

POLICY PAPER

on Private Military and Security Companies

CAPACITY GAINED – ACCOUNTABILITY LOST?

ESTABLISHING A BETTER POLITICAL AND REGULATORY FRAMEWORK

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States and international organizations, as well as non-governmental organizations and transnational corporations, employ Private Military and Security Companies (PMSCs) for logistic support and maintenance and for the protection of their facilities and employees in regions of armed conflict. In recent international military and humanitarian interventions, such as in Iraq, Afghanistan and Africa, use of PMSCs has increased exponentially.

Since PMSCs can offer military and security capacities on short notice anywhere in the world, a growing number of governments rely on such firms to fill personnel and capability gaps within their national armed forces. In order to improve their ability to contribute to international operations, states are even prepared to outsource military core functions previously considered ‘inherently governmental’.

Despite these developments, PMSCs continue to be insufficiently regulated. Because PMSCs play an important role in military and humanitarian operations, it is essential that PMSCs act professionally, and that they be held accountable if they do not. Misconduct by PMSCs can put local populations at risk and undermine the acceptance and success of military missions. In addition, the impunity of contractors can cause long-term damage to the reputation of their clients. The authors of this report argue that improved and binding regulations are necessary to ensure an effective and accountable employment of PMSCs.

1. INTRODUCTION: WHY ARE PMSCS A PROBLEM?

The killing of 17 innocent civilians by the Private Military and Security Company (PMSC) Blackwater in Nisour Square in Baghdad in 2007 attracted huge media and political attention. The incident and its aftermath demonstrated the potentially detrimental effects of the use of PMSCs by governments, international organizations and private clients. Not only can PMSCs pose a threat to local populations; their misconduct can also put the success and acceptance of international operations at risk and cause major damage to their clients' reputation.

In 2015 the perpetrators of Nisour Square were finally sentenced by a United States (U.S.) court. However, little has been done to prevent similar incidents from happening in the future. There are few national and international regulations on the PMSC industry, and many PMSCs and their staff are never punished for crimes they commit abroad. At the same time, employment of PMSCs in national and international security has increased significantly.

Today, the private security industry is valued at up to US\$200 billion, and major global companies such as G4S and Securitas expect further growth – a projection that is not unrealistic given that a decreasing number of tasks are considered the sole prerogative of state forces. A growing range of military and security functions are outsourced to PMSCs, not only in the United States but also in Germany and other European nations. Yet, none of these countries has suitable regulation or licensing regimes for PMSCs that are employed abroad. This report argues that, in light of past experience with PMSCs in Afghanistan and Africa, improved and binding industry regulations are essential. It distinguishes between regulations suitable for home states (where PMSCs are registered), clients and contracting states (which hire PMSCs) and host states (where PMSCs operate).

1.1 What Is a PMSC?

The wide variety of assessments of the size, contribution and consequences of the military and security industry can be explained by the fact that there is no one single definition of what PMSC actually means. Many governments distinguish between Private Security Companies (PSCs), i.e. companies which provide security and protective services, and Private Military Companies (PMCs), which provide military support and training.

Contractors that act in “defence of military personnel and other military objectives against enemy attacks” lose their protection as civilians and become themselves legitimate military targets.¹

However, such typologies are problematic. Owing to mergers and acquisitions, many companies offer an extensive range of services. Major international PMSCs not only provide security and protection; they also offer other services, as well as related technologies and support (see Table 1).

Equally misleading is a differentiation between companies on the basis of whether they operate offensively or defensively. For one, this distinction does not exist in international law. Both offensive and defensive military action in conflicts amount to ‘participation in hostilities’. The distinction between offence and defence is also problematic in practice. Companies that protect logistics convoys along the route between Kabul and Kandahar regularly had to fight up to 200 insurgents to push “through the kill zone”.²

¹ Melzer, Nils (2009): Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, Geneva: International Committee of the Red Cross, p. 38.

² See for example (ENEMY ACTION) DIRECT FIRE Report (Small Arms, Rocket propelled grenade) COMPASS FUEL CONVOY J101A : 0 INJ/DAM, 2009-12-05 21:01:00, Wikileaks.

Table 1. A Selection of PMSCs

Company/Group Name (HQ)	Annual Revenue	Employees	Types of Services
G4S (UK)	US\$10.15 billion	632,000	Guarding, access control, consultancy, monitoring, security technologies, prison services, asylum services, police services, security software
Constellis Group (U.S.) (includes Academi, Edinburgh International, the Olive Group, Strategic Social and Triple Canopy)	US\$1 billion	10,000	Guarding, close protection, training, consultancy, military logistics and support, risk management, security technologies, camp construction and life support, communications
Xeless Group (until 2011: TOIFOR, Germany; includes Xeless German Water and TEC-LOG)	Not published	> 5,000	Camp construction, life support, security, communication, maintenance, logistics and transport services, fuel supply

For this reason, 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* (2008), which has been signed by 53 states, as well as by NATO, the European Union (EU) and the OSCE, defines PMSCs as:

private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.³

This definition acknowledges the variety of services provided by the sector. As will be discussed in the next sections, the main differences are not in the companies themselves but in their clients and in the countries in which these companies are employed.

In international interventions, governments, international organizations, non-governmental organizations (NGOs) and reconstruction firms are the primary consumers of PMSC services, with the U.S. government arguably being the largest client. Its military contingents in Iraq and Afghanistan included as many contractors as it did soldiers. However, other countries are catching up. Germany has used PMSCs for transport, logistics, catering, maintenance, repair, laundry, sewage, waste disposal and fuel supplies.⁴ In Afghanistan, the German government also hired 264 local security guards to provide perimeter security for Germany's police training and civilian missions.

The United Kingdom (UK), France, the Netherlands, Sweden, Norway and Poland also turn to PMSCs for support of their interventions. In addition, international organizations such as the United Nations (UN), NATO and the EU have increased their reliance on PMSCs for risk assessments, guarding services, logistics and life support. Even NGOs and private companies hire PMSCs to provide security training for staff and physical protection of premises in contexts of armed conflict.

During the recent interventions in Iraq and Afghanistan, more than 250,000 military and security contractors were involved in the provision of services such as armed protection, military logistics, maintenance and repair, training of local armed and police forces, election monitoring, and reconstruction.

³ www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/voelkerrecht/Montreux-Broschuere_en.pdf.

⁴ Krahmann, Elke, and Friesendorf, Cornelius (2011): *Debatte vertagt? Militär- und Sicherheitsfirmen in deutschen Auslandseinsätzen*, Frankfurt am Main: HSFK.

1.2 Why Contract PMSCs?

States, international organizations, NGOs and businesses contract PMSCs for several reasons:

- **Lack of personnel:** Due to post–Cold War reductions in national armed forces, many governments are unable to provide sufficient numbers of uniformed personnel to sustain international operations. As a consequence, protecting military camps, humanitarian organizations, reconstruction firms and local populations is often considered to be beyond the responsibility of military and peacekeeping contingents and is therefore left to PMSCs.
- **Cost efficiency:** The often-heard argument that commercial contractors are able to operate more cost-efficiently than are soldiers has been another reason for the involvement of PMSCs, even though public investigations into contracting in Iraq and Afghanistan have found evidence of a large-scale waste of taxpayers' money.⁵ A particular problem is 'prime contracting' with a single PMSC that manages a whole chain of local subcontractors, each of which take their cut. Indefinite delivery/ indefinite quantity (IDIQ) contracts are another issue, because they make it easy for PMSCs to overstate their range of services or their expenses.
- **Dependence:** Due to long-term outsourcing, personnel cuts and full-life cycle support contracts for major weapons systems, many armed forces no longer have the expertise to maintain and operate advanced equipment. In particular, armed forces have become dependent on specific PMSC services as a result, whereas even defence manufacturers now find themselves dispatching staff to conflict zones to support international operations.
- **Political costs:** Some governments also use PMSCs in an attempt to reduce the political costs and difficulties associated with military interventions. In most countries, including Germany, governments can hire PMSCs without involving the legislative branch or informing the general public. Executives can expand their political room for manoeuvre by using PMSCs instead of soldiers, whose deployment often has to be approved by national parliaments. In addition, casualties among PMSCs are not met with the same public outcry as are the deaths of soldiers – a major advantage in countries where populations are sceptical about interventions.

2. PROBLEMS INVOLVED IN THE USE OF PMSCS: THREE CASE STUDIES

2.1 Afghanistan

International PMSCs first arrived in Afghanistan along with U.S. and other ISAF forces after 9/11. However, the number of Afghan security firms increased rapidly following the intervention.⁶ In particular, armed PMSCs proliferated after the security situation had begun to deteriorate in 2007. The large presence of armed security contractors became a major concern for the then President, Hamid Karzai, who decreed the abolition of all armed PMSCs in 2010. A state-owned Afghan Public Protection Force (APPF) was supposed to take their place, but the APPF, unable to meet the security demands of international actors, was closed down in 2014. Many PMSCs have continued operating either under exception licences or to carry out non-armed support and training services.

⁵ Commission on Wartime Contracting in Iraq and Afghanistan (2011): *Transforming Wartime Contracting: Controlling Costs, Reducing Risks: Final Report to Congress*, Arlington, VA, p. 5.

⁶ DeWinter-Schmitt, Rebecca (ed.) (2013): *Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices*, pp. 30–31.

Five major problems have affected the use and operation of PMSCs in Afghanistan:

- Armed security contractors have been implicated in violence against civilians and in extrajudicial killings.⁷
- PMSCs have been accused of exploiting and abusing civilians and their own employees, with offences including extortion, protection rackets, kidnapping, human trafficking, theft and looting.⁸
- Afghan security firms have been involved in power struggles between influential clans or local militias and warlords, thus undermining efforts to establish democratic and accountable political structures at national and local levels.
- PMSCs and their employees have frequently been able to evade criminal prosecution in Afghanistan and in their home states.
- Contractor audits have revealed widespread corruption, waste and inefficiency.⁹

The number of private security guards employed by the U.S. military alone increased tenfold from 2,745 in 2008 to 28,686 in 2012.

The root causes of these problems have been closely linked to insufficient transparency, accountability and control by clients, home states, host states and the industry itself. The lack of transparency and competition in contractor selection processes have contributed to PMSCs impunity in Afghanistan, because clients have tended to select contractors on the basis of size, location and connections rather than on the basis of professional standards.

Also, when international clients have employed local PMSCs, they have paid little attention to operational standards or to the companies' possible involvement in local power struggles. International contracts with armed security firms have unwittingly provided clans, warlords and militias with income and influence. Many of the main Afghan companies had such connections. Watan Risk Management, for instance, has been owned by Ahmad Rateb Popal and Rashed Popal, both of whom are relatives of former President Karzai, and NCL Holdings with NCL Security was founded and chaired by Hamed Wardak, the son of former Defence Minister Rahim Wardak.¹⁰

7 UN (2010): Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination: Addendum Mission to Afghanistan: 14 June, A/HRC/15/25/Add.2, p. 24.

8 Ibid., p. 22; Schmeidl, Susanne (2008): Case Study Afghanistan, in: Joras, Ulrike, and Schuster, Adrian (eds.): Private Security Companies and Local Populations, Bern: SwissPeace, pp. 27, 29; Rønnevik, John S. (2012): Who Runs This Town? Private Security Companies and Their Effect on Security Sector Reform in Afghanistan. Master Thesis, University of Bergen, p. 54; House of Representatives (2010): Warlord, Inc.: Extortion and Corruption Along the U.S. Supply Chain in Afghanistan: Report by the Majority Staff, Washington, D.C: Committee on Oversight and Government Reform, p. 3.

9 Commission on Wartime Contracting (2011), pp. 75–80.

10 www.tkg.af/english/reports/political/234-top-leaders-tied-to-security-companies.

SUBCONTRACTORS: A NEGLECTED PROBLEM

Insufficient transparency, accountability and control over PMSCs have also been a consequence of the growing trend among governments, NATO and the EU to outsource contractor selection, management and control by signing prime contracts with large international firms such as KBR, Supreme and Xeless. This practice has resulted in long subcontracting chains because these PMSCs subcontract parts of their work to smaller companies, which in turn subcontract security and other services to local firms. In Afghanistan, suppliers of military and security services have often been three or more levels removed from the actual client. In some cases, this has led to international actors indirectly funding corrupt or criminal PMSCs, warlords and even the Taliban.¹¹

Subcontracting has also contributed to a weakening of political and legal accountability. Some governments and international organizations acknowledge responsibility for subcontractors in principle. However, in practice, oversight has been limited to the first level of subcontracting. In fact, many clients such as NATO and the EU have viewed the limited responsibility offered by prime contracting as one of its advantages. It has enabled governments and international organizations to avoid having to develop or implement their own rules and standards for the hiring and operations of PMSCs beyond the level of the prime contractor. In Afghanistan, subcontracting chains have impeded national and international prosecution as a result of unclear and overlapping jurisdiction and the inability of victims to identify the responsible company or client.

Highly decentralized contractor selection and management practices have contributed to the undermining of information exchange and of sanctions against PMSCs with dubious track records. Within ISAF, PMSCs were variously employed by the armies or air forces of member states, NATO's procurement agency and NATO headquarters. Status of Forces Agreements (SOFAs) between the U.S., ISAF and the Afghan government have failed to assign unambiguous legal responsibility for the prosecution of crimes committed by PMSCs or their staff. Often, clients and home states have themselves been uncertain about their respective responsibilities. Owing to corruption and personal links between Afghan PMSCs and national and local government, few cases in Afghanistan have ever resulted in prosecution.

2.2 DR Congo

PMSCs have worked in the resource-rich but conflict-ridden DR Congo for the UN, NGOs and international extractive corporations. In particular, the UN's peacekeeping missions MONUC (1999–2010) and MONUSCO (since 2010) have contracted a range of services, including unarmed security, transport and vehicle maintenance and repair. Nevertheless, the number of PMSCs licensed to work in the country has been fairly small. The government of the DR Congo has imposed legal restrictions on the use and operations of PMSCs, including prohibitions of armed security guards and companies not registered in the country.

Despite – or perhaps because of – these efforts, the employment of PMSCs by international actors has been affected by several problems:

- Ironically, attempts of the Congolese government to restrict the private security sector have led to limited competition and weak standards because local licensing in the DR Congo is not dependent on professional vetting and training, with the result that international clients must choose from among a small number of locally registered firms that do not always meet international criteria.¹²

¹¹ Committee on Armed Services United States Senate (2010): Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan, 110th Congress, 2nd Session, 28 September 2010.

¹² <http://monusco.unmissions.org/Default.aspx?ctl=Details&tabid=10662&mid=14594&ItemID=21024>.

- The restriction of the Congolese security market to national and regional African firms has also fostered involvement with regional power brokers. One example is the fact that Modest Makabusa has been on the board of KK Security, a security firm that works for MONUSCO. The Makabusa family has close connections to the Rwandan government and to groups that are sponsored by it.
- Due to the prohibition of armed guards, members of the public armed forces and the police have been hired as additional security providers. Such agreements have fed into already existing corruption and abuse in the public sector, with senior staff sometimes keeping the proceeds of the contracting for themselves.¹³

For these reasons, the UN's attempts to improve contracting with PMSCs by means of its new *Guidelines on the Use of Armed Security Services from Private Security Companies* (2012) have been ineffective in the DR Congo. Moreover, the UN's individual agencies and missions, like those of other international organizations such as NATO and the EU, select, hire and manage their own security contractors, thereby undercutting efforts to collectively identify and exclude unprofessional PMSCs from future contracts. In fact, the UN has knowingly hired substandard local PMSCs in order to get permission from host state governments to operate in their countries.

2.3 Chad and Central African Republic

The EU's recent military operations in Chad (2008/09) and in the Central African Republic (CAR) in 2008/09, in 2014/15 and again since 2015 provide further examples of how a lack of transparency, control and competition in the hiring of PMSCs can affect local populations and the effectiveness of international interventions. These EUFOR missions have not employed private security guards, but have contracted PMSCs for the construction of field camps and for the provision of maintenance services and real-life support.

Two problems have been identified in connection with the use of PMSCs that were not mentioned in any of the case studies above.

- One problem has been the distortion of the local food and drinking water markets as a result of prime contracting with the French state-owned company Economat des Armées (EdA). This company's practice of subcontracting services to a small group of rich local (male) wholesalers has driven small family-based suppliers out of business because these wholesalers have been able to dictate prices and achieve large profit margins.¹⁴
- The company's "paying relatively high wages (100,000 FCFA [CFA francs] and more) even to unskilled workers resulted in [...] turmoil on the local labour markets".¹⁵

Despite the potential negative effects of prime contracting illustrated by this and the previous case studies, the EU ATHENA mechanism, which co-funds EU military operations, has signed framework agreements with EdA on the provision of field camp services, including food and messing, and with the French Service des essences des armées (SEA) on the supply of fuel in theatre, in both cases without an open tender.

¹³ Neethling, Theo (2011): From MONUC to MONUSCO and Beyond: Prospects for Reconstruction, State-Building and Security Governance in the DRC, *South African Journal of International Affairs* 18(1): 23–41; Goede, Meike de (2008): Private and Public Security in Post-War Democratic Republic of Congo, in: Gumede, Samelo (ed.): *The Private Security Sector in Africa: Country Series*, Pretoria: Institute for Security Studies, pp. 35–68.

¹⁴ Strolz, Lorenz M. (2011): The Economic Effects of EUFOR/CHAD-RCA on the Local Economy of Eastern Chad, in: Republik Österreich BMLVS (ed.): *EUFOR/CHAD-RCA Revisited*, pp. 129–40.

¹⁵ Ibid.

3. INTERNATIONAL AND NATIONAL REGULATIONS ON PMSC

In light of these experiences with PMSCs, this section provides an overview of rules and regulations at national and international levels to show that new initiatives are needed to improve the transparency and accountability of, and control over PMSCs.

3.1 International Legal Regulations

International humanitarian law (IHL) that governs armed conflicts does not address the issue of PMSCs directly, but it provides a basis for determining the legal status of PMSC employees. IHL only differentiates between combatants and civilians. The status determines the rights and obligations of individuals (with civilians enjoying special protection) and whether violations are to be prosecuted under civilian or military jurisdiction. The status of the staff of a given PMSC must be determined on a “case-by-case basis”¹⁶ and depends mainly on whether those members of staff have directly participated in hostilities (which is difficult to determine, however, not least because of a lack of clear-cut criteria). Most commentators agree that “[t]he majority of employees of PMSCs fall within the category of civilians”.¹⁷ As such, they are only allowed to use arms for self-defence, and while it is true that employees of PMSCs are sometimes labelled as mercenaries, “the term has, in fact, a narrow interpretation under IHL and would not apply to most private contractors in recent conflicts”.¹⁸

Irrespective of their status, all employees of PMSCs must act in accordance with the provisions of IHL and human rights law, and they can be prosecuted if they are suspected of violations. Existing IHL and human rights law therefore apply to PMSCs. This was reconfirmed by the states that have signed the *Montreux Document* (see Sec. 1.1), a document that is not legally binding but that “recalls existing legal obligations of States and PMSCs and their personnel”.¹⁹ Given that companies do not have an international legal personality, international law assigns the responsibility to ensure adherence to its provisions by PMSCs to the states involved.

The Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination, established by the UN Human Rights Council, formulated a draft convention on private military and security companies. It reaffirms that it is the state's responsibility to ensure that PMSCs adhere to international human rights and humanitarian law and requires states to prohibit the outsourcing of what are considered to be inherently state functions. The convention is now overseen by an open-ended intergovernmental working group that has proposed that the list of what are inherently state functions be limited to a) direct participation in hostilities in armed conflict and b) the detention and interrogation of prisoners of war. However, the working group has reached no consensus on how to regulate PMSCs.²⁰

16 Gillard, Emanuela-Chiara (2006): *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, *International Review of the Red Cross*, 88(863): 525–72; here: p. 530; *Montreux Document*, p. 14.

17 www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/privatization-war/overview-privatization.htm.

18 *Ibid.*

19 *Montreux Document*, p. 9.

20 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 (2015): *Conceptual Note on a Possible Legally Binding Instrument for the Regulation of Private Military Security Companies*, p. 2; Human Rights Council (2015): *Report of the Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies in Its Fourth Session*. A/HRC/30/47.

3.2 International Industry Self-Regulation

The last few years have seen an increase in voluntary initiatives. The International Code of Conduct (ICoC), which is based on IHL and human rights, provides rules for the industry. It was established in 2010 as a result of a multi-stakeholder process involving PMSCs, governments and civil-society organizations. It includes rules on the use of force and principles for the handling of complaints and the vetting of personnel.²¹ To date, over 700 PMSCs have signed the ICoC, but only 87 PMSCs are a member of the International Code of Conduct Association (ICoCA), a multi-stakeholder association founded in 2013. ICoCA has established a certification scheme for PMSCs and is responsible for monitoring compliance with the ICoC.

In response to the ICoC, ASIS International, a U.S. association of security professionals, and the American National Standards Institute formulated together a set of four standards for the regulation of PMSCs with financial support from the U.S. Department of Defense. The first standard, PSC.1, has been adopted by the governments of the U.S. and the UK for all of their contracts with PMSCs. Based on this standard, the International Organization for Standardization (ISO) developed the “Management System for Private Security Operations”,²² ISO 18788:2015, which was published in September 2015.

Given that regulations at the international level assign the responsibility to regulate the activities of PMSCs to the national level, and that international organizations such as the UN do not have the means to hold private actors accountable for violations of international law or human rights, national regulations are central to understanding existing legal and regulatory gaps. However, these national regulations differ considerably in scope and complexity.

3.3 National Regulations

With regard to national regulations, it is important to distinguish between home states (states where PMSCs are registered or incorporated), states that contract PMSCs, and host states (states where PMSCs operate). Many host states have national regulations for the use of certain types of private military and security services. Registration and licensing laws applicable to security contractors have been introduced in several countries, including **Afghanistan**, the **DR Congo**, **Chad** and the **CAR**, although it is doubtful if these regulations are effective. In many weak, failing and failed states, the scope of PMSC regulation is severely restricted, and governments are unable to enforce these laws and hold PMSCs and their personnel accountable. For this reason, debates about national regulation focus on regulation in contracting states and home states such as the U.S. and the UK.

The **United States** has the most complex set of regulations in place. After the scandals involving PMSCs working for the U.S. government in Iraq and Afghanistan, the U.S. established a variety of new regulations, with the result that PMSCs are now governed by a different set of rules and regulations. In addition to other pertinent rules, the U.S. has (1) a regulatory system for the contracting of PMSCs by U.S. governmental agencies; (2) rules for the monitoring and oversight of PMSCs contracted by U.S. government agencies; and (3) a licensing system for the provision of PMSC services abroad for clients other than the U.S. governmental agencies. However, regulation and oversight are split among several different bodies and contain numerous loopholes.²³

The **United Kingdom** has no licensing system, nor does it have any other specific legislation on PMSCs. Hence, governmental contracts with PMSCs could be an instrument to regulate the companies, but “the government is not making enough use of its contracts to raise industry standards”.²⁴ Instead, it seeks to raise the standards of PMSCs by relying on voluntary regulation within the industry. However, monitoring such companies is difficult, not least because there is no register of British PMSCs.

²¹ www.icoca.ch/en/the_icoc.

²² www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=63380.

²³ DeWinter-Schmitt (2013), p. 8.

²⁴ *Ibid.*, p. 9.

Although **Switzerland** is home to only a few PMSCs, in September 2015 a law entered into force that regulates the activities of PMSCs. According to this law, Swiss-based PMSCs wishing to export their services are required to notify the Federal Department of Foreign Affairs (FDFA), which can then grant or refuse to grant a licence or decide that further investigations must be carried out before a decision can be made.²⁵

Germany, by contrast, does not have any regulations or a licensing regime for PMSCs operating on land, despite four separate proposals by CDU/CSU and SPD jointly and by SPD, DIE LINKE and Bündnis 90/ Die Grünen having been submitted to the Bundestag and the passing of a national law on maritime security services. Existing regulations for security companies (the *Verordnung über das Bewachungsgewerbe* of 1995; 2009) concern only the registration and licensing of firms that operate within Germany's borders. However, state prosecutors have cited § 109h of the German Criminal Code (the *Strafgesetzbuch* of 1998, last amended in 2015), which prohibits recruitment for foreign armed services, when trying to indict Asgaard – German Security Group for offering military and security services to a Somali “warlord”.²⁶

The German government has justified its reticence on the grounds that only a few internationally operating security firms are based in Germany, and that international humanitarian and human rights laws should be sufficient. In addition, the government has insisted that inherently governmental functions have not been and will not be outsourced to PMSCs.²⁷ In practice, however, the range of military tasks defined as inherently governmental has narrowed significantly. Whereas in 2004/05, the Bundeswehr prohibited the outsourcing of combat support, repair and maintenance, and logistics during international military interventions as a matter of principle, by 2009 these functions were routinely contracted out. In particular, the ISAF mission in Afghanistan has led to a redefinition of inherently governmental functions and to the employment of private security guards for the protection of German bases in Faizabad, Mazar-i-Sharif, Kunduz and Taloqan.

4. POLICY RECOMMENDATIONS FOR POLITICAL DECISION MAKERS

There are many ways for states and international organizations to contribute significantly to improving PMSC standards and the transparency, accountability and control of the industry, ranging from contractor selection and management to national and international regulations. Few of these mechanisms have been used to their full potential. The following is a list of recommendations for contracting, home and host states, as well as for international organizations.

Refrain from Outsourcing Inherently State Functions

International law includes rules that apply to armed conflict and to the actors involved. Functions that are inherently state functions should not be delegated to private actors.

Set Up Legally Binding International Regulations

States should set up international binding regulations, including common standards for the selection, management and monitoring of military and security contractors as well as sanctioning in cases of misconduct or underperformance, such as the draft suggested by the UN Working Group on Mercenaries.

²⁵ www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2015/2015-06-240.html; www.admin.ch/opc/de/official-compilation/2015/2407.pdf; www.admin.ch/opc/de/official-compilation/2015/2423.pdf.

²⁶ www.muensterschezeitung.de/nachrichten/region/hierundheute/nams/art1757,920847.

²⁷ Krahnmann, Elke (2015): Chance für eine Neuausrichtung: Die Bundesregierung und private Sicherheits- und Militärdienste, in: Kursawe, Janet et al. (eds.): *Friedensgutachten 2015*, Berlin: LIT, pp. 100–111.

Improve Contractor Selection and Management

Contracting states and international organizations should establish transparent mechanisms and clear standards for the selection, management and monitoring of military and security contractors, and they should introduce sanctions for misconduct or underperformance. These mechanisms and standards should then also be made to apply to subcontractors.

Contracting states and international organizations should centralize or coordinate their PMSC contracting through a single agency in order to facilitate an effective selection, management, monitoring and sanctioning of PMSCs.

Curtail Prime Contracting

Contracting states and international organizations should refrain from relying on prime contractors for the selection, management and control of subcontractors, because working with such contractors creates dependence, facilitates corruption, decreases oversight and accountability, and undermines efforts to benefit small businesses in host states.

Contracting states and international organizations should diversify their contracts to prevent overreliance on a small number of prime contractors, such as through long-term or indefinite delivery/indefinite quantity (IDIQ) contracts.

Create National Registration and Licensing Systems

Home states should create national registers and licences for PMSCs seeking to provide services abroad. PMSCs should be included in the register following certification carried out by a state agency. Certification should be based on precise and transparent standards, including issues such as the vetting and training of personnel, the use of force, and knowledge of international humanitarian and human rights law.

Adopt Unambiguous and Extraterritorial Jurisdiction

Contracting states and international organizations should enter into unambiguous Status of Forces Agreements (SOFAs) with host states on criminal jurisdiction over international and local contractors and over their subcontractors at every level involved.

Home states should adopt extraterritorial jurisdiction that extends to the operations of PMSCs abroad in order to allow for the prosecution of PMSC staff in home or contracting states.

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