

# **Input on the revised third draft instrument**

**To the attention of the Chair of Open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies**

**Geneva, May 2024**

## Article 1 – Definition

We welcome the clear, single definition of PMSC as in now in the text, based on the Montreux Document. We estimate that it more adequately captures the spectrum of the private security industry than an artificial separation between the terms “private security companies” and “private military companies” (this does not mean that regulation can subsequently be disaggregated by specific types of services provided).

## Article 5 – Obligations / Commitments with Respect to Registration, Licensing and Recruitment

We welcome the focus on States’s obligation to regulate PMSCs (which is now fully clear in the Article) and the clear qualitative criteria it now enumerates.

- 5.1: We would suggest including a reference that national legislation, regulations, and policies/appropriate measures be based on international norms and good practices such as the instrument, the Montreux Document, and the International Code of Conduct.
- We would suggest merging 5.2. and 5.3, as the former only speaks about establishing an effective licensing system, while the latter precisely defines what it should contain.
- In 5.3., we would suggest naming key macro issues at first and more specific items towards the end.
- 5.3.a. We would suggest adding a new, specific para on company-internal code of conducts, which would also welcome any additional commitments beyond regulatory minima PMSCs want to engage in on their own accord.
- 5.3.e We would suggest changing the order to “selection, vetting, and recruitment”, as this is the standard cycle. Also, dishonourable discharge from the police and the armed forces should be included as a criterion.
- 5.3.f While we welcome third party independent verification, it is not always available in all contexts. We would thus recommend either adding the notion “where possible” or including it as a good practice rather than an obligation.
- 5.3.h The text should specify that “transparency of contracts” means transparency towards regulatory authorities, not towards competitors.
- 5.3.i. The terms “emblems” and “insignia” constitute a duplication. Also, while there might reasons for exceptions to clear identification requirements, those need indeed to be exceptional and based on clear guidelines.
- 5.6. We welcome that the text underlines the need for adequate human and financial resources for regulation; indeed, it is not enough to simply have a text in place, it needs to be implemented concretely. Also, we would suggest changing the term “establishing [competent authorities]” to “determining”, given that

authorities might already exist but simply not have been granted regulatory powers.

## Article 6 – Obligations / Commitments of Contracting States

**I. Determination of Services:** The Montreux Document underscores the importance of a meticulous assessment to determine suitable services for contracting to PMSCs, considering the risk of direct involvement in hostilities (Montreux Document, Good Practice 1). It emphasizes the need for Contracting States to evaluate potential risks associated with contracted services, ensuring that services unsuitable for PMSCs are not outsourced to them. However, the OEWG draft instrument takes a different approach by directly prohibiting PMSC personnel from engaging in activities amounting to direct participation in hostilities or exercising functions inherently assigned to states or state agencies (OEWG, Article 6). While both documents aim to mitigate risks associated with PMSC activities, the Montreux Document focuses on assessment and evaluation, while the OEWG draft instrument takes a more prohibitive stance.

**II. Procedure for Selection and Contracting of PMSCs:** The Montreux Document advocates for a comprehensive process for selecting and contracting PMSCs, emphasizing transparency and supervision throughout the process (Montreux Document, Good Practice 2, 4). It outlines steps such as acquiring information on past services, obtaining references, and conducting background checks on PMSCs and their personnel. However, the OEWG draft instrument does not provide specific guidance on the selection and contracting process itself. Instead, it focuses on ensuring adherence to domestic law, international human rights law, and international humanitarian law in contracts with PMSCs (OEWG, Article 6). While both documents aim to promote accountability and compliance, the Montreux Document offers more detailed guidance on the selection and contracting process by providing layers of responsibility under international law, as well as criteria for the selection of PMSCs by Contracting States.

**III. Criteria for Selection of PMSCs:** The Montreux Document outlines criteria prioritizing adherence to legal standards when selecting PMSCs (Montreux Document, Good Practices 5-13). It includes factors such as past conduct, financial capacity, and personnel training. In comparison, the OEWG draft instrument requires Contracting States to ensure PMSC compliance with domestic law, international human rights law, and international humanitarian law in contracts, but it does not provide specific criteria for selecting PMSCs. This difference highlights a gap in the OEWG draft instrument, as it lacks detailed guidance on the criteria for evaluating PMSCs before contracting them.

**IV. Terms of Contract with PMSCs:** The Montreux Document highlights the importance of including contractual clauses that ensure PMSC compliance with legal standards, such as past conduct, financial capacity, and personnel welfare (Montreux Document,

Good Practices 14-18). It emphasizes the need for specific performance requirements, subcontractor obligations, and provisions for termination in case of non-compliance. In comparison, the OEWG draft instrument addresses this by requiring contracts with PMSCs to promote adherence to domestic law, international human rights law, and international humanitarian law, and by prohibiting contracts with non-compliant PMSCs or subcontractors (OEWG, Article 6). While both documents aim to ensure accountability and compliance through contractual arrangements, the Montreux Document provides more detailed guidance on specific contractual clauses and performance requirements.

<b>Montreux Document Good Practices</b>	<b>OEWG Draft Instrument Provisions</b>
Good Practice 1: Determination of suitable services for PMSC contracting, considering risks of direct involvement in hostilities.	OEWG requires prohibition of PMSC personnel from direct participation in hostilities but lacks detailed guidance on service suitability assessment.
Good Practice 2: Comprehensive process for selecting and contracting PMSCs, including transparency and supervision.	OEWG emphasizes adherence to legal standards in contracts but lacks specific guidance on selection and contracting processes.
Good Practices 5-13: Criteria prioritizing adherence to legal standards when selecting PMSCs, including past conduct, financial capacity, and personnel training.	OEWG requires adherence to domestic and international law in contracts but lacks specific criteria for selecting PMSCs. It also lacks detailed guidance on evaluating PMSCs before contracting them.
Good Practices 14-18: Inclusion of contractual clauses ensuring PMSC compliance with legal standards, such as past conduct, financial capacity, and personnel welfare.	OEWG requires contracts to promote adherence to legal standards but lacks detailed guidance on specific contractual clauses and performance requirements. It also lacks specific provisions for subcontractor obligations and termination clauses.

In summary both documents develop frameworks to mitigate risk associated with PMSCs activities. While the Montreux Document offers concrete criteria for the selection of PMSCs and emphasizes the different layers of responsibility under international law for Contracting States, the OEWG Draft instrument adopts a more prohibitive approach. Instead of establishing detailed guidance on specific contractual clauses and

performance requirements, it highlights additional detailed provisions on the prohibition on the exercise of state function direct participation in hostilities and subcontracting services, as contained in paragraphs (b) and (c).

## Article 7 – Obligations / Commitments of Territorial States

Territorial States bear the responsibility of regulating the activities of Private Military and Security Companies (PMSCs) within their jurisdictions to ensure compliance with relevant legal standards. This includes assessing the suitability of PMSCs to operate within their territory and establishing mechanisms for oversight and accountability.

**I. Determination of Services (Montreux Document, Good Practice 24):** Territorial States must carefully delineate which services PMSCs are permitted to undertake within their jurisdiction. This involves a nuanced consideration of factors such as the potential for PMSC personnel to become involved in direct participation in hostilities.

**II. Authorization to Provide Military and Security Services (Montreux Document, Good Practices 25-29):** PMSCs operating within a Territorial State's jurisdiction must obtain appropriate authorization. This could involve obtaining operating licenses, either general or specific, and may also require individual personnel to be registered or licensed. The process should be overseen by designated authorities, with stringent assessments of PMSC capacity to comply with legal standards.

**III. Criteria for Granting Authorization (Montreux Document, Good Practices 30-38):** Territorial States must establish clear criteria for granting authorization to PMSCs. These criteria should encompass various aspects, including past conduct, financial capacity, personnel training, and internal organizational structure. By ensuring that PMSCs meet these criteria, Territorial States can uphold standards of legality and accountability.

**IV. Terms of Authorization (Montreux Document, Good Practices 39-42):** Authorization agreements between Territorial States and PMSCs should include clauses that ensure ongoing compliance with legal standards. This could involve stipulations regarding past conduct, financial obligations, training requirements, and adherence to internal regulations. Additionally, provisions for bonds or securities may be included to address potential misconduct.

**V. Rules on Provision of Services by PMSCs and Their Personnel (Montreux Document, Good Practices 43-45):** Territorial States should establish clear rules governing the provision of services by PMSCs and their personnel. This includes regulations on the use of force and firearms, as well as requirements for personnel identification to ensure transparency and accountability.

**VI. Monitoring Compliance and Ensuring Accountability (Montreux Document, Good Practices 46-52):** Territorial States must implement robust monitoring mechanisms to

ensure PMSC compliance with authorization terms and legal standards. This may involve the establishment of dedicated monitoring authorities, investigation of reports of wrongdoing, and imposition of administrative measures for violations. Territorial States should also ensure both criminal and non-criminal accountability, including provisions for civil liability and cooperation with relevant authorities.

<b>Montreux Document Good Practices</b>	<b>OEWG Draft Instrument Provisions (or Lack Thereof)</b>
<b>Determination of Services</b>	Territorial States are tasked with determining permissible services, aligned with the Montreux Document.
<b>Authorization Process and Criteria</b>	Detailed provisions on authorization procedures, criteria, and terms are lacking in the OEWG draft instrument, presenting a gap compared to the Montreux Document.
<b>Rules on Provision, Monitoring, and Accountability</b>	The OEWG draft instrument lacks comprehensive guidance on rules for PMSC operations, monitoring mechanisms, and accountability measures present in the Montreux Document.

In summary, while the Montreux Document recalls the obligation of Territorial States to take preventative measures through legislations or administrative processes to legislate, surrender, punish or extradite when violations take place in their territory, the OEWG Draft instrument focuses on which services may be performed by PMSCs and their compliance with licensing requirements by States.

## Article 8 – Obligations / Commitments of Home States

**I. Determination of Services (Montreux Document, Good Practice 53):** On the one hand, the Montreux Document, Home States are advised to assess which services of PMSCs may or may not be exported, considering factors such as direct participation in hostilities. On the other hand, the OEWG provision does not explicitly address the need for Home States to assess and determine which specific services of PMSCs should be prohibited from export.

**II. Establishment of an Authorization System (Montreux Document, Good Practice 54-56):** the Montreux Document recommends the establishment of an authorization system for PMSCs providing services abroad, including corporate or specific operating

licenses, and harmonizing these systems with other States. While the OEWG provision acknowledges the need for registration and licensing requirements, it lacks detailed guidance on establishing a comprehensive authorization system for PMSCs.

**III. Criteria for Granting an Authorization (Montreux Document, Good Practice 60-63):** the Montreux Document highlights criteria such as assessing past conduct, financial capacity, personnel training, and maintaining accurate records for granting authorizations while the OEWG provision does not explicitly address these criteria for granting authorization, potentially leading to gaps in assessing the suitability of PMSCs for providing services abroad.

**IV. Terms of Authorization Granted to PMSCs (Montreux Document, Good Practice 67):** the Montreux Document suggests including clauses in authorizations to ensure compliance with relevant national and international laws, covering various aspects such as past conduct and personnel welfare. The OEWG provision however lacks specific guidance on the terms and conditions to be included in authorizations granted to PMSCs, potentially resulting in less stringent oversight and accountability measures.

**V. Monitoring Compliance and Ensuring Accountability (Montreux Document, Good Practice 68-72):** the Montreux Document emphasizes the importance of monitoring compliance with authorization terms, imposing sanctions for violations, and providing for criminal jurisdiction and non-criminal accountability mechanisms. While the OEWG provision acknowledges the need for monitoring compliance and ensuring accountability, it lacks detailed guidance on specific measures to be implemented, potentially leading to less effective oversight.

In summary, while both the Montreux Document and the OEWG provisions recognize the importance of regulating PMSCs, the Montreux Document offers more extensive and detailed guidance on specific good practices for Home States. The OEWG, however, calls for strengthened legislation and policies to mitigate the risk that PMSCs, their personnel, such nationals and residents are subjected to trafficking in persons, including forced labor, by the imposition of recruitment fees, and to prohibit their nationals from engaging in any activity that is prohibited by the document (article 9). Unlike the OEWG Draft instrument, the Montreux Document provides the obligation of the Home State to respect IHL, also stating an obligation to legislate, investigate, prevent, and provide effective remedies for relevant misconduct by PMSCs. The OEWG provisions could, therefore, benefit from incorporating these additional measures to enhance the effectiveness of PMSC regulation and oversight.

## Article 10 – Jurisdiction

While the provisions contained in the Montreux Document regarding jurisdiction are quite general, the ones of the OEWG Draft Instrument offer specific grounds for the exercise of criminal jurisdiction.

## Article 11 – Regulation of the Use and Acquisition of Weapons as well as the Use of Force

On Use of Force, we would welcome a specific statement in the text on the principle of use of force that should apply for PMSC.

- Add a new 11.1.d. that repeats wording from a previous draft version: “clarify that the use of force by Private Military and Security Companies must be guided by the personal right to self-defence unless explicitly authorised by law to perform wider tasks.”

We would also welcome the strengthening of stipulations with regards to accountability mechanisms.

## Article 12 – Access to Justice, Accountability and Remedies

Under the Montreux Document, remedies are attached to the obligation of the Home State, and Territorial State as a next step following their obligation to investigate and prosecute. On this aspect, the OEWG Draft Instruments goes further as it offers specific provisions on effective remedies and reparations for violations of international law committed by PMSCs and their personnel. The OEWG Instrument hence recalls that victims should have equal, effective, child-friendly, and gender-responsive access to adequate and effective remedies. Both initiatives could reinforce the accountability of PMSC by: (i) linking remedies to the obligation of Home State, Territorial States, Contracting States and Other States as a consequence of their obligation to investigate and prosecute international law violations; (ii) increasing the scope of remedies to include material, symbolic, individual and collective elements.

## IV. Other elements of comparison

**I. Obligations of Other States:** on that matter, the Montreux Document goes a step further than the OEWG Draft Instrument by addressing the obligations of Other States. Unlike the OEWG Draft Instrument, the Montreux Document restates in clear terms the obligation of Other States under IHL to refrain from encouraging or assisting any party in armed conflict. This obligation also entails the duty to investigate, prosecute, surrender, or extradite and provide effective penal sanctions for violations of IHL.



**II. Obligations of PMSCs and their personnel:** Unlike the OEWG Draft Instrument that puts the responsibility on States to make PMSCs and their personnel accountable, the Montreux Document directly recalls PMSCs and their personnel obligations to respect international humanitarian and human rights law, as well as domestic legislation. The initiative offers concrete steps for PMSCs and their personnel to comply with these obligations in terms of recruitment and training for instance.

# **Annex: Part Two of the Montreux Document**

## **Good practices relating to private military and security companies**

### **A. Good practices for Contracting States**

#### **I. Determination of services**

1. To determine which services may or may not be contracted out to PMSCs; in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

#### **II. Procedure for the selection and contracting of PMSCs**

2. To assess the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:

- a) acquiring information relating to the principal services the PMSC has provided in the past;
- b) obtaining references from clients for whom the PMSC has previously provided similar  
a) services to those the Contracting State is seeking to acquire;
- b) acquiring information relating to the PMSC's ownership structure and conducting  
c) background checks on the PMSC and its superior personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.

3. To provide adequate resources and draw on relevant expertise for selecting and contracting PMSCs.

4. To ensure transparency and supervision in the selection and contracting of PMSCs. Relevant mechanisms may include:

- a) public disclosure of PMSC contracting regulations, practices and processes;
- b) public disclosure of general information about specific contracts, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
- c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
- d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies.

### III. Criteria for the selection of PMSCs

5. To adopt criteria that include quality indicators relevant to ensuring respect for relevant national law, international humanitarian law and human rights law, as set out in good practices 6 to 13. Contracting States should consider ensuring that lowest price not be the only criterion for the selection of PMSCs.

6. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:

- a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately remedied such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and, where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
- b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
- c) not previously been rejected from a contract due to misconduct of the PMSC or its personnel.

7. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

8. To take into account whether it and its personnel possess or are in the process of obtaining requisite registrations, licenses or authorizations.

9. To take into account whether it maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Contracting State and other appropriate authorities.

10. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:

- a) rules on the use of force and firearms;
- c) international humanitarian law and human rights law;
- d) religious, gender, and cultural issues, and respect for the local population;
- e) handling complaints by the civilian population, in particular by transmitting them to the appropriate authority;
- f) measures against bribery, corruption, and other crimes.

Contracting States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

11. To take into account whether the PMSC:
- a) acquires its equipment, in particular its weapons, lawfully;
  - b) uses equipment, in particular weapons, that is not prohibited by international law;
  - c) has complied with contractual provisions concerning return and/or disposal of weapons and ammunition.
12. To take into account the PMSC's internal organization and regulations, such as:
- a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery, corruption, and other crimes;
  - b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
    - i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;
    - ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaint mechanisms and whistleblower protection arrangements; and
    - iii. regular performance reporting, specific incident reporting, and reporting on demand to the Contracting State and under certain circumstances other appropriate authorities;
    - iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.
13. To consider the respect of the PMSC for the welfare of its personnel, as protected by labour law and other relevant national law. Relevant factors may include:
- a) providing personnel a copy of any contract to which they are party in a language they understand;
  - b) providing personnel with adequate pay and remuneration arrangements commensurate to their responsibilities and working conditions;
  - c) adopting operational safety and health policies;
  - d) ensuring personnel unrestricted access to their own travel documents; and
  - e) preventing unlawful discrimination in employment.

#### **IV. Terms of contract with PMSCs**

14. To include contractual clauses and performance requirements that ensure respect for relevant national law, international humanitarian law and human rights law by the contracted PMSC.

Such clauses, reflecting and implementing the quality indicators referred to above as selection criteria, may include:

- a) past conduct (good practice 6);
- b) financial and economic capacity (good practice 7);
- c) possession of required registration, licenses or authorizations (good practice 8);
- d) personnel and property records (good practice 9);
- e) training (good practice 10);

- f) lawful acquisition and use of equipment, in particular weapons (good practice 11);
- g) internal organization and regulation and accountability (good practice 12);
- h) welfare of personnel (good practice 13);

Contractual clauses may also provide for the Contracting State's ability to terminate the contract for failure to comply with contractual provisions. They may also specify the weapons required for contract performance, that PMSCs obtain appropriate visas or other authorizations from the Territorial State, and that appropriate reparation be provided to those harmed by the misconduct of PMSCs and their personnel.

15. To require by contract that the conduct of any subcontracted PMSC is in conformity with relevant national law, international humanitarian law and international human rights law, including by:

- a) establishing the criteria and qualifications for the selection and ongoing employment of subcontracted PMSCs and personnel;
- b) requiring the PMSC to demonstrate that subcontractors comply with equivalent requirements as the PMSC initially contracted by the Contracting State;
- c) ensuring that the PMSC is liable, as appropriate and within applicable law, for the conduct of its subcontractors.

16. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:

- a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
- b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transport used by PMSCs.

17. To consider pricing and duration of a specific contract as a way to promote relevant international humanitarian law and human rights law. Relevant mechanisms may include:

- a) securities or bonds for contractual performance;
- b) financial rewards or penalties and incentives;
- c) opportunities to compete for additional contracts.

18. To require, in consultation with the Territorial State, respect for relevant regulations and rules of conduct by PMSCs and their personnel, including rules on the use of force and firearms, such as:

- a) using force and firearms only when necessary in self-defence or defence of third persons;
- b) immediate reporting to and cooperation with competent authorities, including the appropriate contracting official, in the case of use of force and firearms.

## **V. Monitoring compliance and ensuring accountability**

19. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing:

- a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Contracting State's national legal system;
- b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.

20. To provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel, including:

- a) contractual sanctions commensurate to the conduct, including:
  - i. immediate or graduated termination of the contract;
  - ii. financial penalties;
  - iii. removal from consideration for future contracts, possibly for a set time period;
  - iv. removal of individual wrongdoers from the performance of the contract;
- b) referral of the matter to competent investigative authorities;
- c) providing for civil liability, as appropriate.

21. To provide for, in addition to the measures in good practices 19 and 20, appropriate administrative and other monitoring mechanisms to ensure the proper execution of the contract and the accountability of contracted PMSCs and their personnel for their improper and unlawful conduct; in particular to:

- a) ensure that those mechanisms are adequately resourced and have independent audit and investigation capacity;
- b) provide Contracting State government personnel on site with the capacity and authority to oversee proper execution of the contract by the PMSC and the PMSC's subcontractors;
- c) train relevant government personnel, such as military personnel, for foreseeable interactions with PMSC personnel;
- d) collect information concerning PMSCs and personnel contracted and deployed, and on violations and investigations concerning their alleged improper and unlawful conduct;
- e) establish control arrangements, allowing it to veto or remove particular PMSC personnel during contractual performance;
- f) engage PMSCs, Territorial States, Home States, trade associations, civil society and other relevant actors to foster information sharing and develop such mechanisms.

22. When negotiating agreements with Territorial States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:

- a) to consider the impact of the agreements on the compliance with national laws and regulations;

- b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.

23. To cooperate with investigating or regulatory authorities of Territorial and Home States, as appropriate, in matters of common concern regarding PMSCs.

## **B. Good practices for Territorial States**

### **I. Determination of services**

24. To determine which services may or may not be carried out on their territory by PMSCs or their personnel; in determining which services may not be carried out, Territorial States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

### **II. Authorization to provide military and security services**

25. To require PMSCs to obtain an authorization to provide military and security services in their territory (“authorization”), including by requiring:

- a) PMSCs to obtain an operating license valid for a limited and renewable period (“corporate operating license”), or for specific services (“specific operating license”), taking into account the fulfilment of the quality criteria set out in good practices 31 to 38; and/or;
- b) individuals to register or obtain a license in order to carry out military or security services for PMSCs.

### **III. Procedure with regard to authorizations**

26. To designate a central authority competent for granting authorizations.

27. To allocate adequate resources and trained personnel to handle authorizations properly and timely.

28. To assess, in determining whether to grant an authorization, the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:

- a) acquiring information relating to the principal services the PMSC has provided in the past;
- b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
- c) acquiring information relating to the PMSC’s ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures, or obtain information from the Contracting State on these matters.

29. To ensure transparency with regard to authorizations. Relevant mechanisms may include:

- a) public disclosure of authorization regulations and procedures;
- b) public disclosure of general information on granted authorizations, including on the identity of authorized PMSCs and their number of personnel, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
- c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
- d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
- e) publishing and adhering to fair and non-discriminatory fee schedules for authorizations.

#### **IV. Criteria for granting an authorization**

30. To ensure that PMSCs fulfil certain quality criteria relevant for the respect of relevant national law, international humanitarian law and human rights law by the PMSC and its personnel, including those set out below.

31. To require that the conduct of PMSCs and of any PMSC subcontracted is in conformity with relevant national law, international humanitarian law and international human rights law, which includes ensuring that:

- a) the PMSC notifies any subcontracting of military and security services to the authorization authority;
- b) the PMSC can demonstrate that its subcontractors comply with equivalent requirements as the PMSC which initially obtained an authorization by the Territorial State;
- c) the subcontractor is in possession of an authorization;
- d) the PMSC initially granted authorization is liable, as appropriate and within applicable law, for the conduct of its subcontractors.

32. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:

- a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
- b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in



serious crime or have not been dishonourably discharged from armed or security forces;

- c) not previously had an operating license revoked for misconduct of the PMSC or its personnel.

33. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

34. To take into account whether the PMSC maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Territorial State and other authorities.

35. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:

- a) rules on the use of force and weapons;
- b) international humanitarian law and human rights law;
- c) religious, gender, and cultural issues, and respect for the local population;
- b) complaints handling;
- c) measures against bribery, corruption, and other crimes.

Territorial States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

36. Not to grant an authorization to a PMSC whose weapons are acquired unlawfully or whose use is prohibited by international law.

37. To take into account the PMSC's internal organization and regulations, such as:

- a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery and corruption;
- b) the existence of monitoring and supervisory measures as well as internal accountability mechanisms, such as:
  - i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;
  - ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistleblower protection arrangements;
  - iii. regular reporting on the performance of the assignment and/or specific incident reporting;
  - iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.

38. To consider the respect of the PMSC for the welfare of its personnel.

39. To take into account, in considering whether to grant a license or to register an individual,

good practices 32 (past conduct) and 35 (training).

## **V. Terms of authorization**

40. To include clauses to ensure that the conduct of the PMSC and its personnel is continuously in conformity with relevant national law, international humanitarian law and international human rights law. The authorization includes, where appropriate, clauses requiring the PMSC and its personnel to implement the quality criteria referred to above as criteria for granting general and/or specific operating licenses and relating to:

- a) past conduct (good practice 32);
- b) financial and economic capacity (good practice 33);
- c) personnel and property records (good practice 34);
- d) training (good practice 35);
- e) lawful acquisitions (good practice 36);
- f) internal organization and regulation and accountability (good practice 37);
- g) welfare of personnel (good practice 38);

41. To require the PMSC to post a bond that would be forfeited in case of misconduct or noncompliance with the authorization, provided that the PMSC has a fair opportunity to rebut allegations and address problems.

42. To determine, when granting a specific operating license, a maximum number of PMSC personnel and equipment understood to be necessary to provide the services.

## **VI. Rules on the provision of services by PMSCs and their personnel**

43. To have in place appropriate rules on the use of force and firearms by PMSCs and their personnel, such as:

- a) using force and firearms only when necessary in self-defence or defence of third persons;
- b) immediately reporting to and cooperation with competent authorities in the case of use of force and firearms.

44. To have in place appropriate rules on the possession of weapons by PMSCs and their personnel, such as:

- a) limiting the types and quantity of weapons and ammunition that a PMSC may import, possess or acquire;
- b) requiring the registration of weapons, including their serial number and calibre, and ammunition, with a competent authority;
- c) requiring PMSC personnel to obtain an authorization to carry weapons that is shown upon demand;
- d) limiting the number of employees allowed to carry weapons in a specific context or area;
- e) requiring the storage of weapons and ammunition in a secure and safe facility when personnel are off duty;

- f) requiring that PMSC personnel carry authorized weapons only while on duty;
- g) controlling the further possession and use of weapons and ammunition after an assignment is completed, including return to point of origin or other proper disposal of weapons and ammunition.

45. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:

- a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
- b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transportation used by PMSCs.

## **VII. Monitoring compliance and ensuring accountability**

46. To monitor compliance with the terms of the authorization, in particular:

- a) establish or designate an adequately resourced monitoring authority;
- b) ensure that the civilian population is informed about the rules of conduct by which PMSC have to abide and available complaint mechanisms;
- c) requesting local authorities to report on misconduct by PMSCs or their personnel;
- d) investigate reports of wrongdoing.

47. To provide a fair opportunity for PMSCs to respond to allegations that they have operated without or in violation of an authorization.

48. To impose administrative measures, if it is determined that a PMSC has operated without or in violation of an authorization; such measures may include:

- a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
- b) removing specific PMSC personnel under the penalty of revoking or suspending the authorization;
- c) prohibition to re-apply for an authorization in the future or for a set period of time;
- d) forfeiture of bonds or securities;
- e) financial penalties.

49. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing corporate criminal responsibility for crimes committed by the PMSC, consistent with the Territorial State's national legal system.

50. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSC and its personnel, including:

- a) providing for civil liability;

b) otherwise requiring PMSCs, or their clients, to provide reparation to those harmed by the misconduct of PMSCs and their personnel.

51. When negotiating agreements with Contracting States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:

- a) to consider the impact of the agreements on the compliance with national laws and regulations;
- b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.

52. To cooperate with investigating and regulatory authorities of Contracting and Home States in matters of common concern regarding PMSCs.

## **C. Good practices for Home States**

### **I. Determination of services**

53. To determine which services of PMSCs may or may not be exported; in determining which services may not be exported, Home States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

### **II. Establishment of an authorization system**

54. To consider establishing an authorization system for the provision of military and security services abroad through appropriate means, such as requiring an operating license valid for a limited and renewable period (“corporate operating license”), for specific services (“specific operating license”), or through other forms of authorization (“export authorization”). If such a system of authorization is established, the good practices 57 to 67 set out the procedure, quality criteria and terms that may be included in such a system.

55. To have in place appropriate rules on the accountability, export, and return of weapons and ammunition by PMSCs.

56. To harmonize their authorization system and decisions with those of other States and taking into account regional approaches relating to authorization systems.

### **III. Procedure with regard to authorizations**

57. To assess the capacity of the PMSC to carry out its activities in respect of relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:

- a) acquiring information relating to the principal services the PMSC has provided in the past;
- b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
- c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.

58. To allocate adequate resources and trained personnel to handle authorizations properly and timely.

59. To ensure transparency with regard to the authorization procedure. Relevant mechanisms may include:

- a) public disclosure of authorization regulations and procedures;
- b) public disclosure of general information on specific authorizations, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
- c) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
- d) publishing and adhering to fair and non-discriminatory fee schedules.

#### **IV. Criteria for granting an authorization**

60. To take into account the past conduct of the PMSC and its personnel, which include ensuring that the PMSC has:

- a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
- b) conducted comprehensive inquiries within applicable law regarding the extent to which its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
- c) not previously had an authorization revoked for misconduct of the PMSC or its personnel.

61. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

62. To take into account whether the PMSC maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by competent authorities.

63. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international

humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:

- a) rules on the use of force and firearms;
- b) international humanitarian law and human rights law;
- c) religious, gender, and cultural issues, and respect for the local population;
- d) complaints handling;
- e) measures against bribery, corruption and other crimes.

Home States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

64. To take into account whether the PMSC's equipment, in particular its weapons, is acquired lawfully and its use is not prohibited by international law.

65. To take into account the PMSC's internal organization and regulations, such as:

- a) the existence and implementation of policies relating to international humanitarian law and human rights law;
- b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
  - i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;
  - ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistleblower protection arrangements.

66. To consider the respect of the PMSC for the welfare of its personnel as protected by labour law and other relevant national law.

## **V. Terms of authorization granted to PMSCs**

67. To include clauses to ensure that the conduct of the PMSC and its personnel respect relevant national law, international humanitarian law and international human rights law. Such clauses, reflecting and implementing the quality criteria referred to above as criteria for granting authorizations, may include:

- a) past conduct (good practice 60);
- b) financial and economic capacity (good practice 61);
- c) personnel and property records (good practice 62);
- d) training (good practice 62);
- e) lawful acquisitions (good practice 64);
- f) internal organization and regulation and accountability (good practice 65);
- g) welfare of personnel (good practice 66).

## **VI. Monitoring compliance and ensuring accountability**

68. To monitor compliance with the terms of the authorization, in particular by establishing close links between its authorities granting authorizations and its representatives abroad and/or with the authorities of the Contracting or Territorial State.

69. To impose sanctions for PMSCs operating without or in violation of an authorization, such as:

- a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
- b) prohibition to re-apply for an authorization in the future or for a set period of time;
- c) civil and criminal fines and penalties.

70. To support Territorial States in their efforts to establish effective monitoring over PMSCs.

71. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, consider establishing:

- a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Home State's national legal system;
- b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.

72. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel, including:

- a) providing for civil liability;
- b) otherwise requiring PMSCs to provide reparation to those harmed by the misconduct of PMSCs and their personnel.

73. To cooperate with investigating or regulatory authorities of Contracting and Territorial States, as appropriate, in matters of common concern regarding PMSCs.