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PUBLIC-PRIVATE PARTNERSHIPS SERIES

N°2

**PUTTING PRIVATE SECURITY REGULATION INTO
PRACTICE: SHARING GOOD PRACTICES ON
PROCUREMENT AND CONTRACTING 2015–2016**

A Scoping Study

Emmylou Boddi, Anna Marie Burdzy and Nelleke Van Amstel

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About the series

The Public-Private Partnerships Series provides a focus on contemporary security governance challenges and examines the ways in which greater cooperation between states, international organisations, civil society and the commercial sector can help to address them. The series promotes policy relevant research as part of the mandate of DCAF's PPPs Division to support innovative partnerships that bring stakeholders together to realize shared security and development goals.

Putting Private Security Regulation into Practice: Sharing Good Practices on Procurement and Contracting

2015–2016: A Scoping Study

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Introduction, Background, and Methodology

i. Introduction

Over the past years, the setting of international standards based on human rights for the operations of private security service providers has generated considerable attention and has taken shape most prominently in the 2008 Montreux Document on pertinent international legal obligations for states related to operations of private military and security companies (PMSCs) during armed conflict (the Montreux Document), and the International Code of Conduct for Private security Service Providers (ICoC).¹ After a phase of norm setting, a clear focus on promoting implementation of more effective private security regulation on the ground is needed to put these standards into practice. The respect for human rights is highly dependent on states' willingness to include these norms and standards in their national policies and laws and particularly, in national procurement and contracting policies. Contracts and procurement practices are therefore important for effective implementation of regulations governing the private security industry. Commercial incentives are significant in inducing private security providers to adhere to rules and regulations. Contracts and procurement practices with a strong basis in human rights are therefore essential for the implementation of such regulations.

At the same time, within the wider business and human rights realm, increasing attention has been drawn to the potential of governments using commercial incentives for the benefit of human rights implementation within industry. Public procurement is increasingly seen as a powerful tool to fulfil states' obligations to ensure respect for human rights. The importance of effective procurement policies now has a strong international basis in the UN Guiding Principles on Business

¹ For a comprehensive overview of these two documents, see Chapter 2.

and Human Rights (UNGPs).² UNGP 6 specifically requires that states should promote respect for human rights by business enterprises with which they conduct commercial transactions. In its commentary, UNGP 6 also elaborates that one way to achieve this is through setting terms of contract. In diverse sectors, initiatives to increase government buyer influences in order to modify industry behaviour have taken off strongly. For instance, leading academic and policy institutions are focusing on the issue through projects like the Learning Lab on Public Procurement and Human Rights. This multiyear project gathers knowledge and good practices in diverse sectors on government procurement (apparel, electronics and security).³

The role of international organisations (IOs) and states as clients and contracting entities of PMSCs is significant; governments are often the largest single purchasers of security related services.⁴ But when it comes to using purchasing power to encourage the implementation of human rights standards for private security operations, little discussion has emerged on the relevant experiences of different actors. As a result, good practices have not yet been documented and analysed. Indeed, states and IOs have increasingly recognized the need for more regular dialogue and exchange on relevant good practices, particularly as related to procurement and contracting. Thus, insight into real challenges

² *Ibid.*

³ The Learning Lab on Public Procurement and Human Rights is led by the Danish Institute for Human Rights, The Harrison Institute for Public Law at Georgetown Law, the International Corporate Accountability Roundtable (ICAR) and the University of Nottingham. The Geneva Centre for the Democratic Control of Armed Forces also participates in the Learning Lab as Sector Hub leader for procurement of security services.

⁴ In the 2013 financial year, the U.S. Department of State's Worldwide Protective Services program was funded at 2.3 billion USD; see US Dep't of State, Fiscal Year 2013 Agency Financial Report 45 (December 2013), <http://www.state.gov/s/d/rm/rls/perfrpt/2013/index.htm>; Over the last decade (Iraq and Afghanistan) as well as in previous years in the Balkans, over half the total military force consisted of private security contractors; see Moshe Schwartz and Jennifer Church, Congressional Research Service, Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis and Issues for Congress 2 (17 May 2013), <http://fas.org/sqp/crs/natsec/R43074.pdf>, accessed 15 January 2016. In military operations through the EU Common Security and Defence Policy (CSDP), security contracting has occurred where there were insufficient numbers of troops to ensure force protection. Procurement of PSCs in the EU CSDP is likely to increase due to the "overstretch of national armed forces, capability gaps, troop limitations and ideological preferences for the outsourcing of noncore functions. With regards to military operations these factors have meant that member states prefer to supply soldiers for military operations rather than auxiliary functions such as personnel and asset protection;" see Elke Krahnmann and Cornelius Friesendorf, The Role of Private Security Companies in CSDP Operations, European Parliament, Directorate-General for External Policies, Policy Department (12 April 2011), 14–15.

and the identification of concrete good practices is required in order to enable implementation of internationally recognized standards in regards to operations of PMSCs.

ii. Objectives and Rationale

IOs and states play a central role as clients for private security services and therefore offer further potential for implementing more effective private security governance through the mechanisms of procurement and contracting. IOs in particular, are often leaders in their regions and play important supportive and convening roles, and thereby have significant potential to assist national regulatory bodies and improve the impact of PMSCs' activities in their respective regions. However, limited discussion has emerged over how states and IOs approach this in the various stages of their complex procurement processes. As relative newcomers to the Montreux Document,⁵ the role of IOs is unexplored. However, the good practices on contracting found in the Montreux Document are of particular interest to IOs, due to their leading roles in standard setting for their member states. Furthermore, IOs including the EU and the OSCE have expressed increasing interest in more substantive and concrete dialogue both internally, as direct or indirect procurers of private security services, and externally, as standard-setters for their member states.⁶

In order to identify relevant gaps and needs, an analysis of the activities, processes, and relevant policies of IOs and states with regard to private security procurement and contracting is needed. This study forms the start of a broader project that aims to provide that analysis. The project will also seek to identify lessons learnt and share good

⁵ The Montreux Document was initially negotiated in 2008 by 17 states. Since then, it is supported by the European Union (2012), the North Atlantic Treaty Organisation (2013), and the Organisation for Security and Co-operation in Europe (2013).

⁶ In dialogue on the implementation of the OSCE Politico-Military Code of Conduct, it was mentioned by the Participating States, the OSCE Parliamentary Assembly, Secretariat, ODIHR, Partners for Co-operation, and Field Operations, that the Code should also address the democratic control of private military companies and that all Participating States are encouraged to provide more voluntary feedback on PMSCs through the Annual Information Exchange; See Organisation for Security and Co-operation in Europe, Forum for Security Co-operation, Annual Discussion on the Implementation of the Code of Conduct on Politico-Military Aspects of Security, 9 July 2014, 20 and 24. See also the Resolution on the Democratic Control of the Public and Private Security Sectors, adopted as part of the Baku Declaration during the Assembly's 23rd Annual Session in June/July 2014.

practices based on the experience of IOs and states, in order to support the development and implementation of procurement and contracting policies based on international human rights standards. Finally, the project seeks to make knowledge on this topic widely available to other IOs and states, including through the Montreux Document Forum and the International Code of Conduct Association.

As part of this broader project, this study is specifically intended as a first step. To gather insight into good practices that already exist, this study is intended to support the exchange of knowledge on effective procurement and contracting policies that support private security governance.

With respect to the structure of the report, the study first discusses the existing instruments that may be of relevance when aiming to include more effective human rights-based procurement of private security companies. The second section moves onto outlining the stages in the procurement process. Thirdly, the study sets out essential elements of the procurement process, organised in five stages, and shares good practices from selected case studies that exemplify these parts of the procurement process. The final section reflects on key findings and extracts common gaps and challenges. The report is also complemented by a series of annexes that provide context and clarity to the various procurement processes in the international organisations studied.

iii. Methodology and Scope

Throughout 2015, DCAF carried out in-depth desk research as well as informative interviews with relevant contact points to gather insights on procurement and contracting procedures and processes, as well as the relevant laws and good practices. The study was carried out within a non-attribution framework; therefore, individual respondents have not been cited.⁷ Research subjects and case studies focus particularly on international organisations, however, several states have also been chosen due to their substantial procurement processes. Of course, the lessons and practices drawn are useful for both IOs and states.

In this light, the study brings together analysis in relation to two sets of actors:

⁷ The views expressed in this publication are those of the authors. The content does not reflect the views of the institutions referred to or represented within. Any misrepresentations are to be attributed to the authors alone.

1. International organisations:

- **OSCE, EU, and NATO:** By joining the Montreux Document and participating in the Montreux Document Forum (MDF), these actors have expressed clear support for the pragmatic and effective approach of the Montreux Document's rules and good practices. As international organisations with experience in contracting security, these actors can offer a unique perspective to procurement and contracting of PMSCs and PSCs.
- **United Nations (UN):** The UN has highlighted the regulation of PMSCs as a key issue on its agenda, including by developing guidelines on the use of armed private security by the Department of Safety and Security,⁸ which directly refer to the Montreux Document.

2. Montreux Document states:

MD states have taken different directions in including good practices and obligations stemming from the Montreux Document and the ICoC within their procurement policies. Due to their extensive policy regimes, this study will also draw on the experiences of Switzerland, the US and Australia.

- **Switzerland** has adopted the Federal Act on Private Security Services Provided Abroad in September 2013 and requires conformity with the ICoC for all PMSCs based in Switzerland and operating abroad and all PMSCs contracted / sub-contracted by the Swiss government.⁹
- **The United States** has engaged extensively in procurement and contracting of PMSCs; recently, the US DoS has announced its intention to include membership of the ICoCA as a requirement to bid for its contracts.¹⁰

⁸ See the United Nations Department of Safety and Security, Security Management Operations Manual, Guidelines on the Use of Armed Security Services from Private Security Companies, November 2012.

⁹ See the Federal Office of Justice of Switzerland, Message concerning the Federal Act on Private Security Services Provided Abroad, 23 January 2013, <https://www.bj.admin.ch/dam/data/bj/sicherheit/gesetzgebung/sicherheitsfirmen/bot-e.pdf>.

¹⁰ See US Department of State, State Department to Incorporate International Code of Conduct into Worldwide Protective Services Contracts, 16 August 2013, <http://www.state.gov/r/pa/prs/ps/2013/08/213212.htm>.

- **Australia** has been an active supporter of the ICoC since the drafting stages in 2008. Today, as a member of the ICoCA since 2013, the Australian Department of Foreign Affairs and Trade (DFAT) includes contractual clauses with specific reference to compliance obligations in respect to both Montreux and the ICoC for the provision of services in relevant environments. Tendering companies are also required to be ICoC signatories or undertake to become one as a condition of a tender within procurement processes under DFAT's policy for the provision of security services in relevant overseas environments.¹¹

Note on terminology

According to the Montreux Document, the term private military and security company (PMSC) encompasses all companies that provide either military or security services or both, irrespective of how they define themselves. Examples of military services include (but are not limited to) material and technical support to armed forces, strategic planning, investigation, training activities. Security services can include (but are not limited to) guarding and protection of persons and objects (whether armed or unarmed) and training activities with a security application. The ICoC uses the term private security companies and private security service providers (collectively "PSCs") as any company whose business activities include the provision of security services. Many states and IOs, as well as clients of the industry, explicitly prohibit the outsourcing of military force and by extension, the use of PMSCs. These states and IOs refer only to PSCs. Other states and IOs use the more inclusive "PMSC". For the purposes of the study, the editors have maintained the original terminology as used by each actor/case study in their own references. Generally speaking the study will refer to PMSCs, understanding that this refers to the wide definition used by the Montreux Document, encompassing any private entities providing security and / or military services.¹²

¹¹ As discussed in the ICoCA Annual General Assembly, Geneva, October 2015.

¹² Montreux Document, preface paragraph 8.

2

International Regulatory Initiatives

In order to understand the relevance of existing international instruments pertaining to the procurement of private security services by state and IO clients, this chapter discusses four initiatives which have created a layered normative framework for regulation.

1. The Montreux Document

Much of the momentum surrounding PMSC and PSC regulation has taken shape most prominently in the 2008 Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies (PMSCs) during armed conflict (hereafter referred to as the Montreux Document). At the time of launch, the Montreux Document was supported by 17 states. In the eight years since, participation has more than tripled and the Montreux Document is currently supported by 53 states and 3 international organisations (the EU, NATO and the OSCE). With its basis in international humanitarian law and international human rights law, the Montreux Document sets out concrete legal obligations for home, territorial and contracting states when engaging with PMSCs and it is based on the principle that PMSCs operate in an armed conflict environment. Nevertheless, the Montreux Document is also meant to provide practical guidance in other contexts. The Document identifies good practices that are ideally put into place during peacetime, by states in the process of elaborating or improving their national legal frameworks which address the domestic and/or international activities of PMSCs. Part II of the Document sets out an extensive set of good practices including those good practices specifically tailored for contracting states, who often contract far beyond military-like services in armed conflict settings.¹³ These good practices recommend that

¹³ Specifically relevant are Good Practices 1–23.

states undertake the following actions when contracting private security services:

- States and IOs should assess, when selecting PSCs, whether the companies have the capacity to carry out their activities in conformity with human rights;
- States and IOs should examine whether the PSCs set criteria for the selection of personnel to ensure they have not been involved in any misconduct such as violent crime or sexual offences;
- States and IOs should determine whether the personnel of PSCs have sufficient training to respect human rights, including training specifically on the use of force and firearms;
- States and IOs should take into account existing company policies on the implementation of human rights into internal company procedures.

The Montreux Document Forum was established in December 2014 as a platform for dialogue, cooperation, and consultation among participants.¹⁴ The creation of this centre of gravity has indicated a clear focus on promoting implementation of more effective private security regulation on the ground. Indeed, states and IOs have increasingly recognized the need for more regular exchange on relevant good practices, particularly as related to procurement and contracting.¹⁵

2. The International Code of Conduct for Private Security Service Providers (ICoC)

On a parallel track, the ICoC was established in 2010 as the fruit of a multi-stakeholder initiative with the overarching objective to set out international principles and standards of PSCs, particularly when those companies operate in complex environments. The ICoC is a code of standards and guidelines aimed at companies, to improve their policies in order to perform their operations in accordance with human rights. Though drafted with the primary audience of companies in mind, states increasingly require proof of compliance with and implementation of the provisions contained in the ICoC in their procurement policies, to

¹⁴ See www.mdforum.ch.

¹⁵ See also Benjamin S. Buckland and Anna Marie Burdzy, *Progress and Opportunities: Challenges and Recommendations for Montreux Document Participants*, Second edition, Geneva Centre for the Democratic Control of Armed Forces: 2015.

ensure PSCs are serious about human rights commitments. Working with governments, civil society and companies, the ICoC Association was launched in September 2013 to promote, govern, and oversee implementation of the ICoC.¹⁶

3. The UN Guiding Principles on Business and Human Rights (UNGPs)

Within the wider business and human rights realm, public procurement is increasingly seen as a powerful tool to fulfil states' obligations to ensure respect for human rights.¹⁷ The UNGPs were issued in 2011 to operationalise the "Protect, Respect and Remedy" Framework launched by the UN Special Representative on Business and Human Rights. The Framework rests on the state duty to protect against human rights abuses by business, the corporate responsibility to respect human rights and greater access by victims to effective remedy, both judicial and non judicial. Guiding Principle 6 specifically stipulates that "states should promote respect for human rights by business enterprises with which they conduct commercial transactions." Governments conduct a variety of commercial transactions with business enterprises not least through their procurement activities, yielding individual and collective opportunities to promote awareness and respect for human rights by business, including through contract terms.¹⁸

4. Draft of a Possible Convention on PMSCs for Consideration and Action by the Human Rights Council

In addition to these initiatives, it is important to note the efforts occurring within the UN namely the Open-ended Intergovernmental Working Group to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of a legally binding instrument on the regulation, monitoring and oversight of the activities of PMSCs (hereafter referred to as the IGWG). The first text of

¹⁶ See www.icoca.ch.

¹⁷ See UN OHCHR, UN Working Group on Business and Human Rights, 2015 UN Working Group Survey on States as Economic Actors; See also Business and Human Rights Resource Centre, Procurement, <http://business-humanrights.org/issues/other/procurement>, accessed 12 January, 2016.

¹⁸ UN OHCHR, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 9, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, accessed 12 January 2016.

the draft convention contains several provisions related to contracting of PMSCs by state clients.¹⁹ The IGWG is mandated by and reports to the UN Human Rights Council.

¹⁹ UN Human Rights Council, 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, 2 July 2010, <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>, accessed 19 February 2016.

3

The Stages of Public Procurement

Stage 1. Needs Assessment, Authority, Scope of Application and Principles	
A. Authority	→ The authority or chain of authority responsible for all the stages of the procurement process
B. Scope of Application	→ Determination of the types of services or goods, as well as the territorial and temporal scope of application
C. Principles	→ Setting of the overarching general principles applicable to the procurement of any PMSC services
D. Exceptions	→ Existence of cases where the general process and principles, as defined above, are not applicable
Stage 2. Solicitation and Notice	
Stage 2. Solicitation and Notice	→ Publication of the bid solicitation, including the determination of the information (technical specifications of the contract and evaluation criteria) contained in the notice
Stage 3. Evaluation of Potential Contractors	
A. Company	→ Requirements and criteria of the authority for the evaluation of the company
B. Personnel	→ Requirements and criteria of the authority for the evaluation of the company's personnel
C. Equipment, Weapons and Firearms	→ Requirements and criteria of the authority for the evaluation of the company's equipment, weapon and firearms

Stage 4. Contract	
A. Award and Notification	Process for the award decision, its publication and its notification to successful and unsuccessful applicants
B. Clauses to Include in the Contract	Drafting and signing of the contract: inclusion of the terms and conditions already mentioned in the bid solicitation
C. Subcontracting	Agreement on the conditions under which subcontracting is allowed or forbidden
Stage 5. Monitoring, Enforcement and Accountability	
A. Monitoring and Enforcement	Systematic review of the contractor's activities and ensuring its compliance with contractual obligations
B. Accountability Mechanisms: Contractual Sanctions	Make accountability mechanisms available to remedy or prevent violations of contractual clauses

With the aim of establishing essential elements necessary to protect human rights within public procurement practices for private security services, this third chapter sets out the basic stages in the public procurement process. Each of the identified stages of procurement proposes a selection of examples of good practices. This selection is not intended to present a comprehensive overview of procurement, but is meant as an example of what effective procurement and contracting of PMSCs and PSCs could look like, providing a basis for further discussion. This is intended to facilitate the identification of gaps and challenges in existing procedures.

Stage 1 addresses the assessment that should be carried out before the procurement process begins. Stage 2 describes the publication of the bid to the applicants. Stage 3 focuses on the evaluation of the potential contractor, going through the different criteria and requirements that should be taken into consideration for the selection of a contractor in regard to the company, its personnel and its equipment, weapons and firearms. Stage 4 looks into what should be in the contract once a contractor has been chosen. Finally, stage 5 addresses the monitoring and the enforcement of the contract, as well as how to address the accountability of company in case of violation.

STAGE 1. Needs Assessment, Authority, Scope of Application and Principles

Public procurement becomes increasingly complex and sensitive as the range of activities contracted out becomes wider. This is particularly relevant in regard to the evolution of the PMSC sector, both in terms of growth of the sector and diversification of its activities.

Before launching the next stages of the procurement process, there should be an evaluation and assessment of needs and capacities with regards to the security service. This is a “pre-stage” of procurement to determine whether private security contracting is necessary, and if so, to what extent. This needs analysis should be conducted with a review of capacities but also knowledge and background of the particular situation and of the different risks involved, in order to adequately determine the needs.²⁰

To ensure sufficient expertise and control of the process of contracting such a diversity of often technically complex services, it must be ensured that the chain of authority responsible for the procurement of these services benefits in all its stages from sufficient resources, personnel and knowledge. For each IO or state, the responsibility for the procurement of private military and/or security services might be allocated in a different way, depending on the size of the IO or state, its existing capacities, structures and needs. However, a central department responsible for the advising, reviewing, and monitoring of contracts can be more effective than several departments.

In the first stage of the procurement process, the authority or the designated central body²¹ decides *which* services and good to buy, *where*, *when* and *how*. Which services and goods to buy, *where* and *when* to buy them determines the scope of application of the procurement process. The determination of *how* to buy these services and goods sets the principles of the procurement process.

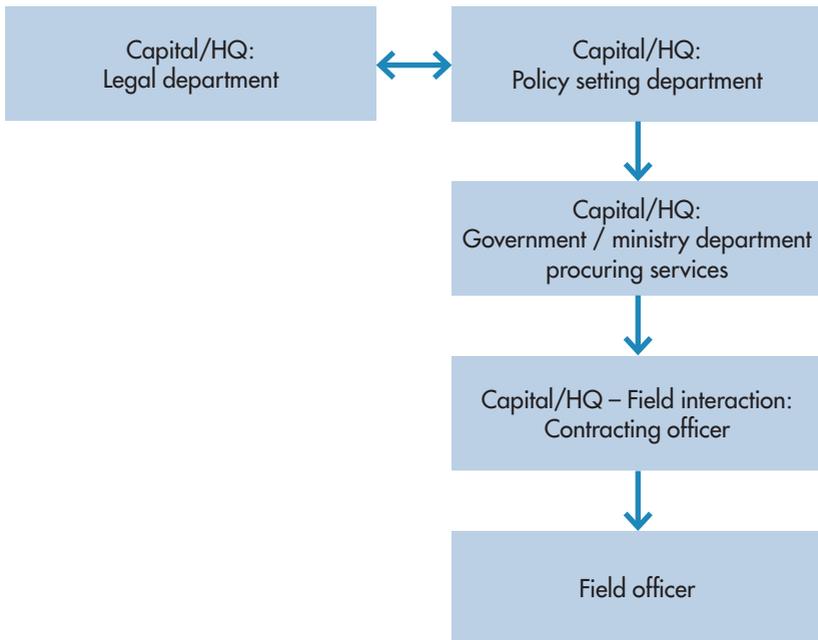
²⁰ The determination of the needs seeks to answer what kind of services or activities are needed (as the final answer might not always lead to private security services) but also for how long, in what amount, and by what type of actors.

²¹ For example, some states and IOs have chosen to separate the standard-setting agency and the contracting authority. In other cases, one central actor in the procurement process (for example the local embassy or the Head of Mission) is responsible for all the different stages. Larger procurers often choose a more complex system, where the different stages are entrusted to specific entities. In this study, we will hereafter refer to those responsible for all or one particular stage of procurement as “the authority”.

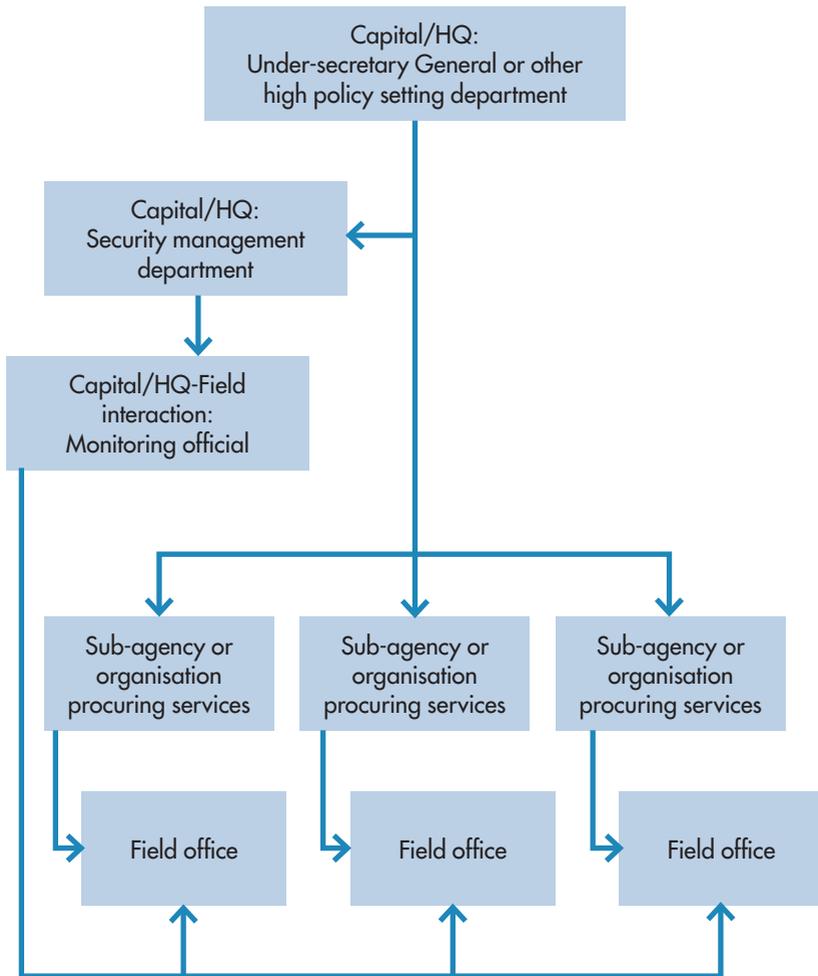
Applicability in terms of human rights protection

In this stage, determining the actual needs for contracting, limiting the services that can be outsourced, and ensuring the right training and expertise of contracting officers, prevents over-reliance on the outsourcing of security. By setting the principles of the procurement system, the Authority decides what human rights standards contractors must comply with as contractual obligation. Further than simple legal compliance, procurement can also address policy objectives, such as value for money where the lowest price for technically acceptable services does not determine the distribution of the contract. Therefore, in terms of human rights, best value for money does not mean lowest price nor minimum technically acceptable. Additionally, policy objectives may be included, such as transparency or the fight against corruption.

Private Security 'Authority' A: Smaller-scale procurement/contractor of private security services



Private Security Authority B: Complex procurement/contractor of private security services



Examples of good practices

A. Authorities

- In **Switzerland**, each Department of the Confederation is responsible for its own procurement of security services.²² Nevertheless, each “contracting authority” is required to consult with the Federal Department of Defence, Civil Protection and Sport (Security Section) and with the Authority appointed by the Federal Council under art. 38.2 of the Federal Act on Private Security Services provided Abroad.²³
- The **EU** Athena mechanism²⁴ offers training to the personnel responsible for the use, management and oversight of contracting private security or private military services, in consideration of their key role.²⁵
- Under the **UN** framework, the need for contracting private security services must first be assessed in collaboration between the Designated Officer (DO), the Security Management Team (SMT) and Security Advisor. Where the DO and the SMT agree that the use of private security services is justified, a request for approval must be submitted to the Under-Secretary-General for Safety and Security. Approval must be obtained in writing. The whole process, including a complete assessment, has to be repeated at each contract renewal.²⁶
- **NATO** defines minimum selection criteria which apply to its contracting officers, who have the exclusive responsibility for the procurement of goods and services on behalf of NATO, among other:
 - Relevant experience and training in NATO or national contracting, financial, purchasing, or related fields.

²² Typically, local embassies, representations or missions.

²³ Switzerland, *Federal Act on Private Security provided Abroad*, 27 September 2013, Art. 30.2, available at: https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Bundesgesetz-ueber-die-im-Ausland-erbrachten-privaten-Sicherheitsdienstleistungen-BPS_EN.pdf.

²⁴ See Annex B for a regarding the Athena mechanism.

²⁵ Council of the European Union, *EU Concept for Contractor Support to EU-led military operations*, §68, 7 April 2014, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208628%202014%20INIT>.

²⁶ United Nations Department of Safety and Security, *Guidelines on the Use of Armed Security Services from Private Security Companies*, 08 November 2012, sections D-E., available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf>.

- Education or special training in business administration, law, finance, engineering, or related fields.
- Good reputation.²⁷
- In the **US**, procurement by federal agencies is defined by the Federal Acquisition Regulation (FAR): the FAR is managed by a Council which is composed of three federal agencies, namely the General Services Administration (GSA), the Department of Defense (DOD), and the National Aeronautics and Space Administration (NASA).²⁸
- The Department of Defense alone has more than 20'000 Contracting Officers and twice as many trained and certified Contracting Officer's Representatives to assist them in the selection and contracting of the Department of Defense contractors, including of PSCs.²⁹

B. Scope of application

- Some states and IOs have explicit provisions forbidding the contracting of *private military companies* in order to prevent the outsourcing of direct engagement in combat roles. These actors allow only for the contracting of *private security companies*.
- **Switzerland** allows public procurement of private security services abroad only for the provision of two types of private security services, namely the protection of persons and the guarding and surveillance of goods and properties.³⁰ Switzerland also sets a minimal threshold value for the application of the law on Public Procurement: contracts with a value lower than the threshold will not be subject to the law on Public Procurement.³¹

²⁷ NATO, *Bi-Strategic Command Procurement Directive N°60-70*, 22 December 2004, art. 1.2-g(1), available at: http://www.aco.nato.int/resources/20/finance/dir60_70.pdf.

²⁸ USA, *Federal Acquisition Regulation*, March 2005, art. 1.101, available at: <https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf>.

²⁹ See United States Response to Questionnaire Concerning the Montreux Document, available at: <https://geneva.usmission.gov/2013/12/09/united-states-response-to-questionnaire-concerning-the-montreux-document-on-pertinent-international-legal-obligations-and-good-practices-for-states-related-to-operations-of-private-military-and-security/>.

³⁰ Switzerland, *Federal Act on Private Security provided Abroad*, 27 September 2013, Art. 30.1, available at: <https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Bundesgesetz-ueber-die-im-Ausland-erbrachten-privaten-Sicherheitsdienstleistungen-BPS-EN.pdf>.

³¹ Switzerland, *Federal Act on Public Procurement*, 16 December 1994, Art. 6, available at: <http://bit.ly/1o2ofhZ>.

- The **EU** Athena mechanism sets extensive principles stipulating when “contractor support”³² can be used to support EU-led military operations. These principles aim to ensure consistent and effective planning and execution,³³ as well as to avoid uncoordinated and competing contracting measures.³⁴
- Regarding which services can be contracted, the EU Athena mechanism provides, as a general guidance, that military forces must maintain all logistic functions in order to “retain the logistic military core capabilities and a fast response capability.” Contractor services are used as a supplement to these capabilities.³⁵ A list of activities that cannot be contracted to private companies is also determined and includes direct participation in hostilities or combat.³⁶ The list also offers guidance on general situations where private companies can usually be contracted.³⁷
- Under the **EU** Athena mechanism, the outsourcing of military capacity is allowed, but only where the required military capacity cannot be obtained from EU Member States by the force generation process and only with the authorisation by a Special Committee.³⁸
- Within the **UN**,³⁹ armed private security services can as a general principle only be considered where there is no possible provision of adequate and appropriate armed security from the host Government, alternate member State(s) or internal UN system resources.⁴⁰ Armed security services from a private company can only be contracted on an exceptional basis and only for the purpose of protecting UN

³² “Contractor support” is defined in this context as a competent commercial entity providing a part of the support to the military on the basis of a contract. See Council of the European Union, EU Concept for Contractor Support to EU-led military operations, §23, 7 April 2014, available at: <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%208628%202014%20INIT>.

³³ *Ibid*, §38.

³⁴ *Ibid*, §40.

³⁵ *Ibid*, §41.

³⁶ *Ibid*, §47.

³⁷ *Ibid*, §48 & 48.

³⁸ European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 7, available at: <http://www.consilium.europa.eu/en/policies/athena/>.

³⁹ In this study, UN practices will be based uniquely on the Guidelines on the Use of Armed Security Services from private security Companies, not referring to the whole of PSC contracting by the UN.

⁴⁰ United Nations Department of Safety and Security, *Guidelines on the Use of Armed Security Services from Private Security Companies*, 08 November 2012, section A.3, available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf>.

personnel, premises and property or to provide mobile protection to UN personnel and property.⁴¹

C. Principles

- The **OSCE** operates according to the “OSCE Supplier’s Code of Conduct”, a non-binding document summarizing the principles concerning international labour standards that any OSCE contractor is expected to adhere to. The code applies to any OSCE contractors and their personnel, parent, subsidiary, affiliate or subcontractor. The principles are divided into labour issues, human rights, environment, and ethical conduct. The code clearly states that the non-adherence to these principles will be considered when determining the eligibility of a potential contractor.⁴²
- As recalled in the code, the OSCE also expects its contractors to adhere to the values of the Helsinki Final Act⁴³ and the UN Charter.⁴⁴
- Additionally, in the 2008 Astana Declaration, the OSCE Parliamentary Assembly called upon participating states who contract PMCs and PSCs in situation of armed conflict and post conflict situations to “include in such contracts the obligations under international humanitarian law and human rights law [...], and to adopt national regulations and good practices”.⁴⁵
- The **EU** Athena mechanism provides that performance-based contracts should be preferred to activity-based contracts, as it allows focusing on outcomes, outputs and quality rather than on how the work is performed.⁴⁶ Additionally, it is stated that “possible cost savings should not be the main driver for outsourcing solutions”.⁴⁷ All contracts concluded under the Athena mechanism must comply with

⁴¹ *Ibid*, section B.8. Static and mobile protection are defined in sections B.9-11.

⁴² OSCE, *OSCE Supplier’s Code of Conduct*, 23 January 2015, available at: <http://www.osce.org/procurement/135931?download=true>.

⁴³ OSCE, *Helsinki Final Act*, 1 August 1957, available at: <http://www.osce.org/mc/39501>.

⁴⁴ UN, *Charter of the United Nations*, 24 October 1945, available at: <http://www.un.org/en/charter-united-nations/>.

⁴⁵ OSCE, *Astana Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the Seventeenth Annual Session*, 29 June – 3 July 2008, available at: <https://www.oscepa.org/meetings/annual-sessions/2008-astana>.

⁴⁶ Council of the European Union, *EU Concept for Contractor Support to EU-led military operations*, §50, 7 April 2014, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208628%202014%20INIT>.

⁴⁷ *Ibid*, §90.

the principle of transparency, proportionality, equal treatment and non-discrimination.⁴⁸

- **NATO** defines integrity, competition, transparency, value for money, fair treatment and positive business partnering, professional proficiency, accountability, uniformity and responsiveness as its general contracting principles.⁴⁹
- **Australia's** public procurement process is defined by the Commonwealth Procurement Rules, whose core principle is best value for money.⁵⁰ Procurement should also encourage competition and be non-discriminatory; use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth; facilitate accountable and transparent decision making; encourage appropriate engagement with risk and be commensurate with the scale and scope of the business requirement.⁵¹ "Ethical behaviour" is understood to mean that the authority should "not seek to benefit from supplier practices that may be dishonest, unethical or unsafe".⁵²

D. Exceptions

- The **EU** Athena mechanism allows derogation to its rules where a contract is declared secret, where its performance must be accompanied by special security measures or when it is required for the protection of essential interest of the EU or of one or more of its Member States. Such derogation is subject to a prior authorisation, and must be kept to the strict minimum. In principle, the only difference is that the publication of the procurement procedure is prohibited and the bid remains confidential.⁵³

⁴⁸ European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 48, available at: <http://www.consilium.europa.eu/en/policies/athena/>.

⁴⁹ NATO, *Bi-Strategic Command Procurement Directive N°60-70*, 22 December 2004, art. 1.1, available at: http://www.aco.nato.int/resources/20/finance/dir60_70.pdf. This directive is applicable to all internationally funded Military Headquarters (HQs) and organisations of Allied Command Operations (ACO); Allied Command Transformation (ACT) and internationally funded activities of the NATO Airborne Early Warning Force (NAEW-F)

⁵⁰ Australia, *Commonwealth Procurement Rules, Achieving value for money*, July 2014, art. 3.2, available at: <http://www.finance.gov.au/sites/default/files/2014%20Commonwealth%20Procurement%20Rules.pdf>.

⁵¹ *Ibid*, Art. 4.4.

⁵² *Ibid*, Art. 6.7.

⁵³ European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 11, available at: <http://www.consilium.europa.eu/en/policies/athena/>.

Stage 2. Bids Solicitation and Notice

Following the determination of which services are needed, the contracting authority establishes a tender process and publishes it (bid solicitation). The bid solicitation contains the specific information concerning the contract (technical information regarding the required goods or services), as well as the evaluation criteria for the contractors. Regardless of the type of tender chosen,⁵⁴ all applicants should have access to the same information and should be evaluated with the same criteria. Notification of the exact bid and requirements ensures transparency, equal opportunity and equal treatment, thereby safeguarding against nepotism and corruption. It also allows proper preparation by the applicant whereby he can ensure that the necessary capacity to comply with the criteria of the contract is available.

Applicability in terms of human rights protection

Respect for human rights should be highlighted as one of the key evaluation criteria, either as an exclusion cause where evidence of human rights violations are linked to a contractor or as a favourable quality where a contractor demonstrates compliance with human rights norms and standards. It is essential to include the respect for human rights as a selection criterion already in the tender process, as contracting officers cannot otherwise exclude or choose contractors on this basis later in the process.

Examples of good practices

- All **Swiss** public bids which are above the legal threshold (whether issued by the federal government, the canton or the communes) must be published on an electronic platform of public procurement, Simap.ch. The platform allows authorities to post their bids and relevant documents, while interested applicants can access them. Information regarding the awarded contract is also published on the same platform.⁵⁵ Additionally, a sample contract reflecting the

⁵⁴ E.g. open procedure (anyone can submit a bid); selective procedure (applicants must submit an expression of interest and only suitable applicants will be invited to submit a bid); invitation procedure (the Authority invites a selection of applicants to submit offers).

⁵⁵ See <https://www.simap.ch/shabforms/COMMON/application/applicationGrid.jsp?template=1&view=1&page=/MULTILANGUAGE/simap/content/start.jsp&language=EN>.

requirements in terms of respect for human rights is included into the bid documentation.

- Under the **EU** Athena mechanism, the bidding documentation must specify the determined requirement with regard to security clearances and criteria relevant for the eligibility of candidates and their personnel, including those of relevance for the respect of human rights, such as for example the exclusion of candidates that have been convicted of grave professional misconduct.⁵⁶ Additionally, it is provided that the specifications must, *inter alia*:
 - specify the exclusion and selection criteria applying to the contract;
 - specify the award criteria and their relative weighting;
 - set out the technical requirements.

The Athena Financial rules also set out that a different procedure will be allowed depending on the estimated value of the contract.⁵⁷

- The **US** FAR requires the bid documentation to entail information regarding the required capacities of applicants and the language of the contractual clauses, including compliance obligation or performance standards. Criteria relevant to the respect for human rights are also included, such as for example the requirement that the applicant have a “satisfactory record of integrity and business ethic”. The evaluation factors and their relative importance must also be clearly stated in the solicitation.⁵⁸
- **Australia**’s DFAT requires applicants tendering for security services to DFAT in relevant environments to demonstrate, in addition to evidence of their capacity to deliver the required services, compliance with certain conditions before being contracted. Those conditions include, *inter alia*, that the applicant is a signatory to the ICoC, or is prepared to become one, possess all the appropriate licenses to operate and to carry weapons and demonstrates no reliably attested record of involvement in serious crime or past unlawful conduct.⁵⁹

⁵⁶ European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 16, available at: <http://www.consilium.europa.eu/en/policies/athena/>.

⁵⁷ European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 5, available at: <http://www.consilium.europa.eu/en/policies/athena/>.

⁵⁸ US, *Federal Acquisition Regulation*, March 2005, art. 9.104-7; 14.201-3; 15.203; 15.204-3; 15.204-5; 15.303; 15.304, available at: <https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf>. See also ICAR, *Turning a blind eye? Respecting Human Right in Government Purchasing*; September 2014, p. 28, available at: <http://icar.ngo/wp-content/uploads/2014/09/Procurement-Report-FINAL.pdf>.

⁵⁹ Australia, DFAT feedback, 16 February 2016. See also *Commonwealth Procurement Rules*,

Stage 3. Evaluation of Potential Contractors

During the third stage of a procurement process, each applicant is evaluated against the criteria determined in Stage 2. The burden to prove their compliance with the criteria is usually on the contract applicant. The authority should make sure that the criteria and requirements can be clearly and objectively assessed. For example, requesting “adequate compliance” without defining what is meant can lead to arbitrary decisions. This process ensures that the selected contractor is capable to comply and that all applicants are held to the same standard, encouraging fair and equal treatment.

Applicability in terms of human rights protection

The evaluation of contractors allows the authority to screen out potential contractors with bad records. In this way, the authority can make certain that the chosen contractor will have the capacity to carry out its mandate and to comply with human rights requirements. In terms of human rights compliance, the criteria should (as a minimum) assess the company itself (background and past conduct, authorisation, internal policies), its personnel (past conduct, welfare of personnel, training including IHL and human rights) and its equipment, in particular weapons and firearms (licenses, lawful acquisition, appropriate training of the personnel carrying firearms, storage and movement condition).⁶⁰

When contracting private security services, many states use the same criteria and standards that they use for all other contractors. This general criteria is primarily based on competitive pricing and technical ability. However, this runs the risk of giving a disproportional importance to pricing, at the expense of other criteria, namely the assurance that human rights standards are being observed. Taking human rights compliance into account for the assessment and selection of contractors, can be an effective means of conveying the importance of human rights directly to the companies.

Achieving value for money, July 2014, art. 10.6, available at: <http://www.finance.gov.au/sites/default/files/2014%20Commonwealth%20Procurement%20Rules.pdf>.

⁶⁰ Montreux Document, Good Practices 5–18.

Examples of good practices

A. Evaluation criteria regarding the Company

- The **Swiss** Federal Act on Private Security Services provided Abroad requires the contracting authority to ensure that companies meet the following requirements:
 - Guarantees concerning the recruitment, training and oversight or personnel (see further requirement in Stage 3.2);
 - Good reputation and irreproachable conduct in business must be attested by its adherence to and compliance with the International Code of Conduct, as well as with by experience in the field, references or membership of a professional association;
 - Solvency;
 - Adequate internal control system;⁶¹
 - Authorisation under the applicable law to carry out private security activities;
 - Liability insurance coverage.⁶²
- Candidates under the **EU** Athena mechanism must be excluded if, i.e., they have been convicted of an offence concerning their professional conduct or if they have been found guilty of grave professional misconduct.⁶³ It is nevertheless provided that requirements on candidates to demonstrate that they are not in one of the situations described as an exclusion criteria shall be kept in proportion to the risk involved and should take into account actual possibilities and operational needs.⁶⁴
- The **EU** Athena mechanism requires that the defined technical specifications do not create unjustified obstacles to competitive tendering. Technical specification should be formulated either

⁶¹ The adequate internal control system must ensure that its personnel comply with established standards of conduct and that disciplinary measures are taken where misconduct occurs.

⁶² Switzerland, *Federal Act on Private Security provided Abroad*, 27 September 2013, Art. 31.1, available at:

<https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Bundesgesetz-ueber-die-im-Ausland-erbrachten-privaten-Sicherheitsdienstleistungen-BPS-EN.pdf>.

⁶³ European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 19, available at: <http://www.consilium.europa.eu/en/policies/athena/>. See also Council of the European Union, EU Concept for Contractor Support to EU-led military operations, §70, 7 April 2014, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208628%202014%20INIT>.

⁶⁴ European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 19, available at: <http://www.consilium.europa.eu/en/policies/athena/>.

by reference to European or international standards, or in terms of performance or functional requirement, with sufficient details for the applicant to determine the purpose of the contract and the contracting authority to award it.⁶⁵

- Companies must meet the following criteria to be considered for selection by the **UN** as armed security providers:
 - Membership in the ICoC;
 - A professional record of providing private security services for at least five years;
 - Possession of valid and current licences for the provision of security services in their Home State, as provided by the Montreux Document;
 - Possession of valid and current licences for the provision of security services and for the import, carry and use of firearms and ammunition in the Territorial State, as provided by the Montreux Document;
 - Membership as a registered United Nations Procurement Division vendor (the company will only be eligible for contract award after the successful completion of registration);
 - Demonstrated capacity to substantially comply with the scope of work.⁶⁶
- Selection factors for PSCs wishing to enter in contract with the **NATO** Allied Command Operations (ACO) are very detailed. Among other selection factors, the contracting officer should examine whether the PSC comes from a state that has signed international and domestic documents defining the legal obligations related to PSCs and the application of these documents in the PSC's internal corporate structure. The PSC will also be required to provide prior professional records, attesting of the following:
 - Respect of domestic and international law;
 - Established company procedures for the training of the personnel;
 - Financial capacity to respond to possible claims;
 - Registration and accreditation by the company's Home State, its adherence to international or domestic legal instruments setting

⁶⁵ European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 22, available at: <http://www.consilium.europa.eu/en/policies/athena/>.

⁶⁶ United Nations Department of Safety and Security, *Guidelines on the Use of Armed Security Services from Private Security Companies*, 08 November 2012, section F.25, available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf>.

- principles and standards to be followed by the PSCs;
- Demonstrated lawful acquisition and use of equipment, including arms and war material.⁶⁷
 - **Australia** requires applicants to demonstrate compliance with conditions for participation, in addition to evidence of their capacity to deliver the required services. Those conditions include, inter alia that the applicant be a signatory to the ICoC and must possess all the appropriate licenses to operate and to carry firearms. Where these requirements are not met by a applicant, the bid would be immediately disqualified.⁶⁸

B. Evaluation criteria regarding the personnel

- The **Swiss** Federal Act on Private Security Services provided Abroad requires the contracting authority to ensure before contracting with a company that its personnel have received “adequate training, commensurate with the protection task assigned to them and in accordance with applicable international and national law”.⁶⁹ In addition to these general requirements, it lists a minimum set of issues that training of PSC personnel must cover respect for fundamental rights, privacy rights and procedural law.⁷⁰
- The law provides for an exception; the contracting authority may grant a contract to a company that does not fully meet the training requirements if there is no other company that meets those requirements at the place at which the service must be provided and if the protection task cannot be accomplished otherwise.⁷¹
- Additionally, where a service is provided abroad, **Swiss** law requires that the company must at least respect the International Labour Organisation’s Fundamental Conventions with regards to working conditions.⁷²

⁶⁷ NATO, *Bi-Strategic Command Procurement Directive N°60–70*, 22 December 2004, art. 2.7.

⁶⁸ Information from the preliminary research conducted by DCAF for the redaction of the DCAF report *Progress and Opportunities: Challenges and recommendations for Montreux Document Participants*, 2015.

⁶⁹ Switzerland, *Federal Act on Private Security provided Abroad*, 27 September 2013, Art. 32.1, available at:

https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Bundesgesetz-ueber-die-im-Ausland-erbrachten-privaten-Sicherheitsdienstleistungen-BPS_EN.pdf.

⁷⁰ *Ibid*, Art.32.2.

⁷¹ *Ibid*, Art.32.3.

⁷² Switzerland, *Ordinance on Public procurement*, 11 December 1995, available (French) at: <https://www.admin.ch/opc/fr/classified-compilation/19950538/index.html>.

- As an additional safeguard, the **OSCE** forbids the contractor to replace or withdraw key personnel referred to in the contract without prior written approval. If a replacement or withdrawal of any key personnel is requested to the OSCE, the contractor must submit a CV or detailed justification to allow the OSCE to evaluate the impact of the change.⁷³
- Under the **UN** framework, the private security company is request to conduct a screening of all its personnel employed for the provision of armed security services to the UN. Screening includes a criminal background check and verification of the person's place of employment for the past five years.⁷⁴ The company is furthermore required to provide each of its personnel with training on the ICoC, the company's Use of Force Policy and the company's Weapons Manual. Additional mandatory training include, inter alia, cultural sensitivity training, Human Rights Law application, integrity and ethical awareness and on prevention of sexual harassment.⁷⁵

C. Valuation criteria regarding equipment, weapons and firearms

- The **Swiss** Federal Act on Private Security Services provided Abroad requires contracted private security personnel to be unarmed as a general rule.⁷⁶ Exceptions can be made where it is required by the situation abroad: such an exception must be specified in the contract and the carrying of a weapon can only be meant for self-defence or in situation of necessity.⁷⁷ In case such an exception is made, the contracting authority must ensure that the personnel possess the permits required under the applicable national law as well as the local weapons registration.⁷⁸

⁷³ OSCE, *General Conditions of contract (Services)*, 24 September 2007, art. 11, available at: <http://www.osce.org/secretariat/40096?download=true>.

⁷⁴ United Nations Department of safety and Security, *Guidelines on the Use of Armed Security Services from Private Security Companies*, 08 November 2012, section F.27–28, available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf>.

⁷⁵ *Ibid*, section H.39.

⁷⁶ Switzerland, *Federal Act on Private Security provided Abroad*, 27 September 2013, Art. 34.1, available at: https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Bundesgesetz-ueber-die-im-Ausland-erbrachten-privaten-Sicherheitsdienstleistungen-BPS_EN.pdf.

⁷⁷ *Ibid*, Art.34.2

⁷⁸ *Ibid*, Art.34.3–4

- The **EU** Athena mechanism provides that prior to hiring any armed personnel, the contractor must confirm that personnel are well trained and have good knowledge of the relevant standard operating procedures. Furthermore, any use of force by a PSC must be in accordance with the applicable law and must not exceed self-defence, defence of third persons and defence of the designated property – excluding deadly force.⁷⁹
- The **UN** requires armed private security companies to develop and implement a company Use of Force Policy and a company Firearms Management Procedures and Weapons Manual. These company policies should be consistent with the ICoC, as well as with the applicable national laws of the state in which services are to be provided, the UN Use of Force Policy,⁸⁰ and with the UN Department of Safety and Security Manual of Instruction on Use of Force Equipment, including Firearms.⁸¹

Stage 4. Contract

At this stage, the authority takes the final decision regarding which applicant wins the contract on the basis of the applicants' evaluation (Stage 3). The award decision is ideally made public. At the least, other applicants are notified with adequate justification. The contract is then drafted and signed by both parties. The content of the contract reflects the terms and conditions already drafted in the bid solicitation.

The issue of subcontracting should be addressed in this phase: if not addressed properly, subcontracting carries the risk of a domino effect, delegating responsibilities and weakening the chain of command. It must be ensured that subcontracting does not weaken either the responsibility of the authority, or the accountability of the prime contractor.

⁷⁹ Council of the European Union, EU Concept for Contractor Support to EU-led military operations, §85, 7 April 2014, available at: <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%208628%202014%20INIT>.

⁸⁰ As found in the *UN Security Policy Manual*, chapter IV, section H.

⁸¹ United Nations Department of Safety and Security, *Guidelines on the Use of Armed Security Services from Private Security Companies*, 08 November 2012, section G.34, available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf>.

Applicability in terms of human rights protection

Contracts provide a powerful tool to require PMSCs to respect human rights. Some national legislation may contain gaps when it comes to the applicability of certain public law commitments to private contractors. Contracts can offer a solution to remedy this regulatory gap, reinforcing the obligations that states/IOs require companies to abide by. Additionally, governments and IOs, have strong purchasing power and can use contracting practices to set global standards, leading towards practices that are more human rights-oriented.

Examples of good practices

A. Award and notification

- In **Switzerland**, the award decision must be published and the decisions must be justified.⁸² Unsuccessful applicants may request the disclosure of certain information, including details about the successful bid and applicant.⁸³ Unsuccessful applicants may also appeal against the decision.⁸⁴
- The **EU** Athena mechanism requires the contracting authority to inform candidates of the decision reached as soon as possible. This notification must include the reasons for any negative decision. Any awarded contract exceeding the “highest threshold”⁸⁵ must be published in the Official Journal of the European Union.⁸⁶

B. Clauses to include in the contract

- In its General Contract Conditions, the **OSCE** requires the contractor to:
 - Comply with all laws, ordinances, rules and regulations during the performance of contract;
 - Obtain any required license or authorisation;

⁸² Switzerland, *Federal Act on Public Procurement*, 16 December 1994, Art. 24 & 23.1, available at: [file:///C:/Users/boddie/Downloads/Federal+Act+on+Public+Procurement%20\(4\).pdf](file:///C:/Users/boddie/Downloads/Federal+Act+on+Public+Procurement%20(4).pdf).

⁸³ *Ibid*, art. 23.2.

⁸⁴ *Ibid*, section 5.

⁸⁵ The “higher threshold” being 130’000 euros for supplies and services. See European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 4.1, available at: <http://www.consilium.europa.eu/en/policies/athena/>

⁸⁶ European Council, Council of the European Union, *Athena, Part II, Financial Rules on Procurement*, November 2012, art. 51.1, available at: <http://www.consilium.europa.eu/en/policies/athena/>.

- Refrain from engaging in any business activity that contravenes economic sanctions imposed by the UN;
- Refrain from engaging (the contractor nor its personnel) in any practice that violates international human rights laws and standards.⁸⁷
- The **UN** model contract⁸⁸ repeats the requirement already mentioned as selection criteria (in particular in regard to training of personnel and the Use of Force Policy, Firearms Management Procedures and Weapons Manual) in its contractual obligations.
- For contracts with PSCs, **NATO** requires the incorporation of explicit clauses that include internationally recognised principles and standards.⁸⁹
- As an example, **US FAR** requires the insertion of contractual clauses prohibiting Child labor. The recommended clause states that “To enforce the laws prohibiting the manufacture or importation of products mined, produced, or manufactured by forced or indentured child labor, authorized officials may need to conduct investigations to determine whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under this contract.”⁹⁰

C. Subcontracting

- The **Swiss** Federal Act on Private Security Services provided Abroad provides that subcontracting of guarding/protection tasks is prohibited without the prior consent of the contracting authority.⁹¹ Additionally, where a company subcontracts the provision of a security service, it has to ensure that the company performing the

⁸⁷ OSCE, General Conditions of contract (Services), 24 September 2007, art. 12, available at: <http://www.osce.org/secretariat/40096?download=true>.

⁸⁸ United Nations Department of Safety and Security, *Guidelines on the Use of Armed Security Services from Private Security Companies*, Annex B – Model Contract, 08 November 2012, section G.34, available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesAnnexBModelContract.pdf>.

⁸⁹ NATO, *Bi-Strategic Command Procurement Directive N°60–70*, 22 December 2004, art. 2.3.c.

⁹⁰ US, *Federal Acquisition Regulation*, March 2005, art.52.222-19, see also art. 22.1505, available at: <https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf>.

⁹¹ Switzerland, *Federal Act on Private Security provided Abroad*, 27 September 2013, Art. 36, available at: <https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Bundesgesetz-ueber-die-im-Ausland-erbrachten-privaten-Sicherheitsdienstleistungen-BPS-EN.pdf>.

service observes the constraints to which the original contracting party is subject. Reference is made to the general code of obligation in regard to liability for harm caused by the subcontracted company.⁹²

- The **OSCE** forbids subcontracting without express written consent. Where subcontracting is approved, the full liability and contractual obligation remain with the contractor; the subcontractor is bound by the same terms and conditions as the contractor.⁹³
- According to the **EU** Athena mechanism, contractors are generally allowed to outsource work to local sub-contractors, providing they guarantee the quality of the service.⁹⁴
- **NATO** provides that sub-contracting should be limited, and only allowed on a case-by-case basis. Sub-contracting must be approved before the conclusion of the contract; if the PSC enters into a subcontract after the conclusion of the contract, written notification must be provided to NATO. It is the contracting officer's responsibility to verify the subcontractor's credentials, standards and professional activities: eligibility criteria and selection factors for PSC apply also to their subcontractors.⁹⁵
- **Australia's** DFAT requires that sub-contractors providing services in relevant environments must also comply with all relevant provisions of the ICoC during the term of a security services contract.⁹⁶

⁹² Switzerland, *Federal Act on Private Security provided Abroad*, 27 September 2013, Art. 6, available at: <https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Bundesgesetz-ueber-die-im-Ausland-erbrachten-privaten-Sicherheitsdienstleistungen-BPS-EN.pdf>.

⁹³ OSCE, *General Conditions of contract (Services)*, 24 September 2007, art. 16, available at: <http://www.osce.org/secretariat/40096?download=true>.

⁹⁴ Council of the European Union, *EU Concept for Contractor Support to EU-led military operations*, §50, 7 April 2014, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208628%202014%20INIT>.

⁹⁵ NATO, *Bi-Strategic Command Procurement Directive N°60-70*, 22 December 2004, art. 2.5.

⁹⁶ Information from the preliminary research conducted by DCAF for the redaction of the DCAF report *Progress and Opportunities: Challenges and recommendations for Montreux Document Participants*, 2015.

Stage 5. Monitoring, Enforcement and Accountability

At this last stage of the procurement process, the authority systematically reviews the contractor's activities (monitoring) and ensures that the contractor complies with the terms and conditions agreed upon in the contract (enforcement).⁹⁷

Different methods can be used to monitor the contractor's activities, such as for example the use of reporting mechanisms, a complaints office, or through direct on-site monitoring. Monitoring is a challenging task, requiring skilled and trained officers.

Where the contractor fails to meet its contractual obligations, the authority turns to accountability mechanisms. Several mechanisms can be made available to remedy or prevent violations of contractual clauses. Most common contractual sanctions consist in the termination or suspension of the contract or debarment of the contractor. Nevertheless, such measures have proven to be too strict, and therefore sometimes ineffective as authorities may be reluctant to use such extreme measures. It is therefore recommended to also provide for sanctions that encourage the contractor to resolve the issue for instance through financial penalties, control arrangements allowing the veto or removal of personnel during contractual performance or the publication of a contractor's compliance record. Judicial measures and remedies are left out of the scope of this report but liability for breach of contract may play an important role in enforcement.

Applicability in terms of human rights protection

The ability of procurement to strengthen respect for human rights will be ineffective if the authority does not have the capacity and means to monitor performance, enforce the contract and to remedy violations, in particular human rights violations

⁹⁷ As mentioned in stage 1 "the Authority" can be given multiple forms and might not be a single entity, but rather a chain of responsibilities: similarly, "the Authority" responsible for the monitoring and enforcement of the contract can take many different forms and might be composed of several entities. For example, some decided to separate monitoring from the headquarters/capital and from the fields.

Examples of good practices

A. Monitoring and enforcement of the contract

- Under the **OSCE** contractual system, contractors are asked to “keep accurate and systematic accounts and records in respect of its performance of the Contract” and must allow the OSCE to periodically and up to 7 years after the end of the contract examine these accounts and records and have them audited by appointed third-parties.⁹⁸
- The **UN** requires the Contracting Officer to ensure that the terms of the contract are being adhered to. For this purpose, a performance review of the company will be undertaken with a daily operations review and a monthly review.⁹⁹ Daily reviews include, inter alia, inspections of the safe handling and storage of firearms and ammunition, physical condition of security posts/stations or assessment whether the conduct of the private company personnel reflects the UN requirements.¹⁰⁰ The Monthly review assesses, inter alia, all incident reports, all reports on the use of force, information on the training programme, and selected individual personnel performance reports.¹⁰¹
- **NATO**’s contracting officers must keep records of all previous and current contracts established with PSCs and request from those PSCs the submission of activities reports at the beginning and at the end of the contract – or more frequently in case the contract is longer than one year.¹⁰²
- Particularly for its larger contracts, the **US DoS**, recruits qualified officers in the field to monitor the compliance of the company with the terms of the contract. Sometimes recruited locally, they are qualified specialists and experts, reporting to the US DoS directly. Officers monitor the appropriate training of guards or their correct

⁹⁸ OSCE, *General Conditions of contract (Services)*, 24 September 2007, art. 22, available at: <http://www.osce.org/secretariat/40096?download=true>.

⁹⁹ United Nations Department of Safety and Security, *Guidelines on the Use of Armed Security Services from Private Security Companies*, 08 November 2012, section 1.42–44, available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf>.

¹⁰⁰ *Ibid*, Section 1.49–50.

¹⁰¹ *Ibid*, Section 1.51–55.

¹⁰² NATO, *ACO Directive concerning the contracting with private security companies*, N°060–101, 16 May 2014, art. 1.2.d.

use of equipment and weapons. Other monitoring officers are based in Washington and only occasionally visit the field; they are uniquely taking into account compliance with contractual requirements and not the day-to-day operations of the company.

B. Accountability mechanism: contractual sanctions

- **OSCE** contractors are requested to maintain insurance coverage for the entire duration of the contract in amounts that cover at minimum third-party claim for death, bodily injury and loss of or damage to property arising in connection with the contract and worker's compensation.¹⁰³
- The **OSCE** can "hold the contractor in default" if the company fails or refuses to deliver the goods or perform the services or if it fails or refuses to comply with any of the other terms and conditions set out in the contract. When a contractor is "in default", the OSCE has three solutions to choose from at its discretion:
 - To impose a penalty;
 - To set a delay within which the contractor must remedy its default;
 - To terminate the contract immediately (in whole or in parts).¹⁰⁴
- The **EU** Athena mechanism provides that binding legal consequences resulting from deficiencies in the performance of services must be agreed in advance with the contractor. It also specifies that "Inherent possible risk related to the specific nature of the tasks led in EU-led military operations should be considered and it should be examined in each case whether the contract should address specific circumstances (state of war, terrorism, massive public disorder) in order to guarantee its implementation by contractors even in deteriorated security environment."¹⁰⁵
- As seen above (Stage 1.3), accountability is one of **NATO's** general contracting principles. According to this principle, "Contracting Officers/Specialists shall effectively discharge their personal

¹⁰³ OSCE, *General Conditions of contract (Services)*, 24 September 2007, art. 20, available at: <http://www.osce.org/secretariat/40096?download=true>.

¹⁰⁴ OSCE, *General Conditions of contract (Services)*, 24 September 2007, art. 34, available at: <http://www.osce.org/secretariat/40096?download=true>.

¹⁰⁵ Council of the European Union, EU Concept for Contractor Support to EU-led military operations, §50, 7 April 2014, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208628%202014%20INIT>

procurement responsibilities by ensuring that effective contractual mechanisms are in-place for all procurement activities. All actions must be clear and auditable and must always consider ways to defend against or mitigate likely contractual risks.”¹⁰⁶

¹⁰⁶ NATO, *Bi-Strategic Command Procurement Directive N°60-70*, 22 December 2004, art. 1.1, available at: http://www.aco.nato.int/resources/20/finance/dir60_70.pdf.

Conclusions and Next Steps

Over the past years, it has become clear that the influence of clients of private security services to improve respect for human rights has not been fully exploited. The role of the client is important because commercial incentives and restrictions can induce private security providers to adhere to relevant regulations. Contracts and procurement practices with a strong basis in human rights are therefore particularly important for the implementation of such regulations. At the same time, international organisations and states play a central role as clients for private security services and can promote more effective regulation through the mechanisms of procurement and contracts.

The Montreux Document and the ICoC offer guidance on effective private security regulation to states, companies, and IOs. While substantive and concrete dialogue has been encouraged through the creation of the MDF and the ICoCA, more detailed exchange is required on this specific topic. Through the mapping of existing elements of the procurement process and the identification of good practices in standard procurement processes of states and IOs, this study sheds light on what practical implementation of international standards can look like. By providing an overview of this topic, the study facilitates the early identification of existing gaps and challenges.

This study has the primary goal of promoting learning through highlighting good practices and clarifying the landscape of existing procurement and contracting systems. Building on this analysis, the following recommendations/next steps are proposed:

I. Identifying challenges:

There is a need for further research to identify real-life challenges in the context of procurement and contracting of private security. By drawing on diverse case studies and expert contributions, there is an opportunity to identify key gaps and challenges in implementation as well to

identify targeted good practices. This can contribute to determining what effective policies look like when it comes to public procurement of private security services.

II. Identifying policies, procedures, and capacity building tools to overcome gaps in regulation:

Rooted in the identification of specific challenges, there is an opportunity to develop practical tools and targeted guidance support. Concrete products such as model contracts/contract templates can assist states and IOs to create and foster policies that integrate human rights priorities into procurement practices.

III. Networking knowledge:

In order to share experiences and further integrate a diversity of perspectives and good practices, it is recommended to connect with wider institutions and actors working on procurement and contracting. This could be accomplished through international and regional frameworks and forums, as well as through participation in policy projects such as the Learning Lab on Public Procurement and Human Rights.¹⁰⁷ Such projects can facilitate broader peer-to-peer experience sharing on integrating respect for human rights into public procurement.

IV. Engaging directly with stakeholders and end-users:

There is a need for further engagement across different procurement actors. In order to contribute to improving regulation of the private security industry on the ground, stronger engagement with those directly involved in procurement of security services (such as contracting officers, contract monitoring agents) should be promoted. By integrating the perspectives and feedbacks of the diverse actors responsible for the drafting and implementation of procedures, states and IOs can develop more effective and specific solutions to overcome challenges.

¹⁰⁷ The purpose of the Learning Lab is to facilitate the implementation of the UNGPs in the context of public procurement. To accomplish this goal, the Learning Lab will map procurement law and practice in selected countries, develop good practices, convene decision-makers so they can share innovations, develop on-line tools and guidance, and disseminate information to international networks. See <http://icar.ngo/analysis/first-international-workshop-of-the-learning-lab-on-public-procurement-and-human-rights/>.

Annex A

UN Procurement and Contracting Policies

Procurement of private security services occurs in three operational contexts within the United Nations (UN): humanitarian operations (ex. Office for the Coordination of Humanitarian Affairs [OCHA]), peacekeeping operations (i.e. Department of Peacekeeping Operations [DPKO] and Department of Field Support [DFS]), and political missions (Department of Political Affairs [DPA]). In humanitarian operations, national and international PMSCs are deployed for the protection of staff and premises, risk assessments and security training. In peacekeeping operations, contracted services have included static security guarding, logistical support and ordnance disposal. The UN DPA, in its diplomatic and peace building tasks, has relied on PMSC services to assist in risk assessment activities, for instance, when assessing risks of violence in elections.¹⁰⁸

With regards to process, the procurement of services offered by private security companies is dealt with in two ways:

- Procurement of security and/or protection of UN staff, premises, and property by armed and/or non armed guards (including humanitarian convoy protection) which are handled by the UN Security Management System (UNSMS) infrastructure.
- Procurement of other types of security related services (including demining, training, logistics, and risk analysis) which are dealt with by individual agencies, UN Office for Project Services (UNOPS), and the UN Procurement Division.

¹⁰⁸ Ase Gilje Ostensen, "UN Use of PMSCs: Practices and Policies," DCAF: 2011, 17.

UNSMS Framework and Procurement of Armed Private Security Companies

In terms of its procurement and contracting processes in the UNSMS framework, the primary responsibility for the security and protection of UN personnel, eligible family members, and the premises and property of UN, rests with the host government. In exceptional circumstances where armed security services become necessary, these should be provided by the host government, alternate member states, internal UN system resources such as Security and Safety Services or security officers recruited directly by a mission or through another UN organisation (ex. DPKO). When this is not possible, private security companies may be considered.¹⁰⁹

The UN operates through a unified but decentralized internal security system. This means that each agency (such as World Food Programme [WFP], OCHA etc.) can determine its own security arrangement, based on unified overarching policies and guidelines. This security system was the culmination of discussions that began in 2003, following the devastating attacks on the UN headquarters in Baghdad, Iraq and 2004 attacks in Algiers. As a result of the ensuing consultations, the UN Department of Safety and Security (UNDSS) was established in 2005, thereby consolidating the security management system into one Department, headed by an Undersecretary General.¹¹⁰ In 2011, the UNDSS initiated the development of policy proposals for more responsible and coherent procurement and contracting of PMSCs. In consultation with the UN Working Group on the use of mercenaries and various agencies within the Interagency Security Management Network (including the High Commissioner for Refugees [UNHCR], UN International Children's Emergency Fund [UNICEF], WFP), the UN developed the Security Management Operations Manual with Chapter IV, Section I offering the policy framework on armed private security companies.

¹⁰⁹ UNDSS, UN Security Management System, Security Management Operations Manual, "Guidelines on the Use of Armed Security Services from Private Security Companies," 08 November 2012, A(1-4).

¹¹⁰ General Assembly Resolution (A/RES/59/276, XI, 7-23 December 2004) created the UNDSS, thereby merging the security management component of the Office of the United Nations Security Coordinator (UNSECOORD), the Security and Safety Services (SSS) at Headquarters and at Offices away from Headquarters, (including the regional commissions), and the civilian security component of the DPJO into a single security management framework.

Policy on Armed Private Security Companies (PSCs):

- Determination of services:

“Armed security services from a private security company may not be contracted except on the exceptional basis and then only for the following purposes:

 - a. To protect UN personnel, premises and property.
 - b. To provide mobile protection for UN personnel and property.”¹¹¹
- Procurement process:
 1. Needs assessment and scope of application and principles: The Policy is binding for all security professionals and managers, UN agencies and organisations in the UNSMS.¹¹² “The policy applies to the selection, contracting and managing of any armed security services from private security companies by an organisation participating in the UNSMS.” (Art. C 6–7). The Policy and the Manual in general do not refer to or apply to non-armed PSCs.
 2. Planning for procurement needs and risks: The decision to use armed PSCs must be based on a Security Risk Assessment.¹¹³ In addition, each country where there is a UN agency or organisation present has a Designated Official that reports to the UNDSS. The Designated Official has to examine and approve the use of PSCs, taking into consideration inter alia “host country and local community acceptance of armed security services from PSCs and the local history of negative impacts of incidents involving PSCs and their security services” (Policy Art. 16). The Undersecretary General then will determine whether the use of PSCs is approved in the situation.
 3. Soliciting bids and providing notice: When the decision is taken to use PSCs, companies bidding for a contract must meet requirements in the “Guidelines on the Use of Armed Security Services from PSCs” (hereafter referred to as the Guidelines).

¹¹¹ Further details on specific services related to static or mobile protection are found in the UN Security Management Operations Manual, “Guidelines on the Use of Armed Security Services from PSCs.”

¹¹² To read more of the governance structure of the UNSMS and the application of the policy manual, See Chapter II, Section B, UN Security Management System Policy Manual, “Framework of Accountability for the UN Security Management System.”

¹¹³ In accordance with Chapter IV, Section A, UN Security Policy Manual, “Policy and Conceptual Overview of the Security Risk Management Process.”

4. Evaluation of potential contractors: Mandatory requirements to bid on a contract include being a member of the ICOC, having a valid license in their Home State and the Territorial state as defined by the Montreux Document, passing a criminal background, providing verification of past employment.¹¹⁴ Use of force and weapons: The armed PSC is required to develop and implement a Use of Force Policy and Weapons Manual in line with national law and consistent with the ICOC and the UN Use of Force Policy and UNDSS Manual of Instruction on Use of Force Equipment, including Firearms.¹¹⁵
4. Contract: It is mandatory for UN agencies and organizations to use the Model Contract provided in Annex B to the Guidelines. Before commencing services under contract, the PSC must provide training to each of its personnel on the ICOC, the Use of Force Policy and the Weapons Manual as well as inter alia: cultural sensitivity training, International Human Rights Law and its application, integrity and ethical awareness, and preventing sexual harassment.¹¹⁶
5. Monitoring, enforcement and accountability: The Guidelines provide for daily and monthly reviews and inspections of PSC activities. With regards to contract renewals, the full procurement process must be carried out, including a new assessment of the primary options of host government, alternate member state or internal UN system resources (Policy, Art. 20). Grievance or complaints mechanism: Neither the Policy nor the Guidelines specify the procedures for the process if a violation of contract is alleged to take place. The Policy maintains that UN personnel that do not abide by the policy may be subject to administrative measures (Policy, Art. 32); meanwhile, the Guidelines instruct that any concerns should be communicated to the Designated Official or Country Representative for further action (Guidelines, Art. 56).

UN Procurement of Other Services

For other types of procurement especially as they relate to outside the strict definitions of guarding people and premises (such as policing,

¹¹⁴ Guidelines, Art. 28.

¹¹⁵ See UN Security Policy Manual, Chapter IV, Section H.

¹¹⁶ Guidelines, Art. 39, j–l, n, o.

training packages, demining etc.), the UN Procurement Division (UN/PD) and UNOPS handle the procurement and contracting process. In this sense, procurement of PMSC services acts to fill in the gaps in operational capacity. UNOPS traditionally handles procurement for agencies and organisations while UN/PD executes the procurement policies decided by the Secretariat and individual missions.

To ensure that companies bidding for contracts comply with certain established UN standards, the UN/PD maintains a roster of registered vendors in accordance with the UN Procurement Manual and UNOPS database of approved companies. Companies can also register as members of the Global Compact, Kofi Annan's initiative on business and corporate social responsibility. Companies may be removed or suspended from the UNOPS database, the UN/PD vendor list, and/or the Global Compact list for both technical and ethical reasons.

UN Procurement Manual:

- Best Value for Money principle: "Price alone is not necessarily determinative of Best Value for Money." (Chapter 1:1.2:2d). Competitive, fair, ethical and transparent sourcing is a key requirement.¹¹⁷
- Procurement process:
 1. Needs assessment and scope of application and principles: The policy applies to all UN management and staff. At HQ, procurement is the responsibility of UN/PD. At other UN locations, Procurement staff, Director of Mission Support, Chief Mission Support or Director or Officer of Administration are responsible for local procurement.
 2. Planning for procurement needs and risks: Planning, funding and definition of requirements;
 3. Bid solicitation and notice: Development of Source Selection Plan, including Evaluation Criteria and Weighting (if applicable); Evaluation and Source Selection.
 4. Evaluation of potential contractors: See section 4 below.
 5. Contract: Identification of vendors¹¹⁸ is facilitated by looking at whether the company is a participant of the Global Compact

¹¹⁷ See also UN Department of Management, Office of Central Support Services, Procurement Division, UN Procurement Manual, Chapter 4: Ethical Standards in Procurement.

¹¹⁸ See Procurement Manual, Chapter 5: Procurement staff should be aware that the UN encourages vendors to participate in the Global Compact.

(seen as a benefit when bidding for contracts). Furthermore, the UN awards contracts to vendors registered with the UN Secretariat through the vendor due diligence review process. Vendors seeking to register with the UN Secretariat are required to submit their applications, including any required documentation through the UN Global Marketplace (UNGM) vendor registration portal.¹¹⁹ Subcontracting: the Vendor must identify any subcontractors. The use of subcontractors does not relieve the vendor with whom the UN has a Contract of its responsibility to fulfill the terms and conditions of Contract. The UN reserves the right to obtain the same level or information from subcontractors as from prime contractors (Chapter 19: 3: 9.40).

6. Monitoring, enforcement and accountability: Risk assessment and management as well as contract management is carried out through a Vendor Performance assessment and ensuring that the Vendor complies with the terms and conditions of the Contract (Chapter 1: 1.2: 3.). Grievance or complaints mechanism: The Procurement Manual describes procedures, remedies and dispute resolution policies in the event of breach of contract (Chapter 15).

¹¹⁹ See www.ungm.org. When registering, vendors are encouraged to provide a copy of their Code of Ethics and/or Anti-Fraud Compliance Programme, or equivalent and evidence of the participation in the UN Global Compact, or support of equivalent initiatives that indicates the applicant's commitment to align its operations and strategies with universally accepted principles in the areas of human rights, labour, environment and anti-corruption. Procurement Manual, Chapter 7:7.6:3.

Annex B

EU Procurement and Contracting Policies

The EU as Standard Setter:

As an international organisation, the European Union sets binding minimum rules (Directives) for its 28 Member States aimed at harmonising procurement across the EU single market. “These rules organise the way public authorities and certain public utility operators purchase goods, works and services. These Directives are then transposed onto national legislation and apply to tenders whose monetary value exceeds a certain amount.”¹²⁰ For tenders of lower value, Member States’ national laws apply which nevertheless must respect EU law.

The main policy setting the rules for all member states with regards to procurement and contracting is the 2014 Procurement Directive.¹²¹ The aim of this Directive is not to regulate procurement in a restrictive manner but to ensure the free movement of goods, services, capital and people within EU boundaries (Art. 1). However, the Court of Justice of the EU has held that Member States may restrict cross border flows of goods, services, capital and people in the pursuit of public interest. A second relevant policy is the 2009 Directive on public procurement in the fields of defence and security.¹²² Again, the goal of this Directive is to level the playing field applying to small and large Member States and companies competing on the market. The Directive tailors procurement rules for the uniqueness of defence and security equipment due to its sensitivity and complexity.

¹²⁰ European Commission, Internal Market, Industry, Entrepreneurship and SMEs, “Public Procurement,” http://ec.europa/growth/single-market/public-procurement/index_en.htm, accessed 9 December 2015.

¹²¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

¹²² Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009, on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security and amending Directives 2004/17/EC and 2004/18/EC.

- Scope of policies: Private security services do fall under the Procurement Directive, but they have a special status. Only certain articles of the Directive apply to these services and the policy does not heavily regulate or restrict the bidding process.¹²³ In terms of transparency, contracting authorities are required to publish a Prior Information Notice of the concession award with the name, type of service, and time limits for other companies wishing to bid.¹²⁴

The 2009 Directive on defence and security procurement applies to public contracts including for:

- Works supplies and services directly related to military or sensitive equipment;
- Works and services for specifically military purposes or sensitive works and sensitive services.

There is no reference to human rights or ethics in the two Directives.

Direct or Indirect Procurement by the EU:

In most cases, private security services are contracted by individual EU member states to support their national contingents in contributing to multilateral operations. As an organisation, the EU also directly and indirectly contracts private security services and this type of procurement occurs in three contexts, namely with the objective:

1. To provide static or mobile security of people and premises in headquarters and field missions;
2. To provide operational support to civilian and military missions under the EU Common Security and Defence Policy (CSDP);
3. To provide security and operational support to EU-funded humanitarian aid actions and the EU's humanitarian aid field missions.

¹²³ Procurement Directive, Article 19: "Other specific services listed under Annex IV falling within the scope of this Directive shall be subject only to the obligations arising from Article 31 (3) and Articles 32, 46, and 47." Other specific services covered by Directive are defined as "Prison related services, public security and rescue services...", investigation and security services, Security services, Alarm-monitoring services, Guard services, Surveillance services, Tracing system services, Absconder-tracing services, Patrol services, Identification badge release services, Investigation services and Detective agency services."

¹²⁴ See Procurement Directive, Article 19, Article 31 (3), Article 32, and Annex IV.

Field security:

While public procurement within the European Union is governed by Directive 2014/24/EU, the legal basis for the European institutions procurement, is laid down in the Financial Regulation (FR)¹²⁵ and in its Rules of Application (RAP).¹²⁶ The FR and RAP incorporate the rules from Directive 2014/24/EU and apply to the procurement of static or mobile security to EU property and personnel in headquarters or field locations. In addition, the 2008 EU Field Security Handbook gives details on security of EU field offices and residences of mission personnel. The Handbook makes clear that the primary responsibility for the security and protection of EU mission personnel rests with the host government, however; when the host government is unable to provide this, applications can be made for hiring security guards on the basis of an official submission.¹²⁷

Contracting under the CSDP:

Under the EU Common Security and Defence Policy, the Athena mechanism is responsible for regulating procedures and financing common costs related to EU military operations. Athena operates on behalf of the 27 member states who contribute financing.¹²⁸ Athena is a package of rules and regulations and executive officers, set up by the Council of the EU to provide direct contracted support to CSDP operations. CSDP operations are under EEAS purview. In 2014, the EEAS issued the Concept for Contractor Support to EU-led military operations (hereafter referred to as the EU Concept). The document defines principles and policies concerning contractor support to operations for EU-led military operations and exercises. It links the EU Concept for Logistic Support with the regulations of the Athena Mechanism and other instruments like the European Defence Agency (Effective Procurement Methods and the Contractor Support

¹²⁵ Regulation (EU, Euratom) No 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union, Part One, Title V (Procurement) (Articles 101 to 120), as amended by Regulation (EU, Euratom) No 2015/1929 of the European Parliament and the Council of 28 October 2015.

¹²⁶ Commission Delegated Regulation (EU, Euratom) No 1268/2012 of 29 October 2012, Part One, Title V (Procurement) (Articles 121 to 172), amended by Commission Delegated Regulation (EU) C(2015)7555 of 30 October 2015.

¹²⁷ Council of the European Union, General Secretariat, Field Security Handbook, October 2008, 97.

¹²⁸ Denmark opted out of CSDP on military matters.

to Operations (CSO) Platform).¹²⁹ The EU Concept elaborates further and complements the Athena Financial Rules on Procurement (hereafter referred to as Athena Financial Rules).¹³⁰

- Determination of services: According to Athena Financial Rules, there cannot be outsourcing of military capabilities unless it is authorised by a Special Committee (Article 7, 1–3). The EU will not employ PMCs (private military companies) under any circumstances.¹³¹ “The use of PSCs is possible but should be limited and thoroughly assessed and approved...and is always subject to national law. The implementation of contracts has to be carried out in the framework of the relevant provisions of the Montreux Document and the PSC International Code of Conduct” (EU Concept, Article 83–84).
- Procurement process:
 1. Soliciting bids and providing notice: The Operation Commander of the mission, Athena Administrator and the Troop Contributing Nation have a collective responsibility to identify support requirements that could be met by civilian contractors, put in place the contractual instruments, and share the provision and use of contractor capabilities. Whenever Athena funds the contract, the Operations Commander has full control over the contracting and must ensure that procurement complies with Athena’s Rules and Procedures. Ad-hoc contracting may be delegated to the Force Commander, in line with Athena regulations. The Athena administrator manages the financing of the contract.
 2. Evaluation of potential contractors: Prior to any collaboration with contractors, the need for outsourcing has to be analyzed and the suitability of the contractor has to be evaluated (including performance capability, operational security, expected level of threat in theatre, nationality of stakeholders etc.) Candidates bidding for a tender can be excluded from procurement

¹²⁹ The EU CSO Platform was designed as a forum for interaction between experts from governmental authorities (logistics and CSO experts) and commercial operators for exchange of information in order to identify commercial solutions for operational demands.

¹³⁰ Athena, Part II, Financial Rules on Procurement, November 2012, <http://www.consilium.europa.eu/en/policies/athena/>, accessed 10 December 2015.

¹³¹ Under the EU Concept, a PMC “provides services to replace or back-up an army or armed group to enhance effectiveness. This category is further broken down into two sub-categories by some authors: Active PMCs, willing to carry weapons into combat and passive PMCs that focus on training and organizational issues” (Article 37). A PSC “provides services aimed at protecting persons, business and property from criminal activities” (Article 36).

procedures, including through previous bankruptcy, professional misconduct, criminal record, or if they are subject to conflict of interest or have misinterpreted themselves.¹³² “Use of force must be in accordance with the applicable law and not go beyond self defence, defence of third persons, and the defence of designated property without the use of deadly force.” (EU Concept, Article 85). The EU Concept also includes a reference to training of PSCs.

3. Contract: The EU Concept recommends that templates or “pre-arranged contracts (Framework contracts) should be available in order to have effective and efficient implementation of the Athena policies.¹³³
4. Monitoring, enforcement, and accountability: Articles 20 and 21 of the Athena Financial Rules provide for administrative measures in case of breach of contract.

Contracting by ECHO

With respect to EU-funded humanitarian aid actions and the EU’s humanitarian aid field missions, the EU Commission’s Humanitarian Aid and Civil Protection Directorate General (ECHO) recognizes the potential necessity for PMSCs to assure the safety of humanitarian personnel. ECHO (and the Commission in general) does not intervene directly on the ground. Instead, humanitarian programmes are implemented through partner organisations that share with the DG ECHO common general objectives. The partner organisations are selected among United Nations relief agencies, members of the Red Cross and Red Crescent movement, International Organisations (IOs), non-governmental organisations (NGOs).

This institutional nature of ECHO means that the protection from harm and damage of staff and supplies used by ECHO’s partner organisations in the implementation of ECHO-funded humanitarian action is the responsibility of the partner organisations themselves.¹³⁴ In 2011, ECHO

¹³² *Ibid*, Art. 17.

¹³³ EU Concept, Art. 142.

¹³⁴ Article 1a of General Conditions applicable to Humanitarian Aid Actions financed by the EU and annexed to the 2014 Framework Partnership Agreement (FPA), as well as Article 2.1 of the General Conditions applicable to Delegation Agreements relating to Humanitarian Actions Financed by the Union (GC IMDA). Partner organisations should also comply with humanitarian principles, Article 3.2 of 2014 FPA and Article 2.6 of GC IMDA.

produced the Humanitarian Aid Guidelines for Procurement which aimed at creating common standards and good practices. These were created for partner organisations as a reference for the development of common terminology and standards among humanitarian organisations in the receipt of EU funds. However, the guidelines do not substitute the humanitarian organisations' own procurement rules and procedures.

Other applicable document: 2004 ECHO Generic Security Guide.

- Determination of services: The Guidelines do not specifically refer to private security procurement; however, they do refer to the procurement of services. The ECHO Generic Security Guide refers to both guards and private security companies, further distinguishing armed guarding.
- Procurement Process:
 1. Evaluation of potential contractors: "Contracts shall be awarded to the applicant offering best value for money, in procurement procedures free of any interference due to a situation of a conflict of interest or unethical behaviour." Procurement procedures must comply with Chapter 2 which stipulates mandatory principles of ethical procurement, transparency, proportionality, equal treatment and non-discrimination.¹³⁵ "...instructions for opening fire should be very clear to all concerned. Management of armed guards needs to be especially strict, with severe penalties for misuse of weapons."¹³⁶ The Generic Security Guide refers to good practices in recruiting of guards and private security companies including in checking references and ensuring guards speak the local language. With regards to armed guards, "a senior manager at HQ should take the decision whether to deploy armed guards, and should do so having consulted with any other humanitarian organisations working in the same area. Before making the decision, managers must be convinced that armed guards will reduce rather than increase the risks to the organisation."¹³⁷

¹³⁵ European Commission, ECHO, Guidelines for the Award of Procurement Contracts in the Framework of Humanitarian Aid Actions financed by the European Union, 31 May 2011, 1, 11–27.

¹³⁶ *Ibid.*

¹³⁷ European Commission, ECHO, Generic Security Guide for Humanitarian Organisations, 2004, 58.

2. Contract: The Guide refers to 'induction' of guards, including that "guards should be briefed on their tasks." The Guide also recommends general assessment of training needs without stipulating human rights training.
3. Monitoring, enforcement and accountability: "An experienced nationally recruited staff member is likely the most appropriate line manager of the guards."¹³⁸ The Guide recommends unannounced checks and general monitoring.

¹³⁸ *Ibid*, 57.

OSCE Procurement and Contracting Policies

The OSCE as Standard Setter:

As an international organisation, the OSCE sets politically binding commitments; this means that the OSCE's decisions and normative instruments are adopted by means of consensus and member states are expected to honour them as good faith commitments.¹³⁹ The main document regulating the relationship between states is the 1994 Code of Conduct on Politico-Military Aspects of Security. This normative document contains internationally recognized principles requiring states to guarantee the political neutrality of armed forces and respect human rights. The annual information exchange accompanies the Code of Conduct, and states are asked to submit questionnaire responses regarding their defence architecture and compliance with international law.

Private security companies and their regulation are not mentioned in the Code of Conduct. However, several references have been made to encourage member states to better regulate PSCs. The following passages are of relevance to the issue:

- Article 20–21: Calls for democratic political control of military, paramilitary and internal security forces as well as intelligence and police. The Articles also call for offering guidance to these security forces and to implement controls so that their actions are within constitutional and legal frameworks.
- Article 25: clarifies that states will not tolerate or support forces that are not accountable to constitutionally established authorities.
- Article 29: Declares that states will integrate training on IHL into military programmes and regulations.

¹³⁹ Victor-Yves Ghébal, "The OSCE Between Crisis and Reform: Towards a New Lease on Life," Geneva Centre for the Democratic Control of Armed Forces, Policy Paper no. 10, November 2005, 1.

In 2008 the OSCE Parliamentary Assembly issued the Astana Declaration to the OSCE Ministers. Astana made specific remarks on the use of private security companies and private military companies. The OSCE Parliamentary Assembly recommended the development of a study and a manual on the use of private contractors for missions in armed conflict and post-conflict situations.

In 2014, the OSCE reaffirmed its commitment to having effective democratic control of the private security sector in the Baku Declaration. The new document repeated its Astana concerns and called again on participating states to compensate for the outsourcing of security tasks to private companies by establishing state oversight over private security companies.

In its efforts to combat corruption, the OSCE has focused efforts also on enhancing public procurement regulation by teaming up with the UN Commission on International Trade Law (UNCITRAL) and the European Bank for Reconstruction and Development (EBRD) in regional seminars for countries to discuss combating corruption, transparency safeguards and review procedures.¹⁴⁰ Notably, the OSCE Mission to Serbia supports the reform of the public procurement system through the development of a Manual for Certification for Public Procurement Officers and holding trainings of procurement officers. From 2006 to 2007, a pilot project introduced a certification system to raise professionalism in public procurement.¹⁴¹

Direct or Indirect Procurement by the OSCE:

The OSCE provides detailed information related to the procurement and contracting of services. According to 2014 and 2015 Contracts postings, the OSCE has procured security services such as guard services for the OSCE Secretariat and provision of 'intruder detection systems' in field offices. A Supplier's Code of Conduct applies to all suppliers with whom the OSCE contracts.

- Determination of services: Under general OSCE procurement rules, 'services' are defined as "any and all services to be provided by the Contractor to the OSCE under the Contract, including but not limited

¹⁴⁰ See OSCE, EBRD UNCITRAL Initiative Regional Seminar, Vienna, <https://www.ppi-ebd-uncitral.com/index.php/osce-ebd-uncitral-initiative-regional-seminar-vienna>, accessed 14 January 2016.

¹⁴¹ OSCE, "OSCE helps Serbia fight corruption in public procurement," 18 May 2011, <http://www.osce.org/serbia/77707>, accessed 14 January 2016.

to applicable consultancy, report, design work, creation or licensing of intellectual property, training, installation, maintenance, repair or other after-sales service.”¹⁴² Under the OSCE Code of Conduct, the most relevant services are related to military, paramilitary and internal security forces as well as intelligence and police.

- Procurement process:

1. Evaluation of potential contractors & contract: “The OSCE expects its suppliers to support and respect the protection of internationally proclaimed human rights and to ensure that they are not complicit in human rights abuses.” The Suppliers’ Code of Conduct lists prohibits inter alia threats of violence, exploitation, abuse, harsh or inhuman treatment, or coercion. In addition, the OSCE “expects its suppliers to adhere to highest standards or moral and ethical conduct, to respect local laws and not engage in any form of corrupt practices...”¹⁴³ Subcontracting is not permitted without the express written consent of the OSCE. The OSCE’s approval of any subcontracting shall not relieve the Contractor from any liability or obligation under contract.¹⁴⁴ Regarding the use of force and firearms, the OSCE policy does not have specific rules on this.
2. Monitoring, enforcement and accountability: The monitoring of compliance with contracts is administrative and the policy does not specify monitoring of ethical conduct or human rights compliance.

¹⁴² OSCE, Procurement and Contracting, General Conditions of Contract (Services), Art. 3 (r).

¹⁴³ OSCE, Procurement and Contracting, Suppliers’ Code of Conduct, Articles 10, 11, and 18.

¹⁴⁴ *Ibid*, Art. 16 (1-2).

Annex D

NATO Procurement and Contracting Policies

Due to its organisational nature, NATO's overarching function is to coordinate national efforts in view of multinational responses to operational needs, thereby reducing the number of individual supply chains. However, each member state is responsible for ensuring that – individually or through cooperative arrangements – their own forces receive the required logistic resources.¹⁴⁵ Currently, NATO is involved in several operations and missions, most notably, Afghanistan (now a non-combat mission following on to the International Security Assistance Force [ISAF]), Kosovo (KFOR), monitoring terrorism and piracy in the Mediterranean sea and off the Horn of Africa, and supporting the African Union (particularly AU mission in Somalia). To supplement these missions, NATO relies on procurement of logistics, which is particularly common in Afghanistan. According to concerns expressed in 2010 by the head of a task force to fight corruption in contracting, from 2008–2010, the amount of money spent in Afghanistan tripled.¹⁴⁶

Direct or Indirect Procurement by NATO Member States or in Accordance with NATO Policy:

Procurement in NATO is coordinated by the NATO Support and Procurement Agency (NSPA). NSPA is the executive body of the NATO Support and Procurement Organisation, of which all 28 NATO nations are members. The NSPA brings together NATO's logistics and procurement support activities in a single organisation.

General procurement policies of goods and services (weapons systems and equipment support, logistic services, and logistic support

¹⁴⁵ NATO, Crisis Management, http://www.nato.int/cps/en/natolive/topics_49192.htm, accessed 12 January 2016.

¹⁴⁶ NATO, Afghanistan: Resolute Support, "New task force stands up to combat contract corruption," <http://www.rs.nato.int/article/news/new-task-force-stands-up-to-combat-contract-corruption.html>, accessed 12 January 2016.

to operations) are governed by NATO Policy on Contracting Support to Operations.¹⁴⁷ This Policy gives detailed guidelines regarding the roles and obligations of contracting officers, including related to the selection of contracting officers and their responsibilities and accountability. The Policy further outlines expectations related to contracting officers' ethical standards.¹⁴⁸

The specific policy governing contracting of private security companies is the ACO Directive 060-101 which is applicable to all internationally funded Military Headquarters and organisations of Allied Command Operations. It was drafted with reference to the Montreux Document and other highest existing standards¹⁴⁹ and applies to peace, crisis and conflict settings, and also to NATO-led operations involving non-NATO nations. NATO Supreme Headquarters Allied Powers Europe (SHAPE) holds responsibility for the implementation, execution and control of the Directive.

- Determination of services :
The ACO Directive does not specify which services can and cannot be contracted. However, the policy refers to private security companies.
- Procurement process :
 1. Bids solicitation and notice & evaluation of potential contractors:
The Directive instructs contracting officers to require PSCs to provide records attesting to the PSC's respect of international and domestic law, financial capacity, accreditation, training, lawful acquisition of firearms. Involvement in criminal activities, allegations of corruption or unethical behavior will be taken into account when awarding the contract. ¹⁵⁰ Use of force and firearms: The ACO Directive references the NATO Policy on Contractor Support to Operations.
 2. Contract: Certification that the personnel of the PSC receive regular training on carrying arms and the use of force and

¹⁴⁷ C-M[2007]0004, NATO Policy on Contractor Support to Operations, dated 12 January 2007; See also NATO Support and Procurement Agency (NSPA), Planning and Management of Contracting, <http://www.nspa.nato.int/en/organization/Logistics/LogSup/Planning.htm>, accessed 17 January 2016.

¹⁴⁸ NATO Policy on Contractor Support to Operations, Art. 2–2.

¹⁴⁹ Telephone discussion with official in NATO SHAPE, 10 November 2015.

¹⁵⁰ AD 060-101, Art. 2–7.

on International Humanitarian Law will be required.¹⁵¹ Subcontracting will require notification to the ACO HQ and Contracting Officers will verify subcontractor's credentials, standards and prior professional activities.¹⁵²

3. Monitoring, enforcement and accountability: "The obligation to establish and sustain a grievance procedure falls within the PSC responsibilities. Notwithstanding the above, PSCs will, under their contract obligations, inform ACO in writing of the introduction of a grievance within a period of a month of an incident giving rise to such grievance procedure."¹⁵³ Termination of contract may occur when there is a failure of the PSC to respect obligations arising out of the Directive.¹⁵⁴

¹⁵¹ Ibid, Art. 2-2 (b).

¹⁵² Ibid, Art. 2-5 (a-c).

¹⁵³ Ibid, Art.2-8 (g).

¹⁵⁴ Ibid, Art. 3-4.

The role of international organisations and states as clients and contracting entities of private military and security companies (PMSCs) is significant. Governments are often the largest single purchasers of security related services. As major clients of private security services, international organisations also have significant potential to assist national regulatory bodies and improve the impact of PMSCs' activities in diverse regions. But when it comes to using contracts and procurement practices to encourage the implementation of human rights standards for private security operations, little discussion has emerged on the relevant experiences of different actors. While substantive and concrete dialogue has been held through various international initiatives, including the Montreux Document and the International Code of Conduct on Private Security Providers, more detailed exchange is required on this topic.

This study has the primary goal of promoting learning through highlighting good practices and clarifying the landscape of existing procurement and contracting systems in international organisations and states. The study: 1) summarizes relevant existing instruments related to human rights-based procurement of private security companies; 2) outlines the essential stages of a procurement process, and; 3) shares good practices from selected case studies. Through this, the study aims to support the development and implementation of procurement and contracting policies based on international human rights standards.