 27, 2013).

³²⁰ 48 C.F.R. § 225.370-4 (2013); 48 C.F.R. § 252.225-7039 (2013); 48 C.F.R. et. seq. (2013).

³²¹ 48 C.F.R. § 252.225-7039; 48 C.F.R. § 7040 (2013).

³²² 48 C.F.R. § 252.225-7039.

³²³ 48 C.F.R. § 252.225-7039; 48 C.F.R. § 7040; U.S. DEP’T. OF DEF. INSTR., *PRIVATE SECURITY CONTRACTORS (PCSS) OPERATING IN CONTINGENCY OPERATIONS, HUMANITARIAN OR PEACE OPERATIONS, OR OTHER MILITARY OPERATIONS OR EXERCISES*, DoDI 3020.50 Encl. 3 (July 22, 2009) [hereinafter DoDI 3020.50] (Incorporating Change 1, Aug. 1, 2011); U.S. DEP’T. OF DEF. INSTR., *OPERATIONAL CONTRACT SUPPORT (OCS) Encl. 2*, DoDI 3020.41 (Dec. 20, 2011) [hereinafter DoDI 3020.41]; U.S. DEP’T. OF DEF. DIR., *CARRYING OF FIREARMS AND THE USE OF FORCE BY DoD PERSONNEL ENGAGED IN SECURITY, LAW AND ORDER OR COUNTERINTELLIGENCE ACTIVITIES Encl. 2*, DoDD 5210.56 (Apr. 1, 2011).

³²⁴ 48 C.F.R. § 252.225-7019.

³²⁵ The National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 833, 124 Stat. 4137 (2011).

³²⁶ 48 C.F.R. § 252.225-7401; U.S. DEP’T OF DEF., *PROCEDURES GUIDANCE AND INFORMATION* § 225.7401.

³²⁷ ANSI/ASIS PSC 1-2012, *supra* note 12.

³²⁸ *Id.*, ¶9.3.

³²⁹ *Id.*, ¶9.5.

³³⁰ *Id.*, A.2.1.

³³¹ *TRANSFORMING WARTIME CONTRACTING*, *supra* note 19, at 156.

³³² Hague, *supra* note 38.

³³³ UK PRIV-WAR REPORT, *supra* note 47, at 38-39.

³³⁴ Chatham House Meeting Summary, *supra* note 83, at 3.

³³⁵ 2002 GREEN PAPER, *supra* note 39 at 26.

³³⁶ Walker & Whyte, *supra* note 59, at 651, 660; *see also*, GREEN PAPER, *supra* note 39 at 23 (discussing the drawbacks of a ban on PMSC military activity abroad).

³³⁷ In reality, however, it is too early to assess what the cost of voluntary self-regulation to the U.K. government because it is in its nascent stages. The domestic part of voluntary self-regulation (certification of British PMSCs to the PSC1 standard) is still in the pilot phase, but is unlikely to cost the U.K. government a significant amount. As regards the international association, it is currently estimated that it will cost between \$3.5-\$5.1 million per annum to run. *See* INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, DRAFT BUDGET: OVERSIGHT MECHANISM FOR THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY PROVIDERS (ICoC) [hereinafter ICoC DRAFT BUDGET], available at http://www.icoc-psp.org/uploads/ICoC_Oversight_Mechanism_Budget_and_Funding.pdf. (reporting that these costs are provisional, and like many international organizations, the ICoCA could end up costing substantially more).

³³⁸ 2002 GREEN PAPER, *supra* note 39, at 25.

³³⁹ *Id.*, at 26.

³⁴⁰ FCO PUBLIC CONSULTATION SUMMARY, *supra* note 40, ¶ 3.

³⁴¹ *Id.* ¶ 6.

³⁴² *Id.* ¶ 28.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ Hague, *supra* note 38.

³⁴⁶ The standard against which maritime-based PMSCs will be certified is currently known as ISO/PAS 28007. The maritime-based PMSC industry is significant in the UK. A 2011 summary of private maritime security company activity by the Security Association for the Maritime Industry indicates that five British PMSCs dominate the market and conduct around 80% of all transits between them. As with land-based companies (discussed below) the government is proposing a system of voluntary self-regulation for the maritime PMSC industry, which is a relatively hands-off approach to raising industry standards.

³⁴⁷ *See supra* Background Section.

³⁴⁸ Hague, *supra* note 38.

³⁴⁹ The ICoC applies only to security services. INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS' ASSOC. (ICoCA), ARTICLES OF ASSOCIATION Art.3 [hereinafter ICoCA ARTICLES OF ASSOCIATION], available at http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf.

³⁵⁰ UK FOREIGN AFFAIRS COMMITTEE, HUMAN RIGHTS ANNUAL REPORT 2008 (SEVENTH REPORT) (Aug. 9, 2009) [hereinafter HUMAN RIGHTS ANN. REPORT], available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfaff/557/55708.htm#n230>.

³⁵¹ ICoCA ARTICLES, *supra* note 32, Art. 13.

³⁵² The U.K. government has defended its decision to opt for voluntary self-regulation on the basis that the Montreux Document states that "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." However, the Montreux Document goes on immediately to state that "In this understanding, Home States should evaluate whether their domestic legal framework...is adequately conducive to respect for international humanitarian law and human rights law by PMSCs." *See* FCO PUBLIC CONSULTATION, *supra* note 40, ¶ 39; and *see* MONTREUX DOCUMENT, *supra* note 1, Pt. II (C).

Taken together these passages make clear that, in the context of the Montreux Document, regulation by trade association is seen as a secondary, complementary measure which, for that very reason, did not require further elaboration.

³⁵³ MONTREUX DOCUMENT, *supra* note 1, Good Practices, 54, 57-67.

³⁵⁴ Chatham House Meeting Summary, *supra* note 83, at 3.

³⁵⁵ FCO Conditions of Contract for Services over £80,000, *supra* note 210, § 8: Warranties, <https://www.gov.uk/government/organisations/foreign-commonwealth-office/about/procurement>.

³⁵⁶ UK Montreux+5 Response, *supra* note 38; *see also*, “FCO Conditions of Contract for Services over £80,000, *supra* note 210.

³⁵⁷ *Id.*

³⁵⁸ Researchers working on this report asked the FCO to provide copies of Pre-Qualification Questionnaires and Key Performance Indicators used to measure contract performance; at the time of writing they had not yet been received.

³⁵⁹ UK Montreux+5 Response, *supra* note 38.

³⁶⁰ FCO-Control Risks Group Contract, *supra* note 211, § 6.

³⁶¹ FCO PUBLIC CONSULTATION SUMMARY, *supra* note 40, ¶39. *See also*, Chatham House Meeting Summary, *supra* note 83, at 7.

³⁶² *Id.*

³⁶³ FCO Conditions of Contract for Services over £80,000, *supra* note 210; *see also* Unclassified Contract No. CGP01630-1 Between the FCO and GW Consulting (UK) Ltd., for the Provision of Security Guarding Services in Iraq, Version 3 (British Embassy Baghdad and British Office Baghdad) (June 27, 2013) [hereinafter FCO-GW Consulting Contract], § 17, available at <https://online.contractsfinder.businesslink.gov.uk/Common/View%20Notice.aspx?site=1000&lang=en¬iceid=1060330&fs=true> (Contractor Warranties).

³⁶⁴ “FCO Conditions of Contract for Services over £80,000, *supra* note 210, § 1 (Interpretation).

³⁶⁵ FCO-GW Consulting Contract, *supra* note 316.

³⁶⁶ *Id.*, § 21.

³⁶⁷ HON. WILLIAM HAGUE MP, SEC’Y OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, GOOD BUSINESS: IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, (Sept. 2013) (hereinafter U.K. ACTION PLAN), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1.pdf.

³⁶⁸ Press Release, RAID-UK, The UK Action Plan on Business and Human Rights Will Bring Little Comfort to Victims of Corporate Abuse (Sept. 4, 2013), available at http://raid-uk.org/docs/Press_Releases/PR_UK_Action_Plan_130904.pdf.

³⁶⁹ Interview with Anonymous Industry Official (Oct. 16, 2013) (on file with author).

³⁷⁰ Email from Robert Wine, BP Group Press Officer (Nov. 11, 2013).

³⁷¹ *See infra* U.K. Remedies Section.

³⁷² *See infra* U.K. Accountability Section.

³⁷³ PRIVATE SECURITY COMPANY ASSOC. OF IRAQ, BAGHDAD MOI OSC REGISTRATION GUIDE 2006, available at http://www.pscai.org/Docs/PSC_Registration_Process_2006.pdf (last visited Nov. 20, 2013). This criteria included a current license with the Iraqi Ministry of Trade, details of the PMSC’s officers and incorporation, names and nationality of personnel, number and types of weapons, number and types of vehicles, summaries of all contracts the company had, copies of corporate logos, a \$25,000 bond from an Iraqi bank, proof of \$1 million public liability insurance, and tax certificates. Applicants needed to guarantee that their personnel were sound in mind and body, had received a medical examination, were

21 years or older, had been trained in weapons handling and personal and/or site protection, had no prison record, had never been a member of the Ba'ath party, and had no ties to terrorism. There was no requirement for training on human rights issues.

³⁷⁴ See PSCAI, PRIVATE SECURITY COMPANY (PSC) REQUIREMENTS FOR IRAQI KURDISTAN [hereinafter PSC REQUIREMENTS FOR IRAQI KURDISTAN], available at http://www.psc.ai.org/Docs/Foreign_Security_Company_Guidelines.pdf (Nov. 18, 2013).

³⁷⁵ The text of CPA MEMORANDUM 17, http://www.trade.gov/static/iraq_memo17.pdf (last visited Nov. 20, 2013); PSCs also appear to be permitted under CPA ORDER NUMBER 91: REGULATION OF ARMED FORCES AND MILITIAS WITHIN IRAQ (June 2, 2004), available at http://www.iraqcoalition.org/regulations/20040607_CPAORD91_Regulation_of_Armed_Forces_and_Militias_within_Iraq.pdf (last visited Nov. 18, 2013). Order 91 prohibits illegal armed forces and militias within Iraq. Section 3 sets forth pertinent exceptions to this rule among which are included private security companies and their employees provided the PSC meets all of the following criteria:

“i) the Private Security Company is properly licensed and regulated by the Ministry of Interior and Ministry of Trade;

ii) all firearms and weapons used by the Private Security Company are licensed in accordance with applicable CPA Orders, Regulations, and Memoranda, and Iraqi laws and regulations; and

iii) all company officers, armed members, and supervisors exercising control of armed members of the Private Security Company have undergone background checks conducted by the Ministry of Interior and possess the requisite weapons authorizations issued by the Ministry of Interior.”

However, whereas Section 6 of the Order provides that “those armed forces or militias that do not qualify for an exception according to Section 3 shall be considered illegal and their weapons and property shall be subject to confiscation,” in practice it is doubtful whether PSCs which have operated without the proper operating license or than have infringed background checks’ requirement have been qualified as such illegal armed forces or militias.

³⁷⁶ PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 89.

³⁷⁷ See CPA MEMORANDUM 17, *supra* note 375.

³⁷⁸ See PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 89; UNWGM-Iraq, *supra* note 89, at ¶ 37, 40.

³⁷⁹ *Id.*

³⁸⁰ See PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 89.

³⁸¹ Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at ¶ 37.

³⁸² See PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 90.

³⁸³ *Id.*

³⁸⁴ Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at ¶ 31.

³⁸⁵ CPA MEMORANDUM 17, *supra* note 375.

³⁸⁶ *Id.*

³⁸⁷ *Id.* p. 11; the registration process was very similar in the Kurdish Region, PSC REQUIREMENTS FOR IRAQI KURDISTAN, *supra* note 374.

³⁸⁸ The Iraqi researcher believes this is because politicians think PMSC regulation is so controversial that they may not want public debate. Iraqi researcher for NOVACT, email to author (Nov. 9, 2013) (on file with author).

³⁸⁹ CPA MEMORANDUM 17, *supra* note 375, at 12.

³⁹⁰ *Id.*, at 12-13.

³⁹¹ *Study on Corruption and Integrity in Iraq’s Public Sector Released*, UNITED NATIONS IRAQ (June 19, 2013), available at http://www.uniraq.org/index.php?option=com_k2&view=item&id=1008:study-on-corruption-and-integrity-in-iraq-s-public-sector-released&Itemid=605&lang=en.

³⁹² Haider Najm, *The Huge, Hidden Salaries of Iraq's Parliamentarians*, NIQASH (Apr. 22, 2010), <http://www.niqash.org/articles/?id=2660>.

³⁹³ *Iraq Protesters Rail Against MPs' Benefits*, CHANNEL NEWS ASIA (Aug. 31, 2013), <http://www.channelnewsasia.com/news/world/iraq-protesters-rail/797474.html>; Harith Hasan, *New Iraqi Protest Movement Targets Corruption*, AL MONITOR, (Sami-Joe Abboud, trans. Sept. 11, 2013), available at <http://www.al-monitor.com/pulse/originals/2013/09/iraq-new-protest-movement-state-shortcomings.html>.

³⁹⁴ See KABUL POLICE HEADQUARTERS, PRIVATE SECURITY GUARD PERMIT FOR FOREIGN INSTITUTIONS, available at http://www.aisa.org.af/licensing_procedur/PrivateSecurityGuardPermitForeign.pdf (last visited Nov. 17, 2013).

³⁹⁵ AISA stopped issuing licenses in late 2006 in order to avoid confusion with the regulatory efforts that were initiated by the Minister of Interior.

³⁹⁶ Martine van Bijlert, *The Survival of the Private Security Companies*, THE AFGHANISTAN ANALYSTS NETWORK (AAN), <http://www.afghanistan-analysts.org/the-survival-of-the-private-security-companies> (last modified Mar. 27, 2011).

³⁹⁷ *Diplomatic Operations* ¶ 3, in 2011 BRIDGING STRATEGY, *supra* note 127.

³⁹⁸ UNWGM Report on Afghanistan, *supra* note 132, ¶ 50, 66.

³⁹⁹ *Id.*

⁴⁰⁰ SCHWARTZ, *supra* note 18, at 3.

⁴⁰¹ UNWGM Report on Afghanistan, *supra* note 132, ¶ 68-70.

⁴⁰² See the APPF website, available at <http://www.appf.gov.af/pscs.htm> (last visited Nov. 17, 2013); and Ministry of Interior Affairs, Islamic Republic of Afghanistan, *Frequently Asked Questions*, AFGHANISTAN PUBLIC PROTECTION FORCE, [HTTP://MOI.GOV.AF/EN/PAGE/5728](http://moi.gov.af/en/page/5728) (last visited Nov. 17, 2013).

⁴⁰³ In general, the 2012 Procedure reproduces some of the 2008 Procedure for PSCs, including the designation of the "MoI's PSC/RMC office" in consultation with the High Council as the authorities to issue and renew the license, the requirement of military training and certification of non-existence of criminal record for RMC personnel, and the inclusion of rules restricting the use of force and requiring the registration and license of weapons.

⁴⁰⁴ See 2012 Procedure for RMCs, *supra* note 145, Annex 2 – Rules for Use of Force, Point 2.

⁴⁰⁵ See the APPF website, *supra* note 334.

⁴⁰⁶ See APPF PSCs/RMCs Status, *supra* note 151.

⁴⁰⁷ SIGAR AUDIT 13-15, *supra* note 134, at 10.

⁴⁰⁸ *Id.*, Recommendations.

⁴⁰⁹ The only provision in the Guiding Principles that approaches the need to consult with stakeholders in creating oversight and accountability mechanisms is 31 (h) which encourages consulting with stakeholder groups when creating non-judicial, operational level grievance mechanisms in business enterprises.

⁴¹⁰ MONTREUX DOCUMENT, *supra* note 1, Good Practices 68 and 70.

⁴¹¹ The National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §862, 122 Stat. 253 (2008); Responsibilities, 32 C.F.R. § 159.5. For example, this subsection provides that the Deputy Assistant Secretary of Defense has ultimate responsibility for monitoring of PSC personnel in an area of contingency operations and that geographic Combatant Commanders provide guidance consistent with DoD instructions and directives and ensure that PSC personnel understand their obligation to comply with the terms and conditions of their contracts.

⁴¹² See generally COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, <http://>

www.wartimecontracting.gov (Now available at <http://cybercemetery.unt.edu/archive/cwc/20110929231911/http://www.wartimecontracting.gov/index.php>) (last visited Nov. 17, 2013) and the CWC's reports.

⁴¹³ See *infra*, United States section "Selecting and Contracting."

⁴¹⁴ 48 C.F.R. § 52.225-19(g) (2013).

⁴¹⁵ 48 C.F.R. § 225.370-4; 48 C.F.R. § 252.225-7039.

⁴¹⁶ DODI 3020.50, *supra* note 276.

⁴¹⁷ Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States (Deviation 2013-00015)(JUN 2013), 48 C.F.R. § 252.225-7040; Contractor Personnel Performing in the United States Central Command Area of Responsibility (DEVIATION 2013-00015) (JUN 2013), 48 C.F.R. § 252.225-7995.

⁴¹⁸ 48 C.F.R. § 252.225-7040.

⁴¹⁹ *Id.*

⁴²⁰ U.S. DEPARTMENT OF DEFENSE, DIRECTIVE 2311.01E (May 9, 2006) (Incorporating Change 1, Nov. 15, 2010, Certified Current as of Feb. 22, 2011) [hereinafter DoDD 2311.01E].

⁴²¹ See, e.g., SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION (SIGIR), "MONITORING RESPONSIBILITIES FOR SERIOUS INCIDENTS INVOLVING PRIVATE SECURITY CONTRACTORS ONCE U.S. MILITARY FORCES LEAVE IRAQ HAVE NOT BEEN DETERMINED, SIGIR 11-019 (July 29, 2011) [hereinafter SIGIR 11-019]; OFFICE OF INSPECTOR GENERAL, U.S. AGENCY FOR INT'L DEV. (OIG USAID), SURVEY OF SECURITY INCIDENTS REPORTED BY PRIVATE SECURITY CONTRACTORS USAID'S/IRAQ CONTRACTORS AND GRANTEES, Rep. No. E-267-11-001-S (Nov. 29, 2010) [hereinafter OIG USAID SURVEY].

⁴²² See, e.g., SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION (SIGIR), OPPORTUNITIES TO IMPROVE PROCESSES FOR REPORTING, INVESTIGATING, AND REMEDIATING SERIOUS INCIDENTS INVOLVING PRIVATE SECURITY CONTRACTORS IN IRAQ, SIGIR 09-019, i-ii (Apr. 30, 2009).

⁴²³ SIGIR 11-019, *supra* note 353, at 2-5; OIG USAID, OIG USAID SURVEY, *supra* note 353, at 2-3.

⁴²⁴ U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-10-357, IMPROVEMENTS NEEDED IN MANAGEMENT OF CONTRACTORS SUPPORTING CONTRACT AND GRANT ADMINISTRATION IN IRAQ AND AFGHANISTAN 19 (2010).

⁴²⁵ SIGIR, *supra* note 354, at ii.

⁴²⁶ *Id.*; OIG USAID SURVEY, *supra* note 353, at 8-9.

⁴²⁷ *Id.*

⁴²⁸ *Id.*, at 19-20.

⁴²⁹ *Id.*; Contractor Personnel Performing in the United States Central Command Area of Responsibility (DEVIATION 2013-00015) 48 C.F.R. § 252.225-7995 (2013).

⁴³⁰ National Defense Authorization Act for Fiscal Year 2008 §862; DoDI 3020.41, *supra* note 276 (December 20, 2011).

⁴³¹ National Defense Authorization Act for Fiscal Year 2011 §835.

⁴³² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-977R, IRAQ AND AFGHANISTAN: AGENCIES ARE TAKING STEPS TO IMPROVE DATA ON CONTRACTING BUT NEED TO STANDARDIZE REPORTING 2 (Sept. 12, 2012) [hereinafter IRAQ AND AFGHANISTAN: AGENCIES ARE TAKING STEPS TO IMPROVE DATA ON CONTRACTING].

⁴³³ *Id.*, at 13-14.

⁴³⁴ SIGIR 11-019, *supra* note 353, at 7-8.

⁴³⁵ For example, the USAID Office of Inspector General reported that in 2010 USAID/Afghanistan had not yet issued instructions to oversee the conduct of private security contractors and that such absence resulted in no assurance that all serious security incidents are being reported. U.S. OFFICE OF INSPECTOR

GENERAL, U.S. AGENCY FOR INT'L DEV., "AUDIT OF USAID/AFGHANISTAN'S OVERSIGHT OF PRIVATE SECURITY CONTRACTORS IN AFGHANISTAN 1, Rept. No. 5-306-10-009-P (May 21, 2010). Its Iraq counterpart concluded that the serious incident reporting for USAID/Iraq was incomplete and its implementing partners failed to keep complete records of such incidents. U.S. OFFICE OF INSPECTOR GENERAL, U.S. AGENCY FOR INT'L DEV., SURVEY OF SECURITY INCIDENTS REPORTED BY PRIVATE SECURITY CONTRACTORS OF USAID/IRAQ'S CONTRACTORS AND GRANTEES 4-5, Rept. No. E-267-11-001-S (Nov. 29, 2010).

⁴³⁶ TRANSFORMING WARTIME CONTRACTING, *supra* note 19, at 115.

⁴³⁷ U.S. GENERAL ACCOUNTABILITY OFFICE, GAO-13-212, DOD NEEDS ADDITIONAL STEPS TO FULLY INTEGRATE OPERATION CONTRACT SUPPORT INTO CONTINGENCY PLANNING 31 (2013).

⁴³⁸ "Nov. 8, 2013 FOIA, *supra* note 32.

⁴³⁹ See e.g., SIMMONDS, *supra* note 31; FCO PUBLIC CONSULTATION SURVEY, *supra* note 40, ¶ 3; FCO Conditions of Contract for Services, *supra* note 210.

⁴⁴⁰ Chatham House Meeting Summary, *supra* note 83, at 12.

⁴⁴¹ For a list of all current members, see <http://www.icoca.ch/> (last visited Nov. 16, 2013).

⁴⁴² This is addressed *infra* U.K. section on accountability.

⁴⁴³ FCO-GW Consulting Contract, *supra* note 316, § 21 (Monitoring of Contract Performance).

⁴⁴⁴ UK Montreux+5 Response, *supra* note 38.

⁴⁴⁵ UK FOREIGN & COMMONWEALTH OFFICE, RESPONSE OF THE SEC'Y OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS TO THE SECOND REPORT OF THE FOREIGN AFFAIRS COMMITTEE, SESSION 2008-09, FOREIGN AND COMMONWEALTH OFFICE ANNUAL REPORT 2007-08, Cm 7585 ¶ 35 (Apr. 2009) [hereinafter RESPONSE OF THE SEC'Y OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS], available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfa/195/cm7585.pdf>.

⁴⁴⁶ HUMAN RIGHTS ANN. REPORT, *supra* note 303.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* See also, RESPONSE OF THE SEC'Y OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, *supra* note 377.

⁴⁴⁹ FCO-GW Consulting Contract, *supra* note 316, § 17.

⁴⁵⁰ See Generally, HAMMOND, *supra* note 201

⁴⁵¹ Defence Reform Bill, 2013-14, H.C. Bill 118 (Gr. Brit.) Pt. 1, (defining defence procurement to include the "management, monitoring or enforcement of contracts", and the purpose of the of this part of the bill as being to "make arrangements for a company to provide defence procurement services"), available at http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0118/cbill_2013-20140118_en_2.htm (last visited Nov. 16, 2013).

⁴⁵² NIKILAOS TZIFAKIS, CENTER FOR EUROPEAN STUDIES, CONTRACTING OUT TO PRIVATE MILITARY AND SECURITY COMPANIES 55 (2012), available at http://thinkingeurope.eu/sites/default/files/publication-files/contracting_out_private_military_and_security_companies.pdf (last visited Nov. 16, 2013).

⁴⁵³ Italics added. ICOCA ARTICLES OF ASSOCIATION, *supra* note 302, Art. 12.2.3.

⁴⁵⁴ "ICoC DRAFT BUDGET, *supra* note 290.

⁴⁵⁵ The text of CPA Memorandum 17 can be found at http://www.trade.gov/static/iraq_memo17.pdf (last visited Nov. 20, 2013).

⁴⁵⁶ Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at 16.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*, at 15-16.

⁴⁵⁹ UNWGM Report on Afghanistan, *supra* note 132, ¶ 50.

⁴⁶⁰ The US-Afghanistan SOFA, *supra* note 220, also states that "The Government of the United States, its

military and civilian personnel, contractors and contractor personnel may import, export out of, and use in Afghanistan equipment, supplies, technology and services, [...] such importation, exportation and use shall be exempt from any inspection, license, other restrictions [...].” Similar clauses have been included in the Afghanistan-ISAF SOFA for contractor personnel. In this regard, in Feb. 2009, the Armed Contractor Oversight Division (ACOD) was established by the U.S. DoD to implement DoD’s armed contractors policies, procedures, processes, and liaison with PSCs throughout Afghanistan. The British firm Aegis was selected as the support contractor. See COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, AT WHAT COST? CONTINGENCY CONTRACTING IN IRAQ AND AFGHANISTAN, INTERIM REPORT 47 (June 2009), available at http://cybercemetery.unt.edu/archive/cwc/20110929221553/http://www.wartimecontracting.gov/docs/CWC_Interim_Report_At_What_Cost_06-10-09.pdf

⁴⁶¹ 2008 Procedure for PSCs, *supra* note 138, art. 9.1.

⁴⁶² See AIKINS, *supra* note 129, at 8-9.

⁴⁶³ UNWGM Report on Afghanistan, *supra* note 132, ¶¶ 50, 66.

⁴⁶⁴ See e.g., Sebastian Abbot, *Private guards anger U.S., Afghans*, TULSA WORLD (May 1, 2010).

⁴⁶⁵ van Bijlert, *supra* note 328.

⁴⁶⁶ 2012 Procedure for RMCs, *supra* note 145, Ch. 4.

⁴⁶⁷ SIGAR AUDIT 13-15, *supra* note 134, at 5.

⁴⁶⁸ *Id.*

⁴⁶⁹ For a useful explanation of the Montreux Document’s legal obligations, see the explanatory comments at the end of the document, available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0078.File.tmp/Montreux%20Broschuere.pdf> (last visited Nov. 17, 2013).

⁴⁷⁰ As noted, this is akin to the commentary of Guiding Principle 5 which notes that “States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights.”

⁴⁷¹ UN Guiding Principles, *supra* note 234, at 6.

⁴⁷² Four examples are provided of when the conduct of PMSCs may be attributable to the Contracting State – if PMSCs are incorporated into the regular armed forces, if PMSCs are members of armed forces, groups, or units under a command responsible to the State, if PMSCs are empowered to exercise elements of government authority, or if the PMSCs are acting on the instructions of the State or under its direction or control.

⁴⁷³ Cockayne, *supra* note 6 at 409 (noting that during negotiations of the Montreux Document the extent of States’ due diligence and remedial obligations for PMSCs’ extra-territorial violation of human rights was a point of contention. The opening of statement 7, stating that “entering into contractual relations does not in itself engage the responsibility of Contracting States,” reflects a compromise solution, and some participants argued that contracting is itself a State action invoking human rights obligations).

⁴⁷⁴ AMNESTY INT’L, PUBLIC STATEMENT ON THE MONTREUX DOCUMENT, *supra* note 231.

⁴⁷⁵ *Id.*

⁴⁷⁶ The commentary to the first Guiding Principle (p. 7) elaborates that “States may breach their international human rights law obligations where such abuse [by private actors] can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse.” The commentary to the fourth Guiding Principle (p.9) states, “Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State’s own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.” The fifth Guiding Principle’s commentary (p. 10) notes that

“Failure by States to ensure that business enterprises performing such [privatized] services operate in a manner consistent with the State’s human rights obligations may entail both reputational and legal consequences for the State itself.”

⁴⁷⁷ AMNESTY INT’L, PUBLIC STATEMENT ON THE MONTREUX DOCUMENT, *supra* note 231.

⁴⁷⁸ *Id.*

⁴⁷⁹ MONTREUX DOCUMENT, *supra* note 1, Good Practices 19, 49, and 71.

⁴⁸⁰ *Id.* Good Practices 20, 50, and 72.

⁴⁸¹ *Id.* Good Practices 50 and 72.

⁴⁸² *Id.* Good Practices 23, 52, and 73.

⁴⁸³ Huskey & Sullivan, *supra* note 15, at 350-354.

⁴⁸⁴ See MONTREUX DOCUMENT, Good Practices 22 and 51; and Cockayne, *supra* note 6 at 417. Earlier drafts had stronger language suggesting that immunity for PMSCs only be granted if citizens of the territorial state would be able to effectively pursue their claims in the PMSC’s legal system, and that agreements clarify whether immunity would be functional or absolute.

⁴⁸⁵ AMNESTY INT’L, PUBLIC STATEMENT ON THE MONTREUX DOCUMENT, *supra* note 231.

⁴⁸⁶ *Id.*

⁴⁸⁷ UN Guiding Principles, *supra* note 234, at 11.

⁴⁸⁸ *Id.*, at 23.

⁴⁸⁹ If one compares the reported crimes and prosecutions of PMSC personnel to those of civilian communities with income levels comparable to those of PMSC personnel and to rates of U.S. Army personnel, “the actual number of reported crimes by and prosecution of contractors each year across the world falls short of these predictions by orders of magnitude”. See Hedahl, *supra* note 233, at 182.

⁴⁹⁰ See for example Huskey & Sullivan, *supra* note 15; JENNIFER ELSEA, CONG. RESEARCH SERV., R40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES (2010) [hereinafter CRS, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN]; JENNIFER ELSEA, MOSHE SCHWARTZ & KENNON NAKAMURA, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES (2008) [hereinafter CRS, PRIVATE SECURITY CONTRACTORS IN IRAQ].

⁴⁹¹ CRS, PRIVATE SECURITY CONTRACTORS IN IRAQ, *supra* note 418, at 26-27.

⁴⁹² *Id.*, at 26; Huskey & Sullivan, *supra* note 15, at 360-361.

⁴⁹³ Examples of such circumstances include where the jurisdiction of federal courts does not apply or is not being pursued, or where the alleged criminal conduct adversely affects a significant military interest. CRS, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN, *supra* note 418, at 29.

⁴⁹⁴ Huskey & Sullivan, *supra* note 15, at 361.

⁴⁹⁵ *Id.*, at 359.

⁴⁹⁶ *Ali v. Austin*, 67 M.J. 186, Misc. No. 09-8001/AR (C.A.A.F. Nov. 5, 2008).

⁴⁹⁷ CRS, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN, *supra* note 418, at 21.

⁴⁹⁸ *Id.* (noting that the Military Commissions Act of 2006 limited the scope of war crimes covered under the 1996 Act from “any” breach of Common Article 3 of the Geneva Conventions to only “grave breaches,” “defined to include torture, cruel or inhuman treatment, performing biological experiments, murder of an individual not taking part in hostilities, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages). For more details, see MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL33662, THE WAR CRIMES ACT: CURRENT ISSUES (2009).

⁴⁹⁹ CRS, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN, *supra* note 418, at 21.

⁵⁰⁰ Huskey & Sullivan, *supra* note 15, at 355.

⁵⁰¹ CRS, PRIVATE SECURITY CONTRACTORS IN IRAQ, *supra* note 418, at 21.

⁵⁰² *Sentence Reduced for CIA Contractor Convicted of Detainee Abuse*, WRAL.COM (Apr. 6, 2010), http://www.wral.com/news/news_briefs/story/7366849/.

⁵⁰³ Huskey & Sullivan, *supra* note 15, at 355.

⁵⁰⁴ *Id.*, at 355-356.

⁵⁰⁵ CRS, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN, *supra* note 418, at 21-23.

⁵⁰⁶ *Id.*, at 23.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *United States v. Maldonado*, 215 Fed. App'x. 938 (11th Cir. 2007).

⁵¹⁰ Press Release, United States Attorneys' Office Eastern District of Virginia, Military Contractor Sentenced for Possession of Child Pornography in Baghdad (Virginia, May 25, 2007).

⁵¹¹ Press Release, Federal Bureau of Investigation, Former Military Contractor from Andrews, Texas Pleads Guilty to Possessing Child Pornography While in Afghanistan (Texas, Jan. 20, 2009).

⁵¹² Press Release, U.S. Attorney for the Eastern District of Virginia, Civilian Contractor Pleads Guilty to Voluntary Manslaughter of Afghan Detainee (Virginia, Feb. 3, 2009).

⁵¹³ Alan Requelmy, *Defense Dept. Contractor Arrested on Post for Sexual Abuse*, LEDGER-ENQUIRER (Aug. 25, 2008), <http://www.ledger-enquirer.com/2008/08/25/417759/defense-dept-contractor-arrested.html> (last visited Nov. 18, 2013); *Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad: Hearing before the Sen. Comm. on the Judiciary*, 113th Cong. (May 25, 2011) (statement of Lanny A. Breuer, Assistant Attorney General of the Criminal Division) (hereinafter *DoJ*), Statement by Assistant Attorney General Lanny A. Breuer).

⁵¹⁴ Tim McGlone, *Convictions Upheld for Former Blackwater Contractors*, THE VIRGINIAN PILOT (Nov. 30, 2012), <http://hamptonroads.com/2012/11/convictions-upheld-former-blackwater-contractors>.

⁵¹⁵ Press Release, Department of Justice, U.S. Army Contractor Sentenced to 42 Months in Prison for Stabbing at Kandahar Airfield in Afghanistan (Washington, D.C., July 11, 2011).

⁵¹⁶ Huskey & Sullivan, *supra* note 15, at 356-357.

⁵¹⁷ Sari Horwitz, *New charges Brought Against Former Blackwater Guards in Baghdad Shooting*, THE WASHINGTON POST (Oct. 17, 2013), available at http://www.washingtonpost.com/world/national-security/new-charges-brought-against-former-blackwater-guards-in-baghdad-shooting/2013/10/17/9307b562-3759-11e3-8a0e-4e2cf80831fc_story.html.

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*

⁵²⁰ David Ingram, *U.S. Judge Says Blackwater Iraq Shooting Case Must Move Faster*, REUTERS, Sept. 10, 2013, available at <http://www.reuters.com/article/2013/09/10/us-usa-crime-blackwater-idUSBRE9890YT20130910>.

⁵²¹ Bennett Rieser, *Justice Department Brings New Charges in 2007 Blackwater Shooting*, WEBPRONEWS (Oct. 17, 2013), http://www.webproneews.com/justice-dept-brings-new-charges-in-2007-blackwater-shooting-2013-10?utm_source=Life_sidebar ("Slatten is being charged with 14 counts of voluntary manslaughter and 16 counts of attempted manslaughter while Liberty and Heard are respectively charged with 13 counts of voluntary and 16 counts of attempted manslaughter. Slough also received 13 counts of voluntary manslaughter, although his number of attempted manslaughter charges is 18").

⁵²² *Id.*

⁵²³ 28 U.S.C. 1783 ("A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document

or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner”).

⁵²⁴ FED. R. CRIM. P. 15(a)(1).

⁵²⁵ F FED. R. CRIM. P. 15(f).

⁵²⁶ CHARLES DOYLE, CONG. RESEARCH SERV., R94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW: AN ABBREVIATED SKETCH (2012) [hereinafter CRS, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW].

⁵²⁷ *Id.*

⁵²⁸ *Id.*, at 6.

⁵²⁹ *Id.*

⁵³⁰ DOJ, Statement by Assistant Attorney General Lanny A. Breuer, *supra* note 441.

⁵³¹ *Id.*

⁵³² CRS, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW, *supra* note 454, at 2.

⁵³³ *Id.*, at 2-3.

⁵³⁴ An attempt to clarify the procedures for “Serious Incident Response & Investigation” in Iraq was made in the 2007 Memorandum of Agreement between the Department of Defense and Department of State on USG Private Security Contractors, *available at* <http://www.defense.gov/pubs/pdfs/signed%20MOA%20Dec%205%202007.pdf> (last visited Nov. 18, 2013). The Agreement states that “To the maximum extent possible, MNF-I and the U.S. Embassy will closely coordinate immediate response to any serious incident” involving a U.S. government PSC. The Regional Security Officer at the Embassy and the MNC-I Contractor Operations Cell must notify each other of serious incidents involving the contractors under their jurisdiction, and the Embassy and MNF-I will coordinate to notify the Government of Iraq. The U.S. Embassy and MNF-I each takes the lead for investigating incidents involving their PSCs, although they can request assistance from each other or request a joint investigation. They are both to engage in transparent sharing of information with each other during an investigation.

⁵³⁵ Huskey & Sullivan, *supra* note 15, at 356.

⁵³⁶ OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2740 MEJA EXPANSION AND ENFORCEMENT ACT OF 2007 (Oct. 3, 2007), *available at* <http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/110-1/hr2740sap-h.pdf>.

⁵³⁷ See Huskey & Sullivan, *supra* note 15, at 350, which also provides more details on immunity in Iraq and Afghanistan. Coalition Provisional Order 17 established contractor immunity in Iraq beginning in 2003 for acts performed pursuant to the terms of the contract, but expired in 2008 with the negotiation of a Status of Forces Agreement (SOFA) between Iraq and the U.S., which gave Iraq primary jurisdiction over U.S. contractors. In Afghanistan, the SOFA for Operation Enduring Freedom is unclear on whether the diplomatic immunity for civilian personnel and government employees also applies to contractors. The arrest and conviction of an Australian security contractor working for a U.S. firm would seem to indicate that Afghanistan can exercise its criminal jurisdiction. The agreement for the International Security Assistance Force explicitly establishes that all ISAF and supporting personnel are subject to the jurisdiction of their own governments.

⁵³⁸ Laura DICKINSON, OUTSOURCING WAR & PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS (2011).

⁵³⁹ Allison Stanger, *Transparency as a Core Public Value and Mechanism of Compliance*, 31 CRIMINAL JUSTICE ETHICS, no. 3 at 293 (2012).

⁵⁴⁰ See MONTREUX DOCUMENT, *supra* note 1, Good Practice 4(d).

⁵⁴¹ See MONTREUX DOCUMENT, *supra* note 1, 21 (f).

⁵⁴² While not all, if even most, serious incident reports will contain evidence of misconduct and result in an investigation, aggregated data may have value in terms of gathering information about factors that could affect contract performance and ultimately the U.S. mission, such as number of contractors injured or killed, propensity to use various types of force, injuries or deaths of civilians, and amounts and degrees of damage to civilian property. For example, a 2007 report by the Democratic staff of the House Oversight and Government Reform Committee found that Blackwater's contractors fired their weapons 195 times, an average of 1.4 times a week, in the time period from the beginning of 2005 through the second week of September of 2007, and as a result have inflicted significant casualties and property damage. In over 80 percent of the cases, Blackwater reports that its forces fired first preemptively. Jomana Karadsheh, Zain Verjee, and Suzanne Simons, *Blackwater Most Often Shoots First, Congressional Report Says*, CNN.COM (Oct. 2, 2007), available at <http://www.cnn.com/2007/WORLD/meast/10/01/blackwater.report/>.

⁵⁴³ CRS, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW, *supra* note 454, Act, 5. Those covered by CEJA would include employees, (sub)contractors, (sub)grantees, dependents, family members, and members of their households.

⁵⁴⁴ *Id.*, at 8.

⁵⁴⁵ Attorney General Lanny Breuer has welcomed CEJA explaining that "MEJA leaves significant gaps in our enforcement capability. In particular, under MEJA, certain civilian U.S. Government employees can commit crimes abroad, yet not be subject to the jurisdiction of U.S. courts. CEJA would address this significant shortcoming by extending U.S. jurisdiction to all non-Department of Defense employees and contractors who commit crimes overseas....[W]e view the enactment of CEJA as crucial to ensuring accountability and demonstrating to other countries that we do not give U.S. Government employees license to commit crimes overseas." DoJ, Statement by Assistant Attorney General Lanny A. Breuer, *supra* note 441.

⁵⁴⁶ See IRAQ AND AFGHANISTAN: AGENCIES ARE TAKING STEPS TO IMPROVE DATA ON CONTRACTING, *supra* note 364.

⁵⁴⁷ MONTREUX DOCUMENT, *supra* note 1, ¶¶ A.20.

⁵⁴⁸ *Id.*, Preface, ¶ 9(a).

⁵⁴⁹ Given the broad range of activities outsourced by the United States Government, a review of civil liability for PMSCs necessarily includes only a portion of United States Government contractors. For instance, we omitted cases involving product liability claims related to the design or manufacture of weapons used on the battlefield, as companies engaged in such activities would likely not be considered PMSCs for the purposes of the Montreux Document. The Montreux Document defines military and security services to include "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." MONTREUX DOCUMENT, *supra* note 1, Preface, ¶ 9(a).

⁵⁵⁰ Such claimants have themselves brought claims or have had their survivors bring claims brought on their behalf. See *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1278 (11 Cir. 2009); see also *Baragona v. Kuwait Gulf Link Transport Company*, 594 F.3d 852, 855 (11th Cir. 2010); *McMahon v. Presidential Airways, Inc.*, 460 F.Supp. 2d 1315, 1318 (M.D. Fla. 2006); *Smith v. Halliburton*, CIV.A.H-06-0462, 2006 WL 2521326 at *1 (S.D. Tex. Aug. 30, 2006); *Whitaker v. Kellogg, Brown & Root*, 444 F.Supp.2d 1277, 1278 (M.D. Ga. 2006).

⁵⁵¹ Trucks. See *Baragona v. Kuwait*, 594 F. 3d at 855. Convoy. See *Carmichael v. Kellogg, Brown & Root*

Servs., Inc., 572 F.3d at 1278; see also *Lessin v. Kellogg, Brown & Root*, 2006 WL 3940556 at *1 (S.D. Tex. 2006); see also *Whitaker v. Kellogg, Brown & Root*, 444 F. Supp. 2d at 1278; and see *McMahon v. Presidential Airways, Inc.*, 460 F.Supp. at 1318.

⁵⁵² *Smith v. Halliburton*, CIV.A.H-06-0462, 2006 WL 2521326 at *1 (alleging contractor negligence related to a suicide bombing at a dining facility).

⁵⁵³ See *Baragona v. Kuwait Gulf Link Transport Company*, 594 F.3d, at 855 (claiming that defendant contractor is liable for causing the collision that wrongfully killed service member).

⁵⁵⁴ See *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 612; see also *Nordan v. Blackwater Security Consulting, LLC*, 382 F. Supp. 2d 801, 803 (E.D.N.C. 2005); see also *Martin v. Halliburton*, 618 F.3d 476, 479 (5th Cir. 2010); see also *Woodson v. Halliburton*, CIV A H-06-2107, 2006 WL 2796228 at *1 (S.D. Tex. Sept. 28, 2006); see also *Nattah v. Bush*, 605 F. 3d 1052, 1055 (D.C. Cir. 2010); see also *Parlin v. Dyncorp Int'l, Inc.*, CIV.A. 08C-01-136FSS, 2009 WL 3636756 at *1 (Del. Super. Sept. 30, 2009); see also *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1158 (Del. 2010).

⁵⁵⁵ Employees who suffered grave injuries or death from executing a task that was ordered by the employer, sued for the negligent execution of the operation, along with either wrongful death, intentional infliction of emotional or physical distress, or both. See *Martin v. Halliburton*, 618 F.3d at 479; see also *Woodson v. Halliburton*, CIV A H-06-2107, 2006 WL 2796228 at *1; see also *Smith-Idol v. Halliburton*, CIV A H-06-1168, 2006 WL 2927685 at *1 (S.D. Tex. 2006).

⁵⁵⁶ Employees have brought claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), the False Claims Act (FCA), the Trafficking Victims Protection Act (TVPA), and the Alien Tort Statute (ATS). RICO claims. See *Fisher v. Halliburton*, 454 F. Supp. 2d 637, 638 (S.D. Tex. 2006); see also *Smith-Idol v. Halliburton*, CIV A H-06-1168, 2006 WL 2927685 at *1; see also *Adhikari v. Daoud & Partners*, 09-CV-1237, 2013 WL 4511354 at *3 (S.D. Tex. Aug. 23, 2013). TVPA, FCA, and ATS. *Adhikari v. Daoud & Partners*, 09-CV-1237, 2013 WL 4511354 at *3; see *Nattah v. Bush*, 605 F. 3d at 1055.

⁵⁵⁷ See *Nattah v. Bush*, 770 F. Supp. 2d 193, 208 -209 (D. D.C. 2011). In *Nattah*, a contractor employee claims that he entered into an oral contract at a "career fair," where he was promised certain living conditions, that he would not be sent to a war zone, among other promises. His breach of contract claim was unsuccessful because the oral contract was made in Virginia, and Virginia's statute of frauds requires these types of contracts to be written and signed. *Id.*, at 208-09.

⁵⁵⁸ Examples were contractor employees claimed that their employer promised them training before engaging in a certain type of activity, and then found themselves carrying out orders without the necessary training. See *Fisher v. Halliburton*, 454 F. Supp. 2d at 638; see also *Lane v. Halliburton*, CIV A H-06-1971, 2006 WL 2796249 at *1 (S.D. Tex. 2006); see also *Smith-Idol v. Halliburton*, CIV A H-06-1168, 2006 WL 2927685 at *1; see also *Woodson v. Halliburton*, CIV A H-06-2107, 2006 WL 2796228, *1.

⁵⁵⁹ See *Fisher v. Halliburton*, 454 F. Supp. 2d at 638; see also *Lane v. Halliburton*, CIV A H-06-1971, 2006 WL 2796249 at *1 (S.D. Tex. 2006); see also *Smith-Idol v. Halliburton*, CIV A H-06-1168, 2006 WL 2927685, *1.

⁵⁶⁰ See *Fisher v. Halliburton*, 454 F. Supp. 2d at 638; see also *Lane v. Halliburton*, CIV A H-06-1971, 2006 WL 2796249 at *1 (S.D. Tex. 2006); see also *Smith-Idol v. Halliburton*, CIV A H-06-1168, 2006 WL 2927685, *1.

⁵⁶¹ See, e.g., *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201, 202 (4th Cir. 2011) (Abu Ghraib and other prisons throughout Iraq); *Al Shimari v. CACI Int'l, Inc.*, 1:08-CV-827 GBL/JFA, 2013 WL 3229720 *1 (E.D. Va. June 25, 2013) (Abu Ghraib prison, Iraq); *Saleh v. Titan*, 580 F. 3d 1, 2 (D.C. Cir. 2009) (Abu Ghraib prison, Iraq).

⁵⁶² See *El Masri v. U.S.*, 479 F.3d 296, 300 (4th Cir. 2007).

⁵⁶³ See *In re XE Alien Tort Litigation*, 665 F. Supp. 2d 569, 573, 575 (tranche of cases consolidated for the purposes of discovery) (firing at vehicles, case no. 1:09cv618); *Estate of Manook v. Research Triangle Institute, International and Unity Resources Group, LLC.*, 693 F. Supp. 2d 4, 10 (D.D.C. 2010) (firing on vehicle).

⁵⁶⁴ See *In re XE Alien Tort Litigation*, 665 F. Supp. 2d at 574 (firing into Al Watahba Square in Baghdad, case no. 1:09cv616; firing into Nisoor Square in Baghdad, case no. 1:09cv617).

⁵⁶⁵ See *id.*, at 574, 576 (shooting Iraqi civilian coming from party, case no. 1:09cv615; beating photographer who took picture of American dignitary, shooting and killing Iraqi security guards, case no. 1:09cv618).

⁵⁶⁶ See *Al Shimari v. CACI Int'l, Inc.*, 728 F. Supp. 2d 702, 714-15 (4th Cir. 2012) (assault and battery, sexual assault and battery, intentional infliction of emotional distress, negligence); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 13 (assault and battery, wrongful death, false imprisonment, intentional infliction of emotional distress, negligence).

⁵⁶⁷ See *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 209 (4th Cir. 2012); *Saleh v. Titan Corp.*, 580 F.3d at 2; *El Masri v. U.S.*, 479 F.3d at 300; *Estate of Manook v. Research Triangle Institute, Int'l and Unity Resources Group, L.L.C.*, 693 F. Supp. 2d at 10; *In re Xe Services Alien Tort Litigation*, 665 F. Supp. 2d at 576; *Al-Quraishi v. L-3 Servs., Inc.*, 728 F. Supp. 2d 702, 714 (D. Md. 2010).

⁵⁶⁸ See *Estate of Manook v. Research Triangle Institute, Int'l and Unity Resources Group, L.L.C.*, 693 F. Supp. 2d at 10.

⁵⁶⁹ See 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

⁵⁷⁰ See *Kiobel v. Royal Dutch Petroleum Co.*, -- U.S. --, 133 S. Ct. 1659, 1661 (2013) ("On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.") (citation omitted).

⁵⁷¹ See *id.* ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. '[T]here is no clear indication of extraterritoriality here,' and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.") (citation omitted).

⁵⁷² See *Al Shimari v. CACI Int'l, Inc.*, 2013 WL 3229720 at 1* (dismissing ATS claims, holding that it lacked jurisdiction where "acts giving rise" to claims occurred outside the U.S., citing *Kiobel v. Royal Dutch Petroleum*, -- U.S. --, 133 S. Ct. 1659 (2013)).

⁵⁷³ See *Al Shimari v. CACI Int'l, Inc.*, 2013 WL 3229720 *1 (E.D. Va. June 25, 2013) ("In light of the United States Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*, the Court holds that it lacks ATS jurisdiction over Plaintiffs' claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign.") (citation omitted). This decision is currently on appeal with briefs filed in October and November 2013. *Al Shimari v. CACI Int'l, Inc.*, Case No. 13-02162 (4th Cir.).

⁵⁷⁴ See *Estate of Manook v. Research Triangle Institute, Int'l and Unity Resources Group, L.L.C.*, 693 F. Supp. 2d at 18-19 (discussing the application of ATS to allegations of violations of the law of nations committed by corporations and finding that corporations are only liable for such actions where it is acting under "color of [state] law"); *Saleh v. Titan, Corp.*, 580 F. 3d 1, 15, 16 (D.C. Cir. 2009) (affirming dismissal of ATS claims, holding that statute is ambiguous as to whether private actors are liable for torture).

⁵⁷⁵ See *Estate of Manook v. Research Triangle Institute, Int'l and Unity Resources Group, L.L.C.*, 693 F. Supp.

2d at 20.

⁵⁷⁶ See *id.*, at 19, 20; *Saleh v. Titan, Corp.*, 580 F.3d 1, 14-15 (D.C. Cir. 2009) (affirming dismissal of ATS claims, holding that statute is ambiguous as to whether private actors are liable for torture).

⁵⁷⁷ See *In re Xe Alien Tort Litigation*, 665 F. Supp. 2d at 589-92 (excluding one of the five cases under review from the option to amend ATS claims because that case's claims, even if taken as true, would not satisfy plausibility standards required under the standard pleading requirements of *Iqbal* and *Twombly*).

⁵⁷⁸ In *Baker v. Carr*, the Supreme Court of the United States established six characteristics to identify a political question: (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) a "lack of judicially discoverable and manageable standards for resolving it;" (3) the "impossibility for a court's independent resolution without expressing a lack of respect for a coordinate branch of the government;" (4) the "impossibility of deciding the issue without an initial policy decision, which is beyond the discretion of the court;" (5) an "unusual need for questioning adherence to a political decision already made;" and (6) "the potentiality of multifarious pronouncements by various departments on one question." 369 U.S. 186 (1962).

⁵⁷⁹ See *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d at 1296; see also *Whitaker v. Kellogg, Brown & Root*, 444 F.Supp. 2d 1277, 1282 (M.D. Ga. 2006); see also *Smith v. Halliburton*, CIV.A. H-06-0462, 2006 WL 2521326, 2006 U.S. Dist. LEXIS 61980 at *6 (S.D. Tex. Aug. 30, 2006); see also *Woodson v. Halliburton*, CIV A H-06-2107, 2006 WL 2796228 at *2.

⁵⁸⁰ See *Carmichael v. Kellogg Brown & Root Servs., Inc.*, 450 F. Supp. 2d 1373, 1376 (N.D. Ga. 2006); see also *Lessin v. Kellogg, Brown & Root*, 2006 WL 3940556 at *3; see also *McMahon v. Presidential Airways, Inc.*, 460 F.Supp. 2d at 1331; see also *Smith v. Halliburton*, CIV.A. H-06-0462, 2006 WL 2521326 at *1 (S.D. Tex. Aug. 30, 2006).

⁵⁸¹ Some courts have adopted a standard whereby a plaintiff's claims are barred by the political question doctrine only if "military decision-making or policy would be a necessary inquiry, inseparable from the claims asserted." *Lessin v. Kellogg Brown & Root* No. H-05-01853, 2006 WL 3940556, at *3. Standard was also adopted in *Carmichael v. Kellogg Brown & Root Servs., Inc.*, 450 F. Supp. 2d at 1376; and *McMahon v. Presidential Airways, Inc.*, 460 F.Supp. 2d at 1324.

⁵⁸² But see *Whitaker v. Kellogg Brown & Root*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006) (granting political question defense because discovery sufficiently demonstrated that the PMSC was working directly with the military at the time of the accident).

⁵⁸³ See *Whitaker v. Kellogg Brown & Root*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006); see also *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d at 1296.

⁵⁸⁴ See *Fisher v. Halliburton*, 390 F.Supp. 2d at 612; see also *Fisher v. Halliburton*, 703 F. Supp. 2d 639, 658 - 59 (S.D. Tex. 2010) (determining *Smith-Idol's* DBA preemption); see also *Fisher v. Halliburton*, 667 F.3d 602, 620 - 21 (5th Cir. 2012); but see *Woodson v. Halliburton*, CIV A H-06-2107, 2006 WL 2796228 at *2 (granting PMSC's motion to dismiss solely based on political question argument because it satisfied the first, second, and fourth of the *Baker* factors).

⁵⁸⁵ See *In re Xe Services Alien Tort Litigation*, 665 F.Supp. 2d at 601-02 (rejecting political question arguments, finding that Defendant PMSC had not shown that any political department judgments would be implicated by the review of the controversy); *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 708 (E.D. Va. 2009) (rejecting political question arguments, finding that review of the controversy would not upset separation of powers); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 732 (D. Md. 2010) (rejecting political question arguments, finding that PMSC operated independently of the military when it injured plaintiffs).

⁵⁸⁶ 28 U.S.C. § 1346 (b), 2671 - 2680. The FTCA made the United States liable for:

Injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

⁵⁸⁷ The United States shall be liable “in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674(a).

⁵⁸⁸ The discretionary functions exception is also an explicit statutory exception, but PMSCs have not asserted it commonly or successfully. This defense was unsuccessfully asserted by the defendant PMSC in *Fisher v. Halliburton*, 703 F. Supp. 2d 639.

⁵⁸⁹ 28 U.S.C. § 2680(j).

⁵⁹⁰ See *Saleh v. Titan*, 580 F.3d at 7 (“In short, the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit.”).

⁵⁹¹ *Saleh v. Titan Corp.*, 580 F.3d at 9 (“During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”).

⁵⁹² *Id.*, at 7 (“Thus, the instant case presents us with a more general conflict preemption, to coin a term, “battle-field preemption”: the federal government occupies the field when it comes to warfare, and its interest in combat is always “precisely contrary” to the imposition of a non-federal tort duty.”). The D.C. Circuit rejected the district court’s adoption of an “exclusive operational control test” *Id.*, at 5-11.

⁵⁹³ The Fourth Circuit, the only other circuit to have been presented with the question of whether the combatant activities exception applies to PMSCs, has elected to allow litigation to develop before deciding the issue. *Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205, 219-220 (4th Cir. 2012) (finding that denials of combatant activity exception, which the court references as the “*Saleh* preemption”, were not subject to interlocutory appeal and remanding to district court for continued litigation).

⁵⁹⁴ See Brief for the United States as Amicus Curiae at 2-3, *Saleh v. Titan Corp.*, No. 09-1313 (D.C. Cir. May 11, 2011) (“[T]his Court should hold that state tort law claims against contractors are generally preempted if similar claims brought against the United States would come within the FTCA’s combatant activities exception and if the alleged actions of the contractor and its personnel occurred within the scope of their contractual relationship with the government, particularly if the conduct occurred while contractor personnel were integrated with the military in its combat- related activities. Even if all of those circumstances exist, however, there should be no federal preemption in the limited circumstances of these cases, to the extent that a contractor has committed torture as defined in 18 U.S.C. § 2340.”); *Saleh v. Titan*, 580 F.3d at 17 (Garland, dissenting) (“Neither President Obama nor President Bush nor any other Executive Branch official has suggested that subjecting the contractors to tort liability for the conduct at issue here would interfere with the nation’s foreign policy or the Executive’s ability to wage war. To the contrary, the Department of Defense has repeatedly stated that employees of private contractors accompanying the Armed Forces in the field are *not* within the military’s chain of command, and that such contractors *are* subject to civil liability.”).

⁵⁹⁵ *Saleh v. Titan Corp.*, 580 F.3d at 4-5.

⁵⁹⁶ For example, one of the Fourth Circuit cases settled for \$5 million in 2013. *Ex-Abu Ghraib Inmates Get \$5m Settlement from US Firm*, BBC NEWS (Jan. 4, 2013), <http://www.bbc.co.uk/news/world-us-canada-20953889>.

⁵⁹⁷ See *McMahon v. Presidential Airways, Inc.*, 502 F. Supp. 3d at 1343.

⁵⁹⁸ See *id.*, at 1337-38 (denying *Feres* defense for PMSC because it could only extend to the US government

or an individual federal employee, PMSCs are private corporations, not individual federal employees).

⁵⁹⁹ See *id.*, at 1353-56 (analyzing situations where the *Feres* immunity could extend to PMSCs, but denying doing so in this case).

⁶⁰⁰ The Defense Base Act was enacted by Congress in 1941, and extended the Longshore and Harbor Workers' Compensation Act to "apply in respect to the injury or death of any employee engaged in any employment . . . under a contract entered into with the United States or any executive department." 42 U.S.C. § 1651(a)(4). This extension of the federal workers' compensation program to contractor employees serves as a guarantee that the employees will be compensated for their injuries, but prevents them from suing PMSCs.

⁶⁰¹ *Fisher v. Halliburton*, 667 F.3d 602, 620 (5th Cir. 2012) ("We think these questions illustrate the lack of predictability that would arise under the DBA's workers' compensation scheme if we allowed employees to proceed with tort claims under the 'substantially certain' theory of liability even though their injuries qualify for coverage under the DBA as injuries resulting from the willful acts of third parties.").

⁶⁰² See *id.*, at 620 (5th Cir. 2012); see also *Martin v. Halliburton*, 808 F. Supp. 2d 983, 990 - 992 (S.D. Tex. 2011).

⁶⁰³ *Fisher v. Halliburton*, 703 F. Supp. 2d at 658 - 662 (evaluating whether the accident that caused their death was expected or desired).

⁶⁰⁴ 42 U.S.C. §§ 1651-1654; Greta S. Milligan, *The Defense Base Act: An Outdated Law And Its Current Implications*, 86 UNIV. OF DET. MERCY L. REV. 407, 411 (2009).

⁶⁰⁵ The DBA applies to a wide range of overseas contract work, including construction projects, "support services, such as food, accommodations, and sanitation for troops on the battlefield," and "intelligence gathering, communications, weapons maintenance, and even troop training." 42 U.S.C. §§ 1651-1654.

⁶⁰⁶ 42 U.S.C. §§ 1651-1654; Milligan, *supra* note 532, at 411.

⁶⁰⁷ The DBA covers all employees, "regardless of nationality (including U.S. citizens and residents, host country nationals (local hires), and third country nationals (individuals hired from another country to work in the host country))," as long as their employment activities satisfy the DBA criteria. *Defense Base Act (DBA) Frequently Asked Questions (FAQ)*, U.S. DEPT. OF LABOR DIVISION OF LONGSHORE & HARBOR WORKERS' COMPENSATION, [HTTP://WWW.DOL.GOV/OWCP/DLHW/DBAFAQS.HTM#2](http://www.dol.gov/owcp/dlhw/DBAFAQS.HTM#2) (last modified May 2005). Judicial proceedings for DBA claims take place in the U.S. district court of the judicial district where the office of the deputy commissioner whose compensation order is involved is located. 42 U.S.C.A. § 1653(b).

⁶⁰⁸ Milligan, *supra* note 532, at 411.

⁶⁰⁹ Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-Examined Effect of Surrogates on the Public's Casualty Sensitivity*, J. NAT'L. SEC. L. & POL'Y (2012).

⁶¹⁰ Milligan, *supra* note 532, at 414. The Supreme Court has established that, under the DBA, there does not need to be a "causal relationship" between the employment and the injury as long as the injury is foreseeable and is within the "zone of special danger" created by the conditions of employment. See *O'Leary v. Brown-Pacific-Maxon*, 71 S. Ct. 470 (1951).

⁶¹¹ Milligan, *supra* note 532, at 415..

⁶¹² *Id.*, at 416.

⁶¹³ 42 U.S.C. § 1711(b) (2000). The WHCA provides a significant subsidy to employers undertaking activity in risky locations, such as Iraq and Afghanistan, because it decreases the overall scope of losses for which these employers are responsible 42 U.S.C. §§ 1651-1654; Milligan, *supra* note 532, at 417. American International Group (AIG), an insurance corporation that is one of the leading providers in the DBA insurance market, estimates that approximately ten percent of Iraq-related claims for employee

injury are eligible for WHCA reimbursement. *Id.* As of Mar. 2008, 252 WHCA claims had been filed from losses incurred in Iraq and Afghanistan; 216 of those had been accepted and twelve denied. *Id.*

⁶¹⁴ 10 U.S.C. § 2734-2736; Captain Jeffrey S. Palmer, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227 (1997).

⁶¹⁵ 10 U.S.C. § 2734. Claims under the FCA are settled and paid by one or more claims commissions that are appointed by the Secretary concerned, or an officer or employee designated by the Secretary, under such regulations as the Secretary may prescribe. Each commission is composed of one or more officers or employees or combination of officers or employees of the armed forces. *Ibid.*

⁶¹⁶ 10 U.S.C. § 2734(h)

⁶¹⁷ *Saleh v. Titan Corp.*, 580 F.3d at 2-3.

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

⁶²⁰ Palmer, *supra* note 542, at 229.

⁶²¹ U.S. nationals who reside in a foreign country primarily because they are employed by the U.S. or a U.S. civilian contractor are not proper claimants. *Id.*, at 241-42. Military retirees who are not employed by the U.S. may be proper claimants, however, those who are employed by the U.S. and who are injured in the scope of their employment are generally not proper claimants. *Id.* U.S. nationals who are sponsored by a U.S. contractor employee are barred also from recovering under the FCA as are dependents accompanying U.S. military or U.S. national civilian employees. *Id.*

⁶²² Proper claimants under the FCA include "A) governments of foreign countries and political subdivisions thereof. B) "Inhabitants" of foreign countries: 1) citizenship or legal domicile not necessary, 2) mere presence insufficient, 3) can include U.S. citizens residing overseas. C) corporations; Improper claimants include A) enemy or "unfriendly" nationals. B) insurers and subrogees. C) U.S. military personnel, Federal civilian employees, and their family members residing overseas primarily because of their own or their sponsor's duty or employment status. D) other residents of the United States, i.e., visitors, tourists, and persons employed overseas"; Claims payable include "Noncombat activities. This includes personal injury, death, personal property damage, and damage to real property that occurs connection with training, field exercises, or maneuvers or other activities which are distinctly military in nature." JagCNET – U.S. Army, Foreign & Deployment Claims 1–15, 5-6 (July 2010).

⁶²³ *Id.*

⁶²⁴ 10 U.S.C. § 2734.

⁶²⁵ Major Michael D. Jones, *Consistency and Equality: A Framework for Analyzing The "Combat Activities Exclusion" of the Foreign Claims Act*, 204 MIL. L. REV. 144, 152 (2010).

⁶²⁶ *Id.*

⁶²⁷ *Id.*

⁶²⁸ *Id.*

⁶²⁹ *Id.*, at 152-53.

⁶³⁰ Office of Federal Procurement Policy Letter, 76 Fed.Reg. 56227-56242 (Sept. 12, 2011).

⁶³¹ Jones, *supra* note 553, at 157.

⁶³² SHARON L. PICKUP, ET. AL, U. S. GOVT. ACCOUNTABILITY OFFICE, GAO-07-699, MILITARY OPERATIONS, THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 1-55 (2007).

⁶³³ *Id.*, at 1.

⁶³⁴ *Id.*, at 51.

⁶³⁵ *Id.*

⁶³⁶ *Id.*, at 52.

⁶³⁷ *Id.*, at 1.

⁶³⁸ PICKUP, ET AL., *supra* note 560.

⁶³⁹ *Id.*, at 2. The funding for solatia payments derive from unit operations and maintenance accounts, while condolence payments come from the Commanders' Emergency Response Program (CERP).

⁶⁴⁰ *Id.*, at 3.

⁶⁴¹ *Id.*, at 4.

⁶⁴² *Id.*

⁶⁴³ *Id.*

⁶⁴⁴ MONTREUX DOCUMENT, *supra* note 1, ¶ A.20 ("To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel, including: . . . (c) providing for civil liability, as appropriate").

⁶⁴⁵ False Claims Act, 31 U.S.C. §§ 3729-3733 (2006).

⁶⁴⁶ MONTREUX DOCUMENT, *supra* note 1, ¶ A.20.

⁶⁴⁷ See generally RALPH C. NASH JR., JOHN CIBINIC, JR., & JAMES NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 1231-1327 (2006) .

⁶⁴⁸ See generally RALPH C. NASH JR., JOHN CIBINIC, JR., & CHRISTOPHER YUKINS, FORMATION OF GOVERNMENT CONTRACTS 1673-1801 (2006) .

⁶⁴⁹ The fundamental question also remains of whether these mechanisms should be used for any purpose other than obtaining the best value for the Government. Cf. Christopher Yukins, *Making Federal Information Technology Accessible: A Case Study in Social Policy and Procurement*, 33 PUB. CONT. L.J. 695 (2004).

⁶⁵⁰ *Laudes Corp. v. United States*, 86 Fed. Cl. 152, 161-62, 164-65 (Fed. Cl. 2009) (affirming court's jurisdiction to hear implied-in-fact contract claims, but held that despite extensive U.S. Department of Defense (DoD) involvement, privity only existed between the plaintiff and the Iraqi government); Appeal of *Kellogg Brown & Root Servs., Inc.*, ASBCA No. 56256, 10-2 B.C.A. (CCH) ¶ 34613 (Nov. 23, 2010) (denying motions to dismiss and for summary judgment regarding dispute over US unilateral novation of contract from Iraqi Coalition Provisional Authority to the Interim Iraqi Government).

⁶⁵¹ See, e.g., Appeal of *Tawazuh Commercial & Constr. Co. Ltd.*, ASBCA No. 55656, 11-2 B.C.A. (CCH) ¶ 34781 (June 13, 2011) (contract specifically stated that responsibility to provide security fell to prime construction contractor, and consequently Government refused claim for equipment damaged in Taliban attack).

⁶⁵² The potential awarding of bid protests costs serves to further encourage contractors to use this enforcement mechanism. See, e.g., *Triple Canopy, Inc.-Costs, B-310566.9 et al.*, 2009 WL 776531, *3 (Comp. Gen. Mar. 25, 2009) (protest of task order for security services in Iraq, stating that where protest is clearly meritorious, GAO will recommend reimbursement of protest costs).

⁶⁵³ *Ettefaq-Meliat-Hai-Afghan Consulting, Inc. v. United States*, 106 Fed. Cl. 429, 433 (Fed. Cl. 2012) (finding Army justified in finding incumbent contractor non-responsible for, inter alia, failing to meet Private Security Arming Requirements such as providing accurate armed employee authorization packages).

⁶⁵⁴ *Aegis Defense Services, Ltd.*, B-403226, 2010 WL 4160698, *8 (Comp. Gen. Oct. 1, 2010) (denying protest finding that despite outstanding past performance of security contracts, award to contractor with no past performance was justified by much lower price, despite protestor's allegation that low price was the result of proposed plans that would result in understaffed, leaderless teams that should have failed the technical evaluation).

⁶⁵⁵ For instance, in *Datapath, Inc. v. United States*, the COFC stated that when "adjudicating bid protests

[we] must ‘give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.’ 28 U.S.C. § 1491(b)(3).” Despite the successful protest, the court refused to terminate the award, and only granted Datapath recovery of its costs for preparing and submitting the initial bid for the contract. 87 Fed. Cl. 162, 164-66 (2009) (sustaining protest but limiting relief to proposal costs rather than awarding injunction). *But see BayFirst Solutions, LLC v. United States*, 102 Fed. Cl. 677, 680 (Fed. Cl. 2012) (granting injunction in post-award protest of award of security management services contract based on flawed past performance evaluations weighing the balance of harm of delay against the integrity of the procurement system and in favor of the successful protestor).

⁶⁵⁶ *Scott v. United States*, 78 Fed. Cl. 151, 154-56 (Fed. Cl. 2007) (pre-award protest of solicitation to provide security support services in Iraq); Brian X. Scott, B-298370 et al., 2006 WL 2390513, *1 (Comp. Gen. Aug. 18, 2006).

⁶⁵⁷ *Mission Essential Pers., LLC v. United States*, 104 Fed. Cl. 170, 171 (Fed. Cl. 2012) (affirming the court’s lack of subject matter jurisdiction over task order protests and dismissing protest over task order to provide Intelligence Support Services). This statutory jurisdictional limitation can be eliminated without the fear of a deluge of task order protests, particularly given the limited number of other protests at the Court of Federal Claims.

⁶⁵⁸ Thus, in *Erinys Iraq Ltd. v. United States*, because the protestor had been excluded from the second phase of the contract competition because of price, any flaws in the non-price factor evaluation were deemed not to have prejudiced the protestor. *Erinys Iraq Ltd. v. United States*, 78 Fed. Cl. 518, 535 (Fed. Cl. 2007) (granting judgment on the record to defendant because any flaws in the technical evaluation or price evaluation did not prejudice the protestor).

⁶⁵⁹ For instance, just as in the tort context, the political question doctrine can impede False Claims Act litigation. *See United States v. Kellogg Brown & Root Servs., Inc.*, 856 F. Supp. 2d 176, 179 (D.D.C. 2012) (finding Government’s argument that political question doctrine required dismissal of defendant’s counterclaim because decision would rest on court’s evaluation of military decisions regarding security).

⁶⁶⁰ *United States ex rel. Badr v. Triple Canopy, Inc.*, 1:11-CV-288 GBL/JFA, 2013 WL 3120204, *15 (E.D. Va. June 19, 2013) (granting dismissal for failing to adequately plead fraud and because false certifications were not “conditions of payment”).

⁶⁶¹ *Triple Canopy*, 2013 WL 3120204, at *7; *see also U.S. ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 308 (4th Cir. 2009) (holding that contractor never promised an exact number of security guards, and thus during any time it provided less than its proposal estimate was not “fraud in the inducement”).

⁶⁶² FED. R. CIV. P. 9. In *Triple Canopy*, for example, the court held that the complaint failed to specify any particular invoice paid by the Government that it would not have otherwise paid.

⁶⁶³ *Triple Canopy*, 2013 WL 3120204, at *11-12; *see also U.S. ex rel. Davis v. Prince*, 753 F. Supp. 2d 569, 573 (E.D. Va. 2011) (dismissal granted in part because relators lacked personal independent knowledge of the contract to qualify as “original sources” to overcome the public disclosure bar: their worthless services claims were based only in their knowledge of use-of-force incidents in Iraq where there were failures to supervise weapons distribution and emails disclosed during Congressional hearings). In this case, the court further held that although the relator did in fact work on one base in Iraq where Triple Canopy operated, his allegation of similar false weapons certifications at other bases were mere “fishing expeditions.” *Id.*

⁶⁶⁴ MONTREUX DOCUMENT, *supra* note 1, at ¶ A.20.

⁶⁶⁵ Federal Acquisition Regulation [FAR] FAR 9.402(b) (2013).

⁶⁶⁶ *Id.*

⁶⁶⁷ An agency's head of contracting may include a suspended or debarred contractor in a specific procurement after a determination that there are compelling reasons to do so. FAR 9.405(a), 9.405-1(a) (2013).

⁶⁶⁸ FAR 9.405(a) (2013). Contractors who are suspended or debarred may continue performing currently awarded contracts, however, agencies may not award new orders under umbrella contracts above guaranteed minimum threshold requirements or exercise options in existing contracts. FAR 9.405-1(b) (2013).

⁶⁶⁹ FAR 9.406-2 (2013). One example of discretionary suspension or debarment may arise from a violation of the Drug-Free Workplace Act of 1988 pursuant to FAR 9.406-2(b)(2), referring to Pub L No 100-690, § 102 Stat 4181 (1988). Other examples of discretionary debarments arise from a finding of fraud, bribery, making false statements (FAR 9.406-2(a)(3) (2013)); FAR 9.406-2(b)(1)(i)(B) (2013) (Providing for debarments for repeated performance failures).

⁶⁷⁰ Statutory suspension and debarments are automatic sanctions arising from violations of certain laws, sometimes resulting in an indictment or conviction. Examples of statutory suspensions and debarments include convictions for contract related felonies pursuant to 10 USC § 2408(a)(1) (2013). (Prohibiting the involvement with any contract for contractors convicted of fraud or felonies arising out of a particular contract with the Department of Defense); drug trafficking pursuant to 21 USC § 862 (With limited exception, prohibiting drug trafficker convicts from receiving federal benefits, including federal contracts); violations of the Clean Water Act pursuant to 21 USC § 862 (With limited exception, prohibiting drug trafficker convicts from receiving federal benefits, including federal contracts); violations of the Clean Air Act pursuant to 33 USC § 1368 (sets forth environmental water standards); for the act's suspension and debarment regulatory administration, *see* 2 CFR § 1532.1100 (2013); and violations of the Walsh-Healy Public Contracts Act pursuant to 42 USC § 7606 (sets forth environmental air standards); for the act's suspension and debarment regulatory administration, 2 CFR § 1532.1100 (2013).

⁶⁷¹ De facto debarments arise from an agency's blacklisting of a contractor, either pursuant to a particular law or through a permanent finding that a contractor is nonresponsible. For example, National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 841(a) (1) (A), 125 Stat 1298 (2012) [hereinafter 2012 NDAA] ("Prohibition On Contracting With The Enemy In The United States Central Command Theater Of Operations"); *MG Altus Apache Co. v United States*, 111 Fed. Cl. 425 (Fed. Cl. 2013) (Finding that agency's permanent finding that the contractor was nonresponsible amounted to being blacklisted was reasonable).

⁶⁷² Compare FAR 9.406-2, Causes for Debarment (Permitting debarments for serious and compelling reasons), with MONTREUX DOCUMENT, *supra* note 1, at V.1 (calling for Contracting States to prevent PMSCs from human rights and law of armed conflict violations).

⁶⁷³ In 2012, for example, the United States enhanced its laws and regulatory requirements prohibiting human trafficking even further by mandating contractors to install compliance programs into their contract administration procedures that promote awareness and curb trafficking activities. Beginning in 2006, the Federal Acquisition Regulation (FAR) implemented 22 U.S.C. § 7104, a statutory provision intended to deter human trafficking. *See* FAR 22.17 and 52.222-50, Combating Trafficking in Persons. In 2012, President Barack Obama issued Executive Order 13627, which provided tools to both federal agencies and contractors to curb human trafficking activities. Exec. Order No. 13627, 77 Fed. Reg. 191 (Oct. 2, 2012). E.O. 13627 expanded the prohibited activities related to human trafficking, requires contractors to implement awareness programs and report violations, requires contractors to cooperate with agency and law enforcement investigations, and requires agencies to determine whether violators should be suspended or debarred. E.O. 13627, § 2(1)(A)-(C). Moreover, human trafficking activities, like commercial sex crimes and forced labor, were tied to suspensions and debarments, whereby contracting

officials are now required to investigate reports of such crimes and determine whether contractual, as well as criminal, sanctions are appropriate. E.O. 13627, § 2(1)(A), (1)(C).

⁶⁷⁴ Compare FAR 9.405-1, Continuation of Current Contracts (Permitting the continuation of a contract with a sanctioned contractor), with MONTREUX DOCUMENT, *supra* note 1, at V.20 (Calling for the termination of a PMSC contract for violating the Montreux principles).

⁶⁷⁵ *Id.*, ¶ A.20(a). In its role as the U.S. CENTCOM's suspension and debarment contracting agent, the U.S. Army's use of compliance agreements has risen in recent years. The U.S. Army Legal Services Agency, Contract and Fiscal Law Division, through its Fraud Procurement Branch, is responsible for adjudicating suspension and debarment referrals made to the U.S. Army. *Army Fraud Fighters*, JAGCNET, U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS (Sept. 25, 2013), available at <https://www.jagcnet.army.mil/852575DF0073EE8E/0/73A60D031CEA23A78525747200566551?opendocument>. (Describing the U.S. Army's use of compliance agreements). These compliance agreements are used in place of a suspension or debarment when a contractor is able to show that it is presently responsible and its internal mechanisms comply with the law and regulation. *id.* According to the U.S. Army's Suspension and Debarment Official,

During the past year, the Army has encouraged the expanded use of Administrative Compliance Agreements in those circumstances where their use provides appropriate assurances of responsibility coupled with continuing oversight to police the process. We refer to our Agreements with contractors as "Compliance Agreements" rather than "Settlement Agreements", because emphasis is placed on contractor change in behavior ("compliance") and more accurately describes the probationary period initiated for the contractor. During the past year, I believe the Army has been creative in crafting Agreements that are tailored to meet responsibility issues involving large as well as small firms. In the end, a process that cultivates responsible and ethical contractors better achieves the ultimate goal of improving the overall integrity and efficiency of the Government procurement process.

Id. In doing so, the U.S. Army carefully scrutinizes when to sanction a contractor and when to permit a contractor an opportunity to continue to compete based upon its willingness to change and conform to statutory, regulatory and contractual standards. This type of procedural due process appears to be in compliance with the Montreux Document's emphasis on ensuring the type of sanction used is appropriate to the contractor related misconduct. MONTREUX DOCUMENT, *supra* note 1, at ¶ A.20. [shortened from full information provided in note #1 above]. Compare the Montreux Document with Letter from Carl Levin, United States Senator, Michigan, Chairman of the Committee on Armed Services, to Robert Gates, Sec'y of Defense (Feb. 25, 2010) [hereinafter Senator Levin's Letter to Sec'y of Defense Gates], available at <http://www.levin.senate.gov/imo/media/doc/supporting/2010/SASC.Letter.Gates.022510.pdf>. In his letter, Senator Levin remarks that although he found Blackwater, a PMSC involved in the Nisour Square incident in Iraq, to have misappropriated weapons, hired personnel suspected of assault and battery, and lied to the Department of Justice, the Department of Defense still awarded the contractor a contract to train the Afghan National Army. Presumably, Blackwater was never administratively sanctioned for its alleged misconduct.

⁶⁷⁶ E-mail from Mark Rivest, Esq., Chief, Procurement Fraud Branch, Contracts and Fiscal Law Division, U.S. Army Legal Services Agency, Fort Belvoir, Virginia to author (Sept. 13, 2013) (on file with author) [hereinafter Rivest E-mail]. For further data, please see *infra* Appendix C.

⁶⁷⁷ For a discussion of these issues, please see the section of this report entitled, "Due diligence obligations for selecting, contracting, and authorizing PMSCs," *supra*.

⁶⁷⁸ Created and authorized by the National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 108-106, § 117 Stat. 1209, 3001 (2003) (Section 3001 is entitled, "Inspector General of the Coalition Provisional Authority").

⁶⁷⁹ Created and authorized by the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No.

110-181, §§ 122 Stat. 3, 842, 1229 (2008) (Section 842 is entitled, “Investigation of waste, fraud, and abuse in wartime contracts and contracting processes in Iraq and Afghanistan;” and Section 1229 is entitled, “Special Inspector General for Afghanistan Reconstruction”).

⁶⁸⁰ Rivest E-mail, *supra* note 604. *Major Procurement Fraud Unit*, U.S. ARMY’S CRIMINAL INVESTIGATION COMMAND, [HTTP://WWW.CID.ARMY.MIL/MPFU.HTML](http://www.cid.army.mil/MPFU.HTML) (last visited Nov. 19, 2013).

⁶⁸¹ Rivest E-mail, *supra* note 604; SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS, AUDIT 13-66, CONTRACTING WITH THE ENEMY: DoD HAS LIMITED ASSURANCE THAT CONTRACTORS WITH LINKS TO ENEMY GROUPS ARE IDENTIFIED AND THEIR CONTRACTS TERMINATED, at B (Apr. 2013), available at <http://www.sigar.mil/pdf/quarterlyreports/2013-07-30qr.pdf> (describing TF2010’s responsibility over intelligence and legal analysis pursuant to Pub. L. No. 112-81, § 841(a)(1)(A), 125 STAT. 1298 (2012) (“Prohibition On Contracting With The Enemy In The United States Central Command Theater Of Operations”)).

⁶⁸² Rivest E-mail, *supra* note 604; *Hearing to Discuss the Federal Bureau of Investigation’s efforts to combat international contract corruption: Before the Comm’n on Wartime Contracting in Iraq and Afghanistan*, Washington (statement of Kevin L. Perkins, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation) (May 24, 2010), available at <http://www.fbi.gov/news/testimony/the-fbi2019s-efforts-to-combat-international-contract-corruption> (describing the FBI’s ICCTF’s mission to combat fraud during overseas contingency operations). *Oversight Partners*, SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION (SIGAR) WEBSITE [hereinafter SIGAR WEBSITE], <http://www.sigar.mil/about/oversight-partners.html> (last visited Nov. 19, 2013) (describing the FBI-led interagency ICCTF as the “principal organization coordinating contract fraud and corruption cases involving U.S. government spending in Southwest Asia”).

⁶⁸³ *Id.* (describing the NPFTF’s mission “to promote the prevention, early detection, and prosecution of procurement fraud”). NATIONAL PROCUREMENT FRAUD TASK FORCE LEGISLATION COMMITTEE, PROCUREMENT FRAUD: LEGISLATIVE AND REGULATORY REFORM PROPOSALS (White Paper June 9, 2008), available at <http://www.gsaig.gov/?LinkServID=A8DD55A6-A6BB-D9F8-0788C31C39FC3CD0&showMeta=0> (describing the NPFTF as an interagency task force with the mission of “improve[ing] the Federal Government’s ability to detect, prevent, and prosecute procurement fraud through legislative modifications and/or changes in policies and practices”).

⁶⁸⁴ SIGAR WEBSITE, *supra* note 610. Note, that the military department’s Offices of Inspectors’ Generals formed a Joint Strategic Oversight Plan for Afghanistan Reconstruction, along with the SIGIR, to coordinate these agencies’ audits and inspections of government contracts in Afghanistan. *See id.*

⁶⁸⁵ These examples were derived from the Montreux Document’s definition of “Private Military and Security Companies” (PMSC). MONTREUX DOCUMENT, *supra* note 1.

⁶⁸⁶ Office of Federal Procurement Policy Letter, *supra* note 558.

⁶⁸⁷ *See, e.g.*, *Supreme Foodservice GmbH, B-405400.1 et al.*, 2011 WL 5387717, *4-6, *12 (Comp. Gen. Oct. 31, 2011) (denying protest of solicitation based on an improper evaluation of protestor’s ability to provide private convoy security given the ordered dissolution of private security firms operating in Afghanistan).

⁶⁸⁸ Consider, e.g., Baroness Warsi, Senior Minister of State for Foreign and Commonwealth Affairs, House of Lords Hansard Transcript, October 30, 2012, Column 496 (The State for Foreign and Commonwealth Affairs suggests that the U.K. government may consider negative perceptions of the PMSC as a thing of the past and primarily an issue for U.S. companies: “The noble Lord will be aware that many of the concerns in this area are historic and dependent on what happened not so much with UK private security companies but, predominantly, with US private security companies.”); *see also, e.g.*, UK Montreux+5 Response, *supra* note 38 (the U.K. government’s not state whether the U.K. government is considering implementing the Good Practices regarding accountability mechanisms, stating only that, “UK PSCs

do not operate in a legal vacuum, and are obliged to obey applicable national and international law. The UK has in place legislation that provides jurisdiction to prosecute grave breaches of the Geneva Conventions, torture, genocide, war crimes and crimes against humanity committed either in or outside the United Kingdom. That legislation covers acts committed by United Kingdom nationals overseas. We are also able to prosecute British citizens for certain crimes such as murder and sexual abuse of children committed overseas. This legislation would enable us to prosecute a British national accused of committing such crimes overseas while working for a PSC. The law regulating the conduct of all UK companies operating overseas has also been significantly strengthened by the introduction of the 2010 Bribery Act.”).

⁶⁸⁹ In order for English criminal law to apply abroad, there must be legislation specifically extending jurisdiction extraterritorially. *See, e.g., Cox v Army Council*, [1963] AC 48 at 67 (“Apart from those exceptional cases in which a specific provision is made in respect of acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England”).

⁶⁹⁰ Geneva Conventions Act, 1957, c. 52 (1957) (U.K.); International Criminal Court Act, 2001, c. 17(2001) (U.K.).

⁶⁹¹ International Criminal Court Act (U.K.), c. 51 (Individuals suspected of genocide, war crimes, or crimes against humanity outside of the U.K. can only be prosecuted in the U.K. if they are a U.K. national or resident, or are subject to U.K. service jurisdiction, s. 51(2)(b). For the definitions of genocide, crimes against humanity, *see Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9; 2187 U.N.T.S. 90, Arts.6, 7, and 8.2; s. 51(1)).

⁶⁹² Criminal Justice Act, 1988, c. 33, §134 (providing jurisdiction for the prosecution of a suspected torturer who is present in the U.K., regardless of his or her nationality or the alleged conduct took place. The crime must be intentional and involve the infliction of severe pain or suffering at the instigation or with the consent or acquiescence of an individual acting in an official capacity).

⁶⁹³ It should be noted that the criminal law systems of England and Wales, Scotland, and Northern Ireland are distinct; we refer to the “U.K.” in this report for ease of reference.

⁶⁹⁴ Offences Against the Person Act, 1861, c. 100 (Regnal. 24 and 25 Vict.), §§ 9 & 10 (England and Wales, and Northern Ireland); Criminal Procedure (Scotland) Act, 1995, c. 46 § 11.

⁶⁹⁵ Sexual Offences Act, 2003, c. 42, s. 72 (England and Wales); Sexual Offences (Scotland) Act, 2009, asp.9, s. 55; The Sexual Offences (Northern Ireland) Order, 2008, No. 1769 (N.I. 2), § 76.

⁶⁹⁶ Sexual Offences Act 2003, c. 42, § 59A (as of Apr. 6, 2013, extraterritorial jurisdiction exists with respect to human trafficking by U.K. nationals for sexual exploitation) and Asylum and Immigration (Treatment of Claimants) Act, 2004, c. 19, § 4 (as of April 6, 2013, extraterritorial jurisdiction exists with regards to human trafficking by U.K. nationals for labor and other exploitation).

⁶⁹⁷ Bribery Act, 2010, c. 23, § 12.

⁶⁹⁸ *See, e.g., Sexual Offences Act 2003*, § 72(2)-(4) (with respect to murder and manslaughter, the accused must be a U.K. national or resident at the time the offence is committed or when the proceedings are commenced).

⁶⁹⁹ Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 1(2) (the Act applies to corporations; government departments and bodies; police forces; and partnerships, trade unions and employers’ associations that are employers).

⁷⁰⁰ *See id.*, s. 28(3) (jurisdiction for corporate manslaughter and corporate homicide outside of England and Wales, Scotland, and Northern Ireland only exists where death is sustained in the U.K., in the U.K. territorial sea, on a U.K. registered ship, on a British-controlled aircraft or hovercraft, and in relation to certain offshore petroleum operations).

⁷⁰¹ In the absence of legislation expressly creating criminal liability for companies, corporate liability

may be established by (a) vicarious liability for the acts of the company's employees or agents; and (b) non-vicarious liability arising from the "identification principle" if the offender was a "directing mind and will of the company", which is limited to the actions of the Board of Directors, the Managing Director, and in certain circumstances, other superior officers: *see Mousell Bros Ltd v. London and North Western Railway Co*, [1917] 2 KB 836 (vicarious liability); *Lennards Carrying Co and Asiatic Petroleum*, [1915] AC 705; *Bolton Engineering Co v Graham*, [1957] 1 QB 159 (per Denning LJ); *R v. Andrews Weatherfoil*, 56 C App R 31 CA; and *Tesco Supermarkets Ltd v. Nattrass*, [1972] AC 153 (identification principle liability).

⁷⁰² *See Corporate Prosecutions*, CROWN PROSECUTION SERVICE ¶ 11, http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/.

⁷⁰³ *See Sexual Offences Act*, 2003, § 1-19, 25-26, 30-41, 47-50, and 61 (England and Wales); *Sexual Offences (Scotland) Act*, 2009, § 48(2); *Sexual Offences (Northern Ireland) Order*, 2008, Pt. 3.

⁷⁰⁴ *See Corporate Prosecutions*, *supra* note 630, ¶ 12 (in certain circumstances, companies could be held liable for negligence; *see the discussion below*).

⁷⁰⁵ MONTREUX DOCUMENT, *supra* note 1, Good Practice 71(a).

⁷⁰⁶ MONTREUX DOCUMENT, *supra* note 1, Good Practice 19(a).

⁷⁰⁷ *Armed Forces Act*, 2006, c. 52, Pt. 11; FCO PUBLIC CONSULTATION SUMMARY, *supra* note 40 (the U.K. government has expressed doubts regarding the application of the Act to PMSCs: "The Government will consider the extent to which the provisions of the Armed Forces Act (2006) might be applied to those PMSCs working for the Government. There are a number of practical and legal problems involved in attempting to apply AFA (2006) including the requirement for a military Commanding Officer and the need for investigations by service police. The Act was established to place under military jurisdiction people who are (at least temporarily) working within the military community. The wider issue also remains that PMSCs often work for the private sector, and this Act would not cover their activities" *Id.* ¶ 23).

⁷⁰⁸ *See Armed Forces Act*, § 51, Pt. 11 & Sch. 15; *The Armed Forces (Civilians Subject to Service Discipline) Order*, 2009, No. 836, Sch. 3. For a discussion of the Service Civilian Court, *see Ministry of Defence, Service Civilian Court*, in *MANUAL OF SERVICE LAW* Ch. 32 (Apr. 19, 2013 version), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/43305/Ch32.pdf (The Service Civilian Court has jurisdiction to, among other things, try offences committed outside the U.K. by civilians working for or accompanying the Service in a designated area (which includes Iraq and Afghanistan), including civilian administrators, spouses and children of service personnel, and contractors working for the armed forces on operations. Its sentencing powers are limited to 12 months in prison).

⁷⁰⁹ Some uncertainty exists regarding whether subjecting civilians to criminal trials by military courts in all but "very exceptional circumstances" could violate Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides the right to a fair hearing by an independent and impartial tribunal; *see Martin v. United Kingdom*, App. No. 40426/98, Eur. Ct. H.R. (2006), *available at* <http://cmiskp.echr.coe.int>. *See also* U.K. JOINT COMMITTEE ON HUMAN RIGHTS, *LEGISLATIVE SCRUTINY: ARMED FORCES BILL* (May 17, 2011), *available at* : <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/145/14510.htm> (The U.K. Ministry of Defence considers that the *Armed Forces Act 2006* meets the requirements of the Convention. In the Ministry of Defence's view, the European Court of Human Rights in *Martin v. U.K.* "was not saying that the United Kingdom needs to put in place a UK civilian court jurisdiction such as the Crown Court, but a court jurisdiction which satisfies the requirements of a civilian court even if established under legislation dealing with the armed forces" which means that, "if a trial of a civilian is to be heard before a Court Martial, all the lay members of the court must be civilians").

⁷¹⁰ The researchers for this report submitted freedom of information requests to the MoD, FCO, DFID,

and Ministry of Justice, but the requests were not fulfilled by the respective agencies because the cost of complying with the requests would have exceeded the statutory limit of £600 set by the *Freedom of Information Act 2000*, c. 36, s. 12.

⁷¹¹ See MONTREUX DOCUMENT, *supra* note 1, Good Practice 4(c) (as a Contracting State).

⁷¹² See, e.g., *Davies v Global Strategies Group (Hong Kong) Ltd and another*, [2010] All ER (D) 192; [2010] EWCA Civ 64; and *Harty v. Sabre International Security Ltd and another*, [2011] All ER (D) 42 (Apr); [2011] EWHC 852 (QB).

⁷¹³ See, e.g., Health and Safety at Work etc. Act, 1974, c. 37.

⁷¹⁴ Similarly, although companies may not be bound by human rights obligations in the same manner as States, human rights obligations may help to inform the relevant standard of care in tort claims brought against companies; see, e.g., JAN WOUTERS AND CEDRIC RYNGAERT, LITIGATION FOR OVERSEAS CORPORATE HUMAN RIGHTS ABUSES IN THE EUROPEAN UNION: THE CHALLENGE OF JURISDICTION 17 (Institute for Int'l L. Working Paper No 124 - July 2008) [hereinafter, WOUTERS & RYNGAERT, LITIGATION FOR OVERSEAS CORPORATE HUMAN RIGHTS ABUSES], available at <http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP124e.pdf> ("substantive norms of international human rights law could inform the duty of care standard as a standard of corporate liability, and thereby weaken concerns over jurisdictional impropriety").

⁷¹⁵ *Id.*, at 7.

⁷¹⁶ *Id.*, at 4. For a current example, see *Case profile: African Barrick Gold lawsuit (re Tanzania)*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/AfricanBarricklawsuitreTanzania> (in a claim filed in the U.K. High Court on July 30, 2013, 12 Tanzanian plaintiffs allege that the defendant companies, African Barrick Gold and North Mara Gold Mine Limited, are civilly liable because they were complicit in the deaths and injury of villagers allegedly caused by police at a mine in Tanzania, and that African Barrick Gold, which is alleged to control the mine, failed to prevent the use of excessive force by mine security and police).

⁷¹⁷ See Business and Human Rights Resource Centre, *supra* note 642; European Council, Council Regulation 44/2001, 22 December 2000, O.J. 2001, 16 January 2001, L 12/1, Art. 2, Art. 60.1, Art. 60.2. (a company will be considered domiciled in the U.K. if its registered office is located in the U.K., or if there is no registered office, the place under the law of which the corporation was formed). Under U.K. law, it is also possible for a court to permit service outside of the U.K. where the claim is for a remedy against a person (including legal persons, such as companies) domiciled in the U.K., see Civil Procedure Rules, 1998, S.I. 1998/3132 (L. 17) (Eng. & Wales), Rules 3.1 & 6.36.

⁷¹⁸ WOUTERS & RYNGAERT, LITIGATION FOR OVERSEAS CORPORATE HUMAN RIGHTS ABUSES, *supra* note 642 at 8-10 (as Wouters & Ryngaert further note, "[t]he enduring role of the territorial principle in transnational tort proceedings in the EU can be exemplified by the case of the United Kingdom (UK), where, like in the U.S., rules of personal jurisdiction are extremely liberal. In the UK, jurisdiction premised on the temporary presence of the defendant, even a foreign one, in the territory of the forum (tag or transient jurisdiction), is well-established.... However, if adjudicatory jurisdiction were to be found by a UK court, this court will, under normal circumstances, only hear the case if some tortious conduct in the UK could be identified. The transnational tort cases that have so far been brought in UK courts indeed appear to revolve around territorial violations of a duty of care by a corporation having overseas activities. Put differently, territorial negligent conduct by that corporation featured prominently. Without a nexus to the UK, in the form of negligent conduct in the UK, claims for an extraterritorial tort may not be actionable" (citations omitted, emphasis in original)).

⁷¹⁹ See, e.g., *Lubbe v. Cape PLC*, [2000] 1 WLR 1545 (over 3000 miners claimed damages for injuries allegedly caused by exposure to asbestos in the defendant corporation's South African mines).

⁷²⁰ *Harty v Sabre International Security Ltd and another*, [2011] All ER (D) 42 (Apr); [2011] EWHC 852 (QB); *Davies v Global Strategies Group (Hong Kong) Ltd and another*, [2010] All ER (D) 192 (Oct); [2010] EWCA Civ 64.

⁷²¹ A defendant may be able to have proceedings stayed on the basis of *forum non conveniens* by showing that the English court is not the proper forum for the claim because another jurisdiction is clearly more appropriate based on the principles summarized in *Spiliada Maritime Corp. v. Consulex Ltd* (1987) AC 460. Even if, however, the defendant proves that another forum is more convenient, the court should refuse a stay of proceedings if, in all the circumstances, the court considers that justice requires the action to be heard in England. For a discussion of these principles in the context of a claim against a PMSC, see *Harty v. Sabre*, *supra* note 687, pt. 11.

⁷²² WOUTERS & RYNGAERT, LITIGATION FOR OVERSEAS CORPORATE HUMAN RIGHTS ABUSES, *supra* note 642 at 19-20.

⁷²³ *Owusu v. Jackson*, [2005] ECR I-3481, ¶ 46; *Id.*

⁷²⁴ Foreign Enlistment Act 1870, c. 90,

⁷²⁵ *Id.*, § 4.

⁷²⁶ The Act may not apply, however, since PMSCs personnel providing services to foreign governments may not be considered being engaged in the State's military or naval service.

⁷²⁷ UK PRIV-WAR REPORT, *supra* note 47, at 38.

⁷²⁸ See discussion in Due diligence obligations for selecting, contracting, and authorizing PMSCs – United Kingdom: Authorizing and Licensing, *supra*.

⁷²⁹ See discussion in Due diligence obligations for selecting, contracting, and authorizing PMSCs – United Kingdom: Contracting Practices, *supra*.

⁷³⁰ MONTREUX DOCUMENT, *supra* note 1, Good Practice 20(b).

⁷³¹ See discussion in Due diligence obligations for selecting, contracting, and authorizing PMSCs – United Kingdom: Authorizing and Licensing, *supra*.

⁷³² See Companies Act, 2006, c. 46, §§ 361, 381-385, 414(B) (the obligation applies to “quoted” companies (including, among others, those listed on the London, New York, and NASDAQ stock exchanges) and do not qualify for a small company exemption).

⁷³³ Companies Act, 2006, § 414C(7).

⁷³⁴ U.K. ACTION PLAN, *supra* note 32, § 2; Companies Act 2006, *ibid.*, § 172.

⁷³⁵ For a discussion of the UK's export controls in the context of PMSCs, see UK PRIV-WAR REPORT, *supra* note 47, at 38-40.

⁷³⁶ *Id.*, at 40.

⁷³⁷ *Id.*

⁷³⁸ For an example of this effect, see *Harty v. Sabre*, *supra* note 687, pt. 11.2 (“There are many other reasons why the natural forum for this dispute is Iraq.... I agree that, prima facie, the courts of Iraq would be the natural forum and... if I had been persuaded that there was no immunity, I would have been minded to grant a stay. But things are not equal.... Justice cannot and will not be done in Iraq because of the First Defendant's immunity. Justice requires that the English court should accept jurisdiction”).

⁷³⁹ UK PRIV-WAR REPORT, *supra* note 47, at 42-43.

⁷⁴⁰ Criminal Justice Act, 1948, c. 58, § 31(1) (“Any British subject employed under Her Majesty's Government in the United Kingdom in the service of the Crown who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England, would be punishable on indictment, shall be guilty of an offence ... and subject to the same punishment, as if the offence had been committed in England.”); *Hastings and Folkestone Glassworks*

Ltd v. Kalson [1949] 1 K.B. 214 at 221 and 222; ARCH BOLD CRIMINAL PLEADING EVIDENCE AND PRACTICE 2-55 (2013).

⁷⁴¹ See, e.g., WOUTERS & RYNGAERT, LITIGATION FOR OVERSEAS CORPORATE HUMAN RIGHTS ABUSES, *supra* note 642, at 27 (“Corporations may not be criminally liable, the alleged abuses may not amount to criminal offences, jurisdiction may be lacking, and establishing corporate criminal liability may be fraught with problems. To these drawbacks could be added the discretionary power of the prosecutor to refuse to take up a complaint, or to discontinue the proceedings (judges hearing tort claims, in contrast, do not have this discretion), and the more limited role of individual victims in a state-steered criminal process”).

⁷⁴² *Id.*, at 6, 26-27.

⁷⁴³ *Id.*

⁷⁴⁴ For a discussion of this issue in the U.S. context, see Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B. C. L. REV. 699 (2007).

⁷⁴⁵ It should be noted that if legislative changes such as those proposed above were made, the investigating and prosecutorial authorities would retain the discretion to bring charges where it is in the public interest to do so; see, e.g., *Code for Crown Prosecutors*, CROWN PROSECUTION SERVICE, available at http://www.cps.gov.uk/publications/docs/code2013english_v2.pdf, para. 4.12; *Corporate Prosecutions*, CROWN PROSECUTION SERVICE, available at http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/ (In the context of corporate criminal liability, factors militating against prosecution include whether the company adopted a “genuinely proactive approach... when the [alleged offence] is brought to [its] notice, involving self-reporting and remedial actions, including the compensation of victims”; there is a “lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the company”; there exists “a genuinely proactive and effective corporate compliance programme”; and “civil or regulatory remedies that are likely to be effective and more proportionate” are available, at para. 32). In light of these considerations, if corporate criminal liability were extended, British PMSCs could have clear incentives to implement best practices, investigate properly complaints of misconduct by PMSC personnel, and take remedial action where warranted in order to avoid liability.

⁷⁴⁶ See *War Crimes/Crimes Against Humanity Referral Guidelines*, CROWN PROSECUTION SERVICE, available at http://www.cps.gov.uk/publications/agencies/war_crimes.html (Investigations of alleged war crimes, crimes against humanity, genocide, and torture are conducted by officers from the Metropolitan Police Counter Terrorism Command, known as SO15, while the Counter Terrorism Division (CTD) of the Crown Prosecution Service, Special Crime and Counter Terrorism Division is responsible for prosecuting such crimes).

⁷⁴⁷ See Corrected Transcript Oral Evidence Taken Before the House of Commons Foreign Affairs Committee (testimony by Henry Bellingham MP, Chris Holtby & Captain David Reindorp), Session 2010-12, (July 6, 2011), available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/c1318-iii/c131801.htm>, Q272 (During questioning in the context of prosecuting suspected pirates, the then-Minister for Africa indicated that it would clearly be in the national interest of the U.K. to prosecute where a U.K. national was injured, which arguably suggests that the U.K. is primarily interested in prosecuting crimes committed abroad in only limited circumstances).

⁷⁴⁸ See WOUTERS & RYNGAERT, LITIGATION FOR OVERSEAS CORPORATE HUMAN RIGHTS ABUSES, *supra* note 642, at 21 (Article 1 of Belgium’s Code of Private International Law provides that, “[i]rrespective of the other provisions of the present Code, Belgian judges have jurisdiction when the case has narrow links with Belgium and when proceedings abroad seem to be impossible or when it would be unreasonable to request that the proceedings are initiated abroad”).

⁷⁴⁹ *Id.*, at 23.

⁷⁵⁰ MONTREUX DOCUMENT, *supra* note 1, Pt. 2(C)(IV).

⁷⁵¹ CPA Order 17 was originally issued on June 26, 2003, and governed the status of the CPA, Multinational Force (MNF), diplomatic entities as well as ‘certain international consultants and contractors’ in respect of the Government of Iraq and the local courts.

⁷⁵² Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at 12.

⁷⁵³ See 2009 *Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq*, also referred to as the U.S.-Iraq Status of Forces Agreement (SOFA). UNWGM Report on Iraq, *supra* note 89, ¶ 2 praised the post-2009 reduction in human rights incidents involving PMSCs, stating, “This could be attributed to several factors: the decrease in their military-related activities in Iraq; stricter regulation by the Iraqi authorities; and efforts by the United States of America to tighten oversight of its private security contractors operating in Iraq”.

⁷⁵⁴ See PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 87-88.

⁷⁵⁵ *Id.*, at 91.

⁷⁵⁶ See PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 91.

⁷⁵⁷ See also S. Jones & M. Chulov, *Iraq Contractor held for murder of fellow Briton and Australian in Baghdad*, THE GUARDIAN (Aug. 9, 2009), <http://www.guardian.co.uk/world/2009/aug/09/british-contractor-iraq-murder/print>

⁷⁵⁸ See also PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 93, for details of the case;

⁷⁵⁹ It has been noted that “Fitzsimons’ lawyers and the organization monitoring the case (Reprieve) declared that they were relieved that the court did not impose the death penalty, apparently accepting as extenuating circumstances the fact that Mr. Fitzsimons was suffering from post-traumatic stress disorder as a consequence of his experience while serving in the British Army in Kosovo.” *Id.* (citing British ex-soldier Danny Fitzsimons sentenced to life imprisonment as Iraqi court accepts evidence of mental illness, REPRIEVE (Feb. 28, 2011), http://www.reprive.org.uk/press/2011_02_28dannyfitzsimonslifeimprisonment/).

⁷⁶⁰ UNWGM Report on Iraq, *supra* note 89, ¶ 17-18; Ned Parker, *5 U.S. contractors in Iraq are held in American’s death, They are suspects in the killing of Texan Jim Kitterman in Baghdad*, LOS ANGELES TIMES (June 8, 2009), <http://articles.latimes.com/2009/jun/08/world/fg-iraq-arrests8>; *Iraq security detains 5 US citizens for corruption*, AL ARABIYA NEWS (June 7, 2009), <http://www.alarabiya.net/articles/2009/06/07/75122.html>; *Criminal Procedure Case-study (2): The killing of James Kitterman*, GLOBAL JUSTICE PROJECT – IRAQ (June 9, 2009), <http://gjpi.org/2009/06/09/criminal-procedure-case-study-2-the-murder-of-jim-kitterman/>.

⁷⁶¹ PALOU-LOVERDOS & ARMENDARIZ, *supra* note 42, at 94-95.

⁷⁶² Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at 11, 17.

⁷⁶³ See Penal Code, Official Gazette, arts. 57 & 61 (1976) (Afghanistan).

⁷⁶⁴ Except for the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) (entered into force Oct. 20, 2001), available at <http://www2.ohchr.org/english/law/mercenaries.htm> [hereinafter U.N. Convention against Mercenaries].

⁷⁶⁵ See Constitution of Afghanistan, art. 29 (2004)

⁷⁶⁶ Afghanistan ratified the 1984 UN Convention Against Torture on April 1, 1987; See Penal Code, Official Gazette, Code, art. 275 (“If the official of public services tortures the accused for the purpose of obtaining a confession, or issues an order to this effect, he shall be sentenced to long imprisonment”). See also *id.*, at arts. 414-416 (regarding illegal arrest and detention.)

⁷⁶⁷ See Military Crimes Code, art.4 (2005).

⁷⁶⁸ Penal Code, Official Gazette, art. 96 (1976) (Afghanistan).

⁷⁶⁹ 2008 Procedure for PSCs, *supra* note 138, art. 27.

⁷⁷⁰ 2012 Procedure for RMCs, *supra* note 145, art. 19.

⁷⁷¹ 2012 Procedure also includes a specific grievance resolution procedure, in the sense of MONTREUX DOCUMENT, Good Practice 47.

⁷⁷² See US-Afghanistan SOFA (2003), Diplomatic Note. ISAF SOFA § 4.14.a

⁷⁷³ According to ISAF SOFA, § 6 - Application: 'The protections hereby set out shall apply to the ISAF and all its personnel and to forces in support of the ISAF and all their personnel'.

⁷⁷⁴ See R. CHUCK MASON, CONG. RESEARCH SERVICE, RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IT IS, AND HOW HAS IT BEEN UTILIZED 8 (2012); see also Huskey & Sullivan, *supra* note 15, at 353.

⁷⁷⁵ For instance, *US v. Passaro*, 577 F.3d 207, (4th Cir. 2009); *US v. Ayala*, 601 F.3d 256 (4th Cir. 2010); *US v. Cannon & Drotleff*, 497 Fed.Appx. 357 (4th Cir. 2012).

⁷⁷⁶ See *Diplomatic Operations*, in 2011 BRIDGING STRATEGY, *supra* note 127.

⁷⁷⁷ This is not explicitly stated in the Bridging Strategy, however, this interpretation clearly follows from the wording and the rules of diplomatic operations, and furthermore, according to the document of the Strategy, PSC working on police training missions will hold diplomatic passports. Moreover, according to some sources, Western diplomats would have confirmed that PSC staff protecting embassies fell under diplomatic immunity; see SwissPeace report – Afghanistan, *supra* note 129, at 35-36.

⁷⁷⁸ See generally SECURITY CONTRACTORS RECOVERY, PSD RECENTLY/CURRENTLY HELD IN PRISON IN AFGHANISTAN, (Jan. 2012). See also Alistair Dawber, *G4S employees in Afghanistan sentenced to years for bribery*, THE INDEPENDENT (Apr. 28, 2010), <http://www.independent.co.uk/news/business/news/g4s-employees-in-afghanistan-sentenced-to-two-years-for-bribery-1956223.html>

For further references of all other cases see below. A case was also identified of a British contractor jailed for fraud and debt charges, but it seems that legal proceedings were not conducted in Afghanistan; he was extradited to the U.K. in 2010 and was awaiting trial expected for Jan. 2012.

⁷⁷⁹ See Interim Criminal Procedure Code for Courts (2004), art. 68.3.

⁷⁸⁰ See Daneel Knoetze, SA man's hell in Afghan jail, DAILY NEWS (May 18, 2012).

⁷⁸¹ See Elena Fon, *Rough Justice: Being a few brief note on the Afghan judicial system for those charged with a serious criminal offence*, SECURITY CONTRACTORS RECOVERY, (Jan. 10, 2012).

⁷⁸² The case referred to the murder of an Afghan colleague following a dispute in 2009. Langdon had tried to cover up the crime by staging a Taliban ambush, but a Nepalese employee reported the incident after returning from the mission. He was about to board on a flight to Dubai when the Afghan police arrested him. See Jeremy Kelly, "Ex-Digger Robert William Langdon escapes the death penalty for Afghan murder", The Australian, Jan. 6, 2011.

⁷⁸³ The decision to commute the initial penalty was remarkably favoured by the decision of the victim's family to accept the compensation offered by the Langdon family. This legal figure which is known as *Ibra* derives from Sharia law and is one of the ways to avert the death penalty. See below the Section on Access to Remedy.

⁷⁸⁴ See for instance UNWGM Report on Afghanistan, *supra* note 132, ¶ 60; See also Abbot, *supra* note 392.

⁷⁸⁵ There is a known case in this regard referring to an American USPI supervisor who allegedly shot and killed his Afghan interpreter after an argument, and instead of reporting the incident and surrendering the contractor to Afghan authorities for an investigation, a "USPI helicopter him out of the province to Kabul, and flew him back to the United States". There is no indication that he has been tried yet, and the PMSC continued to operate in the country. See Fariba Nawa, *The Gunmen of Kabul*, CORPWATCH (Dec. 2007).

⁷⁸⁶ See Afghan Constitution Art. 58 (2004); *see also*, Law on the Structure, Duties and Mandate of the AIHRC, No. 3471, 14 May 2005. Article 23, available at <http://www.aihrc.org.af/en>.

⁷⁸⁷ See UNWGM Report on Afghanistan, *supra* note 132, para. 58.

⁷⁸⁸ *Id.*, ¶ 63.

⁷⁸⁹ UN Guiding Principles, *supra* note 234.

⁷⁹⁰ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* : resolution / adopted by the General Assembly, U.N. Doc. A/RES/60/147 (Mar. 21, 2006), available at: <http://www.refworld.org/docid/4721cb942.html>.

⁷⁹¹ While IHL and IHRL arguably provide a sufficiently adequate regulatory framework for PMSCs, these two areas of international law have differing normative foundations and purposes. Whereas IHRL is a system of actionable rights accorded to individuals, IHL is a system of standards of treatment. As such, IHRL provides direct avenues of redress for victims when their rights have been violated, which is not the case within IHL. There is an ongoing debate as to whether IHL provides individuals direct recourse against States for transgressions of stipulated standards of treatment. This causes some degree of ambiguity for victims seeking redress during times of armed conflict when IHL and IHRL are both applicable. For more, *see* Louise Doswald-Beck and Sylvain Vit , *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94 (1993); Ra l Emilio Vinuesa, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, 1 YBIHL 69 (1998); Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law*, 40 ISRAEL L.R. 310, 312-17 (2007); and RENE PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002).

⁷⁹² See the BPG Principle 25.

⁷⁹³ UN Guiding Principles, *supra* note 234, at 22.

⁷⁹⁴ UN Guiding Principles, *supra* note 234, at 23.

⁷⁹⁵ UN Guiding Principles, *supra* note 234, at 24.

⁷⁹⁶ See also *Necessary Condition: Access to Justice*, UNITED STATES INSTITUTE OF PEACE, USIP <http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice>.

⁷⁹⁷ UN Guiding Principles, *supra* note 234, at 26.

⁷⁹⁸ . PICKUP, ET. AL, *supra* note 560, at 3.

⁷⁹⁹ *Id.*

⁸⁰⁰ See BENJAMIN S. BUCKLAND AND WILLIAM MCDERMOTT, *OMBUDS INSTITUTIONS FOR THE ARMED FORCES: A HANDBOOK* (Geneva: The Geneva Centre for the Democratic Control of Armed Forces, 2012).

⁸⁰¹ MONTREUX DOCUMENT, *supra* note 1, Good Practice 21(d).

⁸⁰² For a discussion of Home State legal obligations, *see, e.g.*, Francesco Francioni, *The Role of the Home State in Ensuring Compliance with Human Rights*, in *WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS* Ch. 5 (Francesco Francioni and Natalino Ronzitti, eds 2011); FRED SCHREIER AND MARINA CAPARINI, *PRIVATISING SECURITY: LAW, PRACTICE AND GOVERNANCE OF PRIVATE MILITARY AND SECURITY COMPANIES* 117 (Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper – No. 6 2004), (hereinafter, SCHREIER & CAPARINI, DCAF PAPER), available at http://www.dcaf.ch/content/download/34919/525055/file/op06_privatising-security.pdf.

⁸⁰³ UN Guiding Principles, *supra* note 234.

⁸⁰⁴ Press Release, UK Foreign & Commonwealth Office, UK first to launch action plan on business and human rights (Sept. 4, 2013) [hereinafter Action Plan Press Release], available at <https://www.gov.uk/government/news/uk-first-to-launch-action-plan-on-business-and-human-rights>.

⁸⁰⁵ U.K. ACTION PLAN, *supra* note 320, pt. 3.

⁸⁰⁶ Action Plan Press Release, *supra* note 720; *id.* (In summary, the U.K. government expects—but does not necessarily require—businesses to: comply with all applicable laws and respect internationally recognized human rights, wherever they operate; seek ways to honor the principles of internationally recognized human rights when faced with conflicting requirements; treat as a legal compliance issue the risk of causing or contributing to gross human rights abuses wherever they operate; adopt appropriate due diligence policies to identify, prevent and mitigate human rights risks, and commit to monitoring and evaluating implementation; consult people who may potentially be affected at all stages of project design and implementation, for example taking into account language and other potential barriers to effective engagement; emphasize the importance of behavior in line with the UN Guiding Principles to their supply chains in the UK and overseas; adopt or participate in effective grievance mechanisms which are transparent, equitable and predictable; be transparent about policies, activities and impacts; and report on human rights issues and risks as appropriate as part of their annual reports).

⁸⁰⁷ U.K. Action Plan, Part 4.

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *Id.* (To promote access to remedies, the U.K. government will: “(i) disseminate lessons from the 2012 experience of the London Organising Committee of the Olympic and Paralympic Games (LOCOG)”, which “developed a process informed by the UNGPs to deal with complaints and grievances related to the application of its Sustainable Sourcing Code by commercial partners, particularly in relation to labour conditions at factories supplying sponsors, licensees and suppliers[;] (ii) task UK Trade and Investment (UKTI) teams in the markets where they operate to advise UK companies on establishing or participating in grievance mechanisms for those potentially affected by their activities and to collaborate with local authorities in situations where further State action is warranted to provide an effective remedy[;] (iii) encourage companies to extend their domestic UK practice of providing effective grievance mechanisms to their overseas operations, adapting them where necessary according to local circumstances and consulting interested parties. This also applies to dispute arbitration/mediation mechanisms through their sector of activity or collective industry organisations[;] (iv) support projects through the FCO Human Rights and Democracy Programme Fund relating to work on remedy procedures in other countries, including: [] help to States wishing to develop their human rights protection mechanisms and reduce barriers to remedy within their jurisdiction; [] support to civil society and trade union efforts to access effective remedy and promote protection of human rights defenders who are actively engaged on issues relating to business and human rights; [] support to business efforts to provide, adopt or participate in effective grievance mechanisms[; and,] (v) keep the UK provision of remedy under review”).

⁸¹⁰ For a critical assessment of the U.K. Action Plan, *see* Press Release, Rights and Accountability in Development, The UK Action Plan on Business and Human Rights will bring little comfort to victims of corporate abuse, (Sept. 4, 2013), *available at* http://raid-uk.org/docs/Press_Releases/PR_UK_Action_Plan_130904.pdf (“The Action Plan is a welcome restatement of the government’s expectations of all business enterprises domiciled in the UK to respect human rights. But the strategy consists of little more than repeating the tired formula of encouraging and providing incentives to business to act more responsibly. Companies operating overseas may do so secure in the knowledge that the Action Plan does not envisage enhanced government oversight or regulation of their conduct, not even when they operate in conflict-prone countries with weak or dysfunctional governments and institutions”).

⁸¹¹ U.K. ACTION PLAN, *supra* note 320, pt.4.

⁸¹² *See, e.g.,* FCO PUBLIC CONSULTATION SUMMARY, *supra* note 40, ¶ 70 (“The Government has carefully considered further arguments offered by respondents in favour of a licensing regime. We remain convinced that such a regime remains impractical and disproportionate. Despite a couple of recent

individual cases, the UK based industry retains a largely favourable reputation and operates to high standards. Considering the global nature of the industry, regulating the UK industry could have little or no effect on non-UK companies and would not prevent international companies being involved in incidents that could call into question the reputation of the UK industry. There is also a risk that legislation would drive the industry offshore. This option would also place an unwarranted strain on a legitimate industry and would be disproportionately costly to small businesses” (emphasis added)); but *see* 2002 GREEN PAPER, *supra* note 39 (recognizing that the risk of PMSCs relocating outside of the U.K. could be minimized: “if the regulatory regime was viewed as fair and reasonable those companies who chose to place themselves outside it by going offshore would be putting themselves on the margins of the sector and their reputations would suffer accordingly” *Id.* ¶ 66).

⁸¹³ U.K. ACTION PLAN, *supra* note 320, Ministerial Forward.

⁸¹⁴ Company Act, 2006, § 414C(7).

⁸¹⁵ Human Rights Act, 1998, c. 42.

⁸¹⁶ *Id.*, § 6.

⁸¹⁷ *See* Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, September 3, 1953, Art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”); *Al-Saadoon and Mufdhi v the United Kingdom* (dec.), no. 61498/08, Mar. 2, 2010 (European Court of Human Rights (Fourth Section), Chambers Decision) (the ECHR was held to apply to detention facilities under the total and exclusive control of the UK); *Al-Skeini and Others v. the United Kingdom* (dec.), no. 55721/07, July 7, 2011 (European Court of Human Rights, Grand Chamber Decision) (where the U.K. assumed authority for the maintenance of security, it was held under Article 1 of the ECHR to have jurisdiction in respect of civilians killed by U.K. soldiers undertaking security operations).

⁸¹⁸ Organization for Economic Cooperation and Dev. (OECD), OECD Guidelines for Multinational Enterprises, 2011 Ed., available at <http://www.oecd.org/daf/inv/mne/>.

⁸¹⁹ *Id.*, at II.I.1.

⁸²⁰ DEP’T. FOR INT’L. DEVELOPMENT (DFID) AND DEPARTMENT FOR BUSINESS INNOVATION & SKILLS (BIS), UK NATIONAL CONTACT POINT PROCEDURES FOR DEALING WITH COMPLAINTS BROUGHT UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (Apr. 28, 2008) (as amended) [hereinafter U.K. NCP COMPLAINT PROCEDURES], available at, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31822/11-1092-uk-ncp-procedures-for-complaints-oecd.pdf.

⁸²¹ *Id.*, 2.3.1.

⁸²² OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: SPECIFIC INSTANCES CONSIDERED BY NATIONAL CONTACT POINTS (Nov. 22, 2011), available at <http://www.oecd.org/investment/mne/33914891.pdf>.

⁸²³ *See* U.K. NCP COMPLAINT PROCEDURES, *supra* note 736; OECD WATCH, CALLING FOR CORPORATE ACCOUNTABILITY: A GUIDE TO THE 2011 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 34 (June 2013), available at http://oecdwatch.org/publications-en/Publication_3962/at_download/fullfile (In brief, the process generally involves three phases. First, the NCP undertakes an initial assessment of a complaint to determine if the complaint merits further examination. Second, if the case merits further examination, the NCP will attempt to mediate a resolution to the complaint with the participation of the complainant and the company. Third, the NCP will issue a “Final Statement” that will include the NCP’s determination of whether a breach of the Guidelines occurred and may include recommendations for the implementation of the Guidelines. Where such recommendations are made, the final step may be the issuance of a “Follow up to Final Statement”).

⁸²⁴ U.K. NCP COMPLAINT PROCEDURES, *supra* note 736.

⁸²⁵ PSC.1 at 9.5.7 (PMSCs are required to “establish procedures to document and address grievances received from internal and external stakeholders”, communicate such procedures “to internal and external stakeholders to facilitate reporting by individuals of potential and actual nonconformances with [the PSC.1 Standard], or violations of international law, local laws, or human rights”, “investigate allegations expeditiously and impartially, with due consideration to confidentiality and restrictions imposed by local law” and establish documented procedures for: (a) Receiving and addressing complaints and grievances; (b) Establishing hierarchical steps for the resolution process; (c) The investigation of the grievances, including procedures to; (1) Cooperate with official external investigation mechanisms; (2) Prevent the intimidation of witnesses or inhibiting the gathering of evidence; and (3) Protect individuals submitting a complaint or grievance in good faith from retaliation. (d) Identification of the root causes; (e) Corrective and preventative actions taken, including disciplinary action commensurate with any infractions; and (f) Communications with appropriate authorities.

⁸²⁶ *Id.*, at 9.4.

⁸²⁷ *Id.*, at 9.4.4.

⁸²⁸ See the section on U.K. due diligence obligations for monitoring PMSC activities, *supra*.

⁸²⁹ Employment Rights Act, 1996, c. 18, § 47B.

⁸³⁰ *Id.*; see also *Whistleblowing, a guide from GOV.UK*, UK Gov’t., available at <https://www.gov.uk/whistleblowing/print> (last updated Nov. 8, 2013).

⁸³¹ *Employment Rights Act 1996*, s. 196(3A).

⁸³² ICOCA ARTICLES OF ASSOCIATION, *supra* note 302, Art. 13.1.

⁸³³ *Id.*, Art. 13.

⁸³⁴ *Id.*, Art. 13.2.7.

⁸³⁵ For a discussion of potential licensing regimes, see 2002 GREEN PAPER, *supra* note 39; DCAF Paper, *supra* note 718.

⁸³⁶ MONTREUX DOCUMENT, *supra* note 1, Good Practice 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”).

⁸³⁷ UN Guiding Principles, *supra* note 234 (“In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be: (a) legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes; (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access; (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation; (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake; (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights; (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms").

⁸³⁸ UK PRIV-WAR REPORT, *supra* note 47, 17.

⁸³⁹ *Id.*, also see FCO PUBLIC CONSULTATION SUMMARY, *supra* note 40, ¶¶ 60-66.

⁸⁴⁰ See, e.g., *id.*, ¶¶ 56-57 ("a robust code of conduct agreed with and monitored by the Government would ensure greater transparency of the industry. A significant aspect of this would be the reporting mechanisms agreed as part of the code. Reporting could be broken down into two broad categories. The Government would require detailed reporting from the trade association/monitoring body into members' compliance with the standards of the code such as on training, recruitment and vetting. The Government would also require reporting from the trade association/monitoring body of any incidents that a member of the association was directly involved in. The code would also require members to provide full reporting of any incident to national or international investigations.... The Government is aware that for the domestic code of conduct to be robust it will be necessary for members to be subject to an audit and inspection regime with „watchdog powers to ensure compliance with the standards set out in the code. Certification/compliance rating scores appear to be a sensible method of measuring/acknowledging compliance. The code would also need an independent capacity/audit function to investigate alleged incidents and draw conclusions on accountability. The code would contain a procedure for confidential „whistle blowing and we would also encourage the trade association/monitoring body to develop close links with associations such as those in Afghanistan and Iraq, to provide further information on the performance of PMSCs 'in country'").

⁸⁴¹ See, e.g., *id.*, at ¶71 ("The Government does not accept the recommendation of the establishment of a full time post of a Government appointed or funded "Inspector-General" responsible for verifications and investigations. The post holder would have no legal powers and this would not be an appropriate use of Government resources. We also believe that the appointing of ombudsmen in conflict zones is both impractical and disproportionately expensive. Our preferred option that the industry and its trade association/monitoring body take primary responsibility for the domestic code of conduct (albeit with a separation of functions, so that its trade promotion activities are separate from its compliance auditing and monitoring/enforcement functions) and that the Government should monitor/review the effectiveness of its implementation, remains the most practical and proportionate solution."); the researchers for this section submitted a freedom of information request on this point, but the request was denied on the basis of the government's policy-making exemption.

⁸⁴² *Id.*

⁸⁴³ *Id.*, at 18.

⁸⁴⁴ *Id.*

⁸⁴⁵ Email from Anonymous Iraqi researcher for NOVACT, to author (Nov. 9, 2013).

⁸⁴⁶ Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at 11, 17.

⁸⁴⁷ *Id.*, at 18.

⁸⁴⁸ "Full Text of Iraqi Constitution," THE ASSOCIATED PRESS (Oct. 12, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450.html> (last visited Nov. 9, 2013).

⁸⁴⁹ Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at 18.

⁸⁵⁰ *Id.*, at 16.

⁸⁵¹ See Article 6 of the Afghan Penal Code (1976): "(2) A person who inflicts a loss as a result of

committing a crime shall be adjudged to compensation of the inflicted loss, too.” Also, article 293: “(1) If as a result of the beating or wound mentioned in article 292 of this Law the person against whom the crime is committed becomes temporarily handicapped or remains unable to work for more than twenty days, the offender shall be sentenced, in addition to compensation for the damage, to medium imprisonment of not less than two years.” And article 473, “if the commitment of the crimes specified under this Chapter [Fraud] inflict a loss upon the person against whom the crimes have been committed, the offender shall be adjudged to compensation.”

⁸⁵² The case of the South African contractor sentenced for murder in 2010 does not seem to have entailed any sort of compensation due to the self-defense nature of the crime.

⁸⁵³ See Roth Nordland, *NATO Contractor is Sentenced to Death in Afghanistan*, N.Y. TIMES, (Jan. 27, 2010), available at http://www.nytimes.com/2010/01/28/world/asia/28australia.html?_r=0; Jeremy Kelly, *Ex-Digger Robert William Langdon Escapes the Death Penalty for Afghan Murder*, THE AUSTRALIAN (Jan. 6, 2011).

⁸⁵⁴ 2008 Procedure for PSCs, *supra* note 138, art. 27.

⁸⁵⁵ See Afghan Constitution, Art. 58 (2004); see also AFGHANISTAN INDEPENDENT HUMAN RIGHTS COMMISSION (AIHRC), <http://www.aihrc.org.af/en>

⁸⁵⁶ UNWGM Report on Afghanistan, *supra* note 132, ¶ 58. Also, AIHRC, VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN AFGHANISTAN: PRACTICES OF CONCERN AND EXAMPLE CASES 5-6 (2007).

⁸⁵⁷ See ISAF SOFA (2002), Annex A, Section 3, article 10; US-Afghanistan (2003), final provision.

⁸⁵⁸ The particular case related to a night raid conducted on the house of an AIHRC staff member. According to the statement provided by the AIHRC, the victims: “were freed and told to report to a nearby international military base to receive damages. On following up their complaint there, however, no apology and only a total of \$100 in compensation was offered. When they rejected this as insufficient the American official present left the room and the remaining Afghan forces threatened the victim that if he proceeded with this complaint he would be “beaten and thrown into jail”. A consequent investigation revealed that the raid was led by American paramilitary operators, who do not fall under the command of NATO/ ISAF or even the American armed forces. Numerous efforts to resolve the issue directly with the American embassy resulted in repeated promises of an investigation and swift action but yielded no clarification of responsibility, apology or redress of any kind.” See AIHRC, “Violations”, 2007, *supra* note 856, at 6.

⁸⁵⁹ United Nations, Reports on the Department of Safety and Security and on the use of private security: Report of the Advisory Committee on Administrative and Budgetary Questions 10-15, U.N. Doc. A /67/624 (Dec. 7, 2012).

⁸⁶⁰ According to Annual Statistical Reports on UN Procurement. For more on UN data, see; Lou Pingeot, ROSA LUXEMBURG STIFTUNG, GLOBAL POLICY FORUM, DANGEROUS PARTNERSHIPS: PRIVATE MILITARY AND SECURITY COMPANIES AND THE UN, (June 2012), available at http://www.globalpolicy.org/images/pdfs/GPF_Dangerous_Partnership_Full_report.pdf.

⁸⁶¹ See e.g., Åse Gilje Østensen, Center for the Democratic Control of Armed Forces, UN Use of Private Military and Security Companies (2011), available at <http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies>; Ian Richards, *The UN Must Stop Outsourcing Peacekeepers*, HUFFINGTON POST (Sept. 9, 2013), available at http://www.huffingtonpost.com/ian-richards/the-un-must-stop-outsourc_b_3874641.html; and U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, WORKING GROUP ON THE USE OF MERCENARIES, SUMMARY REPORT OF THE EXPERT PANEL ON THE USE OF PRIVATE MILITARY AND SECURITY COMPANIES BY THE UNITED NATIONS (July 31, 2013), available at <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/EventSummary.pdf>.

⁸⁶² United Nations Department of Safety and Security, Guidelines on the Use of Armed Security Services from Private Security Companies ¶ F.25.c and d. (Nov. 8, 2012).

⁸⁶³ *Id.*, ¶ F.25.a.

⁸⁶⁴ *Expert Group on Mercenaries Debates Use of Private Military and Security Companies by the United Nations*, U.N. Office of the High Commissioner for Human Rights (July 26, 2013), available at 2013, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13581&LangID=E>.

⁸⁶⁵ DEP'T. OF SAFETY AND SECURITY, GUIDELINES ON THE USE OF ARMED SECURITY SERVICE, paragraph A.3.

⁸⁶⁶ *Id.*, Annex A - Statement of Works, ¶ 2, 9.

⁸⁶⁷ *Id.*, ¶¶ 3-7, 10-16.

⁸⁶⁸ *Id.*, ¶¶ F.25.a-e.

⁸⁶⁹ *Id.*, ¶ 22.

⁸⁷⁰ *Id.*, ¶¶ 42-55.

⁸⁷¹ DEP'T. OF SAFETY AND SECURITY, ¶¶ 27-33, 38-41.

⁸⁷² *Id.*, ¶ 29.

⁸⁷³ *Id.*, ¶ 40, Annex B - Model Contract, 8 November 2012, *Id.* ¶ 4.19.

⁸⁷⁴ *Id.*, Statement of Works, ¶ 27

⁸⁷⁵ The UN's own "Human Rights Due Diligence Policy on UN support to non-UN security forces" (2011), created to ensure due diligence in situations where the UN gives support to non-UN security forces, could provide concepts for such a policy. See RESIDENT COORDINATOR, HUMAN RIGHTS DUE DILIGENCE POLICY ON UN SUPPORT TO NON-UN SECURITY FORCES (HRDDP) ¶ 1 (2011), available at <http://rconline.undg.org/wp-content/uploads/2011/11/2011-HRDDP-Policy.pdf> ("Support by United Nations entities to non-UN security forces must be consistent with the Organization's Purposes and Principles in the Charter and its obligations under international law [...] UN support cannot be provided where there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law").

⁸⁷⁶ The DIRCO 2010-2013 Strategic Plan can be found at <http://www.dfa.gov.za/departments/strategic%20plan%202010-2013/index.htm> (last visited Nov. 17, 2013).

⁸⁷⁷ Interview with Anonymous, DIRCO official (Oct. 8, 2013).

⁸⁷⁸ U.N. Office of the High Commissioner on Human Rights, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination 17 ¶ 69, U.N. Doc. A/HRC/21/43, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/149/12/PDF/G1214912.pdf?OpenElement>.

⁸⁷⁹ *Id.*

⁸⁸⁰ Private Security Industry Regulation Amendment Bill of 2012 § 36A.

⁸⁸¹ DRAFT OF THE SOUTH AFRICAN REVIEW, available at <http://www.info.gov.za/view/DownloadFileAction?id=163572> (last visited Oct. 28, 2013).

⁸⁸² DEP'T OF DEFENCE, REPUBLIC OF SOUTH AFRICA, SOUTH AFRICAN DEFENSE REVIEW: DRAFT DOCUMENT FOR PUBLIC ENGAGEMENT 80 (2012) [hereinafter SOUTH AFRICAN DEFENSE REVIEW].

⁸⁸³ *Id.*, at ¶ 47.

⁸⁸⁴ *Id.*, at ¶ 47(a).

⁸⁸⁵ Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council art. 2, UN Doc. A/HRC/15/25, available at <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf> (last visited Oct. 2, 2013).

⁸⁸⁶ SOUTH AFRICAN DEFENSE REVIEW, *supra* note 789, ¶ 48.

⁸⁸⁷ *Id.*

⁸⁸⁸ Sarah Stillman, *The Invisible Army*, THE NEW YORKER (June 2011), available at http://www.newyorker.com/reporting/2011/06/06/110606fa_fact_stillman (Recruits for the Pentagon's invisible army: more than seventy thousand cooks, cleaners, construction workers, fast-food clerks, electricians, and beauticians from the world's poorest countries who service U.S. military logistics contracts in Iraq and Afghanistan. Filipinos launder soldiers' uniforms, Kenyans truck frozen steaks and inflatable tents, Bosnians repair electrical grids, and Indians provide iced mocha lattes").

⁸⁸⁹ This includes U.S. PMCs that are involved in the peacebuilding process in Liberia and the ongoing United Nations/African Union Mission (UNAMID) in the Darfur region of western Sudan

⁸⁹⁰ South Africa's support, as noted in the South Africa side bar, appears only to exits on paper.

⁸⁹¹ THE PRIVATIZATION OF SECURITY IN AFRICA 3 (John Stremlau, et al., eds. 1999).

⁸⁹² Jeffrey Herbst, *The Regulation of Private Security Forces*, in THE PRIVATIZATION OF SECURITY IN AFRICA 126 (John Sremlau, et la., eds. 1000).

⁸⁹³ RENO WILLIAM, WARLORD POLITICS AND AFRICAN STATES 132 (1998).

⁸⁹⁴ *Id.*, at 79 (Warlord's authority was based on the control of gold, diamond mining, timber and rubber); *id.*, at 99 (breakdown of value of the trade).

⁸⁹⁵ *Id.*, at 138.

⁸⁹⁶ *Id.*, Introduction.

⁸⁹⁷ National Security estimates total employment in the sector at approximately 3,000, while other sources suggest it may be as high as 4,000–5,000. By comparison, the Sierra Leone Police employs 9,300 persons. R. Abrahamsen & M. Williams, SECURITY BEYOND THE STATE: PRIVATE SECURITY IN INTERNATIONAL POLITICS 149 (2011).

⁸⁹⁸ Reno William, *Patronage Politics and the Behavior of Armed Groups*, 9 CIVIL WARS 330 (2007).

⁸⁹⁹ ROBERT D. KAPLAN, THE COMING ANARCHY: SHATTERING THE DREAMS OF THE POST COLD WAR 9 (2001). ("West Africa is reverting to the Africa of the Victorian atlas. It consists now of a series of coastal trading posts, such as Freetown and Conakry, and an interior that, owing to violence, volatility, and disease, is again becoming, as Graham Greene once observed, "blank" and "unexplored").

⁹⁰⁰ WORLD BANK, WORLD DEVELOPMENT INDICATORS ONLINE (WDI) DATABASE, available at: <http://data.worldbank.org/data-catalog/world-development-indicators> (last visited Nov. 20, 2013).

⁹⁰¹ DAVID KEEN, CONFLICT AND COLLUSION IN SIERRA LEONE (2005).

⁹⁰² Cockayne, *supra* note 6 ("in the summer of 2007, IPI, DCAF and the ICRC drafted detailed discussion papers, totaling over 100 pages, drawing together existing practice—of states, private clients and industry associations (...) the most important sources of practice were: national legislation in the United States, UK, South Africa, Iraq, Afghanistan, Angola, Sierra Leone").

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⁹⁰⁴ CECIL GRIFFITHS, GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (DCAF), MAPPING STUDY ON FIGHTER AND SECURITY SECTOR REFORM ACTORS AND ACTIVITIES IN LIBERIA (2011).

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⁹⁰⁶ "[A]security sector review was conducted by the RAND Corporation. This report was seen as the basis for a national dialogue on security-sector reform. Andreas Mehler, Andreas, *Why Security Forces*

Do Not Deliver Security Evidence from Liberia and the Central African Republic, 38 *Armed Forces & Society* 59 (2010); and see DAVID GOMPERT, ET AL., *MAKING LIBERIA SAFE: TRANSFORMATION OF THE NATIONAL SECURITY SECTOR* (2007), available at http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG529.pdf.

⁹⁰⁷ GRIFFITHS, *supra* note 811.

⁹⁰⁸ Alan Bryden, PMSC Regulation: The Way Forward, 35th Round Table on Current Issues of International Humanitarian Law, Sanremo, 6-8 Sept. 2012, available at <http://www.ihl.org/ihl/Documents/Bryden%20San%20Remo%20remarks1.pdf>.

⁹⁰⁹ Panel Event on the Use of Private Military and Security Companies by the United Nations, UN Working Group on Mercenaries (July 31, 2013).

⁹¹⁰ Int'l Crisis Group (ICG), *Liberia: Uneven Progress in Security Sector Reform*, AFRICA REPORT, no.148, at 31 (Jan. 13, 2009), available at: <http://www.crisisgroup.org/~media/Files/africa/westafrica/liberia/Liberia%20Uneven%20Progress%20in%20Security%20Sector%20Reform.pdf>. It adds that: "For three years, Crisis Group has attempted to gain access to the contract defining DynCorp's work in Liberia. Four people who have read it have indicated in interviews that the description of the work is approximately three pages but vague. Another question surrounding State Department contracting of PMCs is the use of indefinite delivery, indefinite quantity (IDIQ) contracts. These contracts, opened for bidding once every five years, gave DynCorp and PAE monopolies for all peacekeeping related work in Africa."

⁹¹¹ *Id.*, at 35. Accessed 22 Jan. 2012

⁹¹² ABRAHMSSEN & WILLIAMS, *supra* note 804, at 148.

⁹¹³ PETER ALBRECHT, SAFERWORLD, MONITORING AND EVALUATION ARRANGEMENTS FOR THE SIERRA LEONE SECURITY SECTOR REFORM PROGRAMME: A CASE STUDY (2009), available at, <http://www.saferworld.org.uk/downloads/pubdocs/SierraLeoneCaseStudy.pdf> p.3.

⁹¹⁴ *Regulating Private Security in Sierra Leone*, 5 *Journal of International Peace Operations*, no. 4, at 30 (2009).

⁹¹⁵ Interview with James Jonah (Oct. 29 2013).

⁹¹⁶ Antony Barnett and Patrick Smith, *British guard firm 'abused scared Iraqi shepherd boy'*, THE GUARDIAN (Nov. 14, 2004), <http://www.theguardian.com/world/2004/nov/14/iraq>.

⁹¹⁷ James Glanz, *Use of contractors added to War's Chaos in Iraq*, N.Y. TIMES (Oct. 23, 2010), http://www.nytimes.com/2010/10/24/world/middleeast/24contractors.html?_r=1&hp.

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⁹²² SARAH K. COTTON ET AL., RAND CORP. HIRED GUNS: VIEWS ABOUT ARMED CONTRACTORS IN OPERATION IRAQI FREEDOM 26 (2010).

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⁹²⁴ UNAMI Report on Human Rights July-Dec, 2007, *supra* note 97, *at* 12; James Glanz, *Security guard Fires from Convoy, Killing Iraqi Driver*, N.Y. Times (Nov. 12, 2007), <http://www.nytimes.com/2007/11/12/world/middleeast/12contractor.html>.

⁹²⁵ UNAMI Report on Human Rights July-Dec, 2007, *supra* note 97, *at* 12; during its visit, the UN Working Group requested information on this [2010] incident and any follow up, but did not receive any information indicating that PMSC employees had been arrested or tried in this case; Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 89, at 18; UN ASSISTANCE MISSION FOR IRAQ, 2010 REPORT ON HUMAN RIGHTS [hereinafter UNAMI 2010 REPORT ON HUMAN RIGHTS] http://www.ohchr.org/Documents/Countries/IQ/UNAMI_HR%20Report_1Aug11_en.pdf (last visited Nov. 12, 2013).

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