International, Corporate, and Individual Responsibility for Conducts of Private Military and Security Companies[1]

Good afternoon to everybody,

Thank you very much to the organizers of the Round Table for allowing me the opportunity to be here today. It is a great honour to be speaking in front of you.

I. The quest for international accountability and its limits

The recourse to private military and security companies (PMSCs), which is particularly significant in situations of armed conflict and military occupation, to perform functions ranging from combat activities to the protection of diplomatic personnel is not an entirely new phenomenon.[2] What is largely unprecedented is the scale of the use of private contractors, and the dangers that their often reckless conduct poses for local populations.[3] Operating under a veil of secrecy and anonymity, often protected by immunities from local jurisdictions, members of PMSC have, at times, committed crimes and, not infrequently, States have used them to skirt their obligations under international law.[4]

[1] Presentation by Andrea Carcano (Ph.D., University of Milan, 2008; LL.M., NYU, 2005) currently a Lecturer in International Law with the LL.M. Program in International Crime and Justice (University of Turin and UNICRI), formerly a legal officer with the Appeals Chamber of the ICTY. This paper purports to sketch some key legal issues that arise in matter of accountability for the conduct of private contractors in international law. The goal is to arrive at a more comprehsive paper containing an updated appraisal of the status of accountability for conducts of private contractors in international law (having regard to both international and non-international armed conflicts and dedicating one specfic section to the debate as to whether private companies should be held directly accountable under international law), and undertake a critical reflection on the contribution that the Montreux document may give to ensure a mechanism of effective accontability. Criticisms, remarks, and suggestions are most welcome. I can be contacted at andrea_carcano@yahoo.it or by phone at 0614161640.

[2] Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press, 2003) 19-39; Louise Doswald-Beck, 'Private Military Companies under International Humanitarian Law' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford University Press 2007) 120–3.

[3] David Isenberg, 'A Government in Search of Cover: Private Military Companies in Iraq' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford University Press 2007) 82–93; Emanuela-Chiara Gillard, 'Business Goes to War : Private Military Security Companies and International Humanitarian Law' (2006) 88 International Review of the Red Cross 525-572. Francesco Francioni, 'Private Military Contractors and International Law: An Introduction' 2008 (19) European Journal of International law, 961-2.

[4] Peter Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 Columbia Journal of Transnational Law 521–6.

Speaking from a normative perspective, tackling these problems requires, as the Montreux documents laudably tries to do, protracted efforts in two domains: (i) the articulation and clarification of a set of substantive rules that can govern and restrain the conduct of PMSCs; and (ii) the identification and concrete application of procedural/enforcement rules (or secondary rules under Herbert Hart's terminology) that can ensure an effective system of accountability.[5] My presentation focuses on the latter of these two aspects, namely, identifying and applying procedural and enforcement rules.[6]

(*pause*) If we look at contemporary international law as a whole and we consider international law as it is and not as we think it should be, it must be realistically admitted that it alone cannot ensure full accountability for PMSCs. As a normative system of States, by States, for States, international law does not bind those that are not its subjects. PMSCs are not—at present— neither active nor passive subjects of international law—and hence, unless States agree otherwise (for instance via a specific agreement imposing obligations on them), the PMSCs are bound by international law only indirectly through national laws, or when their conduct is attributed to a subject of international law such as States.[7] Also for this reason, international law

[5] Focusing on this effort see the studies of Lindsey Cameron, 'Private Military Companies: their Status under International Humanitarian Law and its Impact on their Regulation (2006) 88 International Review of the Red Cross 573-598; Kathryn R. Johnson, 'Shields of War: Defining Military Contractors 'Liability for Torture' (2012) 61 (5) American University Law Review 1417-1431; Carsten Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19(5) European Journal of International Law 989-1014; Emanuela C. Gillard, 'Business goes to War: Private Military/Security Companies' (2006) 88 International Review of the Red Cross 525, 549-572; Juan C. Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder' (1998) 34 Stanford Journal of International Law 75-161; Steven L. Schooner, 'Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsources, Government' (2005) 16 Stanford Law and Policy Review 549; and Laura A. Dickinson, 'Military Lawyers, Private Contractors, and the Problem of International Law Compliance' (2010) 42(2) New York University Journal of International Law & Politics 355-388.

[6] It deals with the circumstances under which the PMSCs themselves; the States and corporations hiring on them; and the individuals (and their superiors–whether military or civilian) employed in a PMSC can be held accountable in contemporary international law.

[7] See in this regard International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, Supplement No. 10 (A/56/10) 40–9 (Draft Articles Commentary). The matter of the responsibility of international organizations (an issue raised by one of the participants) for the conduct of private contractors was not part of the topic of the presentation. Tackling the issue will, of course, require a

would not normally govern the transaction between a private corporation and a PMSC. Therefore, a full accountability mechanism requires an orderly division of labour: international law must be complementary to, and work in concomitance with, norms issued by regional organizations such as the European Union, and, most important, domestic laws.[8]

On the other hand, it should be equally stressed that, by virtue of the principle of individual criminal responsibility, the personnel of PMSCs is directly responsible *qua* private individuals (including their civilian and military superiors) under international law and liable—when the relevant criteria are met—to charges of war crimes and, eventually crimes against humanity.[9] Operating both at the international and domestic level, the principle of individual criminal responsibility is probably the sharpest arrow in the quiver of international accountability. But for a number of reasons—some of which will be recalled here—the full potential of this "weapon" is difficult to unleash.

II. The Montreux Document and the Draft Articles on State Responsibility

distinct paper as the matter is complex and the related legal regime has yet to consolidate in a clear set of norms. One key issue is whether the regime of responsibility of international organizations should follow the model of State Responsibility or be a *sui generis* one keeping into account the specifities of the status of international organization and the functions they perform. On the responsibility of international organisations for the conduct of private actors see International Law Commission, Seventh Report on Responsibility of international Organizations. A/CN.4/610, 27 March 2009, 8-14. See also for some pertinent remarks Nigel White, Sorcha MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19(5) European Journal of International Law 965-988.

[8] See in this regard Kristine A. Huskey and Scott Sullivan, 'United States: Law and Policy Governing Private Military Contractors after 9/11', in Mirko Sossai and Christine Bakker (eds) *Multilevel Regulation of Military and Security Contractors : the Interplay Between International, European and Domestic Norms* (Hart 2012) 331-380. Clive Walker and David Whyte,'Contracting out War? Private Military Companies, Laws and Regulation in the United Kingdom' 54 (2005) International and Comparative Law Quarterly 651-689. See also in general Giulia Pinzauti, 'Adjudicating Human Rights Violations Committed by Private Contractors in Conflict Situations before the European Court of Human Rights' in Francioni and Natalino Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (OUP 2011) 149-170.

[9] As well discussed in Chia Lehnardt, 'Individual Liability of Private Military Personnel under International Criminal Law'(2008) 19(5) European Journal of International Law 1015-1034.

Articles 4 to 8 of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) set out the conditions under which a given conduct can be attributed to a State. Clearly based on, and inspired by the Draft Articles, Articles 7 and 8 of the Montreux Document provide for the conditions under which a State may be responsible for the conduct of PMSCs and their personnel for violations of IHL, human rights, or other rules of international law. I would argue that the solutions adopted in the Montreux document—and proposed to the attention of States—constitute a sort of *lex specialis* that, operating in accordance with customary international law, can specify and qualify the content of the rules of State responsibility in the peculiar field of armed conflict and PMSCs.[10] I shall discuss the relevant provisions of the Montreux Document in turn.

III. Responsibility for de *jure* or *de facto* incorporation into the armed forces

Under letter (a) of Article 7 of the Montreux Document, the responsibility of a State is engaged when a PMSC acts as an "organ of the State". The incorporation of a PMSC into the armed forces of a State may happen not merely because of the existence of a contract, but because of

[10] One of the participants at the Round Table aptly rose the problem of the relationship between the IHL regime of State responsability and the general rules on State Responsibility. This is an important point that requires serious reflection. In my view, the Montreux Document draws on the Draft Articles on State Responsibility. Accordingly, this paper seeks to show where there is an import from those rules into the field of IHL and where there is a departure from them based on the specifities of IHL. The approach adopted in the Montreux Document may suggest that the State responsibility regime in matter of violations of international humanitarian law is not a 'self-contained regime' operating indepedently from the Draft Articles on State Responsibility. Whether the approach adopted in the Montreux Document is convincing from a normative perspective and should thus be endorsed as such, that is without modifications, requires further analysis and research. This will be undertaken in future versions of this paper. On this topic, for some pertinent analysis see Marco Sassoli, 'State responsibility for violations of international humanitarian law' (2002) 84 IRRC 401-433. See also Carsten Hoppe, 'Private Conduct, Public Service? : State Responsibility for Violations of International Humanitarian Law committed by Individuals providing Coercive Services under a Contract with a State' in *Les règles et les institutions du droit international humanitaire à l'épreuve des conflits armés récents*, Académie de Droit International de la Haye, (Martinus Nijhoff Publishers) 2010, 411-483.

what is provided in the contract, which must be issued in accordance with the domestic legislation of the State.[11]

Under letter (b) of Article 7, the Montreux Document provides for the responsibility of States also in cases where a PMSC or its personnel are *de facto* incorporated in the armed forces of States because they are 'members of organised armed forces, groups or units under a command responsible to the State'.[12] This is the case of irregular armed forces, which are not incorporated within the internal law of the State, but still may be involved in combat activities alongside with States.[13]

The test articulated in letter b of Article 7, that is "of being under a command responsible to the State" is different from the test articulated in the field of State responsibility. In its judgement of 26 February 2007, in the *Genocide* case, the ICJ stated:

> persons, groups of persons or entities' may for the purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument.[14]

While the wording employed in the Montreux document is clearly different, I would submit that the differences should not be exaggerated. The test used in the Montreux Document is a 'tailor made' test, which suits the contest of an armed conflict. It is an example of how the Montreux

[11] Under Article 7(a) of the Montreux Document 'Contracting States' are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, 'in particular if they are: incorporated by the State into their regular armed forces in accordance with its domestic legislation'.

[12] This formulation reproduces *verbatim* the formulation contained in Article 43 of Additional Protocol I, which does not distinguish between regular and irregular forces. See on Article 43 of Additional Protocol: International Committee of the Red Cross, *Customary International Humanitarian Rules* (CUP 2005), vol 1, 11-14 (to be checked).

[13] Private contractors are not necessarily members of the armed forces of a party to conflict whether regular or irregular. If they do not perform combat activities, they could, on a case by case basis, be deemed to fall under the category of those accompanying the armed forces (such as aircraft crews, war correspondents, supply contractors, members of labour units). This category is defined in Article 4A(4) of the Geneva Convention III. This category covers "persons who accompany the armed forces without actually being members thereof". See in this regard, Giulio Bartolini, 'Private Military and Security Contractors as "Persons Who Accompany the Armed Forces' in Francioni and Ronzitti (n 8) 218-234.

[14] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, ICJ Reports 2007, para 392.

Document—insofar it accords with customary international humanitarian law—operates as *lex specialis* in respect of the Draft Articles on State Responsibility.

(i) Official versus private capacity

Once the conduct of a PMSC is attributed to a State because the PMSC is incorporated *de iure* or *de facto* in its armed forces, the problem arises of delimiting the purview of such responsibility. In the field of state responsibility, the responsibility of a State as concerns the 'organs of the State' or entities equated to it, is triggered by conducts committed in a seemingly official capacity. But the distinction between official and private conduct is less pressing in the field of IHL where humanitarian concerns are clearly at the forefront.[15]The Montreux Document does not provide an explicit answer on this point. A specific answer may be found in Article 91 of Additional Protocol I, which reflects customary international law.[16] Article 91 reads:

> A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

This approach found recent confirmation in the ICJ's judgment of 19 December 2005 in the *Armed Activities* Case (Congo versus Uganda) where the ICJ held that

> According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention… as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.[17]

I would then conclude on this point by stating that once a PMSC is incorporated *de iure* or *de facto* within the armed forces of a State, that State will be responsible for the whole conduct of the PMSC insofar as a PMSC is part of its armed forces, including cases in which a PMSC acts

[15] The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connection with the official function and was, in fact, merely the act of a private individual. See Draft Articles Commentary (n 7) 42.
[16] Case Corcerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*)19 December 2005, ICJ Reports 2005, para 214.
[17] Ibid.

contrary to the instructions received, or exceeds its authority in accordance with Article 7 of the Draft Articles on State Responsibility.

(i) The problem of immunity

Nothing would be more misleading than assuming that once a given conduct of a PMSC is attributed to a State, then full accountability is realised. Not only, the process for the activation of State Responsibility is complex, if not cumbersome and an injured State, which is willing to activate it, needs to emerge. But also the identification of a PMSCs' conduct with that of a State, particularly in situation of armed conflict, may trigger immunity mechanisms at the domestic level, preventing the exercise of jurisdiction over the private contractors. This is what happened in the *Caci* case.[18]

In a judgement issued on 11 September 2009, the US Court of Appeals for the District of Columbia dismissed the suits brought against two military contractors that were involved in the interrogation of prisoners at Abu Ghraib because essentially the contractors were part of a 'military mission acting under military command'.[19] They were subject to military direction, said the Court, even if not subject to normal military activity.[20]

The Federal Court of Appeals remarked that the Federal Tort Claims Act, while providing a course of action against the acts of the US government, maintains immunity for 'any claims arising out of the combatant activities of the military or armed forces'.[21] And, then, it elaborated the following test:

[18] *Haidar Muhsin Saleh et al. v. Titan Corporation*, Caci International, United States Court of Appeals, 11 September 2009. (*Caci* Decision)
[19] For the Court of Appeals there was 'no dispute that they were in fact integrated and performing a common mission with the military under ultimate military command.' *Caci* Decision at 11.
[20] Ibid.
[21] Ibid.

> during wartime where a private service contractors is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities should be preempted.[22]

The Court of Appeals observed that the plaintiffs are unwilling to assert that the contractors are state actors' because 'It would virtually concede that the contractors have sovereign immunity.'[23]

IV. Exercise of governmental authority

Under letter c of Article 7 of the Montreux document, a State may be responsible for the conduct of a PMSC—without incorporating it within its forces—when empowering the PMSC to 'exercise elements of governmental authority'. The conferral of governmental authority may happen through a contract based on a State law or regulation. It is the law of the State that must empower a given entity to exercise elements of governmental authority even if it is not an organ of the State. A State may also entrust governmental authority to a PMSC when it is acting in compliance with the provisions of an international treaty. As to the latter, one example is the obligation of an occupying power to maintain public order and safety under Article 43 of the Hague Regulations. Where the protection of oilfields, for example, is viewed as a specific duty necessitated under Article 43 of the Hague Regulations, entrusting their protection to a PMSC by an occupying power may be seen as a transfer of governmental authority.

A key hurdle is, of course, to define what governmental authority means. In a sense virtually everything that the military does is a governmental function. But, whilst there is no question that PMSC personnel hired to guard military persons or objects in armed conflict is exercising governmental authority, arguably, the same may not be said in the case of a PMSC that is hired by a State to guard the installations or personnel of a private company in a conflict

[22] *Caci* Decision, at 16.
[23] Ibid. The Court remarked that the 'appellants are caught between Scylla and Charybdis cannot allege the contractors acted under color of law for jurisdictional purpose while maintaining that their action was private when the issue is sovereign immunity' at 28.

zone. This situation would be unlikely to fall within letter c of Article 7 since the purpose of the activities is to protect the employees of a private firm rather than government officials.[24]

V. PMSCs acting under the instructions or control of a State

Letter d of Article 7 of the Montreux Document provides for the responsibility of States if the PMSCs or their personnel are: (i) '[a]cting on the instructions of the State (that is the State has specifically instructed the private actor's conduct); or under its direction or control (that is actual exercise of effective control by the State over a private actor's conduct)'. [25] This norm essentially reproduced Article 8 of the Draft Articles on State Responsibility. It adopts the effective control test devised in the *Nicaragua* case[26]whose customary nature was recently reaffirmed by the ICJ in the *Genocide* case.[27] The Montreux document is right in endorsing the *Nicaragua* test. But, it should not be overlooked that the 'Nicaragua test' may be under "scrutiny". This is not only because of the case-law of the ICTY speaking of 'overall control'. But because other courts, namely the Special Court for Sierra Leone and, significantly, the ICC have adhered to 'the overall control test' in their case-law.[28]

I shall now turn to the field of individual criminal responsibility.

VI. Individual criminal responsibility

[24] Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge University Press 2011) 108.
[25] Article 8 of the Draft Articles reads: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. Jackson Nyamuya Maogoto and Benedict Sheehy, 'Private Military Companies & International Law: Building new Ladders of Legal Accountability & Responsibility" 11 (2009) Cardozo Journal of Conflict Resolution 99.
[26] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, 27 June 1986, ICJ Reports 1986, para 115.
[27] Genocide Case (n 14) paras 402–7.
[28] Prosecutor v. Lubanga Dyilo, 'Decision on the confirmation of charges', Case No. ICC-01/04-01/06, 29 January 2007, paras 210-212.

(i) Individuals

As said in the Nuremberg judgement, crimes are committed by individuals not by abstract entities.[29] Personnel of a PMSC may incur individual criminal responsibility directly under international law if they commit violations of IHL or human rights that are crimes under international law.[30] Individual responsibility is direct. It operates without the interposition of the State, but it is not automatic. Not every crime committed during an armed conflict is a war crime and thus not every person who commits a crime during an armed conflict is a war criminal.

Provided that there is an armed conflict, individual criminal responsibility operates whether or not a private contractor is incorporated in the armed forces of a party to the conflict. For the conduct of a private contractor to be considered a war crime, it is necessary to establish a nexus between that conduct and the armed conflict. The armed conflict need not to have been the cause of the commission of the crime. However, the existence of the armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.[31] Hence, if it can be established that the perpetrator acted in furtherance of, or under the guise of the armed conflict, his acts could be seen as closely related to the armed conflict and hence the required nexus would be established.[32]

[29] Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany* , Part 22, London, 1950, p. 447, available at <http://www.yale.edu/lawweb/avalon/imt/proc/judnazi.htm#common> last accessed 29 September 2012.

[30] John P. Cerone, 'The Vanishing Relevance of State Affiliation in International Criminal Law : Private Security Contractors and Other Non-State Actors' in Research handbook on International Criminal Law in Bartram S. Brown (ed) (Edgar Elgar Publishing 2011)17-3; Ottavio Quirico, 'The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law' in Francioni & Ronzitti (n 8) 423-447.

[31] *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (*Appeal Judgment*)*, IT-96-23 & IT-96-23/1-A, ICTY Appeals Chamber, 12 June 2002, para 58.

[32] Section 23 of the Montreux documents reads: 'The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality

(iii) Responsibility of Superiors

Under customary international law, the rules of command responsibility apply not only to military commanders but also to civilian superiors. In the language of the Appeals Chamber of the ICTY in the *Celebici* case:

> The Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control.[33]

Article 28 of the Statute of the International Criminal Court reflects these developments. And so does Article 27 of the Montreux Document, which reads: "Governmental officials, whether they are military commanders or civilian superiors" or "directors or managers of PMSCs" may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their "failure to properly exercise control over them, in accordance with the rules of international law.

Some of the choices made in Article 27 of the Montreux Document puzzles me, however, and leave me with questions. Article 27 does not contain the key wording 'failure to prevent or punish' as Articulated in Article 87 paragraph 2 of Additional Protocol I. It mentions that a superior could be held responsible for 'crimes under international law' because of the "failure to properly exercise control over them, in accordance with the rules of international law'. But the problem is to understand the nature of the command responsibility envisaged in Article 27. Is it a responsibility for omission? Is Article 27 requiring superiors "to exercise proper control over their subordinates" as an additional duty to the customary duties of preventing or punishing the commission of crimes? Or, is the exercise of 'proper control over their subordinates' a component of the general duty to prevent the commission of crimes?

[33] *Prosecutor v. Zdravko Mucić aka "Pavo", Hazim Delić, Esad Landzo aka "Zenga", Zejnil Delalić* (Appeal Judgement), IT-96-21-A, ICTY, 20 February 2001, para 668.

And, why Article 27 does not mention the duty to punish the commission of crimes of subordinates under their control? A clear reaffirmation of this duty would require military and civilian superiors—at the highest level—to take immediate action when learning of the commission of crimes or to be held responsible (if not accomplice) for failure to do so. This would requires establishing an internal review and accountability mechanism and/or inform the competent authorities as the commission of crimes as the case may be. By failing to mention this customary duty of superiors, there is the risk, it is submitted, that Article 27 may relax the standard of command responsibility already enshrined in customary international law. It may be giving a sort of 'normative discount' to military and civilian superiors of PMSCs making more difficult to ensure accountability for the commission of crimes.

VII. Some concluding thoughts and a proposal

I would like to conclude by underscoring that States remain (and may continue to be so in future) a key "consumer" of the services of private contractors, and it is States that may be prone to shield in one way or another, the private contractors working for them. It was an order of the CPA, the occupation administration in Iraq, that granted full immunity from Iraqi courts to private contractors in Iraq, an immunity that lasted until 2008.

At the 2009 Naples Session, the *Institute de droit international* issued a resolution where it held that 'the removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be achieved'.[34] It clarified that under customary international law 'No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.' And

[34] 2009 Naples Session, Resolution on the Immunity from Jurisdiction of the State and Persons who act on behalf of the State in case of international crimes.

recommended that ‘States should consider waiving immunity where international crimes are allegedly committed by their agents’. I suggest that the *Montreux* Document should follow a similar approach. It should point out that under customary international law, functional immunity, as opposed to personal immunity, does not cover international crimes. Perhaps, this could be a step—though by no means the only one— towards a more effective system of international and national accountability for PMSCs and their personnel. I thank you for your attention. *Je remercie aussi les interprètes pour leur patience.*