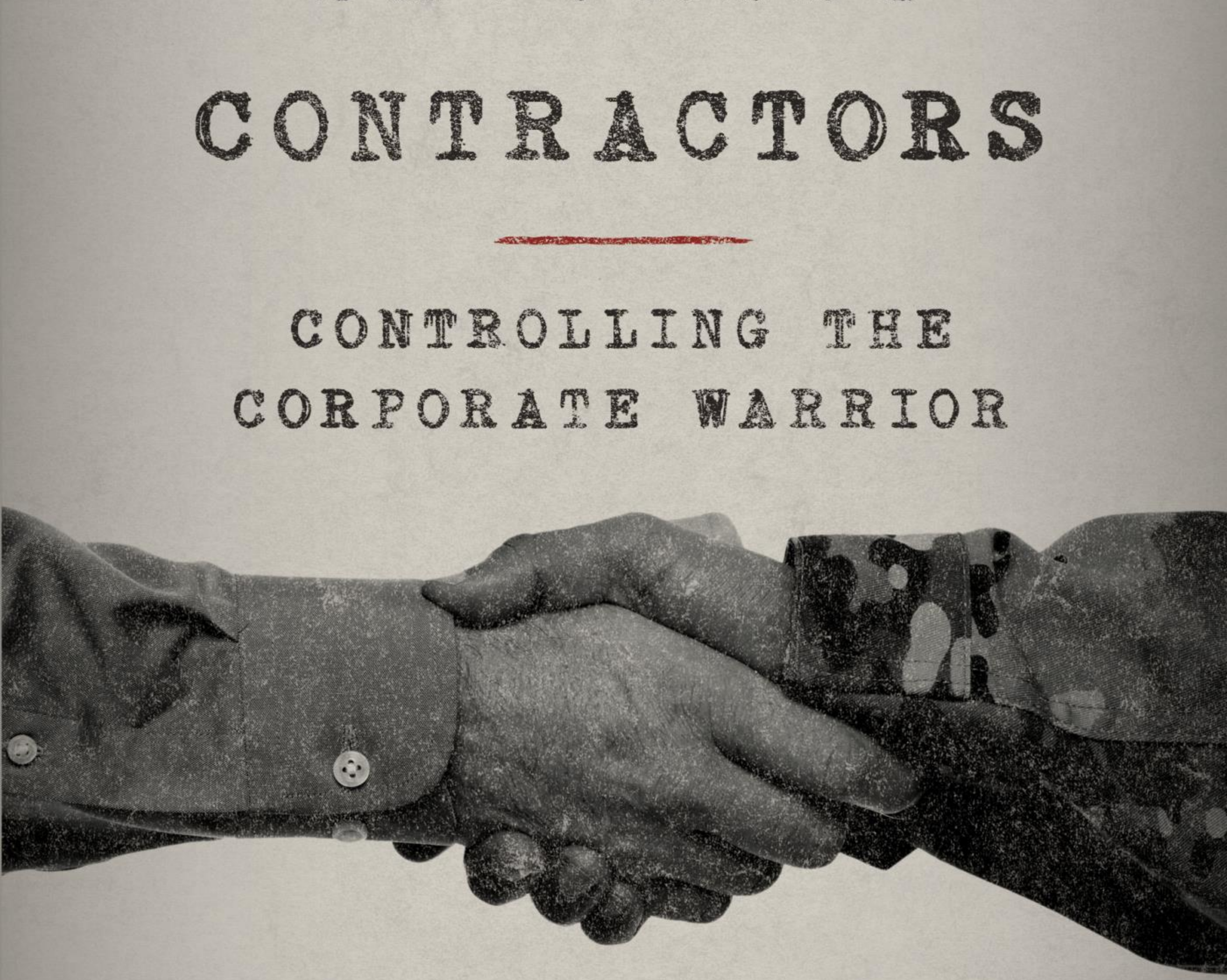
PRIVATE MILITARY AND SECURITY CONTRACTORS

CONTROLLING THE CORPORATE WARRIOR



EDITED BY

GARY SCHAUB JR.

AND RYAN KELTY

Private Military and Security Contractors

Private Military and Security Contractors

Controlling the Corporate Warrior

Edited by Gary Schaub Jr. and Ryan Kelty

ROWMAN & LITTLEFIELD
Lanham • Boulder • New York • London

Published by Rowman & Littlefield
A wholly owned subsidiary of
The Rowman & Littlefield Publishing Group, Inc.
4501 Forbes Boulevard, Suite 200, Lanham, Maryland 20706
www.rowman.com

Unit A, Whitacre Mews, 26-34 Stannary Street, London SE11 4AB,
United Kingdom

British Library Cataloguing in Publication Information Available

Library of Congress Cataloging-in-Publication Data
Names: Schaub, Gary, 1969– editor. | Kelty, Ryan, 1971– editor.
Title: Private military and security contractors : controlling the corporate warrior / edited by Gary Schaub and Ryan Kelty.
Description: Lanham, Maryland : Rowman & Littlefield, 2016. | Includes bibliographical references and index.
Identifiers: LCCN 2016007297 (print) | LCCN 2016007467 (ebook) | ISBN 9781442260214 (cloth : alk. paper) | ISBN 9781442260221 (pbk. : alk. paper) | ISBN 9781442260238 (electronic)
Subjects: LCSH: Private military companies (International law) | Private military companies—Law and legislation. | Private security services—Law and legislation.
Classification: LCC KZ6418.5 .P75 2016 (print) | LCC KZ6418.5 (ebook) | DDC 341.6—dc23
LC record available at http://lccn.loc.gov/2016007297

 ™ The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences Permanence of Paper for Printed Library Materials, ANSI/NISO Z39.48-1992.

Printed in the United States of America

Contents

Chapter Ten

The Montreux Document

The Legal Significance of a Non-legal Instrument

Ian Ralby

It is not often that the most legally significant instrument in a given field is expressly not a legal instrument. But the field of private security is unusual in many respects. The 2008 "Montreux Document" was the first major international undertaking to address the use of companies that offer security services for hire.[1] A number of initiatives have sought to bolster the accountability of armed contractors in the years since the Montreux Document was first signed, but it remains the only initiative focused on the interaction between states and the industry.[2] While the Document's text restates existing international legal obligations and provides states with "good practices" concerning their engagement with "private military and security companies" (PMSCs), the Document has international legal significance in two key respects. First, it is the most credible and extensive clarification of the legal twilight surrounding the PMSC industry. Second, and most importantly, it is likely over time to form the basis of customary international law regarding the use of PMSCs. Despite its own protestations, therefore, the Montreux Document should be seen to have inherent and growing international legal significance.

THE MONTREUX DOCUMENT

In 2006, the International Law Division of the Swiss Federal Department of Foreign Affairs and the International Committee for the Red Cross (ICRC) initiated the so-called Swiss Initiative to address the perceived accountability gap in the use and operation of companies offering security services in conflict zones.[3] Eighteen key countries collaborated via four expert meetings

and five intergovernmental sessions over the next two years to first identify the existing international legal obligations surrounding the industry and suggest what "good practices" states should adopt when interacting with the industry.[4] The participating countries were Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Russia, Sierra Leone, South Africa, Sweden, Switzerland, Ukraine, the United Kingdom, and the United States—essentially the countries with the strongest ties to PMSCs.[5] On 17 September 2008, 17 of those states—Russia backed out the day before the proceedings concluded—endorsed the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict.[6] Now, with 53 states and 3 international organizations—the European Union (EU), North Atlantic Treaty Organization (NATO), and the Organization for Security and Cooperation in Europe (OSCE)—"participating" in the Montreux Document,[7] it is the most widely accepted international agreement on the subject of private armed contracting.

According to its preface, the Document "recalls existing legal obligations of States and PMSCs and their personnel . . . and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict."[8] It is expressly non-binding and explicitly neither creates nor alters any legal obligations.[9] Participating states and organizations specify that they do not seek to endorse the use of PMSCs, but rather to use multilateral collaboration in order to clarify what laws and practices should guide states and other contracting entities[10] when the decision to use a PMSC has been made.[11] Importantly, the preface also makes it clear that the principles of the Document are not limited to armed conflict settings and not exclusively applicable to states.[12] It encourages cooperation between states in the implementation of the Document, suggesting that the realization of the Document's aims will be an ongoing process.[13] Additionally, part of that cooperation includes working with PMSCs.

WHAT ARE PRIVATE MILITARY AND SECURITY COMPANIES?

This entire volume could be filled with analysis of the various terms that are used to label private military, private security, and armed contracting activity. Fortunately for the present analysis, however, the Montreux Document provides the most widely endorsed definition of the term "private military and security companies," or PMSCs. They are

> 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.[14]

It bears noting, however, that many companies within the industry as well as some of the participating states object to the inclusion of the word "military" in the definition.[15] Their argument is that they only provide defensive security services under the laws of self-defense and defense of others.[16] While that may be the case, the Montreux Document applies to companies offering a broad array of services that, as the above definition indicates, includes activities beyond protection of people or even property.

The international accountability initiatives that have sprung forth from the Montreux Document—including the International Code of Conduct for Private Security Service Providers (ICoC) and its governing association (ICoCA), the American National Standards Institute Private Security Company (ANSI PSC) standards, and the forthcoming International Organization for Standardization (ISO) standards—have all applied to a more limited array of actors than the PMSCs addressed in the Montreux Document. Indeed, companies that maintain and operate weapons systems, provide prisoner detention services, and train local forces are expressly excluded from these other initiatives.[17] This analysis, therefore, will use the terminology and definition provided by the Montreux Document.

As many continue to refer to PMSCs as "mercenaries," it is important to take a moment to distinguish these two different sets of private actors involved in conflict. Mercenaries have been defined under international law in a number of instruments, including an African Union convention,[18] Additional Protocol I to the Geneva Conventions,[19] and a 1989 United Nations convention[20] that outlaws the recruitment, use, financing, and training of mercenaries (which will be discussed further below). The definitions contained in the various international legal instruments, however, are lengthy, with numerous sub-parts, and require that all elements be met. PMSCs are considered to fall "outside the full domain of all of these existing legal regimes."[21] Furthermore, as one commentator boldly put it: "any mercenary who cannot exclude himself from th[ose] definition[s] deserves to be shot—and his lawyer with him."[22] The present analysis will not delve into the distinctions between mercenaries and PMSCs, but maintains, throughout, that the two terms are neither synonymous nor interchangeable.

THE STATUS OF THE MONTREUX DOCUMENT

The Montreux Document is part of a growing body of "soft law" initiatives. Contrasted with "hard law," which refers to binding legal commitments, "soft law" is often used to characterize quasi-legal instruments like the Montreux Document that, while not binding, nevertheless indicate a desire on the

part of states to clarify how they should conduct themselves. Soft law is a controversial term, as some legal practitioners and scholars do not believe in its existence.[23] It is unquestionable, however, that the Montreux Document is not a treaty, convention, or other traditional instrument, but does nevertheless constitute an agreement between states. The terminology used to describe and explain the Montreux Document indicates a concerted effort for it not to be mistaken for a hard law instrument. States are not signatories, they do not ratify it, and it is not "in effect." Instead, states "participate" in it. This nuance underscores the soft law, or at least non-binding nature of the Document.

As noted, significant analysis could be devoted to distinguishing *PMSCs* from *mercenaries*, but a brief comparison between the uptake of the Montreux Document versus the UN Mercenary Convention provides some insight into the former's significance. On 4 December 1989, the General Assembly made good on its commitment to outlaw mercenary activity by producing the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.[24] The UN Mercenary Convention, as it is known, did not, however, take effect until 20 October 2001, as it took those 12 years to garner sufficient support. Since 1989, only 33 of the 193 member states of the United Nations have ratified the UN Mercenary Convention.[25] Since 2008, 52 states and 3 major intergovernmental organizations have signed to participate in the Montreux Document.[26] The lack of support for the UN Convention and the speed with which the Montreux Document—which tacitly legitimizes the existence and operation of PMSCs—has been embraced indicates that state practice favors the acceptance of PMSCs over banning mercenaries. Furthermore, 13 states have signed both documents, indicating that these states understand PMSCs as being fundamentally different from the mercenaries outlawed by the UN convention. The growing support for the Montreux Document certainly suggests increasing international consensus surrounding its content—with regard to both the legal obligations and "good practices." But the non-binding nature of it also helps account for the speed with which it has been adopted. This analysis, therefore, explores the hard law effects of this soft law instrument.

On its terms, the Montreux Document applies to armed conflict settings. While PMSCs continue to be used in both international and non-international armed conflicts, the industry has become involved in a wide variety of contexts around the world, many of which are complex or hostile, but not armed conflicts. the Document notes that many of the provisions drawn from international humanitarian law only apply in the context of armed conflict, but the participating states suggest nevertheless that many of the good practices, in particular, can apply to other contexts in which PMSCs are hired.[27] Notably, however, the onus of compliance falls on the voluntary action of the states, as "each State is responsible for complying with the obligations it has undertak-

en pursuant to international agreements to which it is a party, subject to any reservations, understandings and declarations made, and to customary international law."[28] The value of the Document, therefore, lies in identifying what obligations do exist in the context of private military and security contracting. Taking this broader construction of the document, the analysis will not consider the Montreux Document to be limited in relevance only to armed conflict settings.

STRUCTURE OF THE ANALYSIS

This analysis explores the legal significance of the Montreux Document in its two most significant areas: (1) the clarification it provides regarding the application of international law to PMSC contracting, and (2) the potential it has to form the basis of binding customary international law. It does not, however, herald the initiative as resolving the issue of accountability for PMSCs. On the contrary, it suggests that the Montreux Document provides a valuable starting point for a process that will need to continue indefinitely. Wherever possible, the analysis points out the shortcomings of the Montreux Document, but highlights what has been done thus far to remedy any such problems.

An analysis of the Document's section on legal obligations helps elucidate its substance and its role in clarifying legal consensus surrounding the PMSC industry. This first part, among other things, notes the importance of having clarification as to the status of armed contractors under international humanitarian law and highlights that, though endorsed by states, the Document also provides legal guidance to PMSCs. It also points out some of the gaps that have arisen since 2008, particularly with regard to "manpower states," which are not included along with contracting, home, and territorial states in the Document.

In the second part, the analysis explores the Document's potential role in creating customary international law, examining in some depth the portions relating to "good practices." Some of those good practices are also examined insofar as they contribute to legal clarity. Ultimately, the main conclusion of the analysis argues that the Montreux Document may already be contributing to the creation of customary international law. It goes so far as to suggest that, given the number of participating states, there appears to be customary international law developing around the acceptability of using PMSCs.

The analysis concludes by arguing that this non-legal, non-binding document might ultimately have as much international legal significance as if it had been a multilateral treaty or convention. It reasons that, from an international law standpoint, no initiative since the Montreux Document compares to it in legal significance. The conclusion emphasizes that, while imperfect,

the Montreux Document remains the most important development to date in the quest to resolve the legal twilight that continues to surround the private military and security industry.

PART I: LEGAL CLARIFICATION

The legal clarification provided by the Montreux Document is the primary focus of the first 27 paragraphs, grouped under the heading "Part One." Part One focuses on the existing laws pertaining to PMSCs and breaks them into six categories: those applicable to (1) contracting states, (2) territorial states, (3) home states, (4) all other states, (5) PMSCs and their personnel, and finally (6) the relevant laws of superior responsibility. To clarify, contracting states are the ones that hire PMSCs, territorial states are those on whose territory PMSCs operate, and home states are the ones in which PMSCs are registered as businesses. According to the publicity surrounding the Montreux Process, "The Montreux Document is the first international document to describe international law as it applies to the activities of private military and security companies (PMSCs) whenever these are present in the context of an armed conflict."[29] While this assessment is true in some regards, it is important to remember that states, not PMSCs, are the signatories of the Montreux Document. So the principal focus and value of the Document is in clarifying international legal principles, parameters, and guidance with regard to how states should interact with the industry. It only clarifies to a limited extent, therefore, principles, parameters, and guidance for the industry itself. With that in mind, there are some important provisions worth noting.

General Obligations

According to the Montreux Document, contracting states, territorial states, home states, and all other states are advised that they have an obligation "to ensure respect for international humanitarian law"[30] and "are responsible to implement their obligations under international human rights law."[31] Furthermore, contracting states, territorial states, home states, and all other states "have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I."[32] These provisions unequivocally restate the bodies of law under which the various interested states must operate. Furthermore, they remind participating states of their obligation to ensure their domestic laws adequately incorporate international legal principles and provide functional criminal penalties when the international laws are violated. While these general provi-

sions do not provide substantive guidance on the interpretation of international laws vis-à-vis PMSCs, other provisions go into greater specificity.

Contracting Responsibility

The Document establishes that contracting states retain their international legal obligations even after contracting with a PMSC[33] and thus cannot outsource to PMSCs what they cannot legally do themselves.[34] While seemingly obvious, this provision is extremely important in light of criticism suggesting that states use PMSCs to avoid legal obligations.[35] The Document furthermore establishes that states have an affirmative duty to monitor the PMSCs with which they contract,[36] to punish any violations of international law,[37] and to amend their national legal systems to provide penal remedies for any PMSCs that violate the Geneva Conventions or Additional Protocol I.[38] This obligation is not a one-off, so the requirement of legal reform requires that states continually work to ensure that domestic legislation adequately satisfies international obligations, even as the activities of the industry evolve and change. Contracting states also, according to the Montreux Document, have a responsibility to provide reparations to parties injured by PMSCs as the result of violations of international humanitarian law and international human rights law.[39] These provisions clearly establish an obligation on the part of contracting states to proactively address these matters of accountability and seem to be consistent with the "Respect, Protect, Remedy" framework promoted by the United Nations in its Guiding Principles on Business and Human Rights.[40]

State Responsibility

One of the most significant provisions of the Document in terms of legal clarification pertains to the responsibility of contracting states for the actions of the PMSCs they hire. Paragraph 7 of the "Legal Obligations" section reads:

> Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:
>
> a. incorporated by the State into its regular armed forces in accordance with its domestic legislation;
> b. members of organized armed forces, groups or units under a command responsible to the State;

c. empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or
d. in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).[41]

This paragraph explains, according to the states principally involved in the private military and security industry, how the actions of PMSCs can be attributed to the states that hire them. Without even delving into the nuances of state responsibility,[42] this provision provides agreement between states as to how the relationship between contracting states and PMSCs should be treated. Indirectly, this also helps illuminate the various functions a PMSC can have and the various ways such companies can take on responsibilities traditionally held by states.

Individual Responsibility

The final paragraph of the "Legal Obligations" section also further clarifies the responsibility of states that hire PMSCs, as well as the directors and officers of the PMSCs themselves.[43] Whereas paragraph 7 focused on the responsibility of states for the actions of PMSCs, this paragraph establishes individual criminal liability for acts committed by the personnel of PMSCs. Contractual relations alone do not suffice to create such liability according to this provision. In order for a superior, whether within a PMSC, within the client government, or within a nonstate client that has hired the PMSC, to be individually liable for the acts of a contractor, he or she must exercise control over the contractor. Again, this provision provides important guidance to PMSCs, albeit indirectly, as to how their personnel can incur liability, and thereby, how they should seek to avoid or limit that liability. Furthermore, it serves as a warning to states regarding the exercise of control over the acts of a PMSC. By making military or civilian government personnel individually liable for the criminal conduct of a PMSC under their control, they place a heavy burden on state officials to ensure the lawful actions of such contractors. It also clarifies that individuals cannot avoid responsibility for PMSC misconduct on account of their position or role within a client organization.

PMSC Responsibility

With regard to PMSCs themselves, paragraphs 22–26 of the "Legal Obligations" section are most directly relevant in terms of guiding the conduct of the industry. Paragraph 23 provides clear direction for the personnel of PMSCs: "The personnel of PMSCs are obliged to respect the relevant nation-

al law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality."[44] At any given time under normal circumstances, an individual should be able to determine the law of the state in which he or she operates as well as the law of the state of his or her nationality, even if he or she has to hire a lawyer to do so. This provision, therefore, provides useful guidance that is understandable without substantial extrapolation. Problems may arise, however, when there is no guidance given as to what to do when the rule of law has collapsed in the state in which PMSCs are operating, or when there is a conflict between that state's laws and those of another relevant jurisdiction like that of the contracting state or of the contractor's nationality. So difficult questions remain unanswered.

The other four paragraphs in this section similarly suffer from a failure to address the full complexity of international law, but are nevertheless helpful in providing some clarification. Paragraph 22 reads: "PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labor law, and specific regulations on private military or security services."[45] The Montreux Document does not take on the mammoth task of interpreting how or even when international humanitarian law, either customary or treaty-based, applies to PMSCs. Indeed, relatively little work has been done to delve into the legal nuance surrounding the industry.[46] The caveat added to the mention of human rights law, "imposed upon them by applicable national law," makes the human rights component of this provision somewhat more intelligible. That said, what laws are "applicable" may be difficult to interpret in the contexts in which PMSCs operate.

This is an industry that had only self-imposed industry guidelines that could lead to established standards or practices at the time the Montreux Document was written[47] and has few credible sources of official guidance on how to operate within international law to this day. Indeed, the Montreux Document set out to start the process of resolving that very uncertainty. While the Montreux Document provides a general formula for determining what human rights law applies, the difficulty is that it might not always be clear for a PMSC, especially one registered in state A, working on a contract for state B in state C with personnel from state D, to determine how to apply that formula in practice.

Applying IHL to PMSCs

While it is all well and good that international humanitarian law (IHL) applies to PMSCs—a fact that is indisputable, since IHL applies universally within armed conflict settings—the difficult question is determining where

PMSCs, a relatively new entity in world affairs, fit into treaties and customs that do not account for their existence. The Montreux Document does offer some guidance. "The status of the personnel of PMSCs is determined by international humanitarian law, on a case by case basis, in particular according to the nature and circumstances of the functions in which they are involved."[48] This provision provides a starting point and methodology for determining the status of a PMSC contractor in the midst of an armed conflict. It does not, however, clarify how that determination should actually be made. In other words, this provision does not provide criteria for evaluating whether the individuals are protected civilians, unprotected civilians, members of militias and other volunteer corps, contractors accompanying the armed forces, or possessing of some other status.

The next paragraph skips over the status determination process and examines the legal protections attributed to PMSC personnel when they are operating in civilian status. "If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities."[49] Direct participation in hostilities is a difficult matter to interpret. While the ICRC has published its Interpretive Guidance on the matter, those interpretations, particularly with regard to PMSCs, are not universally shared. While there is some consensus that self-defense—the principal activity of PMSCs—does not constitute direct participation in hostilities, the lack of universal agreement means that this provision of the Document, like many of the others, is too vague to provide consistent guidance. But it is, again, an important starting point and useful for identifying where problematic legal issues are likely to arise.

Paragraph 26 of the Montreux Document, on the other hand, provides the most important guidance for interpreting how international humanitarian law applies to PMSCs. This paragraph, more than any other in the Montreux Document, explains how PMSCs fit into the existing law of armed conflict. It reads:

> The personnel of PMSCs:
>
> a. are obliged, regardless of their status, to comply with applicable international humanitarian law;
> b. are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;
> c. are entitled to prisoner of war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention;

d. to the extent they exercise governmental authority, have to comply with the State's obligations under international human rights law;
e. are subject to prosecution if they commit conduct recognized as crimes under applicable national or international law.[50]

In terms of providing clarity, this provision shows that PMSCs can have a range of statuses and can have prisoner of war protection in certain circumstances. It also establishes that their default status is as protected civilians, unless that status is mitigated or altered under the circumstances. Additionally, it places an emphasis on their following IHL regardless of their status and furthermore opens the door to their exercising quasi-official governmental status with regard to human rights obligations. The danger is that it leaves quite a few uncertainties. For example, when would PMSC personnel be deemed members of organized armed forces? Would that only be a de jure determination or would it also include de facto incorporation? Could a PMSC itself be considered an organized armed group? Under what circumstances, besides the direct participation in hostilities, might the contractors lose their protection under IHL? Indeed, the Montreux Document may raise as many, if not more, questions than it answers.

Perhaps not surprisingly, this paragraph has been the focus of extensive commentary and critique. What is surprising, however, is that much of that commentary and criticism lacks rigor and is rife with inaccuracies. For example, one commentator wrote: "Among other obligations, the Montreux Document guarantees PMC personnel POW status (provided they comply with article 4(A) of the Third Geneva Convention), and thus stands in stark contrast to Protocol I."[51] First, it is not clear why PMSC personnel having prisoner of war status in certain circumstances stands in stark contrast to Additional Protocol I. Such a statement indicates that the commentator believes PMSC personnel to be equivalent to mercenaries who, under Article 47 of Additional Protocol I, do not have such status—a confusion that is inconsistent with sound legal analysis.[52] Further, the Montreux Document, as discussed above, only mentions prisoner of war status for PMSCs when they act as persons accompanying the armed forces under Article 4(A) of the Third Geneva Convention. Nothing in the Montreux Document requires PMSC personnel to "comply" with Article 4(A)—a strange notion to begin with, since compliance with a list of statuses does not make sense.

Similarly, esteemed international criminal law scholar Cherif Bassiouni has written, "The Document avoids defining contractors as combatants or non-combatants, a move probably designed to have the document provide a more functional than political approach to the role of civilian contractors in combat zones."[53] Though the Document does not mention combatant status specifically, paragraph 26 does establish PMSCs as protected civilian non-combatants in most cases and clarifies that they can, under the proper

circumstances, have combatant status and that they can do things to lose civilian protections. Jamie Williamson of the ICRC even recognizes that very point in an analysis of direct participation in hostilities.[54]

Conclusion

This brisk review of the some of the key legal portions of the Montreux Document highlights a few important elements. First, the Document places responsibilities on participating states to proactively engage in legislative processes to ensure that existing international legal obligations are adequately translated into domestic law. Second, it provides some clarity regarding interpretation of international law with regard to the use and operation of PMSCs. Third, while it flags a number of legal issues, it does not delve into some of the more complex nuances of them. It is limited, therefore, in the guidance it provides to states. Further work to establish international consensus on certain legal complexities will be needed. Finally, it sets a solid stage for future undertakings to delve into the legal challenges and nuances that remain unaddressed. In other words, the Document does not answer all the questions that would provide complete legal clarity, but it does offer a good starting point for honing the international consensus around the legal matters relevant to the PMSC industry.

PART II: THE BASIS OF CUSTOMARY LAW

Understanding the Montreux Document's potential role in developing customary international law requires at least a basic understanding of how international law is made. The statute of the International Court of Justice establishes four principal sources of international law:

1. Treaties and conventions.
2. Custom.
3. The laws of civilized nations.
4. Jurisprudence of courts and treatises of experts.[55]

While some commentators seem to believe a convention is the only way to adequately address the accountability issues of the private security industry,[56] they often fail to recognize that there are other processes, already in motion, that may provide, over time, the legal clarity needed for the industry to be a functional, legal, and reliable contributor to international security.

Customary international law is born of state practice.[57] The International Law Association defines it as being "created and sustained by the constant and uniform practice of states in circumstances that give rise to the legitimate expectation of similar conduct in the future."[58] By prescribing a uniform and

mutually agreed approach to interacting with the PMSC industry, the Montreux Document could form the basis of customary international law. In other words, if states consistently and continually adhere to the principles and prescriptions of the Montreux Document, particularly out of a sense of obligation, then customary international law will form around the Document's content. Having reviewed the Document's portion on legal obligations in part 1, it is necessary to review the good practices section to explore what new international law may arise out of adherence to the Montreux Document.

Good Practices

The term "best practices" is commonly found as an indication of the expected standard within a given field. Similar to the emphasis on states "participating" in the Document instead of "ratifying" it, the use of the term "good practices" in the Montreux Document highlights the novelty and uncertainty surrounding the PMSC industry. In other words, states were content to articulate good practices, but they were not willing to declare them "best practices," as best practice would require greater time and experience to ascertain. As in the legal section, the good practices are divided among those for contracting states, those for territorial states, and those for home states. In contrast to the legal section, however, no sections focus specifically on the industry itself or the laws of superior responsibility.

Contracting States

The section on contracting states begins by asserting that states must first assess what they may and may not outsource.[59] Certain services presumably fall within the exclusive ambit of the state, and therefore the state may not contract with a PMSC to perform those services. The provision, however, does not clarify where to draw the line, but seems to indicate that direct participation in hostilities would be impermissible, as it notes that "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."[60] While this provision is a useful reminder that not all services can be outsourced, it does not provide much guidance on how to determine what services would be permissible versus impermissible for a PMSC to perform on behalf of the contracting state.

The next several provisions pertain to the "procedure of selection and contracting of PMSCs." Essentially, the Document instructs that contracting states must perform due diligence before hiring a PMSC. While not expressly referenced, it is likely that current interpretation of these provisions will encourage consideration of the due diligence approach promoted by UN Special Rapporteur on Business and Human Rights John Ruggie in the UN

Guiding Principles on Business and Human Rights.[61] The Document suggests that, ultimately, there must be transparency in the relationship between the contracting state and the PMSC. Paragraph 4 details various ways in which this transparency can be achieved. This section provides contracting states with valuable guidance on what to do when selecting a PMSC.

The section setting forth the "criteria for the selection of PMSCs" provides remarkably detailed and practical advice, covering everything from prior records to financial stability to training standards. This portion of the Montreux Document is evidently based on the experiences gleaned from a relatively unregulated private military and security industry. It requires that contracting states ensure that the equipment and weapons used by the company are obtained legally; that the contracting state ensure that the PMSC's personnel are trained in national and international law; that the PMSC have not participated in any violations of international humanitarian law or human rights law, or at least have remedied any past violations; that the PMSC have the financial stability to fulfill its contract and pay any liabilities it may incur; that the PMSC have all the proper licenses; that the PMSC abide by labor laws and look after the welfare of its employees and contractors, and so on.[62] Indeed, paragraphs 5–13 contain the most direct guidance of any part of the Montreux Document and the most direct guidance in any international instrument to date concerning the responsibilities when hiring a PMSC. It is not surprising that these provisions are later referenced in other parts of the Document.

As helpful in some respects as these provisions may be, the question arises: How? How are states to verify this information with virtually no domestic and, as yet, no international infrastructure for recording or preserving the necessary information? As there is no central body that adjudicates violations of IHL and as states are often unable to pursue action on such violations, verifying violations of IHL is quite difficult. Equally, confirming that the PMSC has sufficient financial stability to ensure that it can pay for any liabilities it might incur is impracticable, since the range of liabilities is immense and rife with uncertainty. These pragmatic barriers to the best practices of the Montreux Document inhibit its potential effectiveness and even the ICoCA has not yet provided adequate remedy. That said, it is a good aspiration toward which to work.

The guidance as well as the challenges inherent in paragraphs 5–13 are incorporated into many of the remaining good practices. In establishing the contract between the state and the PMSC, for example, the Document instructs that the criteria of paragraphs 5–13 should be included. The focus is on ensuring the preeminence of national and international law, and to do so, the contracting state should consider contractual provisions addressing

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).[63]

Though these provisions incorporate by reference the uncertainty discussed above, the guidance provided is, from a theoretical standpoint, quite useful. The subsequent provisions on the termination of contracts, the contractual arrangements surrounding selection and hiring of subcontracted PMSCs, requirements regarding identification of PMSC personnel, pricing and payment arrangements, and consultative agreements with the territorial state or states are likewise of substantial value and utility.[64] Even if they do not provide specifics, they provide a set of ingredients necessary for states to include when contracting with PMSCs.

Focusing more on some of the legal significance of the Document, the section on "monitoring compliance and ensuring accountability" provides advice to contracting states regarding the treatment of PMSCs in their national laws.[65] It advocates that the states institute laws that address criminal and noncriminal matters, and institute administrative frameworks for regulatory oversight, building on a number of provisions from the "Legal Obligations" portion of the Document. Since these provisions are fundamental to the present analysis, it is worth examining them in their entirety.

Paragraph 19 focuses on criminal law, not just for individual contractors, but for the corporate entities employing them as well. It advocates that contracting states seek

> 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.[66]

The recommendations of this paragraph mean that contracting states should actually amend their laws in order to be able to exercise criminal

jurisdiction over both the employees of a PMSC with which it has contracted and the PMSC itself. It suggests, for example, that UK courts should have criminal jurisdiction over the American or even Peruvian employees of a US PMSC with which it has contracted. Furthermore, the UK courts should have criminal jurisdiction over the US PMSC as a corporate entity with an independent capacity for criminal activity. The clarification of such jurisdiction would help substantially to reduce one of the principal areas of legal twilight surrounding PMSCs. It would certainly establish more stringent relations between state principals and their agents. Essentially, this provision recommends that states adopt long-arm criminal statutes that allow for prosecution of crimes committed abroad, regardless of nationality.

This recommended criminal jurisdiction would apply to crimes defined under international law, as well as in the contracting state's domestic law. This means that contracting states would have to resolve any complications in their own legal systems that could potentially hinder a criminal prosecution of a noncitizen or nonresident corporation for international crimes committed on foreign territory. Currently, such complications form a substantial barrier to successful prosecutions in most states. Even procedural concerns and evidentiary issues relating to the collection and admissibility of evidence must therefore be addressed. These recommendations, therefore, propose a rather extensive undertaking.

The Document goes on to make similar recommendations regarding noncriminal matters:

> 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:
>
> a. immediate or graduated termination of the contract;
> b. financial penalties;
> c. removal from consideration for future contracts, possibly for a set time period;
> d. 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.[67]

This paragraph also requires new legislation specifically targeted at decreasing twilight in national law surrounding the use and operation of PMSCs in noncriminal contexts. Subsection (a) is uncontroversial, as it draws on standard contract laws and indeed seeks more to set the terms of the contract than to amend a legal system. It does, however, implicitly require

some form of data collection, as contracting states are expected to keep track of companies based on their past performance. Subsection (b) is a simple recommendation that straddles criminal and noncriminal measures, and essentially suggests that the contracting state be prepared to refer the PMSC to investigating entities such as the police or tax agencies. It is not entirely clear, however, what parameters this subsection attempts to set.

Finally, subsection (c) is both important and ambiguous. Whereas the section on criminal law clarified, albeit in broad terms, what the contracting states needed to do, this provision leaves a great deal of uncertainty as to how a state should proceed. Providing civil liability could mean anything from clarifying the laws of vicarious corporate liability to instituting civil penalties for specific conduct by PMSCs. The word "appropriate" is highly ambiguous, as this is a new field, with few precedents, and virtually no guidance or agreed-upon standards. The Montreux Document is the first articulated set of guidelines, so it does not help much that in attempting to clarify issues of civil accountability—one of the most, if not the most contentious issue—the Document advises contracting states to take "appropriate" action.

Having now recommended substantial amendments to national criminal law and civil law to account for the nature of PMSCs, the Document proceeds to suggest that states also adopt administrative mechanisms for dealing with the operation of these companies.[68] Again, the drafters opted to use "appropriate" as a means of characterizing the measures that the contracting state must take. Additionally, the provisions themselves are rather vague as to what is actually necessary. Some sort of accountability mechanism needs to be put in place, and it needs to be adequately resourced; it needs to provide training, information sharing, and oversight. But there is no sense of how such a mechanism might actually be set up, or how it would work. Since there is no precedent for one it will be a challenge to successfully develop one on these principles alone. Again, however, it is an important step to have an agreement between the states as to the ingredients necessary for moving forward with how to resolve the issues of accountability surrounding PMSCs. There may be a number of different approaches, but at least there is some consensus as to what is required.

Territorial States

While the first 23 paragraphs of good practices in the Montreux Document center on the obligations of contracting states, the next 29 paragraphs focus on the obligations of territorial states. These would be states like Iraq, Afghanistan, Sierra Leone, Colombia, and others—many of which would be collapsed, failed, or otherwise in a situation where the rule of law had broken down. In summarizing the obligations, the Document establishes that "Territorial States should evaluate whether their domestic legal framework is ade-

quate to ensure that the conduct of PMSCs and their personnel is in conformity with relevant national law, international humanitarian law and human rights law or whether it needs to establish further arrangements to regulate the activities of PMSCs."[69] The one acknowledgment of the difficulties such states face is that the Document suggests that territorial states may accept information from the contracting state concerning the PMSC's ability to conduct itself in a manner consistent with domestic and international laws. Seeing as most collapsed and failed states will not be able to fulfill the obligations or adhere to the best practices described in the Montreux Document, it is not worth spending the time on a close analysis of the entire section, but as Afghanistan has shown, not all states amid armed conflict are unable to take measures to regulate PMSCs.

At the outset, territorial states are charged with determining what activities PMSCs may legally engage in on their territory.[70] Again, direct participation in hostilities seems to be a threshold point. Once such a determination is made, the territorial states should then institute, manage, and oversee a licensing and authorization program to ensure that PMSCs are approved to perform the services in which they engage.[71] Paragraphs 26–29 deal with the procedure of authorizing PMSCs to act, and paragraphs 30–39 address the specific criteria the territorial state should use in determining whether to authorize the PMSC. These criteria are similar and at times identical to those provided to contracting states in determining whether the PMSCs were suitable for hiring. Yet there are even more criteria. While the aims are laudable, it is difficult to conceive of how these territorial states, as a practical matter, would even be able to engage in the kind of background investigation required. The introduction to the section on territorial states indicates that, in light of the challenges faced by such states, they may accept information from contracting states about the PMSCs. Given that the Montreux Document pertains to armed conflict settings, the only way that territorial states could adhere to these requirements would be to cooperate and rely upon the contracting state. This proposes, therefore, a strange dynamic concerning the licensing procedure within the territorial state. Furthermore, what if, as in Sierra Leone, the contracting state and the territorial state are one and the same? Such a dynamic effectively eliminates the possibility of serious accountability on the part of the PMSC. Perhaps even more challenging: What happens if, as in the early stages of Iraq, the contracting state is at war with the territorial state? Information sharing on PMSCs in such circumstances appears impossible or untenable.

In addition to suggesting territorial states set maximum numbers for PMSC personnel and equipment, and require the companies to post bond, paragraphs 40–42 further establish that the territorial state should refer to the criteria of paragraphs 30–39 in formalizing the authorization. Paragraph 40 is even a near copy of paragraph 14, which establishes what contracting states

should include in a contract and lists past conduct, personnel records, and training among other things.[72] This is an extensive and challenging undertaking for a state that perhaps does not have a functioning electricity grid or control over its own capital city.

The term "appropriate" continues to characterize the advice given in the next several paragraphs to territorial states. Territorial states should have in place "appropriate rules on the use of force and firearms by PMSCs and their personnel"[73] and "appropriate rules on the possession of weapons by PMSCs and their personnel."[74] These various paragraphs on safety procedure again provide nice ideals, but such ideals are hard to imagine being practiced in most territorial states. Additionally, it is hard to assess, given the unique nature of conflict, what "appropriate" weapons regulations would be. These good practices therefore leave a great deal of discretion to the state in which the conflict is located and seem to actually be better suited to non-armed conflict settings.

In the final section on territorial states, "Monitoring compliance and ensuring accountability," the Montreux Document encourages territorial states to take similar legal measures as contracting states. In other words, territorial states should amend their laws to account for criminal and noncriminal jurisdiction over the actions of PMSCs. Additionally, they should oversee the authorization program that allows PMSCs to operate in the country. While such recommendations might seem reasonable, no state will normally plan to be the host of an armed conflict; and when it is a host, amending its laws to account for PMSCs will rarely constitute a top priority. In other words, these extensive recommendations really only apply to a very few states that might possibly be in a position to take them on board despite the turmoil within their boundaries. Again, this entire section seems better suited to guiding the conduct of states that are not engaged in armed conflict.

Home States

The final portion of the good practices part of the Montreux Document provides a series of recommendations for home states. These last 20 paragraphs principally reiterate the sorts of suggestions directed at both contracting and territorial states in the previous sections. In the introduction to this portion of the Document, the limitations of the advice given are noted: "It is recognised that other good practices for Regulation—such as regulation of standards through trade associations and through international cooperation—will also provide guidance for regulating PMSCs, but have not been elaborated here."[75]

The introduction continues, however, to advocate essentially an audit and rethinking of the domestic legal regimes surrounding PMSCs: "In this understanding, Home States should evaluate whether their domestic legal frame-

work, be it central or federal, is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel, or whether, given the size and nature of their national private military and security industry, additional measures should be adopted to encourage such respect and to regulate the activities of PMSCs."[76]

Finally, the introduction advocates that home states look to the laws of contracting and territorial states for guidance on regulatory regimes. Between the placement of this section as the last portion of the Document, and several suggestions that home states cooperate with other relevant states, it seems the drafters of the Montreux Document see home states not as taking the lead on the regulation of PMSCs, but as the least important of the various states involved with the industry. Given that the home states have immense leverage over PMSCs—as the authority best placed to limit or control the services their country exports—this advice is, much like the section on territorial states, out of sync with reality.

In general, the Document advocates that home states develop an authorization program in which they use a series of criteria to determine whether PMSCs should be allowed to offer their services within those states.[77] The criteria are essentially the same as those used by territorial states in their authorization schemes and by contracting states in determining whether to enter a contract.[78] The home state should also adapt its laws to account for criminal and noncriminal jurisdiction over PMSCs and to create other administrative oversight.[79] Those states should also monitor and oversee the licensing and authorization program and implement various compliance measures.[80] And they should have "appropriate" accountability mechanisms in place to address weapons purchase, ownership, and use.[81] Besides the notion that home states should "harmonize their authorization system and decisions with those of other States and take into account regional approaches relating to authorization systems,"[82] there is nothing surprising or novel in this portion of the Document.

Conclusion

These good practices were developed by collaboration between states, the ICRC, and high-level international experts. The industry had not been, and perhaps still has not been, in operation long enough to discern if those practices are actually best practices or merely good ones. As a result, this guidance is based on a mix of what is necessary, what is ideal and feasible, and what is ideal, but not yet realistic. In other words, these practices constitute a blend of the achievable and the aspirational. The criticism in this analysis points out what is perhaps not clear on account of legal uncertainty and what is not yet possible on account of the immaturity of the accountability infrastructure surrounding the industry. None of that criticism, however, detracts

from the great benefit that the guidance in the Montreux Document provides. If states follow that guidance out of a sense of obligation, and recent studies suggest they are,[83] then that routine practice based on the Document will begin to form customary international law over time. That law would then become binding, even on the states that have not chosen to participate in the Montreux Document. Consequently, the good practices section of the Document may ultimately have greater legal effect than the legal obligations section.

COMMENTARY AND GENERAL ANALYSIS

It is easy to criticize the Montreux Document for all the things it does not do. It does not resolve all issues of accountability for the private military and security industry. It also does not dispel all the legal twilight or uncertainty surrounding the industry. It does not close the gaps of practice between legal systems that may make it difficult for states and other actors to achieve comprehensive accountability. The legal section does not delve into the complex nuances of legal obligations incumbent upon states or do much to interpret the international legal obligations of the industry itself. Indeed, many of the most challenging legal questions pertaining to PMSCs under international law are left unanswered by the Montreux Document. And the good practices section does not provide a comprehensive or enforceable "how to" guide to addressing all issues that may arise in private military and security contracting.

But it is more important to recognize what the Montreux Document does and will continue to do. As the previous two sections argue, the Document helps clarify the consensus surrounding the application of international law to the use and operation of PMSCs and provides a starting point for the development of international custom. Indeed, the contrast between the number of states that have signed the UN Mercenary Convention and the number of states and organizations that participate in the Montreux Document—together with the overlap between those two lists of states—helps indicate that there may be growing custom with regard to the recognition of PMSCs as acceptable, legal actors within the field of international security. Perhaps even more importantly, evidence suggests that states are working to incorporate the principles and practices of the Montreux Document into their national law and policy, and are taking their commitment to the Montreux Document seriously.[84]

To fully appreciate the value of the Document, however, it is worth reviewing some of the key criticisms of it beyond those articulated above. Amol Mehra, in a rather extensive and pointed critique, argues that "although the goal of the Montreux Document is to clarify the pertinent international

legal obligations under international humanitarian law and human rights law, it lacks either a concrete and clear categorization of applicable laws, or the enforcement mechanisms necessary to address violations."[85] While such concrete and clear categorization would theoretically be helpful, it is unrealistic given the complexity of the legal twilight surrounding the industry. Many of the legal clarifications provided by the Montreux Document are subtle and perhaps undetectable to those who are not intimately engaged with the nuances of international law. The Document does not provide what Mehra wishes, but doing so would require oversimplifying the legal complexities. Furthermore, the Document does indicate that the appropriate mechanism for addressing violations would be the domestic courts of the interested states and encourages states to proactively invigorate their national capacity on this front. Thus, this critique seems more aimed at international legal complexity than at actual shortcomings of the Montreux Document.

Mehra further criticizes the limited scope of the Document given that armed conflicts only constitute a portion of the settings in which PMSCs operate, and armed guarding only constitutes one of the services PMSCs provide.[86] First, the ICRC and Swiss Foreign Ministry were focusing on armed conflict settings because that was the context of greatest concern. Second, the *lex specialis* of international humanitarian law needed to be addressed and interpreted with regard to these "new" actors in conflict. Third, the ICRC's focus is armed conflict settings, so it makes sense that it would be focused on that context. Fourth, the definition of PMSCs in the Document is much broader than armed guarding as it includes training of other forces, the maintenance and operation of weapons systems, and other activities that have actually not been covered by any of the other accountability initiatives to date. Finally and most importantly, the Document does suggest, as noted, that the principles—particularly the good practices—are relevant in non-armed conflict contexts, as well. This criticism, therefore, is inconsistent with the actual content of the Document.

Mehra proceeds to also criticize the Document for not conforming to the "framework for corporate activity and human rights" developed by John Ruggie in the UN Guiding Principles on Business and Human Rights.[87] As Mehra writes:

> By choosing to create its own framework, the Montreux Document in effect creates a separate way of examining PMSCs even though they are themselves business entities. This choice is unfortunate because it undermines the effort towards consistency in the drafting of international obligations. Consistency is important to ensure the uniform application of common principles to corporate entities, and to minimise any confusion over applicable obligations.[88]

Essentially, Mehra questions the legitimacy and position of the Montreux Document in international affairs, suggesting that while it is backed by some

important states, it falls outside recognized international structures. Other commentary on the Document further develops this argument but is largely countered, as Nigel White points out, by the fact that the ICRC was not only involved, but at the helm of the initiative to produce the Document, thereby lending it considerable credibility.[89] Additionally, the Montreux Document does not need to reference the Ruggie framework in order to be consistent with it. As noted above, many of the legal clarifications and good practices provided are completely consistent with the main tenets of the UN Guiding Principles on Business and Human Rights, which weren't even published until three years after the Document. Incidentally, Mehra's current role as a member of the Board of Directors of the ICoC Association, which derives from the Montreux Document, suggests he has perhaps changed his position or at least does not feel these criticisms are fatal to the credibility of the initiative.

In a more optimistic and positive tone, Mehra also writes that "if State parties do adopt the Montreux Document in significant numbers, it may gain the dimension of becoming 'soft law,' and through influencing the practice of States, could become binding customary international law. In other words, to the extent that the Montreux Document and its contents are adopted by States, it may acquire a firmer root in the legal realm."[90] While there are several inaccuracies with this statement, the point is nevertheless valid. States are not parties to the Montreux Document, and given its status as an international agreement, it does not need to "become" soft law; it already is. That said, Mehra is right that the Montreux Document seems to be growing firmer legal roots and becoming legally significant in new ways.

James Cockayne, an informal advisor to the Montreux Process, wrote one of the most extensive early reviews of the Document. He finds that it has five key areas of significance: (1) "a very public reaffirmation by a diverse group of states, including the United States, of the applicability of international humanitarian law (IHL) and human rights to contemporary armed conflict";[91] (2) "an important statement of lex lata regarding states' existing duties to protect human rights and to ensure respect for international humanitarian law (IHL), when dealing with PMSCs";[92] (3) "a snapshot of the current common ground among key states on the question of states' obligations to regulate the extraterritorial conduct of business entities more generally";[93] (4) "soft standards in the form of 73 'good practices,' which may lay the foundation for further practical regulation of PMSCs through contracts, codes of conduct, national legislation, regional instruments and international standards";[94] and (5) "reveal[ing] the tension between two international regulatory approaches that are increasingly relevant to conflict and security: a state-backed approach that emphasizes a patchwork of hard law obligations; and an industry-backed approach that encourages cross-jurisdictional regulatory harmonization to reduce transaction costs and help secure industry in-

vestments."[95] These milestones are somewhat vitiated by the shortcomings Cockayne elaborates upon in his article.

Ultimately, Cockayne finds three key weaknesses in the Document: (1) "the Document proves unwieldy—and has notable lacunae—as a guide for PMSCs as to the conduct they ought engage in";[96] (2) "further work may need to be done to flesh out state and corporate due diligence obligations, on the basis of the Montreux Document's provisions";[97] and (3) "more could be done to build on the rather fragmented treatment of remedial arrangements in the Montreux Document."[98] In general, Cockayne warns that the Montreux Document might engender apathy or complacency with regard to the effort to improve regulation of and increase the legal clarity surrounding the industry. In other words, if states considered the Document the solution to all the problems, it is unlikely that they would push forward with continuing to address the problems. These criticisms have largely been addressed by the processes that have sprung forth from the Document, as they have helped clarify the standards and obligations for PMSCs, provided states with a means of assessing PMSCs in the due diligence process, and created a mechanism to ensure that remedial arrangements do not fall through the cracks. More could be done and is being done, but it does not seem that apathy will stifle onward progress. Cockayne concludes, however, that the Montreux Document "has the potential to provide the basis for other forms of more enforceable regulation."[99] And it has.

The ICoC, ICoCA, PSC Standards Series, and ISO Standards all reference the Montreux Document as a normative statement of international consensus. As these various initiatives, and others, are all aimed at the accountability of PMSCs themselves, their potential legal effect is limited. In other words, while they may contribute to presumptions of negligence in some domestic courts, they cannot ever rise to the level of being customary international law, as they do not provide guidance for state action. Furthermore, while they are in no way limited to armed conflict settings, none of them address the services included in the Document's definition of PMSCs that aren't "security services." Finally, these largely voluntary, business-oriented processes do not all fit together into a completely coherent framework. Rather, they form a patchwork of obligations incumbent on PMSCs themselves.[100] So while the Montreux Document may have limited direct effect on the operation of PMSCs, its real effect is on guiding the conduct of states and is therefore far more significant with regard to international law.

One final feature to note is the Montreux Document Forum, which was initiated in September 2013. Essentially a collaborative exercise among the participating states and organizations of the Montreux Document, the forum provides an incredibly useful venue for ensuring that the legal clarifications and promoted good practices of the Document remain consistent with inter-

national consensus and relevant to the actual operations of the industry. As this forum is nascent, it is hard to predict what functions it may have, but it does provide a potential venue for updating and adapting international approaches to the industry.

CONCLUSION

The Montreux Document is not perfect and does not solve the issue of international accountability for PMSCs. But perfection was never its goal, as indicated by the use of the term "good" rather than "best" when prescribing practices for states. And solving the issue of international accountability was never considered a possible outcome. Rather, the aim was to start a process of developing international consensus on how to address the private military and security industry. The Document provides some clear, as well as subtle, guidance to states, and to a lesser degree to the industry, on what international legal obligations exist and how they should be applied to the contracting and operations of PMSCs. Ultimately, however, the section on good practices may prove to be more legally significant than the section on legal obligations, as it may serve as the basis for the development of binding customary international law.

Looking ahead, there are a number of implications that can be drawn from this analysis. They include:

- *Customary international law is forming and will form around the Montreux Document*. It does appear that customary international law is forming around the Montreux Document and more will likely form as states, over time, consistently adhere to the practices promoted by the Document out of a sense of obligation. At a minimum, there seems to be customary law forming over the international recognition of PMSCs as an acceptable actor, distinct from mercenaries.
- *A treaty or convention is not currently needed and could be a mistake*. A treaty or convention does not appear to be the best approach to addressing ongoing concerns that PMSCs lack accountability. As the PMSC industry continues to mature and evolve, and as the use of PMSCs continues to move in different directions, the posture of states toward the industry will need to adapt as well. The advantage of customary international law is that it is flexible and born of states' best practices. In the case of international custom based on the Montreux Document, the starting point for those practices would be derived from recommended approaches proffered by leading international legal experts.
- *Better coordination between multi-stakeholder accountability initiatives and state processes is needed*. The various accountability initiatives aimed

at PMSCs themselves need better coordination with state-based approaches to regulation and policy. The Montreux Document Forum may provide a venue for clarifying how the patchwork of initiatives should be understood to work together in concert with both international and national laws.

- *Expert legal clarification is needed*. Further and ongoing clarification of international legal nuances is needed. While individual experts can conduct such work in isolation, there needs to be a focal point for states to digest this expert interpretation, form consensus around it, and integrate it into national law and policy. The Montreux Document Forum is not currently configured for this purpose, but it could serve as a useful locus for developing this capacity.
- *Assistance to states with incorporating international obligations and practices is needed*. States will need ongoing assistance with incorporating international legal obligations and agreed good practices relating to PMSCs into domestic law and policy. Again, no mechanism for such assistance currently exists, but states could collectively create such capacity, potentially within the Montreux Document Forum.

There are certainly more possible extrapolations from this analysis, but these five points provide an indication of what may be next for states in their efforts to develop accountability and international legal clarity regarding the PMSC industry. Notwithstanding the criticism levied or the follow-on progress that is still needed, this analysis holds that the Montreux Document remains the most legally significant instrument to date concerning private military and security companies.

NOTES

1. Confederation of Switzerland Department of Foreign Affairs and the International Committee of the Red Cross, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, UN Document A/63/467-S/2008/636 (Geneva: International Committee of the Red Cross, 2008), available at http://www.eda.admin.ch/psc (hereinafter "Montreux Document").

2. See, e.g., International Code of Conduct Association, *The International Code of Conduct for Private Security Service Providers* (Geneva: International Code of Conduct Association, 2010), available at http://icoc-psp.org/; International Code of Conduct Association, *Articles of Association of the International Code of Conduct Association* (Geneva, 2013), available at http://www.icoca.ch/en/articles_of_association; American National Standards Institute, *Management System for Quality of Private Security Company Operations: Requirements with Guidance*, ANSI/ASIS PSC.1-2012 (Alexandria: ASIS International, 5 March 2012).

3. Simon Chesterman, "Lawyers, Guns and Money: The Governance of Business Activities in Conflict Zones," *Chicago Journal of International Law* 11, 1 (Summer 2010), page 334.

4. Confederation of Switzerland Department of Foreign Affairs, "The Montreux Document on Private Military and Security Companies" (5 May 2015), available at http://www.eda.admin.ch/psc, accessed 31 July 2015.

5. Montreux Document.
6. Confederation of Switzerland Department of Foreign Affairs, "The Montreux Document on Private Military and Security Companies."
7. Confederation of Switzerland Department of Foreign Affairs, "Participating States of the Montreux Document" (8 April 2015), available at http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html, accessed 31 July 2015.
8. Montreux Document, preface ¶ 2.
9. Montreux Document, preface ¶ 3.
10. Montreux Document, preface ¶ 8.
11. Montreux Document, preface ¶ 7.
12. Montreux Document, preface ¶¶ 5, 8.
13. Montreux Document, preface ¶ 6.
14. Montreux Document, preface ¶ 9(a).
15. Discussion at the First Meeting of the Security in Complex Environments Group, Aerospace Defense Security Group, Ltd. (13 January 2011).
16. Sarah Percy, "Morality and Regulation," in Simon Chesterman and Chia Lehnardt, editors, *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007), pages 12–14; United Kingdom Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation*, HC 577 (London: The Stationery Office, 12 February 2002), ¶ 9.
17. International Code of Conduct Association, *The International Code of Conduct for Private Security Service Providers*, ¶ 7.
18. Organization of African Unity, *Convention for the Elimination of Mercenarism in Africa (Opened for Signature) 3 July 1977*, OAU Document CM/817 (29), Annex 2, Article 1 (3rd revision 1977) (entered into force 22 April 1985).
19. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Article 47 (8 June 1977), 1125 UNTS 17512, available at http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument (hereinafter "Additional Protocol I").
20. United Nations, *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* (4 December 1989), UN Treaty Series 2163 (A/RES/44/34), Article 1 (hereinafter "UN Mercenary Convention").
21. Peter W. Singer, "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law," *Columbia Journal of Transnational Law* 42, 2 (Spring 2004), page 532.
22. Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weinenfeld and Nicolson, 1980), pages 374–75, note 83.
23. Andrew T. Guzman and Timothy L. Meyer, "International Soft Law," *Journal of Legal Analysis* 2, 1 (Spring 2010), pages 171, 172.
24. UN Mercenary Convention.
25. UN Mercenary Convention.
26. Confederation of Switzerland Department of Foreign Affairs, "Participating States of the Montreux Document."
27. Montreux Document, preface ¶ 5.
28. Montreux Document, part 1 (2008) .
29. Confederation of Switzerland Department of Foreign Affairs, "The Montreux Document on Private Military and Security Companies."
30. Montreux Document, part 1 ¶¶ 3, 9, 14, 18.
31. Montreux Document, part 1 ¶¶ 4, 10, 15, 19.
32. Montreux Document, part 1 ¶¶ 5, 11, 16, 20.
33. Montreux Document, part 1 ¶ 1.
34. Montreux Document, part 1 ¶ 2.
35. See, e.g., James R. Coleman, "Constraining Modern Mercenarism," *Hastings Law Journal* 55, 6 (June 2004), pages 1493, 1537.
36. Montreux Document, part 1 ¶¶ 3–4, 6.
37. Montreux Document, part 1 ¶¶ 3–4, 6.
38. Montreux Document, part 1 ¶ 5.

39. Montreux Document, part 1 ¶ 8.
40. United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York: United Nations, 2011).
41. Montreux Document, part 1 ¶ 7.
42. "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries," in *Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43*, UN Document A/56/10 (New York: United Nations, 2001).
43. Montreux Document, part 1 ¶ 27.
44. Montreux Document, part 1 ¶ 23.
45. Montreux Document, part 1 ¶ 22.
46. See, e.g., Ian Ralby, "Private Military Companies and the *Jus ad Bellum*," in Marc Weller, editor, *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015).
47. As discussed in chapters 8 and 9 in this volume.
48. Montreux Document, part 1 ¶ 24.
49. Montreux Document, part 1 ¶ 25.
50. Montreux Document, part 1 ¶ 26(b).
51. Adam Ebrahim, "Going to War with the Army You Can Afford: The United States, International Law, and the Private Military Industry," *Boston University International Law Journal* 28, 1 (Spring 2010), page 213.
52. Percy, "Morality and Regulation," pages 12–14.
53. M. Cherif Bassiouni, "Legal Status of Forces in Iraq from 2003–2008," *Chicago Journal of International Law* 11, 1 (Summer 2010), pages 1, 23.
54. Jamie Williamson, "Challenges of Twenty-first Century Conflicts: A Look at Direct Participation in Hostilities," *Duke Journal of Comparative and International Law* 20, 3 (Spring 2010), pages 457, 465.
55. Statute of the International Court of Justice, Article 38(1)(b).
56. José Luis Gómez del Prado, rapporteur, *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*, UN Document A/HRC/15/25 (New York: United Nations, 2 July 2010).
57. Statute of the International Court of Justice, Article 38(1)(b).
58. International Law Association, "Statement of Principles Applicable to the Formation of General Customary International Law," adopted by Resolution No. 16/2000, London Conference,section 1(i).
59. Montreux Document, part 1 ¶ 1.
60. Montreux Document, part 1 ¶ 1.
61. United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*.
62. Montreux Document, part 2 ¶¶ 5–13.
63. Montreux Document, part 2 ¶ 14.
64. Montreux Document, part 2 ¶¶ 14–18.
65. Montreux Document, part 2 ¶¶ 19–23.
66. Montreux Document, part 2 ¶ 19.
67. Montreux Document, part 2 ¶ 20.
68. Montreux Document, part 2 ¶ 21.
69. Montreux Document, part 2, "B. Good Practices for Territorial States."
70. Montreux Document, part 2 ¶ 24.
71. Montreux Document, part 2 ¶ 25.
72. Montreux Document, part 2 ¶ 40 (2008) .
73. Montreux Document, part 2 ¶ 43.
74. Montreux Document, part 2 ¶ 44.
75. Montreux Document, part 2, "C. Good Practices for Home States."
76. Montreux Document, part 2, "C. Good Practices for Home States."

77. Montreux Document, part 2 ¶¶ 54–59.
78. Montreux Document, part 2 ¶¶ 60–66.
79. Montreux Document, part 2 ¶¶ 71–72.
80. Montreux Document, part 2 ¶¶ 68–69.
81. Montreux Document, part 2 ¶ 55.
82. Montreux Document, part 2 ¶ 56.
83. Rebecca DeWinter-Schmitt, editor, *Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices* (Barcelona: Adjuntament de Barcelona, 2013).
84. DeWinter-Schmitt, *Montreux Five Years On*.
85. Amol Mehra, "Bridging the Accountability Gaps: The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations," *Pacific McGeorge Global Business and Development Law Journal* 22, 2 (2010), pages 323, 329.
86. Mehra, "Bridging the Accountability Gaps," pages 323, 328.
87. Mehra, "Bridging the Accountability Gaps," pages 323, 329.
88. Mehra, "Bridging the Accountability Gaps," pages 323, 329.
89. Nigel D. White, "The Privatization of Military and Security Functions and Human Rights: Comments on the U.N. Working Group's Draft Convention," *Human Rights Law Review* 11, 1 (2011), pages 133, 134.
90. Mehra, "Bridging the Accountability Gaps," pages 323, 329.
91. James Cockayne, "Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document," *Journal of Conflict and Security Law* 13, 3 (Winter 2008), page 403.
92. Cockayne, "Regulating Private Military and Security Companies," page 403.
93. Cockayne, "Regulating Private Military and Security Companies," page 403.
94. Cockayne, "Regulating Private Military and Security Companies," page 404.
95. Cockayne, "Regulating Private Military and Security Companies," page 404.
96. Cockayne, "Regulating Private Military and Security Companies," page 427.
97. Cockayne, "Regulating Private Military and Security Companies," page 427.
98. Cockayne, "Regulating Private Military and Security Companies," page 427.
99. Cockayne, "Regulating Private Military and Security Companies," page 427 .
100. Ian Ralby, "Accounting for Private Security," *Fletcher Security Review* 2, 1 (January 2015).