

JOINT CIVIC-DCAF WORKSHOP

**The Growing Use of Private Military
and Security Companies in Conflict Settings:
How to Reduce Threats to Civilians?**

KEY OUTCOMES

**CENTER FOR
CIVILIANS IN CONFLICT**
RECOGNIZE. PREVENT. PROTECT. AMEND.

DCAF Geneva Centre
for Security Sector
Governance



INTRODUCTION

In the 2000s, the rising prominence of private military and security companies (PMSCs) in armed conflict settings spurred public interest in the industry. PMSCs are now even more prevalent than they were fifteen years ago, and they operate in more States and with a broader range of clients. The declining deployment of PMSCs by western governments in Iraq and Afghanistan and the geographical diversification of PMSCs contracted in armed conflicts and complex environments have changed the geographic zones in which these businesses operate. It has also resulted in a significant shift in the services provided by some PMSCs during armed conflict.¹

PMC, PSC and PMSC

The many labels used to describe private contractors providing services in security and defense sectors can create room for confusion, especially with regard to applicable legal and regulatory framework. Terms worth defining for sake of clarity include private military companies (PMCs), private security companies (PSCs), private military and security companies (PMSCs), and mercenaries. In the context of the present workshop, the definition of the Montreux document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (hereafter, the Montreux Document) was used. It covers the range of “private business entities that provide military and/or security services, irrespective of how they describe themselves”. Their personnel are “persons employed by, through direct hire or under a contract with a PMSC including its employees and managers.”² A such, both PMCs and PSCs can fall under the category of PMSCs, and consequently, the functions described by the term may refer to a number of security and military services including protection of persons and infrastructures, maintenance and operation of weapons systems, guarding prisons, intelligence gathering, hostage negotiations, and advice to or training of local forces and security personnel.

In many conflict-affected environments today, private companies not only provide physical security for employees or infrastructure, but also serve in roles traditionally reserved for the armed forces – for example, by providing logistical or intelligence support for military operations or providing training for State and non-state armed groups - and in some cases, even combat. In just the last decades, PMSCs have surfaced across multiple conflict-affected geographical locations and, in several instances, their deployment has been accompanied by concerns about their association with violations of human rights and international humanitarian law (IHL).

The emergence of new territorial States³ has gone ahead with the emergence of additional home States⁴ for PMSCs. There has also been a shift in the locations where PMSCs operate, as well as a new range of contracting States⁵. While the use of PMSCs in armed conflicts and fragile

1 DCAF, Webinar series: “A new wave? Addressing the contemporary use of private military and security companies in armed conflict and complex environments” (2021-2022), <https://www.dcaf.ch/use-private-military-and-security-companies-armed-conflict>.

2 This definition is from the Montreux Document, but there is not a widely agreed definition as PMCs and PSCs are often mixed and blurred.

3 “Territorial States” are States on whose territory PMSCs operate.

4 “Home States” are the States of nationality of a PMSC, namely where it is registered and incorporated.

5 “Contracting States” are the States that directly contract for the services of PMSCs.

environments is growing, the question can be asked as to whether existing international efforts and norms to regulate the sector are still adequate.⁶

These companies do not operate in a legal vacuum. There are well-established international norms and good practices that apply to their operations, especially in situations of armed conflict framed by the Geneva Conventions. The Montreux Document and the International Code of Conduct for Private Security Service Providers (ICoC) were respectively created in 2008 and 2010 by the international community with the aim of better articulating responsibilities applicable in armed conflicts and complex environment in accordance with domestic law, international human rights law (IHRL) and IHL. The Montreux Document, currently supported by 58 States and 3 international organizations, reaffirms the existing obligations of States under international law to adequately regulate PMSCs in situations of armed conflicts, and can also be a blueprint for the supervision of the sector in other situations. The ICoC articulates responsibilities of private security companies to ensure the responsible provision of private security services, particularly when operating in complex environments.

However, formally assessing a State's specific responsibilities under international law, and fully implementing obligations as per international law has proven to be a complex endeavor that may depend on several factors, to include:

1. Whether the State directly contracts with the private company ("contracting States"), is a host to the contracting company ("territorial States"), or whether the State is the "home State" to the contractor.⁷
2. The status of contractors as civilians or combatants, to include such times as the contractor participates in hostilities whether they are formally members of the armed forces or not.
3. Whether or not there is a situation of armed conflict (international or non-international)
4. The degree of control exercised by the State over the conduct of the company or contractor.

Despite some progress, PMSCs often operate without the same constraints or oversight as those of conventional forces, resulting in harm to civilians for which there is no acknowledgment or accountability.

Urgent action is needed to ensure comprehensive regulation, monitoring, and oversight of PMSCs to ensure their accountability in conflict settings. Based on CIVIC's upcoming report on "Privatizing war, the Impact of PMSCs on the Protection of Civilians", DCAF and CIVIC jointly facilitated a policy dialogue exploring ways to reduce threats to civilians arising from the use of PMSCs in armed conflict. This dialogue gathered key actors involved in the protection of civilians, including thematic experts, civil society, governments, and EU, UN and industry representatives to explore ways to reduce threats to civilian protection. Discussion areas included the need to strengthen international and domestic legal and regulatory frameworks for PMSCs, national implementation of international norms good practices, and reinforced capacity of monitoring actors.

This document summarizes the main outcomes of this workshop held online on 15 March 2022.

6 DCAF, Webinar series: "A new wave? Addressing the contemporary use of private military and security companies in armed conflict and complex environments" (2021-2022), <https://www.dcaf.ch/use-private-military-and-security-companies-armed-conflict>.

7 There is a distinction to make between Contracting, Territorial and Home State when referring to PMCS, PMCs or PSCs. This distinction is important under international law to understand where the responsibility and accountability falls on in case of violation of contract or human rights violations, or harm caused to civilians.

SECTION 1

Patterns of harm, gaps that impede efforts to prevent, minimize, and address civilian harm caused by PMSCs, and obstacles for holding PMSCs or their sponsors to account for violations of human rights and IHL violations

According to CIVIC's upcoming report, and although it remains challenging to establish a clear correlation between patterns of harm and use of PMSCs due to the lack of available data, the presence of PMSCs is associated with initial, worrying trends in civilian protection. Reported threats to civilians include:

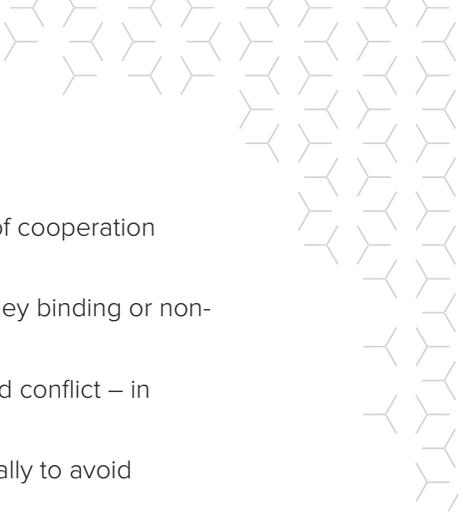
- Civilians caught in the line of fire, whether from on the ground operations or air strikes, especially when in urban settings
- Sexual exploitation and abuse
- Suspicion of unlawful arrests, extrajudicial killings, and torture, including on vulnerable groups
- Occupation of civilian buildings and civilian infrastructure
- Fear of reprisal for witnessing or reporting abuses
- Displacement of populations as an indirect result of fear
- Destructions of building, electric grids, water supplies and other primary services

Further to direct harm to civilians, monitoring agencies, local CSOs, INGOs and other organizations who have the mandate or otherwise are able to monitor incidents of civilian harm happening in areas where PMSCs are operating, are faced with extreme safety and security challenges, including in relation to data protection and staff physical security. INGOs and other local or international humanitarian actors are also faced with significant challenges in terms of access and security.

PMSCs who commit serious violations may be held criminally liable either in international tribunals or in courts that exercise extraterritorial jurisdiction over certain violations of international law. However, gaps in the international and national legal and regulatory frameworks hamper compliance and accountability. These gaps include:

- Applying the correct labels to the many kinds of private contractors in conflict-affected settings (whether PSCs, PMSCs, and PMCs) may help ensure that the appropriate normative and regulatory regime is applied to their conduct;
- The lack of transparency surrounding the permitted activities contributes to confusion and gaps in civilian protection;
- The difficulty in attributing specific types of harm in monitoring and documentation efforts;
- The difficulty in holding home, contracting, and territorial States accountable in cases of violations of human rights;

... the presence of PMSCs is associated with initial, worrying trends in civilian protection.

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- The lack of remedy mechanisms for victims of violations, as well as the lack of cooperation amongst States to conduct investigations of violations of human rights;
 - Insufficient implementation of international norms and good practices – be they binding or non-binding – at national and regional levels;
 - Lack of State capacity – particularly territorial States in the middle of an armed conflict – in adequately regulating, monitoring, and holding PMSCs accountable;
 - In certain cases, reliance on PMSCs by contracting and home States specifically to avoid accountability.

To fully implement international law, States must enact domestic laws to adequately regulate the conduct of PMSCs operating within their borders, to regulate the conduct of PMSCs accompanying their forces, and to regulate the export of private military and security services abroad.

SECTION 2

Sharing Good Practices and Exploring Ways forward

Supporting monitoring and data collection

Data collection and monitoring is the first step to effective evidence-based actions in support to stronger accountability and more comprehensive legal regulatory frameworks. Even though some databases, including Armed Conflict Location and Event Data (ACLED), and Uppsala Conflict Data Program (UCDP), or Iraq Body Count (IBC) usually refer to other unconventional actors (such as non-state armed groups) as “potential perpetrators of human rights violations”, they currently do not report disaggregated data on incidents allegedly attributed to PMSCs. This hampers specific attribution for harm in monitoring and documentation efforts.

To address these issues, the following approaches may be considered:

1. Develop specific measures to support the efforts and build the capacities of monitoring agencies, local CSOs, INGOs, and other organizations who have the mandate or otherwise are in a position to monitor incidents of civilian harm happening in areas where PMSCs are operating, including financial and political support, as well as supporting the development of enhanced training, and reinforced security and data protection protocols.
2. Strengthen the judicial systems of countries where PMSCs are operating, so that reported incidents are being investigated into.
3. Support the establishment of and sufficient funding for local actors including National Human Rights Institutions, so they can conduct and support investigations.

Adopting and enforcing more comprehensive national legislative and regulatory frameworks

The presence of PMSCs in a variety of scenarios raises significant concerns for national authorities and presents regulatory issues for this booming industry. Challenges include outdated or obsolete laws; inadequate capacities of national regulatory authorities particularly in armed conflict and fragile settings; generic licensing, registration and contracting requirements; inadequate oversight and accountability of PMSC activities; ineffective or non-existent grievance mechanisms for victims of human rights abuses.⁸

National legislative and regulatory frameworks are key to closing the accountability gap for PMSCs, particularly if a variety of concerned States – contracting, territorial and home States as well as potentially States of nationality – can be juxtaposed. States should adopt regulatory and legislative frameworks to adequately monitor, oversee, and impact the behavior of PMSCs and reduce risks for civilians, as national regulatory authorities are in a unique position to ensure that democratic oversight is established and maintained to achieve transparency and accountability within the private security and military industry. As a response to the growing concerns related to the regulation of the PMSC industry, the Montreux Document Forum supports national authorities in developing or updating national regulations in line with international norms and good practices.

8 DCAF, *Legislative Guidance Tool for States to Regulate Private Military and Security Companies* (2016), <https://www.dcaf.ch/legislative-guidance-tool-states-regulate-private-military-and-security-companies-0>.

The extraterritorial application of legislation is also often missing in national PMSC legal framework. This lack of clarity regarding the extraterritorial applicability of legislation can result in a lack of accountability for PMSCs' activities and their personnel operating abroad. There are a few ways to solve these issues: States should adopt clear definitions on the permitted and prohibited activities and services of PMSCs in their national legislation, based on available international norms and good practices. Moreover, States should adopt specific legislation relating to the activities of PMSCs abroad.

For instance, Switzerland's Federal Act on Private Security Services provided Abroad circumvents the issue by looking at services provided, not how the company defines itself. If company is registered in Switzerland and provide services included in a non-exhaustive list, then they fall under PMSCs regulations. This Act also aims at framing how private security services providers must behave domestically and abroad. The Act was efficient in promoting accountability and transparency within the industry, although it also highlighted the need to cooperate and establish an international network of similar national frameworks as some companies, reluctant to respect the rules of the Act, chose to move their registration to another State and effectively avoid oversight by Switzerland.

Once a case study for impunity relating to the conduct of PMCs, Iraq now offers another compelling example of the way that national legislation can be helpful in regulating the conduct of contractors. In June 2004, the Coalition Provisional Authority (CPA) adopted Memorandum Number 17 which requires both national and international PSCs operating in Iraq to register with the Ministry of Interior, and provides guidance on registration, licensing, and regulations of PSCs.⁹ However, these regulations remained fairly loose. According to interviews conducted by CIVIC in the context of their research with analysts and staff from PSCs operating in Iraq, major changes only began to occur in the legal and operating environments for PSCs following the 2007 Blackwater incident,¹⁰ thanks to a strengthening of the Iraqi legislation that restricted the access of international PSCs from operating in Iraq. Additionally, the Iraq-US Status of Force Agreement signed in 2009 made it so US contractors were no longer immune to Iraqi laws.

Strengthening the implementation of existing norms framing the conduct of PMSCs in conflict settings

States cannot distance themselves from their basic obligations under international law simply by outsourcing their combat functions to PMSCs, nor can they shed state responsibility when laws are violated by private agents acting under their authority. However, as mentioned earlier, the implementation of IHL and IHRL with regards to the conduct of PMSCs has proven to be challenging, leading to problematic accountability gaps. The international community is therefore encouraged to support initiatives geared at creating instruments through which States reaffirm their commitment to the full implementation of the norm while encouraging the adoption of good practices towards stronger civilian protection and accountability, such as the good practices identified in the Montreux

9 Jordi Palo-Laverdos and Leticia Amendariz, *The Privatization of Warfare, Violence and Private Military & Security Companies: A factual and legal approach to human rights abuses by PMSC in Iraq* (2011), p 42, <https://novact.org/wp-content/uploads/2012/09/The-privatization-of-warfare.pdf>; Coalition Provisional Authority, "Registration Requirements for Private Security Companies (PSC)", *Memorandum Number 17*, June 26, 2004, https://govinfo.library.unt.edu/cpa-iraq/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf.

10 CIVIC interview with the Director of a PSC in Iraq (name withheld) interview no. 4, April 2021; CIVIC interview with the Business Development Director of a PSC in Iraq (name withheld), interview no. 9, May 2021; CIVIC interview with a security expert (name withheld), interview no. 3, April 2021; Heidi Peltier, "The Growth of the "Camo Economy" and the Commercialization of the Post-9/11 Wars", *Boston University* (Boston: June 30, 2020), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2020/Peltier%202020%20-%20Growth%20of%20Camo%20Economy%20-%20June%2030%202020%20-%20FINAL.pdf>

Document and the ICoCA.¹¹ Participants to the present workshop discussed in particular the work of the Open-ended intergovernmental working group on PMSC established in 2017 by the Human Rights Council to draft an international regulatory framework to protect human rights and ensure accountability for violations and abuses relating to the activities of PMSCs. After consultations, a [Zero draft](#) was produced and will be presented at the group's third session in May 2022.

Strengthening accountability

Private contractors who commit serious violations may be held criminally liable either in international tribunals or in courts that exercise extraterritorial jurisdiction over certain violations of international law.

While substantial strides have been made in the past two decades to clarify international norms and good practices on PMSCs, update national legislative and regulatory frameworks, and increase human rights due diligence by clients in contracting PMSCs services, accountability mechanisms overall have evolved less. It is imperative they be supported in better holding PMSCs violating IHL and IHRL to account, be it national, regional, or international courts.

One workshop participant also highlighted the use of sanctions, such as the set of sanctions enacted by the EU in 2021 and 2022 against the Wagner group itself, associated individuals and connected entities¹², to try and better hold perpetrators into account, including PMSC individuals or groups, bearing in mind that sanctions remain a politicized process.

- 11 For the Montreux Document, see: "Part Two on good practices relating to private military and security companies", p. 16. For the ICoCA, see: ICoCA, *Guidance On Human Rights Impact Assessments For Private Security Providers* (2021), https://icoca.ch/wp-content/uploads/2021/07/ICoCA_HRIA_Guidance_A4_EN_WEB.pdf & ICoCA, *Guidelines for Private Security Providers on Preventing and Addressing Sexual Exploitation and Abuse* (2019), https://icoca.ch/wp-content/uploads/2020/07/ICoCA_PSEA_Guidelines_A4_web_1.pdf.
- 12 Council of the European Union, "EU imposes restrictive measures against the Wagner Group" (Brussels, December 13, 2021), <https://www.consilium.europa.eu/en/press/press-releases/2021/12/13/eu-imposes-restrictive-measures-against-the-wagner-group/> & "Official Journal of the European Union", Vol65, (Brussels, February 23, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2022:042I:FULL&from=EN>.

RECOMMENDATIONS

To States:

As clients and regulators, all national governments – whether global powers, assisting nations, or conflict-affected States – must play an essential role in fostering higher national and international standards for the use and operation of PMSCs. To that end, they should:

- Join, promote and implement the existing frameworks on PMSCs such as the Montreux Document and ICoC;
- Support multilateral initiatives to promote higher standards in the use of PMSCs;
- Acknowledge that PMSCs are ‘State agents’ when performing State duties and incorporate relevant provisions in the contract;
- Ensure their military frameworks including planning tools, conflict sensitive assessments and threats assessment, can identify and respond to threats to civilians arising from the use of PMSCs;
- Support the development of capabilities of all actors who are monitoring IHL and IHRL violations by PMSCs and reduce the threats they are facing when doing so.

To PMSCs:

PMSCs are encouraged to adapt their internal frameworks, policies, and practices in ways that will prevent and mitigate potential civilian harm arising from their presence, activities, and operations in conflict countries. They should:

- Join and ensure compliance with the ICoCA;
- Take appropriate measures to operate in accordance with applicable laws and regulations;
- Adopt and implement basic safeguards to prevent and mitigate the risk of civilian harm arising from their presence and activities in conflict countries;
- Exercise heightened IHL and IHRL due diligence to capture potential and actual harm to civilians arising from presence and activities;
- Proactively establish internal grievance mechanisms to prevent, mitigate, and respond to potential incidents on vulnerable populations.

To the United Nations and other intergovernmental bodies:

Gaps in the international regulatory framework, as well as challenges to monitoring IHL and IHRL violations attributed to PMSCs, call for a strengthened role of the UN and other appropriate international and regional intergovernmental bodies to increase accountability and transparency on incidents of civilian harm and violations arising from the use of PMSCs in conflict countries. In particular:

- Intergovernmental bodies and entities such as UN peace operations and the OHCHR should monitor harm to civilians resulting from PMSC presence.

To INGOs and local CSOs:

INGOs and local civil society organizations may have the mandate or otherwise be in a position to monitor and report on IHL and IHRL abuses and violations or other incidents of civilian harm happening in specific contexts where PMSCs are operating. However, they are also particularly exposed to potential retaliation or security threats if they are perceived as or are undertaking these activities.

CSOs that are or wish to undertake these activities could consider:

- Monitor incidents of civilian harm allegedly attributed to PMSCs, while simultaneously adopting a “Do No Harm” approach in view of preserving the security of staff members, liaise with local/international CSOs, local coalitions, and other monitoring agencies, and
- Engage on evidence-based advocacy with governments in view of promoting stronger regulatory and policy frameworks on the use of PMSCs in conflict countries.

In addition, INGOs should:

- Make sure to have adequate procurement policies in place when contracting private security services.

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