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Examining the Regulatory Framework of Private Military and Security Companies under the Montreux Document.

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Abstract

The Private Military and Security Industry is a growing market globally given the persistent increase in security challenges among nations. The international regulation of this industry has proved difficult as a result of the complexity and sensitivity of the force sector. Given the dearth in regulation in this sector at the international level, this research seeks to analyse whether the Montreux Document, an international regulatory framework, offers a good regulation to the Private Military and Security Industry. The methodology adopted is doctrinal and the research materials are sourced from international laws/instruments, books, journal and online articles. The work found that the Montreux Document, though a step in the right direction towards regulating the operations of Private Military and Security Companies (PMSCs) abroad, it is however fraught with certain shortcomings. Given its soft law approach, the enforcement mechanism is weak thereby occasioning low levels of accountability and a high degree of criminality among PMSCs global activities. This research recommends majorly for State parties to the Montreux Document to domesticate the various obligations and good practices/standards provided under the Document in their national legislation. This will invariably strengthen the sanction and enforcement arrangements under the Document as the States involved will readily enforce the provisions of the Document thereby suppressing and managing PMSCs violations abroad. A case was equally made for the Montreux document to be revised to build its fragmented remedial system in order to enable State Parties to have a specific guide on how to deal with claims instituted by victims of PMSCs violations at the global level.

Keywords: Private Military and Security Companies, Montreux Document, Human Rights and Regulation.

1.1 Introduction

The Private Military and Security Industry has contributed greatly towards the global economy given its booming activities across States and international organisations. "This has led to a situation in which regulatory governance has become more complex and in which the boundaries between International Humanitarian Law and Human Rights Law have become blurred due to the lack of strong oversight at the national and international levels".[1] Private Military and Security Companies (PMSCs) over the years have aided in curbing the security challenges of

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[1] Raymond Saner, Private Military and Security Companies: Industry-Led Self-Regulatory Initiatives versus State-Led Containment Strategies (1st edn, CCDP 2015) 23.

countries. Nonetheless, grave issues of concern have been raised as a result of the nature of services they perform and their involvement in scandals.[2]

Contrary to the armed forces of States which falls directly within the responsibility of the State under the Command-and-Control structure of regulation, PMSCs are private actors whose primary objective is profit maximization.[3] Considering the fact that PMSCs are generally self-regulated across States, compliance with international human rights and humanitarian law standards raises a cause for concern, as control and supervision over their actions remains fragmentary. It is quite saddening to note that in several instances where crimes are committed abroad, the industries and/or their personnel are not adequately held responsible due to the complexity with regulation.[4]

This research seeks to analyse the international regulatory framework of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operation of Private Military and Security Companies during Armed Conflict (otherwise known as the Montreux Document).[5] This is aimed towards understanding the regulatory processes employed in regulating the activities of PMSCs abroad in a bid to critically analyse the tools used to create the Montreux Document.

The Montreux Document employs a State regulatory structure under the command control basis, where States are to ensure that the international obligations and good practices enshrined in the Document are domesticated at the national level in their various States. The Document emphasizes an overall State responsibility for PMSC activities. The administrative, judicial, enforcement among other powers highlighted under the Document are to be overseen by the States.[6] The significance of the Montreux Document is highlighted as it shows a conflict between two international regulatory structures relevant to conflict and security; "a state- backed approach that emphasizes a patchwork of hard law obligations and an industry-backed approach that encourages cross-jurisdictional regulatory harmonization to reduce transactional costs and help secure industry investments".[7]

The Montreux Document emphasizes that it is not legally binding, but contains a list of necessary international obligations and good practices.[8] It is regarded as an evidence of emerging norms on

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[2] Anna Van Oeyeren, 'Cry Havoc! and let slip the Dogs of War: Regulating Private Military and Security Companies' (2016) 15 European View 155, 156.
[3] Ibid.
[4] Switzerland Federal Department of Foreign Affairs, 'Private Military and Security Companies' (Federal Department of Foreign Affairs, 3 January 2020) https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies.html accessed on 26 February 2020.
[5] The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict. (17 September 2008). Hereinafter referred to as 'The Montreux Document'
[6] Ibid
[7] James Cockayne, 'The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law' (2007) 88(863) International Review of the Red Cross 1-32.
[8]EvyeniaZaferis, 'Proposal for a Treaty to Apply the Foreign Corrupt Practices Act Solution to the Corporate Criminal Problem in Private Military and Security Companies during Armed Conflict' (2017) 41 Loy LA Int'l & Comp L Rev 243, 254.

PMSCs.[9] James Cockayne opines that it "contains a set of generally respected standards on which other regulatory initiatives might be based".[10]

2.1 Analysing the Regulatory Dynamics of the Montreux Document

A critical perspective in debates on PMSCs is the concern that PMSCs operate in legal vacuum abroad, by carrying out operations without regulation across States in cases where International Humanitarian law does not particularly regulate PMSCs.[11] Consequently in 2005, discussions as to how International Humanitarian Law and Human Rights Law apply to PMSCs was had between the International Committee of the Red Cross and the Swiss Foreign Ministry. This subsequently led to the emergence of the Montreux Document in 2008. The Montreux Document is therefore a reflection of the agreement that international law is applicable to PMSC and that the latter does not operate without regulation.[12] There are currently 56 State parties to the Montreux Document as against the initial 17 States that finalized the Document in Montreux, Switzerland in 2008.[13]

The Montreux Document represents one of the most significant efforts to establish a non-binding but widely respected regime for the regulation of PMSCs abroad.[14] Its regulatory framework is applicable to the State Parties to the Document.[15] The Document equally has signatory international organizations such as the European Union, North Atlantic Treaty Organization (NATO), Organization for Security and Co-operation in Europe (OSCE).

The Document constitutes of two parts, the first part contains obligations that States have to assume towards the regulation of PMSCs. States under these obligations are to ensure compliance with international law in their relationship with PMSCs. They are to enact appropriate laws that are in conformity with international law; create methods of enforcement of the law enacted, including the investigation and prosecution of offenders, to take responsibility for the activities of PMSCs they contract, including readiness to provide reparations whenever

[9] Kim Sorensen, 'The Politics of International Law: The Life Cycle of Emerging Norms on the Use and Regulation of Private Military and Security Companies' (2017)26 Griffith Law Review 89, 104.
[10] James Cockayne, 'Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document" (2009) 13 Journal of Conflict and Security Law, 401, 427.
[11] Kim Sorensen, (n 10) 99.
[12] Switzerland Federal Department of Foreign Affairs, 'The Montreux Document' (Federal Department of Foreign Affairs, 3 January 2020) https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html accessed on 26 February 2020.
[13] Switzerland Federal Department of Foreign Affairs, (Federal Department of Foreign Affairs, 3 January 2020) 'Participating States of the Montreux Document' https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html accessed on 26 February 2020.
[14] Laurence Juma and James Tsabora, 'The South African Defence Review (2012) and Private Military/Security Companies (PMSCs): Heralding a Shift from Prohibition to Regulation?' (2013) 16(4) PER/PELJ 232.
[15] The 17 States that finalized the Document include:Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, United Kingdom, Ukraine, and United States of America. The following States subsequently became parties to the Document; North Macedonia, Ecuador, Albania, Netherlands, Bosnia and Herzegovina, Greece, Portugal, Chile, Uruguay, Liechtenstein, Qatar, Jordan, Spain, Italy, Uganda, Cyprus, Georgia, Denmark, Hungary, Costa Rica, Finland, Belgium, Norway, Lithuania, Slovenia, Iceland, Bulgaria, Kuwait, Croatia, New Zealand, Czech Republic, Luxembourg, Japan, Ireland, Monaco, Madagascar, Estonia, Montenegro and Panama.

necessary to parties who suffer as a result of PMSC activities.[16] The regulatory framework of the Montreux Document as reflected in its Part 1 covers the responsibilities and activities of the following actors; Contracting States (States that hire PMSCs), territorial States (States on whose territory PMSCs operate), Home States (States in which PMSCs are based), other States as well as PMSCs and their personnel.[17]

It is noteworthy to state the 'superior responsibility' principle provided under the first part of the Montreux Document, which makes superiors of PMSC personnel (such as government officials or directors and managers of PMSC) liable for crimes committed by PMSC personnel under international law for failure to exercise proper control over them.[18] Unfortunately the Montreux Document failed to provide a mechanism to enforce the above provision. Nevertheless, it bolsters the idea that those in positions of power and authority should be held accountable for the actions of their subjects under their control.[19]

The second part of the Montreux Document lists 73 good practices which are to act as a guide to States in ensuring respect to human rights and international humanitarian law and promote responsible conduct in States relationship with PMSCs. According to James, this part of the Document provides "soft standards which may lay the foundation for further practical regulation of PMSCs through contracts, codes of conduct, national legislation, regional instruments and international standards".[20]

The Document emphasizes that a State is under no legal obligation to implement any specific good practice and that "a particular good practice may not be appropriate in all circumstances and States should not necessarily follow all these practices as a whole, since any of these good practices will need to be adapted in practice to specific situation and the States legal system and capacity".[21]

In all these the responsibility rests on the States, the contracting States will be liable for the violations of human and humanitarian rights law by PMSCs, if the said PMSC is incorporated into the regular armed force; the PMSC is under the command of the State; the PMSC is authorized to perform certain governmental power or to perform functions normally conducted by organs of the State or the PMSC is acting under the instructions of the State.[22]

2.1.1 Managing Risk

PMSCs operating in various political climates and geographic locations have been caught up in highly publicized cases of human rights violations, allegations of instigating political conflicts

[16] Laurence Juma and James Tsabora, 'The South African Defence Review (2012) and Private Military/Security Companies (PMSCs): Heralding a Shift from Prohibition to Regulation?' (2013) 16(4) PER/PELJ 255.
[17] Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict. (17 September 2008) Part 1.
[18] Ibid, Part 1, F, Para 27.
[19]EvyeniaZaferis (n 8) 255.
[20] James Cockayne, 'Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document" (2009) 13 Journal of Conflict and Security Law, 401,402.
[21] The Montreux Document, Part 2, Introduction.
[22] The Montreux Document, Part 1, Para 7.

and financial dishonesty.[23] The Montreux Document in a bid to manage the risks involved in PMSC operations provides that States must ensure that PMSCs are properly trained and made aware of their various obligations. States are also enjoined to take appropriate administrative, judicial or disciplinary measures to prevent and suppress violations of international humanitarian law by PMSCs.[24]

2.1.2 Enforcement, Remedies and Compliance

In as much as "the term regulation does not inherently imply the monitoring regime with legal ramifications in cases of non-compliance, including the imposition of sanctions as an element of hard law".[25] This notwithstanding, sensitive industries such as the market for force especially when it involves private actors require strong enforcement mechanisms to aid compliance. Unfortunately the Montreux Document has failed in this regard as it does not have an oversight mechanism to monitor state compliance.[26] Abdul argues that the Montreux Document does not stipulate meaningful consequences in cases of non-compliance.[27]

States under the Document are obliged to adopt relevant legislative and other measures to give effect to the obligations provided under the regulation. Such measures include conferring them with criminal jurisdiction to prosecute violations occasioned by PMSCs, providing a fair trial and sanctions commensurate with the gravity of the offence as well as providing effective remedies for misconducts of PMSCs and their personnel.[28]Faizen asserts that there is no mechanism provided for States to translate 'good practices' enshrined in the Document into national law. It is therefore not surprising according to him, that five years after the Montreux Document came into force, only Switzerland (which is the propeller of the Document) is close to incorporating the 'good practices' into law.[29]

According to a Report on the implementation of the Montreux Document, most State parties to the Document such as the United Kingdom and the United States need to improve their national legislations for an effective monitoring and implementation of the obligations under the Document.[30] Afghanistan was noted to lack a regulation on PMSCs, as "its monitoring and

[23]Raymond Saner, AmakaUchegbu and LichiaYiu, 'Private Military and Security Companies: Legal and Political Ambiguities Impacting the Global Governance of Warfare in Public Arenas' (2019) 41(2) Asia Pacific Journal of Public Administration 63, 68.
[24] Montreux Document, Part 1, Para 3,9 and 14.
[25] Raymond Saner et al, (n 23) 68.
[26] Corina Seiberth, 'Private Military and Security Companies in International Law, A Challenge for Non-binding Norms: The Montreux Document and the International Code of Conduct for Private Security Service Providers' (2014) Intersentia, 149-150, 158.
[27] Abdul S Minty, Chair-Rapporteur, Report of the Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies on its Second Session. 24 December 2012 UN Doc A/HRC/22/41, 10(411)
[28] Montreux Document, Part 1, Para. 4-6, 10-12, 15-17.
[29]Faizen Patel, 'Regulating Private Military and Security Companies: A Comprehensive Solution' Proceedings of the Annual Meeting (American Society of International Law) 107 International Law in a Multipolar World, 202.
[30] Rebecca DeWinter-Schmitt (ed), Montreux Five Years on: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices (2013, Spain) Creative Commons, p.8.

investigative functions were inoperative due to a lack of due diligence and generally improper implementation and enforcement procedures".[31]

Regarding the issue of providing accountability and remedies, Faizen argues that accountability is a crucial factor for which the Montreux Document is not particularly a strong regulation, as it has failed to provide effective remedies in cases of violations of human and humanitarian law by PMSCs.[32] In the absence of a legislative action in the UK, regarding misconducts committed by PMSCs abroad, significant accountability gaps still persist.[33] The United States has equally failed to enact a comprehensive system of regulations and laws to hold PMSCs criminally liable for violations committed abroad.[34] Considerable progress has been made by the United States in the area of meeting its obligations under the Montreux Document by providing access to non judicial remedies; however these remedies have a problem of inaccessibility as a result of lack of transparency.[35]

The United Kingdom at the national level employs a system of voluntary self-regulation in a bid to promote higher standards in the Private Military and Security Industry.[36] This could be likened to self-regulation under the Management-based approach of State regulation.

There are two major reasons for the UK government's preference for this sort of regulation: first, the government avoids the difficulties inherent in investigating and enforcing orders in relation to PMSC conduct abroad,[37] "even though it is acknowledged that outsourcing regulation does little more than shift the burden to the relevant trade association".[38] Furthermore, "voluntary self-regulation makes financial sense, by outsourcing legitimization to a voluntary, privately funded organization; the government evades the costs normally associated with regulation".[39] The latter reason has been a major criticism of the command and control state based approach of regulation.

2.1.3 Externalities

All markets are subject to frictions, with externalities disrupting them.[40] Despite the progress made with the Montreux Document, questions may still be asked as to how international it is in

[31] Ibid 11.
[32]Faizen Patel, 'Regulating Private Military and Security Companies: A Comprehensive Solution' Proceedings of the Annual Meeting (American Society of International Law) 107 International Law in a Multipolar World, 202.
[33] Rebecca DeWinter-Schmitt (ed), (n 30) 9
[34] Ibid 8.
[35] Ibid 9.
[36] William Hague, Secretary of State for Foreign & Commonwealth Affairs, *Written Ministerial Statement: Promoting High Standards of Conduct by Private Military and Security Companies Internationally*, Commons Hansard, vol. 515, pt. no. 47(Dec. 17, 2012),
[37] Paul McGrade, Deputy Head Conflict Department, UK Foreign & Commonwealth Office, Private Military and Security Companies, Summary of the International Law Discussion Group Meeting Held at Chatham House 9 (June 14, 2013) 3.
[38] UK Foreign & Commonwealth Office, Private Military Companies: Options for Regulation 4(Feb. 12, 2002) Para 26.
[39] Rebecca DeWinter-Schmitt (ed), (n 30) 62.
[40] Anna Van Oeyeren, 'Cry Havoc! and let Slip the Dogs of War: Regulating Private Military and Security Companies' (2016) 15 European View 155, 157.

terms of support from a wide range of State actors.[41] The over representation of western States in its consultation process, created a regulatory gap as most of the State actors in whose territory PMSC violations and abuses occurred were not parties to the Document.[42] This was one of the reasons why the Montreux Document was not adopted by the United Nations during its consideration of a treaty to regulate PMSCs.[43]

One of the negative externality forces affecting the Montreux Document is the market for force that is PMSCs. As earlier discussed, the Montreux Document was a regulation by States for States without the involvement of the Private Military and Security Industry actors. It is submitted that these non state actors on whose activities this regulation revolved around should have been part of the law making process. A contrary argument may be made to justify the exclusion of PMSCs in the Montreux Document regulation process, on the basis of the sensitivity and nature of industry involved which could best be regulated and controlled by the State. Unfortunately, the Montreux Document has failed as a strong international regulation given its shortfalls in this area. The exclusion of the non state actors (such as PMSC industries) from the normal treaty-making process and their subsequent inability to become parties to the relevant treaties, mean that alternative non-legal regimes have had to be adopted. "These regimes…operate in a grey zone between law and politics; relying on international legal principles for the normative framework and remaining dependent on political pressures, rather than courts, for the enforcement of these norms".[44]

3.1 Conclusion and Recommendations

Considering the fact that international law is purely State regulated as it is made by States for States; whether through legislation, command and control or contractual relations. Partnerships with PMSCs in multi-stakeholder initiatives such as the Montreux Document will remain important towards the effective and efficient implementation of international law to and by PMSCs.[45]The States of the Western region argue that informal intergovernmental agreements such as the Montreux Document and voluntary industry codes of conducts are sufficient to regulate PMSC operations abroad.[46]

However, the UN Working on the Use of Mercenaries is of the opinion that such agreement as the Montreux Document is merely complementary to, but never a substitute for strong

[41] Kim Sorensen, 'To Leash or not to Leash the Dogs of War? The politics of Law and Australia's Response to Mercenarism and Private Military and Security Companies'(2015) 36 Adelaide Law Review, 406, 425.
[42] Alexander Nikitin, Chairperson-Rapporteur, Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination. 21 January 2009, UN Doc A/HRC/10/14, 11(44).
[43] Ibid.
[44] Andrew Clapham and Gaeta Paola (eds) The Oxford Handbook of International Law in Armed Conflict (1st edition, Oxford University Press 2014) 706.
[45] Andrew Clapham and Gaeta Paola (eds.) *The Oxford Handbook of International Law in Armed Conflict* (2014, Oxford) Oxford University Press,643-655.
[46] Kim Sorensen, (n 10) 104.

international and national regulatory framework.[47] In analyzing the Montreux Document, it is discovered that national law will govern the actions of PMSCs abroad. Thus the document is "persuasive in law and falls to States to make it binding in Law".[48]

Regarding the challenges encountered by States in providing effective remedies, the Montreux Document should be revised to build its fragmented remedial arrangement, both States and PMSCs would benefit from a more specific guidance on how they ought to deal with claims initiated by victims of PMSC violations at the international level.[49]

In the light of the absence of strong sanction powers in the Montreux Document, it would be globally useful to establish an independent organ that keeps track of the implementation of the good practices and standards provided under the Document.[50]

While there are ambiguities in the frameworks of national regulation governing the operations of PMSCs around the world, there is no legal vacuum at the international level concerning whether PMSCs should be prosecuted for crimes committed abroad. The fact that there is still low levels of accountability and a high degree of criminality within the market for force notwithstanding legal regulations on an international level such as the Montreux Document. It suggests that international law may not (yet) be an effective tool to regulate PMSCs.[51]

It is submitted that the Montreux Document being the first international regulation on the operations of PMSCs is a step in the right direction despite its numerous shortcomings as already discussed in this essay. Its failings are peculiar to those of most international regulations because of their 'soft law' approach. The responsibility therefore shifts to the various State parties to the Document to domesticate the various obligations and good practices/standards provided under the Document in their national legislation. Through the strong sanction and enforcement powers of these Sates, the risks occasioned through PMSC activities abroad would be properly managed and suppressed.

[47] UN Working Group on the Use of Mercenaries, 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 People to Self-Determination (2016) UN Doc A/HRC/33/43.
[48] James Cockayne, 'Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document" (2009) 13 Journal of Conflict and Security Law, 427.
[49] James Cockayne, (n..) 427.
[50] Raymond Saner, *Private Military and Security Companies: Industry-Led Self-Regulatory Initiatives versus State-Led Containment Strategies* (2015, Geneva Switzeland) CCDP p.21.
[51] Raymond Saner, AmakaUchegbu and LichiaYiu, 'Private Military and Security Companies: Legal and Political Ambiguities Impacting the Global Governance of Warfare in Public Arenas' (2019) 41(2) Asia Pacific Journal of Public Administration 63, 68.