



# Addressing the use of private security and military companies at the international level

Far from being merely a seductive notion, the reality today is that many states, even powerful democratic states are increasingly relying on private military contractors to manage their military efforts in conflicts and in peacetime.<sup>1</sup>

## INTRODUCTION

The debate on the use of private security providers and services in Africa's conflicts and post-conflict situations has in the last decade grown in prominence within the broad field of security studies. This has also tremendously shaped the thinking of international lawyers as the involvement of private military/security companies (PMSCs) in African conflicts has had a significant bearing on both International Humanitarian Law (IHL) and International Human Rights Law (IHRL). As conflicts continue to be more complex in many countries around the world, the use of PMSCs has also increased. In contemporary times, so complicated are conflicts that there has also been a steady increase in the use of unmanned systems, especially in places like Iraq and Afghanistan. According to Singer, by the end of 2008 there were '5 331 unmanned aircraft systems in the American inventory, from vigilant Global Hawks and armed Predators that circle thousands of feet overhead to tiny Ravens that peer over the next city block' (Singer 2009:105). The question that emerges is: to what extent can the use of unmanned aircraft systems by PMSCs in African conflicts be avoided or stopped?

The key premise of this paper is that the use of PMSCs in conflict and post-conflict situations is here to stay due to the fact that PMSCs have become indispensable non-state actors whose services have become an integral part of security and military arrangements. They have come to be seen as an 'indelible feature of large-scale military and even humanitarian interventions even as their existence and actions raise a host of ethical

and legal concerns' (Menon 2008:4). While the rise of outsourcing security services has been well documented, the debate around the use and misuse of PMSCs in conflict and post-conflict situations is not yet advanced. There is still a need to address the legal implications of the use of PMSCs in various circumstances resulting from conflicts.

According to the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict ('Montreux Document'), governments, companies and individuals are nowadays often reliant on PMSCs in areas of armed conflict.<sup>2</sup> This has given rise to the demand especially by States for clarification of pertinent legal obligations under IHL and IHRL. The key issue, therefore, is the extent to which contracting entities should engage PMSCs in conflict and post-conflict situations. From States' practice, both in Africa and beyond, it is clear that PMSCs are, in one way or the other, heavily relied upon during African conflicts and in post-conflict situations. While both IHL and IHRL are applicable during armed conflicts, the former as opposed to the latter is also applicable during post-conflict situations. The extent to which PMSCs should be involved in these situations is still unclear. This is complicated by the fact that there is still no universal definition of PMSCs and their roles are still undefined, especially at the international level.

The aim of this paper is firstly, to contribute to the scholarly debate regarding the use of PMSCs in conflict and post-conflict situations. Secondly, to comment on the current Draft International Convention on the Regulation, Oversight and Monitoring of Military and Security Companies (Draft Convention).<sup>3</sup> The paper is therefore divided into two parts. In the first part, the paper will define the term 'PMSCs' in order to place the discussion in proper context. This will be followed by an examination of some of the most important PMSCs in

African conflicts; the use of PMSCs in combat zones and in the context of Africa Command (Africom) and the implications thereof; the generally unregulated recruitment of Africans by PMSCs; and some African approaches to the use of PMSCs in conflict situations. In the second part, the paper will provide a general overview of the Draft Convention, its purpose, scope of application and the international oversight and monitoring it envisages. The effectiveness of the Committee on Regulation, Oversight and Monitoring of Private Military and Security Companies will be assessed as well as the obligations of intergovernmental organisations.

## DEFINING PRIVATE MILITARY AND SECURITY COMPANIES

According to the Montreux Document, PMSCs are ‘private business entities that provide military and/or security services, irrespective of how they describe themselves’ (2008:6). It identifies military and security services as including, in particular, the ‘armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.’<sup>4</sup> The Montreux Document’s definition of PMSCs is not without flaws. For example, the definition does not expressly recognise the fact that a service which PMSCs provide is engaging in combat operations as is the case in Iraq and Afghanistan. What is commendable is that it does highlight the fact that PMSCs describe themselves differently. For example, there are those private business entities which call themselves PMCs and provide security services and those which call themselves PSCs and provide military services. Sometimes these entities provide both military and security services.

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The Montreux Document’s definition assumes that such entities may only be ‘private’; yet, it is also possible that they may be businesses that are co-owned in partnership with the public. This, therefore, presupposes that if the business is a private-public partnership, it cannot be said to be a PMSC. What has also transpired is that some PMSCs have harboured mercenary units within them. According to the Commission on Human Rights Report on the question of the use of mercenaries as a means of

violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by the former Special Rapporteur, Ballesteros, ‘today’s mercenaries do not work independently. They are more likely to be recruited by private companies offering security and military advice and assistance, in order to take part or even fight in internal or international armed conflicts.’ (1999).

Moving away from the provocative term ‘mercenaries’ and following the all-inclusive term of PMSCs, a new term has since emerged. Brooks and Rathgeber refer the private sector support for military and stability operations to ‘contingency contractors.’<sup>5</sup> It is, however, not always the case that PMCs and/or PSCs are engaged on a contingency basis. The Draft Convention defines a PMSC as ‘a corporate entity which provides on a compensatory basis military and/or security services including investigation services, by physical and/or legal entities.’<sup>6</sup> Although the Draft Convention defines military services and security services, it does not do so comprehensively. For example, it defines military services as ‘specialised services related to military actions’ which include services such as strategic planning; intelligence; investigation; land, sea or air reconnaissance; flight operations of any type, manned or unmanned; satellite surveillance; military training and logistics; material and technical support to armed forces; and other related activities.

This definition is open-ended as it makes use of the word ‘including’. Some of these services are also related to security services. What qualifies any service as a military service is that first, it must be specialised, and secondly, that it must be related to military actions. The question, which may be posed, is whether the provision of mobile toilets to armies in the battlefield may be deemed to be a specialised service related to military actions? Perhaps there is a need to define what a ‘military action’ entails. What is of interest is the fact that the most obvious military action in the form of a combat operation is not included in the definition of a military service.

The definition of security services refers to ‘armed guarding or protection of buildings, installations, property and people, police training, material and technical support to police forces, elaboration and implementation of informational security measures and other related activities.’<sup>7</sup> The use of the words ‘and other related activities’ also makes this definition open-ended. Other services may be deemed to fall under the ‘other related activities’ category.<sup>8</sup> There is a need to tighten these definitions. From the above-mentioned description, the definition of PMSCs remains a complex issue because it is not comprehensive enough to cover everything that PMSCs are practically involved in.

## THE CLASSIC EXAMPLE OF A PMSC IN AN AFRICAN CONFLICT

The typical example of the use of a PMSC in an African conflict is that of the now defunct South African-based company, Executive Outcomes (EO), in Sierra Leone between 1995 and 1997. Eeben Barlow, a veteran of the South African Defence Force (SADF), formed EO in 1989. What is most striking about EO is the fact that it openly participated in offensive combat operations at the instance of governments and multinational corporations. It was not until its involvement in Sierra Leone that serious concerns were raised, especially because of its growing interests in Sierra Leone's rich mineral resources, which became a form of payment to the organisation for the services rendered. In fact, a PMSC's interest in any activity is driven by the pursuit of maximum profits. Ensuring peace and security is, arguably, a secondary consideration.

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EO was contracted by the Sierra Leonean Government in order to train and support its military force, the Republic of Sierra Leone Military Forces (RSLMF). Accordingly the contract mandated EO to provide between 150 and 200 fully equipped soldiers in order to provide assistance to the RSLMF in its efforts to fight against the rebel faction, the Rebel Revolutionary United Front (RUF). It is reported that in just one month after the arrival of EO; the rebels were literally quashed as many died during an offensive that was carried out by both EO and the RSLMF. Having gained control of the capital, EO led a series of offensives against the RUF in the diamond areas in the country and also attacked its headquarters, which marked the beginning of a temporary ceasefire.

While it is always said that EO succeeded in bringing peace to Sierra Leone, it must be noted that its engagement was to a very large extent driven by the desire to maximise their profits by all means and at all costs. The RUF entered into forced negotiations which also saw the termination of the contract between the newly elected government and EO. The contract was terminated owing to the prospects of a UN peacekeeping force as well as strong international resistance against EO. The departure of EO from Sierra Leone in 1997 marked the eruption of conflict again which resulted in the military coup that led to the dismantling of the Sierra Leonean government.

While reliance on PMSCs by states can be said to contribute towards peace and security efforts positively, this

is only on a very temporary basis. PMSCs cannot in any way sustain long-term stability. This is also illustrated in the case of Iraq and Afghanistan. The active participation in offensive combat operations by EO illustrates a new modality of mercenary activity undertaken not by an individual, as it was traditionally done, but by a contracted powerful company which was well organised. Fighting in exchange of money has its own disadvantages especially when the money is no longer available to sustain the PMSCs' work. For this reason, mining concessions as a form of payment become an alternative means to sustain the continued engagement of PMSCs.

## THE USE OF PMSCS IN COMBAT ZONES

It has been argued that the privatisation of military combat functions is not a new phenomenon.<sup>9</sup> Both PMSCs and mercenary forces have been involved in warfare 'from long before the nation state was acknowledged to be the principal political construction.'<sup>10</sup> Even the so-called 'contingency contractors' have been around for many years, though according to Brooks and Rathgeber,<sup>11</sup> their roles and numbers depend entirely on demand. The question is whether, as a result of the long history of warfare, Africa should accept and recognise the use of PMSCs (or even the contingency contractors) for combat purposes? Engaging in combat is a core military function, which, if left to non-state actors may undermine any peace efforts in given circumstances. According to a written statement submitted to the UN Working Group on the Use of Mercenaries by Human Rights Advocates, '[u]nlike state-run military and police forces, which are subject to fairly strict regulation by their governments and international laws, PMSCs act with relative impunity in the current international and domestic legal landscape.' (2008). Hence Dasgupta argues that the use of PMSCs by states becomes worrisome because it has a potential of compromising the states' legitimate monopoly over the use of force.<sup>12</sup>

It is a known fact that some commentators have been very keen in calling upon states to legitimise the use of PMSCs in combat operations.<sup>13</sup> While there is still a debate around the question of whether PMSCs should engage in combat operations, which is traditionally a core military function, it is still also not clear whether such combat operations should be offensive or defensive. The initial Draft International Convention on Private Military and Security Companies,<sup>14</sup> (which has since been revised and superseded by the Draft Convention dated 13 July 2009) by the UN Working Group on the Use of Mercenaries, sought to put this debate to rest by providing that the envisaged specialised services related to military actions, which may be undertaken by PMCs, may include that of combat operations.

The initial Draft Convention defined a PMC as ‘an organisation, established under the legislation of the state party to provide on a compensatory basis military services by physical persons and legal entities which have a special authorisation (license).’ By ‘military services’ the initial Draft Convention referred to ‘specialised services related to military actions including combat operations, strategic planning, intelligence, logistics, training, material and technical support and other.’ However, whether this implied attempt to legitimise the engagement of PMSCs in combat operations would be accepted by a majority of states remains but a speculative exercise. One thing is certain though: the initial Draft Convention did not seek to legitimise the engagement of PMSCs in combat operations, offensive or defensive. Without any doubt, this arguably authorised PMSCs to become what could be called ‘modern legal mercenaries’. Whether Africa is ready for these ‘modern legal mercenaries’ remains a moot question. Many lessons have been learned through the engagement of EO in Sierra Leone.

Resulting from the engagement of PMSCs in combat zones such as Iraq and Afghanistan, a heated debate ensued regarding the propriety and accountability of PMSCs. The use of PMSCs in combat operations, it would seem, has since become an acceptable phenomenon, especially in the western world.<sup>15</sup> This, however, is not necessarily the case in Africa. In contemporary times, no African state boasts of using PMSCs in combat zones. Hence, therefore, the use of the word ‘mercenary’ is constantly tossed around whenever PMSCs operate in combat zones.

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Within the African context, questions concerning PMSCs’ civil and criminal liability have not even been a consideration as they are generally seen as illegal organisations. The irony is of course in the use of PMSCs by some African leaders in exterminating rebel factions which seek to challenge their rule. In this regard, those PMSCs which come to their assistance are seen as advancing a national peace effort while those which subsequently come to the rebel faction’s assistance are considered mercenaries deserving to be eliminated. This

double standard speaks very loud to the need to define PMSCs universally and to identify those PMSCs, which are desirable from those which are not.

Despite the general acceptance of the use of PMSCs in combat operations, especially those contracted by the world superpowers, the question which Africa needs to confront is whether or not PMSCs should indeed be used in combat operations as is the case in Iraq and Afghanistan. The use of PMSCs in combat operations points to the fact that the contracting states are in fact incapable of undertaking their responsibilities. Kestian notes that the reality is that these civilians employed by PMSCs are an ‘integral part of the war effort’.<sup>16</sup> Supporting this assertion is retired Army General, Barry McCaffrey, who maintains that, ‘[W]e’ve got an armed forces in uniform that is incapable of carrying out the current national-security strategy,’ and without contractors, ‘our war effort collapses.’<sup>17</sup> The reality of the matter is that the power of a so-called ‘superpower’ is to some extent augmented by PMSCs. Again the issue concerning the heavy reliance on PMSCs introduces the question of whether state armies are in any way efficient in ensuring national security without the support of PMSCs?

The use of PMSCs in combat zones becomes complicated where the employees of PMSCs get injured. Kestian<sup>18</sup> narrates a story of a truck driver who made ends meet by serving as a truck driver and driving a camouflaged fuel tanker without armour plating, in military-led convoys to deliver fuel to various military bases in Iraq. After being hit by a sniper in the knee during one of these convoys, and upon his return to the US, he tried to get treatment for his injuries but he was turned away from veteran hospitals. He was awarded a ‘Defense of Freedom’ medal by the Pentagon but was not assisted in getting help to deal with his nightmares and pain. What was even more unfortunate was the fact that his own insurance company denied him medical treatment because of a lack of documentation. Many lessons could be learned by Africa from this unfortunate situation. Many Africans are recruited to work in combat zones by PMSCs without any proper regulatory or control mechanisms.

## THE UNREGULATED RECRUITMENT OF AFRICANS BY PMSCS

That Africa has become a recruitment ground for PMSCs is not in dispute. Evidence shows that PMSCs and recruitment agencies have been very active in securing African expertise in order to fulfil their mandates in conflict situations. As early as the 1990s, South Africans who were part of the former South African 32 Battalion (a specialised unit of the former SADF disbanded in 1992) were recruited to work for PMSCs in a South African mining



town known as Pomfret.<sup>19</sup> Understandably so, former SADF members had to exercise their constitutional right to choose a trade, occupation, or profession freely in terms of section 22 of the South African Constitution 1996 (Act 108 of 1996). This right is, however, not absolute in the sense that its enjoyment is subject to section 198 (b) of the South African Constitution, which provides that the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in the Constitution or national legislation. That national legislation is in existence.

The recruitment exercise of South Africans by PMSCs was in violation of the South African Foreign Military Assistance Act 1998, (Act 15 of 1998) which obliged any South African citizen seeking to work for a PMSC abroad to obtain authorisation from the National Arms Control Committee (NACC). This recruitment exercise continued with the result that in 2008 the estimated number of South Africans, mainly former police officers and soldiers, stationed in Iraq stood at an astounding figure of 10, 000. (Human Rights Council, 2008).<sup>20</sup> Human Rights Advocates vociferously argue that '[t]his alarming trend, combined with the alleged violations of international labour standards, raises the concern that the recruitment of third-party nationals by PMSCs may comprise human trafficking.'<sup>21</sup>

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Due to the embarrassment caused by private military and security contractors in conflict areas, particularly the heightened risk of human rights abuses, a call was made for their vetting.<sup>22</sup> Perrin refers to the hard lessons learned by other governments in Iraq when an investigation revealed that a former British Army soldier who had been jailed for working with Irish terrorists, and a former South African soldier who had admitted to firebombing the houses of more than 60 political activists during the apartheid era, were working for a PMSCs in Iraq. It is for this reason, among others, that South Africa has taken the issue of the use of PMSCs very seriously, taking drastic measures to minimise and possibly end it through legislation.

Resulting from the proposed South African regulatory framework in the form of the very stringent

Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Act 2006 (Act 27 of 2006), an association known as the Pan African Security Association (PASA) was established by former members of the South African 32 Battalion in 2008. According to the PASA website, the association was established in order to 'ensure that security and related contracts in Africa are solely discharged by legitimate companies complying with internationally accepted regulatory standards and the laws and regulations of African states.'<sup>23</sup> It is not very clear what exactly the 'security and related contracts' to be undertaken by the members of PASA are. What is noteworthy is the fact that PASA aims at ensuring that South African PMSCs are legitimised and recognised as part and parcel of the private security industry in South Africa capable of undertaking various tasks within Africa and beyond.

PASA generally models itself on the British Association of Private Security Companies (BAPSC), based in London, and IPOA, The Association of the Stability Operations Industry (formerly the International Peace Operations Association (IPOA), based in Washington DC, USA, which have been very active in ensuring that these organizations are recognised as integral components within the security field. One of the main challenges that will face PASA, however, is none other than the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict 2006 (Act 27 of 2006), which is a very stringent law that will, in all likelihood, prohibit its members' security and related activities beyond South Africa's borders. Moreover, because the founders of PASA are linked to the notorious South African 32 Battalion, chances that the association will eventually be recognised as a legitimate association representing South African PMSCs, are, if none existent, very slim.

Representing the South African ANC-led government, the former South African Defence Minister, Mosiuoa Lekota noted that '[p]rivate military or security companies are able to intervene in conflicts, tilting the balance of power in favour of their paymasters [and] they have the potential to undermine legitimate constitutional democracies.'<sup>24</sup> Resulting from what the South African government perceives the PMSCs' capability to be, the regulatory framework is arguably aimed at ensuring that, by all means possible, South African PMSCs and the recruitment of South Africans with military/security expertise by PMSCs, do not flourish. The argument that is always made in this regard is that the PMSC industry will be pushed underground as very few, if any at all, will subject themselves to a cumbersome process of obtaining authorisation for the purpose of rendering military or security (and related) expertise beyond South Africa.

The recruitment of Africans by and/or for PMSCs is not only taking place in South Africa, a country with its own turbulent political history which, in 1994, culminated in a new South African constitutional dispensation. In Uganda, for example, a study by Kirunda (2008: 17) revealed that a considerable number of Ugandans were recruited by foreign PMSCs through a private security company known as Askar Security Service. Askar Security Service's updated website states that by 28 March 2009 the company had successfully recruited over 600 security personnel from Uganda for a US-based security company. What is of interest here is that some 600 so-called Third Country Nationals (TCNs) were deployed at five camps in Iraq and performed security duties for a primary contractor under contract with the US armed forces.<sup>25</sup> Because Uganda lacks a regulatory framework which could control the recruitment of Ugandans by PMSCs, it could be argued that this kind of activity may, as human rights advocates (2008) maintain, comprise human trafficking.

It has been reported that Namibia is also faced with the challenge of its citizens being recruited by PMSCs contrary to the Namibian laws. In 2007, a firm known as the Special Operations Consulting-Security Management Group (SOC-SMG) openly announced a recruitment drive by running adverts in local newspapers.<sup>26</sup> It transpired that a local recruitment company known as APS Personnel had an agreement with SOC-SMG, providing for the recruitment of Namibian citizens with military, police, or security experience to serve as security guards protecting American economic interests in conflict areas where the US had a presence. It was also alleged that the Namibian Ministries of Labour, Trade and Industry and Safety had in fact authorised this exercise.<sup>27</sup>

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The above-mentioned examples are a tip of an iceberg because many Africans are recruited by PMSCs, sometimes through agents, without any clear regulatory and control mechanisms within the continent. The absence of such effective regulations means that statistics of the number of African citizens that are currently employed by PMSCs are inadequate. Also, there are no guarantees that Africans who are eventually recruited into PMSCs operating in conflict zones will have their labour rights protected. Furthermore, there are no guarantees that,

as result of their involvement in such conflicts, they will be treated for what is known as 'shell shock', which is a psychological effect of having been involved in combat operations.

## THE POSSIBLE USE OF PMSCS WITHIN THE CONTEXT OF THE AFRICA COMMAND

One undeniable fact is that the use of PMSCs in Iraq and Afghanistan will come to an end. This will, however, take some time as US President, Barack Obama, recently announced a further deployment of American soldiers in Afghanistan. Once the presence of the US in Afghanistan and Iraq comes to an end, this will undoubtedly put the legion of PMSCs out of business. It is predicted that Africa will be the most likely market for their operations. The likelihood is that the operation of Africom on African soil will act as a powerful catalyst for PMSCs operations, especially in conflict and post-conflict situations in Africa in an endeavour to pursue American interests within the continent. On 7 February 2007, Former President of the United States, George Bush, stated that:

This new command will strengthen our security cooperation with Africa and help to create new opportunities to bolster the capabilities of our partners in Africa. Africa Command will enhance our efforts to help bring peace and security to the people of Africa and promote our common goals of development, health, education, democracy, and economic growth in Africa.<sup>28</sup>

As the creation of new opportunities aimed at bolstering the capabilities of US partners in Africa is undertaken, there is no doubt that the use of PMSCs will be a critical factor, especially in so far as peace and security matters are concerned. After all, peace and security matters in both Iraq and Afghanistan are not only undertaken by the American security forces but in concert with PMSCs. It therefore stands to reason that opportunities for the PMSCs in Africa will be very many once Africom is rolled out. The only glitch thus far is securing an African state that will be willing to host Africom.

At a news conference, Army Lieutenant General, Walter Sharp, Director of Joint Staff stated, 'This command also has the responsibility... to do whatever military operations that the Secretary [of Defence] and the President direct.' He maintained that Africom 'is a combatant command plus, the plus meaning what we're able to hopefully be able to garner together for the interagency coordination from the very beginning' (Swart 2007).

## WORKING TOWARDS AN INTERNATIONAL PMSC CODE OF CONDUCT

The reasoning behind the development of an international code of conduct is that PMSCs are legally established entities which provide their services (military or security and related services) on a contractual basis. These services also include support services for combat operations and post-conflict training and reconstruction. The PMSC industry is also highly transnational in nature and is rapidly growing in value and importance, especially in conflict situations. The public scrutiny of the use of PMSCs has been inevitable with experts and commentators calling for the industry's accountability. The PMSC industry's conduct, especially in a conflict context, has intensified the call for the development of an international code of conduct in order to address the lack of consistent standards. The international code of conduct is aimed at improving regulatory frameworks and accountability, including the thorough investigation of alleged violations of human rights by PMSCs, and fostering a rigorous quality control. African states have thus far not been involved in the elaboration of an international PMSC code of conduct. In fact, debate around how best to address PMSCs in armed conflicts has not received much attention in Africa when compared to Europe and the Americas. This is very detrimental to the continent as in one way or the other it is affected by PMSCs.

African states have thus far not been involved in the elaboration of an international PMSC code of conduct

In June 2007 the member states of the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution to study the problem of PMSCs to establish its impact on the state monopoly and its use of force and whether there was a potential need for a new regulation at the national and/or international level. This resolution called for a PACE instrument to regulate and lay down minimum standards for PMSCs. The passing of this resolution led to the appointment of Dr Wolfgang Wodarg, a member of the German Bundestag, as the Special Rapporteur of the Political Affairs Committee to study this issue. Among other things, the Committee is currently studying ways to regulate PMSCs best. This is part of its efforts to improve parliamentary oversight and democratic governance of PMSCs.

The development of a PMSC code of conduct is an ongoing process that resulted from the Swiss Initiative on private military and security companies which culminated in the adoption of the Montreux Document. The Swiss Initiative was launched in 2006 by the Swiss Federal Department of Foreign Affairs (FDFA) and the International Committee of the Red Cross (ICRC) in order to give clarity to existing legal obligations of the private security/military actors and to develop non-binding good practices for PMSCs. The Montreux Document was adopted by 17 states on 17 September 2008 and formed the non-binding good practices for PMSCs. Only three of these 17 states were from Africa, namely, Angola, Sierra Leone and South Africa.

What is of significance about the Montreux Document is that it gives expression to the consensus that IHL and IHRL has a bearing on PMSCs. Further, the Montreux Document underscores the notion that there is no legal vacuum for their activities during armed conflict and obliges PMSCs to comply with both IHL and IHRL.<sup>29</sup> It must be noted that the Montreux Document is not necessarily sufficient in addressing the challenges posed by PMSCs. The envisaged international PMSC code of conduct will also not be as sufficient. This is due to the fact that the Montreux Document is not a legally binding document. It only provides states with good practices to promote compliance with IHL and IHRL during armed conflicts. The envisaged international PMSC code of conduct will be voluntarily adhered to and will arguably lack any legally binding effect.

## DRAFTING AN INTERNATIONAL CONVENTION ON PMSCS

Parallel to the process of developing an international PMSC code of conduct is the process led by the UN working group on the use of mercenaries. This working group is very important in that its focus is confined to the growing industry of using PMSCs in current conflicts. Its work also seeks to address the issue of accountability of PMSCs for human rights violations, with a longer-term goal of developing a new international instrument on PMSCs. That Africa has missed a great opportunity of addressing the involvement of PMSCs in its armed conflicts is not in dispute. Generally, African States and the African Union in particular, have thus far not been involved in the elaboration of the Draft Convention.

If African states, will eventually take part in this debate, it will arguably be towards the final process just prior to the adoption of the text during which time a thorough understanding of the issues involved is likely to have been fully discussed. Needless to say, the Draft Convention is the first international instrument

that seeks to address the challenges posed by PMSCs comprehensively. Until the elaboration of the Draft Convention, the UN only addressed the challenges posed by mercenaries through the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989. It cannot be denied that there was evidence that PMSCs were also recruiting mercenaries, which in essence compounded the challenges posed by mercenaries. There was therefore a need to initiate a better strategy aimed at going beyond addressing traditional mercenarism and to concentrate on its new modalities in the form of PMSCs. The new modalities of mercenaries present a plethora of challenges in that some PMSCs, for instance, recruit mercenaries to provide military and security services in conflict situations. Some of the functions provided by PMSCs, such as waging wars, may be regarded as undertaking inherent state functions.

Containing 51 articles, the Draft Convention is innovative in a number of significant ways. Its underlining philosophy is international human rights law

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particularly on state responsibility in relation to PMSCs. The preamble to the Draft Convention provides, among other things, that ‘responsibility for violations of human rights may be imputable not only to states but also to inter-governmental organisations and non-state actors and that mechanisms must be devised to ensure the accountability of states, inter-governmental organisations and non-state actors’. The rationale behind this formulation is the fact that there are ‘great dangers involved in the delegation or outsourcing of inherently governmental functions’.<sup>30</sup> The answer to the question of what is inherently a governmental function is key to the effectiveness or otherwise of the Draft Convention. What must be noted is that the Draft Convention does not seek to reinvent the wheel in so far as the application of international humanitarian law in armed conflicts, whether international or non-international, is concerned. What the Draft Convention does is to merely reaffirm ‘the relevant international humanitarian law, notably the Hague Regulations on Land Warfare of 1907, the Four Geneva Conventions of 12 August 1949 and the two Additional Protocols of 1977’ in its preamble.

The discussion that follows presents a commentary on the Draft Convention pursuant to the Human Rights Council Resolution A/HRC/10/11 adopted on 26 March 2009, which requested the working group on the use of mercenaries to, among other things, consult with inter-governmental and non-governmental organisations, academic institutions and experts on the content and scope of a possible draft convention on private companies offering military assistance, consultancy and other military and security related services on the international market.<sup>31</sup> As the nature of the problem on the use of PMSCs has already been contextualised, it is equally important to see how the UN seeks to respond to the challenges resulting from the use of PMSCs.

## PRELIMINARY OBSERVATIONS ON THE DRAFT CONVENTION

One glaring feature of the Draft Convention is that it arguably results largely from the invasion or illegal occupation of Iraq and Afghanistan by the US (and its allies), the use of PMSCs in these states, and the consequent Nisour Square massacre of 16 September 2007 in Baghdad.<sup>32</sup> Put bluntly, the Draft Convention is a strong message from the UN through the working group to the US and its allies who constantly use PMSCs in these volatile situations. If one reads the Draft Convention in this light, it becomes more understandable in terms of contextualising the issues it seeks to address. In terms of Resolution 7/21 on the mandate of the working group on the use of mercenaries, the working group’s aims include seeking opinions and contributions from governments, intergovernmental and non-governmental organisations on questions relating to its work.<sup>33</sup> As the process progresses, it is hoped that African governments will play an active role in refining this Draft Convention in the not so distant future.

It is not clear why the request to consult by the Working Group mandate is only confined to the provision of military and security (and related) services that are offered at the ‘international market’ as opposed to all markets including the ‘domestic market’. Not only are these services offered at the international market but also at national markets. Again it is clear that the main concern of the Draft Convention is to address the provision of services as they relate to the international market. This, however, does not seek to address the problem in a holistic manner. The focus on PMSCs from world superpowers, which are involved in conflict areas, blurs the debate on the involvement of PMSCs and private actors in these conflicts. Some PMSCs are in fact operating internally and are also involved in conflicts especially in the third world. More consultation is therefore required from the third world, especially Africa. Hence a call is



made for the African Union to engage in the crafting of this international instrument.

## ADDRESSING MERCENARY ACTIVITIES

As already mentioned above, the Draft Convention reaffirms the current International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989.<sup>34</sup> In so far as the scope of application is concerned, Article 3 (2) of the Draft Convention states that the Convention has no application with respect to those persons or entities covered by this Convention. The Draft Convention contains Article 9, which at face value seems to be covering the ‘prohibition of mercenary activities’. This Article only provides that ‘[e]ach state party which has not yet done so shall consider ratifying the international Convention against the Recruitment, Use, Financing and Training of Mercenaries.’ This Article does not address any issue relating to the prohibition of mercenary activities. In fact, this Article is not in line with the purpose of the Draft Convention, which is to ‘re-affirm and strengthen the principle of State responsibility for the use of force and to identify those functions, which are, under international law, inherently governmental.’<sup>35</sup> This Article is, therefore, misplaced.

The fact that some PMSCs have been involved in mercenary activities requires that the Draft Convention also addresses this issue

The fact that some PMSCs have been involved in mercenary activities requires that the Draft Convention also addresses this issue. It is very clear that drafters of the Convention were reluctant to address this very sensitive issue. If the Draft Convention concentrates on regulating, overseeing, and monitoring PMSCs, this should also be applicable to their illegal involvement in mercenary activities. The Article dealing with the prohibition of mercenary activities should be expanded upon to reflect how this prohibition should be addressed. Reference may then be made to the current international instruments dealing with mercenaries within this provision. Otherwise, it may be implied from the non-inclusion of this provision that PMSCs are no longer involved in mercenary activities. This aspect is too important to be left out in this Draft Convention.

## THE PURPOSE OF THE DRAFT CONVENTION

The purpose of the Draft Convention is to, among other things, ‘identify those functions which are, under international law, inherently governmental and cannot be outsourced’. The Draft Convention fails to achieve this particular aspect of its purpose. In terms of Article 2(k) of the Draft Convention, the definition provides for ‘fundamental state functions’ which are functions which the state cannot outsource or delegate to non-state actors. Article 31(5) of the Draft Convention also confirms the contents of Article 2(k) by stating that PMSCs and their employees ‘shall not carry out activities under Article 2(k) as fundamental functions of the State.’

The first problem with this part of the definition provided in the Draft Convention is that it fails to give clarity on what is to be considered a fundamental state function, except to say that it is only those which the state cannot delegate to non-state actors. The second problem is that no functions are identified except a few functions which are said to be ‘consistent with the principle of state monopoly on the use of force’. Certainly, fundamental state functions go beyond those which are consistent with the principles of state monopoly on the use of force. The definition only refers to waging war and/or combat operations; taking prisoners; law making; espionage; intelligence; and police powers, especially the powers of arrest or detention, and the interrogation of detainees.

The third problem with this definition is that there is no state monopoly on the use of force with regard to law making, espionage, and intelligence. For purposes of the Draft Convention the use of force refers to ‘both the use of lethal as well as non-lethal weapons and techniques which may have lethal consequences’.<sup>36</sup> The question of why these functions need to be consistent with the principle of the state monopoly on the use of force in order to fall under the meaning of fundamental state functions is, at the least, very confusing.

While the purpose of the Draft Convention is to identify fundamental state functions (which it does not), it allows state parties to do so specifically. This defeats the whole purpose of the Draft Convention as stated in Article 1.

## THE SCOPE OF APPLICATION

In terms of Article 3, the Draft Convention is applicable to states, intergovernmental organisations and non-state actors, which include PMSCs and their personnel. It is however subject to signature, ratification, and accession by both states and intergovernmental organisations under Article 43 of the Draft Convention. To be

effectively implemented, the Draft Convention must be ratified or acceded to by the entities to which it seeks to apply. The mention of the non-state actors does not make any reasonable sense as they cannot sign, ratify or accede to the Draft Convention. Their coverage within the purpose of the Draft Convention suffices.

The Draft Convention provides for its signature, ratification, acceptance or approval. While the effect of signature, ratification, accession acceptance and approval by states is well known under international law, the Draft Convention is silent as regards the effect of signature, ratification, accession acceptance and approval by an intergovernmental organisation. What is of interest is that while Article 43(3) provides that an intergovernmental organisation may ratify, accept or approve the Convention only if at least one of its Member States has done likewise, Article 43(4) provides that an international organisation (as opposed to intergovernmental) as well as states may accede to the Convention. The application of the Convention to international organisations is not in line with Article 3, which only provides for organisations that are intergovernmental.

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## The notion of ‘formal confirmation’ is unknown under international law

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It also does not make any sense for an intergovernmental organisation to ratify, accept or approve of an instrument that has only been ratified, accepted or approved by one member state of that organisation. Assuming one of the Southern African Development Community (SADC) states ratifies, accepts or approves of the Draft Convention, SADC is at liberty to deposit its own instrument of ratification, acceptance or approval. The Draft Convention is not clear regarding the consequences of these actions. Instead Article 43(3) only obliges the intergovernmental organisation to ‘declare the extent of its competence with respect to the matters governed by this Convention.’ About whether this action is binding on intergovernmental organisations as a body or on individual member states (some of which have not ratified, accepted or approved the Convention), more clarity is still needed.

The Draft Convention further complicates the issue by providing under Article 44 that it ‘shall be subject to ratification or accession by signatory states *only*.<sup>237</sup> What happens to intergovernmental organisations? The Article further provides that the Draft Convention ‘shall be subject to formal confirmation by [a] signatory

intergovernmental organisation.’ The Article furthermore provides that it ‘shall be open to accession by any state or intergovernmental organisation which has not signed the Convention.’ The notion of ‘formal confirmation’ is unknown under international law. The consequences of the formal confirmation are also not elaborated upon in terms of the Draft Convention.

Article 44(2) brings into the ‘consent to be bound’ process both PMSCs, their professional associations as well as other non-state actors. According to this Article these ‘can communicate their support to this Convention.’ This cannot be interpreted to assume that by merely communicating support, then PMSCs, their professional associations, and non-state actors are agreeing to be bound by the Draft Convention. What is of interest is that with the mere mention of a professional association, the Article assumes that there are also non-professional associations of PMSCs. No definition is given for a ‘professional association’. The mention of ‘other non-state actors’ presupposes that rebel groups, vigilantes, community police, warlords, and drug lords may communicate their support for this Draft Convention.

## UNLAWFUL ACTIVITIES AND THE USE OF FORCE

The Draft Convention defines ‘unlawful activities’ as encompassing military or security services by non-state actors that fall within the exclusive domain of the fundamental functions of the state as well as activities lawfully delegated to non-state actors where those activities are carried out in violation of international human rights and humanitarian law standards.<sup>38</sup> When reading this definition together with what comprises a ‘fundamental state function’ coupled with Article 10 on the illegality of the use of force, it is very clear that the use of force is firstly, a fundamental state function; secondly, it is an unlawful activity; and thirdly, it is illegal.

Article 10 provides that each state party shall take such legislative, administrative, and other measures as may be necessary to prohibit PMSCs and their personnel from directly participating in armed conflicts, military actions or terrorist acts. All these activities are ‘unlawful’ and ‘illegal’, as they constitute the use of force, using both lethal and non-lethal weapons or techniques, which may have lethal consequences. The use of force by PMSCs is therefore proscribed in terms of the Draft Convention.

## PROHIBITION OF CERTAIN ACTIVITIES

Article 8 of the Draft Convention states that state parties shall define and limit the scope of PMSC activities. With regard to private military companies, the Draft

Convention clearly states that the military services they provide are 'specialised services related to military action'. Military action involves the use of force. The Draft Convention specifically prohibits the use of force. Although it is implied in the Draft Convention that it allows private military companies to operate, it is not possible that they can operate without making use of force; by virtue of its very nature, it is inevitable that military companies may use force. Unless and until such companies are not associated with the word 'military', there is no way in which they cannot make use of force. The use of force is a fundamental state function as it is consistent with the principle of state monopoly on the use of force as defined under Article 2(k) of the Draft Convention. Article 4(4) specifically provides that '[no] state party can delegate or outsource fundamental state functions to non-state functions *which includes the use of force*'.<sup>39</sup> This means that the use of PMCs by any state is, therefore, prohibited in terms of this Draft Convention.

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The use of force by PMSCs is therefore proscribed in terms of the Draft Convention.

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If it is accepted that the use of force is a fundamental state function, then Article 4(4) of the Draft Convention is in conflict with Article 4(6) of the same. While the latter states that no state party can delegate or outsource fundamental state functions to non-state actors, the former stipulates that '[e]ach state party shall take legislative and other measures required to introduce full or partial prohibition on the transfer of the right to use force and/or to carry out special operations by non-state actors such as [PMSCs], other legal entities and individuals.' It does not make any reasonable sense to introduce a partial prohibition (that is, to limitedly allow) on the transfer of the right to use force, which is specifically prohibited in other provisions of the Draft Convention as discussed above.

Article 8 also provides a list of prohibited functions, which are intrinsically or inherently governmental which cannot be undertaken by a non-state actor. These include waging war; combat operations; taking prisoners; espionage; intelligence; and police powers, especially the powers of arrest or detention, and the interrogation of detainees. The Draft Convention does not provide a definition of 'waging war'. Is waging a war the same as waging a conflict? A conflict and a war are not the same. 'Espionage', 'intelligence' and 'police powers' are technical words and it cannot be assumed that they have

a universal and/or general meaning. It is essential for the Draft Convention to provide definitions of these terms.

## OBLIGATIONS OF INTER-GOVERNMENTAL ORGANISATIONS

Article 30(1) of the Draft Convention sets out the internal rules and regulations intergovernmental organisations that have ratified the Convention are obliged to adopt as well as measures to monitor compliance with the Convention. This Article does not, however, address the question of civil and criminal responsibility of those intergovernmental organisations that contract non-state actors, especially those that have ratified the Draft Convention. While Article 30 of the Draft Convention addresses the obligations of inter-governmental organisations, Article 30(2) singles out the UN. It states that in the event that the UN employs PMSCs in the implementation of Security Council resolutions, peacekeeping or other missions carried out under the UN Charter, it shall do the following:

- Exercise due diligence in ensuring the strict adherence to human rights norms by personnel of said companies;
- Not invoke Article 103 of the UN Charter in any manner that could hamper the implementation of the Draft Convention;
- Promptly investigate any reports of violations of human rights norms; and
- Impose appropriate disciplinary or penal sanctions.

The obligations stated above do not include criminal or civil responsibility of inter-governmental organisations that contracted PMSCs violate human rights. In so far as states are concerned, Article 4(2) of the Draft Convention provides that '[e]ach state party bears responsibility for the military and security activities of private entities registered or operating in their jurisdiction, whether or not these are contracted by the state.' This responsibility, however, does not seem to extend to intergovernmental organisations which are equally bound by the provisions of the Draft Convention as soon as they ratify it.

## INTERNATIONAL OVERSIGHT AND MONITORING

The Draft Convention has established a Committee on the Regulation, Oversight and Monitoring of Private Military and Security Companies (otherwise known as the Committee under Article 32). However, throughout this Article the functions of the Committee are not stated and it is difficult to identify the overall mandate of the Committee. It is only in other Articles that the

functions of the Committee are described, albeit in an *ad hoc* fashion. For instance, under Article 33, one of the Committee's functions is to consider reports from state parties on the legislative, judicial, administrative, or other measures they have adopted and which give effect to the provisions of the Draft Convention, and to make observations and recommendations accordingly. Under Article 34, the Committee shall issue interpretative comments on the provisions of the Draft Convention, as appropriate. Other functions of the Committee are found in Articles 35 to 42. While all these Articles speak of the functions the Committee has to undertake, its overall mandate is not very clear.

On the issuing of interpretative comments by the Committee, the Draft Convention does not give an indication on how this function should be carried out except that this should be carried out 'as appropriate'.

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## COMPLAINTS AGAINST PARTIES, INDIVIDUAL, AND GROUP PETITIONS

According to Article 37 of the Draft Convention, if a party to the Convention considers that another party is not giving effect to the provisions of the Convention, it may bring the matter to the attention of the Committee. A 'party to the Convention' may either be a state or intergovernmental organisation, which has a right to ratify the Convention. This Article assumes that a 'party to the Convention' is only a state party when in fact the Draft Convention provides that it 'shall also be open for signature by 'intergovernmental organisations'.<sup>40</sup> This is observed in Article 37(2) of the Draft Convention, which reads '...either state shall have the right to refer the matter to the Committee by notifying the Committee and the other Party.' The words 'party', 'state' and 'state party' seem to be used interchangeably. It is only when one reads Article 45(2) that the Draft Convention states that references to 'State Parties' in the present Convention shall apply to such organisations within the limits of their competence.' This issue could have been addressed in the definition clause.

Article 37 of the Draft Convention reveals a serious weakness of the Convention - the absence of an enforcement mechanism. Even the Committee established by

the Draft Convention cannot enforce the provisions of the Convention against parties. As already stated above, the only thing that the Draft Convention provides for is for the Committee to consider state reports and to make observations and recommendations. The irony is that while the Draft Convention creates a condition in respect of the petition procedure (involving individual and group petitions) to depend on state parties making declarations to the effect that they recognise the competence of the Committee, the complaints procedure (involving parties to the Convention) does not contain such a condition.

As already stated above, the Draft Convention allows for individual and group petitions to be submitted and this is only in relation to a state party that recognises the competence of the Committee in terms of Article 40(1). This means that a state party may choose not to recognise the competence of the Committee, thus making it impossible for any aggrieved individual or group to submit a petition against that state party. The fact that the Draft Convention allows states to opt out of the individual and group petitions process, defeats its purpose of reaffirming and strengthening the principle of state responsibility for the use of force, especially through the use of PMSCs, whether or not they are contracted by the state. Thus, victims of a violation of any rights contained in the Draft Convention by a state party will find themselves without any remedy owing to Article 40 (1).

In terms of Article 40(2) of the Draft Convention, if a state party decides to recognise the competence of the Committee, it 'may establish or indicate an entity within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any rights set forth in this Convention and who have other available local remedies.' This, therefore, means that while recognising the competence of the Committee, the state party may force an individual or group to exhaust local remedies before approaching the entity within the national legal order and, by extension, the Committee. The problem with establishing and indicating an entity within the national legal order is that it may not be as independent as the Committee which, according to the Draft Convention, must be of high moral standing, impartial, and its members must have a recognised competence in the field covered by the Convention.<sup>41</sup> The entity within the national legal order should only consider a petition after available local remedies are exhausted. This is confusing in the sense that both the entity within the national legal order and the local remedies to be exhausted must be within the domestic or local system. It is not clear why the entity within the national legal order does not form part of the local remedies.



Having made a declaration recognising the competence of the Committee and consequently deposited the declaration with the Secretary general of the UN, Article 40 (3) of the Draft Convention states that such ‘...[a] declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect petitions pending before the Committee.’ Again this defeats the purpose of the Draft Convention. For example, a door may be shut in the face of an intending petitioner whose rights have been violated by that particular state party. That is to say, when the state party withdraws a declaration just before the intending petitioner submits that petition before the Committee, there will be no legal recourse since the Committee will not have the competence to entertain the individual or group petition. What is even more disturbing is the fact that, in withdrawing the declaration, the state party need not furnish reasons for doing so. The Draft Convention is also silent on the reasonable grounds which state parties may rely upon for withdrawing the declaration.

The entity within the national legal order should only consider a petition after available local remedies are exhausted

Article 40(5) of the Draft Convention states that ‘[i]n the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this Article [i.e. the entity within a national legal order], the petitioner shall have the right to communicate the matter to the Committee within six months.’ This provision suggests that no petitioner may in these circumstances communicate their matter with the Committee before their matter is considered by an entity within a national legal order and its outcome is not satisfactory. The effect of this provision is that it may delay a matter under the guise that it is being considered by an entity within a national legal order. The failure to address the question of what this entity should be is bound to create a lot of confusion in so far as implementing the provisions of the Draft Convention is concerned.

The Draft Convention is not clear on what shape this entity should take. Whether it is an administrative, judicial, or quasi-judicial entity, this is a decision that individual state parties should make. This, therefore, makes the process of enforcing state responsibility inconsistent among the state parties to the Draft Convention. Again, owing to the failure of the Draft Convention to

set out the mandate of the Committee, it is difficult to determine the mandate of the entity within the national legal order. All that is mentioned in Article 40(2) of the Draft Convention is that this entity ‘shall be competent to receive and consider petitions from individuals and groups of individuals ...who claim to be victims of a violation of any rights set forth in this Convention and who have exhausted other available local remedies.’ This Article only talks of the functions of the entity as opposed to its mandate. Again it is assumed that before the matter is considered by the entity, the petitioner must have ‘exhausted other available local remedies’ which is a process that can delay the petitioner in eventually reaching the Committee.

## THE EFFECTIVENESS OF THE COMMITTEE ON REGULATION, OVERSIGHT AND MONITORING OF PMSCS

A regulation is only as good as its enforcement mechanism. The Committee, whose mandate is not defined in the Draft Convention,<sup>42</sup> is toothless. After considering a petition, the Committee undertakes two key functions: - first, it ‘shall forward its suggestions and recommendations, if any, to the party concerned and to the petitioner’ in terms of Article 40(7)(b) of the Draft Convention; and second, it ‘shall include in its annual report a summary of such petitions, and where appropriate, a summary of the explanations and statements of the parties concerned and of its own conclusions and recommendations’ in terms of Article 40(8) of the Draft Convention. It must be noted that the Committee does not make decisions; it only makes ‘suggestions’, ‘recommendations’, and draws ‘conclusions’, which are then included in its annual report. The Draft Convention is not clear about what should happen to these ‘suggestions’, ‘recommendations’, and ‘conclusions’ at the international level and in terms of monitoring their implementation.

Article 40(10) of the Draft Convention only provides that ‘state parties shall adopt enabling legislation so as to facilitate the implementation or enforcement of the Committee’s conclusions and recommendations’. It is unfortunate that the Draft Convention does not state what should happen to the state party in the event that it fails to adhere to this provision. The implementation mechanism of the Draft Convention is very weak. Unfortunately, the Draft Convention does not provide any possible remedies for the petitioners.

Article 42 of the Draft Convention states that the Committee ‘shall report annually, through the Secretary General, to the General Assembly of the United Nations on its activities and make further suggestions and general recommendations based on the examination of the reports and information received from the states

parties.’ Again, these are not decisions but ‘suggestions and general recommendations’, which ‘shall be reported on to the General Assembly together with comments, if any, from states parties.’<sup>43</sup> There is no indication as to what the General Assembly should do with these suggestions and recommendations from the Committee. This is another serious weakness in ensuring an effective implementation of the Draft Convention.

The Committee’s competence is only dependent upon ten state parties to the Draft Convention being bound by declarations accepting the competency of the Committee. This is a serious inroad in enabling the Committee to be effective and in allowing both individuals and groups to submit petitions before the Committee. To some extent this condition again defeats the whole purpose of reaffirming and strengthening the principle of state responsibility for the use of force.

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## THE BINDING EFFECT OF THE DRAFT CONVENTION, AMENDMENTS AND RESERVATIONS

Article 43 of the Draft Convention provides for signature ratification, acceptance, approval, and accession. According to the Vienna Convention on the Law of Treaties 1969, ‘ratification’, ‘acceptance’, ‘approval’, and ‘accession’ in each case refers to the international act whereby a state establishes, on the international plane, its consent to be bound by a treaty.<sup>44</sup> The Draft Convention goes beyond the state by also recognising intergovernmental organisations establishing their consent to be bound by a treaty on the international plane. The application of the Vienna Convention in interpreting the Draft Convention’s provisions, however, is problematic because it only applies to treaties between states and not necessarily international organisations.<sup>45</sup>

The amendment clause of the Draft Convention creates a possibility where some state parties may be bound by different versions of the Convention. Article 47(5) of the Draft Convention provides that amendments adopted in pursuance of the prescribed amendment procedure ‘shall only be binding on those states parties

which have expressed their consent to be bound by it... [and] [o]ther states parties shall still be bound by the provisions of the of this Convention and any earlier amendments that they have ratified, accepted or approved.’ Assuming 20 amendments are made over a period of ten years, this will mean that 21 versions of the Convention would be applicable to state parties that have expressed consent to be bound by the original version of the Convention and the subsequent 20 amendments. What is of interest is the fact that while the adoption of an amendment is subject to a two-thirds majority vote (in the case of not reaching a consensus), the binding effect does not automatically flow from this two-thirds majority vote in adoption.

Reservations are only permissible provided they are not contrary to the purpose of the Draft Convention, which, as already discussed above, is not very clear, especially with regards to the identification of inherently governmental functions.

## CONCLUSION

This paper has attempted to achieve two objectives. The first objective was to provide an analysis on the use of PMSCs and the challenges associated with it. The second objective was to present an international perspective on how best to address the challenges associated with the use of PMSCs with particular focus on the Draft Convention, which is currently being elaborated upon by the UN Working Group. The Draft Convention is likely to change from its current form. The UN Working Group is currently considering comments on the Draft Convention by civil society organizations and academic institutions and individual experts. The process of revising the provisions of the Draft Convention is ongoing, especially those that are contentious. Nevertheless a risk has been undertaken to include the comments on the Draft Convention as at 31 July 2009 in this paper in order to make a contribution towards the international discourse on how best to address PMSCs at an international level. As more regional consultations on the activities of PMSCs are yet to be held by the UN Working Group, it is hoped that this contribution will be of essence in this important debate.

Giving a justification for the use of PMSCs, Brooks and Rathgeber (2008:18) noted that,

The United States utilised some 700,000 contractors in the Second World War, 80,000 in Vietnam, and more contractors than soldiers during the major Balkan operations in the 1990s. Disasters like the Asian tsunami in 2004, hurricane Katrina and the Pakistani earthquake in 2005 require the same sorts of companies and skills as

the peacekeeping operations in Darfur and Haiti and the stability operations in Afghanistan and Iraq.

The reality today is that African States do make use of PMSCs in a number of ways in order to achieve a number of objectives. Brooks and Rathgeber (2008:18) argue that from a regulatory perspective it is critical that a significant distinction between PMCs and PSCs be made in terms of their definition. Whether this distinction is required remains a moot question. The Draft Convention does not address this distinction except to group PSCs and PMCs together in one general term, PMSCs. This issue is one that states will have to clarify before the Draft Convention is adopted.

Brooks and Rathgeber (2008:18) propose that the term PMC should be preserved 'only for the specialised firms that willingly engage in offensive operations, such as the no longer operational Executive Outcomes and Sandline Internations.' They further argue that PSCs are clear in the provision of their work in that their civilian personnel provide only legal defensive and protective services and, as such, private civilian security is as common in stable countries as it is in contingency operations.<sup>46</sup> This proposition by Brooks and Rathgeber is, however, problematic in that some PMCs offer security services and some PSCs offer military services and vice versa. Sometimes making such a distinction becomes counter-productive in terms of addressing the challenges presented by both PMCs and PSCs especially in combat zones. Again, if a distinction has to be made between PMCs and PSCs, African States should address this issue as they are also affected by the involvement of PMSCs, whether as recipients, users, or PMSCs personnel contributing states.

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The reality today is that African States do make use of PMSCs in a number of ways in order to achieve a number of objectives

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It is undisputable that 'the Iraq War is where the history books will note that the [private military/security] industry took full flight'.<sup>47</sup> The staggering estimate of PMSCs personnel in Iraq of between 20 000 to 155 000 and their future remains speculative. While the Iraq War is will not preoccupy PMSCs forever, Africa, due to its protracted conflicts fuelled and sometimes propelled by its rich mineral resources, is likely to become home to most of PMSCs' personnel. The prediction is that Africom will

in most likelihood act as a catalyst in the use of PMSCs in African conflict and post-conflict situations. It has been proven that PMSCs thrive where there is conflict. The classic African example of EO in Angola and Sierra Leone proves this fact. Sometimes PMSCs contribute to more insecurity. The classic example of the involvement of PMSCs in Afghanistan also proves this fact. On this point, the main finding of Schmeidl (2007, 2008) was that in Afghanistan, PMSCs were viewed in a very negative light and that, instead of bringing security, the local population viewed PMSCs as a source of insecurity.

That the PMSC industry is flourishing is not in dispute. Perrin argues that the PMSC industry is projected to reach US\$210 billion by 2010 worldwide (Perrin 2008:5). From a Canadian perspective, Perrin states that '[w]e need to take a hard look at what roles these private firms are taking on, in order to protect our reputation and interests in Afghanistan and elsewhere, and whether sufficient safeguards are in place to ensure proper conduct. Waiting for something to go awry before taking action is bad policy.' (Perrin 2008:5) This statement equally applies to African States, which are largely providing a recruitment ground for PMSCs operating worldwide, particularly in conflict situations. They also make use of PMSCs in order to fight against rebel factions. Some PMSCs are ready and available to assist and restore ousted African Presidents into power, thus engaging in mercenary activities.

When considering the Draft Convention, which seeks comprehensively to address the various challenges posed by PMSCs, two questions arise: firstly, has the Draft Convention succeeded in achieving its purpose; and secondly, is there an effective mechanism to achieve this purpose? Unfortunately, the answers to both questions are in the negative. On the question of state responsibility for the use of force, this notion does not cover international organisations, yet they are capable of being 'parties' to the Draft Convention. The Draft Convention does not convincingly and comprehensively identify those functions which are, under international law, inherently governmental (except a few). The promotion of cooperation between states requires states to speak with one voice especially when it comes to recognising the competence of the Committee, which receives and consider petitions from or on behalf of individuals or groups of individuals. The fact that state parties may be bound by a number of versions stemming out of the original Draft Convention may present a lot of challenges especially if they relate to the workings of the Committee.

In so far as implementing the Draft Convention is concerned, while states are obliged to take all necessary measures to ensure that there is no illegal or arbitrary use of force by non-state actors, the implementation

mechanisms beyond these measures, especially at the Committee level (international level), are very weak. States may be bound by the Draft Convention and opt out of the petition procedure by simply not recognising the competence of the Committee to receive and consider petitions. The fact that the Committee does not have any enforcement mechanism presents a challenge to the achievement of the purpose of the Draft Convention. In this way, there is no effective mechanism that is aimed at achieving this purpose.

In conclusion, the Draft Convention is an instrument that seeks to uphold the notion of state responsibility in respect of the use of PMSCs. In other words, the Draft Convention seeks to ensure that states fulfil their obligations to respect, protect, and ensure human rights. This means, firstly, that states have an obligation to respect human rights by not arbitrarily interfering with human rights; secondly, that states have an obligation to protect human rights by protecting all persons from acts by third parties that could impair the enjoyment of their human rights; and thirdly, that states have an obligation to ensure human rights by adopting legislative, judicial, administrative, educative and other appropriate measures to fulfil human rights. The question, which remains is whether states are willing to embrace the principle of state responsibility in relation to PMSCs? Any answer to this question can only be but speculative.

In other words, the Draft  
Convention seeks to ensure  
that states fulfil their obligations  
to respect, protect, and  
ensure human rights

## NOTES

- 1 Zoe Salzman, Private military contractors and the taint of mercenary reputation, *40 N.Y.U.J. Int'l L. & Pol.* 854.
- 2 Swiss Initiative, in Cooperation with the International Committee of the Red Cross, on Private Military and Security Companies (17 September 2008). Available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0056.File.tmp/Montreux%20Document.pdf> (Accessed 9 April 2009).
- 3 Draft Convention on the Regulation, Oversight and Monitoring of Military and Security Companies, 13 July 2009. <http://www.mgimo.ru/files/121626/draft.pdf> (Accessed 31 July 2009). The UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination is currently receiving comments on the Draft Convention so that it can be amended and refined.
- 4 Swiss Initiative, in Cooperation with the International Committee of the Red Cross, on Private Military and Security Companies Montreux document (2008), 6.
- 5 Doug Brooks and Shawn Lee Rathgeber, The industry role in regulating private security companies, *Human Security Bulletin* 6(3), (March 2008), 18.
- 6 Art. 2 (a) of the Draft Convention.
- 7 Art. 2 (c) of the Draft Convention.
- 8 These may include the following as provided for in section 1 (1) of the South African Private Security Industry Regulatory Act No 56, 2001: - giving advice on the protection or safeguarding of a person or property or on any other type of security service as contemplated in the Act or on the use of security equipment; providing a reactive or response service in connection with safeguarding of any person or property in any manner; providing a service aimed at ensuring order and safety on premises used for sporting, recreational, entertainment or similar purposes; manufacturing, importing, distributing or advertising monitoring devices; performing the functions of a private investigator; providing security training or instruction to a security provider or prospective security service provider; installing, servicing or repairing security equipment; performing functions of a locksmith; making a person or the services of a person available, whether directly or indirectly, for rendering the above to another person; managing, controlling or supervising the rendering of the above; and creating the impression, in any manner, that one or more of the services as mentioned above are rendered.
- 9 Winston Nagan and Craig Hammer, The rise of outsourcing in modern warfare: sovereign power, private military actors, and the constitutive process, *Maine L. Rev.* 60 (2008), 431
- 10 Ibid, 433.
- 11 Doug Brooks and Shawn Lee Rathgeber, 18.
- 12 Sunil Dasgupta, The public domain question in non-state armed groups hiring PMCs, *Human Security Bulletin* 6(3), (March 2008), 15.
- 13 Todd S Milliard, Overcoming post-colonial myopia: A call to recognise and regulate private military companies, *Mil. L. Rev.* 1(2) (2003), 176.
- 14 See the Working Group's unofficial website at <http://www.unwg.rapn.ru/en/legislation.htm>. (Accessed 18 April 2009).
- 15 This point will be dealt with in more detail when considering the salient features of the Draft Convention.
- 16 Matthew R. Kestian, Civilian contractors: forgotten veterans of the war on terror, 39 *U. Tol. L. Rev.* 887 (2008), 888.
- 17 Ibid, 888-889.
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- 37 My emphasis.
- 38 Article 2 (1) of the Draft Convention.
- 39 My emphasis.
- 40 Article 45(2) of the Draft Convention.
- 41 Article 32(1) of the Draft Convention.
- 42 Article 41(b) of the Draft Convention provides that '[t]he Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.' This mandate referred to is not expressly stated in the Draft Convention.
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## ABOUT THE PAPER

This paper discusses the use of private military and security companies (PMSCs) and provides a commentary on the current United Nations Draft International Convention on the Regulation, Oversight and Monitoring of Military and Security Companies of 13 July 2009 (Draft International Convention), which seeks to address the challenges posed by PMSCs. It provides a perspective on the definitional challenges of PMSCs and examines some PMSC activities in past African conflicts. The paper also unpacks the use of PMSCs in combat zones and in the context of the envisaged Africa Command (Africom) and the implications thereof. It considers the generally unregulated recruitment of Africans by PMSCs and the risks associated with the absence of regulations for the exportation of military and security expertise. The paper also considers the Swiss Initiative, which culminated in the adoption of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict on 17 September 2008 and the development of the International PMSC Code of Conduct. In commenting on the Draft International Convention the paper provides a general overview, purpose, scope of application and the international oversight and monitoring it envisages.

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