



Legislative Guidance Tool for States to Regulate Private Military and Security Companies



Schweizerische Eidgenossenschaft
Confédération suisse
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Federal Department of Foreign Affairs FDFA



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a centre for security,
development and
the rule of law

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List of Acronyms

Civil society organisation	CSO
European Union	EU
Federal Act on Private Security Services Provided Abroad (Switzerland)	PSSA
Geneva Centre for the Democratic Control of Armed Forces	DCAF
International Code of Conduct Association	ICoCA
International Code of Conduct for Private Security Service Providers	ICoC
International Committee of the Red Cross	ICRC
International humanitarian law	IHL
International human rights law	IHRL
International organisation	IO
Ministry of Interior	MoI
Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict	MD
Non-governmental organisation	NGO
North Atlantic Treaty Organisation	NATO
Organisation for Security and Co-operation in Europe	OSCE
Private military and security company	PMSC
Private security company	PSC
Private Security Industry Regulatory Authority (South Africa)	PSIRA
Superintendencia Nacional de Control de Servicios de Seguridad, Armas, Municiones y Explosivos de Uso Civil (Peru)	SUCAMEC
United Nations	UN
Voluntary Principles on Security and Human Rights	VPs
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	WGM

Terminology

Authorisation/license:

For the purposes of this Guidance Tool, this refers to any type of system granting a company the right to operate on the basis that it complies with pre-defined formal and material requirements. Authorisations and licenses are sometimes referred to as permits.

Complex environments:

This tool refers to 'complex environments' to designate any areas experiencing or recovering from unrest or instability, whether due to natural disasters or to armed conflicts within the meaning of IHL, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited or non-existent.

Contracting State:

State that directly contracts services of a PMSC, including, as appropriate, where such a PMSC subcontracts with another PMSC.

Detention/deprivation of liberty:

There are two main types of detention: criminal and non-criminal (e.g. internment for security reasons in armed conflict or administrative detention for a range of reasons outside of armed conflict). Criminal detention is the detention of an individual alleged or found to be guilty of a crime classified in the criminal code and punishable by imprisonment. Internment, or administrative detention, is defined as deprivation of liberty that has been initiated/ordered by the executive branch – not the judiciary – without criminal charges being brought against the individual concerned.

Direct participation in hostilities:

This term means direct participation in combat operations or any action likely to directly harm the military operations or capacity of the enemy or inflict harm to protected persons and objects, in support of one party to the conflict and against the other. In IHL, civilians are afforded protection and may not be attacked, unless and for such time as they take a direct part in hostilities.³

Home State:

State where the PMSC is registered or incorporated; the home State is the State of nationality of a PMSC.

International Code of Conduct for Private Security Service Providers (ICoC):

Drawing on the provisions of the Montreux Document, the ICoC addresses private security companies directly. It requires its signatory companies to 'commit to the responsible provision of Security Services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients'. The ICoC applies primarily to security services delivered in 'complex environments', however, the standards and recommendations are relevant in non-complex-environments. Its governing body, the ICoC Association (ICoCA), is a multi-stakeholder initiative with three equal pillars representing States, PMSCs and civil society organisations. The ICoCA is mandated to promote, govern and oversee the implementation of the ICoC through:

- Certification of Member Companies to ICoC standards;
- Reporting, monitoring and assessing performance of Member Companies' compliance with the ICoC; and
- Handling complaints regarding alleged violations of the ICoC.

International humanitarian law (IHL):

IHL is a branch of international law; which prescribes rules seeking to limit the effects of armed conflict and to protect people who are not or are no longer participating in hostilities. IHL restricts the means and methods of warfare. IHL applies in situations of armed conflict, whether international or non-international, as defined in IHL. IHL is contained in several treaties, including the four Geneva Conventions of 1949 and their Additional Protocols as well as in customary international law.¹

International human rights law (IHRL):

IHRL lays down obligations and duties for States to respect, to protect and to fulfil human rights. IHRL is a set of international rules established by treaty or custom on the basis of which individuals and groups can expect and/or claim certain behaviour or benefits from governments. A series of international human right treaties and other instruments give legal form to human rights.²

Internment (armed conflict):

Deprivation of liberty of a person that has been initiated/ordered by the executive branch – not the judiciary – without criminal charges being brought against the internee. Internment is an exceptional measure of control that may be ordered for imperative security reasons in armed conflict. Internment should not be used in lieu of criminal prosecution in individual cases when criminal process is in fact feasible. Civilian internees should be released as soon as the reasons for their internment cease to exist. See also detention/deprivation of liberty.

Legislation:

For the purposes to this tool, the term legislation will be used to refer to any law, regulation, rule, text or other instrument having force of law or a binding character in domestic contexts.

Mercenary:

A mercenary is defined in international humanitarian law (IHL) as someone who: (1) is especially recruited in order to fight in an armed conflict; (2) in fact takes a direct part in hostilities; (3) is motivated essentially by the desire for private gain; (4) is not a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (5) is not a member of the armed forces of a party to the conflict; and (6) has not been sent by a State which is not a party to the armed conflict on official duty as a member of its armed forces. This definition usually excludes most PMSC personnel.

Private military and security company (PMSC):

“PMSC” encompasses all companies which provide either military or security services or both, irrespective of how they describe themselves. Examples of military services that companies can provide (but are not limited to) include: material and technical support to armed forces, also strategic planning, intelligence, investigation, training activities with military implications, satellite surveillance, or other related activities. Security activities can include (but are not limited to) guarding and protection of persons and objects (whether armed or unarmed) and any kind of training activities with a security application. As these activities are not easily categorized and often overlap, the term “PMSC” is used throughout the Guidance Tool in order to avoid a strict delimitation between private military and security companies. Furthermore, the term is also used for practical purposes as the recommended provisions for lawmakers apply across the security industry spectrum, and apply equally to regulating large international companies as well as small domestic companies

Private security company (PSC):

See PMSC. Some States and international organisations regulate the industry by referring to private security companies without reference to companies who provide military services. Other States have regimes that address PMSCs and PSCs separately. When quoting legislation that refers to “PSCs,” the original terminology is maintained in this Guidance Tool. However, in general terms, this Guidance Tool will use “PMSCs” which incorporates the notion of “PSCs” as companies that provide security services, military services, or both, irrespective of how the companies define themselves.

Registration:

Registration is often included in the authorisation/licencing process, but can also be addressed independently, either before, in parallel, or after the authorisation/licencing process. Registration refers to the mandatory, formal recording of a company and its details into a register held by a public authority.

Territorial State:

State on whose territory PMSCs are operating.

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 (MD):

The MD was adopted by 17 States in 2008 and is the result of a joint initiative launched by Switzerland and the International Committee of the Red Cross (ICRC). It is the first document of international significance to reaffirm the existing obligations of States under international law, in particular IHL and international human rights law (IHRL), relating to the activities of PMSCs. Without adopting a position regarding the legitimacy of PMSCs, the MD recalls existing international legal obligations and offers a set of good practices to guide States to take national measures to implement their obligations. It is not a legally binding treaty and does not create new legal obligations.

Use of force:

Use of force is generally understood as any physical constraint, ranging from physical restraint by hand or with a restraining device, to the use of firearms or weapons. The use of force is traditionally considered the prerogative of public forces (police or military), both at the domestic and at the international levels.

Introduction

1. Objectives of this Guidance Tool

Since the early 1990s, the world has seen a shift in the way that security is provided by state actors. Many traditional public security functions have been contracted out to private military and security companies (PMSCs) within domestic markets and also internationally, where the increased presence of private contractors in armed conflicts has brought them closer to military operations. This shift has created an industry which is estimated to be worth US\$244 billion per year.⁴

Trends indicate that the use of PMSCs is increasing with States, business actors and other organisations, (including humanitarian organisations) contracting private military and security services. PMSCs today also operate in a variety of contexts. They may provide security in other countries, in conflict zones, or in complex and/or high-risk non-conflict zones. But as the outsourcing of security services and logistics continues (e.g. prisoner transport, protection of persons, guarding or surveillance of goods and properties, cash transfer, guarding oil and gas or mining installations, event security, monitoring of offenders or close protection), they also operate increasingly at the domestic level.

Furthermore, some PMSCs have attracted increasing international attention due to allegations of misconduct or human rights abuses and violations of international humanitarian law (IHL) by the company or its personnel. In all these circumstances, there is potential for misconduct and significant adverse human rights impacts by PMSCs. Further, at a national level, many States lack adequate national legal frameworks to address such issues. There is an urgent need for improvements to national regulatory frameworks to ensure PMSCs promote an internal human rights culture and, ultimately, respect human rights principles.

The aims of this Guidance Tool are simple and involve two key objectives:

- To raise awareness of existing national legislation, policies, and best practices;
- To provide guidance for parliamentarians to develop or update national legislation related to PMSCs, in line with international legal obligations and taking into account good practices.

2. Background

As a response to the growing concerns related to lack of regulation of the private security industry, Switzerland and the International Committee of the Red Cross (ICRC) jointly launched in 2006 an international process to create the Montreux Document. The Montreux Document recalls the existing international legal obligations of States in relation to PMSCs in situations of armed conflict. Furthermore, it lists good practices designed to help States take national measures to implement these obligations and encourages national legislators and policymakers to review whether their domestic arrangements for PMSCs conform to international obligations and best practice in this area. This guidance tool draws heavily on the guidance of the Montreux Document and on other leading international frameworks,⁵ and sets out challenges faced by States to adequately regulate PMSC activities, proposing that parliamentarians and lawmakers should consider legislating in this area at the national level. This Guidance Tool offers a blueprint for legislators to create policies and laws which are in line with internationally recognised good practices.

3. Who is the Audience for this Guidance Tool?

This Guidance Tool is aimed at parliamentarians and law and policymakers who undertake to develop new or to update existing laws for national regulation of the private military and security industry. This tool can also be helpful as a reference guide for companies who are looking to inform their procurement practices based on existing international obligations and using internationally recognised good practice. The living examples of national good practices presented throughout the Tool can also be helpful in raising awareness for civil society carrying out monitoring and oversight of companies' activities, to help better understand benchmarks for ethical PMSC operations in the field.

4. Why is this Important for Parliamentarians and Lawmakers?

Parliamentarians and lawmakers are in the unique position to ensure that democratic oversight is established and maintained to achieve transparency and accountability within this burgeoning sector of the security industry. States are obliged to ensure that security actors, including PMSCs, do not breach fundamental human rights or commit abuses of international human rights law (IHRL) in the course of their work. A vital starting point for all States to ensure PMSCs are held accountable for their activities is to develop and implement an effective national legislative framework. This Tool aims to assist parliamentarians and lawmakers to develop or update existing national laws in line with international obligations and good practices.

5. What are the Key Challenges to the Regulation of the PMSC Industry?

As the security landscape continues to change on a global scale, the requirements for effective regulation have also shifted. This raises questions for States, including: which types of military or security functions should be outsourced to private companies? How does the State monitor the activities of PMSCs and how do States respond to abuses of human rights and violations of IHL by PMSCs where they do occur? Who should be monitoring PMSCs and their personnel? How do States deal with PMSCs when human rights abuses and IHL violations do occur and what mechanisms for effective remedies are developed to help victims?

Furthermore, most national laws fail to adequately ensure that legislation extends to PMSCs registered or incorporated in the country but operating abroad. Given that transnational operations of PMSCs are on the rise, this lack of clarity regarding the applicability of national legislation over foreign activities of PMSCs could create accountability vacuums. This can be further complicated when companies are requested to carry out functions

in situations of armed conflict which increase the likelihood that their personnel become involved in direct participation in hostilities. IHL and IHRL, as well as many effective laws, norms and standards already exist to guide States in navigating these difficult questions. However, existing national laws are not always clear on how a State's international human rights obligations apply to and govern the operations of PMSCs. This can contribute to a higher risk of human rights abuses and IHL violations, in particular where limited capacity or other obstacles impede or prevent accountability of companies.

6. How to use this Guidance Tool

This Guidance Tool is comprised of 7 distinct Chapters structured around key challenges for parliamentarians and lawmakers in regulating PMSCs. It proposes recommended content that lawmakers can include into national legislative frameworks. This aims to ensure that legislation is comprehensive and reflects international good practice. These Chapters are as follows:



In order to offer practical guidance to parliamentarians and lawmakers, this Tool gathers common challenges that can arise when States are developing legislative frameworks. These challenges are then analyzed in detail, followed by concrete recommendations and examples of good practice. The good practices are not meant to be prescriptive and it is up to the user of the Tool to evaluate whether they are feasible and appropriate to the local context and specific situation.

There are two ways to use this Tool:

1. If parliamentarians and lawmakers are considering developing new comprehensive legislation, it is advised to move chronologically throughout each Chapter in order from 1 to 7 to assist in the drafting process.
2. When updating national legislation, or when addressing specific issues, users of the Guidance Tool can look to the list of challenges, identify the specific challenges that need to be addressed, and access the relevant Chapters. See below for the complete list of challenges.



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General Provisions Contained in Legislation

WHAT IS IN THIS CHAPTER?

This Chapter is intended to support parliamentarians and lawmakers to include general provisions in legislation that clarify the following:

- The purpose of the PMSC law;
- The scope and application of the PMSC law;
- The key definitions used in the PMSC law.

CHALLENGE 1.1 The stated objective of PMSC legislation often lacks an explicit requirement for companies and their personnel to respect human rights and IHL.

In legislation there are introductory articles that provide an opportunity to explain “why” the specific legislation is needed, while the remainder of the law gives guidance as to “how” to fulfil the stated purposes. These overarching principles set out the framework for the legislation and should be phrased carefully. With regards to legislation of PMSCs, there is insufficient emphasis on human rights and IHL in the introductory articles and overarching principles. A majority of PMSC legislation does not define such general principles or simply refers back to other laws (most often the national constitution), with no specific mention of respect for human rights or IHL. Clarifying the general purposes of the legislation provides an opportunity to place human rights protection and the public good –as opposed to commercial benefit– as a core objective of the legislation. Furthermore, recalling the general applicability of IHL is important, particularly when PMSCs operate in situations of armed conflict and where personnel are likely to carry out military activities that may lead them to become involved in direct participation in hostilities.

RECOMMENDATIONS

- Explicitly state that a purpose of the law is to require PMSCs and their personnel to respect human rights and for PMSC personnel to respect IHL.
- Reiterate in the legislation's guiding principles that the State retains its responsibilities under international law instead of referring to other legislation that may generally include these principles.

EXAMPLES OF GOOD PRACTICE

- Peru's new decree regulating private security service lists respect for human rights, complementarity and coordination with the police, non-interference with military activities and transparency as underlying principles of the law.⁶
- In the preamble of its act on the “Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict”, South Africa⁷ provides that the regulation is necessary “in the interest of promoting and protecting human rights and fundamental freedoms.”
- El Salvador's legislation on private security services refers in its preamble to the 1992 Chapultepec Peace Agreements⁸ and states that the activities of private security providers must adhere to the rule of law and strictly respect human rights.⁹
- The preamble of Guatemala's legislation on private security agencies provides that the legislation should “benefit human rights, personal and collective rights to security.” It furthermore instructs private security provider to respect the Constitution, international human rights treaties and other legislation.¹⁰
- Switzerland's Federal Act on Private Security Services provided Abroad (PSSA) is one of the few pieces of legislation to explicitly include IHL in its objectives: one of the stated aims of the law is to contribute to compliance with international law, in particular with human rights and IHL.¹¹

CHALLENGE 1.2 Unclear or inadequate definition of the extraterritorial application of legislation can result in a lack of accountability for PMSCs' activities abroad.

When determining the scope of PMSC legislation, the extraterritorial application of legislation is often left out or inadequately drafted. This lack of clarity regarding the applicability of legislation over PMSCs operating abroad and their personnel can result in an accountability vacuum.¹² Many countries have adopted extensive legislation on PMSCs, including detailed rules on the use of force and firearms, but they remain primarily aimed at the domestic private security industry. The applicability of national law is less clear when companies are operating abroad. For example, Home States have laws that apply to companies based on their territory. However, these laws are often vague when it comes to the operations of that company abroad. In fact, this is a challenge for all States since a PMSC may be registered in one State (Home State), contracted by another (Contracting State) to carry out activities in a third State (Territorial State). As a consequence, the extraterritorial application of the legislation is of particular importance for Home States in order to hold accountable PMSCs operating in armed conflict where the rule of law may be weak, and where the local population is particularly vulnerable.

RECOMMENDATIONS

- PMSC-relevant legislation should specify that PMSCs' operations abroad fall under their jurisdiction, or
- States should adopt specific legislation relating to the activities of PMSCs abroad.

EXAMPLES OF GOOD PRACTICE

- South African legislation of the private security industry focuses on the provision of both internal and external security services. Any act of a PMSC which constitutes an offence under the private security industry regulation and which is committed outside of the national territory by "any security service provider registered or obliged to be registered" is considered to have been committed in South Africa.¹³ It also specifies how to determine the jurisdiction of a court to try an offence under this provision.¹⁴
- India prohibits extraterritorial activities of private security companies that have not obtained prior permission from the Controlling Authority, which must first consult the Central Government.¹⁵
- Honduras is one of the few Latin American countries to address extraterritorial activities: its legislation forbids the training of national or foreign staff for the provision of private security services abroad.¹⁶
- In Switzerland, the Federal Act on Private Security Services Provided Abroad (PSSA) which entered into force in September 2015 applies to natural and legal persons that provide private security services abroad or services in connection with private security services provided abroad. Furthermore, it applies to those who establish, base, operate, or manage a PMSC in Switzerland and to those who exercise control from Switzerland over such a company.¹⁷

CHALLENGE 1.3 The lack of a universally accepted definition of private military and security companies can complicate the adoption of legislation.

Several core notions around PMSCs – including the term “PMSC” itself – do not have a universally accepted definition. While a number of international documents such as the Montreux Document, the International Code of conduct for Private Security Providers (ICoC) or the draft Convention developed by the Working Group on Mercenaries¹⁸ propose definitions, these are not entirely consistent with each other.¹⁹ When developing national PMSC laws, it is important for States to take particular care in how they define core terms.

The definition of “PMSC” should not be either too vague or too strict. An overly vague definition would be open to interpretation and could be difficult to enforce. An excessively strict definition would not be able to take into account the fast-changing development of the sector, thereby becoming obsolete and ineffective in regulating PMSCs. A number of States do not include “military” activities in their regulatory framework, and only refer to private security companies (PSCs). Nevertheless, many States and IOs contract services that – depending on the circumstances – could be considered closer to military services, such as logistics support and training.²⁰ Countries with resource constraints also increasingly hire contractors to complement their national armed forces, such as in the maintenance of weapons.²¹ What matters is not how the company labels itself (security or military) but what activities it actually carries out.

RECOMMENDATIONS

- Legislation and policies should adopt the inclusive definition of PMSCs as proposed by the Montreux Document. This definition encompasses companies that provide either military or security services or both.
- The definition used should also clarify what is meant by the wider activities. For instance, “logistics support” or “training” are broad terms and the law should be clear as to what they entail.
- Definitions should be clear and consistent with the rest of the text.

COMPARATIVE OVERVIEW OF EXISTING DEFINITIONS ADOPTED BY INTERNATIONAL INSTRUMENTS:

PMSCS OR PSCS	
Montreux Document	"PMSCs" are private business entities that provide military and/or security services, irrespective of how they describe themselves.
ICoC	Private Security Companies and Private Security Service Providers (collectively "PSCs"): any Company (as defined in this Code) whose business activities include the provision of Security Services either on its own behalf or on behalf of another, irrespective of how such Company describes itself.
WGM Draft Convention (not yet finalised)	Private Military and/or Security Company (PMSC) : refers to a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities.
MILITARY AND/OR SECURITY SERVICES	
Montreux Document	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.
ICoC	Security Services : guarding and protection of persons and objects, such as convoys, facilities, designated sites, property or other places (whether armed or unarmed), or any other activity for which the Personnel of Companies are required to carry or operate a weapon in the performance of their duties.
WGM Draft Convention (not yet finalised)	<p>Military services: refers to specialised 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.</p> <p>Security services: refers to armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities</p>

Permitted and Prohibited Activities

WHAT IS IN THIS CHAPTER?

This Chapter is intended to support parliamentarians and lawmakers to ensure that PMSCs do not undertake activities that might bring their personnel into direct participation in hostilities. Additionally, it is important that PMSCs do not interfere with the important role played by public security. In particular, this section will support parliamentarians and lawmakers to consider the following when drafting legislation:

- Types of activities that should only be undertaken by State forces;
- Situations where the PMSC may be considered as becoming involved in direct participation in hostilities.

CHALLENGE 2.1 Overly strict or excessively vague definitions of permitted and prohibited activities of PMSCs can undermine the effectiveness of the legislation.

When drafting legislation for the private military and security industry, it can be difficult to define the list of permitted services, given the wide range of activities in which such companies can engage and the need to distinguish between different contexts (e.g. situations of armed conflict or post-conflict situations). As a result, many States have provisions in their national laws that are too vague; other States' laws are too prescriptive. A vague definition of the permitted and prohibited activities of PMSCs can lead to inconsistent interpretation or application. On the other hand, a very strict list of permitted or prohibited activities runs the risk of being excessively rigid and becoming quickly outdated as States' security needs change and the private military and security market develops.²² Under IHL, States have an obligation not to contract PMSCs to carry out activities that IHL explicitly assigns to State agents or authorities. These activities include responsibility over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions.²³

To address this challenge, States have taken various approaches to legislation. For instance, the United States has prohibited the contracting of "inherently governmental functions."²⁴ There is no internationally accepted definition of what an "inherently governmental" function is. However, the term usually refers to activities perceived as being directly linked to national sovereignty or to the public interest. In the United States, the term has been further defined by numerous regulatory, statutory and policy provisions, as well as interpreted in court decisions.²⁵ Other States, such as Finland or Denmark, choose to provide a list of the permitted and prohibited activities of PMSCs. The challenge for States is to find the right balance between being adequately specific on one hand, and leaving enough room for the changing needs of the security sector on the other.

It is difficult to offer one "best practice" solution as the most suitable definition will be highly dependent on each State's needs, requirements and the operating environments of PMSCs. To determine the permitted and prohibited activities of PMSCs, States should endeavour to have a comprehensive overview and understanding of the industry, taking into account the services currently and likely to be provided by private security contractors. States should also consider in what contexts these services will be provided before deciding which activities can and cannot be outsourced. In addition to the protection of persons and objects, this may include such services as risk management, training of security forces and security risk advisory functions. States should hold discussions at both parliamentary and national policy levels to clearly identify the services PMSCs should be allowed to provide. States should also participate in the discussions on this topic at the international level. Furthermore, when defining the permitted and prohibited activities of PMSCs, States should take care to minimize the likelihood that PMSC personnel could become involved in direct participation in hostilities in the context of an armed conflict.²⁶

Note to reader: In defining what activities PMSCs can carry out, it is also helpful to refer to Chapter 3 (i.e. Challenge 3.4: effective training of relevant authorities regarding international law obligations) and Chapter 7 (Accountability and Effective Remedies to Victims).

RECOMMENDATIONS

- Hold broad consultations with state security providers, private security industry representatives, and other security actors (such as civil society organisations and other interest groups). On the basis of these consultations, carefully determine and stipulate in the legislation which services and activities PMSCs may or may not provide.
- Communicate effectively the permitted and prohibited activities so that PMSCs understand what services they may and may not provide, while allowing some flexibility to accommodate changes in the private security market.

EXAMPLES OF GOOD PRACTICE

- The United Arab Emirates limits the permitted activities of private security companies to the provision of protective security services, prohibiting them from conducting direct judicial police work.²⁷
- Many countries, particularly in Latin America, include as a general rule in their legislation that private security providers are required to assist the police under certain circumstances. Mexico for example requires private security agencies to cooperate with the authorities in case of emergencies, disasters or any other situation when requested by a competent authority,²⁸ and Cuba provides that private security providers must support the public security forces in addition to the carrying out of their own, independent mandates.²⁹
- The United Kingdom takes another approach: it does not define any permitted or prohibited activities but instead relies on an extensive licensing framework, declaring that it is an offence “to engage in any licensable conduct except under and in accordance with a licence.”³⁰
- South Africa is one of the few States which specifically refers to military activities in legislation. In the “Prohibition of mercenary activities and regulation of certain activities in country of armed conflict act,” South Africa defines “assistance or services” as “any form of military or military-related assistance, service or activity,” but also as “any form of assistance or service to a party to an armed conflict by means of advice or trainings, personnel, financial, logistical, intelligence or operational support, personnel recruitment, medical or para-medical services or procurement of equipment” and “security services.”³¹
- Peru’s legislation on private security services sets a “principle of non-interference” as a limit to the permitted activities of PSCs: their activities must not interfere with tasks assigned by law to the national police or to the armed forces. PSCs must also respect the “principle of complementarity and coordination,” establishing private security as complementary to the police function, contributing to the maintenance of public safety as well as requiring private security to collaborate with the police in situations where public security is affected.³²

CHALLENGE 2.2 The responsibility of States to uphold their obligations and responsibilities under international law is often unclear in legislation. States retain this responsibility and in some cases can be held responsible for violations by PMSCs or their personnel.

When defining the permitted and prohibited activities of PMSCs, legislation must additionally pay attention to the fact that a State always retains its obligations and responsibilities under international law, even if it contracts PMSCs to perform certain activities. This means that in some cases, the Contracting State can be held responsible for the conduct of the PMSC it hires. Similarly, the obligation to ensure respect for IHL will remain incumbent on the State. The non-transferable character of some State responsibilities is of particular relevance in situations of occupation; an occupying State has the obligation to exercise vigilance in preventing violations of IHL and abuses of human rights.

RECOMMENDATIONS

- The accountability of all PMSCs and their subcontractors to the contracting State must be made clear to all parties.
- When defining the permitted and prohibited activities of PMSCs, give special consideration to services that could cause PMSC personnel to become involved in direct participation in hostilities in situations of armed conflict.

EXAMPLES OF GOOD PRACTICE

- Switzerland's PSSA prohibits the provision of private security services by companies that fall within the law's scope of application³³ if there is a strong likelihood these will be used in connection with serious violations of human rights.³⁴ As will be addressed in the Challenge 2.3 below, Switzerland is also one of the rare States to explicitly regulate the direct participation in hostilities of PMSCs.
- Additionally, the Swiss PSSA provides that subcontracting of protection tasks is prohibited without the prior consent of the contracting authority. Where a company subcontracts the provision of a security service, it has to ensure that the company performing the service keeps in with the constraint to which the contracting party is subject to.³⁵

CHALLENGE 2.3 In situations of armed conflict, the difference between the direct participation in hostilities by PMSC personnel and other activities may be difficult to determine. Some services provided by PMSCs may amount to direct participation in hostilities by personnel and thereby violate IHL or domestic law.

In situations of armed conflict, the line separating direct participation in hostilities and other activities can be very difficult to define. For example, a PMSC providing protective services to military personnel or other military targets in the context of armed conflict would amount to direct participation in hostilities. On the other hand, the protection of these same persons and objects against crime or violence with no relation to the hostilities would not technically amount to direct participation in hostilities, but would be difficult to distinguish in practice.³⁶ These issues should be considered when contracting with PMSCs.

States have an obligation, within their power to ensure respect for IHL by PMSCs they contract – including with regard to the limits placed on the use of methods by means of warfare. In some cases, the Contracting state can be held responsible for violations of international law committed by PMSCs or their personnel.

Furthermore, certain IHL obligations prohibit States from contracting out certain activities out to PMSC. As mentioned, the overall responsibility for the supervision of prisoner-of-war camps and civilian places of internment must remain with the State. While certain administrative tasks could still be outsourced, it would be unlawful to transfer the overall responsibility for the camp's supervision to a PMSC.

What is the implication of PMSC personnel directly participating in hostilities?

Whether or not PMSC personnel are directly participating in hostilities within an armed conflict has important implications for their status and rights under IHL. In the context of an armed conflict, PMSC personnel are typically regarded as civilians, thus benefiting from the protection afforded to civilians under IHL.³⁷ However, IHL provides that civilians lose their protection from attack if and for such a time as they directly participate in hostilities. Both offensive and defensive acts can constitute direct participation in hostilities and as a consequence, result in loss of civilian protection.³⁸

RECOMMENDATIONS

- When defining the permitted activities of PMSCs, stipulate that PMSCs may not provide those services which IHL requires only States to perform.
- When contracting PMSCs, take into account whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities, and carefully consider whether private contractors are appropriate in this situation.

EXAMPLES OF GOOD PRACTICE

- South Africa's legislation forbids the participation of its nationals in armed conflicts of foreign States.³⁹
- Most PMSC legislation does not address direct participation in hostilities. The Swiss PSSA is one of the few exceptions. Article 8 states that "[it] is prohibited
 - a. to recruit or train personnel in Switzerland for the purpose of direct participation in hostilities abroad;
 - b. to provide personnel, from Switzerland, directly or as an intermediary, for the purpose of direct participation in hostilities abroad;
 - c. to establish, base, operate, or manage, in Switzerland, a company that recruits, trains, or provides personnel, directly or as an intermediary, for the purpose of direct participation in hostilities abroad;
 - d. exercise control, from Switzerland, over a company that recruits, trains, or provides personnel, directly or as an intermediary, for the purpose of direct participation in hostilities abroad.
- Additionally, "persons who are domiciled [...] in Switzerland, and are in the service of a company that is subject to the Act shall be prohibited from directly participating in hostilities abroad."⁴⁰

CHALLENGE 2.4 The distinction between mercenaries and PMSC personnel is not always well understood.

Distinguishing PMSCs from mercenaries is a common issue raised by many States. The most challenging questions arise when addressing what "military" activities PMSCs may or may not provide – it is frequently unclear how these types of services are different from classic "mercenary" activities.

What is a mercenary?

Article 47 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), 8 June 1977 States that:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - a. is specially recruited locally or abroad in order to fight in an armed conflict;
 - b. does, in fact, take a direct part in the hostilities;
 - c. is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - d. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - e. is not a member of the armed forces of a Party to the conflict; and
 - f. has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The UN Convention Against the Recruitment, Use, Financing and Training of Mercenaries (1989) and the Organisation of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa (1977) also address the issue of mercenaries. These Conventions prohibit the use of mercenaries.

The definition of mercenaries under IHL excludes most PMSC personnel, most of whom are not contracted to fight in military operations and many of whom are nationals of one of the parties to the conflict. Moreover, it is

difficult to prove the motivation of private gain. Lastly, while some contractors are reportedly very highly paid, it would be very difficult to verify if they receive a substantially higher wage than soldiers.

While Additional Protocol I to the Geneva Conventions and other instruments⁴¹ provide definitions for mercenaries, their complexity and subjective character make them difficult to apply in practice. Thus, when determining prohibited and permitted activities, rather than prohibiting “mercenary” activities, a more pragmatic approach would be to prohibit the provision of certain services, such as the direct participation in hostilities within the context of an armed conflict, by all commercial non-State actors including PMSCs.

It is important to note that national laws which address mercenaries are not sufficiently relevant to address the issue of PMSCs.

RECOMMENDATIONS

- Prohibit commercial actors, including PMSC personnel, from directly participating in hostilities within the context of an armed conflict.

EXAMPLES OF GOOD PRACTICE

- In parallel to its private security industry regulation⁴², South Africa dedicated a specific piece of legislation to addressing the prohibition of mercenary activities as well as certain activities in countries of armed conflict.⁴³ This legislation defines and prohibits “mercenary activity,” but also addresses the prohibition of other related activities, such as the enlistment of South Africans in foreign armed forces.⁴⁴

CHALLENGE 2.5 In some situations, the distinction between the functions of PMSCs and those of the police and/or the armed forces can be blurred and can create confusion over division of roles and responsibilities, potentially leading to the inappropriate use of coercive force by PMSCs.

The roles of PMSCs and those of the public security and military personnel can be similar, either complementary or overlapping. The similar nature of their functions can cause confusion over roles and responsibilities, with PMSCs sometimes exercising authority and/or use of coercive force traditionally reserved for public security and military actors. Clarity in the definition of roles and responsibilities between public and private security providers is particularly important when it comes to the use of force, apprehension and detention.

In some countries, State security and military personnel work for PMSCs when off-duty. This may further increase the confusion over roles and responsibilities. It may be difficult for the public to differentiate between private and public security forces. Problems can also arise when police officers “switch” to work for a PMSC while off-duty, and then fail to limit their use of force and use of certain weapons to what is appropriate for a private contractor. To deal with this issue, some States choose to prohibit active and former law enforcement and military officials from working in PMSCs. This helps to avoid confusion as to roles and rules of engagement when carrying out official duties and in some States has also been implemented as a measure to reduce corruption.

RECOMMENDATIONS

- Distinguish in the law that there is a difference between public security and military functions and those of PMSCs (this will be helped by developing clear provisions on prohibited and permitted activities as set out above in response to Challenge 2.1 of this Chapter).
- Require a clear physical distinction between private and public actors, as well as identification at all times to avoid confusion of the public (approved and distinguishable uniforms, ID cards).
- Set rules regarding the participation of active or former law enforcement or military officials in PMSCs. Provide for clear conditions and restrictions such as requiring a letter of consent/formal authorisation from public security and military institutions stating the particular individual is allowed to work for a PMSC.
- Require that off-duty public officers not use their publically-issued weapons, firearms or ammunitions in the course of performing PMSC services.
- Consider barring active duty public security/military personnel from working for a PMSC.

EXAMPLES OF GOOD PRACTICE

- Many countries have adopted legislation requiring private security providers to wear uniforms that can be easily differentiated from those of the army and the police: for example, this is the case in China⁴⁵ and in the United Arab Emirates.⁴⁶
- Panama forbids members of the Police forces and of the Judiciary Police to assume any function or to play any role in a private security agency.⁴⁷
- Mexico's legislation on private security companies also states that active members of any public institution or of the armed forces are forbidden to have any role, either in the management, in the administration or as operational personnel of a private security company. The same also applies to anyone who has been dismissed by any public institution or the armed forces for disciplinary infractions or corruption, or who has been sentenced for a premeditated crime.⁴⁸
- Guatemala not only forbids active members of the police and the armed forces from having any role in private security companies, but also extends the prohibition to the ministries in charge of security and any other institution involved in security.⁴⁹ Additionally, these persons must wait 4 years after leaving the public security position before being involved with a PSC.⁵⁰
- Some countries, such as for example Burkina Faso⁵¹ require private security companies to clearly state their private character to avoid confusion between their activities and public security.
- In Peru, the regulation on private security services expressly prohibits hiring or training mercenaries or personnel engaged in activities in the same or similar nature. This prohibition seeks to avoid the violation of treaties and applicable international agreements. Additionally, the legislation adopted the definition of mercenary from the Article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.⁵²

Authority Responsible for the PMSC Industry

WHAT IS IN THIS CHAPTER?

This Chapter is intended to support parliamentarians and lawmakers in the establishment and development of an adequate agency or authority that has the mandate and capacity to control and oversee the PMSC industry. In particular, this section recommends the necessary elements for the effective functioning of such an office/agency/authority. Additionally, the Chapter addresses how the authority can effectively perform the role of a monitoring mechanism.

CHALLENGE 3.1 Monitoring mechanisms are often weak, not carried out in a systematic manner or nonexistent.

Contracting out security activities to PMSCs can reduce direct control over aspects of the security sector by government actors.⁵³ Systematic and institutionalised monitoring mechanisms can help compensate for this loss of control.

An effective monitoring mechanism is crucial to:

- Ensure the compliance of PMSCs' activities with the legislation, in particular with IHL and human rights;
- Provide reliable, up-to-date, and consolidated information on PMSC activities (this information is ideally kept in a national register, see Challenge 2.3);
- Keep pace with the growth and evolution of the private military and security industry.

Most countries' national legislation on PMSCs includes some monitoring or at least reporting requirements. But those entities charged with carrying out monitoring are rarely given enough powers and/or resources to allow for sufficient and systematic monitoring. Very few monitoring mechanisms allow the designated authority to inspect the premises of the PMSC – for example to inspect the storage conditions of weapons and firearms.

RECOMMENDATIONS

- Create a designated PMSC Authority, specifically tasked with and designed for the regulation, oversight and monitoring of the PMSC sector.
- Establish systematic, diligent and institutionalised monitoring mechanisms within the PMSC Authority.
- Ensure the legislation contains an obligation that the company reports regularly to the Authority. The report should, at the very least, include the following information:
 - ◆ Personnel data (including records of past conduct of personnel and of the company in general);
 - ◆ Equipment, weapons and firearms (including if weapons were acquired lawfully and information of their storage and transfer);
 - ◆ Incident reporting. Serious incidents should be reported immediately to the Authority;
- Current activities being carried out by the PMSC.
- Give the Authority the power and capacity to carry out inspections, including access to the company's premises and inspection of documents;
- Require that PMSCs join the International Code of Conduct Association or another globally recognised multi-stakeholder association. Where appropriate, national law should require membership in good standing with the ICoCA as a condition of registering and doing business in the State and/or contracting with the State. Due to the jurisdictional gaps that arise in a transnational industry, the ICoCA plays a complementary role to the national regulatory Authority. The ICoCA can assist in providing oversight of the industry, particularly of PSCs operating extraterritorially.

EXAMPLES OF GOOD PRACTICE

- China established a public system for the supervision and the administration of security and guarding companies and granted it substantial powers of control over PMSCs.⁵⁴
- The United Arab Emirates legislation on PMSCs empowers a 'Competent Authority' to handle, supervise and follow-up the work of PMSCs⁵⁵ and allows it to access company records and to conduct audits at any time.⁵⁶
- Cameroonian legislation provides that PMSCs are subject to oversight by the Competent Authority; including comprehensive monitoring and inspection.⁵⁷
- Under the Swiss law, private security companies are required to become members of the International Code of Conduct Association which oversees and monitors companies operating abroad.⁵⁸
- PMSCs have a duty to cooperate under the Swiss PSSA law; they must provide the Competent Authority all required information and documents.⁵⁹ Failure to do so may result in unannounced on-site inspections, examinations of documents and seizure of material.⁶⁰
- The Peruvian legislation on private security services empowers the regulatory agency to oversight and follow-up the work of companies and agents, including monitoring and inspection at any time.⁶¹

COUNTRY CASE STUDY : South Africa's PSIRA

South Africa's private security industry is the largest on the continent and as a result, the regulatory framework is one of the most comprehensive of Africa.⁶² Its primary regulatory body is the Private Security Industry Regulatory Authority (PSIRA), which oversees the licensing and monitoring framework and is granted with broad and detailed inspection powers. The PSIRA is responsible for applications for licenses as well as for monitoring compliance with the Private Security Industry Regulation Act.⁶³

The mission of the PSIRA is to "protect the constitutional rights of all people to life, safety and dignity through the effective promotion and regulation of the private security industry."⁶⁴ Its mandate includes the following objectives:

- Promote a private security industry which acts in terms of the principles contained in the Constitution and other applicable laws and which is characterised by professionalism, transparency, accountability, equity and accessibility;
- Conduct an on-going study and investigation of the rendering of security services and practices of security service providers;
- Institute legal proceedings against transgressors of the security standards;
- Receive and consider applications for registration and renewal of registration as security service provider;
- Develop and maintain a computerised database to store information concerning the industry.⁶⁵

CHALLENGE 3.2 The absence of a specific national regulatory authority may undermine compliance with relevant law.

CHALLENGE 3.3 States may not always have the capacity and resources available to carry out the increasingly complex range of activities required for the effective regulation and monitoring of PMSCs.

CHALLENGE 3.4 If a designated authority exists, the personnel of the authority may not have adequate skills, training and/or resources to carry out their functions effectively.

Not every State has created a specific national regulatory authority responsible for the PMSC sector. Some have instead decided to delegate the responsibility to existing entities, for example to the Ministry of Interior. Further, considering the many challenges presented by this sector and the complex responsibilities it entails, there is a risk that an existing institution with numerous other mandates and responsibilities will not be able to provide PMSC oversight in an effective manner. The regulation, control and oversight of PMSCs would therefore be better placed with a specific national regulatory authority, tailor-made for this purpose.⁶⁶ In addition, regulatory authorities may not always be sufficiently independent from the State, leading to risks of interference, lack of transparency and corruption.⁶⁷

In other cases, national authorities that were previously established to oversee other bodies of legislation have had the task of overseeing PMSCs added to their mandates. Critics have argued that these kinds of authorities often have multiple responsibilities and infrequent meetings and are likely to result in less effective oversight mechanisms.⁶⁸

In addition, regulatory authorities are not always sufficiently funded, and/or lack the necessary personnel to effectively carry out their mandate. The personnel of a PMSC Authority require very particular expertise and experience to be able to effectively accomplish their oversight responsibilities, including in-depth familiarity with the private security sector, State security needs, and with IHL and human rights law. Failure of the Authority to employ persons with this skill-set can undermine the system's effectiveness.

RECOMMENDATIONS

- Create a newly designated PMSC authority, specially tasked with and designed for the effective regulation, control and monitoring of the PMSC sector.
- To support capacity, take into account regional approaches to monitoring PMSCs. Consider harmonising the system based on regional good practice examples.
- Ensure enough independence is attributed to this authority to prevent risks of political interference and corruption.
- Ensure that the authority is provided with sufficient funding and qualified personnel.

EXAMPLES OF GOOD PRACTICE

- The South African PSIRA appoints inspectors as staff members; these inspectors are obliged to abide by a code of conduct, containing “a set of minimum standards of conduct which is necessary to realize the objects of the Authority.”⁶⁹
- In its legislation introduced in 2015, Peru established the “*Superintendencia Nacional de Control de Servicios de Seguridad, Armas, Municiones y Explosivos de Uso Civil*” (SUCAMEC), a specialised technical body attached to the Ministry of Interior, as the national authority in charge of controlling and regulating PMSCs. It is responsible for the supervision, control and oversight of the sector. SUCAMEC not only grants PMSC authorisations, but is also in charge of regulating and monitoring PMSC’s activities and of setting the training standards for PMSCs. SUCAMEC has the authority to impose administrative measures and sanctions.⁷⁰

Authorisation, Licensing, and Registration of PMSCs

WHAT IS IN THIS CHAPTER?

This Chapter encourages parliamentarians and lawmakers to consider the creation of an authorisation or licensing process as well as a registration process for PMSCs.

CHALLENGE 4.1 Effective oversight of PMSCs is a complex task that should be supported by a comprehensive system; this begins with requiring PMSCs to obtain authorisation/licenses.

The PMSC sector should be overseen by a tailor-made system to ensure that the industry is effectively controlled by the State. Simply incorporating PMSCs into existing state-led security oversight mechanisms constructed around a mostly public military and security sector may not adequately address the particular needs of the expanding PMSC industry.

To this end, States should establish a compulsory authorisation/licensing process for PMSCs based or operating on their territory. Such a process should be adequately resourced, accessible, and adapted to the activities and changing nature of the PMSC industry. As seen in many States, if companies find it difficult or impossible to meet the demands of complex and costly authorisation processes, there is a risk they will move to a regime where the requirements are not so onerous.

RECOMMENDATIONS

- Develop an authorisation system, requiring each PMSC to obtain a specific authorisation/license in order to operate.
- Consider whether licenses should be granted for specific limited and renewable periods and/or for specific services.
- Require membership in good standing with the ICoCA as a prerequisite for obtaining an authorisation or license (or other similar globally recognised multi-stakeholder association).
- Ensure transparency with regards to the granting of authorisations or licenses. This may include public disclosure of authorisation regulation and procedures, publication of overviews of incident reports or complaints, and granting oversight to parliamentary bodies/committees including by providing annual reports.

EXAMPLES OF GOOD PRACTICE

- India's legislation on Private Security Agencies provides that no person shall "carry on or commence the business of private security agency, unless he holds a licence issued under this Act."⁷¹
- The Sri Lankan legislation on Private Security Agencies requires companies providing private security services to register with the Competent Authority before receiving a license to operate.⁷²
- Ecuador provides that private security companies (PSCs) must first register before they can apply for an authorisation to operate, delivered by the Ministry of Interior, designated as the authority for PSC. To obtain such an authorisation, PSCs must submit their internal policies and procedures to the General Department of Labour for approval.⁷³
- South Africa's PSIRA issues public annual reports on the authority's operations; in addition to providing an analysis of the trends in the industry, these reports also include a public disclosure of compliance inspections.
- In Peru, companies providing private security services must have the authorisation of the Regulatory Authority before operating.⁷⁴

CHALLENGE 4.2 Unclear and/or excessively low criteria for the granting of authorisations/licenses to PMSCs can lead to human rights abuses and violations of IHL.

Failure to set clear requirements or setting them too low can undermine the authorisation/licencing process. Considering that the industry could be entrusted with sensitive tasks, which can potentially affect human rights, PMSCs' authorisations to operate should be conditional upon verification that they have met rigorous requirements.

To ensure the highest standards of compliance with IHL and human rights, the authorisation/license should require the following:

1. Companies should maintain records of past conduct of the company and its personnel (see also Challenge 4.4, which addresses this issue as part of formally “registering” a PMSC to operate);
2. Personnel and management should receive adequate training, in particular on IHRL and IHL (see Challenges 6.1 and 6.2); and
3. Companies and personnel should lawfully acquire and use equipment, particularly weapons and firearms (see Challenges 6.3 to 6.5).

RECOMMENDATIONS

- Set clear criteria for a PMSC to obtain an authorisation. At a minimum, companies should provide the following when applying for a authorisation/license:
 - ◆ Records of past conduct – for the company, its management and its personnel;
 - ◆ Personnel and property records;
 - ◆ Mandatory training – in particular in IHL and IHRL, and generally in human rights;
 - ◆ Records of financial and economic reliability;
 - ◆ Records documenting lawful acquisition and use of equipment – including weapons and firearms;
 - ◆ Evidence of safe and healthy working conditions and provisions for the welfare of personnel.
- Membership in good standing in the ICoCA or similar globally recognised multi-stakeholder association which can assist to ensure implementation of these good practices.

Note to States: Legislation should require companies to develop internal policies supporting these good practices. Internal company policies should reinforce the minimum standards in labour conditions and address the welfare of the personnel (see Challenge 6.6) to ensure that minimum international labour standards are being met.

EXAMPLES OF GOOD PRACTICE

- *The Private Security Agencies (Regulation) Act* of India defines clear eligibility criteria, considering in-depth the background of a person applying for a licence,⁷⁵ but also setting out minimum standards for training⁷⁶ and an obligation to provide information to the Controlling Authority, including whether the persons employed are charged with crimes.⁷⁷ The Indian legislation on private security agencies also details eligibility criteria for private security agency personnel (“private security guard”).⁷⁸
- In Guatemala, *The Law Regulating Private Security Services (Act No. 52/2010)* requires that PMC personnel that have previously already worked for a company or institution of the same type (including public security providers or the armed forces) prove they have not been terminated for committing a crime or committing human rights abuses.⁷⁹
- In Peru, companies providing private security services must meet a list of requirements, including to ensure appropriate training of its agents as well as adequate monitoring their work; to maintain infrastructure and equipment for the proper custody and storage of firearms and ammunition for civilian use; and to possess property cards for each firearm that is related to its agents.⁸⁰

CHALLENGE 4.3 Lack of clear conditions for the renewal, suspension or revocation of an authorisation/license can result in a lack of accountability.

Effective authorisation/licensing regimes provide not only an initial assessment of whether a PMSC should be granted a license, but they are also helpful tools for the long-term control of PMSCs.

Authorisations/licenses are conditional upon the fulfilment by PMSCs of the criteria and standards described above (see Challenges 4.1 and 4.2 above). However, without on-going oversight and meaningful sanctions for non-compliance, authorisations run the risk becoming a one-time administrative formality. As a follow-up control mechanism, clear procedures for the suspension or revocation of authorisations/licenses can ensure the efficiency of the process and long-term compliance with the criteria and standards established for obtaining the authorisation/licence. Similarly, as described in Challenge 4.1, authorisations should be limited in time and subject to renewal, in order to ensure regular and systematic oversight of the PMSC's compliance with the criteria and standards.

RECOMMENDATIONS

- Set out conditions and administrative processes for the denial, suspension or revocation of authorisation/license.
- Require membership in good standing with the ICoCA as a prerequisite for renewing an authorisation or license (or other similar globally recognised multi-stakeholder association).
- Provide a fair and transparent appeals process in case of denial, suspension of an authorisation/license.
- Stipulate the limited period of the authorisation/license and define the terms and conditions for renewal.

EXAMPLES OF GOOD PRACTICE

- The legislation in India allows licenses to be granted for a period of five years⁸¹. It can be renewed upon request to the Controlling Authority.⁸² The legislation additionally lists detailed grounds allowing the Controlling Authority to cancel or suspend a license⁸³ and provides for a right to be heard and to appeal possible decisions of the Controlling Authority.⁸⁴
- Peruvian legislation requires that legal persons who provide or develop private security services must obtain an operating license issued by the competent authority, which is not transferable and is valid for five years from the date of its issuance. In addition, this operation authorisation can be successively renewable for the same period.⁸⁵
- Sri Lanka's Competent Authority may deny or revoke authorisation where the company has violated any of its provisions or has conducted his business "in such a manner as is detrimental to the safety of the person or property of the persons who have availed themselves of the services provided by the company."⁸⁶

CHALLENGE 4.4 Lack of a comprehensive centralized registry containing records of PMSCs and their personnel can compromise the transparency of the sector and impede effective monitoring and oversight.

Proper assessment and oversight of PMSCs necessarily requires access to reliable, transparent and comprehensive information. A central database or registry compiling and storing all relevant information gathered by the authority concerning authorised PMSCs is essential for effective oversight and can provide for a simple and powerful monitoring tool.

Such a registry should not only contain basic company information (e.g., financial data, management, authorisations received) but should also include records on personnel (training, firearms licenses, past conduct). If such a registry were made available or partly accessible to the public, it also has the potential to improve public scrutiny and the transparency of the sector.

RECOMMENDATIONS

- Establish mandatory registration of PMSC and personnel records.
- Maintain a national register, compiling updated relevant information about PMSCs operating in the country or exporting their services. The information should include at a minimum:
 - ◆ All PMSCs that have been authorised or licensed;
 - ◆ Records of past conduct, trainings, and firearms licenses of managers and personnel;
 - ◆ Durations and details of contracts;
 - ◆ Registered equipment, including firearms, ammunition and vehicles.

EXAMPLES OF GOOD PRACTICE

- Peru requires that PSCs be registered in the National Register of Data Management (RENEGI), but also provides that a registry of sanctions will be part of the RENEGI. The last four years of records of sanctions will be public.⁸⁷
- In India, private security agencies are obliged to keep a register listing the details of their management, their personnel and their clients. This register may be accessed by the Controlling Authority.⁸⁸
- Sri Lanka requires any private security agency to register before being able to receive a licence to operate⁸⁹; the competent Authority is additionally required to keep and maintain a register of every person registered under the Act.⁹⁰
- Mexico requires the Competent Authority to maintain a national register with the necessary information for “the supervision, control, monitoring and evaluation of private security providers, its personnel, its weapons and equipment.”⁹¹
- In the Gambia, PMSCs are regulated by an office in the Ministry of Interior; the Licensing Authority for Private Security Guard Companies. This authority has the obligation by law to create and to maintain a register of all licenced companies and approved persons.⁹²
- In Asia, countries such as Pakistan, the Philippines and Sri Lanka have adopted legislation that contemplates a security agency register. For instance, the Sri Lankan Private Security Agencies Act states that the Competent Authority must keep and maintain a register of every person registered under this Act.⁹³
- Cameroon requires the competent authority to hold a national register of all private security companies.⁹⁴

COUNTRY CASE STUDY : The “white list of private security guards” of Ecuador

In Ecuador, PMSCs must be registered in a special ledger of the Commercial Registry as legally established entities. Moreover, before receiving an authorisation to operate, they must register in special registries of the Joint Command of the Armed Forces and the General Headquarters of the National Police.

Furthermore, an additional public database has been established within the Ministry of Interior (MOI). This database contains a list of PSC guards with no criminal record and who have agreed to cooperate with the national police upon request. It is known as the “white list of private security guards.” This list contains the names of 10,344 guards out of the estimated 60,000 that exist in Ecuador. To be included in the list, these guards must have undergone certification training through the MOI where they have also received theoretical training, including on human rights, and also practical aspects such as firearms training. After finishing the training series (120 hours), all guards receive MOI accreditation (which includes receiving a certificate of completion and an identification card).

Vetting, Selection, and Contracting of PMSCs

WHAT IS IN THIS CHAPTER?

This Chapter addresses the particular challenges encountered by parliamentarians and lawmakers to regulate the cases where the State is the client of private security services (Contracting State). In particular, this section is intended to support lawmakers in considering the following when drafting legislation:

- The vetting process and selection criteria;
- The regulation of subcontracting;
- Contracts and sanctions for breach of contract.

CHALLENGE 5.1 When States contract PMSCs for particular services, there is often no systematic process for vetting, selection, and contracts. Where such a process is in place, the standards and criteria can be inadequate.

When contracting services to a PMSC, many States use the same procurement criteria that they use for all contractors, which are primarily based on competitive pricing and technical ability. However, because of the nature of the services provided by PMSCs, particularly for companies whose activities may involve the use of force, it is crucial to develop appropriate selection, vetting, training and contracting criteria. Vetting, training and selection processes and the awarding of contracts, if properly constructed and regulated, can be an effective means of ensuring that companies implement the norms and values of IHL and human rights. Furthermore, adequate vetting, training, selection and contracting processes are also important considering that the State retains its responsibilities under international law and may be held accountable for the actions of its contractors (see Challenge 2.2).

Where an efficient and reliable authorisation/licensing system is in place (as per recommendations in Chapter 4), vetting of a PMSC could consist of verification that the company is in compliance with the system. But for States where such an authorisation system is not in place, the vetting of PMSCs could be conducted by an independent oversight mechanism such as the ICoCA. This helps to ensure that contracted companies comply with international standards, in particular in regard to the respect of human rights and international humanitarian law, appropriate training of its personnel and use of weapons and firearms.

RECOMMENDATIONS

- Prior to awarding any PMSC contract, identify the needs and analyse the risks linked to the requested services (such as the need to carry weapons or particular knowledge or training requirements).
- Adopt a specific and systematic vetting process for the selection and contracting of PMSCs.
- Criteria and standards of the vetting process for the selection and contracting of PMSCs should mirror those for the authorisation of a PMSC. At a minimum, the process should include requirements for the following:
 - ◆ Records of past conduct – for the company, its management and its personnel;
 - ◆ Personnel and property records;
 - ◆ Required training – in particular on IHL and human rights;
 - ◆ Records of financial / economic stability;
 - ◆ Documentation of the lawful acquisition and use of equipment – including weapons and firearms;
 - ◆ Requirement that companies develop internal company policies that implement international standards;
 - ◆ Requirement of safe and healthy working conditions for personnel (See, e.g., ICoC Art 64).
- A model contract could also be attached to the legislation as a template to be used for contracting with PMSCs. The model contract should contain clauses requiring compliance with relevant norms of international humanitarian and human rights law, as well as conditions which reflect the basic criteria required of PMSC as part of the authorisation/licensing process.

EXAMPLES OF GOOD PRACTICE

- The Government of the United Kingdom has a robust PSC procurement policy. Each PSC is required to fill out a pre-qualification questionnaire; selection criteria include professional training of personnel and all contracts must include clauses for the termination of the contract in case of human rights violations.⁹⁵
- Before contracting with a company, the Swiss law obliges the Competent Authority to make sure that the company fulfils a list of requirements in the following areas:
 - » Recruitment, training and oversight of the personnel;
 - » Reputation of the company, attested to not only by its membership in good standing in the ICoCA but also by its experience in the field, references and other association memberships;
 - » Company solvency;
 - » Adequate internal control system, including effective disciplinary measures;
 - » Authorisation to carry out activities under the applicable law;
 - » Appropriate liability insurance.⁹⁶
- The Swiss Federal Department of Foreign Affairs also provides a model contract for PMSCs operating abroad.⁹⁷
- Peru requires any natural or legal person hiring private security services to verify in the national register that the company possesses a valid authorisation. Those contracting with non-authorised PMSCs may be sanctioned. Additionally, those contracting with non-authorised PMSCs will be directly liable if the contracted services result in violation of the rights of third-parties.⁹⁸

CHALLENGE 5.2 The subcontracting by a PMSC of some of its activities can undermine effective State oversight.

Subcontracting is considered common practice in many industries, and is also frequently used in the PMSC industry. When a PMSC subcontracts out some of its activities, the relation between the first contracting party (i.e. the State) and the entity that is actually operating on the ground (the subcontractor) becomes less direct, and can compromise effective State oversight. This is especially problematic when military or security services are subcontracted. To avoid losing its ability to effectively monitor and oversee the activities of PMSCs, including their subcontractors, the State needs to set requirements and conditions for subcontracting.

RECOMMENDATIONS

- Define which activities may and may not be subcontracted.
- Define under what conditions subcontracting is allowed. At the very least, notice of subcontracting should be given to the State and subcontracting should also be subject to State authorisation/license.
- Stipulate that responsibility for adhering to the terms of the contract regardless of subcontracting rests with the primary contractor.

EXAMPLES OF GOOD PRACTICE

- The Swiss law provides that where a PMSC subcontracts the provision of a security service, it has to ensure that the subcontractor operates in compliance with the law.⁹⁹ Where the State contracts protection tasks, subcontracting is conditional to the written consent of the contracting authority.¹⁰⁰

CHALLENGE 5.3 Contracts often lack comprehensive clauses requiring compliance with IHL and human rights standards.

The increasing use of PMSCs challenges traditional national and international legal frameworks, leaving some ambiguity as to the applicability of certain public law commitments to private contractors. The Montreux Document is one example of an initiative that was developed to clarify and reinforce existing State obligations under international law, encouraging States to fill regulatory gaps presented in national laws. However, where additional legislation is insufficient, the contracts themselves can offer a solution to fill regulatory gaps,¹⁰¹ and they are a powerful tool to reinforce the standards that States wish companies to comply with. To this end, it is important that PMSC contracts include comprehensive clauses imposing compliance with human rights standards and IHL.

RECOMMENDATIONS

- When drafting a contract, include a clause imposing compliance with IHL and human rights law.
- Include in the contract the obligation to fulfil the criteria and standards listed as conditions for the vetting and authorisation/licensing processes (see Challenge 2.3).

EXAMPLES OF GOOD PRACTICE

- The USA Federal Acquisition Regulations requires the insertion of contractual clauses prohibiting child labour. The recommended clause states that “To enforce the laws prohibiting the manufacture or importation of products mined, produced, or manufactured by forced or indentured child labour, authorised officials may need to conduct investigations to determine whether forced or indentured child labour was used to mine, produce, or manufacture any product furnished under this contract.”¹⁰²
- Swiss legislation on PMSCs states that the contract must “require the company in particular to:
 - » Provide information on progress with the performance of the contract if the contracting authority so requests;
 - » Disclose the identity of the personnel deployed to the contracting authority;
 - » Prepare a report for submission to the contracting authority;
 - » Immediately replace any personnel who do not have the required skills or who adversely affect the performance of the contract;
 - » Immediately report to the contracting authority any circumstances that could adversely affect the performance of the contract;
 - » Immediately report to the contracting authority any incidents in which personnel have used force or police measures or have acted in self-defence or in a situation of necessity;
 - » Immediately report to the contracting authority if the requirements for the company or for training are no longer being met;
 - » Obtain the prior written consent of the contracting authority before the contractual delegation of protection tasks.”¹⁰³

CHALLENGE 5.4 Sanctions for breach of contract may not be included in contracts. Where they do exist, sanctions may be unclear or inadequately enforced.

As already discussed above, contracts can be a powerful tool to require PMSCs to respect IHL and IHRL. Contract obligations can therefore be used to fill accountability gaps. However, both legislative frameworks and contracts often fail to provide for adequate sanctions for breach of contract. Even where sanctions are provided for by the contract, the State should have adequate enforcement mechanisms in place, including monitoring and oversight. To be effective, these mechanisms should include sufficient and adequately trained personnel to monitor contracts.

RECOMMENDATIONS

- Provide for sanctions both in legislation and in the contract for breach of contract. A system of graduated sanctions can be put in place to respond to less severe violations.
- Provide for proper mechanisms to enforce the sanctions, including regular monitoring and oversight.
- Make sure to provide for sufficient and adequately trained personnel. This responsibility can fall upon the Competent Authority (see Chapter 3).

EXAMPLES OF GOOD PRACTICE

- According to Peru's new decree regulating private security service, anyone who contracts a non-authorised PMSC will be held responsible for any violation of the rights of third parties that result from the contracted services.¹⁰⁴
- In Switzerland, contracts between PMSCs and the federal Government must include provision for contractual penalties in the event of non-fulfilment.¹⁰⁵ Additionally, the contracting authority must provide the head of security of its department and the Federal Department of Foreign Affairs with a copy of the contract and inform them of any problem related to its performance.¹⁰⁶

Obligations of PMSCs and their Personnel

WHAT IS IN THIS CHAPTER?

This Chapter is intended to support parliamentarians and lawmakers to include minimum standards in legislation regarding the obligations of PMSCs and their personnel to avoid inappropriate or harmful behaviour. In particular, three different aspects are addressed in this section:

- The training of the personnel;
- The equipment of PMSCs, including weapons and firearms;
- The obligations of PMSCs towards their personnel.

CHALLENGE 6.1 PMSC managers and personnel may lack adequate training and practical knowledge of the application of IHL and human rights.

CHALLENGE 6.2 PMSCs managers and personnel may lack knowledge of the cultures, traditions and values of the local communities in which they are operating.

As the roles and tasks of PMSCs are becoming increasingly complex, certain activities of PMSC personnel have the potential to violate IHL and commit abuses of human rights. For instance, the risk of human rights abuse increases when PMSCs are hired/contracted to perform services such as interrogation services or security services involving the use of force. The range of activities carried out by PMSCs is very broad, where each particular type of activity – be it activities such as transferring cash, guarding sporting events or providing close protection to humanitarian workers in armed conflict or disaster settings – calls for specific training and knowledge. The lack of both general training which encompasses basic knowledge and skills for all PMSCs managers and personnel, as well as of specific training for each different type of activity and operational context can result in irresponsible behaviour that could translate to serious human rights abuses and violations of IHL.

Considering how important it is for PMSC managers and personnel to be trained effectively, it is strongly recommended that oversight of private security personnel training should be defined and controlled by an appropriate authority that determines the specific training requirements. Training should be carried out in a systematic manner and coordinated at the national level to ensure all PMSC personnel benefit from adequate and relevant training. Training should also be adapted to the specific context within which the PMSC operates. In some circumstances, a lack of knowledge of the cultures, traditions and values of local communities where a company is operating can lead to inappropriate behaviour and increase the potential for conflict and possible human rights abuses or violations of IHL by PMSC personnel.

RECOMMENDATIONS

- Ensure that legislation includes requirements for mandatory human rights and IHL training tailored for both managers and personnel, as a prerequisite for PMSCs gaining authorisations to operate.
- Task a national entity with the design and oversight of mandatory training for PMSC managers and personnel.
- Ensure requirements of regular refresher training in legislation.
- Define mandatory additional training for specific activities carried out by PMSCs, in particular those taking place in complex environments and those bringing actors of different cultural backgrounds together. This could include sensitivity or gender training.

EXAMPLES OF GOOD PRACTICE

- In the Philippines, anyone wishing to exercise a private security profession must apply for a license. The legislation defines the requirement for the license, in particular in regard to education and training, differentiating between the different types of professions, such as for example private security guards, security consultants and private detectives.¹⁰⁷
- Mexico's legislation provides an extensive and detailed list of obligations of private security service providers.¹⁰⁸ Among other obligations, private security services must be provided in accordance with the terms and conditions established by the authorisation granted to the provider and no services should be provided without such an authorisation. Moreover, Mexico prohibits private security providers from engaging in or permitting acts of torture, and other cruel, inhuman or degrading treatment.¹⁰⁹
- Mexico's legislation also addresses PMSC personnel members directly, requiring them to respect the terms and condition of the company authorisation, in particular for those carrying weapons.¹¹⁰
- In Hungary, the Ministry of Interior is responsible for the organisation and training of PMSC personnel.¹¹¹
- In Burkina Faso, private security training centres including their training programmes and instructors must be authorised by the ministry in charge of security.¹¹²
- Under the Swiss law, States as contracting parties have the obligation to make sure that the security personnel of the PMSC have received "adequate training, commensurate with the protection task assigned to them and in accordance with applicable international and national law." It further specifies that the following elements must be addressed in training:
 - » Respect for fundamental rights, personal privacy rights, and procedural laws;
 - » The use of physical force and weapons when acting in self-defence or where it is necessary;
 - » Dealing with persons offering resistance or prepared to resort to violence;
 - » Providing first aid;
 - » Assessing health risks of the use of force;
 - » Combating corruption.¹¹³

COUNTRY CASE STUDY : Peru's mandatory Study Plan for PSCs personnel

In Peru, PSCs must ensure that their personnel are trained in accordance with the legislation, which¹¹⁴ has empowered SUCAMEC to establish a mandatory Study Plan for both basic and detailed training of PSC personnel.¹¹⁵ This Study Plan has been established through the detailed directive "for the Basic Formation and the Further Education of Private Security Agents," which aims to improve the quality of private security services. The directive requires that PSC personnel obtain a high level of training, ensuring compliance with national and international regulations.¹¹⁶

All PSCs personnel must obtain an ID card, issued by SUCAMEC; completion of the Study Plan with a minimum grade is one of the conditions for the obtention of the ID Card. The Study Plan includes the following modules:

- Constitution and human rights;
- Legislation and private security;
- Ethics in private security;
- Security standards and procedures;
- Emergency control and security installations;
- Customer care and identification of persons;
- Knowledge and handling of firearms;
- Drafting and preparation of documents;
- First aid;
- Knowledge of alarm systems and communications;
- Self-defence.¹¹⁷

CHALLENGE 6.3 PMSCs may not always have adequate equipment, or may carry inappropriate weapons and firearms.

CHALLENGE 6.4 PMSCs personnel may not always have adequate training in the safe and appropriate use of weapons and firearms which they are permitted to carry in the course of their duties.

CHALLENGE 6.5 PMSCs may not always acquire their weapons and firearms in an appropriate manner, or may not have the capacity to store them in conditions corresponding to adequate security standards.

Appropriate legislation to control the use of equipment, weapons and firearms by PMSCs is essential to avoid abuses. Keeping in mind the importance of distinguishing the functions of PMSCs from those of the police and the armed forces (see Challenge 2.2), use of inappropriate equipment, weapons and firearms can result in violations by PMSCs. Once the State has defined what equipment, weapons and firearms are allowed to be carried for each type of service delivered by PMSCs, proper training in regard to their use needs to be required for PMSC personnel.

Furthermore, particularly where PMSC personnel are allowed to carry weapons and firearms, it is important that their acquisition, storage and use are adequately regulated. Registration of weapons should be monitored in order to help discourage the illegal arms trade. For example, in some States, the rapid growth of PMSCs has led to an increase of weapons in circulation, and these weapons have been subsequently used in criminal actions or being lent to criminals.¹¹⁸

RECOMMENDATIONS

- Define precisely what equipment, weapons and firearms (if any) PMSCs may use.
- Define clear rules regarding the use of force, weapons and firearms.
- Set minimum training requirements for PMSC personnel who are allowed to carry weapons and firearms in the course of their duties. The minimum requirement should at least entail training in regard to:
 - ◆ Technical use of equipment, weapons or firearms;
 - ◆ Situations in which it is permissible to use weapons or firearms;
 - ◆ Specific weapons management training.
- Require companies to obtain specific licenses and permits for the use of weapons and firearms.
- Require each PMSC to keep a register listing all weapons and firearms as well as their status (including acquisition, storage and transfer).
- Require PMSC personnel to store weapons and firearms when not being used.
- Set clear requirements for the acquisition of weapons and firearms and prohibit the illegal acquisition, possession and trafficking in firearms and ammunitions.
- Require mandatory reports of any weapons-related incidents to the national authority.
- Although designed for public security providers, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials¹¹⁹ can provide guidance on management of weapons which may also be useful for PMSCs.¹²⁰

EXAMPLES OF GOOD PRACTICE

- China adopted a specific and detailed legislation limiting the use of firearms by private security company employees and defining the rules of engagement.¹²¹
- Panama requires that each security guard be assigned a specific firearm. This permits tracking of weapons, as each guard is assigned a specific firearm.¹²²
- Peruvian law stipulates that private security companies must develop a curriculum for basic training and areas of specialisation. These trainings are designed to provide the knowledge and skills necessary to staff carrying out activities of private security services in its various forms. Moreover, all firearms, ammunition and related articles possessed by the private security providers, must be stored in safe places in compliance with the requirements of the legislation.¹²³
- In El Salvador, private security companies are obliged to hand over all weapons, ammunition and security equipment in case of labour strikes or other times of work stoppage.¹²⁴ Such restrictions can be good practices, depending on the situation and background of the country, as it can decrease the risk of inappropriate use of weapons in unstable or volatile situations.¹²⁵
- Cameroon also has a similar regulation: weapons are automatically seized if the authorisation of a private security company is revoked and PMSCs are required to deposit their equipment (including weapons) at the regional competent authority in case of a temporary cessation of activity.¹²⁶

CHALLENGE 6.6 If a PMSC does not provide safe and adequate working conditions, this will negatively impact the performance of its employees/personnel.

CHALLENGE 6.7 PMSCs do not always adopt internal company policies reflecting commitment to national standards, IHL and human rights.

The working conditions of PMSCs personnel are of particular importance as PMSCs can operate under working conditions that can be both physically and psychologically demanding, for example employees working long shifts, or those working in complex environments or emergency situations. Under these conditions, it is of particular importance that the company provides the best working conditions possible, including providing safety measures, sufficient time off and suitable equipment. It is more likely that an armed guard working long hours and/or in volatile environments will commit a mistake if not given adequate time to rest.

Furthermore, companies should develop and implement internal company policies that specifically reflect their commitments to respecting national laws and standards, labour policies, as well as IHL and human rights. Internal policies reflect the culture and intentions of the company and show a commitment to ensure a more ethical industry. This is especially important when companies operate in complex environments.

RECOMMENDATIONS

- Ensure that PMSCs respect general national laws and standards (e.g. labour law, immigration law, tax law, etc.), as well as IHL and IHRL imposed upon them by applicable national law.
- Ensure that PMSCs provide adequate working conditions (e.g. working hours, remuneration and holidays).
- Ensure that legislation specifies that the selection and contracting of PMSCs by the State will favour companies which have adopted internal company policies reflecting their commitment to national standards, international humanitarian laws and human rights

EXAMPLES OF GOOD PRACTICE

- In the Philippines, legislation defines minimal criteria concerning the employment conditions of private security employees, including payrolls and mandatory insurance coverage.¹²⁷

Accountability and Effective Remedies to Victims

WHAT IS IN THIS CHAPTER?

This Chapter seeks to help parliamentarians and lawmakers to support effective accountability of PMSCs. In particular, an effective regulatory system should address the following:

- Sanctions for violation of the regulation as corporate liability;
- Accountability gaps related to the transnational character of PMSCs and their activities;
- Remedies to victims.

CHALLENGE 7.1 In complex environments or situations of weak governance, PMSCs may not be held accountable for violating national laws and standards. Sanctions for violations of international law may not exist or are often not enforced.

CHALLENGE 7.2 Criminal and non-criminal corporate liability may not be available.

As discussed previously, State efforts to develop and implement legislation represents the first step to setting standards and principles for PMSCs' activities, and effective monitoring helps to ensure compliance with the legislation. Sanctions to support PMSC accountability are the last step of the process. PMSCs are bound not only by specific PMSC legislation, but also generally by applicable national laws and standards. Because of the sensitivity of the work of the sector, it is particularly important to hold PMSCs accountable to national laws and standards.

It has been observed that even with increased efforts to introduce specialized legislation for the PMSC industry, these efforts are not always effective in practice.¹²⁸ This often occurs as a result of a lack of effective implementation rather than inadequacy of the law itself.¹²⁹

Criminal and civil penalties usually apply to natural persons; corporate responsibility extends the application of penalties to legal persons (i.e. companies). Nevertheless, the rules on corporate liability for actions of PMSCs and/or their personnel and rules on corporate criminal liability for crimes committed by PMSCs and/or their personnel are not always clear or may contain gaps. This lack of clarity or these accountability gaps can allow PMSCs and/or their personnel to evade their responsibility for crimes and misbehaviour.

When a violation of an authorisation/license does not result in effective and systematic sanctions, the likelihood of future compliance is lower and deterrence from future violations or misbehaviour is reduced. Specific criminal and civil sanctions for violations and strong enforcement mechanisms are therefore needed to accompany these sanctions.

RECOMMENDATIONS

- Define appropriate sanctions for violations of national and international law.
- Ensure that PMSCs respect applicable national and international laws and standards as specifically related to labour law, immigration law, and tax law.
- Design an enforcement mechanism with enough power to provide for effective and systematic sanctions. This mechanism is linked closely to the development of an effective monitoring mechanism, as seen in Challenge 3.1 and in the Challenges in Chapter 4, and could include linkages with existing corporate and individual sanction regimes to address criminal and civil accountability mechanisms.
- If required, clarify or implement new rules on corporate civil and criminal responsibility.
- Develop provisions defining clearly and comprehensively the liability of PMSCs and their personnel for any misconduct.
- Require companies to have civil liability insurance for risks related to the activities of the PMSC.
- Put in place a fair appeal system for the company to be able to be heard or to contest the alleged violations and imposed sanctions.

EXAMPLES OF GOOD PRACTICE

- Sri Lanka¹³⁰ and Malaysia's¹³¹ legislation on private security agencies addresses liability of offences committed by a company, attributing liability to the director of the company. Malaysia additionally has established a "general penalty" for contravening the provision of the legislation on Private Agencies.¹³²
- China's legislation on private security companies defines detailed sanctions for offences; it is established that a private security guard's liability can be administrative or criminal, depending on the facts of each case; it further prescribes that the use of firearms by a private security guard in violation of the relevant provision will be punished under the Regulation on Administration of Use of Guns by Full-time Guards and Escorts.¹³³
- In Singapore, it is an offence to fail to inform the licensing officer of the hiring or the termination of a licensed security officer.¹³⁴
- In Guatemala, it is a crime to provide private security services without an authorisation; it is sanctioned with six to twelve years of prison and a fine. Knowingly contracting a non-authorised person or company for the provision of private security services is also a crime, punishable with the same sanctions.¹³⁵
- In Burkina Faso, the law provides that any violation of the specific legislation on private security companies will be sanctioned by either a warning or the suspension or withdrawal of the authorisation – without prejudice to civil or penal sanctions.¹³⁶

CHALLENGE 7.3 The transnational character of some PMSCs or their activities can create accountability gaps.

The fact that many PMSCs operate across international borders increases the possibility of accountability gaps because of a lack of clarity regarding how national legislation applies to foreign activities of PMSCs and their personnel. Challenge 1.2 of this guide addressed gaps and recommendations for the extraterritorial application of legislation. If a national law lacks extraterritorial application, this is problematic for both individual and corporate accountability. Even countries that frequently use PMSC services, including contracting them abroad, are still lacking provisions regulating the extraterritorial activities of PMSCs. Additionally, misconduct of PMSCs often takes place in Territorial States who may not have the capacity to investigate and prosecute foreign nationals or companies because of conflict or other security issues. Accountability mechanisms can be reinforced by the adoption of mutual legal assistance regimes. This will be addressed in more detail in the following challenge.

RECOMMENDATIONS

- As stated in Challenge 1.2, clarify that domestic legislation is applicable abroad. Alternatively, adopt specific legislation relating to the activities of PMSC abroad.
- Specify in the legislation the conditions for exercising national criminal and civil jurisdiction over extraterritorial conduct of PMSCs.
- Status of Forces Agreements should pay special attention to the roles of private contractors; jurisdictional gaps should be actively avoided when agreements are concluded between States.

CHALLENGE 7.4 Insufficient cooperation between States can contribute to lack of accountability for PMSCs operating abroad.

The accountability gaps addressed in the challenge above can be exacerbated by insufficient cooperation between States. As discussed earlier in this handbook (see Challenge 1.2), companies or their personnel might evade liability for misconduct for their activities abroad where their Home State doesn't define clear extraterritorial application of its legislation; where the Territorial State is not willing or able to prosecute foreign companies or nationals; and where the Home State is not able to enforce the law extraterritorially.

These gaps can be solved by cooperation between States, such as mutual legal assistance agreements between Home States and Territorial States. Laws should be developed that spell out clearly under which jurisdiction PMSCs and its personnel are liable for misconduct. Cooperation between States can help to ensure that such laws are enforced. Extradition agreements can also help to ensure that PMSCs and their personnel are held accountable for human rights abuses and violations of IHL.

Additionally, cooperation agreements can also assist States to share relevant information related to the PMSCs' background - such as the vetting processes of a company, and relevant information on instances of past conduct of a PMSC or their personnel, or information acquired during any existing investigations and prosecutions.

RECOMMENDATIONS

- Develop mutual legal assistance programs with Territorial States where nationals or national companies are active, including extradition agreements. More broadly, States can also develop agreements with States of nationality of PMSC personnel.
- Foster cooperation, information sharing and assistance between States.

EXAMPLES OF GOOD PRACTICE

- Mutual legal assistance is addressed in the Swiss law: the Competent Authority can request the foreign authority to provide information and personal data required for the enforcement of the Act, and may disclose such information where the foreign State grants reciprocity, under guarantee that the data will be used in conformity with the Act or, in criminal proceedings, in accordance with the provisions on international mutual legal assistance.¹³⁷

CHALLENGE 7.5 National legislation rarely establishes mechanisms that ensure effective remedies for victims.

The gaps in criminal and non-criminal liability for PMSCs and their personnel can prevent victims from seeking and obtaining justice. Considering the potential for harm from PMSC activities, it is essential that national legislation establishes accessible mechanisms to provide effective remedies to victims. States have an obligation to ensure, within their power, respect for IHL, including by taking appropriate measures to prevent any violations by personnel of PMSCs. Further, States are responsible to implement their obligations under IHL, including by taking appropriate measures to prevent, investigate and provide effective remedies in case of misconduct of PMSCs and their personnel. Other factors can also impede the efficiency of effective remedial mechanisms. The willingness of national prosecutors, potentially linked to question of transparency and corruption, as well as overly long or costly procedures can make it difficult for victims or discourage them from obtaining effective remedies.

With respect to the civil liability of PMSCs, significant accountability gaps can be created by State policies that privilege official government policy related to “national security” or other foreign or military affairs, even when private contractors are involved. In these cases, it is sometimes argued that PMSC contractors are incorporated into the military to an extent where they are deemed to be acting on discretionary official government policy and therefore are granted immunities. In these cases, little remedy is available for victims of human rights abuse.¹³⁸

RECOMMENDATIONS

- Establish mechanisms for remedies to victims that provide at a minimum:¹³⁹
 - ◆ Equal and effective access to justice;
 - ◆ Adequate, effective and prompt reparation for harm suffered;
 - ◆ Access to relevant information concerning violations and remedial mechanisms.
- Ensure the procedure is accessible to victims and not hindered by external factors such as high cost, time or unwillingness of prosecutors.
- Ensure there is a clear separation between the State armed forces and private contractors and actively avoid jurisdictional gaps.

EXAMPLES OF GOOD PRACTICE

- The Philippines requires all private security companies applying for a license to operate to issue a bond by a “competent or reputable surety or fidelity or insurance company”: the bond is meant to cover any legal claim filed against the company.¹⁴⁰

Notes

1. See the complete list at: <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.
2. The main global legal instrument is the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948. Other global treaties include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as treaties on the prevention and punishment of torture and other forms of cruel, inhuman or degrading treatment or punishment, on the elimination of racial discrimination and discrimination against women, or on the rights of the child. See also <https://www.icrc.org/eng/resources/documents/misc/5kzmuy.htm>.
3. See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, 2009, Recommendation V, p. 46, available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.
4. UNODC, *State Regulation concerning Civilian Private Security Services and their Contribution to Crime Prevention and Community Safety*, 2014, p. 2, available at: <https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Ebook0.pdf>, (original source: <http://www.prweb.com/releases/global-security-services/market-analysis-2016/prweb10387295.htm>).
5. International legal instruments specifically addressing PMSCs include, other than the MD, the WGM Draft of a Possible International Convention on PMSCs.

International legal sources of relevance to the use of PMSC, principally in terms of IHL and human rights include the following instruments: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Arms Trade Treaty, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the Geneva Conventions and Additional Protocol I, the Rome Statute of the International Criminal Court as well as Customary International Law.

Regional legal instruments that are also relevant to the use of PMSCs include, among other, the Central American Model Law for Regulating the Services of Private Security Companies, the Organisation of African Unity Convention for the Elimination of Mercenaries in Africa, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the Arab Charter on Human Rights, the Convention for the Protection of Individuals with regards to Automatic Processing of Personal Data and the Convention on the Control of Acquisition and Possession of Firearms by Individuals.

Finally, soft laws instruments of relevance included the following general instruments: the Code of Conduct for Law Enforcement Officials, the UNBPUFF, the UN Guiding Principles of Business and Human Rights, the

OECD Guidelines for Multinational Enterprises and the Standard Minimum Rules for the Treatment of Prisoners, and the following instruments specific to PMSCs: the International Code of Conduct for Private Security Providers, the Sarajevo Code of Conduct for Private Security Companies, the Abu Dhabi draft Preliminary Recommendations on the Oversight and Regulation of Civilian Private Security Services and on their Contribution to Crime Prevention and Community Safety and the *Ligue Internationale des Sociétés de Surveillance* and its Code of Conduct.

6. Peru, *Decree N°1213 Regulating Private Security Services*, 24 September 2015, Art. 3, available at: <http://www.elperuano.com.pe/NormasElperuano/2015/09/24/1291565-3.html>.
7. South Africa, Act n°27 of 2006, *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Country*, 16 November 2011, available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/SouthAfrica2.pdf>.
8. The Chapultepec peace agreements marked the end of 12 years of civil war and recognised the necessity to regulate the activity of all institutions, groups or persons that provide security services or protection to private persons.
9. Salvador, *Law on private security services*, Act No. 227/2000, preamble II, available at: http://psm.du.edu/media/documents/national_regulations/countries/americas/el_salvador/el_salvador_law_on_psc_2000.pdf.
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12. Benjamin S. Buckland & Anna Marie Burdzy, *Progress and Opportunities: Challenges and Recommendations for Montreux Document Participants*, second edition, DCAF, 2015, pp. 23-25.
13. South Africa, *the Private Security Industry Regulation*, Act n°56 of 2001, Section 3.1, available at: http://www.saflii.org/za/legis/consol_act/psira2001451/.
14. *Ibid*, Section 39(2).
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- of violating human rights and impeding the exercise of the right of peoples to self-determination, Comparative analysis of the regulation of private military and security companies in eight Asian countries, p.4.
16. Honduras, *Organic Law Establishing the National Police*, Act No. 67/2008, Art. 140.2, available (Spanish) at: <http://www.tsc.gob.hn/biblioteca/index.php/leyes/62-ley-organica-de-la-policia-nacional-de-honduras>.
 17. Switzerland, *Federal Act on Private Security Services Provided Abroad*, 27 September 2013, Art. 2, available at: https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Bundesgesetz-ueber-die-im-Ausland-erbrachten-privaten-Sicherheitsdienstleistungen-BPS_EN.pdf.
 18. Such as the Montreux Document, the ICoC or the WGM draft convention, see table below.
 19. For example, the Montreux Document's definition of PMSCs (MD, Preface §9.a) includes in the services provided by a PMSC, among others, prisoner detention. However, the WGM draft convention excludes "inherently State functions" from the range of activities that can be carried out by PMSCs (WGM draft convention, Art. 2.i), including "the power of arrest or detention" as "inherently State functions." See also Christine Bakker & Mirko Sossai, (ed.) *Multilevel Regulation of Military and Security Contractors; The Interplay between International, European and Domestic Norms*, Oxford and Portland, Oregon, Hart Publishing, 2012, p. 19.
 20. Laura A. Dickinson, *Outsourcing War and Peace; Preserving Public Values in a World of Privatized Foreign Affairs*, New Haven and London, Yale University Press, 2011, p.4.
 21. *Ibid*, p.4.
 22. For example, in consideration of the expansion of PMSCs in detention center management, intelligence gathering or the operation of weapon systems.
 23. Montreux Document, Part I, Obligation 2, p. 11.
 24. United States, *OMB Circular No. A-76: Performance of Commercial Activities (Revised 2003) (superseded)*, White House Office of Management and Budget, Washington, DC, 1999, Section B (1) (a), available at: https://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/.
 25. Kate M. Manuel, *Definitions of "Inherently Governmental Function" in Federal Procurement Law and Guidance*, Congressional Research Service, 23 December 2014, available at: <https://www.fas.org/sgp/crs/misc/R42325.pdf>.
 26. Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL, ICRC, 2009.
 27. United Arab Emirate, *Federal Law No. 37 of 2006, On Private Security Companies*, Art. 12, available at: [https://www.moi.gov.ae/DataFolder/EN%20Laws%20and%20Regulations/Private%20Security%20Companies/Federal%20Law%20No.%20\(37\)%20of%202006%20On%20Private%20Security%20Companies.pdf](https://www.moi.gov.ae/DataFolder/EN%20Laws%20and%20Regulations/Private%20Security%20Companies/Federal%20Law%20No.%20(37)%20of%202006%20On%20Private%20Security%20Companies.pdf).
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 29. Cuba, *Act No. 186/1998, Governing the Security and Physical Protection System*, Art. 33, available (Spanish) at: http://psm.du.edu/media/documents/national_regulations/countries/americas/cuba/cuba_decree_law_186_1998_on_personal_protection_and_security_systems.pdf.
 30. United Kingdom, *Private Security Industry Act 2001*, 11 May 2001, Art. 3.1, available at: http://www.legislation.gov.uk/ukpga/2001/12/pdfs/ukpga_20010012_en.pdf.
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118. See Solomon Wilson Kirunda, *Private and Public Security in Uganda*, in Sabelo Gumedze (Ed.), *The Private security Sector in Africa, Country Series*, Monograph No. 146, July 2008, available at: <https://www.issafrica.org/chapter-one-private-and-public-security-in-uganda-solomon-wilson-kirunda>.
119. UN Office of the High Commissioner for Human Rights, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>.
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