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# **THE MONTREUX DOCUMENT AND THE INTERNATIONAL CODE OF CONDUCT**

Understanding the relationship between international initiatives to regulate the global private security industry

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Nelleke Van Amstel and Tilman Rodenhäuser



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## About the series

The Public Private Partnerships Series provides a focus on contemporary security governance challenges and examines 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 realise shared security and development goals.

## The Montreux Document and the International Code of Conduct

Understanding the Relationship between International Initiatives to Regulate the Global Private Security Industry

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# Executive Summary

Innovative instruments intended to regulate the private security industry at the international level, such as the Montreux Document and the International Code of Conduct for Private Security Service Providers (ICoC) and its Association (ICoCA), have emerged over the past years. While addressed to different actors, the Montreux Document and the ICoC share the principle objective of enhancing private security company (PSC) compliance with applicable rules of international humanitarian law and international human rights law. However, effective implementation remains a challenge. One reason is that the potential synergies between the two processes may not yet be fully appreciated. This paper provides a detailed comparison between good practices contained in the Montreux Document and the ICoC principles. In particular, it examines to what extent states may build on the ICoC and its Association in order to regulate the provision of private security services effectively and thereby implement good practices identified in the Montreux Document.

The paper recommends that states include ICoCA membership in their national authorisation or hiring processes. The principles of the ICoC and the governance mechanism established by the ICoCA can complement or even be an essential component of a state's effort to regulate PSCs in accordance with Montreux Document good practices.

Additionally, the paper proposes that states take into account ICoCA membership in their monitoring of PSCs and in imposing administrative measures as recommended by the Montreux Document good practices. In no case, however, can such measures replace or compromise states' national judicial systems. It is also shown that states can strengthen non-criminal accountability and grievance management by requiring PSCs to obtain ICoCA membership. A combination of providing judicial remedies under national law and requiring PSCs to offer non-judicial remedies would reflect the good practices recommended in the Montreux Document.

By integrating the ICoC and its Association into national PSC regulation mechanisms, states contribute to the development of internationally agreed norms binding PSCs regardless of where they operate. This also contributes to increasing clarity on applicable rules for PSCs and their personnel as well as coordination between states (as recommended by the Montreux Document good practices).

In sum, states have the primary responsibility to protect human rights of all persons under their jurisdiction and therefore to regulate private security services. The Montreux Document seeks to reinforce this role. However, with the ICoC and its Association, a multi-stakeholder initiative has established tools that can effectively complement states' regulatory efforts. In conclusion, these initiatives should now be used to their full potential in supporting oversight of private security companies.

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# Introduction

Innovative regulatory instruments at the international level, such as the Montreux Document<sup>1</sup> and the International Code of Conduct for Private Security Service Providers (ICoC) and its Association (ICoCA) have emerged over the past years. However, effective implementation of these regulatory initiatives remains a work in progress. On its fifth anniversary, a major study was published analysing challenges to implementation of the legal obligations and good practices of the Montreux Document.<sup>2</sup> In particular, based on first-hand information from states participating in the Montreux Document process, the study found that national licensing systems are often inadequately resourced and apply low standards. In addition, many states have weak monitoring mechanisms when it comes to companies' compliance with terms of authorisations, contracts, and licenses.<sup>3</sup> Addressing these implementation challenges will be increasingly important for states during the coming years.<sup>4</sup>

While directed to different actors, the Montreux Document and the ICoC share the principal objective of enhancing PSC compliance with applicable rules of international humanitarian law and international human rights law. The conceptual and substantial relationship between the two documents, however, has been under-analysed, and potential synergies between the two processes are not yet fully appreciated. This paper examines how states can build on the ICoC and its Association in order to regulate the provision of private security services effectively in accordance with good practices identified in the Montreux Document.

What are the challenges to effective regulation of private security companies (PSCs) at the national level? To begin with, the international nature of the services provided complicates states' regulatory efforts. While national legislation often does not apply extraterritorially, operations of PSCs are not bound to one state. Though the headquarters may be based in one state ("home state"), operations may take place in one or several others ("territorial state"), while yet another state may have contracted the services of the PSC ("contracting state"). Thus, a legally complex situation appears in which the applicable law can be difficult to determine. Additionally, environments where PSCs operate often include areas where the rule of law has not been effectively established or has been substantially undermined. This means that the territorial state, where operations and their impacts occur, is unable to regulate effectively. Hence, in practice, PSCs regularly operate under unclear and limited oversight. This is particularly apparent in the maritime sector, where the laws applicable to the provision of security services on vessels depend to some extent on their location, namely whether they navigate on the High Seas or in a state's territorial waters.<sup>5</sup> In addition to the ambiguity over which law applies, states' capacity to enforce jurisdiction may be limited.

This paper explores ways in which regulatory challenges can be addressed and private security regulation can be optimised by capitalising on the links between the Montreux Document and the ICoC. It examines the relationship between the two, identifies actual and potential synergies, and seeks ways in which the principles included in the ICoC and its governance and oversight mechanism, the ICoCA, can support implementation of the good practices of the Montreux Document. In this manner, the paper intends to assist policymakers in considering how the ICoC can be used when drafting national PSC regulation. This can lead to

higher quality of the standards of operations of PSCs and greater accountability in case of abuses.

Following this introduction, part 2 of this paper analyses the Montreux Document and the ICoC and its Association. Part 3 analyses the synergies between the Montreux Document good practices and the ICoC Association regulatory system. In particular, it examines states' a) authorisation and hiring systems, b) rules on the provision of security services, and c) monitoring and ensuring accountability. Part 4 draws on this analysis to provide practice-oriented advice for policymakers on how to enhance national PSC regulation in accordance with Montreux Document good practices by requiring ICoC membership from private security companies. This is followed by a conclusion in part 5.

## 2

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## The Swiss Initiative

Since 2000, the complexities surrounding the use of private security companies have become increasingly visible, primarily due to well known incidents of gross human rights violations involving private security operations. This led to the perception that PSCs somehow operated with impunity and outside the realm of international law. In order to dispel the idea of a legal vacuum and to promote compliance of PSCs with international humanitarian law and human rights law, the International Committee of the Red Cross and the Swiss government initiated an intergovernmental process leading to the development of the Montreux Document. Following the adoption of the Montreux Document, leading PSCs, several governments, and selected civil society actors initiated a parallel multi-stakeholder initiative to develop the International Code of Conduct for Private Security Service Providers (abbreviated as ICoC, the Code, or the Code of Conduct) setting out human rights principles and good industry practices directly applicable to PSCs.

Together, these documents aim to clarify existing rules and standards applicable to the provision of private security services. They form two independent but complementary initiatives to regulate the global private security industry.<sup>6</sup> The comparative analysis in this paper focuses on these two main tools of private security regulation, explained in more detail in the sections below.

## The Montreux Document

The Montreux Document is an intergovernmental initiative launched to promote respect for international humanitarian law and human rights law wherever private military and security companies (PMSCs)<sup>7</sup> are present in armed conflicts. The Montreux Document seeks to clarify obligations and good practices applying to states with regard to the regulation of PMSCs. For the first time, an intergovernmental document agreed on and clearly articulated the most pertinent international legal obligations of states in their relations with PSCs, showing that indeed private contractors do not operate in a legal vacuum. The process not only included states from various regions of the world but also drew widely on the knowledge of industry representatives, academic experts, and non-governmental organisations.<sup>8</sup> When it was adopted in 2008, seventeen states offered their support to the Montreux Document. Currently, fifty-three states and three international organisations have joined.<sup>9</sup>

The Montreux Document contains two parts. The first section clarifies states' existing obligations under international law related to private military and security companies, in particular those of contracting, territorial, or home states. It reminds states of their obligation to ensure respect for international humanitarian law and to protect international human rights, their duty to investigate and prosecute international crimes, and their obligation to offer remedies if violations are attributable to them. Part one also clarifies the status and law directly applicable to PMSCs and their personnel.<sup>10</sup> The Montreux Document is not a legally binding instrument but seeks to provide guidance on the basis of existing international law.

The second part of the Montreux Document gathers good practices related to the regulation of PSCs by states. They are intended to present practical guidance for governments to

establish effective oversight and control over PSCs; regulate PSCs' roles and responsibilities; and set up procedures, systems, and processes related to contract, licensing, and authorisation systems. The good practices also include recommendations for states on establishing monitoring and accountability mechanisms. These recommendations are not legally binding, and they are not restricted in their scope of application to armed conflict situations.<sup>11</sup> Although the formal scope of application of the Montreux Document is armed conflicts, the existing obligations and good practices may also be instructive outside of armed conflict, and most of the good practices are best implemented during peacetime. This means that these good practices can guide states in implementing their international human rights obligations in any situation. The list of good practices is not exhaustive, nor does it expect every state to have the capacity to implement all good practices. Nevertheless, they represent important tools with which states can implement pertinent legal obligations as contained in the Montreux Document into their national legislative systems.

In 2014, participants of the Montreux Document agreed that more cooperation was needed to ensure widespread support and implementation of its obligations and good practices. As a result, the Montreux Document Forum was established as an intergovernmental forum aiming to strengthen dialogue among Montreux Document states and international organisations on regulating PSCs. The forum is a platform to exchange information on implementation practices, to support outreach, and to increase awareness of the Montreux Document in different regions.<sup>12</sup>

## The ICoC and its Association

Following the creation of the Montreux Document, there was a strong conviction that companies also needed to be directly included in efforts to regulate their industry. This led to the second track of the Swiss Initiative: the International Code of Conduct for Private Security Service Providers. Companies, states, and human rights organisations as well as academics and industry clients jointly developed the ICoC. This multi-stakeholder group negotiated a set of rules setting out human rights and humanitarian principles for PSCs, translating existing rules into principles that companies can apply in their operations.

The ICoC has two main substantive parts. Firstly, the ICoC outlines core human rights principles, including the prohibition of torture and human trafficking and rules on the use of force and detention.<sup>13</sup> Secondly, it sets out policy and management rules, such as vetting and training of personnel, weapons management, and grievance procedures, thereby outlining corporate good practices.<sup>14</sup> The ICoC requires companies to comply with these principles, to include them in personnel and subcontractor contracts, and not to enter into contracts where performance would directly or materially conflict with them.<sup>15</sup> Signing the ICoC thus forms a public commitment by companies to implement and operate in accordance with these provisions. The ICoC was finalised and signed in November 2010 by fifty-eight private security companies. Within three years, the number of signatory companies grew to over seven hundred.

The ICoC has a clearly defined scope of application. It applies to PSCs that are involved in providing security services in complex environments. Security services are defined as guarding or protecting persons, facilities, or objects, or any other activity that requires them to carry or operate a weapon.<sup>16</sup> The term “complex environments” not only includes armed conflicts but also

post-conflict situations and other circumstances “where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent.”<sup>17</sup> These are situations that do not necessarily have to be the consequence of an armed conflict or a natural disaster; the three conditions listed in the ICoC definition of complex environment are not cumulative.<sup>18</sup> Situations of instability that are the consequence of internal troubles could therefore be included. This scope emphasises the importance of the ICoC as a tool that is complementary to national governance mechanisms and is particularly relevant when the ability of national authorities to exercise oversight over companies is weak.<sup>19</sup>

When drafting the ICoC, the parties involved foresaw that a voluntary code of conduct could lack the enforcement capacity to ensure compliance. Therefore, the ICoC specified that within eighteen months of its signing, the relevant stakeholders would establish an external independent mechanism for effective governance and oversight. Consistent with the drafting process for the ICoC, the establishment of this oversight mechanism was a multi-stakeholder process. It was guided by a temporary steering committee consisting of representatives of the private security industry, states, and civil society organisations, who collectively led the negotiations and drafting process between 2011 and 2013. In February 2013, the parties agreed on the “Articles of Association,” which form the statutes of the Geneva-based Association, launched later that year. The Association performs the role of an independent governance and oversight mechanism to ensure implementation of and compliance with the Code.

### *The ICoC Association*

The ICoC Association brings together members from three stakeholder pillars: governments, industry, and civil society organisations. All members are represented in the Association's General Assembly, which is its main governance body.<sup>20</sup> All three pillars are also equally represented in the twelve-person Board of Directors.<sup>21</sup> This structure aims to ensure independence and a system of checks and balances between the interests of industry representatives to keep the obligations on their constituency realistic, and the human rights scrutiny of civil society actors.

The Association is tasked to perform three core functions:

- To certify member companies by assessing whether their internal company systems and policies meet the requirements of the Code of Conduct;<sup>22</sup>
- To monitor member companies' compliance with the Code of Conduct, based on established human rights methodologies. This will include regular reporting to the ICoC Association on company performance under the Code; monitoring by the ICoCA of its members, consisting of gathering and receiving information from public and other sources; and the possibility for the ICoC Association's Executive Director to initiate field-based reviews of company conduct;<sup>23</sup>
- To handle complaints on alleged violations of the Code of Conduct, including allegations that member companies' grievance mechanisms are not accessible, are unfair, or are not offering effective remedies.<sup>24</sup>

The ICoC Association is thus envisaged to perform monitoring and oversight functions over PSCs in an independent manner defined by a truly multi-stakeholder process.

## The relationship between the Montreux Document and the Code

The Montreux Document and the Code are closely related but nevertheless differ in scope and content. The provisions of the Montreux Document and the principles included in the ICoC have numerous similarities:

- The two initiatives were born from the same objective: namely, ensuring the delivery of private security consistent with human rights and international humanitarian law standards by clarifying the obligations of all actors involved;
- Many of the stakeholders involved in drafting the Montreux Document were also driving the ICoC process;<sup>25</sup>
- In addition, the scope of application of the two documents overlaps to a certain extent, meaning that they address similar situations. While part I of the Montreux Document is formally only applicable to armed conflicts, part II provides good practices relevant for a wider range of situations. Vice versa, the provision of security services in complex environments, to which the ICoC applies, certainly includes armed conflict.

These points strongly suggest that the Montreux Document and the ICoC have great potential to complement each other. However, some obvious differences also exist, relating to target audience and the nature of the two documents:

First, whereas the Montreux Document sets out primarily existing obligations and good practices for states on how to regulate PSCs, the ICoC prescribes principles for companies to implement directly in their operations. Importantly, this means that many states perceive the two documents as being very different. As an intergovernmental process and a document referring in its first part to established rules of international law, the Montreux Document has enjoyed significant attention and support from states. In contrast, the ICoC, as a multi-stakeholder initiative including industry and

civil society involvement, has led some states to question whether it is appropriate to engage with the ICoC, and whether it can inform their policies regarding PSC regulation. However, it is important to emphasise that the ICoC and its Association have benefited from substantial state involvement. The Association currently has six member states,<sup>26</sup> including two states home to significant numbers of PSCs, namely the United States and the United Kingdom.

Second, distinct implementation mechanisms are foreseen in the two processes. The ICoC initiative has a multi-stakeholder oversight mechanism, which was created to monitor implementation of the ICoC. Thus, the ICoCA was designed as an external body to oversee company conduct. When it comes to the obligations and good practices in the Montreux Document, it is the task of each state to implement its requirements into its national legal system. In order to fulfil this function diligently, the Montreux Document good practices provide advice for states on the national monitoring of PSCs' compliance with the regulations set up in accordance with the Montreux Document.

Though different in some ways, the ICoC and the Montreux Document are far from being two distinct processes that should be discussed separately. Rather, their functions are complementary and mutually reinforcing. As the next section will discuss, the ICoC can form an important supporting tool for states to implement the good practices on PSC regulation as laid out in the Montreux Document.

## 3

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## The relationship between the Montreux Document Good Practices and the ICoC

This section analyses the extent that Montreux Document good practices are reflected in the ICoC and the ICoC Association. A detailed comparison is offered between the good practices on PSC regulation recommended in the Montreux Document and the regulation system established under the ICoC. As the Montreux Document and the ICoC are addressed to different actors and are structured differently, the comparison looks not only at individual provisions but also at ideas and concepts underlying both documents. The three broad fields in which the Montreux Document suggests good practices for PSC regulation should be considered: first, states' authorisation and hiring systems for PSCs; second, the enactment of rules on the provision of private security services; and third, monitoring PSC compliance with applicable regulations and ensuring accountability for alleged misconduct. An overview presentation of the structure of Montreux Document good practices is found in Box 1.

### Box 1: Montreux Document good practices – an overview

For territorial and home states, the good practices listed in the Montreux Document include the following:

- determining which services private security companies may or may not provide;
- (consider) establishing an authorisation system for companies;
- basing authorisation on specific requirements and establishing rules for the provision of private security services; and
- monitoring companies' compliance with established rules and ensuring accountability.

For contracting states, the good practices listed in the Montreux Document include suggestions on the following subjects:

- determining for which services PSCs can be hired;
- establishing selection and contracting procedures;
- applying pre-determined criteria to the selection of companies;
- providing clear terms of contracts; and
- monitoring companies' compliance with established rules and ensuring accountability.

## Authorisation and hiring system

As a preliminary but essential step in regulating private security services, the Montreux Document recommends that states determine which services PSCs may or may not provide.<sup>27</sup> Every state has to decide, according to its own policies, whether it allows the operation of PSCs on its territory, the export of PSC services, or the hiring of private security services by state organs. However, specific services that PSCs can provide are not prescribed in the Montreux Document or the ICoC. In other words, both documents leave it to states to decide which services PSCs are permitted to offer or can be hired for.<sup>28</sup> As the Montreux Document states in its preface, the document does not endorse or express an opinion on “the use of PMSCs in any particular circumstance but seeks to recall legal obligations and to recommend good practices if the decision has been made to contract PMSCs.”<sup>29</sup>

If a state decides to allow for the operations or registration of PSCs on its territory, or to contract the services of a PSC, the Montreux Document emphasises the need for responsible authorisation, licensing, and contracting processes. It recommends that territorial states establish a system under which companies and/or their personnel must obtain authorisation to provide private security services. For home states, the Montreux Document recommends the establishment of a licensing system.<sup>30</sup> Licensing, contracting, and authorisation bodies should be equipped with adequate resources and trained personnel in order to discharge diligently their responsibilities.<sup>31</sup> In a transparent process, the competent authority should examine past conduct of the PSC and of its personnel and consider whether the company’s structure and capacities enable it to meet all requirements set out for obtaining authorisation.<sup>32</sup>

Establishing authorisation procedures and institutions is an exclusive state privilege, just as the decision on which

services – if any – PSCs are permitted to provide on a state’s territory, to export from it, or for which they can be hired. The establishment of the ICoC and its Association or other existing international regulatory mechanisms cannot release states from the responsibility to comply with their obligations under international law and to effectively regulate PSCs under their jurisdiction. The ICoC and its Association can, however, assist states in establishing and operating a transparent process according to which PSCs may obtain the required authorisation. Indeed, one of the core functions of the ICoCA is to certify that companies’ systems and policies meet the ICoC principles and standards derived from it.<sup>33</sup> Under the certification process developed by the ICoCA, this will require companies to obtain certification through a professional certification body<sup>34</sup> and to prove that they have in place additional human rights-related policies to the ICoCA, which surpass what is required by other industry standards.

This process is meant to operate transparently under the responsibility of the ICoCA, which brings together expertise from states, the private security industry, and civil society organisations. Thus, as set out in the ICoCA statutes, the Association and its certification procedures are designed to reflect good practices recommended for states when authorising or hiring PSCs and to provide an international, multi-stakeholder certification process for PSCs.

ICoCA membership and certification could provide a mechanism that testifies whether companies operate in accordance with the ICoC and thereby meet the quality criteria listed in the Montreux Document good practices. These quality criteria should be considered by states in the licensing, authorisation, or hiring process. They are designed to help states determining a PSCs’ capacity to operate in accordance with national and international

law. These quality criteria include considerations on companies' past conduct, financial capacity, maintenance of weapons and property records, training of personnel, respect for welfare of personnel, acquisition of weapons, and their internal organisation and regulations. As shown in Table 1 below, these quality criteria are reflected to a significant extent in the principles set out in the ICoC. ICoCA member companies commit to operating in accordance with these principles when signing the ICoC and joining the Association. Importantly, in the ICoCA's certification process, the Association examines companies' capacity to comply with these principles.

Montreux Document Quality Criteria	ICoC Principles
<ul style="list-style-type: none"> <li>• States should require that PSCs' conduct and the conduct of their subcontractors is in conformity with relevant national law, international humanitarian law, and international human rights law.<sup>35</sup></li> <li>• Contracting states should also take into account whether companies and their personnel are in possession of required registrations, licences, or authorisations.<sup>36</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Companies commit to operating in accordance with applicable national and international laws and regulations,<sup>37</sup> and all subcontractors or other actors carrying out security services on their behalf operate under the same regulations.<sup>38</sup></li> </ul>
<ul style="list-style-type: none"> <li>• States should take PSCs' past conduct into account, which includes ensuring that PSCs have no reliably attested record of involvement in serious crime.</li> <li>• If a company or its personnel has been involved in unlawful conduct, it should have appropriately remedied such conduct.</li> <li>• Moreover, states should conduct comprehensive inquiries within applicable law regarding the extent to which company personnel have been involved in serious crime.<sup>39</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Companies assess and ensure that their personnel are able to operate in accordance with the ICoC (and therefore national and international law) and that personnel required to carry weapons have not been convicted for a crime that would question the individual's ability to comply with the Code's principles.<sup>40</sup></li> <li>• ICoCA membership testifies that PSCs are not involved in serious crime and deal with potentially unlawful conduct appropriately.<sup>41</sup></li> </ul>
<ul style="list-style-type: none"> <li>• States should take into account whether companies have sufficient financial and economic capacity to meet possible liabilities.<sup>42</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Companies are required to have sufficient financial capacity to meet potential liabilities involved in the provision of their services.<sup>43</sup></li> </ul>
<ul style="list-style-type: none"> <li>• States should take into account whether companies maintain property and personnel records, particularly regarding weapons and ammunition.<sup>44</sup></li> </ul>	<ul style="list-style-type: none"> <li>• PSCs shall keep records of the issuance and use of weapons and munitions.<sup>45</sup> Companies shall also keep employment records for all employees.<sup>46</sup></li> </ul>

<ul style="list-style-type: none"> <li>• States should take into account whether PSC personnel are sufficiently and recurrently trained, including on the applicable law; the use of force and firearms; religious, cultural, and gender issues; complaints handling; and corruption.<sup>47</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Companies shall conduct recurrent professional training to maintain and further the ability of personnel to comply with the ICoC and all applicable law.<sup>48</sup> In particular, PSC personnel shall receive training on the weapons they operate and on the use of force.<sup>49</sup></li> </ul>
<ul style="list-style-type: none"> <li>• States should take into account whether companies acquired weapons unlawfully or if they use weapons prohibited under international law.<sup>50</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Companies shall comply with states' regulations on the possession and the use of weapons, and they shall not acquire or use weapons prohibited under applicable law.<sup>51</sup></li> </ul>
<ul style="list-style-type: none"> <li>• States shall take into account companies' internal organisation and regulations to ensure compliance with applicable law.</li> <li>• Companies should also have monitoring and supervisory mechanisms in place, including an internal accountability mechanism and a complaints mechanism for third parties.<sup>52</sup></li> </ul>	<ul style="list-style-type: none"> <li>• In order to ensure compliance with the Code and its principles, companies shall incorporate the ICoC principles into their policies and internal control and compliance system<sup>53</sup> and shall facilitate implementation through other adequate measures such as company policies, work culture, and staff contracts that require observance of the ICoC.<sup>54</sup></li> <li>• Companies shall also establish fair and accessible grievance mechanisms offering effective remedies under which their personnel and third parties can report wrongdoing by company personnel.<sup>55</sup></li> </ul>
<ul style="list-style-type: none"> <li>• States shall take into account whether companies respect the welfare of their personnel.<sup>56</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Companies shall strive to provide for a safe and healthy working environment.<sup>57</sup></li> </ul>

Table 1: Criteria and Principles set out by the MD and ICoC

## Rules on the provision of security services and the use of force

The good practices collected in the Montreux Document recommend that states have in place basic but very important rules on the provision of private security services, which should be either set out in the laws of the state in which PSCs operate or included in the terms of contract when hiring PSCs. Several good practices relate to rules on the use of force.<sup>58</sup> Companies should only be permitted to resort to the use of force and firearms when necessary in self-defence or in defence of third persons. Companies should also be required to report all incidents. Second, the Montreux Document recommends that states should provide clear rules on the types of weapons PSCs are permitted to possess, their registration and storage, and on permissions for individuals to carry weapons.<sup>59</sup> Third, states should require – unless impossible due to force protection requirements and security of the assigned mission – that company personnel and their means of transport are clearly and individually identifiable.<sup>60</sup>

Adopting legislation on the use of force and on the possession and use of firearms is a state prerogative and should be regulated under the territorial state's legislation. The principles of the ICoC can, however, complement and reinforce these rules.<sup>61</sup> Indeed, by signing the ICoC, private security companies commit to complying with applicable laws and regulations, stemming both from national and from international law.<sup>62</sup> More specifically, the ICoC contains guiding principles that can be applied to the three sets of rules highlighted in the Montreux Document good practices. The ICoC stipulates that force shall only be used where strictly necessary and proportionate to the circumstances and the use of firearms is restricted to self-defence and the defence of others against serious threats to life;<sup>63</sup> the ICoC also requires companies to produce detailed reports of any use of force and other security incidents, which shall be provided to national authorities if so

required;<sup>64</sup> and the ICoC principles on the use of force and firearms as well as incident reporting reflect international human rights standards.<sup>65</sup>

Similarly, the ICoC requires companies to obtain and maintain national authorisations for the possession and use of weapons.<sup>66</sup> Companies shall ensure secure storage of weapons and ammunition, control and record their issuance, identify and account for all ammunition, and verify that weapons and ammunition disposal is done in a proper manner. In addition, neither the company nor its personnel should engage in illegal weapons transfers.<sup>67</sup> Finally, the ICoC's principles on the identification of PSC personnel and their means of transport reflect the good practices of the Montreux Document.<sup>68</sup>

This brief comparison shows that – regarding the quality criteria examined above – the ICoC incorporates and further elaborates on rules on the provision of security services that reflect Montreux Document good practices. Importantly, the ICoC not only requires companies to agree to these rules, but as will be demonstrated in the next section, the ICoCA also establishes a monitoring and compliance system that enforces their implementation.

## Monitoring compliance and ensuring accountability

The good practices listed in the Montreux Document recommend that states provide for adequate monitoring and accountability of PSCs and their personnel. Monitoring and accountability have two interlinked components: penal and administrative. With regard to criminal jurisdiction, it is recommended that states provide for criminal prosecution of alleged crimes under national and

international law, including for serious crimes committed abroad.<sup>69</sup> States should also consider establishing corporate criminal responsibility. In addition, the Montreux Document recommends that states cooperate internationally in investigating alleged wrongdoings of PSCs.<sup>70</sup>

As criminal jurisdiction traditionally forms part of states' sovereign rights and constitutes a core responsibility of national authorities,<sup>71</sup> this is an area where states have the obligation to take action in order to meet their obligations.<sup>72</sup> The ICoC or other international regulatory mechanisms cannot relieve states from their responsibility. However, the ICoC Association is designed to provide functions that can help states to implement Montreux Document good practices. This is reflected in the following three areas: the monitoring of PSCs' compliance with the human rights and management principles set out in the ICoC, the provision of non-judicial remedies for individual victims of PSC misconduct, and the imposition of administrative measures in response to PSC misconduct.

Montreux Document good practices recommend that states establish and resource a monitoring authority to which the civilian population and state authorities can report alleged wrongdoings. This authority should be able to investigate reports and offer PSCs a fair opportunity to respond to allegations.<sup>73</sup> To a significant extent, these recommendations appear to be reflected in the monitoring and reporting functions of the ICoCA. One of the Association's core functions is to exercise oversight on member companies' performance under the Code. As described above, exercising oversight consists of four components: reporting by companies, monitoring through the ICoCA, field-based reviews, and a complaints process.<sup>74</sup> As a result, the Association will receive reports on alleged misconduct from various sources. It is an

essential task to analyse, verify, or dismiss allegations of breaches of the ICoC. Consequently, the ICoCA is likely to build up significant expertise on monitoring and analysing PSC conduct and their compliance with the human rights and international humanitarian law principles as set out in the ICoC. Similarly, the ICoCA can be expected to perform continuous monitoring of companies' respect for good management standards.

In addition to establishing a monitoring authority, the Montreux Document good practices recommend that states provide for non-criminal accountability mechanisms, for example by providing for civil liability or by requiring PSCs or their clients to provide reparation to victims of misconduct.<sup>75</sup> While establishing civil liability requires states to provide for a functioning judicial system to enable claims, non-judicial accountability mechanisms can also take other forms, such as non-judicial grievance mechanisms as foreseen in the ICoC. ICoCA member companies are required to provide a fair and accessible grievance mechanism that offers effective remedies for company misconduct.<sup>76</sup> Accordingly, the Association's certification and compliance process will require the establishment of such mechanisms and monitor their operation. Additionally, the ICoC Association is mandated to receive specific complaints on the functioning of member companies' grievance mechanisms. This may lead to engagement with companies on improving their grievance mechanisms; increased opportunities for corrective action; or the referral of complaints to an external, fair, and accessible grievance procedure that may offer effective remedies.<sup>77</sup> Thus, the ICoC Association's complaints process is designed to ensure that effective remedies for possible violation of the ICoC are available and address and resolve disputes that arise in the course of PSC operations. Granted, such non-judicial mechanisms are complementary to state's justice systems and

should never replace judicial measures.<sup>78</sup> At the same time, where access to national judicial remedies is difficult or where national remedies are non-existent, company grievance mechanisms may offer the only remedy available to victims of PSCs.

Montreux Document good practices recommend that states impose administrative measures in response to PSC wrongdoing, including suspension or revocation of authorisations and bans from reapplication, demanding removal of specific personnel, forfeitures of bonds, or financial penalties.<sup>79</sup> When designing and imposing such administrative measures, cooperation with or reliance on the ICoC Association could assist states in implementing Montreux Document good practices. Under the ICoCA's Statutes, the Association's secretariat would become active in situations where concerns emerge on companies' compliance with the ICoC. In this engagement, a first step would be to provide observations to the company and engage in constructive dialogue to address such concerns.<sup>80</sup> In a second step, the ICoC Association's Board of Directors "shall offer observations and advice to Member companies aimed at improving performance or addressing specific compliance concerns," and determine and request necessary corrective action by companies within a specific time period.<sup>81</sup> If companies either fail to implement such corrective action or do not cooperate in good faith with the ICoC Association, suspension proceedings would be initiated.<sup>82</sup> Thus, the ICoC Association foresees a constructive dialogue with companies in order to improve their compliance with the ICoC principles. Where companies fail to engage constructively in this process, this may lead to exclusion from the ICoCA. Arguably, this process is more lenient than a strict imposition of administrative measures. However, an eventual decision by the ICoCA to suspend a company's membership could provide states with a strong indication of whether PSC

misconduct occurred and whether companies fulfil their domestic and international obligations. Based on this information, it would be upon the state to take further action, for example by imposing administrative sanctions.

To sum up, the comparison presented in this section illustrates that a significant number of good practices on PSC regulation compiled in the Montreux Document are also reflected in the principles of the ICoC and its oversight mechanism. The ICoC requires member companies to provide their services while strictly respecting applicable national law as well as a number of human rights and humanitarian law principles. Similarly, companies must operate in accordance with relevant management standards. These requirements follow the basic rules on the provision of security services recommended in the Montreux Document and the so-called quality criteria that states are requested to apply when hiring or authorising PSCs in accordance with Montreux Document good practices. In addition, the ICoC Association's core functions of certifying PSCs under the ICoC, providing monitoring of PSC conduct, and operating a complaints process reflect structures and functions that the Montreux Document good practices recommend for states to implement. How states may use these synergies between Montreux Document good practices and the PSC regulation mechanism established with the ICoC and its Association is discussed in the following part.

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## Implementing Montreux Document Good Practices through the ICoC

When states agreed on the good practices on PSC regulation contained in part II of the Montreux Document, they did so with the objective of providing “guidance and assistance to states in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationships with PMSCs.”<sup>83</sup> The Montreux Document good practices present key elements and recommendations for responsible authorisation, hiring, regulating, and monitoring of PSCs. However, implementing these recommendations requires significant resources and expertise. States should have in place competent authorities responsible for licensing, hiring, or authorising PSCs according to a set of quality criteria. States should establish monitoring mechanisms to oversee PSC conduct and ensure accountability, and they should also set out rules based on international human rights and humanitarian law in accordance with which PSCs are required to operate. Breaches of these rules and other laws should have civil and penal law consequences.

This part builds on the comparative analysis of the Montreux Document good practices and the oversight mechanism created by the ICoC and its Association to show how states can use the ICoC and its Association in order to regulate PSCs effectively and in accordance with internationally recognised good practices. This may help states address some of the main challenges involved in

PSC regulation, namely to improve national licensing systems; to enhance the standards applied by them; and to strengthen national monitoring mechanisms of companies' compliance with terms of authorisations, contracts, and licenses.<sup>84</sup> Especially for states that do not have sufficient resources to establish comprehensive PSC regulation systems or do not wish to create heavy national regulation systems, the certification and monitoring provided by the ICoC can help meet obligations under international law to effectively regulate PSCs.

## Authorisation and hiring system

The examination of companies' internal policies and systems, their compliance with national and international regulations, or the vetting of company employees requires important state resources and expertise. However, this process can be greatly facilitated by integrating ICoCA membership into the process.<sup>85</sup> With the ICoC Association, a multi-stakeholder governance and oversight mechanism has been established that is designed to assess and certify whether companies meet the principles set out in the ICoC. It provides states with a qualified assessment of whether specific PSCs meet essential quality criteria as set out in the Montreux Document good practices.

At the same time, states remain responsible for designating a process with competent authorities for the regulation of PSCs. National authorisation entities should be staffed appropriately and have transparent procedures – whether relying on ICoCA membership or not. Naturally, states remain free to impose further restrictions on companies or on their operations.<sup>86</sup>

### Recommendation:

States should include reference to ICoCA membership in their national authorisation or hiring processes, for example by requiring such membership as a prerequisite to participate in a bidding process or for obtaining an authorisation. States should also require ICoCA membership as one element in their national authorisation or hiring process, complemented by additional national regulation. In other words, ICoCA membership could potentially complement or even be an essential component of a state's effort to regulate PSCs in accordance with Montreux Document good practices.

## Monitoring and ensuring accountability

In addition to certifying companies' systems and policies, one of the ICoCA's core functions is to monitor PSC conduct in accordance with the principles set out in the ICoC. To fulfil its monitoring function, the Association will draw on various sources including company reports, reports by third parties, field visits, and independent monitoring by the Association. ICoCA membership depends on continuous compliance with the principles set out in the ICoC. Companies that violate national or international law or the ICoC principles will lose their membership if they are unwilling or unable to make appropriate changes. If states include active ICoCA membership as a requirement for maintaining national authorisation and as a contract obligation, losing ICoCA membership would also mean losing such authorisation and thus being excluded from existing or future contracts. In this

respect, states could benefit from the ICoCA's expertise in PSC monitoring to inform their administrative decisions on PSC conduct. Potentially, this could also help states to save resources by building on existing structures. At the same time, states would significantly enforce compliance with the ICoC. If compliance with the ICoC was a prerequisite for obtaining national licences, contracts, or authorisations, violating the ICoC would entail important business consequences.

Current ICoC Association member states consider the Association's future expertise in monitoring company conduct as an important strength of the Association and a significant way in which the ICoC can complement national regulation systems.<sup>87</sup> The ICoC Association will receive some of its information on PSC conduct confidentially and under non-disclosure agreements, and may only publish general information on its monitoring function in its annual report or in statements on specific incidents.<sup>88</sup> Still, the ICoCA's knowledge and judgment on PSC conduct will be reflected in whether or not it grants certification and membership, and in its reaction to allegations of ICoC violations. Again, if ICoC Association membership was required for obtaining and maintaining national authorisation to offer private security services or as a prerequisite for bidding for government contracts, violating the human rights, humanitarian law, and management principles set out in the ICoC would have real business consequences.

### Recommendation:

States should take into account ICoCA membership in their monitoring of PSCs and in the imposition of administrative measures as recommended by the Montreux Document good practices. Such measures could include revoking a company's authorisation or terminating a contract. In no case can such measures replace or compromise states' national judicial systems.

## Non-criminal accountability

Traditionally, it is upon states to offer judicial remedies for victims of unlawful company conduct. However, PSCs regularly work in circumstances where the states' authority and ability to provide law and order is compromised. In these situations, a grievance mechanism offered by the PSC may be the only means where alleged victims can turn to in order to obtain remedies. The ICoC requires companies to provide a fair and accessible grievance mechanism that provides effective remedies for alleged victims of company conduct. Via its complaints process, the ICoCA is tasked to ensure that these grievance mechanisms are operated according to the ICoC. Due to the very nature of the services provided, PSCs may experience conflicts with persons and communities. By demanding ICoCA membership, states require companies to provide a mechanism that offers effective remedies irrespective of where alleged misconduct was committed. Consequently, home states and states that contract PSCs to provide services abroad in particular, can ensure that at least non-criminal accountability is available no matter under which jurisdiction a company operates.

Contrary to penal prosecution or imposing financial penalties, grievance mechanisms as well as the ICoCA's engagement with companies are not of a punitive nature but aim to enhance companies' compliance with the rules set out in the ICoC, including by promoting best practices within the private security industry.<sup>89</sup> Unlike national justice systems, the governance and oversight provided by the ICoC Association is primarily based on constructive dialogue – and this is independent from any judicial findings. Consequently, by requiring PSCs to be ICoCA certified, states also ensure that the companies engage in constructive dialogue on compliance and share good practices.

#### Recommendation:

States should strengthen non-criminal accountability and grievance management through requiring PSCs to be ICoCA certified. However, this cannot replace classical judicial remedies offered by states (whether civil or criminal) but only complement them and other state-run non-judicial oversight mechanisms which may have powers overseeing PSCs (such as ombuds institutions, anti-corruption commissions and National Human Rights Institutions). A combination of providing judicial remedies under national law and requiring PSCs to offer non-judicial remedies would reflect the good practices recommended in the Montreux Document.

## Standard setting and unification of applicable rules

Effective regulation of private security companies may necessitate regulation by different states. Thus, the Montreux Document recommends that home states should take special note of the regulatory systems in territorial and contracting states “in order to minimize the potential for duplicative or overlapping regimes.”<sup>90</sup> In practice, one way for states to do this would be to base their regulatory mechanisms on internationally agreed principles which outline requirements that companies must meet in order to be eligible for authorisation and selection by different states.

As an internationally agreed set of management requirements and principles based on human rights and international humanitarian law, such requirements are found in the ICoC. Importantly, PSCs were heavily involved in developing the ICoC. This buy-in means that member companies can realistically be expected to comply with the principles included in the Code. Requiring PSCs to be ICoCA-certified – and therefore ICoC compliant – presents a practical solution on how to ensure PSCs’ respect for essential human rights norms, e.g. on the use of force, the prohibition of torture, or the imperative of humane treatment.<sup>91</sup>

### Recommendation:

By integrating the ICoC and its Association into national PSC regulation mechanisms, states contribute to the development of internationally agreed norms binding PSCs no matter where they operate. This also contributes to increasing clarity on applicable rules for PSCs and their personnel as well as coordination between states as recommended by the Montreux Document good practices.

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## Conclusion

From the outset, the ICoC and its Association were intended as a mechanism that builds on and complements the Montreux Document.<sup>92</sup> While addressed to different actors, the Montreux Document and the ICoC share the same principle objective of enhancing PSC compliance with applicable rules of international humanitarian law and international human rights law. The conceptual and substantial relationship between the two documents, however, has been under-analysed and potential synergies between the two processes remain unrealised. This paper has sought to address this gap by examining to what extent states may build on the ICoC and its Association to effectively regulate the provision of private security services in accordance with good practices identified in the Montreux Document.

The ICoC and its governance and oversight mechanism reflect a significant number of Montreux Document good practices. Integrating key aspects of the ICoC and its Association in national PSC regulation can therefore help states to establish effective regulatory mechanisms. The relationship can be mutually reinforcing: requiring ICoCA membership from PSCs under national legislation and practices can be a significant enforcement mechanism for the principles contained in the ICoC.

States may decide to require ICoCA membership from PSCs that provide security services on their territory, export such services from their territory, or are contracted to provide security services.

In this case, the ICoC Association offers three benefits. First, it provides states with an independent expert assessment of whether the company has sufficiently rigorous internal policies and systems to ensure its compliance with national and international regulations. Second, the ICoCA will conduct ongoing external monitoring on whether member companies comply with the principles set out in the ICoC. Importantly, ICoC principles based on international humanitarian and human rights law reflect a minimum standard that any security company must comply with in any operation. If the ICoCA encounters continuous misconduct by companies, it will suspend membership. This may provide states with an important indication of whether a national operating licence or a contract should be withdrawn or terminated and whether further legal measures might be necessary. Third, the ICoC requires PSCs to provide a fair and accessible grievance mechanism that provides effective remedies.

Integrating the ICoC and its Association in national regulatory mechanisms cannot, in any way, compromise states' sovereign right and obligation to regulate companies under their jurisdiction. Only states can decide which services PSCs are permitted to provide within their jurisdiction, and only states can provide national judicial measures that ensure PSC compliance with fundamental human rights and international humanitarian law. However, PSCs move easily across different jurisdictions and often operate in places where state law enforcement and judicial systems may not function effectively. In addition, PSC regulation can be resource intensive and requires significant expertise. In this context, the ICoC Association provides important services that states may use to meet their responsibility under international law to ensure respect for human rights and international humanitarian law by individuals and companies and to implement the good

practices recommended in the Montreux Document.

In light of a continued high demand for private security services by state and non-state clients, coupled with the reality of inadequate oversight in many states, PSC regulation is likely to remain a significant challenge in the coming years. In response to this challenge, innovative and pragmatic approaches to regulation have emerged over the past decade. While states have the primary responsibility to protect human rights of all persons under their jurisdiction and therefore to regulate private security services, with the establishment of the ICoC and its Association, as well as the Montreux Document Forum, national regulatory efforts can be complemented and reinforced. These initiatives have the potential to function as international oversight mechanisms for the global private security industry. For this to happen, they need to be used. States should carefully consider the recommendations included in this paper in order to build synergies between the Montreux Document and the ICoC and thus to better implement good regulatory practices at the national level.

## Endnotes

<sup>1</sup> Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict.

<sup>2</sup> Benjamin S. Buckland and Anna Marie Burdzy, *Progress and Opportunities, Five Years On: Challenges and Recommendations for Montreux Document Endorsing States*, the Geneva Centre for the Democratic Control of Armed Forces (DCAF), (2013).

<sup>3</sup> *Ibid.*, p. 6-8.

<sup>4</sup> See Montreux +5 Conference, Chairs' Conclusions, available at <http://www.icrc.org/eng/assets/files/2014/montreux-plus-5-conclusions-12-2013.pdf>; challenges in implementation become more important as the number of PSCs in most states increases.

<sup>5</sup> For a comprehensive analysis of the issue, see Anna Petrig, "The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates," *International and Comparative Law Quarterly*, Vol. 62, (2013).

<sup>6</sup> For further discussions on the origins of this process, see Markus Dully, "The Swiss Initiative on Private Military and Security Companies," in Gumedze, S. (Ed.): *Private Security in Africa: Manifestation, Challenges and Regulation* (2007), pp. 171-184.

<sup>7</sup> While the Montreux Document speaks of PMSCs, the ICoC uses the term PSCs. In this article, we will use the more common term PSC to refer to all companies providing security services as defined in the ICoC definitions section. For the purpose of this article, the term PSCs includes private military companies.

<sup>8</sup> For insights on the drafting process, see James Cockayne, "Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document," *Journal of Conflict & Security Law*, Vol. 13, (2009).

<sup>9</sup> For an up to date listing of participants, see <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>.

<sup>10</sup> Montreux Document, paras. 22-27.

<sup>11</sup> This point is emphasised generally in para. 5 of the Preface of the Montreux Document and more specifically in the Introduction to the Good Practices part of the Montreux Document.

<sup>12</sup> See [www.mdforum.ch](http://www.mdforum.ch).

<sup>13</sup> ICoC, Chapter F.

<sup>14</sup> ICoC, Chapter G.

<sup>15</sup> ICoC, paras. 16-20.

<sup>16</sup> ICoC, para. 13 and the definitions provided in Chapter B.

<sup>17</sup> ICoC, Chapter B, definition of complex environments.

<sup>18</sup> The 'three conditions' for a complex environment are: 1) any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, 2) where the rule of law has been substantially undermined, and in which the 3) capacity of the state authority to handle the situation is diminished, limited, or non-existent.

<sup>19</sup> Para. 14 of the ICoC states explicitly: "This Code complements and does not replace the control exercised by Competent Authorities, and does not limit or alter applicable international law or relevant national law."

<sup>20</sup> Importantly, the Association's statutes foresee that most issues voted on by the General Assembly require a majority of the members present and eligible for voting in each stakeholder pillar. This means that each pillar can effectively veto decisions: ICoCA, Articles of Association (AoA), Article 6.5.

<sup>21</sup> ICoCA, AoA, Article 7.2.

<sup>22</sup> ICoCA, AoA, Article 11.

<sup>23</sup> ICoCA, AoA, Article 12.

<sup>24</sup> ICoCA, AoA, Article 13.

<sup>25</sup> One notable exception is the International Committee of the Red Cross, which was strongly involved in the development of the Montreux Document but not in the development of the ICoC.

<sup>26</sup> Australia, Norway, Sweden, Switzerland, United Kingdom, United States

<sup>27</sup> Montreux Document, Good Practices, paras. 1, 24, 53.

<sup>28</sup> One important exception to this principle is found in para. 2 of the Montreux Document Good Practices: "Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions."

<sup>29</sup> Montreux Document, Preface.

<sup>30</sup>Montreux Document, Good Practices, paras. 25 and 54. The Montreux Document does not require contracting states to establish a specific authorisation institution. For home states, it also recommends operating a regulation system for weapons and ammunition exports. Montreux Document, Good Practices, para. 55.

<sup>31</sup>Montreux Document, Good Practices paras. 3, 26-27 and 54; 58.

<sup>32</sup>Montreux Document, Good Practices, paras. 28-29 and 57-59. Similar action is recommended for states when hiring a PSC, see Montreux Document, Good Practices, paras. 2-4.

<sup>33</sup>ICoCA, AoA, Art. 11.1.

<sup>34</sup>The exact certification procedures of the ICoCA were agreed in July 2015, see [www.icoca.ch](http://www.icoca.ch)

<sup>35</sup>Montreux Document, Good Practices, paras. 14-15, 31, 67. For contracting and home states, this criterion is not listed as a quality criterion but as a requirement that shall be ensured through the terms of contract/authorisation.

<sup>36</sup>This good practice is only required for contracting states under Montreux Document, Good Practices, para. 8.

<sup>37</sup>ICoC, para. 21.

<sup>38</sup>ICoC, para. 16.

<sup>39</sup>Montreux Document, Good Practices, paras. 6, 32 and 60.

<sup>40</sup>ICoC, para. 48. Further vetting requirements under the ICoC are found in its paras. 45-47 and 49.

<sup>41</sup>See discussion of ICoCA certification and monitoring below.

<sup>42</sup>Montreux Document, Good Practices, paras. 7, 33, and 61.

<sup>43</sup>ICoC, para. 70.

<sup>44</sup>Montreux Document, Good Practices, paras. 9, 34, and 62.

<sup>45</sup>ICoC, para. 58 (c-d).

<sup>46</sup>ICoC, para. 53.

<sup>47</sup>Montreux Document, Good Practices, paras. 10, 35, and 63.

<sup>48</sup>ICoC, para. 55.

<sup>49</sup>ICoC, para. 59.

<sup>50</sup>Montreux Document, Good Practices, paras. 11, 36, and 64.

<sup>51</sup>ICoC, paras. 56-57.

<sup>52</sup>Montreux Document, Good Practices, paras. 12, 37, and 65.

<sup>53</sup>ICoC, para. 44.

<sup>54</sup>ICoC, paras. 17-18, 27.

<sup>55</sup>ICoC, paras. 66-67.

<sup>56</sup>Montreux Document, Good Practices, paras. 13, 38 and 66.

<sup>57</sup>ICoC, para. 64.

<sup>58</sup>Montreux Document, Good Practices, paras 18 and 43. No similar good practice is found for home states, which seems to reflect the practical consideration that the home state cannot determine under which rules a PSC operates when providing services under another state's jurisdiction.

<sup>59</sup>Montreux Document, Good Practices, para. 44. This good practice is particularly addressed to states on whose territory PSCs operate. These principles are to some extent reflected in para. 14(f) (contracting States) and para. 67(e) (home States).

<sup>60</sup>Montreux Document, Good Practices, paras. 16, 45.

<sup>61</sup>As para. 14 of the ICoC points out, the principles of the Code are purely complementary and do "not limit or alter applicable international law or relevant national law."

<sup>62</sup>ICoC, para. 21.

<sup>63</sup>ICoC, paras. 30-31.

<sup>64</sup>ICoC, para. 63.

<sup>65</sup>See: The Geneva Academy, *The International Code of Conduct for Private Security Service Providers* (2013), p. 36. This is also reflected in para. 32 of the ICoC which requires a PSC, if authorised to assist in states' law enforcement functions, to comply with all applicable national and international laws, including the standards expressed in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

<sup>66</sup>ICoC, para. 56. Accordingly, para. 57 prohibits the use or possession of any unlawful weapons.

<sup>67</sup>ICoC, paras. 57-58.

<sup>68</sup>ICoC, para. 43.

<sup>69</sup> Montreux Document, Good Practices, paras. 19, 49, and 71. Extraterritorial jurisdiction is particularly relevant for home states and contracting states; it is not mentioned for territorial states.<sup>70</sup> Montreux Document, Good Practices, paras. 23, 52, and 73.

<sup>71</sup> The Montreux Document further suggests that states consider the impact of rules on jurisdiction and immunities on compliance of PSCs and their personnel when they negotiate agreements on the status of PSCs. See Montreux Document, Good Practices, para. 51.

<sup>72</sup> The obligation to respect and to ensure human rights is found in different international human rights law treaties. States are explicitly asked to give effect to human rights through national legislation. See, for example, article 2(1) and (2) International Covenant on Civil and Political Rights. This is also reflected in paragraphs 4, 10 and 15 of Part 1 of the Montreux Document.

<sup>73</sup> Montreux Document, Good Practices, paras. 21, 46-47, and 68.

<sup>74</sup> See ICoC, AoA Art. 12 and 13.

<sup>75</sup> Montreux Document, Good Practices, paras. 50 and 72.

<sup>76</sup> ICoC, Para. 66-67.

<sup>77</sup> ICoC, AoA, 13(2)(3)-(5).

<sup>78</sup> ICoC, AoA para. 67 requires companies to cooperate with state's investigations and not participate in or tolerate from their personnel the impeding of witnesses, testimony, or investigations. The ICoC Association's complaints process is also designed as complementary and independent from states' legal proceedings or investigations. See Art. 13(2)(10).

<sup>79</sup> Montreux Document, Good Practices, paras. 20, 21, 48, and 69.

<sup>80</sup> ICoC, AoA, Art. 12(2)(5).

<sup>81</sup> ICoC, AoA, Art. 12(2)(6)-(7).

<sup>82</sup> ICoC, AoA, Art. 12(2)(8).

<sup>83</sup> Montreux Document, p. 16.

<sup>84</sup> Montreux Document, p. 6-8.

<sup>85</sup> Experience from national systems shows that licensing private security companies to provide their services may involve significant government resources and possibly cooperation between different governmental departments. In addition, some companies tend to exaggerate their knowledge and capacities, which requires vigilance and experience on the side of the authorising agency.

<sup>86</sup> For example, it may be advisable for territorial states to restrict the number of PSC personnel and the type and number of weapons employed for a certain service, or contracting states may decide to restrict the kind of services that can be contracted out. See Montreux Document, Good Practices, paras. 1 and 42.

<sup>87</sup> This was emphasised by the representative of the United Kingdom at a meeting among states on "The ICoC and Regulation of Private Maritime Security Companies" in Geneva in July 2014.

<sup>88</sup> ICoC, AoA, Art. 12(2)(9) and 12(3).

<sup>89</sup> See especially ICoC, AoA, Art. 12(4) and Art. 13(3). The Articles of Association do not foresee financial penalties or the forfeiture of bonds in case of company misconduct.

<sup>90</sup> Montreux Document, p. 25.

<sup>91</sup> See The Geneva Academy, *The International Code of Conduct for Private Security Service Providers* (2013), p. 36. This is also reflected in para. 32 of the ICoC which requires a PSC, if authorised to assist in states' law enforcement functions, to comply with all applicable national and international laws, including the standards expressed in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

<sup>92</sup> The preamble of the ICoC states that the Code builds, *inter alia*, on the foundations laid by the Montreux Document.



The Montreux Document and the International Code of Conduct for Private Security Service Providers (ICoC) have emerged over recent years as a response to the need for greater oversight and accountability of the global private security industry. While the Montreux Document focuses primarily on the role of states and the ICoC on the industry itself, these innovative international regulatory instruments share a common objective to promote the compliance of the private security sector with applicable rules of international humanitarian law and international human rights law. However, despite this evident complementarity, their relationship remains under-analysed and poorly understood.

This paper offers a detailed comparison of the Montreux Document and the ICoC. In particular, it identifies ways that different stakeholders – national authorities, international organisations, civil society organisations and the industry itself – can draw on these initiatives in order to encourage transparency and promote good practices at the national level. It demonstrates that while states have the primary responsibility for security sector management and oversight, these initiatives offer great potential to complement and reinforce this role. The key message emerging from this paper is that fostering synergies between the Montreux Document and the ICoC can constitute an important step forward in implementing effective private security regulation in different national contexts.