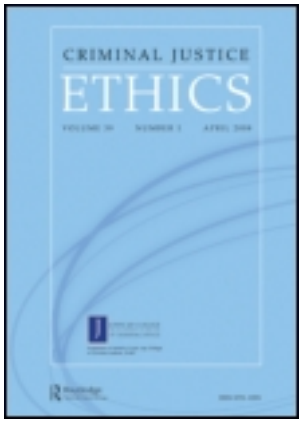

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ARTICLE

A U.N. Convention to Regulate PMSCs?

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In the last 20 years the ruthless competition for natural resources, political instability, armed conflicts, and the terrorist attacks of 9/11 have paved the way for private military and security companies (PMSCs) to operate in areas which were until recently the preserve of the state. PMSCs, less regulated than the toy industry, commit grave human rights violations with impunity. The United Nations has elaborated an international binding instrument to regulate their activities but the opposition of the U.S., U.K., and other Western governments—and from PMSCs, which prefer self-regulation—have prevented any advancement.

Keywords: U.N. Working Group on the use of mercenaries, private military and security companies (PMSCs), U.N. Draft Convention on PMSC, U.N. Open-ended Intergovernmental Working Group, Montreux Document

The Context

The years that followed the decolonization period in the 1960s were marked by the activities of mercenaries. With the fall of the Berlin Wall, the collapse of the U.S.S.R., and the globalization of the world economy (a globalization which triggered a "ruthless competition for natural resources, political instability, armed conflicts and crisis situations"[1]), the last 20 years have been stamped by the activities of private military and security companies (PMSCs).

Military and security functions, considered inherently state functions, are being increasingly outsourced to the private sector.[2] The growth of this new industry, a direct consequence of merging public and private sectors (government and big business) with an unstoppable flow of money in a period of economic recession, has seen the increasing outsourcing of military functions to private contractors, with companies such as Blackwater (renamed Xe and Academi) and DynCorp doing the jobs of professional soldiers. In the field of

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intelligence, private contractors are hired to do the work of spies.[3]

This new industry is transnational in nature and has literally exploded with the privatization of war in the Afghan and Iraqi conflicts, where private contractor personnel have outnumbered those of the military.[4]

The reappearance of mercenaries in the 1960s, after their disappearance for almost a century, coincided with the decolonization process initiated by and conducted under the auspices of the United Nations. In 1977, with Protocol I Additional to the Geneva Conventions, the international community agreed on a definition of and a status for mercenaries operating in international armed conflicts. And in 1989, after many years of negotiations, the United Nations adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries[5] which criminalized mercenary activities. The International Convention entered into force in 2001 when the mercenary phenomenon had been mostly replaced by the activities of PMSCs. By then, the convention was already considered obsolete.

However, the 2004 coup in Equatorial Guinea and the recent 2011 developments in Côte d'Ivoire and Libya remind us that mercenaries remain active in many parts of the world, particularly in Africa. The authorities of Côte d'Ivoire and Libya resorted to mercenaries to impede exercise of the right of the peoples to self-determination.[6] There have also been reports that former mercenaries have been contracted by PMSCs and deployed to Somalia.[7]

Only 32 states have ratified the International Convention against mercenaries. Even fewer countries (including Belgium, France, Italy, Namibia, and South Africa) have dealt with mercenary activities in their criminal or military codes using the definitions in Protocol I or the 1989 International Convention.

Since 1990, the world has witnessed a proliferation of private companies that profit from the military and security services they offer in armed and low-intensity conflicts and post-conflict situations, international relief, and contingency operations. Until recently, such services were considered to be the preserve of the state.

The United States, South Africa, the United Kingdom, Afghanistan, Iraq, and Sierra Leone, among others, have been confronted by human rights abuses committed by employees of PMSCs. The United States, the United Kingdom, and South Africa[8] are three of the major exporters of PMSC services to areas of conflict. Debates between their parliaments and government executives have revolved around how best to regulate these companies. Of the 464 PMSCs signatories to the International Code of Conduct being elaborated under the Swiss Initiative (as of September 10, 2012), 163 of the PMSCs are from United Kingdom, 54 from the United States, and 19 from South Africa.[9]

PMSCs also decide to place their headquarters in a given country because they calculate that they are not going to have regulatory difficulties with that particular government. Many PMSCs that have their headquarters in Washington or London are registered in tax havens such as the Bahamas or the Caymans.[10]

Similar to South Africa's legislation,[11] Afghanistan,[12] Iraq,[13] and Sierra Leone[14] have all established national regulatory frameworks. The Swiss government is studying

possible frameworks of regulation at the national level in addition to the Montreux Document and the International Code of Conduct, and this work is being carried out in collaboration with the security industry and the U.S. and the U.K. governments.[15]

A third category of countries, including Colombia, Chile, Fiji, Nepal, Romania, and Uganda, has served as a pool from which former military and law enforcement personnel have been contracted as cheaper labor by PMSCs and their subsidiaries in order to increase their profits.

Although PMSC personnel carry out many of the activities that mercenaries have been conducting throughout history, they are not usually ''mercenaries.'' Contrary to the ''dogs of war'' mercenaries of the past, PMSCs are legally registered business entities. The definition of mercenaries contained in international instruments does not generally apply to PMSC personnel.

The gross human rights violations in which PMSCs have been involved, and questions about their legitimacy and the type of activities they carry out, as well as the norms under which they should operate and how to monitor their activities, have galvanized the international community's attention.

Confronted with this new nonstate actor, governments, the new security industry, and regional organizations,[16] as well as the United Nations and intergovernmental organizations, have reacted differently and adopted divergent approaches to dealing with this expanding phenomenon.

National Initiatives

Switzerland

The involvement of PMSCs in Iraq, following its occupation by American and Coalition Forces and the immunity status provided to foreign private contractors, led the Swiss government, as depository of the Geneva Conventions and headquarters of the International Committee of the Red Cross (ICRC), to react. In 2006, the Swiss government, together with the ICRC, launched the Swiss Initiative, which adopted the Montreux Document in 2008. The second phase of the Swiss Initiative consists of the elaboration of an international code of conduct for PMSCs, to be finalized in 2012.

Behind this move was also the embarrassment caused by the scandal of the 2004 coup in Equatorial Guinea. Several part-owners of Meteoric Tactical Systems—a company providing security to the Swiss Embassy in Baghdad—were involved in the coup during their holidays and were arrested in Zimbabwe.[17] In addition, the expansion of PMSCs in Switzerland forced the government to attempt harmonization of the legislation in the different Swiss cantons.[18] Legislation was drafted to be adopted in December 2007, but the Swiss government decided to provisionally renounce regulation of PMSCs in Switzerland that were active in zones of crisis or conflicts. In 2010, the Swiss government was again obliged to react following the scandal caused by the establishment

in Basle of AEGIS Group Holdings SA, one of the major international PMSCs.[19] According to the Swiss Ministry of Justice, over 20 PMSCs established in different cantons were operating in conflict zones.[20] The Swiss government is now developing regulations to be adopted by its federal parliament.[21] A draft of the law was circulated in January 2012.[22] The legislation aims at preserving the domestic and external security of Switzerland and its neutrality as well as guaranteeing respect for international law. It foresees the legal prohibition of certain activities and the establishment of regulations. It will apply to persons and companies providing services abroad or in Switzerland.

As it stands, the draft law appears more like window dressing than a national mechanism aiming at effectively controlling and monitoring PMSC activities. The sanctions contained in its Article 17 are weak. Because it is not envisaged as a centralized body responsible for licensing, giving authorization to, and controlling private security companies, there will necessarily be delays and inefficiency in implementing the law.[23] Provisions regarding human rights protection could contain more specific standards, and gender issues particularly should be spelled out. The scope of application (Articles 2 and 4) contains activities that have been a matter of concern for the international community, including intelligence, espionage, and the detention[24] and interrogation of prisoners.

The law will also apply to firms established in Switzerland that have financial shares in companies operating abroad. It will prohibit direct participation in hostilities in an armed conflict, as well as activities in relation to either participation in hostilities or grave violations of human rights. In order to control their activities abroad, companies will have to declare themselves to the Swiss authorities. All activities contrary to the law will be forbidden. The law foresees administrative and penal sanctions and will also apply to federal authorities outsourcing functions of protection to an overseas private security company. Federal authorities will have to make sure that the company fulfills a number of prerequisite conditions and that its personnel have been adequately trained. The legislation determines under what conditions the use of force and weapons are authorized.

United Kingdom

On January 24, 2008, an Early Day Motion[25] was signed by 82 members of the U.K. Parliament, expressing the concern of the House of Commons about the ''exponential growth of PMSCs since the invasion of Iraq.''[26] Members of Parliament were ''disturbed by the substantial rise of reported incidents of civilian killings and human rights abuses by PMSCs guards in Iraq who remain unregulated and unaccountable.'' The House of Commons noted that six years after the Green Paper that originated in a request from the Foreign Affairs Committee following the involvement of a British PMSC in Sierra Leone, there was still no United Kingdom legislation regulating PMSCs. The Members of Parliament believed that ''self-regulation by the industry is not appropriate in this instance'' and urged ''the Government to bring forward legislative proposals for the control of the

PMSC sector as an urgent priority.''[27] Civil society and concerned NGOs[28] had also identified and monitored a number of individuals and companies operating in this industry which had committed grave human rights violations.[29]

South Africa

Following the involvement of South African PMSCs in a number of armed conflicts in Africa, the government adopted the 1998 Regulation of Foreign Military Assistance Act (RFMAA). This prohibits mercenary activity and regulates the provision of ''foreign military assistance'' by South African citizens, companies, and permanent residents in South Africa. Under the RFMAA, ''foreign military assistance'' includes military assistance to a party to an armed conflict in the form of advice or training; personnel, financial, logistical, intelligence, and operational support; personnel recruitment; medical or paramedical services; and procurement of equipment. It also prohibits security services for the protection of individuals involved in armed conflict or their property; any action aimed at overthrowing a government or undermining the constitutional order, sovereignty, or territorial integrity of a state; and any other action that has the result of furthering the military interests of a party to the armed conflict. Any person or company who seeks to provide ''foreign military assistance'' must be specifically authorized to do so.

The RFMAA has had a very limited impact on South African mercenaries, PMSCs operating abroad, or South African nationals offering their services to foreign PMSCs. Between 2,000 and 4,000 South Africans were working in Iraq in 2010. Thirty-five South Africans employed by PMSCs were killed in Iraq between 2004 and 2010. Their bodies were repatriated to South Africa. Four others were abducted in 2006 and their status remains unknown. According to the Department of International Relations and Cooperation, the RFMAA has prompted a large part of the South African industry to relocate or go underground in order to escape regulation.[30] Following the 2004 Equatorial Guinea coup, in which several South African mercenaries were involved, new legislation was adopted in 2006, but it is not yet in force.

United States of America

The contracting out of a number of military and security activities to private companies in Iraq and Afghanistan has on numerous occasions been a source of embarrassment to the United States government. Employees of PMSCs have been accused, in high-profile incidents, of violating human rights, shooting civilians, using excessive force, being insensitive to local customs or beliefs, and treating local populations disrespectfully. Concerns over the lack of transparency, oversight, and accountability have also attracted media and public attention.[31]

In 2004, the killing of four Blackwater employees by Iraqi insurgents in Fallujah dramatically changed the course of the war. The U.S. Army unleashed Operation Phantom Fury and recaptured Fallujah in November 2004, leaving over 1350 insurgents dead, with some 95 U.S.

soldiers killed and 560 wounded.[32] According to several sources, in order to save money, Blackwater had failed to provide the appropriate safeguards for protecting a military convoy that needed to pass through an area controlled by insurgents.[33]

In 2006, a drunken Blackwater employee shot and killed a guard to the Iraqi Vice President. In 2007, the U.S. House of Representatives Committee on Oversight and Government Reform found that Blackwater had avoided paying Social Security, Medicare, and federal income and employment taxes.[34]

Also in 2007, the Special Inspector General for Iraq Reconstruction indicated that the U.S. State Department did not know specifically what it had received for most of the $1.2 billion in expenditures it had paid in its contract with DynCorp for the Iraqi Police Training Program. This was not the first time that DynCorp was suspected of illicit behavior. In the 1990s, during the Balkans operations, several DynCorp employees working in the U.N. Police task force were involved in a sex-trafficking scandal (including ''owning'' girls as young as 12 years old) and prostitution rackets. The supervisor of DynCorp in Bosnia videotaped himself raping two young women. None of these employees has been ever prosecuted.[35]

The Balkans allegations were brought to a Texas court in 2000 by an aircraft mechanic working for DynCorp who had ended up fired and was later forced into protective custody. On June 2, 2000, an investigation was launched in the DynCorp hangar at Comanche Base Camp, one of two U.S. bases in Bosnia and Herzegovina, and all DynCorp personnel were detained for questioning.[36] U.S. Army Criminal Investigation Division (CID) spent several weeks investigating and the results appear to support the allegations. DynCorp had fired five employees for similar illegal activities prior to the charges.[37] Many of the employees accused of sex trafficking were forced to resign under suspicion of illegal activity. DynCorp agreed to settle a suit brought by the former aircraft mechanic, Ben Johnston, two days before the case was set to go to trial in Texas. The amount of Johnston's settlement is confidential, but both Johnston and his attorney said they viewed the settlement as a victory—and as a vindication after two years of fighting the company.[38]

Kathryn Bolkovac, a U.N. International Police Force monitor, hired by DynCorp on another U.N.-related contract, also filed a lawsuit against DynCorp in Great Britain in 2001. She sued the company for unfair dismissal due to a protected disclosure (i.e., whistleblowing). She had reported that DynCorp police trainers in Bosnia were paying for prostitutes and participating in sex trafficking. On August 2, 2002 the court unanimously decided in her favor. At the time that she had reported that DynCorp officers were paying for prostitutes and participating in sex trafficking, DynCorp had a $15 million contract to hire and train police officers for duty in Bosnia and Herzegovina. None of the DynCorp employees were prosecuted, since they enjoyed immunity.[39] In 2010, Bolkovac's story was made into the film *The Whistleblower*.[40]

In 2009, photos were published showing employees of ArmorGroup North America—hired by the State Department to provide security at the U.S. Embassy in Kabul—engaging in

lewd sexual hazing and harassment. Previous reports indicated a number of other allegations, including how the deficiencies of the company endangered the security of the embassy.[41]

A 2010 Senate Armed Services Committee investigation found that EOD Technology, another company contracted to protect the U.S. Kabul embassy, was suspected of hiring local warlords with possible Taliban ties. A report of the Subcommittee on National Security and Foreign Affairs of the U.S. Congress stated that the Department of Defense's contract had fueled a vast protection racket run by a shadowy network of warlords, strongmen, commanders, and corrupt Afghan officials. Not only did the system run afoul of the Department of Defense's own congressionally mandated rules and regulations, but it also appeared to risk undermining the U.S. strategy in Afghanistan.[42]

In April 2010, five former Blackwater employees were indicted for conspiring to violate federal firearm laws, for possession of unregistered fire arms, and for obstruction of justice. That same year, Xe Services LLC (formerly Blackwater) agreed to pay to the State Department a penalty of $42 million for 288 alleged violations of the Arms Export Control Act.[43]

Furthermore, there have been challenges to accountability asserted in a number of litigations against PMSCs in cases of torture and the abuse of detainees in the Abu Ghraib prison (involving employees of CACI and Titan), as well as in the 2007 shooting deaths of 17 Iraqi civilians by Blackwater employees in Nisoor square in Baghdad.[44]

In 2011, a congressional bill, the ''Stop Outsourcing Security Act''—which was designed to phase out the use of private military contractors—was tabled again. Since 2007, the bill has been rejected four times.[45] Also rejected since 2003—despite having been reintroduced at four different sessions of Congress—is the ''Transparency and Accountability in Security Contracting Act.''[46] After a three-year investigation begun in 2008, a bipartisan congressional panel found that the U.S. had wasted or misspent $34 billion in the Iraq and Afghanistan wars.[47]

The U.S. Congress has regularly stated that it does not have complete access to information about all security contracts; the number of armed private security contractors working in Iraq, Afghanistan, and other combat zones; the number of contractors who have died; and any disciplinary actions taken against contract personnel or companies. The Special Inspector General for Iraq Reconstruction had not obtained information regarding the U.S. State Department's 2012 deployment in Iraq of some 5500 private security contractors.[48] In addition, there have been embarrassing reports to Congress indicating waste, fraud, and abuse running into the billions of dollars. A summary of the reports states: ''for many years the government has abdicated its contracting responsibilities—too often using contractors as the default mechanism, driven by considerations other than whether they provide the best solution, and without consideration for the resources needed to manage them. That is how contractors have come to account for fully half the United States presence in contingency operations.''[49]

The United Nations Draft Convention on PMSCs

Any national response to regulate PMSCs will have to take into consideration the transnational nature of the security industry. National legislative efforts, well intentioned as they may be, will never be successful without a coordinated response by the international community to the increasing role of the private sector in war and peace. To be effective, any regulatory framework will need to interlock legislation, regulation, and monitoring mechanisms at the national, regional, and international levels.[50]

Lack of transparency and accountability, human rights abuses, the outsourcing of inherently state functions to the private sector, the waste of resources, corruption, and rackets run by shadowy networks of warlords all pose real threats to the democratic ideals pursued by Western states as enshrined in the Magna Carta, the 1689 English Bill of Rights, the French and the U.S. constitutions,[51] as well as the U.N. Charter and its system of collective security based on sovereign states. As Martin van Creveld notes, the ascendancy of a kind of corporation that is not sovereign, and whose expansion with globalization is reaching all social dimensions, represents one of the greatest revolutions in modern times—and it is full of implications that we are only beginning to understand.[52]

The widespread contracting out of military and security operations—historically, inherently state functions—to the private sector has raised important issues and questions as to the extent that non-state actors can be held accountable for human rights violations. States have the responsibility to protect individuals against human rights violations committed by corporations such as private military and security companies. When such violations occur, victims have the right to an effective remedy and to appropriate reparation.

Two intrinsically contradictory strategies coexist at the threshold of the twenty-first century. On the one hand, in failing states such as Afghanistan and Iraq, U.N. peacekeeping and capacity-building missions backed by Western nations aim at building the state monopoly of legitimate force by capacitating a national army, police, and judiciary. On the other hand, these same Western states are increasingly outsourcing to the private sector large parts of their military and security forces and, therefore, undermining the state monopoly of force.[53]

The text of the Draft Convention developed for the United Nations by the Working Group on the use of mercenaries is based on the following paradigm:

> *The need of an international binding instrument as a means to invigorate cooperation among Member States in reaffirming that the sovereignty of States, the UN international collective security system and the strengthening of democracy lies on the responsibility of States to maintain the control of the legitimate use of force and States' obligations to investigate, prosecute, punish and ensure effective remedies to victims of human rights violations.*

From May 23 to 27, 2011, the U.N. Open-ended Intergovernmental Working Group to consider the possibility of elaborating an international regulatory framework for PMSCs held its first session in Geneva. A few months previously, in September 2010, the U.N. Human Rights Council had decided to establish such a mechanism to consider the possibility of elaborating an international regulatory framework. The Human Rights Council had indicated that members of the intergovernmental working group should, inter alia, consider the option of developing a legally binding instrument on the regulation, monitoring, and oversight of the activities of PMSCs, including their accountability. Such an instrument would take into consideration the principles, main elements, and draft text as proposed by the Working Group on the use of mercenaries.[54]

Participants in the first and the second sessions of the Open-ended Intergovernmental Working Group, respectively held in May 2011 and August 2012, agreed that the activities of PMSCs should be properly regulated. There was, however, disagreement on the form that such regulation should take: whether an international convention was necessary or whether current international and national obligations combined with self-regulation were sufficient.

The debates during these sessions of the open-ended working group reflect the strongly divergent ideological and political positions of U.N. Member States regarding the activities of PMSCs, differences that will be difficult to resolve. However, the prospect of a human rights treaty focused on PMSCs remains and the participants have agreed to continue meeting and holding discussions.

Is the idea of an international binding instrument to regulate and monitor the activities of PMSC so farfetched? Such a move has not only been proposed by a majority of Member States of the United Nations but also by members of the U.K. House of Commons[55] and by members of the Parliamentary Assembly of the Council of Europe.[56] They felt that a sensitive area involving the use of force and public security must not be left to corporations without strict delimitations of what are inherently state functions. They proposed establishing regulation and controls for those activities that may be carried out by the private sector.

Arguments in Favor of an International Binding Instrument

Taking into account the current legal vacuum covering the activities of PMSCs,[57] the dangerous activities they carry out, the types of environment in which they operate, and the impact of their activities on the enjoyment of human rights, states should register, license, regulate, and monitor their activities and ensure accountability through prosecution when necessary. Victims of human rights violations committed by PMSCs and their employees should be able to exercise their right to an effective remedy. As indicated earlier, the few national regulations so far adopted have serious limitations. Only an international legally

binding instrument could ensure that states apply minimum standards to regulate PMSCs' activities.

The services provided by PMSCs cannot be considered as ordinary commercial commodities to be controlled through self-regulation initiatives. The functions filled by PMSCs are highly specific and dangerous and involve the trade-off of a wide variety of military and security services requiring the elaboration of international standards and monitoring mechanisms.

The fact that the definition of "mercenaries" under the two international conventions does not generally apply to the personnel of PMSCs[58] is also a strong argument for the adoption of a new instrument.

A majority of PMSCs has been created or is managed by former militaries or ex-policemen for whom this is big business:[59] they attract large numbers of military and police personnel looking for opportunities to make easy money. Unfortunately, they hollow out and weaken existing security institutions by draining resources and worsening public security.

The policy of outsourcing military and security functions from governments and intergovernmental organizations has not arisen as a result of spontaneous generation. A convergence of interests among key personalities in different national and international administrations with the security industry has been evident, including a revolving-door syndrome. The new security industry has placed key personalities within the administration and relevant institutions to secure its interests. The interest of governments in avoiding responsibility and monitoring by democratic institutions has also contributed to the development of such a policy.

Contrary to the arguments put forward by Doug Brooks and Hanna Streng,[60] there has been a regular and consistent lobbying from outside and from within the PMSC corporate community to obtain contracts from governments, intergovernmental organizations, and international organizations: the offer has stimulated the demand. A clear example has been the shift in the United Nations policy to outsource security since Gregory Starr, the person responsible for contracting Blackwater when he was at the U.S. State Department, was appointed U.N. Undersecretary General for Safety and Security.[61]

It has been argued that "*supply* in the market for force tends to self-perpetuate, as PMSCs turn out a new caste of security experts striving to fashion security understandings to defend and conquer market shares." On the other hand, "*demand* does not penalize firms that service 'illegitimate' clients in general. Consequently, the number of actors who can wield control over the use of force is limited mainly by their ability to pay."[62]

Arguments against a Binding International Instrument

Western states argue that what is really needed is better implementation of the existing international mechanisms, not new legislation, and contend that new self-regulatory mechanisms, such as the Montreux Document and the International Code of Conduct, have not yet been implemented.

Other reasons advanced are the lack of agreement among states on what are inherently state functions that cannot be contracted out to the private sector, as well as the conviction that the national licensing system envisaged by the Draft Convention would be too costly for governments. This argument is surprising, for licensing regimes already exist in most countries. Countries without a licensing regime for PMSCs, such as Canada, are the exception.[63]

The elaboration of a multilateral binding instrument needs the consensus of Member States. The proposed Draft Convention has the opposition of those governments in whose territories the majority of PMSCs is registered. They argue that a much broader consultation is needed in the development of a treaty. They also emphasize that the issue of regulating PMSCs intersects with several branches of international law, such as the law on the use of force, international humanitarian law, international criminal law, and the law on state responsibility, and it is not primarily a matter for the Human Rights Council.

The proposed U.N. Draft Convention, among other things, would:

- Reaffirm State Responsibility regarding the activities of PMSCs;
- Identify ''inherently'' state functions for which the state takes direct responsibility and that cannot be delegated or contracted out in order to ensure that states preserve their sovereignty and do not abdicate their responsibility toward their citizens and other states;
- Cover not only international armed conflicts but any other situation in which PMSCs operate;
- Extend responsibility to intergovernmental organizations, such as the U.N. or NATO;
- Require state parties to establish jurisdiction for the offenses addressed by the convention;
- Establish in each state a national regime of regulation and oversight over the activities in its territory of PMSCs and their personnel comprising (1) a register or governmental body, and (2) a national licensing system of import/export of military and security services;
- Create an International Committee on the Regulation, Oversight, and Monitoring of PMSCs;
- Establish (1) an Inquiry procedure, (2) an Inter-States Complaint mechanism, and (3) an Individual and Group petitions procedure;
- Envisage establishing an international fund to provide reparation to victims of offenses identified in the convention and/or assist in the victims' rehabilitation.

State Responsibility

PMSCs' security and military capabilities for hire have enabled states and non-state actors to overcome political limitations regarding the use of force. States have weak legal responsibility for the functions they outsource to PMSCs as well as for the behavior of their employees.[64] Current international law has several gaps concerning the accountability of PMSCs. Under international humanitarian law, PMSCs are not considered

part of a state's armed forces or supporting militias. Moreover, states themselves rarely address PMSCs' violations.

As Nigel White notes, states and international organizations bear responsibility in international law when human rights are violated. However, there exists a gap regarding the responsibility of PMSCs to whom states and international organizations are increasingly outsourcing their security functions.[65]

In addition to defining the inherently state functions which PMSCs would not be allowed to fulfill, the proposed convention would reaffirm the responsibilities of states regarding the activities that PMSCs could perform in case states choose to contract out certain activities.[66] On the issue of transparency and accountability, the Draft Convention establishes strong provisions regarding these non-state actors who had formerly been protected by a cloak of immunity and subcontracting. States are required to adopt measures to investigate, prosecute, and punish abuses committed by PMSCs and to ensure effective remedies to victims—therein ignoring preexisting immunity agreements.

In the Draft Convention, states are categorized into contracting states, states of operation, home states, and third states. Irrespective of this division, in accordance with Article 4 of the Draft Convention on General principles, "Each State party bears responsibility for military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the state." However, the Draft Convention does not go into secondary levels of responsibility to address whether states should be responsible for the acts themselves, or for failing to apply the due diligence principle in cases of international human rights and humanitarian law violations. Last, but not least, the Draft Convention reflects the weaknesses of international law in not directly addressing PMSCs. Instead it imposes obligations on those states contracting with PMSCs or having them on their territories (either as home states or states of operation).

Inherently State Functions that Cannot Be Delegated

The Draft Convention is the first international instrument that attempts to draw a line between those activities that are state functions and cannot be delegated or contracted out to the private sector and those that may be outsourced but should, nonetheless, be regulated.

The main reason for identifying and prohibiting the delegating or outsourcing of such functions is to ensure that states preserve their sovereignty in relation to other nations and provide equal security to their citizens. The monopoly on the use of force is closely linked to the emergence of the modern state and the strengthening of democracies in western European countries and other nations such as Canada, the U.S., Australia, Japan, India, and New Zealand.

The monopoly on the legitimate use of force is a central attribute of

sovereignty. Nonetheless, a state may, in a manner consistent with human rights standards, delegate certain functions involving the use of force to private actors. This view is based on the understanding that sovereign states must maintain control of the legitimate use of force. This view, however, is not shared by all governments, particularly Western states that favor privatization at all costs.

It will be necessary for long negotiations to occur in order to reach a consensus on which activities constitute inherently state functions. For example, the Montreux Document permits private contractors to fulfill military and security services which include ''prisoner detention and advice to or training of local forces and security personnel''[67] whereas the Draft Convention does not.

This is not the only gray area that must be diminished in terms of what PMSCs may and may not do. Among the functions that are consistent with the principle of the state monopoly on the legitimate use of force and the belief that a state cannot outsource or delegate this right to PMSCs under any circumstances, one also finds references to functions such as ''direct participation in hostilities, waging war and/or combat operations.'' One must ask, under what circumstances would the activity of private contractors driving petrol or ammunitions to supply the military constitute ''direct participation''?

Under international humanitarian law, ''direct participation in the hostilities is not restricted to situations where individuals are involved in military deployment or are armed with a view to taking an active part in combat operations: direct participation is not necessarily restricted to a minority'' of PMSCs.[68] Although the Geneva Conventions and their Additional Protocols do not provide a definition of ''direct participation in hostilities,'' the commentary on Additional Protocol I indicates that '' 'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.''[69]

The scope of other functions will also need to be discussed. For example, references to ''intelligence, knowledge transfer with military, security and policing application.'' The actions of MPRI (Military Professional Resources Incorporated) resulted in the direct transfer of knowledge and military skills to the Croatian army in 1994–95. On that occasion, Croatia, after having separated from Yugoslavia, was militarily confronted by the Krajina Serbs, but the Croatian army was ill-equipped. The interest of the U.S. was to weaken the Serbs by bolstering the Croatian army. However, the U.N. Security Council embargo prohibited the direct assistance or sale of arms to one of the conflicting parties. In 1994 a Washington agreement permitted the State Department to issue a license by which the Croat government signed contracts with MPRI. The main aim of the contract was to make a professional Croatian army capable of launching a few months later the ''Operation Storm,'' which defeated the Krajina Serb army. The MPRI operation not only included training but also tactics, unit strategy, and coordination (functions that would be forbiden under the Draft Convention).[70]

Regulation of the Use of Force and Firearms for those Activities that May Be Outsourced

The Draft Convention does not prohibit altogether the use of arms by PMSCs. It recognizes that employees may carry firearms in providing military and security services. It establishes measures to ensure that, in providing military and security services, employees of PMSCs shall, as far as possible, apply non-violent means before resorting to the use of force and firearms.

The Draft Convention stipulates that employees may use force or firearms[71] only under certain circumstances.[72] In all these circumstances, PMSCs shall identify themselves as such and give a clear warning of their intent to use firearms, if the situation permits. Whenever the use of force and firearms is unavoidable, PMSC personnel must exercise restraint, minimize damage and injury, and respect and preserve human life. They also must also ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment, and that relatives or close friends of the injured or affected person are notified as soon as possible.

What is important to recognize is that there is a normative gap in international law. Despite indications of disapproval about some types of outsourcing, particularly with regard to direct participation in hostilities, international law does not prohibit the outsourcing of state functions to PMSCs or even the direct participation of contractors in hostilities.[73]

For this reason, in addition to identifying the inherently state functions, the Draft Convention could also have indicated a list of activities that should not be forbidden by an international legally binding instrument. Such activities could include protection services (humanitarian convoys, maritime convoys, close protection); guarding services (supply depots, embassies, refugee camps); and transport services (humanitarian aid, refugees). A list such as this would also assist in diminishing the gray areas of PMSC activities. However, the task might be accomplished through the jurisprudence of the proposed Oversight Committee.

In the case of convoys, an important distinction has to be made between humanitarian convoys and convoys that transport merchandise or goods for military purposes and can become targets in armed or low-intensity conflicts. In this context it is worth mentioning the suit against KBR and its former parent company, Halliburton, that was brought in U.S. courts by the families of victims. On April 9, 2004, Iraqi insurgents attacked a U.S. Army convoy and two drivers were killed.[74] The families accused the PMSC companies of fraud-in-recruiting for allegedly convincing drivers that they would be engaged only in rebuilding and not in combat activities. They also accused the companies of sending the drivers into a high-risk area, knowing they could be attacked and possibly killed.[75] A district court in Texas rejected KBR and Halliburton's

request to dismiss the suit and allowed the case to proceed. But the 5th Circuit overturned the lower court's decision based on the fact the drivers were entitled to workers' compensation. The court said allowing the case to proceed would undercut the workers' compensation program, which is designed to provide "prompt relief for employees, and limited and predictable liability for employers," Judge Priscilla Owen wrote for the three-judge panel.[76]

The Draft Convention would not regulate the activities of "the vast majority of companies that operate in high risk environments even unarmed security companies"[77] in so far as the employees of those companies would not be performing intelligence work that would be considered under the convention as an inherently state function.

Support activities for protecting people, premises, or convoys conducted by PMSCs, such as the ones mentioned above, cannot be governed by softer law instruments alone but should be monitored by states party to the convention under the national regime of regulation and oversight.

In this regard it is interesting to note that in its interim report the U.S. Bipartisan Commission on Wartime Contracting in Iraq and Afghanistan came to several important conclusions regarding the contracting of security functions. It criticized the government for not having "clear standards and policy on inherently governmental functions" and called for the development of a single consistent definition to ensure that only officers or employees of the federal government or members of the armed forces perform inherently governmental and other critical functions.[78]

Criminal Responsibility

States parties are required to establish jurisdiction over acts that carry out inherently state functions or perform legitimately outsourced activities that violate the standards of international human rights law or, where applicable, international humanitarian law. Such violations can include the export/import of PMSC services without license or authorization; or unlawful use of force and firearms when the offense is committed within its territory, or on board a ship or aircraft registered under its laws; or when the offense is committed by its nationals; and when the victim is one of its nationals.

In conformity with the principle *aut dedere aut judicare*, state parties are required to establish jurisdiction when the offender is present within its territory and the state does not extradite such a person to any other state party asserting jurisdiction over such a person. The Draft Convention also envisages individual criminal responsibility of the superiors of PMSC personnel.

Furthermore, it contains provisions to establish the liability of legal persons and entities for the offenses specified by the convention. The liability of legal persons may be criminal, civil, or administrative, or a combination of these, without prejudice to the criminal liability of the natural persons who have actually committed the offenses.

National Monitoring System

The Draft Convention provides for a monitoring system for PMSCs at the domestic and the international levels. An effective control and accountability of PMSCs is possible only if there is a robust system of national regulation and enforcement. States are, therefore, required

> *to establish a comprehensive domestic regime of regulation and oversight over the activities in [their] territory of PMSCs and their personnel including all foreign personnel, in order to prohibit and investigate illegal activities as defined by this Convention as well as by relevant national laws.*[79]

In order to coordinate among the different law enforcement and other bodies at the domestic level as well as to cooperate and exchange information at the international level, in accordance with Article 16 of the Draft Convention, states are requested "to establish and maintain a general State Registry of PMSCs operating in their jurisdiction, including details of any subsidiaries or holding companies of each registered PMSC" and to "identify or establish a governmental body responsible for the registry of PMSCs and exercise oversight of their activities."[80]

States are requested to investigate reports of violations of international humanitarian law and human rights norms by PMSCs and ensure civil and criminal prosecution and punishment of offenders. Furthermore, they are requested to take appropriate action against companies that commit human rights violations or engage in any criminal activity, inter alia by revoking their licenses and reporting to the international committee established by the convention on the record of activities of these companies.

States will have to ensure that PMSCs and their personnel carry out their activities exclusively under their respective licenses and authorizations, and these must be registered in the general Registry of the State.[81] The criteria for granting licenses and authorizations will take into account any record of human rights violations committed by the companies, providing and/or ensuring training in international human rights and humanitarian law, and robust due diligence measures.

The Draft Convention also requires that PMSCs and their personnel import and export their services only under the appropriate licenses and authorizations, and that PMSC personnel are required to be professionally trained and vetted according to the applicable international standards—in particular regarding the use of specific equipment and firearms.

Such oversight activities cannot be left to self-regulation alone, as under the "mechanism" of the International Code of Conduct proposed by the security industry (a follow-up to the Montreux Document). The self-regulatory mechanism that the security industry is devising with the International Code of Conduct would eliminate a number of competitors among PMSCs. The security industry ultimately would be comprised of a core of multinational

PMSCs (those with sufficient resources) that would become a ''de facto'' oligopoly or monopoly without any control whatsoever by national authorities.

In addition, the majority of PMSCs excluded by this code of conduct would continue to operate by offering cheaper rates, without being controlled either by the industry (self-regulation) or by governments (national regulation under domestic legislation). What are needed are international standards and mechanisms of regulation integrated into domestic legislation and applied to all PMSCs. Or, as indicated by White, it is necessary to have a monitoring treaty mechanism to ensure that states and corporations fulfill their due diligence obligations.[82]

International Monitoring System

The Draft Convention envisages an international system of oversight and monitoring for the activities of PMSCs. For the purpose of reviewing the Draft Convention's application, a Committee on the Regulation, Oversight, and Monitoring of PMSCs is proposed, consisting of a given number of experts of high moral standing, impartiality, and recognized competence in the field covered by the convention. They are elected by Sstates Pparties from among their nationals, and such elected experts shall serve in their personal capacity, with consideration being given to equitable geographical distribution and to the principal legal systems.

After a given number of parties have signed up to the convention, the elected committee will establish its own procedural rules to provide—as is the case for other U.N. human rights organs—for interpretative comments on the provisions of the convention. The committee will be responsible for establishing and maintaining an International Register of PMSCs operating in the international market, based on information provided by states parties as well as the Periodic Reports mechanism. For the latter, state parties will have to submit to the committee periodic reports on the legislative, judicial, administrative, and other measures they have adopted to give effect to the convention. The committee, after having considered these reports, will make observations and recommendations to the states parties.

The committee will also be responsible for several optional procedures. Under an inquiry procedure, if the committee receives reliable information indicating ''grave or systematic violations'' of the convention, and after having sought observations from the state(s) in which the offenses occurred and from the companies involved, it may launch a confidential inquiry undertaken by one or more members of the committee. Such an inquiry could, with the agreement of the state(s) concerned, conduct a visit *in loco*. The findings are to be transmitted to the state(s) concerned and the proceedings will be confidential. However, the committee, after consultations with the state(s) concerned, may decide to include a summary account of the

results of the proceedings in its annual report to the U.N. General Assembly.

Under the Inter-State Complaint Mechanism, if a state that is party to the convention (having made the appropriate declaration recognizing the competence of the committee to receive and examine interstate communications) considers that another state party is not giving effect to the provisions of the convention, it may bring the matter to the attention of the committee. The committee shall then transmit the complaint to the party concerned, requesting written explanations or statements clarifying the matter and the remedy, if any, that may have been instituted by that party. If a matter referred to the committee is not resolved to the satisfaction of the states parties concerned, the committee may, with the prior consent of those states parties, appoint an ad hoc Conciliation Commission comprising five persons—who may or may not be members of the committee—with a view to achieving an amicable solution on the basis of respect for the convention.

In addition, the convention contains an optional Individual and Group Petition Procedure under which the committee may receive and consider petitions from or on behalf of individuals claiming to be victims of a violation by a state party that has recognized the competence of the committee. Among the criteria for considering a petition by the committee is a requirement that all effective available domestic remedies must have been exhausted. This rule does not apply, however, where the application of the remedies is unreasonably prolonged. If it deems necessary, the committee can recommend that the state party take such interim measures as may be necessary to avoid possible irreparable damage to the victims of the alleged violation. When the procedure is finalized, the committee communicates its views to the state party and to the author of the petition. This type of procedure is the same as those of the other U.N. human rights treaty organs.

Compensation to Victims: The Right to an Effective Remedy

The Draft Convention recognizes the need for victims of human rights violations committed by PMSCs to have access to justice. It contains a provision requiring states to consider establishing an international fund to be administered by the U.N. Secretary General to provide reparation to victims and/or assist in their rehabilitation. This, however, may not be considered sufficiently strong to reflect the growing need for stronger procedures at the international level. Considering the ineffectiveness of a large number of domestic legal systems, victims of human rights abuses committed by PMSCs should have direct access to justice. This could involve the creation of an ombudsman mechanism to guarantee access to justice to the victims, using models such as the Kosovo Ombudsman and the office of the ombudsperson created by the Security Council for individuals targeted by sanctions.[83]

Concluding Remarks

The state monopoly on the legitimate use of force, a central attribute of sovereignty on which the U.N. system of collective security is based, is a fairly recent political concept and one that is closely linked to the emergence of the modern state and the development of democratic institutions in Western Europe.

Although certain functions involving the use of force may be delegated to private actors, PMSCs' activities raise questions having different implications in countries with a firm monopoly on the use of force and in countries that have not reached that stage and lack such a monopoly. In the latter countries, such as Afghanistan and most African countries, or in countries where a monopoly has been destroyed, such as Iraq, the use of private force can be extremely problematic for building state democratic institutions.

At present, there is no comprehensive regulatory framework for the activities of PMSCs. States, nonetheless, bear the responsibility for holding private military and security companies accountable for human rights violations and are therefore required to develop national rules to regulate PMSCs. These rules must ensure that PMSCs are held criminally responsible for the conduct of their employees and that compensation mechanisms are established for victims of human rights violations.

Any national response to regulate PMSCs will have to take into consideration the transnational nature of the security industry. National legislative efforts, well intentioned though they may be, will never be successful without a coordinated response by the international community to the increasing role of the private sector in war and peace. In order for any regulatory framework to be effective it is vital to interlock legislation, regulation, and monitoring mechanisms at the national, regional, and international levels.

The research carried out by the U.N. Working Group on the use of mercenaries underscores that a national/international system based on self-regulation is insufficient. Democracies are being hollowed out by the development of a multinational security industry that merges the public and the private sectors, government, and big business. If we do not want to see the market of the security industry imposing its own rules on democracy,[84] it becomes imperative to establish international and national frameworks that are regulated and monitored by states.

Given the lack of agreement on a number of issues and the strong opposition of influential Western governments to a binding international instrument in the form proposed by the U.N. Working Group on the use of mercenaries, there is a need for the Open-ended Intergovernmental Working Group to identify and synchronize the complementarities that do exist between the Draft Convention, on one side, and the Swiss Initiative comprising the Montreux Document and the International Code of Conduct, on the other.[85]

The sessions of the Open-ended Intergovernmental Working Group provide member states that are in favor of an international binding regulatory framework with the opportunity to convince those Western states that favor a self-regulatory framework that

> *certain functions such as combat, arrest, detention, interrogation, and intelligence gathering, are acts of states no matter who performs them. They therefore give rise to state responsibility. Under this approach the outsourcing of state functions is permitted but the outsourcing of state responsibility is not.*[86]

The Swiss draft law points out, albeit insufficiently, how complementarities that already exist between a binding instrument such as the international Draft Convention and a self-regulatory code of conduct could be integrated into a national regulatory framework.

This approach may also enable the integration into an international binding regulatory framework of the international code of conduct for PMSCs, developed under the Swiss Initiative, as well as any other regulations developed by the security industry. It would also be necessary to translate a number of the ''Good Practices'' included in the Montreux Document into binding international legal obligations.

Because there exists a protection gap—due to the fact that the contents of international human rights obligations of states are not always specifically determined in international law, with a consequent lack of effective remedies for human rights violations—the proposed convention would fill such a gap. States should not be relieved from their obligations and responsibilities under international law by the mediation procedure proposed under the ''mechanism'' foreseen in the international code of conduct. It is the responsibility of sovereign states to ensure that effective access to justice and appropriate remedies are available to victims of human rights violations committed by PMSC personnel.[87]

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79 United Nations Human Rights Council, A/HRC/15/25, 2 July 2010, Annex, Art. 13.

80 Ibid, Art. 16.

81 U.K. Government Green Paper, "Private Military Companies: Options for Regulation," HC 577 (London, February 2002), para. 73.

82 White, ''Due Diligence Obligations of Conduct,'' see the Conclusion.

83 Nigel White, ''The Privatization of Military and Security Functions and Human Rights: Comments on the U.N. Working Group's Draft Convention,'' *Human Rights Law Review* 11 (2011): 149.

84 Sharon Weinberg, ''Windfalls of War: Pentagon's No-bid Contracts Triple in 10 Years,'' *i.watch news*, August 29, 2011. See also Commission on Wartime Contracting in Iraq and Afghanistan, Final Report to Congress, *Transforming Wartime Contracting, Controlling Costs Reducing Risks* (August 31, 2011); and Sarah Stillman, ''The Invisible Army,'' *New Yorker*, June 6, 2011.

85 I cannot but underscore the ethical implications of the U.N. mandate and refer to the point raised by John Kleinig during our workshop as to whether contractors are ethical or whether they do ''unacceptable damage to the dignity of'' the human being.

86 White, ''Due Diligence Obligations of Conduct,'' see the Conclusion.

87 The principle of effective remedy or effective reparation is enshrined in all modern international human rights treaties. International law requires states to provide an effective remedy of a right guaranteed by international law.