Helena Torroja *Editor*

Public International Law and Human Rights Violations by Private Military and Security Companies

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Editor
Helena Torroja
Law School
University of Barcelona
Barcelona, Spain

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Foreword

This book, edited by Professor Helena Torroja, grew out of her ongoing commitment to the mandate of the Working Group on the use of mercenaries (OHCHR), with which she has actively collaborated since shortly after its creation by the Human Rights Commission in 2005 (Res. 2005/2).

The Working Group has benefited from her expertise with various activities carried out in fulfillment of our mandate, according to which we are to monitor mercenaries in all their manifestations and study mercenary-related trends and activities in different parts of the world and their impact on human rights, particularly on the right of peoples to self-determination. The collaboration has primarily focused on the part of the mandate concerning the impact of the activities of private military and security companies (PMSCs) on these rights and the regulatory frameworks governing such companies around the world, including their gaps, shortcomings, and good practices.

The present book was undertaken at the initiative of Professor Torroja in response to the growing concern of the international community over the threat posed by the criminal activities of mercenaries to peace and security in developing countries, particularly in conflict zones. It likewise aims to address concerns over the role played by PMSCs, which have diversified their activities from the provision of military assistance, consultancy, and security services to other areas in which they also affect the enjoyment of human rights and are rarely held accountable for human rights violations.

The work of the experts invited to participate, all of whom have extensive experience in the study of these phenomena, reflects the urgent need to make effective progress on the strengthening of the international legal framework for both phenomena at a time when, as recognized by the Human Rights Council in its Resolution on the Working Group, "armed conflicts, terrorism, arms trafficking and covert operations by third Powers encourage, *inter alia*, the demand for mercenaries and for private military and security companies on the global market" (Res. 33/4 de 2016).

Every chapter of the book draws on exhaustive research presenting diachronic analyses and considering the social and legal reality of mercenarism and the activities of PMSCs. The reality of how these companies operate in specific situations, the serious human rights violations in different states and operational contexts, and the analyses of the national and international legal context in which these nonstate actors operate repeatedly point to gaps and weaknesses and an urgent need to strengthen national and international regulatory frameworks.

Indeed, together the chapters by Felip Daza, Rebecca DeWinter-Schmitt, José Luis Gómez del Prado, Mario Laborie, Carlos López, and Helena Torroja make up one of the most comprehensive publications on the phenomena of mercenarism and PMSCs, constituting an important contribution to our understanding of these phenomena and the means of improving the protection of human rights in different scenarios.

Patricia Arias
Member of the United Nations Working Group on the Use of Mercenaries,
United Nations Human Rights Council
Geneva, Switzerland
30 June 2017

Acknowledgments

This book grew out of the research project *Toward an International Regulation of the New Forms of Mercenarism: Support for the Regulatory Developments Proposed by the United Nations Working Group on the Use of Mercenaries* (2014), conducted at CEI International Affairs (University of Barcelona) under the direction of Professor Helena Torroja and funded through a grant from the International Catalan Institute for Peace (ICIP). The project first gave rise to a report for the UN Working Group, which was subsequently publicly debated at the international seminar *Human Rights and New Forms of Mercenarism: Violations, Limits and Opportunities of the International Legal System*, held on April 21, 2017, which was coorganized by CEI-International Affairs and NOVACT and cosponsored by the City of Barcelona and Palau Macaya-Obra Social la Caixa. Additional support was provided for the project's final publication from the City of Barcelona through a grant under the 2016 Barcelona Solidarity Program to CEI-International Affairs, NOVACT, and the Delàs Center for Peace Studies for the project *STOP CORPORATE WAR: Promoting Research, Social Mobilization and Advocacy in Catalonia and at the International Level to Prevent Modern Wars*. Special thanks should also be given to Kari Friedenson and Thomas Bell for their translation of most of the chapters.

Contents

Introduction

Helena Torroja

Abstract The present study clearly and thoroughly shows the consequences for the realization and enjoyment of human rights of the new mercenarism, as channeled through so-called private military and security companies (PMSCs). It also offers an overview of the evolution and current status of the legal and nonlegal (soft law and self-regulation) initiatives that seek to limit it. Finally, it offers pragmatic solutions to promote consensus among states regarding an international instrument to limit and control PMSCs.

The issue of PMSCs has been examined extensively in recent years and from a variety of research traditions. With the aim of contributing new ideas to the debate, this book explores the concerns that we were able to identify after years of study and collaboration with the UN Working Group on the use of mercenaries. One fundamental concern was how the privatization of the very core of sovereignty (armed force), for the primary purpose of its exportation, could be taking on an increasingly transnational scope without any international limits or control. Was it not possible to identify a set of international limits on which states could agree with a view to preventing and limiting the consequences of this phenomenon for peace and the enjoyment of human rights?

To answer these questions, we initiated a collaboration with the aforementioned Working Group, proposing that a report be drafted with a view to identifying the human rights implications of PMSC practices, determining the current status and limits of existing norms and soft-law initiatives of recent years, and presenting new ideas and proposals for international regulation. The present book grew out of that report, submitted in December 2016 to the UN Working Group on the use of mercenaries.

We began with three questions. First, how is the issue of PMSCs related to human rights and to what extent? This is not an innocent question. On the country, it is intended to respond to the position of some states on the Human Rights Council

H. Torroja (✉)
Law School, University of Barcelona, Barcelona, Spain
e-mail: htorroja@ub.edu

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that have argued that it is not the right forum to address the subject as PMSCs are essentially a matter of armed force and not of human rights.[1] We sought to determine whether that was true or, on the contrary, there exists a direct relationship between the privatization of armed force and the enjoyment of human rights.

The second question was intended to verify the adequacy, or lack thereof, of the existing regulations for PMSCs (both hard law and soft law). Are these regulations, along with recent practice, enough to prevent, limit, and control the human rights violations resulting from the privatization of armed force, especially when it is exported?

Finally, we asked whether it was still possible for states to join forces to promote an international consensus on minimum legal principles that could be formally adopted with a view to limiting and controlling the phenomenon. To this end, it was necessary first to identify what this international minimum standard would consist of.

Thus, the first two chapters of the book seek to answer the first question and deal with practical aspects of the phenomenon. In his chapter, "Afghanistan and Syria: Non-State Actors and Their Negative Impact on Human Security," Mario Laborie offers an in-depth look at the presence of nonstate actors in those two failed states. In providing detailed, highly systematized information about the factual reality, he makes an important contribution. In the case of *Afghanistan*, he highlights the presence of progovernment groups, including (a) militias, paramilitary groups, and auxiliary police forces (the largest being the Khost Protection Force or KPF) and (b) PMSCs and the Afghan Public Protection Force (APPF). Mostly local, many of these PMSCs are led by members of the Afghan government, close relatives of the political elite, or warlords and, in practice, function as militias at the service of a given warlord who may even have contacts with the insurgents, whom he pays off to avoid confrontations. In addition to these groups, there are the insurgents: the Taliban; Al-Qaeda and its Uzbek affiliates, the Islamic Movement of Uzbekistan and the Islamic Jihad Union; the Haqqani Network; Hezb-e-Islami Gulbuddin; and Daesh. The conflict in *Syria* also features numerous nonstate armed actors (NSAAs), including (1) militias; (2) mercenaries and PMSCs (in particular, Russian private security contractors, such as those employed by the company Slavonic Corps); and (3) foreign combatants and terrorists.

In the chapter "Delimitation and Presence of PMSCs: Impact on Human Rights," Felipe Daza delimits the presence and services provided by PMSCs and analyzes their impact on human rights. The study is based on the findings of the Shock Monitor monitoring center, an international research initiative undertaken by NOVACT that has analyzed 385 PMSCs and 108 human rights incidents that have taken place since 2000. This is also a valuable contribution, given the lack

[1]The western delegations (including the EU and Norway, among others) argued that, as an issue involving the use of armed force, it should be dealt with by the Sixth Committee of the General Assembly rather than the Human Rights Council (see: Gómez del Prado JL, Torroja H (2011), pp. 62–63).

of research on the ground in this field. In it, Daza highlights the transnational nature of these private corporations. The countries that were home to the largest number of the analyzed PMSCs were the US, the UK, Israel, France, the UAE, Cyprus, and South Africa, among others. The main PMSC home countries were also the countries most likely to contract their services. Although governments are currently still PMSCs' main clients, the extractive and energy industries are increasingly contracting their services as well. With regard to these services, most of the transnational companies Shock Monitor analyzed perform both security and military functions (74%); therefore, the PMSC concept best reflects the industry's essence. The main services provided by the 385 PMSCs analyzed were security and protection (283); intelligence (163); consulting and training for police (154); military operational support (97); construction and maintenance of military infrastructure (87); military logistics support (83); maritime security (51); provision, maintenance, and disposal of weapons/explosives (47); others (legal support, hijacking management, etc.) (45); military assistance (29); mine clearance and demining (19); quasi-police tasks (18); humanitarian aid (11); provision and maintenance of surveillance systems and remote control (6); and combat and military operations (4). The most important territorial countries were Afghanistan and Iraq. In the section "Impact on Human Rights," the author reports that the human rights most frequently violated were as follows (expressed as the percentage of analyzed cases affecting each category): the right to physical and psychological integrity, including the right to life and the right to fair and humane treatment (84%); civil and political rights (41%); international crimes (25%, most taking place in the context of the occupation of Palestine); labor rights (7%); the rights of the child (15); rights related to equality and nondiscrimination (1%); the right to privacy (0.05%); and the right to health (1%).

As these chapters show, the phenomenon of PMSCs does indeed have a direct impact on respect for human rights. The following chapters thus seek to answer the second question: are current regulations limiting this phenomenon sufficient and complete? In "The Ineffectiveness of the Current Definition of a 'Mercenary' in International Humanitarian and Criminal Law," José Luis Gómez del Prado defines the concept of mercenarism and identifies the international norms that regulate it, concluding that they are not applicable to today's PMSCs. The chapter is premised on the idea that these companies are the new mercenaries, an idea disputed by influential states such as the US, the UK, Australia, Canada, the Netherlands, and Switzerland, which take a contrary view. Their strategy has been to draft recommendations and voluntary international codes of conduct. This process began in 2006, with the preparation of the Montreux Document (2008), which contains guidelines and good practices for PMSCs, albeit only when they are operating in armed conflict situations, and concluded in 2010, with the adoption of the International Code of Conduct for Private Security Service Providers (ICoC) and the founding of the ICoC Association (ICoCA), which has six member states and around 100 PMSCs that are contributing members. The author notes that these documents mask revolving doors between governments and PMSCs in the countries where the major security industry multinationals are located, as well as the profits

they generate and the interests they create. Consequently, he argues that the definition of "mercenary" found in international treaties is not applicable to PMSCs. Nor can the definition of "mercenary" be applied to individual PMSC contractors. The universally accepted strict definition, found in Article 47 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, is contained, *mutatis mutandis*, in all the international treaties on mercenarism currently in force, including the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. In practice, it is difficult to apply for several reasons, including the excessive emphasis placed on motivation, which is difficult to demonstrate, the requirement that the individual be recruited for the purpose of fighting in an armed conflict and the requirement that he or she not be a national of any of the parties to the conflict. In short, the types of mercenarism that may have been relevant in the 1960s have ceased to be so today. Legally, existing conventional laws on the prohibition of mercenaries are inoperative. The Montreux Document and the ICoC do not contain appropriate mechanisms for regulation, monitoring, supervision, accountability, and access to effective remedies by victims for the activities of PMSCs. The author thus concludes that it is necessary and urgent to adopt a binding international instrument to regulate and supervise PMSCs' activities.

In "Private Military and Security Companies and Human Rights," Carlos López-Hurtado seeks to identify the nexus between the international human rights system and PMSCs in order to identify the regulatory and protection gaps. The chapter is premised on the obligation of states under general international law and the international treaties they have ratified to respect and protect human rights. It examines general international law concerning state responsibility for the human rights violations committed by PMSCs based on the International Law Commission's 2001 draft Articles on Responsibility of States for Internationally Wrongful Acts. The author argues that it is difficult for corporations to be considered state agents (Draft Article 4), although the OAS has adopted a broader concept of "agent of the state" at the regional level. He draws special attention to the Committee against Torture's position, which links the nature of the activity being performed with the public or private nature of the agent. He concludes that Draft Article 5 is similarly difficult to apply due to the lack of consensus regarding what constitutes "governmental authority," as is Draft Article 8, as the mere act of contracting a PMSC is not enough for its acts to be considered acts of the state. Following this analysis, the author examines the different means and methods for attributing and enforcing the liability of PMSCs. He finds that while companies' legal liability for human rights offenses is more widely accepted and developed today than it was two decades ago, it remains insufficient. Finally, he looks at issues arising from the transnational nature of business, such as the problem of the liability of parent companies for the acts of their subsidiaries, or the jurisdictional scope of national courts. He concludes by stressing the need to fill existing international gaps.

In the next chapter, "International Soft Law Initiatives: The Opportunities and Limitations of the Montreux Document, ICoC, and Security Operations Management System Standards," Rebecca DeWinter-Schmitt offers an overview of the soft law and self-regulation mechanisms affecting these companies and how they have evolved. The chapter details the evolution of the two parts of the Swiss initiative:

the Montreux Document and the ICoC/ICoCA. Indeed, it is written from the perspective of PMSCs and thus offers a certain defense of the self-regulation system, known by its proponents as "co-regulation." DeWinter-Schmitt highlights the intrinsic gaps and irregular subsequent application (as reported in the Montreux+5 study) of the Montreux initiative and notes the creation, in 2014, by the Swiss government, the ICRC, and DCAF (a Swiss government research center) of a forum of states supporting the Montreux Document, with DCAF serving as the Secretariat. Of the relatively small number of participating states (53), most are northern or developed countries (36). Its limitations include a lack of oversight mechanisms, other than discussion. With regard to the ICoC, the author highlights the establishment, in 2013, of the ICoC Association (ICoCA), which was set up as a Swiss nonprofit association.

Finally, the last chapter seeks to answer the third question, regarding the possibility of identifying the minimum international legal principles limiting the privatization of armed force for which there is a consensus among states. While De-Winter Schmitt in some ways defends the sufficiency of the soft law system despite its gaps, in the chapter "Ideas on the International Minimum Standard for the Privatization, Export, and Import of Armed Coercion," Helena Torroja advocates the need to recognize an international minimum standard of state action with regard to the privatization, export, import, and contracting of PMSCs. Torroja argues that states should recognize the existence of such an international minimum standard. She considers self-regulation (intentionally misleadingly called "co-regulation" by some) to be insufficient. This international minimum standard could be established through an international convention, which would address minimum requirements and would not be as long or detailed as the possible draft convention presented by the Working Group on Mercenaries in 2010. The purpose of the convention would be to *promote respect for human rights in the processes and practices of outsourcing, contracting, exporting, and importing armed coercion by states*. Were it not possible to reach a consensus on the adoption of an international treaty, the adoption of this minimum standard should at least be promoted as part of the content of a UN General Assembly resolution.

The final chapter, consisting of the conclusions and written by the editor, Helena Torroja, lays out the main findings of each of the preceding chapters, highlighting the key takeaways with regard to the quest to incorporate the limitation of the privatization of armed force into international law. In short, it defends a lawful coercive sovereignty, i.e., one that conforms to the rule of law.

Reference

Gómez del Prado JL, Torroja H (2011) Hacia la regulación internacional de las empresas militares y de seguridad privadas. Marcial Pons, Barcelona, pp 62–63

Helena Torroja is tenured Professor of Public International Law at the Law School, University of Barcelona. She is also Academic Director of the International Studies Center (UB, Spanish Foreign Affairs Department and Caixa Banc, www.ceibcn.com) and Consultant of the UN Human Rights Office of the High Commissioner on PMSC and human rights.

Afghanistan and Syria: Nonstate Actors and Their Negative Impact on Human Security

Mario Laborie

Abstract This chapter offers an in-depth look at the presence of nonstate actors in those two failed states. In the case of Afghanistan, he highlights the presence of progovernment groups, including (a) militias, paramilitary groups, and auxiliary police forces (the largest being the Khost Protection Force or KPF) and (b) PMSCs and the Afghan Public Protection Force (APPF). Mostly local, many of these PMSCs are led by members of the Afghan government, close relatives of the political elite, or warlords and, in practice, function as militias at the service of a given warlord who may even have contacts with the insurgents, whom he pays off to avoid confrontations. In addition to these groups, there are the insurgents: the Taliban; Al-Qaeda and its Uzbek affiliates, the Islamic Movement of Uzbekistan and the Islamic Jihad Union; the Haqqani Network; Hezb-e-Islami Gulbuddin; and Daesh. The conflict in Syria also features numerous nonstate armed actors (NSAAs), including (1) militias, (2) mercenaries and PMSCs (in particular, Russian private security contractors, such as those employed by the company Slavonic Corps), and (3) foreign combatants and terrorists. As both cases show, in these "internationalized non-international armed conflicts," as they are known under IHL, the direct participation in hostilities of NSAAs negatively impacts all aspects of human security, making them one of the main threats to peace and stability. The central government loses control of large parts of the territory, leading to the collapse of central government structures, as they can no longer guarantee citizens essential services related to security, health, education, or infrastructure. As a result, populations organize around prestate political structures, which develop ad hoc agreements to manage the affairs of an environment without state sovereignty. As in medieval Europe, there is a return to tribal logic and to temporary warlords, reprivatization of the law, and renewed confusion between economic exploitation and political dominance. Thus, the massive presence of various types of NSAAs has increased the level of violence in both Syria and Afghanistan.

M. Laborie (✉)
Eurocorps, Strasbourg, France
e-mail: labigle.m@gmail.com

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1 Introduction

War, understood as organized violence that brings societies in political dispute into conflict, has been a mainstay of human history. Today, wars can still be found in large areas of the world. In 2014, 40 armed conflicts were ongoing in 25 places around the world—although only 11 reached a threshold of intensity of at least 1000 combat-related fatalities in a single year. The data suggest that while the threat of war between states has declined, conflicts within states, arising from the different natures and divergent interests of their own communities and ethnic groups, have increased. In 1946, 47% of conflicts were intrastate conflicts; in 2014, the figure was 100%.[1]

Contemporary domestic conflicts, whose main victims are civilians, have been called "new wars" by Kaldor[2] and "anarchic" conflicts by the International Committee of the Red Cross[3] (ICRC). These are chronic, armed confrontations, in which anarchy and chaos reign, involving a complex blend of disparate ethnic, political, economic, and religious interests. Every civil war has its own set of characteristics due to the different human, economic, political, or geographical context in which it takes place. However, such particularities notwithstanding, Afghanistan and Syria are both examples of the aforementioned "new wars" or "anarchic conflicts." As indicated by its title, this chapter will seek to offer an overview of the main characteristics of these two ongoing civil wars.

Crucially, both cases involve failed states as the respective governments are unable to ensure their monopoly on the use of force to the benefit of warlords, communal groups, militias, paramilitary groups, and insurgents. At the same time, goods that are essential to the civilian population's survival are looted and seized. Violence is becoming an end in itself and is thus perpetuated as a way of life, while corruption and crime are on the rise.

Both conflicts involve regular military forces and nonstate armed actors (NSAAs), which, in nearly all cases, engage in brutal violence without the constraints established under international humanitarian law (IHL).[4] Precisely the

[1]Compared to 1990, the number of conflicts in the world has fallen by more than half. However, while the total number of armed conflicts has declined significantly since the end of the Cold War, 2014 saw the largest number of such conflicts of any year since 1999. Moreover, as a result of the escalation of various conflicts, as well as the extreme violence in Syria, the number of war-related fatalities has constantly increased in the period since 1989. Pettersson T, Wallensteen P (2015) p. 536–550.

[2]In the author's view, the "new wars" are like investment firms in which the different armed groups profit from the violence, whether in economic terms or because it enables mobilization around extremist political ideologies. Actual battles are relatively rare; instead, most of the violence is directed against the civilian population. Kaldor M (2016).

[3]International Committee of the Red Cross (ICRC) (2004).

[4]In the case of failed states, in terms of international humanitarian law, "only Article 3 common to the four 1949 Geneva Conventions, which encompasses armed conflicts that take place between armed factions within a country and in which the government is not involved, as well as those rules

challenge of enforcing IHL is one of the crucial features of both wars. IHL was created to address conflicts between states, not to manage conflicts in which the lines between combatants and civilians are blurred, and most of the time illicit means or modes of combat are used, causing superfluous damage or unnecessary suffering.

Afghanistan has a long history of corruption, warlords, tribal disputes, and armed leaders who demand bribes or impose taxes. Loyalties often lie not with the government but with the most feared leader or highest bidder. At the same time, since the country's army and police lack the training and numbers required to ensure security, the use of armed contractors has become imperative. However, this solution poses significant dilemmas when it comes to guaranteeing the security of the Afghan people.

At the time of writing, Syria's civil war has been raging for more than 5 years; in this time, the humanitarian disaster has taken on horrifying proportions. Although the UN stopped counting the number of fatalities in 2013, according to some estimates, the conflict has left at least 370,000 people dead to date.[5] Moreover, nearly five million Syrians have taken refuge in neighboring countries or Europe, and at least another 6.6 million have been internally displaced.

In this devastated context, the organized violence in Syria clearly differs from the "Afghan case" in several ways. The war, which has long since ceased to be a "mere" domestic conflict, today has all the characteristics of an anarchic conflict. This view is supported by its delimitation along sectarian lines, whereby, in broad terms, the Sunni majority (70% of the Syrian population), from which the insurgents fill their ranks, is opposing the Alawites (11%) and Christians (10%), the traditional base of Bashar al Assad regime, even as the Kurds pursue their own agenda. These sectarian divides have facilitated the emergence and development of multiple NSAAs, which fight each other relentlessly and whose main victims are civilians.

2 Nonstate Armed Actors (NSAAS) in the "New" Armed Conflicts

The transformations caused by globalization have weakened states' ability to defend their citizens' interests exclusively. This, in turn, has negatively impacted the traditional nation-state model, eroding its basic principles of sovereignty, legitimacy, and shared identity.

In this context, a variety of usually transnational, nonstate armed groups have turned to violence to achieve their goals, which vary in nature. In other words, as

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of customary international humanitarian law that become applicable at the specific threshold of Common Article 3, are potentially applicable." Geiss R (2009), pp. 133–134.

[5]Taylor A (2016).

opposed to the interstate wars typical of the twentieth century, today we are witnessing the privatization of the new armed conflicts and the demilitarization of war. The growing privatization of violence, which poses a major challenge to states' monopoly on the legitimate use of force, is essential to understanding the current state of conflict in the world.[6]

There is no consensus regarding the definition of a nonstate armed group. On the contrary, the basic definitions associated with such actors "differ between international lawyers, social scientists from different disciplines, and practitioners from international governmental and nongovernmental organizations."[7]

A detailed explanation of this concept falls beyond the scope and aims of this text. Consequently, this chapter will use the following definition from the UN publication "Humanitarian Negotiations with Armed Groups: A Manual for Practitioners":

> [NSAAs] have the potential to employ arms in the use of force to achieve political, ideological or economic objectives; are not within the formal military structure of States, State-alliances or intergovernmental organizations; and are not under the control of the State(s) in which they operate.[8]

In keeping with this description, it can be deduced that the generic characteristics of the nonstate armed groups acting in Syria or Afghanistan would be, first, the use of organized violence to achieve their goals, whatever the nature thereof; second, the multiplicity of armed activities in which they engage and that are sometimes intertwined with those of the central government or other nonstate actors; and, third, their lack of a relationship with formal governmental mechanisms.

With regard to this last point, it should be stressed that the basic subject of concern is the capacity of some of these groups to replace national armed forces. The fact that, in certain situations, the governments in Kabul or Damascus themselves encourage this delegation of functions merely adds to the matter's complexity.

For the purposes of this research, NSAAs can be classified as follows:

- Insur gents or rebel opposition groups: these nonstate groups seek regime change in a given state. The names they are given generally depend on the political nature of the conflict. Terms such as *guerillas*, *insurgents*, *terrorists*, and even *criminals* are all used, at times to describe the same activity, depending on the political orientation of the people using them.[9]

[6]Laborie M (2011a).

[7]Krause K, Milliken J (2009), p. 203.

[8]Mchugh G, Bessler M (2006).

[9]It should be recalled that some states have made use of terrorist techniques. Boyle M (2008), p. 171.

- Paramilitaries: the government provides them with equipment, weapons, and training to act against rebel groups that threaten the *status quo*, using similar tactics to the insurgency's own. The governments of the countries in which these paramilitary groups act, in which they are sometimes responsible for massacres and the killing of civilians, tend to deny having control over them.
- Warlords: these individuals seek to retain control of a territory through a militia that in reality acts as a "private army" and is usually maintained through the exploitation of natural resources in the territory under their authority.
- Clan chiefs: these are local authorities that exercise a traditional and legitimate authority over a given population group. To maintain the group's security, they often recruit self-defense forces, which, as in the previous case, can also be called militias.
- Foreign fighters/combatants: they individuals who travel to a state other than their state of residence or nationality in order to perpetrate, plan, prepare, or participate in terrorist acts or to provide or receive training for terrorist purposes, including in connection with armed conflicts.[10] As will be argued below, this definition can lead to confusion in the application of IHL.
- Mercenary: there is no generally accepted definition of what constitutes a mercenary. Informally, it is agreed that mercenaries are combatants who meet three conditions: first, they are foreign to the country where the conflict is taking place; second, they are primarily motivated by monetary gain; and third, in some cases, they participate directly in the hostilities.[11]
- Private military and security companies: these are private business entities that provide military and/or security services. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings, and other places; maintenance and operation of weapon systems; prisoner detention; and advice to or training of local forces and security personnel.[12]

[10]United Nations Security Council (2015).

[11]These criteria are the basis for the three current official sources providing a definition of "mercenary": the 1977 OAU Convention for the Elimination of Mercenarism in Africa; the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries; and the first Protocol Additional to the Geneva Conventions, from 1977, as part of international humanitarian law.

[12]Definition provided in the "Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict." (2008). It is worth noting the restrictive nature of this definition, as the Montreux Document focuses solely on areas of conflict and not on other areas in which PMSCs might also operate.

3 The Afghan Case: A Fragmented and Violent Environment

3.1 The Weakness of the Afghan State After Decades of Conflict

The case of Afghanistan is paradigmatic as it has all the characteristics of the aforementioned anarchic conflicts. It is a failed state, insofar as there is no nation as such and government control does not extend to all provinces.[13] This fact is indicative of the extreme weakness of the state mechanisms available to the country's government. Needless to say, this situation is further complicated by the violent actions of the Taliban and other insurgent groups.

In certain regions, this glaring authority vacuum has been filled by a variety of NSAAs, who have benefited from the traditional tribal nature of Afghan society. Feelings of fondness for the tribe, clan, or family remain present in many facets of the country's political, economic, and social life. Although its importance varies from one ethnic group to another, among the country's Pashtun majority, the tribe or clan operates as a political and military unit controlled by a leader that shares responsibility for the crimes committed by its members and, in some cases, acts as an economic unit in which resources are also shared.

Since the toppling of the Taliban in 2001, the international community has made an enormous effort to create stable and effective government structures, focusing on state-building tasks. Specifically, it has sought to establish armed forces and police capable of gradually assuming the security of their own country.

Despite this effort, which continues today, the future of the Asian country remains conditioned by a large number of simultaneous challenges related to its, at best, incomplete governance. From security and the economy to human rights, the official indicators and reports point to a gradual decline in stability in recent months. Although the capacity and effectiveness of the central government in Kabul have significantly increased since 2001, disparities at the local level and, above all, corruption[14] remain widespread. At the same time, the lack of economic prospects is a multiplier for emigration. Most Afghans are wary of their country's uncertain future; as a result, thousands of mostly educated young people leave their nation each day—many for Europe. All of this harms the country's governance, which, in turn, favors the actions of antigovernment groups and, therefore, the violence they exert.

[13] According to the Fragile States Index 2015 (2015).

[14] According to Transparency International's Corruption Perceptions Index 2015 (2015).

3.2 Specific Features of the Afghan Armed Conflict: Asymmetric Warfare

Since the start of the Western military intervention in Afghanistan, the Afghan conflict has been considered "asymmetric." This classification mainly reflects the existence of considerable inequalities in the military capabilities of the belligerents, especially in the way in which some or all of them use lethal force without the usual constraints imposed by IHL.

Such asymmetric conflicts, also known as "irregular" conflicts, are characterized by a confrontation between the strong and weak in which the two parties use diametric strategic models—a set of coordinated measures to enable the achievement of military objectives—to gain superiority over their opponent at a given time and place. However, the war's real center of gravity is not the enemy forces but rather the willingness and support of the civilian population or a sector thereof. This point is vital to understanding the war's impact on human security.

3.3 NSAAs in Afghanistan

The withdrawal of most of the international combat forces and the assumption of full state sovereignty by Kabul in early 2015 marked the start of a new stage in the Afghan conflict in which the presence of NSAAs is increasingly important.

3.3.1 Progovernment Groups

In 2008, the failure of several efforts to train police forces led to the decision to develop local armed forces to protect their communities. Prior to that, the International Coalition had opposed helping such forces anywhere in Afghanistan out of fear of once again creating militias or paramilitary groups that, as in the past, were not properly controlled by Kabul.

However, the country's urgent security needs and the apparently successful experience in Iraq led to the belief that it would be advisable to encourage the activity of local armed groups to assist the Afghan National Police (ANP) and the Afghan National Army (ANA) in their security work. The rationale was that, although they would be operating outside the military or police command structures, these groups would both free the ANP and ANA from having to perform certain routine tasks and help to strengthen cooperation with local authorities.

As a result, progovernment armed groups, such as militias, auxiliary police forces, and private security companies, have emerged as key players in the Afghan conflict. The term "pro-government armed group" refers to an NSAA with an internal organizational structure that participates in the conflict and is distinct from the government forces, rebel forces, and criminal organizations. There is no

legal basis for these armed groups under Afghan law.[15] In 2010, the Interior Ministry estimated that there were no fewer than 2500 unauthorized armed groups operating in territory under government control.[16]

3.3.2 Militias, Paramilitaries, and Auxiliary Police Forces

In 2008, shortcomings in the recruiting and training of the national security forces, coupled with the country's increasing instability, led the authorities to approve the creation of local militias to fight the insurgency. Thus, following the model used by the US in Iraq, the International Coalition formalized several initiatives aimed at training auxiliary forces based on a given ethnicity, clan, or population while also placing them, at least in theory, under government control.[17]

Based on the experience gained in the Provincial Protection Program and City Stabilization Operations, the Afghan Local Police (ALP) was created in 2012. This paramilitary body, trained and armed by US special forces and assisted by civilian contractors, is made up of independent units, some 300 members strong, that operate in a given local area under the command of a district chief. Each candidate is vetted by a local *shura*, as well as by the Afghan intelligence, who authorize the candidate's assignment to an ALP unit. Currently, some 28,000 local police officers assigned to the program are operating in most of the country's 34 provinces. Almost without exception, there is a link between the ALP units and the militias, known locally as *Arbaki*—based on the former tribal security system[18]—led by local warlords, whose loyalty to Kabul is often questionable.[19]

For the same purposes and in light of the deteriorating security situation, in 2015, the Afghan government launched the National Uprising Support Strategy to create progovernment militias in 25 provinces in which the regular forces are largely absent. In many cases, these militias are linked to members of the government who have been identified as warlords for decades.[20]

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[15]United Nations Assistance Mission in Afghanistan (2016).

[16]Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination (2010). p. 9.

[17]The Daily Star (2010) Afghanistan Recruits Iraq-style Militia Force.

[18]For some, the fact that the Arbaki are an Afghan tradition means they are not militia by Western standards. Militias are made up of people from different walks of life, who have not been properly vetted. In contrast, the members of the Arbaki hail from specific villages and tribes and must be approved by the tribal chiefs. Some believe that the Arbaki concept should be restored as a means of securing Afghanistan, as occurred during the reign of Zahir Shah and in earlier, pre-Communist times. Seraj A (2014).

[19]Munoz C (2015).

[20]For example, in early 2016, groups of militia members associated with the vice president, Abdul Rashid Dostum, and his political party, Junbish-e-Milli, carried out counterinsurgency operations in the province of Jawzjan. Likewise, Abdul Rasul Sayyaf, another influential politician and an ethnic Pashtun, has said that former mujahideen, who fought against the Soviet invasion, could join the fight against the Taliban without government approval. Transparency International (2016).

Since the fall of the Taliban, the CIA has created its own network of militias to fight the insurgency. The largest is the Khost Protection Front (KPF), a paramilitary force that is more influential in that province than the national police and army and that operates outside the regular chain of command. The recruits come from local tribes and are promised better wages, equipment, and living conditions than in the Afghan military.

3.3.3 PMSCs and the Afghan Public Protection Force (APPF)

International PMSCs came to Afghanistan, together with the US and ISAF forces, at almost the same time as the military intervention to overthrow the Taliban. Ever since, PMSCs have provided multiple services to the international organizations, NGOs, and other players present in the country, such as risk analysis and planning, infrastructure security, communication lines and convoys, and field operations related to demining and logistics support.

However, the number of companies dedicated to guard and to do armed custody work owned by Afghan citizens increased rapidly following the intervention.[21] The main reasons for the presence of armed contractors were, first, the gradual deterioration of the security situation, with an increasingly active insurgency, and, second, the need to train the members of the ANA and the country's police. Thus, Afghanistan became a major market for PMSCs, many of them led by members of the Afghan government, close relatives of the political elite, or warlords.[22] Although many of this latter group nominally operated through PMSCs authorized by the Afghan Interior Ministry, in fact they were acting in a vacuum of legal authority and had conflicting interests with the fundamental objective of building a solid and efficient government in the country.[23]

Over time, the media reported numerous cases of abusive and even criminal conduct by the armed contractors, claiming that the contractors were undermining international efforts and strengthening the positions of the country's insurgents. In 2007, then Senator Barack Obama acknowledged this fact, stating, "We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors."[24]

In light of this situation, on August 17, 2010, then Afghan President Hamid Karzai signed Presidential Decree 62, requiring all private security companies, both domestic and foreign, that were operating in the country to cease their operations by

[21] De Winter-Schmitt R (2013).

[22] For instance, Watan Risk Management was owned by Ahmad Rateb Popal and Rashed Popal, both relatives of former President Karzai, and NCL Holdings, along with NCL Security, was founded and chaired by Hamed Wardak, son of former Defense Minister Rahim Wardak. Transparency International (2015).

[23] US House Of Representatives (2010).

[24] Council on Foreign Relations (2007).

the end of the year. The sole exception to this decree would be contractors to guard diplomatic delegations and official buildings, provided their activities were limited to the interior of the corresponding premises. Pressure from the international community delayed the decree's entry into force.

Karzai also promoted the creation of a public company, the Afghan Public Protection Force (APPF), with the aim of taking over the functions hitherto performed by the PMSCs.

The model followed ever since to recruit the members of this force has, once again, been that of the old Pashtun *Arbakis*. The APPF's members, who operate at the district level, are chosen by the tribal leaders. Once their candidacies have been reviewed and approved by the Afghan Interior Ministry, the recruits receive three weeks of training. By early 2014, the APPF was some 20,000 strong.

The APPF's current status is, at best, confusing. In March 2014, the Afghan Interior Ministry ordered the state-run company's dissolution, indicating that the "APPF will remain within the scope and mandate of ANP to provide security" and that the guards' salaries "will be paid by the Afghan government."[25] In August 2015, the new Afghan president, Ashraf Ghani, signed Presidential Decree 66, which allows US and NATO forces, and their respective contractors, to use private security guards outside their facilities or if they are providing "direct support" to the Afghan national security forces. Recent reports by the US Department of Defense indicate that there is no record of the current status of the APPF or whether the company continues to operate and provide security to supply convoys traveling on Afghan roads.[26] In these circumstances, many PMSCs have continued to operate in the country, either under exceptional licenses or carrying out unarmed services.[27]

3.4 Insurgents

Most of the groups that have made up the insurgency in Afghanistan since the fall of the Taliban regime can trace their roots to the fight against the Soviet invasion in 1979. Many of the main current insurgent leaders are former *mujahideen*, who, with US support, fought against the Soviet presence in the country. Following the USSR's withdrawal, the country was racked by a bloody war, from which the Taliban—or "students"—emerged victorious.

The fall of the radical Islamist regime, as a consequence of the international intervention, was a call to jihad for radical Islamists around the world. Arabs,

[25]Foschini, F (2014).

[26]Special Inspector General for Afghanistan Reconstruction (2016).

[27]In the second quarter of 2016, 872 armed guards were working for the US Department of Defense in Afghanistan. USCENTCOM (2016).

Caucasians, Central Asians, and Uighurs were drawn by the fight against the Western presence in the region.

Today, the Afghan insurgency is made up of a wide variety of interrelated/opposed armed groups, although, from an ideological point of view, they all share the same ultimate goal of creating an Islamic emirate governed by the principles of the most extremist and radical Sunnism. These groups have an undeniably national character, although some also clearly include foreign fighters.

The five main insurgent groups active in the region of the country are the Taliban; Al-Qaeda and its Uzbek affiliates, the Islamic Movement of Uzbekistan, and the Islamic Jihad Union; the Haqqani Network; Hezb-e-Islami Gulbuddin; and Daesh.

In Afghanistan, the alliances and rivalries between the majority-Pashtun Islamist movements, the largest ethnic group in Afghanistan and Pakistan, are usually defined by personal motivations and struggles for control of the population and territory. This is where drug trafficking comes into play, as a source of power and a means of financing violent activities. In other words, it is extremely difficult to dissociate drug trafficking from insurgent activities. Moreover, whenever possible, the illicit trade is spread through the region's countries by means of legal trade networks.

4 The Syrian Case: Anarchic War and Sectarianism

From the very start, the Syrian civil war has been characterized by three deeply interconnected factors that differentiate it from the "Afghan case": its sectarian nature, the great ideological fragmentation of the opposition, and its influence on the geopolitical dynamics affecting the Middle East as a whole. The interplay of these three factors gives rise to a highly complex panorama, which explains the conflict's long duration and cruelty.

4.1 Specific Features of the Syrian Armed Conflict: The War of All Against All

Despite being almost uniformly Sunni, the rebel opposition to the regime is highly fragmented, both organizationally and in terms of its objectives. This division of the opposition, at both the political and military levels, has facilitated the development of jihadist groups that, over time, have come to predominate the moderate factions. These Salafi jihadist groups include, among others, Jaish al-Islam, the Islamic Front, Ajnad al-Sham Islamic Union, and Jaish al-Mujahideen. However, for the time being, the two jihadist groups that have attracted worldwide attention are

Al-Nusra Front,[28] Al-Qaeda's Syrian branch, and the self-styled Islamic State in Iraq and the Levant, also known as the Islamic State or Daesh. These groups do not hesitate to fight each other or, conversely, temporarily unite, as the circumstances require.

Daesh has gained global notoriety for the brutality of the means it uses to fight and control the population living in areas under its control. With the help of social networks and information technology, the dramatic images and radical narratives instantly reach audiences worldwide. For Daesh, there is no limit to the use of force, and any form of action is permissible.

This form of unrestricted warfare has its counterpart in the Syrian regime, which also uses offensive methods that clash with the basic principles of international humanitarian law.[29] It, moreover, fiercely represses any political opposition, and its prisons have become torture centers.[30]

4.2 NSAAs in Syria

4.2.1 Militias

The main problem that the Assad regime faces is the lack of personnel to staff its military forces, which prevents it from sustaining long offensives, as well as from holding on to conquered ground. Over the course of the war, this problem has grown more acute due to the number of casualties suffered and the high rate of desertions among its ranks. As a result, paramilitary forces have become a key asset for the regime.

In this regard, the National Defense Forces, an umbrella organization encompassing various progovernment militias consisting of some 60,000 troops, is a vital element for Damascus.[31] Although these forces have participated as shock troops in offensive operations, their main functions include occupying conquered land and protecting supply lines and facilities, thereby freeing up the regular army to carry out the main combat operations.

The regime's resilience cannot be understood without the support of the Lebanese Shiite militia Hezbollah and other Shiite groups, such as the Quds Force—the special forces unit of the Iranian Revolutionary Guard—or the Iraqi militia Asa'ib Ahl al-Haq. In March 2014, between 4000 and 5000 Hezbollah militiamen and

[28] In July 2016, the leader of the Al-Nusra Front, Abu Mohammad al-Golani, announced that the organization was cutting ties with Al Qaeda and would be changing its name to Jabhat Fateh al-Sham (Front for the Liberation of Syria).

[29] Maurer P (2014).

[30] In an August 2016 report, Amnesty International calculated that, since the conflict began in 2011, almost 18,000 people have died in the regime's prisons in Damascus. Price M, Gohdes A, Ball P (2016).

[31] Jane's Sentinel Security Assessment - Eastern Mediterranean (2014).

20,000–30,000 Iraqi Shiite members of Asa'ib Ahl al-Haq[32] were fighting in Syria.[33]

The Kurdish minority in Syria has also resorted to militias. The withdrawal of the regular Syrian army from regions with a Kurdish ethnic majority has meant that, in practice, the People's Protection Units (YPGs from the Kurdish)—the armed wing of the Democratic Unity Party (PYD from the Kurdish)—control the main cities in the northwest of the country. In recent months, fighting between jihadists and *peshmergas*, the Kurdish combatants, in northern Syrian enclaves has intensified, and for the first time there have been clashes between the YPG and Assad's army.

4.2.2 Mercenaries and PMSCs

Russia's direct participation in the Syrian hostilities in support of the Assad regime is being carried out not only through regular military forces but also via private security contractors.

In October 2013, the media reported on the participation of some 300 Russian "mercenaries," hired by the company Slavonic Corps, in combat operations. Although technically a private Hong Kong-based company, Slavonic Corps is considered a branch of the Moran Security Group, a well-known St. Petersburg-based PMSC. By offshoring this way, the group was able to circumvent Russian laws prohibiting "private military" activity and "mercenaries."[34] On their return to Russia, some of these contractors were detained by the authorities for having engaged in "mercenary activities" in Syria. However, Slavonic Corps seems to have acted again in 2014, in Crimean territory and in the Ukrainian region of Luhansk.[35]

In late March 2016, an investigative piece published by *Fontaka*, an independent Russian newspaper, reported that the Kremlin had contracted the members of another private company, Wagner, to fight in Syria and Ukraine. These contractors would be handling tanks and heavy weapons as part of Russia's military forces in both theaters of operations.[36]

As Prime Minister, Vladimir Putin called for the legalization of private military services, arguing that they were a "tool for the implementation of national interests

[32]Since the US forces withdrew from Iraq in December 2011, Asa'ib Ahl al-Haq has emerged as one of the most powerful players in Iraqi political and public life. The group is closely connected to Hezbollah and has ties with Iran's supreme leader, Ayatollah Ali Khamenei. Chulov M (2014).

[33]Kershner I (2014).

[34]The Interpreter (2013) St. Petersburg Sends Contractors to Syria.

[35]Galeottin M (2016).

[36]Fontanka (2016) In Syria killed dozens of Russian soldiers working for private military company.

without direct participation of the State." The Russian authorities could thus use contractors to send trained military personnel overseas with deniability.[37]

Wagner, which currently has some 400 contractors, is not legally registered under Russian law and has no official status in the country—although there is a branch in Argentina, and it seems to operate a training base in the Russian city of Molkino.[38] In short, although the company is technically private, in fact it operates as a tool of the Russian government. Thus, in Syria, with the approval and, no doubt, funding of the Kremlin, Wagner is conducting combat missions, rendering the use of the term "mercenary" to refer to these activities inappropriate from an international law perspective. In this regard, it is worth noting that some of Wagner's casualties may have posthumously received official Russian awards for distinguished service, which would seem to support the claim that they were acting under government direction.[39]

4.2.3 Foreign Combatants/Terrorists

The conflicts in Syria and Iraq, and, especially, the rise of Daesh, have turned the region into a beacon for radical Islamists the world over. Thousands of foreigners have joined the brutal project of Abu Bakr al-Baghdadi, the supreme leader of the jihadist organization, to create a caliphate spanning all territories once dominated by Islam. The UN has called these jihadists, who hail from over 100 countries, "foreign terrorist fighters" and estimates their ranks at 25,000.[40]

However, this label poses two main problems. First, the term "terrorist" is ambiguous as it is subject to multiple interpretations.[41] It is sometimes used as a pejorative to avoid considering opponents of the *status quo* legitimate combatants under IHL and thereby granting them their recognized rights. At the opposite end of the spectrum is the idea that a people under foreign occupation or a dictatorship is entitled to resist and that no definition of terrorism should take away this right.

It is thus preferable to use the notion of "terrorist act" in connection with the drastic prohibition thereof under IHL, as the term "terrorism" does not express a legal concept (although it is a criminal behavior) but is rather a combination of political objectives, propaganda, and violent activities aimed at achieving a specific goal.[42] Terrorist acts can be considered one of the indiscriminate and, therefore, prohibited ways of conducting hostilities in irregular warfare. In weak states, this

[37]Quinn A (2016).

[38]Galeottin M (2016).

[39]Fitzpatrick C A (2016).

[40]Statement by the President of the Security Council on "Threats to international peace and security caused by terrorist acts." See Note 10.

[41]Sandoz counts 109 different definitions of terrorism. Sandoz Y (2002) p. 321 and 325.

[42]Rodríguez Villasante y Prieto J L (2007) p. 221.

type of combat is often just one of the tactics used in the political conflict between factions.

The second problem arises from the notion of "foreign terrorist fighter" itself. IHL, which seeks to clarify the status of the actors involved in a war in order to protect noncombatants, recognizes only two types of legitimate agents in a conflict: civilians and combatants. There is no third type such as might be inferred from the label "foreign terrorist."

The rules of IHL are based on an uncontroversial principle: in any fight against terrorism involving armed combat, through an armed conflict, the precepts of IHL unquestionably apply; however, they must not obstruct justice or serve as a pretext for impunity for war crimes.[43]

5 Implications for Human Security (HS)

Since the end of the Cold War, a school of thought has gradually gained traction based on the generic idea that too much emphasis has been placed on states as the reference point for security and that an alternative discourse should be used that focuses on individuals and/or social groups. National sovereignty is no longer given the same importance it received under traditional approaches; instead, there is, at least in theory, a "global sovereignty," in which respect for individual dignity should take precedence over any other consideration. For some, the state is now viewed as an element generating insecurity.[44]

At the 2005 World Summit, it was recognized that "all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential."[45] The UN thus sought to promote the notion of "human security" as a radically new way of extending protection to human beings. Challenged by some politicians and analysts due to its lack of specificity, the concept includes, among other considerations, the economy, food, health, politics, the environment, and the protection of individuals and the communities in which they live. In other words, "human insecurity" is caused by not only direct violence but also other factors related to underdevelopment and poverty.

In practice, the increasing participation of NSAAs, of all kinds, in today's armed conflicts is a step toward the demilitarization of war. As the Afghan and Syrian cases show, the restrictions on the use of violence established by *jus ad bellum* and *jus in bello*, which are binding on states and their armed forces, disappear, negatively impacting the human security of civilians affected by the fighting.

[43]Ibid, p. 253.

[44]Laborie M (2011b).

[45]United Nations General Assembly (2005).

In Afghanistan, where securing the support of the local population is essential to achieving the longed-for stability and where efforts are being made to build something resembling reliable state institutions, improper conduct, by both contractors and armed militia members, affects Afghans' perception of their government, which has already been largely discredited and suffers from a lack of legitimacy.

In 2015, the United Nations Assistance Mission in Afghanistan (UNAMA) detected a worrisome increase in the activity of progovernment militias and armed groups; since then, it has repeatedly recommended that they be dissolved. Likewise, although they acknowledge that government-backed militias play an important role in the fight against the insurgency, NATO commanders in Afghanistan have said that in the long term the threat they pose far outweighs the benefits they provide.[46]

In addition to the illegality of armed militias conducting armed operations, the paramilitary groups lack the training and discipline of regular forces and are not equipped to adequately protect civilians. Moreover, these groups often do not have a clear command structure, and the authorities are thus unable to effectively control them and identify those responsible for crimes or abuses.

The UN has documented human rights abuses by progovernment armed groups, including deliberate killings, assaults, extortion, intimidation, and theft. Between January 1 and December 31, 2015, UNAMA documented 136 civilian victims (54 killed and 82 injured) of such groups, 42% more than in 2014.[47]

For example, the KPF has been accused of involvement in civilian killings, torture, arbitrary arrests, and the use of excessive force. It must be recalled that this militia receives support from the CIA. The US intelligence agency is not subject to the human rights vetting procedures required under the Leahy Law, which prohibits the use of US taxpayer dollars to train or equip any foreign military or police unit accused of perpetrating human rights violations. A 2015 UN report noted that five detainees had been arrested by the KPF working in conjunction with "international military forces" and had been taken to the base at Camp Chapman, where they were "subjected to ill treatment." Two of these detainees showed signs of having been tortured when they were transferred to the ANP.[48]

For all these reasons, contrary to expectations, stability and security have declined in many parts of the country. As in the 1990s, following the fall of the pro-Soviet government, the Taliban have used these circumstances and the warlords' greed as a tool against the government in Kabul, presenting themselves as an alternative to the abuses of the paramilitaries.

Warlord-led militias fought against each other in the devastating civil war of the 1990s, which led to the deaths of hundreds of thousands of Afghan civilians and to the country's material destruction. The same scenarios are playing out again today,

[46]Munoz C, Military leaders worry about Afghan militias, See Note 19.

[47]United Nations Assistance Mission in Afghanistan (2016) p. 64.

[48]Raghavan, S (2015).

as old feuds and power struggles have resurfaced, triggering armed clashes between progovernment militias that indiscriminately affect civilians.[49]

Another issue is the use of PMSCs, which, according to Transparency International, pose five problems for Afghanistan[50]: first, their implication in violence against civilians and in extrajudicial killings; second, exploitation and abuse of civilians, through offenses such as extortion, protection rackets, kidnapping, human trafficking, theft, and looting; third, their involvement in power struggles between clans or local militias and warlords, which undermines efforts to establish democratic and accountable political structures at the national and local levels; fourth, PMSCs and their employees allegedly involved in crimes frequently manage to evade criminal prosecution in Afghanistan or their home states; and fifth, audits of these companies that have revealed cases of corruption, waste, and inefficiency.

In any case, the main concern is PMSCs owned by citizens of the country. In fact, many of them are no more than a militia at the service of a given warlord who has contacts with the insurgents, whom he pays off to avoid confrontations. Some of these companies have been implicated in criminal activities and human rights violations. The vast presence of armed contactors, without adequate means of control over the use of lethal force, generates a sense of fear and insecurity among civilians.

In June 2010, a US congressional hearing found that US forces were paying millions of dollars to local warlords, linked to the Taliban, to ensure the safe passage of convoys.[51] At almost the same time, it was discovered that a large sum of money, initially intended for a development project in the city of Jalalabad, had ended up in the hands of the insurgency.

Another report, this time by the US Senate Armed Services Committee,[52] published on September 28, 2010, noted that Americans were unintentionally helping the Taliban and endangering Western troops by entrusting their security to poorly vetted private agents who often had ties to local chiefs. The American senators concluded that this use of private security firms, which was inconsistent with the long-term counterinsurgency strategy, would negatively impact security and stability in Afghanistan.

The APPF, created to do away with the problems generated by PMSCs, has failed to achieve the objectives originally set by the Afghan government. The scant training provided, the recruitment problems, and the diffuse chain of command have hindered the operation of this force, whose current status lacks transparency.

Nor has the ALP avoided allegations of human rights violations. Its members have the authority to temporarily detain suspected criminals or insurgents and transfer them to the ANP or ANA. However, this power has given rise to serious abuses. Both the UN and human rights groups have denounced that members of the

[49]Ibid.

[50]Transparency International (2015).

[51]US Department of Defense (2010).

[52]US Senate Committee on Armed Services (2010).

ALP have engaged in killings, theft, kidnapping, rape, arbitrary detentions, intimidation, land appropriation, and sexual abuse. According to UNAMA, 134 civilian casualties could be attributed to the action of local police in 2015.[53]

Notwithstanding the above, the insurgents are the main group responsible for civilian deaths in Afghanistan, accounting for 62% of all such victims. In 2015, UNAMA documented 6859 civilian casualties (2315 deaths and 4544 injured) from operations and attacks carried out by antigovernment elements. The UN Mission identified several factors that contributed to this toll: the use of improvised explosive devices against the ANA and ANP, suicide attacks, targeted killings of civilians and members of government and state institutions, and the use of the death penalty as a means of implementing a parallel justice system in areas controlled by insurgents.[54]

With regard to Syria, the civil conflict is playing out with an extraordinary level of violence and ferocity. Human rights organizations have repeatedly accused both the regime in Damascus and the antigovernment factions of indiscriminate attacks, killings, torture, arbitrary arrests, and other gross human rights violations.

The regime's use of means and forms of combat that are both indiscriminate and contrary to international humanitarian law causes enormous suffering in the civilian population. In particular, the use of so-called barrel bombs, dropped from helicopters and able to destroy entire buildings, has become common practice. These types of improvised explosive devices are used to destroy hospitals, schools, and other infrastructure that is critical to people's lives.[55]

In particular, the regime in Damascus, with the support of its Russian allies, seems to be pursuing the destruction of hospitals and the death of medical personnel in areas held by the rebel forces.[56] Between December 2015 and March 2016, Amnesty International documented at least six such attacks, which would constitute war crimes. The organization has suggested that Russia and the regime use these attacks as a way to force residents to flee before laying siege to a city or neighborhood.[57] The use of chemical weapons in the conflict has also been documented, although in this case by both the regime and the rebel opposition.[58]

The government's systematic violence has turned prisons into torture centers. According to the Human Rights Council, people detained by the authorities in Damascus have been beaten to death or died from injuries sustained due to torture. Others have perished as a result of inhuman living conditions. "The Government

[53]United Nations Assistance Mission In Afghanistan (2016) p. 67.

[54]Ibid, pp. 33–57.

[55]Roth, K (2015).

[56]BBC News (2016) Syria crisis: Air strikes on hospitals 'war crimes'.

[57]Amnesty International (2016).

[58]As a result of the international pressure, the government surrendered its arsenal of this type of weapons in July 2014. In November 2015, the Organisation for the Prohibition of Chemical Weapons confirmed the use of mustard gas in the town of Marea, north of the Syrian city of Aleppo, the site of combat between the Islamic State and a group of Syrian rebels. Deutsch A (2015).

has committed the crimes against humanity of extermination, murder, rape or other forms of sexual violence, torture, imprisonment, enforced disappearance and other inhuman acts."[59]

At the same time, the actions of the progovernment Shiite militias have exacerbated the sectarian nature of the conflict, leading to a stream of Sunni refugees who are fleeing not only from the war but also because of potential reprisals. The same is true of the actions of the Kurdish *peshmergas* when they act in areas with an ethnic Arab majority.[60]

In this war "of all against all," it is no surprise that Syrian rebel groups have also committed egregious war crimes. According to Amnesty International, five such antigovernment factions—al-Nusra Front, Ahrar al-Sham, Nureddin-Zinki, Daesh, and Division 16—have detained and tortured lawyers, journalists, and children for criticizing them, committing acts viewed as immoral, or belonging to minorities.[61]

The case of foreign fighters who have joined jihadist groups in Syria or Iraq has drawn special attention from the UN Security Council. The UN has consistently expressed concern for the fact that foreigners increase the intensity, duration, and intractability of the conflicts and, also, that they could pose a serious threat to their home states, where their extremist ideology might lead them to promote terrorism.

6 Conclusions

Today, the study of the nature and characteristics of armed conflicts is crucial to identifying effective policies for their prevention, management, and resolution. Civil or internal wars, which have become the norm in modern-day conflicts, are more difficult to conceptualize than international ones due to the complexity and diversity of the scenarios in which they take place.

Undoubtedly, the main factor contributing to this situation is the progressive privatization of organized violence as the growing number and importance of nonstate armed groups is key to the instability of states. As the Afghan and Syrian cases show, in these "non-international" conflicts, as they are called under IHL, the direct participation in hostilities of NSAAs negatively impacts all aspects of human security, making it one of the main threats to peace and stability.

In failed states such as those analyzed here, the central government loses control of large parts of the territory, leading to the collapse of central government structures, as they are unable to guarantee citizens essential services related to security, health, education, or infrastructure. As a result, populations organize

[59]The Human Rights Council has reported on the existence of hundreds of thousands of detainees. Several thousands more have disappeared after being arrested by the government. Human Rights Council (2016).

[60]The New Arab (2016b) Residents flee as Syrian fighters near IS-held town.

[61]The New Arab (2016a) Amnesty: Extremist Syrian rebels 'guilty of war crimes'.

around prestate political structures, which develop ad hoc agreements to manage the affairs of an environment without state sovereignty. As in medieval Europe, there is a return to tribal logic and to temporary warlords, reprivatization of the law, and renewed confusion between economic exploitation and political dominance. Thus, the massive presence of many types of NSAAs has increased the level of violence in both Syria and Afghanistan.

The resurgence of local progovernment militias in Afghanistan negatively impacts the security of civilians, outweighing any potential benefits they might provide in the fight against the Taliban. At the same time, the use of NSAAs hinders efforts to establish effective national armed forces and police as they actually constitute illegitimate competition. Additionally, the ANP and ANA must overcome the challenges posed by the tribal structure of Afghan society, which is exploited to the benefit of local leaders, warlords, and insurgents.

With regard to the use of PMSCs, the security of the supply chains of military forces and international organizations is in fact being outsourced to warlords and local militia leaders, who compete with the Afghan central government for power and authority. By providing these protection services, these nonstate actors obtain money, legitimacy, and a raison d'être for their private armies.

In short, the ALP, government militias, and PMSCs and the APPF have been a source of human insecurity for two sets of reasons. The first has to do with the interests of these groups themselves, which often differ from those of the government in Kabul. The second is related to the lack of national and international oversight of these armed groups, which generates a sense of impunity with regard to the crimes committed.[62]

Within the parameters laid out in the text, the Syrian war has reached levels of savagery and violence that are difficult for Westerners to imagine. It is no coincidence that this conflict is also dominated by the actions of various NSAAs, each with its own agenda. The reason for the confrontation between the different parties is the expression of ethnic or religious identity rather than political ideology. The actions of the belligerents heed no limits or legal regulations. Most vitally, civilians have become a military target, forcing the populations of entire regions to flee from their homes.

The challenge of regulating all these types of actors and, especially, their conduct lies in the constantly declining role of states in the international arena. Under these circumstances, any measure that might exacerbate this weakness should be carefully evaluated.

[62]Krahmann E, Friesendorf C (2014) p. 17.

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Mario Laborie is a Spanish army colonel (active duty), Political Advisor of Eurocorps, Doctor in International Security, analyst and lecturer specialized in armed conflicts and geopolitics. He is university professor in the PhD program at UNED.

Delimitation and Presence of PMSCs: Impact on Human Rights

Felipe Daza

Abstract Today, private military and security companies (PMSCs) can be found in various operational contexts and provide a wide range of services for public and private clients. It is increasingly common to see PMSCs patrolling borders, providing security in airports, protecting extractive industry projects, or providing military services in areas affected by conflict.

The demand for PMSCs' services has grown considerably in the last decade, reflecting the process of privatization of security in areas in which it was traditionally provided by public security forces. The outsourcing of these services, which in many cases involve the use of force, has a vast impact on human rights.

This chapter delimits the presence and services provided by PMSCs at the international level and analyzes how their operations impact human rights. The author identifies and systematizes types of human rights' violations according the services provided by PMSC and their operational contexts with the aim of providing more evidence and factors to open a public debate on which security areas should remain under the management of public institutions and which PMSC activities should be regulated.

1 Introduction

This chapter aims to delimit the presence and services provided by private military and security companies (PMSCs) at the international level, as well as to analyze how their operations impact human rights. To this end, it will examine the economic magnitude of the process of privatization of security and the factors that have contributed to the emergence of an eminently transnational private military and security industry.

F. Daza (✉)
International Institute for Nonviolent Action (NOVACT), Barcelona, Spain
e-mail: felip@novact.org

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The present chapter is based on the results of the **Shock Monitor**[1] monitoring center, an international research initiative undertaken by NOVACT that aims to document, record, systematize, and analyze the impact of PMSCs' operations on the human rights of the communities where they operate. Shock Monitor was launched to remedy the lack of sufficient statistics on the human rights abuses committed by PMSCs, as well as of official, systematic reports by public authorities and international bodies in this industry.

To prepare this report, Shock Monitor analyzed **385 PMSCs and 108 human rights incidents** at the international level, from 2000 to the present. That year saw major developments in the privatization of security in the occupation of Palestine. Following the second Palestinian Intifada, Israel transferred broad security functions to PMSCs in various operational contexts in the occupied Palestinian territories (OPT). Today, this security model is shaping the EU's border security policy through the main Israeli PMSCs coupled with large companies from the European and US military industries.[2] Furthermore, just one year later, the attack on the Twin Towers in New York led to a major turning point in the global privatization process, with the countries of Afghanistan and Iraq serving as PMSCs' main scenarios of operation.

Shock Monitor draws on data collected by local researchers in the PMSCs' territorial countries. All recorded and verified incidents have at least three types of sources. This rigorous approach will make it possible to draw incontrovertible conclusions regarding the need for national and international regulation of the industry.

2 The Rise of PMSCs: Keys to Understanding the Industry's Development

The contracting of PMSCs by states has gone from being the exception to being the rule. The last 20 years have witnessed an alarming use of PMSCs, mainly by Western countries such as the US and the UK, allowing the industry to expand into many countries in conflict and/or suffering from political and social instability. The turning point in the industry's development can be geographically traced to the invasions of Iraq and Afghanistan following the events of September 11, 2001.

According to Andy Bearpark, director-general of the British Association of Private Security Companies, "In Iraq in 2003 and 2004 money was basically free. That meant that [private security] contracts were being let for ridiculous amounts of money – millions and millions of dollars of contracts were being pumped into the industry. The industry exploded in terms of the volume of business on the back of

[1] See www.shockmonitor.org.

[2] Akkerman M (2016), pp. 41–42.

Iraq."[3] Estimated global revenues range from $20 to 100 billion,[4] and the UN Working Group on the Use of Mercenaries estimated that global demand for private security services would increase 7.4% annually to $244 billion by 2016.[5] In the specific case of Iraq, these economic estimations translated to the presence of 190,000 PMSC contractors between 2003 and 2007, counting only those on US government-funded contracts.[6]

Despite the industry's extensive development, there is a remarkable lack of data on the number of contracts, the contracted PMSCs, the services they provide, and the cost of using PMSCs to governments, which are their main clients.[7] This lack of transparency also extends to the countries where the PMSCs operate; the licensing processes in countries in conflict are incomplete and belated. The first licensing process for PMSCs in Afghanistan took place in 2008, at least ten years after the arrival of private security contractors in the country.[8]

To understand the PMSC industry's development beyond the scenarios of Iraq and Afghanistan, it is necessary to look at the global trends that have contributed to the emergence and transformation of these new nonstate armed actors.

First, when the Cold War ended, most of the military and defense structures created by the Soviet Union and the US were dismantled. This left a huge military surplus, in terms of both manpower and weapons, and triggered a reduction in global military spending. The military and security industry's transformation was inevitable; the surpluses were regrouped and managed by private companies, which then sought new strategies to grow their share of the profits.

Second, the privatization of public industries promoted by globalization and neoliberal processes also extends to the areas of defense and security, under the pretext of enhancing economic efficiency. According to senior military and security officials, the use of PMSCs is warranted in terms of military strategy as it allows soldiers to focus on specifically military functions, enables rapid deployment capacity, provides great technical expertise, and offers the long-term advantage[9] of becoming more economically efficient by reducing the costs of maintaining a professional army in peace times. The abolishment of mandatory military service in many countries, and the consequent reduction in the number of troops in their armies, has also contributed to this phenomenon.

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[3] *The rise of the UK's private security companies*, BBC News, November 2, 2010. Available at http://www.bbc.com/news/business-11521579, last accessed on October 20, 2016.

[4] Buzatu A (2008), p. 7.

[5] See United Nations Office of the High Commissioner for Human Rights, Working Group on the Use of Mercenaries, *Report to the 68th session of the General Assembly*, UN Doc. A/68/339, August 20, 2013. Available at: http://www.un.org/en/ga/third/68/documentslist.shtml, last accessed on October 20, 2016.

[6] Fontaine R, Nagl J (2010), p. 11.

[7] DeWinter-Schmitt R. (ed.) (2013), p. 18.

[8] Armendáriz L (2013), p. 14.

[9] NOVACT (2016), p. 14.

Third, the use of PMSCs reduces political costs for governments. Unlike sending troops on peacekeeping missions or missions to defend national interests overseas, hiring private contractors to operate in conflict zones makes it possible to avoid public scrutiny as it does not require parliamentary approval. Although they benefited from immunity clauses in 2004 and 2009 in Iraq, private contractors are not recognized as official members of the armed forces.[10] Thus, states are able to evade their responsibility for the casualties these companies cause and for any human rights abuses they may commit in the provision of their services. Furthermore, there is complete opacity surrounding the contracts signed and no effective regulatory framework to ensure accountability, including the responsibility of states and other PMSC clients, or access by the victims to means of redress.

Fourth, as will be seen below, the governments of the PMSCs' "territorial" countries sometimes have an interest in encouraging the development of this type of industry in their countries or are forced to allow these private corporations into their territory to ensure the completion of the country's reconstruction processes.[11]

Finally, not only did the 9/11 attacks in the US "justify" a foreign military policy culminating in the occupation of Iraq and the bombing of Afghanistan; they also enabled the implementation of a new security strategy at the domestic level. The US Homeland Security Act focuses on both international threats and internal ones, thereby increasing the country's security needs. In just a few years, the virtually nonexistent domestic private security industry burst on stage and swelled to its current size. As Naomi Klein has written, the relationship between Homeland Security policies, the development of the private security industry, and the fostering of a sense of danger in society during the Bush Administration is especially worrisome.[12]

The privatization of national and international security promoted by the US quickly spread around the globe, triggering a proliferation of PMSCs on the market and of rationales for their use by strategic policy players. NATO's new 2008 security strategy, "Towards a Grand Strategy for an Uncertain World," is the result of this logic based on a prevention strategy aimed at keeping risks at a distance and protecting NATO members' homelands.[13] To paraphrase the former European commissioner Franco Frattini, security is conceived of as a "common good," the responsibility for which no longer falls solely to the state but rather should be shared by private bodies.[14]

[10] Armendariz L, Palou-Loverdos J (ed.) (2011), p. 64.

[11] Isenberg D (1997), p. 3.

[12] Klein N (2007), p. 306.

[13] See NATO, *Towards a Grand Strategy for an Uncertain World*, 2008.

[14] For more information see Frattini F., *Security by design*, speech at the EU Security Research Conference in Berlin, March 26, 2007. Available at http://europa.eu/rapid/press-release_SPEECH-07-188_en.htm, last accessed on October 20, 2016.

3 Delimitation and Presence of PMSCs

3.1 Home and Contracting Countries

Shock Monitor's analysis of PMSCs' home countries (where the companies are headquartered) and territorial countries (where they conduct their operations) confirms the transnational nature of these private corporations, in terms of both the multiple nationalities of their employees and their theaters of operations. The countries with the largest number of analyzed PMSCs were the US, the UK, Israel, France, the UAE, Cyprus,[15] and South Africa.

The main PMSC home countries are also the countries most likely to contract their services. The US and UK governments and their agencies were the main PMSC clients in Iraq, which was the scene of the first major privatization of war and security. The first foreign private contractors arrived along with the Coalition Forces. The US remained the PMSC industry's largest client in Iraq until the withdrawal of its troops in 2011.[16]

The widespread use of PMSCs by governments in the contexts of Iraq and Afghanistan also extended to other national and international actors: international organizations such as the UN, international NGOs and humanitarian organizations, media companies, multinational extractive corporations or shipping companies, and businesspeople, among others.

Although governments are currently still PMSCs' main clients,[17] the extractive and energy industries are increasingly contracting their services, too.[18] Some 46% of the PMSCs analyzed by Shock Monitor advertise services for companies on their websites, and 18% specifically offer services for the energy industry, especially oil, gas, and mining companies. One of main global PMSCs, G4S, reported that the revenues from its "Secure Solutions" program in 2012 had the following breakdown: government contracts (23%); contracts with private corporations and industries, including humanitarian organizations (59%); and contracts with financial institutions (18%).[19]

In contexts of conflict or political and social instability, PMSCs are used to defend the industries' interests in order to ensure the extraction and transportation

[15]Most PMSCs headquartered in Cyprus work in the field of maritime security.

[16]*For more information see Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. Addendum: Mission to Iraq,* (UNWG-Mission to Iraq). A/HRC/18/32/Add.4, 2011, p. 7. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A.HRC.18.32.Add.4_en.pdf, last accessed on October 20, 2016.

[17]See Interview with Doug Brook, president of International Stability Operations Association (ISOA). Available at http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/brooks.html, last accessed on October 20, 2016.

[18]Pingeot L (2012), p. 13.

[19]See G4S corporate information. Available at http://www.g4s.com/~/media/Files/Annual%20Reports/ARA%202012.pdf, last accessed on October 20, 2016.

of natural resources. They thus follow "rules of engagement" based on protecting the client at any cost, legitimizing the use of lethal force against the local population should the mission so require.[20]

In the humanitarian sector, contracting of PMSC services by humanitarian agencies increased between 2003 and 2008, especially in contexts of postconflict rehabilitation, humanitarian crises, and reconstruction following natural disasters.[21] Due to the controversial nature of PMSCs, humanitarian organizations have tried to keep these contracts secret and even choose whether to contract a national or international company depending on the services required, using local PMSCs for armed services and international ones for unarmed services, such as training, risk assessment, or security consulting.[22] Despite various reports by research centers and international organizations on the reputational risks, negative impact on human rights, and lack of accountability of PMSCs, the UN's secretaries-general and senior security officials have kept in place and even strengthened a policy of outsourcing security to these private corporations. Although the UN's public records are incomplete, spending on these services increased 73% between 2009 and 2010, from $44 million to $76 million.[23]

The opacity of the contractual relationships between PMSCs and their clients—as well as between PMSCs and their employees—including public institutions and international organizations such as the UN, poses challenges for the attribution of responsibility in situations of human rights abuses.

3.2 Services

Unlike under the traditional concept of mercenarism, modern PMSCs can work for various clients in a single territory and perform a wide range of functions. Indeed, the functions of private contractors have evolved from simple tasks (catering, medical services, transportation, etc.) to more complex ones (intelligence, mine clearance and demining, protection, etc.).[24]

Depending on the nature of these tasks, a distinction can be made between armed and unarmed functions. Likewise, the functions can be divided into security services and military services, a classification that has allowed some public institutions to eliminate certain military tasks from official documents, as can be seen in the regulations of the Coalition Provisional Authority in Iraq, and to refer to this industry as private security companies. This distinction is contradictory, given that Congressional Research Service reports state that the US has relied heavily on

[20] NOVACT (2016), p. 12.

[21] Stoddard A, Harmer A, Didomenico V (2008), pp. 8–9.

[22] *Ibid.*

[23] Pingeot L (2012), pp. 20–23.

[24] Fontaine R, Nagl J (2010), p. 9.

private corporations for support in combat, military assistance, and stabilization operations.[25] Most of the transnational companies analyzed by Shock Monitor carry out both security and military functions (74%); therefore, the PMSC concept is a better reflection of the industry's essence.

The main services offered by the 385 PMSCs analyzed are as follows:

1. security and protection (283)[26];
2. intelligence (163)[27];
3. consulting and training for police (154)[28];
4. military operational support (97)[29];
5. construction and maintenance of military infrastructure (87)[30];
6. military logistics support (83);
7. maritime security (51);
8. provision, maintenance, and disposal of weapons/explosives (47);
9. other (legal support, hijacking management, etc.) (45);
10. military assistance (29)[31];
11. mine clearance and demining (19);
12. quasi-police tasks (18)[32];
13. humanitarian aid (11);
14. provision and maintenance of surveillance systems, remote control (6);
15. combat and military operations (4).

Of the ten main services offered by PMSCs, at least five are considered inherent state functions, that is, functions consistent with the principle of the state's monopoly on the legitimate use of force.

One of the functions most often offered and performed by PMSCs is **intelligence services**, including counterintelligence, cybersecurity, and risk analysis and management. In this line, PMSCs include in their structures IT security departments that provide surveillance and monitoring systems, maintenance of these systems, and secure storage in their databases. In a national security context, this type of function enables access to and the collection and processing of hundreds of thousands of pieces of personal data.

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[25]Elsea J K, Schwartz M, Nakamura K H (2008).

[26]This category would also include functions such as protecting convoys, security for critical infrastructure (e.g., embassies, government buildings, etc.), guard services, etc.

[27]Includes services such as risk analysis and management, interrogation, counterintelligence, and cybersecurity.

[28]Encompasses training and consulting services for law enforcement in defensive tactics and strategic planning.

[29]Services related to establishing and managing chains of command and control and operational communication centers.

[30]Includes provision of security services, delimitation of security areas in base camps, etc.

[31]Refers to training and consulting services for armed forces.

[32]Functions related to keeping the public order traditionally performed by police, such as guarding and controlling access at borders.

The outsourcing of these types of functions to private security companies has several implications in terms of national and international security. First, it allows PMSCs to access personal data, create profiles, and identify and neutralize individuals who might pose a threat to the country. The European Parliament has expressed serious concerns with regard to such profiling and its legal implications, in terms of what is and is not acceptable, especially in connection with race, ethnicity, and religion, in the context of data protection, law enforcement cooperation, exchange of data and intelligence, aviation and transport security, immigration and border management, and the treatment of minorities.[33] As documented by the Open Society Initiative expert Rebekah Delsol, since the 9/11 attacks, 32% of British Muslims report having been subjected to discrimination at airports, one of the main operational contexts of PMSCs.[34]

Second, the economic interests and "hard security" approach of PMSCs, based on secret intelligence operations, war logics, and extra-legal actions, clearly shape their conflict analyses and risk assessments. These analyses thus end up ignoring the social and political dynamics of the countries in which they operate and marginalizing diplomatic and mediation-based alternatives, which obviously do not involve the use of force and thus fall outside their area of expertise. As Lou Pingeot noted in the report "Dangerous Partnership," the outsourcing of intelligence services to private corporations means allowing these PMSCs to define their clients' security strategy and, in the specific case of international organizations such as the UN, to endanger their reputation and broader political posture.[35]

For example, in its 2015 Risk Map, Control Risks, one of the main PMSCs conducting intelligence and risk analysis and management functions, defined the Gulf of Aden region, the eastern coast of Africa from Eritrea to Mozambique, and the Arabian Sea as an extreme risk in terms of maritime security.[36] This analysis was echoed in several reports by other PMSCs, such as the French company Amarante International.[37]

However, at the start of 2016, Peter Cook, president of the Security Association for the Maritime Industry (SAMI), the main international lobbyist for maritime PMSCs, announced the association's voluntary liquidation because the threat of piracy in the highest-risk areas had disappeared and, as a result, so had many small PMSCs, leading to a collapse in the association's membership. According to Cook,

[33]For more information, see European Parliament, Committee on Civil Liberties, Justice and Home Affair, *Recommendation to the Council on profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control*, (Rapporteur: Sarah Ludford), September 30, 2009. Available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/759/759535/759535en.pdf, last accessed on October 20, 2016.

[34]Delsol R (2008).

[35]Pingeot L (2012), p. 41.

[36]See Control Risks, *RiskMap*, 2015. Available at http://africanbusinessmagazine.com/uncategorised/control-risks-risk-map-2015-infographic/, last accessed on October 9, 2016.

[37]See the Amarante International corporate website at http://www.amarante.com/fr/, last accessed on October 21, 2016.

the association was a victim of its own success; no commercial vessel has been hijacked off the coasts of Somalia or the Horn of Africa since 2012.[38]

Quasi-police services related to law enforcement, detentions, and interrogation, among others, also pose a serious threat to the rule of law. The following events exemplify this threat: (i) the defunct company USIS was hired to assist the Regional Security Office in Baghdad by investigating crime scenes, interviewing witnesses, collecting and analyzing evidence, testifying in judicial and administrative proceedings, analyzing incidents for compliance with policy, laws, and regulations, and maintaining case files and tracking the status of investigations[39]; (ii) the private US corporation Torres offers "military and law enforcement services" on its corporate website, including a wide range of border management functions such as planning, implementation, integration, execution, and operations to prevent the entry of terrorists, unlawful migrants, and criminals, as well as the trafficking of drugs, contraband, and human beings[40]; (iii) the likewise US-based MVM offers services for the classification and transport of immigrants[41]; and (iv) the British company Polarm offers specialized services for removing protestors from critical infrastructure in cooperation with the police in order to "enable a rapid return to business."[42]

3.3 Territorial Countries

As Mario Laborie's chapter "Afghanistan and Syria: Non-State Actors and Their Negative Impact on Human Security" shows, PMSCs exacerbate the process of fragmentation of armed actors, undermine state sovereignty, and negatively impact human security. International PMSCs contribute to this process through the development of local PMSCs in their territorial countries.

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[38]See statements by Peter Cook at https://maritimecyprus.com/2016/04/19/the-security-association-for-the-maritime-industry-sami-announces-voluntary-liquidation/, last accessed on October 20, 2016.

[39]See United Nations Office of the High Commissioner for Human Rights, Working Group on the Use of Mercenaries, *Report to the 68th session of the General Assembly*, UN Doc. A/65/325, October 25, 2010. Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/493/92/PDF/N1049392.pdf?OpenElement, last accessed on October 20, 2016.

[40]See the "Military and Law Enforcement Services" section of the Torres corporate website at http://www.torresco.com/services-solutions/military-police-training/, last accessed on October 9, 2016.

[41]See the MVM corporate website at http://www.mvminc.com/services/immigrationsupportanddetentionmanagement/securetransportationservices, last accessed on October 9, 2016.

[42]See the Polarm corporate website at http://www.polarmgroup.com/protestor-removal/4591666598, last accessed on October 20, 2016.

In Afghanistan, the first PMSCs to arrive in the country prior to 9/11 were foreign. However, the national industry gradually grew until most PMSCs licensed to operate in the country were Afghan owned, and most of their employees were local.[43]

The industry's development was due in part to the Afghan government's inability to protect the country's reconstruction and stabilization projects. In 2005, following the escalation of violence in the country, the government acknowledged this shortcoming and outsourced its security functions to PMSCs. At the same time, senior Afghan government officials and commanders saw a lucrative business opportunity in the sector. In fact, many members of the state's armed forces and police have joined the private security industry, drawn by the better pay.[44]

This helped to create a public-private security system in which the security of international actors was transferred to PMSCs and the security of public spaces and Afghan citizens was ensured by the underprepared Afghan National Security Forces (ANSF), which ended up contracting training services from the PMSCs.

The great proliferation of local PMSCs also led to the development of an irregular private network made up of Afghan PMSCs and tribal leaders linked to militias, which hindered the program to disarm the country's illegal armed groups implemented by the Afghan government with the support of the international community.[45] This situation also pushed back the implementation of a complete licensing and registration process for PMSCs operating in the country until 2008.[46] The situation in Afghanistan today shows that this high reliance on the PMSC industry has not been conducive to the development of solid security structures in the country.

Unlike in the Afghan case, in Iraq, the PMSC industry was essentially foreign. International PMSCs were awarded lucrative contracts to train the new Iraqi army and police, but the training programs were insufficient and recruits were poorly vetted. In practice, this led to a lack of loyalty of Iraqi soldiers and police to the public institutions they served, with the consequent inability to maintain order and security, leading to an increase in violence.[47] In this atmosphere of distrust toward the police, a local PMSC industry grew up, with the participation of political leaders and members of government.[48] In 2011, the UN Working Group on the Use of

[43]For an account of PMSCs operating in Afghanistan until 2007, see: Rimli, L., and Schmeidl, S., *Private Security Companies and Local Populations: An exploratory study of Afghanistan and Angola*, SwissPeace, Bern, 2007. See also: *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination. Addendum Mission to Afghanistan A/HRC/15/25/Add.2*. Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/143/57/PDF/G1014357.pdf?OpenElement, last accessed on October 20, 2016.

[44]Hammes T X (2011), p. 31.

[45]Aikins M (2012), p. 6.

[46]Armendariz L (2013), p. 14.

[47]Allawi A (2007), p. 120.

[48]NOVACT (2016), p. 14.

Mercenaries found that of the 117 PMSCs licensed in Baghdad in 2011, 89 were Iraqi.[49] Of the 35,000 registered PMSC employees, at least 23,160 were Iraqi. These figures bear witness to the industry's potential in Iraq, especially when compared to the number of Iraqi federal police (45,000) at the time the US withdrew its troops.

Another case of the development of a local PMSC industry was the process of privatization of Israeli security. This process was accelerated with the second Palestinian Intifada in 2000 and accompanied by different policies to privatize security in the occupied territories. The strategy to privatize security was organized around two processes. First, security functions at checkpoints and illegal settlements in the OPT were outsourced to PMSCs. In 2014, 38 "border" checkpoints between Israel and the West Bank, and 87 inside the OPT, were managed by private security agents,[50] and in 2008, the Israeli government transferred the responsibility for the security of 40 illegal settlements in the OPT to PMSCs.[51] Second, the government undertook a "civilianization" process, consisting of the transfer of security functions to civilians, specifically, to colonists in illegal settlements in the OPT. This process reflects the Israeli defense doctrine, which considers West Bank settlements to be key military and regional defense spots, assigning military support and security functions to the Israeli Defense Forces (IDF) and the actual defense of the settlement in emergencies to the settlers themselves. Thus, settlements can currently have their own civilian security groups, made up of a civilian security coordinator (CSC) and a 12-person emergency unit. The security functions of these civilian groups have been expanded through Israeli military orders beyond the settlements' borders to include broader regions, including industrial areas, within the context of perimeter security. This has enabled the creation of civilian communities, trained and equipped with weapons from the Israeli army and coordinated by a CSC, who, although hired by the settlement's authorities, is trained and paid by the country's Ministry of Defense.[52] This figure is consistent with the concept of a private security contractor, whereby the state transfers its powers in matters of security and quasi-police work to civilian actors in conflict areas.[53]

3.4 Operational Contexts

The public-private security system that has developed in Afghanistan and Iraq beginning in 2005, based on the states' dependence on PMSCs, has moved beyond situations of war to include contexts of peace. In this framework, PMSCs have

[49]UNWG-Mission to Iraq (2011), pp. 7–9.
[50]Armendáriz L (2015), p. 21.
[51]*Ibid*., p. 27.
[52]*Ibid*., pp. 26–27.
[53]NOVACT (2016), p. 62.

adapted to provide different types of services for different operational contexts. Today, PMSCs can easily be found protecting military bases in conflict zones, building perimeter security systems on European countries' borders, performing risk analyses for maritime shipping companies, or searching passengers at international airports.

The various operational contexts in which they provide their services can mainly be differentiated based on the nature of the services provided and their impact on human rights. The most predominant operational contexts identified by Shock Monitor are as follows.

(A) Critical and strategic infrastructure: this context includes those assets, systems, and networks, whether physical or virtual, that are vital to a state and whose incapacitation or destruction would have a debilitating effect on a country's security, economic, or public health system.[54] This definition would include operational contexts such as airports, ports, transportation infrastructure (bridges, roads, etc.), energy infrastructure (electricity, nuclear energy, dams, etc.), military bases, embassies, etc. Most of the contracts in these operational contexts are signed with governments and international organizations for static security functions, intelligence services, the installation of surveillance equipment, etc.

At least 18% of the companies analyzed by Shock Monitor offer critical infrastructure security services, especially for ports, airports, and embassies. In Iraq, numerous foreign PMSCs performed security services in the Green Zone in Baghdad and at its access points, as well as at most of the embassies in the Iraqi capital. For instance, the staff at the US embassy in Baghdad was protected by at least 200 private contractors under a $10 billion five-year Worldwide Protective Services contract that the US Department of State signed with eight PMSCs in 2010, including DynCorp International and Triple Canopy.[55] Likewise, in September 2013, the British company G4S signed a new contract with the Iraqi Ministry of Transport to extend its contract to provide security at Baghdad International Airport.[56]

(B) Extractive industry projects: this context involves protecting infrastructure for the exploitation and processing of mineral and energy resources and the transportation thereof to other countries. It is another of the main operational contexts of PMSCs, accessed through contracts with international and local companies. Shock Monitor has identified 184 PMSCs (47% of the total number analyzed) that offer services for companies in the oil, gas, and mining industries. The types of services offered to extractive companies include static protection of the company's infrastructure and employees; the construction of security systems such as smart fences, closed-circuit television (CCTV) systems, and other security

[54]Here we use the definition of critical infrastructure established by the US Department of Security. See https://www.dhs.gov/what-critical-infrastructure, last accessed on October 21, 2016.

[55]NOVACT (2016), p. 13.

[56]G4S corporate information is available at http://www.g4s.com/en/Media%20Centre/News/2013/09/19/Baghdad/, last accessed on October 20, 2016.

sensors; risk analysis and management in the territorial countries; and mobile protection of the transportation of extracted resources.

(C) Maritime security: this context includes security services for the transportation of goods by sea, the protection of fishing vessels, and risk analysis, as well as port security (which is also related to critical infrastructure). PMSCs provide these services under contracts with other transnational companies. A total of 13% of the companies analyzed by Shock Monitor currently offer services in this operational context, which includes the fight against piracy.

Other secondary but highly sensitive operational contexts from the vantage point of the rule of law and international law are as follows:

(D) Prisons: the process of privatization of prison security is carried out through contracts with prison authorities. The main companies offering services at prisons are G4S (UK), MVM Inc. (US), Magal Security Systems (Israel), Sodexo (France), and Grupo Revenga (Spain). These companies perform services such as the construction of infrastructure and the delimitation of security areas through CCTV systems and other remote-control devices, security at prison access points, and even prisoner rehabilitation programs.

(E) Borders and immigration control: this operational context is on the rise due to the growing security demands to control access by migrants and refugees to the EU. According to the military and security expert Mark Akkerman, the arms and security industry is shaping the EU's border security policy through lobbying, regular interactions with EU institutions, and research in the sector.[57] This has allowed many PMSCs to access this operational context, offering a variety of services, such as the construction of security infrastructure, mobile border security, or intelligence services. For example, according to its corporate services, the Israeli company Magal Security Systems is exporting its extensive expertise in the construction of security systems for the Wall in the OPT at the global level in the form of services consisting of the construction of "smart fences" equipped with security sensors, cameras, and other remote-control devices for the detection of "intruders."[58] Ten of the companies identified by Shock Monitor openly offer border security services.

(F) Homeland Security: this is one of the areas to show the most growth since 9/11. It is estimated that, in 2009, government spending on homeland security services amounted to around $141.6 billion worldwide.[59] The concept of "homeland security" is based on risk analysis and threat prevention and mitigation within a state's borders. Therefore, it includes some of the aforementioned contexts, such as borders and critical and strategic infrastructure. However, for the purposes of this classification, it refers to cyber-, macro-event, and urban security contexts. In this

[57] Akkerman M (2016), pp. 17–24.

[58] For more details, see Observatory on Human Rights and Business in Middle East and North Africa, *magal s3: El negocio de las fronteras*. Available at www.odhe.cat, last accessed on October 1, 2016.

[59] Hayes B (2009), p. 4.

framework, governments outsource national security and intelligence services such as cybersecurity, personal identification systems (biometric tools), communications, macro-event security management, and the provision, control, and maintenance of unmanned aerial vehicles (UAVs). As a result of the growing demand for these services, technology departments at PMSCs and/or strategic partnerships between IT security companies and PMSCs, including companies in the arms industry, have proliferated. Some 10% of the PMSCs analyzed by Shock Monitor specifically offer services in homeland security sectors.

(G) Humanitarian aid and reconstruction: in these types of contexts, contracts with international organizations such as the UN and international NGOs that need security and protection services in order to perform reconstruction and humanitarian aid functions are very common. The demining and/or the detection and disposal of unexploded ordnance (UXO) services offered by some PMSCs are also performed in these contexts through contracts with governments and international organizations. This category also includes the contracts for protection and risk analysis required by international media companies and journalists stationed in war zones and areas hit by natural disasters. Some 5% of the PMSCs analyzed by Shock Monitor offer services in this operational context.

(H) Occupation and combat contexts: these are contexts in which PMSCs offer military services in cooperation with public security forces. Specifically, they include functions related to operational support, military assistance, military logistics, and security for critical infrastructure (military bases). In Iraq, PMSCs have participated directly in combat through the protection of certain infrastructure deemed strategic by the insurgents. The cases of Fallujah in 2004 and the Battle of Najaf are examples of direct participation in hostilities by PMSCs in contexts of armed conflict.[60] In the context of the occupation of Palestine, PMSCs offer security services for checkpoints, industrial zones, settlements, critical infrastructure (transport systems), and the Wall. They offer both armed and unarmed services, such as protection; security inspectors who perform security checks on Palestinians crossing checkpoints; and the provision and maintenance of control and surveillance systems (sensors, drones, UAVs, etc.). Shock Monitor has identified ten companies that operate in these operational contexts, all of which are Israeli.

4 Impact on Human Rights

Currently, Shock Monitor has recorded and systematized 108 human rights violations committed by PMSCs since 2000 in 22 countries. Initially, the monitoring center focused on the Middle East, North Africa and Central Asia, analyzing

[60]For more information on the Fallujah case see http://www.corpwatch.org/article.php?id=12829, last accessed on October 10, 2016. For more information on the Battle of Najaf, see https://www.washingtonpost.com/archive/politics/2004/04/06/private-guards-repel-attack-on-us-headquarters/fe2e4dd8-b6d2-4478-b92a-b269f8d7fb9b/, last accessed on October 20, 2016.

86 cases in Palestine, Iraq, Israel, Afghanistan, Bahrain, and Libya. Now, in a second stage, it is expanding to Latin America and the rest of Africa. To date, Shock Monitor has analyzed seven cases in Colombia, Peru, Ecuador, Brazil, and Honduras, as well as eight cases in Ethiopia, Angola, South Africa, Zimbabwe, and Somalia. Finally, this analysis also includes three cases in Asia and five in Western countries (the US, the UK, and Germany).

4.1 Main Trends in PMSCs' Impact on Human Rights

The main trends in PMSCs' impact on human rights were as follows:

(1) In 86% of the cases of human rights abuses, the client who had contracted the PMSC's services was a public actor; in 11%, a private actor; and in 2%, unknown.
(2) The human rights impact of PMSCs' operations had the following breakdown:
    (a) Right to physical and psychological integrity, including the right to life and the right to fair and humane treatment: this category is most often impacted by PMSCs, with 84% of cases directly violating these types of rights.
    (b) Civil and political rights: 41% of the analyzed cases affected the exercise of these types of fundamental freedoms.
    (c) International crimes, including war crimes and crimes against humanity, among others: 25% of the analyzed cases fell into this category, most of which took place in the context of the occupation of Palestine.
    (d) Labour rights: related to the special protection of workers; Shock Monitor has identified eight cases affecting these types of rights (7%).
    (e) Finally, other identified impacts affected the rights of the child (1%), rights related to equality and nondiscrimination (1%), the right to privacy (0.05%), and the right to health (1%).

The first three major types of human rights violations reflect the need for specific regulation of the PMSC industry due to the specific nature of the functions that it performs involving the use of lethal force, the performance of quasi-police tasks, and the commission of international crimes.

(3) According to Shock Monitor's analysis, the services accounting for the largest number of human rights violations were as follows:
    1. security and protection (87 cases),
    2. quasi-police/border tasks (22),
    3. intelligence (10),
    4. combat (6),
    5. operational support (3),
    6. provision of surveillance systems (3).

This breakdown shows that at least three of the services with the greatest impact on human rights are considered functions inherent to the state.

Likewise, the impact of security and protection activities spans various scenarios. First, the defense of critical infrastructure in contexts of armed conflict may include participation in hostilities with insurgent groups (six cases). Second, the protection of extractive industry infrastructure opposed by local communities can lead PMSCs to repress civil and political rights in contexts of social protest (eight cases). Finally, the static protection of infrastructure that strengthens an occupation system (26 cases), as in the case of Palestine, can involve complicity with the occupying forces and accessory from an international law perspective, with the serious violation of the right to self-determination that this entails.

(4) Finally, the operational contexts in which human rights violations occur most often were as follows:

1. occupation (27 cases),
2. protection of critical and strategic infrastructure (21),
3. mobile protection (convoys) and logistics (19),
4. extractive industry projects (oil, gas, mining) (11),
5. prisons (11),
6. borders and immigration control (7),
7. social protest (11),
8. combat (6).

4.2 Analysis by Operational Context

4.2.1 Occupations

Shock Monitor has identified 27 cases directly related to the occupation of the Palestinian territories and their operational contexts: settlements, checkpoints, separation barriers, and crossing points. The policy of privatization and civilianization of security functions has had a huge negative impact on the lives and rights of the Palestinian people. These impacts occur during the performance of protection and security functions for settlements, the construction of the Wall, and security functions at checkpoints. Although in theory these are static protection functions, the security of the personnel and machinery used to build the Wall in the West Bank also involves mobile security tasks.

The civilian security agents in the illegal settlements in Palestine act with excessive discretion and a paucity of operating procedures. On May 21, 2007, security guards from the Israeli company Avidar Security Services shot at five journalists attempting to cover a Palestinian demonstration against the security fences near the West Bank settlement of Efrat. The journalists reported that no

warning shots were fired and that the agents opened fire directly at where they were standing.[61] In 2005, an Israeli CSC killed a Palestinian near the houses of the West Bank settlement of Petza'el; the CSC was sentenced to 200 h of community service.[62]

Israeli checkpoints in the OPT serve to control the population. One of the main effects of the process of privatization of security in this context is the atmosphere of impunity of security personnel.[63] On September 1, 2007, due to a critical health issue, the elderly Palestinian woman Kamela Kabha and her son tried to cross the Reihan checkpoint to reach the hospital in Jenin. However, security guards from the Israeli company S.B. Security Systems detained them for more than 3 h. Ms. Kabha died during the wait. No information has been found about any official inquiry, judicial proceeding, or compensation for the victim's family.[64]

In its advisory opinion on Israel's construction of the Wall in the West Bank, including Jerusalem, the International Court of Justice in The Hague found this infrastructure to be illegal as it constitutes a violation of international law. It therefore determined that construction of the Wall should cease, the sections already built should be dismantled, and the Palestinian victims should be compensated for the harm suffered. However, construction of the Wall continues to annex portions of occupied Palestine. Palestinian and international protests against the Wall's construction are quite frequent, resulting in direct clashes between Israeli security forces, border police, and PMSC employees, on the one hand, and Palestinian and international protestors, on the other. On July 8, 2005, Mahayoub Aasi was shot by unidentified private security guards at an anti-Wall protest in the Palestinian town of Beit-Likya. The guards prevented other Palestinians from approaching him. By the time a Palestinian Red Crescent ambulance reached him, he had bled to death.[65] The protection functions performed in relation to the construction of the Wall violate not only the right to physical integrity and the right to life, as in this specific case, but also the free exercise of civil and political rights by the Palestinian population protesting an infrastructure that is illegal under international law.

Since the 2011 implementation of the light rail connecting Jerusalem and the illegal West Bank settlements, multiple incidents of human rights violations have been reported. Shock Monitor has recorded four cases caused by private security

[61]See case recorded by Shock Monitor (17OPT). Source: Waked A (2007). Available at http://www.ynetnews.com/articles/0,7340,L-3403082,00.html, last accessed on July 18, 2014.

[62]See case recorded by Shock Monitor (88OPT). Source: Yesh Din (2014), *The Lawless Zones: The Transfer of Policing and Security Powers to the Civilian Security Coordinators in the Settlements and Outposts,* p. 41.

[63]Ronen Y (2012), pp. 441–442.

[64]See case recorded by Shock Monitor (19OPT). Source: "*Private Security Companies in the Occupied Palestinian Territory (OPT): An international Humanitarian Law Perspective*," Program on Humanitarian Policy and Conflict, Harvard University (2008), p. 4.

[65]See case recorded by Shock Monitor (80OPT). Source: Who profits research Center (2014) *Proven Effective: Crowd Control Weapons in the Occupied Palestinian Territories*.

companies in the exercise of armed security functions for the light rail. All four cases impacted the victim's right to physical and psychological integrity, and one culminated in the death of a Palestinian.[66]

4.2.2 Critical and Strategic Infrastructure

In the operational contexts of critical and strategic infrastructure such as embassies, government buildings, military bases, and nuclear plants, among others, PMSCs mainly perform static security and protection functions.

The distinguishing feature of these types of infrastructure is their strategic importance from a military point of view, especially in contexts of armed conflict, which, in practice, can lead to attacks by insurgent groups. Consequently, protecting this type of infrastructure can lead private security contractors to engage directly in hostilities with these groups. That is what happened in the defense of the Coalition Provisional Authority headquarters in the Iraqi city of Kut in 2003, when contractors from the companies Hart Group, Control Risks, and Triple Canopy were involved in combat against Iraqi insurgents that resulted in multiple casualties.[67] Likewise, in the Battle of Najaf, on April 4, 2004, Blackwater (today, Academi) commandos clashed with Iraqi militia members in the defense of the local US military base.

In the context of military bases, various cases of sexual assault, including rape, have been recorded involving PMSC personnel, such as the alleged rape of Jamie Leigh[68] and sexual harassment of James Friso[69] in Iraq or the allegations of sexual assault at the Tolemaida air base in Colombia.[70]

Shock Monitor has also identified numerous violations of human rights by PMSCs and their workers during the protection of government buildings and checkpoints in Iraqi cities. At least eight of the analyzed cases ended in the death of civilians, causing a total of nine casualties.[71] One of the most notable cases

[66]See case recorded by Shock Monitor (73OPT, 82OPT, 83OPT, 97OPT). Source: Palestinian Center for Human Rights database.

[67]See case recorded by Shock Monitor (23IRQ). Source: Kwok J (2006), "Armed Entrepreneurs," *Harvard International Review* 28, no. 1, 2006, pp. 34–37.

[68]See case recorded by Shock Monitor (45IRQ). Source: Kim S, *Jamie Leigh Jones Ordered to Pay $145,000 in Court Costs After Failed Rape Claim*, ABC News. Available at http://abcnews.go.com/Business/jamie-leigh-jones-ordered-pay-145000-contractor-kbr/story?id=14635936, last accessed on October 21, 2016.

[69]See case recorded by Shock Monitor (52IRQ). Source: Isenberg D, *Gun? Check. Radio? Check. Lawyer? Check!,* The Huffington Post. Available at: http://www.huffingtonpost.com/david-isenberg/gun-check-radio-check-law_b_1217129.html, last accessed on August 2, 2014.

[70]See case recorded by Shock Monitor (98COL). Source: http://latino.foxnews.com/latino/news/2015/04/07/us-army-to-investigate-allegations-sexual-assault-by-military-personnel-in/, last accessed on October 20, 2016.

[71]See cases recorded by Shock Monitor (40IRQ, 47IRQ, 54IRQ, 57IRQ, 60IRQ, 61IRQ, 62IRQ).

occurred on February 27, 2007, when a Blackwater contractor stationed on the rooftop of the Iraqi Ministry of Justice shot three Iraqi guards of the state-funded Iraqi Media Network.[72]

Finally, several cases were identified in the context of the protection services provided by PMSCs to embassies and consulates related to the contractors' training, vetting, and labor rights. AEGIS was accused by several former employees of breakdowns in the chain of command and excessive working hours during the protection of the US embassy in Kabul (Afghanistan).[73] Meanwhile, the attack on the US embassy in Benghazi, Libya, resulting in the death of the US ambassador, Christopher Stevens, exposed the inadequacy of the processes used by the company Blue Mountain Group to screen and train security guards to protect this critical infrastructure.[74]

Clearly, these types of contexts, which initially involve static security and protection functions, have a high number of negative impacts on the right to physical and psychological integrity, the right to life, the right to fair and humane treatment, and labor rights that can affect the security of all personnel at a critical infrastructure.

4.2.3 Logistics Convoys and/or Escorts

The negative human rights impact of the performance of mobile security functions, such as the protection of logistics convoys (the transport of military supplies or natural resources for extractive companies), as well as security services for VIPs (government representatives, businesspeople, etc.), is also notable. In Iraq and Afghanistan, at least 19 cases of human rights violations were identified affecting the right to physical and psychological integrity, the right to life, and the denial of assistance, causing considerable material damage. The 19 cases recorded by Shock Monitor resulted in 28 fatalities and 60 injured, some quite serious, as well as extensive material damage.[75] In this regard, on multiple occasions, the witnesses of an incident reported that the shots were unjustified and that the security guards rarely helped the victims but rather quickly left the scene of the crime. This points to systematic operating procedures that could be considered crimes and serious human rights abuses, not only by the contractor in question but also by the company itself.

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[72]See case recorded by Shock Monitor (55IRQ). Source: UN Assistance Mission for Iraq (2007), *"Human Rights Report,"* no. 27. Available at http://www.ohchr.org/Documents/Press/UNAMIJuly-December2007EN.pdf, last accessed in 2014.

[73]See case recorded by Shock Monitor (115AFG). Source: Human Rights and Business Resource Center (2013), *PMSC Bulletin*. Available at https://business-humanrights.org/sites/default/files/media/documents/pmsc-bulletin-issue-4-30-apr-2013.pdf, last accessed October 20, 2016.

[74]See case recorded by Shock Monitor (119LY). Source: *Ibid.*

[75]See cases recorded by Shock Monitor (37IRQ, 39IRQ, 42IRQ, 44IRQ, 46IRQ, 48IRQ, 49IRQ, 50IRQ, 51IRQ, 53IRQ, 56IRQ, 58IRQ, 59IRQ, 63IRQ, 64IRQ, 65IRQ, 66IRQ, 67IRQ, 93AFG).

4.2.4 Extractive Industry Projects

The analysis of extractive companies includes geographical areas marked by conflict, weak governance, or political and social fragility. In this context, intense corporate cooperation was identified between extractive companies, especially in the oil, gas, and mining industries, and the PMSC industry. According to Shock Monitor's records, the PMSC services for such companies with the greatest negative impact on human rights are those related to the protection of the personnel and machinery used for the extractive project.

This impact results in violations of human rights and fundamental freedoms, mainly the right to physical and psychological integrity, including the right to life; the right to security; the right to freedom of movement; civil and political rights, such as freedom of expression, demonstration, and association; and labor rights. Some 50% of the analyzed cases included serious violations of civil and political rights.

This is because many extractive industry projects cause serious environmental and economic damage to their surroundings, which leads to strong opposition from the local communities where the project is being carried out. PMSCs are contracted to protect the project's infrastructure and personnel, as well as to protect the transportation of the goods to distribution sites. Additionally, police presence in these rural areas is minimal, which increases the impunity of the PMSCs' operations. Shock Monitor has recorded multiple cases of rights abuses in this context, often in contexts of protest, where the security guards tasked with protecting the extractive project harshly repress the communities' protests, sometimes in collaboration with the police. The most serious cases are related to operations undertaken by private security agents to evict and displace indigenous communities in order to enable the execution and expansion of the extractive project.

In 2005, the PMSC Forza (a Securitas subsidiary) was involved in the repression, detention, and torture of farmers who opposed a mining project by the extractive company Río Blanco in Peru.[76] In 2009, the company Orion was allegedly involved in the killing, abduction, and eviction of farmers resisting an agro-industrial project by the company Dinant in the region of Bajo Aguán in Hondorus.[77] In 2012, an unknown private security company killed two workers protesting low wages at the Magdalena and Aviemore mines in South Africa.[78] One year later, in Taiwan, the company Hi Tan Security was accused of violently attacking demonstrators

[76]See case recorded by Shock Monitor (95PE). Source: Pingeout L (2012), p. 11.

[77]See case recorded by Shock Monitor (106HON). Source: Human Rights Watch (2016) *Honduras: No Justice for Wave of Killings Over Land*. Available at: https://www.hrw.org/news/2014/02/12/honduras-no-justice-wave-killings-over-land, last accessed on October 20, 2016.

[78]See case recorded by Shock Monitor (122SA). Source: Huffington Post Canada. Available at http://www.huffingtonpost.ca/2012/11/01/forbes-coal-shooting-south-africa_n_2057386.html, last accessed on October 20, 2016.

protesting a wind turbine project by the Chinese company InfraVest.[79] In 2014, the Brazilian Federal Court of Justice found the company Gaspem guilty of involvement in the violent repression of indigenous Guarani-Kaiowá communities and the death of two of their leaders.[80] In 2015, Shock Monitor recorded two incidents. First, in Colombia, the NGO Movimiento Ríos Vivos denounced the private security company Seracis and the extractive company Empresas Públicas de Medellín for violent aggression against a leader of the opposition movement to the Hidroituango hydroelectric project.[81] Meanwhile, in Ecuador, Comunidad Amazónica de Acción Social "Cordillera del Cóndor Mirador" denounced the eviction of 13 families by the police and the PMSC Serseivi, contracted by EcuaCorriente, for the local population's opposition to the mining project and its environmental impact on the area.[82] Finally, in 2016, the Standing Rock Sioux accused the company G4S of setting dogs on protestors during a demonstration against the Dakota Access LLC pipeline project in North Dakota, in the US.[83]

4.2.5 Prisons

In the context of prisons, PMSCs offer various types of services, ranging from access control to the provision of equipment and security systems, sometimes including comprehensive prison management, as at various penitentiaries in the UK.

G4S is one of the leading companies in this sector. Its operations in Israel and the OPT caused such an international outcry that it was ultimately forced to withdraw from the region.[84] Specifically, G4S has been denounced for providing security services and systems to the Ketziot, Rimonim, Al Jalame, Meggido, and Damon

[79]See case recorded by Shock Monitor (108TAI). Source: Business & Human Rights Resource Center, *PMSC Bulletin*, April 2014. Available at https://business-humanrights.org/sites/default/files/media/documents/pmsc-bulletin-issue-6-30-apr-2014.pdf, last accessed on October 20, 2016.

[80]See case recorded by Shock Monitor (104BZ). Source: Procuradoria da República no Mato Grosso do Sul. Available (in Portuguese) at http://www.prms.mpf.mp.br/servicos/sala-de-imprensa/noticias/2014/01/decretado-fechamento-de-empresa-de-seguranca-envolvida-em-morte-de-liderancas-indigenas-em-ms, last accessed on October 20, 2016.

[81]See case recorded by Shock Monitor (99COL). Source: NOVACT (2016).

[82]See case recorded by Shock Monitor (102EC). Source: *Business, Conflict and Human Rights Newsletter (2015)* no. 4. Available at http://media.wix.com/ugd/e6086f_272c3e2b72f34a9bae2be251b039e3a2.pdf, last accessed on October 15, 2016.

[83]See case recorded by Shock Monitor (103US). Source: Lazare S (2016), *Reckless Security Firm Hired to Protect Dakota Pipeline Company Has Dark Past in Palestine*, Global Research. Available at http://www.globalresearch.ca/reckless-security-firm-hired-to-protect-dakota-pipeline-company-has-dark-past-in-palestine/5545295, last accessed on October 21, 2016.

[84]For more information, see: Apps S (2016) *G4S leaving Israel shows that the boycott, divestment and sanctions campaign is winning,* The Independent. Available at http://www.independent.co.uk/voices/g4s-leaving-israel-shows-that-the-boycott-divestment-and-sanctions-campaign-is-winning-a6926051.html, last accessed on October 21, 2016.

prisons in Israel, the latter two of which handle cases of Palestinian administrative detainees. It also offers services at the Abu Kabir, Moskobiyyeh, and Kishon detention and interrogation centers, known for cases of torture of prisoners. Finally, G4S provides the Ofer prison, in the OPT, with perimeter security and access control systems.[85] Six Palestinian youths were held in solitary confinement at the Al Jalame and Meggido prisons for months.[86] According to the Israeli organization B'tselem, at the end of April 2016, 414 minors were being held in Israeli prisons and detention centers.[87]

In 2013, the South African government canceled its contract with G4S at the Manguang prison following an inquiry that concluded that 62 detainees had suffered cruel and degrading treatment.[88] That same year, UK prison inspectors reported the failure of that country's HMP Oakwood prison, managed by G4S, to meet minimum health and hygiene standards.[89] These types of incidents impact the right to dignified and humane treatment and the right to access to health care.

In this regard, it is worth noting that in the operational context of prisons, violations of rights to physical and psychological integrity occur in relation to cases of torture and interrogation. Shock Monitor has identified several such cases from 2003. The most notorious case was that of the participation of translators from the US companies CACI and TITAN in processes of interrogation and torture, revealing negligence in the hiring and supervision of these services.[90] Meanwhile, in Afghanistan, the independent private contractor David Passaro, hired by the CIA, killed the prisoner Abdul Wali following several days of interrogations at the Asadabad military base.

[85]For more information see War on Want (2014) *G4S securing profits, globalising injustice*. Available at http://www.waronwant.org/sites/default/files/G4S%20securing%20profits,%20globalising%20injustice%20(corrected%202015).pdf, last accessed on October 21, 2016.

[86]See case recorded by Shock Monitor (78OPT). Source: Sherwood H (2012). Available at http://www.theguardian.com/world/2012/jan/22/palestinian-children-detained-jail-israel, last accessed on July 18, 2014.

[87]A breakdown of the data is available at http://www.btselem.org/statistics/minors_in_custody, last accessed on October 21, 2016.

[88]See case recorded by Shock Monitor (112SA). Source: Hopkings R (2015). Available at http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/11847153/G4S-accused-of-torturing-inmates-to-death-in-South-Africa.html, last accessed on October 20, 2016.

[89]See case recorded by Shock Monitor (113UK). Source: *Report on an unannounced inspection of HMP Oakwood by HM Inspector of Prisons*. Available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/03/oakwood-2013.pdf, last accessed on October 20, 2016.

[90]See case recorded by Shock Monitor (24IRQ). Source: *Al-Quaishi, et al. v. Nakhla and L-3 Services*, Center for Constitutional Rights. Available at http://ccrjustice.org/Al-Quraishi-v-Nakhla-L3, last accessed on August 2, 2014.

4.2.6 Borders and Immigration Control

In this operational context, quasi-police functions are predominant. PMSCs perform tasks related to the construction of smart security systems on border fences and walls, mobile protection along borders, and security at temporary detention centers for immigrants, among others. Shock Monitor has recorded three incidents in this operational context that violate the right to physical and psychological integrity and the right to life. In 2010, the Angolan Jimmy Mubenga died on a deportation flight from the UK in the company of three G4S guards.[91] In 2013, the company Serco was accused of sexually assaulting immigrants detained at Yarl's Wood Immigration Removal Center.[92] In 2014, violent repression by G4S security guards at an Australian immigration detention center left one detainee dead and 77 injured.[93]

4.2.7 Homeland Security

In other spheres of the homeland security context, PMSCs specialized in IT security have had a significant impact on human rights. The main activities in this specific context are related to functions of intelligence, cybersecurity, risk analysis and management, and the provision of equipment and surveillance systems. The performance of these functions impacts the right to privacy and civil and political rights.

Shock Monitor has identified serious cases in which PMSCs have helped to neutralize government opposition. The British company Gamma Group sold its FinFisher technology to the government of Bahrain for use in spying on the political opposition and the country's human rights advocates. Gamma sold the Bahraini government this equipment despite its well-known repression of Bahraini civil society.[94] Similarly, the German company Trovicor, in partnership with Gamma and the also German-based Elaman, provided the Ethiopian intelligence services with surveillance systems to identify and punish government opposition.[95]

[91] See case recorded by Shock Monitor (90UK). Source: De Winter-Schimtt R (2013), p. 25.

[92] See case recorded by Shock Monitor (110UK). Source: Townsend M (2013). Available at: https://www.theguardian.com/uk-news/2013/sep/21/sexual-abuse-yarls-wood-immigration.

[93] See case recorded by Shock Monitor (107PNG). Source: Business & Human Rights Resource Center (2014), *PMSC Bulletin*, no. 6. Available at https://business-humanrights.org/sites/default/files/media/documents/pmsc-bulletin-issue-6-30-apr-2014.pdf, last accessed on October 20, 2016.

[94] See case recorded by Shock Monitor (100BAH). Source: CORE (2015), p. 25.

[95] Case recorded by Shock Monitor (101ET). Source: *Ibid*.

5 Conclusions

PMSCs have become an essential tool for defense and security policies, both in situations of armed conflict and in times of peace. Thus, the PMSCs that first emerged and established themselves during the occupations of Iraq or Afghanistan today also offer services for maintaining public order on our borders or providing security at prisons or immigration detention centers. In this regard, the responses to the refugee crises have given rise to a new business opportunity for the PMSC industry. For instance, in 2015, the Slovenian government hired PMSCs to manage migrant flows over its borders with Croatia.[96]

The huge business that the privatization of war and security is turning out to be clashes head-on with the great opacity of the PMSC industry and its clients. Although, as seen above, the US and UK are both the main home countries and the main contracting countries for PMSCs, accessing information about the contracts signed between PMSCs and their clients can be quite difficult. Government actors take advantage of this lack of transparency to contract these private corporations and avoid scrutiny and public debate.

This lack of transparency is accompanied by weak regulation of the PMSC industry, which leads to legal vacuums that pose challenges for defining the status of private contractors, a lack of clear rules of engagement, a failure to identify personnel, civilianization processes, and the transfer of responsibilities from states to PMSCs, which is especially serious in contexts of occupation, such as in the OPT. As a result, an architecture of impunity is being imposed that leaves the victims of PMSC abuses defenseless. The most extreme cases of impunity took place between 2003 and 2009 in Iraq, where hundreds of human rights violations occurred.

The vast majority of human rights abuses documented by Shock Monitor in Iraq and other territories affect the victims' physical and psychological integrity. Shock Monitor also found that 87 of the 108 cases of human rights violations analyzed occurred during the performance of classical security and protection functions in operational contexts such as critical infrastructure, convoys, transport and logistics, and extractive industry projects. Consequently, PMSCs cannot be understood as simply another industry, but rather as an industry that offers services involving the use of force and the handling of weapons and advanced security technology, requiring specific regulation and supervision.

[96]For more information, see *Slovenia to hire private security firms to manage migrant flows*, The Guardian, October 26, 2015. Available at https://www.theguardian.com/world/2015/oct/26/slovenia-private-security-firms-manage-migrant-flows-refugees, last accessed on December 1, 2016.

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Felipe Daza is codirector of the International Institute for Nonviolent Action (NOVACT), founder and researcher of "Shock Monitor – Observing Private War Impact on Human Rights" and civil society activist with more than 10 years experience supporting social and conflict transformation processes in Middle East, Balkan region and Eastern Europe.

The Ineffectiveness of the Current Definition of a "Mercenary" in International Humanitarian and Criminal Law

José L. Gómez del Prado

Abstract The world is facing today new forms of mercenarism. Non-State armed groups, such as foreign fighters and private military and security companies (PMSCs), operate with impunity in armed conflicts.

In the 1960s, colonial powers recruited mercenaries, particularly in Africa, to crush liberation movements fighting for their independence. Private military and security companies closely linked to the economic interests of the international mining sector have replaced these soldiers of fortune, or dogs of war.

The turning of the century has seen PMSCs increasingly taking part in hostilities and armed conflicts. The revolving door phenomenon between governments and PMSCs, particularly in Western countries, has largely contributed to this phenomenon.

With the globalization of the economy, in the 1980s, governments are increasingly outsourcing to the private sector security and a number of functions considered as the prerogative of the State.

The United Nations has defined the use of mercenaries "as a means of violating human rights and impeding the exercise of the right of peoples to self-determination." In order to control this phenomenon, it adopted, in 1989, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

The UN Convention, however, as well as other international instruments adopted in the mid-twentieth century have become obsolete to deal with the new forms of mercenarism.

This article underscores the difficulties to apply the provisions contained in the definition of the 1989 Convention and emphasizes the need to adopt a new binding international instrument regulating private military and security companies.

J.L. Gómez del Prado (✉)
United Nations Working Group on the Use of Mercenaries, Geneva, Switzerland
e-mail: delprado72@hotmail.com

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1 The Evolution of Mercenarism and the Development of International Norms 1950–2016

Mercenarism has taken place throughout the ages from the ancient Egypt of Ramses II to the present day. A combination of two essential components—a military and a business element—provides the power and ability to adapt to all kinds of economic systems and political regimes. The prototypes for the concept are, without question, the Renaissance era of *condottieri*—mercenaries on land and privateers at sea. A close equivalent today would be the private military and security companies (PMSCs).

> In the Renaissance era *condotierri* were skilled at bringing together the two specialties of mercenary practice: knowledge of military practices and business know-how. In that age, it was the State that would employ the *condotierri*, having them sign a contract (condotta) in the presence of a notary to form a corporation. The contract specified the amount (prestanza) given to the condotierri to buy arms and equipment and to hire freelances (soldiers), as well as the nature of the activity to be performed, the number of freelances, and the timespan.

Clear proof that PMSCs are simply a reincarnation of the *condotierri* is found in the argument made by E. Prince (the founder of Blackwater) in order to obtain financial backing from shipping companies and set up operations countering the piracy that currently plagues the Somalian coastlines.

In a speech to financiers, Prince declared that operations could be similar to those of the privateers hired by the government in the American Revolution. He argued: "A privateer was a private ship, with a private crew, with a private master and they would receive a hunting license. It's called a Letter of Marque" against the pirates. It's actually provided for in the Constitution." "They were allowed to go hunt enemy shipping and they did very well. Even General Washington was an investor in one of those privateer operations."[1]

This is exactly what many governments have been doing since the turn of the twentieth century—a privatization of war and security.

Major PMSCs today, such as Academi (formerly Blackwater), DynCorp, Aegis Defence Services, G4S, and Garda World, operate in the same way as the *condotierri*; (1) they sign a contract to perform a specific activity, be it with the US Pentagon, the US State Department, an international organization, an international NGO, or whomever; (2) the budget for the contract is used to buy arms, to hire the personnel needed to perform the work required in the specified time frame, and to cover any other costs.

The formation of European countries consolidated the central power of kings and weakened that of the nobles. The use of force hence became a royal prerogative, prior to the emergence of State armies in the nineteenth century.

Kings would hire mercenaries or grant letters of marque to shipping companies in order to make war or provide themselves with security. Swiss mercenaries were

[1] Scahill J. (2013), pp. 481–482.

responsible for protecting the royal family of Louis XVI during the French Revolution when the people of Paris descended upon the Palace of Versailles.

With the advent of democracy in Europe and North America in the nineteenth and twentieth centuries, populations began to look upon these private means of force unfavorably, and over time they disappeared and became banned by international treaties. The 1856 Paris Declaration Respecting Maritime Law states in its Article 1: "Privateering is, and remains, abolished."

And the 1907 Hague Convention relating to the Conversion of Merchant Ships into Warships further expands on this rule. Article 1 of the Convention stipulates: "A merchant ship converted into a war-ship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies."

This has strengthened the idea, based on Max Weber's theory, that the legitimate use of force is inherent to the State, the government alone holding a monopoly over the legal use of force.

This idea has been reinforced in turn by the fact that, in the years following the Second World War, States have controlled strictly military and security activities.

In the twentieth century, the precept that the collective use of force in international affairs grants governments a monopoly on the legitimate use of force as regards national and international security is one that has taken stronger hold. The principle of a State monopoly over the use of armed force is stipulated in the Kellogg–Briand Pact of 1928, the United Nations Charter of 1945, the Geneva Conventions of 1949 and their Additional Protocol I of 1977, which excludes mercenaries from the status of prisoners of war.[2]

From **1954 to 1974**, the UN General Assembly and Security Council adopted resolutions referring to the crime of aggression, the right of self-determination of peoples, and the activities of mercenaries in matters relating to the development of the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

These international instruments established norms relating to the duty of States to abstain from organizing or encouraging armed bands, groups, irregulars or mercenaries against other States or in violation of the right of self-determination of peoples. In accordance with Article 1, which is common to both of the two Covenants in the International Bill of Human Rights, *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*.[3]

No reference whatsoever to mercenaries' motivations in these international instruments.

[2]Krahmann, E. (2013), pp. 53–71.

[3]United Nations, Resolution 2625 (XXV) of October 24, 1970; United Nations General Assembly Resolution 3314 (XXIX) of December 14, 1974, Article 3 (g); International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

In 1976, Angola established a court to judge foreign mercenaries from a US PMSC hired by the National Liberation Front of Angola (FNLA), which was fighting the Popular Movement for the Liberation of Angola (MPLA). The court sentenced four of them to death and gave prison sentences to nine other foreigners.

They were accused of crimes against peace and of being mercenaries. The court's sentence was based upon UN resolutions.[4]

On July 3, 1977 the Organization of African Unity (OAU) adopted the Convention for the Elimination of Mercenarism in Africa. It included in its definition of mercenaries both natural and legal persons: an individual, a group, an association, a government representative, or even a State itself.

The convention was largely based on the draft produced by the International Commission of Inquiry set up by the Angolan government with the aim of having an objective evaluation of the Luanda judgment. The Commission was made up of 51 representatives from 37 different countries and regions from around the world.[5]

However, Additional Protocol I to the Geneva Conventions with its Article 47 had already been adopted by consensus a month earlier, on June 8, 1977—almost exactly a year after the Luanda court had passed the aforementioned death and prison sentences.

The adoption of Article 47 brought with it a reduction in the drive and energy that had been present in the UN General Assembly resolutions, the Luanda draft convention, and the 1977 OAU Convention.

From that time onward, the definition of mercenary found in Article 47 has been reused, *mutatis mutandis*, in all regional and international instruments relating to mercenarism, including the 1989 UN Convention.

As will be discussed in Sect. 2 of this chapter, Article 47 was relevant in twentieth century armed conflicts between different States but ceases to be so in the new intra-State wars of the twenty-first century.

In **1989,** the UN adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. It included the clauses of Article 47, albeit from the perspective of public international law and that of *Jus ad Bellum*, which prohibits any of the activities from being performed by sovereign governments. The greatest obstacle and difficulty for the delegations negotiating the new international treaty in the UN was the need to define mercenaries and the crimes they commit on the basis of Article 47 of Additional Protocol I,[6] which has been universally accepted.

These international instruments confirm, at a specific time in history, the will of some States to consolidate their national sovereignty and reinforce the international norm that the monopoly over the legitimate use of force belongs solely to States.

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[4]United Nations General Assembly: Resolution 3103(XXVIII); Resolution 2548(XXIV); Resolution 2395(XXIII); Resolution 2465(XXIII).

[5]Lockwood, G. H. (1977), pp. 183–202.

[6]United Nations Documents A/44//43; A/C.6/44/SR.42; A/44/766 Agenda item 144 Report of the Sixth Committee; A/44/P.V.72; A/C.6/44/SR. 41-42-44 and Corr.1.

At best, this initiative has been met with a lukewarm response from UN Member States, but in the majority of cases—in particular the major powers and countries with significant arms and security industries—the General Assembly's recommendation to ratify the 1989 International Convention has been disregarded. None of the five Permanent Members of the Security Council (China, France, Russia, United States, United Kingdom) is a Party to the Convention, and the only Western European countries to have ratified it are Belgium and Italy.

Although not Parties to the Convention, France and South Africa have passed laws of a similar nature. Despite having a law in place, France did not bring to trial its most famous mercenary, Bob Denard, under said law. There was no trial or conviction for mercenary activities, probably because of the services he had provided to the French government.

Switzerland passed a law regulating private companies, its "Loi fédérale sur les prestations de sécurité privée fournies à l'étranger," which came into force on January 16, 2014.

This, together with the ineffectiveness of the definition of a "mercenary," has not helped consolidate the tenet that the legitimate use of force is inherent to the State. Only 34 States—just 17% of the UN's Member States—are Parties to the Convention, and the legal vacuum present in international criminal law has not been rectified by national legislation. A study by the UN Working Group on Mercenaries on legislation showed that of the ten countries Party to the Convention that the study looked at, only three had prohibited mercenary activities at a national level.[7]

South Africa, which is not Party to the 1989 Convention, adopted in 1998 its Regulation of Foreign Military Assistance Act. Despite its limitations, this has enabled the trials of individuals and companies involved in cases of mercenarism.[8]

According to the responses sent by 17 governments to the Working Group for its database,[9] three countries had made convictions for mercenary activities.

During the 1960s decolonization period, colonial powers and multinational mining companies recruited foreign mercenaries, known as *soldiers of fortune* or *dogs of war*, to defend their economic and geopolitical interests and to suppress nationalist movements toward independence, particularly in Africa.

PMSCs, whose interests were closely linked to those of the large multinationals, have been steadily carrying out more of the activities previously performed by mercenaries, gradually replacing them. At the end of the twentieth century, the activities traditionally linked to mercenaries had amalgamated with the new class of PMSCs.

The most explicit example of this was the attempted coup d'état in Equatorial Guinea in 2004, carried out with clear participation from mercenaries. Some of these mercenaries were working or had worked for PMSCs in various other

[7]United Nations documents A/HRC/33/43, paragraph 92 and A/HRC/30/34, paragraph 133.

[8]United Nations, Document A/HRC/18/32/Add.3, paragraph 32–38.

[9]United Nations Document A/HRC/24/45, paragraph 13.

countries providing security to Western Embassies in Baghdad (Iraq) after the American invasion.[10]

Two major factors have contributed to this significant change in the global doctrine regarding the legal use of force, shattering the political norm that had been consolidated since the nineteenth century, that only the State may legitimately use force.

Firstly, the globalization of the economy has stimulated the privatization of all sectors, including the military and security. Secondly, there has been a policy from major powers, led by the USA, with the decisions of President Bush regarding the conflicts in Afghanistan and Iraq,[11] to consider that the use PMSCs to wage war is particularly relevant.

During World War II, PMSCs in the USA armed forces totaled 10%, while for the wars in Iraq and Afghanistan the figure had raised to 50%. Currently, 75% of the North American armed forces in Afghanistan are composed of PMSCs.[12]

The results of an investigation by the US Senate in 2010 indicated that the company EOD Technology, which protected the US Embassy in Kabul, hired local warlords with possible Taliban ties. Other Senate reports indicated cases of fraud, excessive expenditure and unwarranted use of billions of dollars. In all of these reports, it is stressed that the government had abdicated its responsibilities through the use of private companies.[13]

The privatization of military and security services affects the universal safeguarding of human rights, which have been systematically developed by the United Nations ever since its adoption of the Universal Declaration of Human Rights in 1948.

States may authorize, entrust, or appoint private forces to perform certain functions that are inherent to the State. However, ultimately it is still the State that is responsible for any violations that might be committed. Each State is charged with being "internationally accountable for the force it uses or allows to be used."[14] Nevertheless, there is no international instrument to determine which military and security functions are inherent to the State.

United States is the government that outsources most its inherent State functions. During the mission of the UN Working Group on Mercenaries to Washington, the authorities declared: "The **United States** limits outsourcing of **"inherently governmental functions**." Federal law and policy define the scope of those functions that only governmental personnel, and not contract employees, may perform. Inherently governmental functions were originally defined as activities that "are so

[10]United Nations Document A/HRC/18/32/Add.2, paragraph 20.

[11]Krahmann, E. (2013), pp. 53–71.

[12]The Atlantic (2016).

[13]Gómez del Prado, J.L. (2012), pp. 262–286.

[14]United Nations Document A/HRC/32/39, May 6, 2016; UN International Criminal Tribunal for former Yugoslavia, CC/PIO/190-E, (1997) TADIC CASE: THE VERDICT.

intimately related to the public interest as to require performance by Federal Government employee." This is further proof of States' double standards.

The "Stop Outsourcing Security Act" initiated by Representative Jan Schakowsky and Senator Bernie Sanders of the United States Congress, on February 23, 2010, aimed at prohibiting the use of private security contractors in war zones. It was met with fierce opposition from Representatives of the Republican Party.

Had this law been passed, it would have brought to an end the activities of private military contractors, which (i) the government was ever more reliant upon to carry out critical and essential functions; (ii) comprised operations that were outside the military chain of command, with a history of irresponsible and criminal behavior; and (iii) had led senior military commanders to express serious concerns and doubts regarding such private security contractors, that they were destroying any hopes of achieving the government's objectives in Iraq.[15]

In 1991, United Nations Member States disregarded the International Law Commission's recommendation to keep the crime of mercenarism in the code of crimes against the peace and security of mankind. Neither does mercenarism feature in the Rome Statute of the International Criminal Court.

In contrast, the African Union's **Malabo Protocol of 2014** does include mercenarism among the 14 international crimes that the judges of the African Court of Justice and Human and Peoples Rights will be able to try people for. The protocol establishes 14 international crimes, including mercenarism, the trafficking of persons or drugs, piracy, corruption, genocide, crimes against humanity, and war crimes.

The judges of the new African Court of Justice and Human and Peoples' Rights will also be able to connect mercenarism with other international crimes. Additionally, in accordance with the Protocol's Article 46C (Corporate Criminal Liability), the judges will be empowered to try not only natural persons but also legal persons (companies) for the crime of mercenarism.[16]

In this regard, it is worth remembering that, already as early as 2003, the UN Commission on Human Rights had recognized that armed conflicts, terrorism, and the illegal trade in arms and drugs strengthened the demand for mercenaries. The UN General Assembly had already highlighted such relationship.[17]

Neoliberalism and the globalization of the economy have brought with them the privatization of military and security activities. The hiring of PMSCs is a huge business. In the financial year of 2014, the Pentagon spent 285 billion dollars ($285,000,000,000)[18] on these contracts, equaling the total money allocated to all other government agencies. Supporting this trend have been the interpretations made by influential nations such as the United States of America, the United

[15]Gómez del Prado, J. L. (2011), pp. 24–27.

[16]African Union Document EX.CL/846(XXV), Annex 5.

[17]United Nations Document E/CN.4/2004/15; UN General Assembly Documents A/44/766; A/44/P.V.72; A/C.6/44/SR. 41-42-44 and Corr.1.

[18]The Atlantic, *Ibid*.

Kingdom, Australia, Canada, the Netherlands and Sweden regarding PMSCs and the powerful security industry.

All these countries uphold the view that neither PMSCs nor their employees are mercenaries in accordance with the universally accepted strict definition from Article 47 of Additional Protocol I to the Geneva Conventions of 1949, a definition that, *mutatis mutandis,* is contained in all of the international treaties on mercenarism currently in force.

Article 47 of Additional Protocol I is part of *Jus in Bello* and does not criminalize mercenaries. Mercenaries, however, are criminalized by the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, part of *Jus ad Bellum*, which has incorporated *mutatis mutandis* the definition of a mercenary from Article 47.

In order to divest themselves of the stigma associated with the word "mercenaries," PMSCs have progressively added to their means of protecting themselves from any potential litigation relating to their mercenary activities. They have metamorphosed and changed from private military companies (PMCs) first to private security companies (PSCs) and now to private security providers.

Industry lobbies have been behind such a process establishing voluntary international codes of conduct that divest themselves of the stigma of the word "mercenaries" and prevent the international community to adopt binding regulation regarding their activities.

These include the former International Peace Operations Association (IPOA) and the British Association of Private Security Companies (BAPSC), as well as companies and executive directors of PMSCs with the support of key governments such as the United States of America, the United Kingdom, Australia, Sweden, Canada and Switzerland, all of whom have major interests in the industry.

Switzerland's central role can be attributed to, among other factors, pressure from academics and the general public after finding out about the unprincipled actions of Aegis, a PMSC based in Switzerland, as well as the involvement in the attempted coup d'état in Equatorial Guinea of two employees of Meteoric Tactical Systems, a South African PMSC that provided security services to the Swiss Embassy in Baghdad, and the systematic violations of international humanitarian law committed by PMSCs in Iraq. It should be borne in mind that Switzerland is the main promoter of international humanitarian law and the home to the Headquarters of the International Committee of the Red Cross.[19]

This process of diverting the international attention of PMSC's operations by establishing voluntary codes of conduct began in 2006 with the production of the Montreux Document. This document contains guidelines and good practices for PMSCs operating in **armed conflict situations** in order to promote respect for

[19]United Nations Documents A/HRC/18/32/Add.2 and A/63/467.

international humanitarian law. However, neither the PMSCs nor the governments that privatize these military and security functions follow these good practices.[20]

It concluded in 2010 with the adoption of an International Code of Conduct for Private Security Service Providers (ICoC) and an ICoC Association comprising six member States: Australia, Norway, Sweden, Switzerland, the United Kingdom, and the United States and around 100 PMSCs that are contributing members. Among these, there are companies whose records for violations are far from clean, for example Academi (formerly Blackwater), Aegis Defence Services (formerly Sandline), DynCorp, G4S, Garda World, and Avant Garde Maritime Services (AGMS).[21]

The motives for arguing that the definition of mercenaries found in the international treaties is not applicable to PMSCs can be seen in the revolving doors between governments and PMSCs in the countries where the major multinationals in the security industry are located, as well as the profits they generate and the interests created.

The infamous Blackwater, a company that now goes by the name Academi, had among its executive directors Cofer Black, former Director of the CIA's Counter Terrorism Center; Enrique Prado, former CIA Chief of Operations; and Rof Richter, second in command of the CIA's Clandestine Service.

G4S, the largest PMSC in the world with more than 620,000 employees and profits of 6,325,000 US dollars, has had among its directors Lord P. Condon, former Commissioner of the UK Metropolitan Police, and J. Reid, former Home Secretary and Defence Secretary for the UK government.

MPRI, a company renamed L-3, was created by US General Vernon Lewis and has included on its board of directors the following generals: Carl Vuong, US Army Chief of Staff 1987–1993; Ronald H. Griffith, US Vice-Chief of Staff until 1997; Harry E. Soyster, US Vice President of Operations.[22]

According to the NGO War on Want, the closely connected interests of PMSCs, intelligence services and multinational companies constitute the vital core of the security industry. Many of the smaller PMSCs are completely staffed by ex-military personnel, while other ex-members of the armed forces are also found in the key positions at the larger PMSCs.[23] At least 46 PMSCs in the United Kingdom employ former members of the British Special Forces,[24] and the situation is very similar in the United States of America.

This makes it possible for politicians to fight wars without the scrutiny of supervisory bodies or the general public. Unlike the Pentagon or the CIA, PMSCs

[20]"Un Silence Qui Derange", Radio-Canada.ca, 16 June 2009; Gómez del Prado, J. L. (2011), p. 50; United Nations Document A/HRC/15/25/Add.1; Wall Street Journal, May 18, 2009; Corporación Colectivo de Abogados 'José Alvear Restrepo' (2007).

[21]Guardian, January 10, 2013.

[22]Gómez del Prado, J. L. (2011), p. 49.

[23]BBC News (2010).

[24]War on Want (2016).

do not report to the US Congress and are not subject to accountability. Blackwater employees performed secret operations in Pakistan for the US government. The main reason was to avoid any scrutiny from Congress.[25]

Even worse is the secrecy they practice, invoking the need to protect private information; PMSCs are not subject to the Freedom of Information Act, whereas the military and intelligence services are. All of this has contributed to a continuation of the growth in both the number and scope of activities performed by PMSCs. This can be noted particularly in Yemen, Syria, and Iraq, as well as in Nigeria, where PMSCs have replaced the Nigerian army in the fight against the terrorists of Boko Haram.[26]

With the recent upsurge in piracy in the Indian Ocean, the use of PMSCs in the shipping industry is rising sharply. Over half of the companies that are members of the Security Association for Maritime Industry (SAMI) are British. It is estimated that around 200 PMSCs are currently running operations. The militarization of the seas carries serious consequences: it is often fishermen who find themselves the unwitting targets of the indiscriminate shots fired by said companies.[27]

Private shipping companies exploit a legal vacuum, making use of "floating armories," vessels that drop anchor in international waters and sell guns, ammunition, and many other kinds of military equipment in a completely unregulated manner. In the Indian Ocean, there are currently around 20 "floating armories,"[28] which can be used by PMSCs with total impunity to deposit, purchase, or hire armaments.[29] In August 2013, the UK Department of Business Innovation and Skills issued 50 licenses for floating armories operating in the Indian Ocean and the Gulf of Aden.[30]

2 Article 2 of the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries

The aforementioned article criminalizes the activities of mercenaries. As with all instruments relating to mercenarism in international humanitarian law and international criminal law, it revolves around two main criteria in terms of the person accused of acting as a mercenary: (a) his status as a **foreigner** and (b) his **motivation**.

[25]Scahill, J. (2013), pp. 177–178.

[26]The Atlantic, *Ibid*.

[27]Bloomberg (2012); War on Want, *ibid*.

[28]United Nations Document A/HRC/30/47 (2015), paragraph 61–64.

[29]Guardian, *Ibid*; War on Want, *Ibid*.

[30]Lloyd's List (2013); War on Want, *ibid*; United Nations Document A/HRC/30/47, (2015) paragraph 53–64.

These two essential criteria serve to define mercenaries acting in the two situations envisaged in Article 3 of the 1989 International Convention: those who (a) *participate directly in hostilities* or (b) participate *in a concerted act of violence*.

The 1989 instrument against mercenarism was adopted by the United Nations in order to protect the right of peoples to self-determination in the context of *Jus ad Bellum* and the Charter prerequisites that establish the norms for what States can do when they use force.

The 1989 International Convention[31] integrated all of the clauses from Article 47 of the 1977 Additional Protocol I to the Geneva Conventions, except for the clause that states "does, in fact, take a direct part in the hostilities," which considers the status of a mercenary in an armed conflict from the perspective of international humanitarian law,[32] *Jus in Bello*, which, contrary to *Jus ad Bellum*, does not look at justifications for engaging in war but rather tries to regulate its conduct.

The provisions in Article 47 that were relevant during the second half of the twentieth century in the context of international humanitarian law for the purpose of examining international armed conflicts involving regular armies are no longer relevant for twenty-first century conflicts[33] such as those in Syria, Libya, or Yemen. News media periodically highlight the participation of mercenaries and PMSCs in these countries.[34]

The armed conflict in Syria—with its heavy degree of participation from foreign fighters, "proxies," mercenaries and PMSCs, as well as the displacement of six million people in and outside the country—has regional and geopolitical dimensions that affect not only neighboring countries such as Lebanon, Turkey, Jordan, and Iraq but also countries in the European Union.[35]

Difficulties in applying the definition of a mercenary stem from the emphasis of international instruments with clauses based on Article 47, which looks at mercenarism in terms of the subjective goal or purpose that the individual committing the crime wants to achieve, not in terms of the external or objective element of the crime.

It is important to stress the irrelevance of Article 47, given that all the international instruments on mercenarism contain the prerequisites of this article, except for the 1977 OAU Convention, which also includes companies and other subjects with the potential to be involved in mercenary activities.

According to Article 47, status as a mercenary is not defined by the objective element of the crime; quite the contrary, the definition is essentially based on the **motivation** of the person committing the crime.

Common law legal systems are principally based on the act committed (*actus reus*—guilty act), i.e. the external element of the crime and not the subjective

[31]United Nations, General Assembly Resolution A/RES/44/34, of 4 December 1989.

[32]United Nations, *Treaty Series*, vol. 1125, No. 17512.

[33]Duffield, M. (2004), pp. 40–43.

[34]Hispan TV (2016a, b); Voltairenet.org (2016).

[35]United Nations (2013), pp. 5–7.

intention of the person who commits it (*mens rea*), except for some acts where the criminal action (*actus reus*) is made with certain intention (*mens rea*—guilty mind). *Mens rea* refers to the mental element of the offence, which accompanies the act.

This creates a problem for cases of mercenarism in international law and the 1989 Convention as the mercenary is a criminal, not merely an individual excluded from the right to the status of a "combatant" as established in international humanitarian law.

2.1 Status as a Foreigner

With a few exceptions, the fact that non-State armed groups or combatants are foreign, whether they are armed groups, foreign volunteers, insurgents, Mujahidin, mercenaries, PMSC contractors, or foreign fighters,[36] can be relevant for the two situations envisaged by the 1989 Convention: those who (a) *participate directly in hostilities* or (b) participate *in a concerted act of violence*.

For the accusation of being mercenary to be effective, the aim of fighting in an armed conflict must have been specified in the recruitment of the individual. However, this specification does not feature in the clauses of the contracts analyzed by the members of the UN Working Group on Mercenaries on its investigatory missions in Chile, Ecuador, Fiji, Honduras, and Peru.[37]

The Convention's definition also fails to take into account nationals from a country's diaspora who could return to fight against their own country, a matter that was highlighted by the Special Rapporteur on the use of mercenaries[38] and the UN Working Group on Mercenaries.

Furthermore, in the wars in Iraq and Afghanistan, it was not possible to classify PMSC contractors from the United States or from any other country directly involved as mercenaries, given their status as nationals of one of the parties to the conflict: it is worth noting that the mobilization of a diaspora may include nationals of one party to the conflict (another non-State armed group).[39]

Another prerequisite of the 1989 Convention regarding status as a foreigner is that the person must be *(c) neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) not a member of the armed forces of a party to the conflict; and (e) not have been sent by a state which is not a party to the conflict on official duty as a member of its armed forces*.

In this regard, it should be noted that the majority of those who perpetrate mercenary acts have been members of the armed forces of their countries and

[36]United Nations Document A/70/330, pp. 4–7.

[37]United Nations Documents: Chile (A/HRC/7/7/Add.4), Ecuador (A/HRC/4/42/Add.1), Fiji (A/HRC/7/7/Add.3), Honduras (A/HRC/4/42/Add.2), Peru (A/HRC/7/7Add. 2).

[38]United Nations Document E/CN.4/2002/20, paragraph 88.

[39]United Nations Document A/70/330, paragraph 87.

have worked directly or indirectly with the States geopolitically or economically interested in the conflict, even though they may not have been sent officially.

Currently, there are a considerable number of active soldiers and reservists who take time off or request a leave of absence away from their countries in order to be hired by PMSCs in an armed conflict. The pay is so attractive that national armies are hemorrhaging personnel who are choosing to work for PMSCs. This phenomenon is affecting both developed[40] and developing[41] countries.

The contracts signed by those hired for these types of operations make no mention of *direct participation in hostilities*. Generally, such contracts refer to a "hazardous environment" and "a high-risk environment, including [...] risks and hazards of war," etc. Personnel are hired as independent contractors who are to provide security services, not as mercenaries or individuals who are to fight in an armed conflict.[42]

2.2 Motivation

While there are some circumstances where status as a foreigner may be relevant, the same cannot be said for the concept of motivation, contained in the definition of a mercenary in the instruments of international humanitarian and criminal laws—neither in the regional nor in the national arena.

Motivation is a prerequisite that is extremely difficult to demonstrate. In accordance with these instruments, to convict a mercenary, it is necessary to prove before the court that the person *participated in hostilities or in concerted act of violence* driven essentially by a desire for private gain.

For many mercenaries such as Bob Denard, undoubtedly the most well-known mercenary intervening in Africa as far as foreign individuals or bands are concerned, as well as for a great many others, although the desire for private gain was significant, there were countless other important reasons, such as completing a mission for their government[43,44] or that of building a new nation in the cases of individuals acting for the so-called Islamic State.[45]

Another condition in the definition is that a party to the conflict should effectively make the offer for private gain or on its behalf; if another person makes it, the definition is not met. Persons who are hired to participate in hostilities or acts of violence are generally contracted either by mercenary acquaintances or by PMSCs.

[40] Antonyshyn, D., Grofe, J. & Hubert, D. (2009).

[41] United Nations Document A/HRC/7/7/Add.4, paragraph 13.

[42] United Nations Document A/HRC/7/7Add.2, paragraph 27–28.

[43] Weinberg, S. (1994).

[44] Le Monde (2006).

[45] Arte (2016a, b).

The contracting activities of PMSCs involve a labyrinth of contracts in which specifications about responsibility are not only sparse but also very vague. Many of the contracts for which the primary objective is to perform "security" activities—which in reality can qualify as "mercenary" activities—have been outsourced by a "certain government," a "certain mining company," a "certain PMSC," or a "certain international organization." In turn, the companies that win these contracts—whether they are mercenaries or PMSCs—subcontract the work to another company, which is sometimes in the same country but more often is in the Third World, the latter option being more economical.

Due to the stigma implied by mercenary activities in which personal gain was the sole motivation, the 1974–1977 Plenipotentiary Conference of the International Committee of the Red Cross (which adopted Article 47 of Additional Protocol I to the Geneva Conventions of 1949) introduced the element of motivation.

The delegations ruled that individuals who participated in mercenary activities could not benefit from the status of prisoner of war or that of **combatant**, a term reserved exclusively for soldiers of a party in the hostilities. To their views, mercenaries are objectionable because they are motivated not by an appropriate cause but by financial gain.[46]

In an armed conflict situation, the person's motivation has been induced by the *private gain* that is promised *by or on behalf of a party to the conflict*. However, this *material compensation* must be "substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party." This conditionality adds further difficulty to prove.

In any other situation of armed violence where the person *takes part in this act,* they must by motivated essentially by the desire to obtain significant private gain and be prompted by *the promise or payment of material compensation*.

However, the majority of people recruited by PMSCs to carry out security activities in the conflicts in Iraq or Afghanistan—people who could have been considered mercenaries—were motivated by a combination of selfish and altruistic motives: desires, reasoning, feelings, and motivations, which were all in play simultaneously.

In addition to earning a year's or two years' pay in a relatively short space of time, another factor for soldiers in armies from all around the world is that the extreme situations offered by armed conflicts allow them an opportunity to finally put into practice all of the theoretical concepts they have learned in order to ply their trade, but which they may never have had a chance to use.

The danger, the feeling of risk, and the adrenaline caused by certain situations are other reasons that persons hired by PMSCs to work in Iraq mentioned, ahead of the high remuneration received.[47]

For others, particularly soldiers from Third World countries such as Chileans and Peruvians, their motivation came from the possibility of offering their families

[46]Percy, S. (2007).

[47]Temps Present (2005).

either a better education for their children or perhaps the ability to pay for medical treatment for relatives, as collected and recorded in the interviews that members of the UN Working Group on Mercenaries had with ex-soldiers recruited by PMSCs to provide security in Afghanistan and Iraq, during its missions in Peru and Chile.[48]

A devastating economic situation may also have been a root cause in the motivation of the foreign fighters from Kosovo who were recruited by the so-called Islamic State to fight in Syria, attracted by propaganda and online messages promising them a better life in an idyllic Muslim country.

This has been the case of Kosovo, where the rapidly rising unemployment rate among young people has boosted radicalization in mosques. Online propaganda has also contributed. It presents an idyllic Islamic State in which Muslims are free from being made to feel ashamed about their religion, can walk with their heads held high, and have perfect conditions in which to bring up their children. In addition, they will become soldiers of Allah. Some 22 young people from just one small town in Jacana responded to these messages and traveled to Syria.[49]

Further reasons that may trigger and set in motion an individual's motivation can be associated with the actions of famous international leaders who have shaped the course of history, who in certain stages of their lives might have been mercenaries, terrorists, bandits, and/or revolutionaries. Possible examples include Giuseppe Garibaldi, Francisco de Miranda, and Joseph Stalin.[50]

A chronological analysis of the development of international norms relating to mercenarism since the creation of the UN shows that until the adoption of Article 47 of Additional Protocol I, United Nations instruments had never before given such importance to motivation.

For each individual prerequisite in the definition, it should also be noted that all of the elements or conditions in the definition must be applied at the same time, cumulatively. As part of its conditions, the 1989 Convention has the following prerequisites: (a) being foreign, (b) being motivated by the desire for private gain, (c) not being a national of a party to the conflict, (d) not being a member of the armed forces of a party to the conflict, (e) not having been sent by a State that is not a party to the conflict on official duty as a member of its armed forces. Unlike Article 47 of Additional Protocol I, the 1989 Convention does not contain the prerequisite of direct participation in the conflict.

Human behavior is extremely complex; it has many nuances and cannot be reduced to one single factor.[51] The participation of individuals and non-State armed groups in armed conflicts has to be seen as an epiphenomenon of mercenarism. It is impossible to prove legally the belief that mercenaries are solely financially motivated.[52]

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[48]United Nations Documents A/HRC/7/7Add.2 and A/HRC/7/7Add.4.

[49]Arte (2016a, b).

[50]Clapeau, P. (2006); Davrichewy, K. (2016).

[51]Diplock Report, (1976) paragraph 6.

[52]Percy, S. (2007), p. 177.

In the Former Yugoslavia Wars and in the armed conflicts in Afghanistan, Iraq, Syria, and Yemen, non-State individuals and armed groups have been used because of economic and geopolitical interests and for the exploitation of natural resources by certain criminal mafias and states or by both.[53] The so-called Islamic State gains much of its finances through illegal trafficking of arms.[54] Their finances also come from the illegal trafficking of migrants and refugees.[55]

The sending of arms to Saudi Arabia and other countries involved in the war in Yemen or other conflicts in the Middle East by States that ratified the UN Arms Trade Treaty, but are now violating it through these actions, is further proof of the double standards used by these States.[56]

Rather than looking at the necessary prerequisites that set in motion an individual's motivation, we should be concentrating on the acts taking place and the human rights violations they perpetrate.

3 Final Considerations: The Need for a Binding International Instrument Regulating and Monitoring the Activities of PMSCs

In the current international context of globalization and privatization of the economy, States are increasingly following the example of the United States of America as they give up their monopoly over the legitimate use of force to the market. The new security industry is flourishing, with an estimated value of around 400 billion dollars.[57]

PMSCs are multifunctional; all of them, in particular the biggest multinationals of the security, are conglomerations with specialized branches able to execute activities ranging from military actions, training, logistics, and security to intelligence, espionage, and in some cases even secret operations for a government.

The involvement of Blackwater is a clear example, which demonstrates how central the company had become to covert US actions.[58] The Prince Group (Blackwater) was made up of Blackwater Worldwide; Greystone, which provided training, logistics, consultancy, and maritime services; EP Investment holding company, incorporating Aviation World Wide Services, as well as subsidiaries such as Presidential Airways, which could provide services such as those alleged to have been used to help the CIA with rendition flights, and Total Intelligence Solutions,

[53]United Nations Document A/HRC/31/68 paragraph 136–139.

[54]Solomon, E. & Mhidi, A. (2015).

[55]El País (2016).

[56]ATT Monitor (2016).

[57]Saner, R. (2015).

[58]Scahill, J. (2013), pp. 177–178.

the services of which may have been used by the CIA for murky operations in Afghanistan.[59]

Thirty of the 50 largest PMSCs in the world perform military and security activities with no distinction drawn between the two.[60]

Although governments may delegate certain inherently State functions to PMSCs, ultimately it is the States that are responsible for any violations of international human rights law. States must demand of PMSCs that they comply with the same standards and checks that apply to services such as the military and the police.

States have a responsibility to ensure that there are no lacunae in the protection of human rights that might allow PMSCs operating in the national and transnational arenas to have impunity. In cases where there are violations of human rights, States are under an obligation to ensure that these are investigated and that there are trials and compensation for the victims.

However, there are no international laws to regulate PMSCs' activities, for which the only oversight comes from multinationals and large mining and oil companies.

The UN Working Group on Mercenaries carried out a study on the laws and regulations on PMSCs in 60 countries across the UN's five geopolitical regions: Africa, Asia and the Pacific, Eastern Europe, Western Europe.[61]

The study covered 30% of the UN's 192 Member States. The analysis of the countries' laws and regulations was conducted based on the following eight elements: (a) scope of the legislation; (b) licensing, authorization and registration; (c) selection and training of PMSCs' personnel; (d) permitted and prohibited PMSC activities; (e) rules on the acquisition of weapons by PMSC personnel; (f) use of force and firearms by PMSC personnel; (g) accountability for violations committed by PMSC personnel and remedies for victims; and (h) ratification of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

In general terms, among various other aspects, the study highlights the following: (a) the lack of legislation on PMSCs and the lacunae in the laws and regulations of countries that do have legislation, (b) the complete vacuum regarding both the question of military and security services provided abroad and the extraterritorial applicability of rules on this matter, (c) the range of different approaches taken by countries that have adopted measures in the security sector, (d) the danger of PMSCs' personnel using force or becoming involved in hostilities.

The Working Group noted that the transnational nature of private military and security services in conjunction with the lacunae in laws and regulations "underscore the risk that the status quo can seriously undermine the rule of law and the

[59]Mother Jones (2008).

[60]Saner, R., *Ibid.*

[61]United Nations Documents A/HRC/24/45, A/HRC/27/50, A/HRC/30/34 and A/HRC/33/43.

effective functioning of democratic State institutions responsible for ensuring public safety."[62]

In light of the analysis and the results of the study, the Working Group once again reiterated the need for "a comprehensive, legally binding international regulatory instrument."[63] This instrument would be "the best way to ensure consistent regulation worldwide and adequate protection of the human rights of all affected by the activities of private military and security companies."

With the acquiescence of governments such as those of the United States and the United Kingdom, where the majority of these companies are based, PMSCs use voluntary codes such as the 2010 International Code of Conduct for Private Security Service Providers (ICoC), thus seeking to legitimize the security industry's activities and block the introduction of binding international regulation. The clauses contained in the 1989 International Convention have become increasingly limited and obsolete and cannot be applied to the activities of this new form of mercenarism that are the PMSCs.

As analyzed in this article, it is impossible to apply the definition of a mercenary to the contractors working for PMSCs.[64] The types of mercenary activities that were prevalent in the 1960s are no longer relevant. The big multinationals have legal personality and are legally registered. Their boards of directors are composed of figures having held important positions of responsibility in the governments of their respective countries.

The Convention has gaps in terms of its legal application as it does not provide for the activities of PMSCs in armed conflicts: it does not distinguish between active and passive activities (PMSC contracts mention passive security activities in hazardous areas); it does not touch upon the matters of training military personnel, support operations for the armed forces, or strategic planning; it does not give any specifications regarding other support services for combat situations (medical services, logistics, armaments, fuel, water, maintenance activities, etc.) or the protection of people and premises.

The Montreux Document and the International Code of Conduct do not contain mechanisms that can provide regulation, monitoring, supervision, accountability, and effective remedies for victims in a way that corresponds to PMSCs' activities.

The possibility of making a distinction between the activities of private military companies and private security companies, indicated by the Chair-Rapporteur of the UN Intergovernmental Working Group,[65] is not only irrelevant but also in fact dangerous.

To follow such a path would be to take exactly the direction preferred by the main transnational PMSCs, who are nearly all from the English-speaking world (the United States, the United Kingdom, and Canada) and have taken control of most of

[62]United Nations Document A/HRC/27/50, paragraph 68.

[63]United Nations Document A/HRC/30/34, paragraph 131.

[64]Percy, S. (2007), p. 177.

[65]United Nations Document A/HRC/30/47, July 9, 2015, paragraph 77. 1.

the international market, forming a monopoly or oligopoly. Many of these are members and/or founders of the ICoC Association.[66]

The 50 largest PMSCs are located in the United States (27), the United Kingdom (12), Sweden (2), South Africa (2), Israel (2), Canada (1), the Netherlands (1), Australia (1), Spain (1), and the Dominican Republic (1). Of these, the ten largest PMSCs are Academi (US), the infamous Blackwater in its new guise; Aegis Defence Services (UK), formerly Sandline; DynCorp Int. (US); G4S (UK); L-3 MPRI Inc. (US); Vinell Corp. (US); BAH (US); Garda World (Canada); Prosegur (Spain); KBR (US).[67]

It should be also borne in mind that most of these ten largest PMSCs have committed human rights abuses, such as Blackwater in Nissour Square (Baghdad) and DynCorp, contracted by the UN in Bosnia to train the country's police force, which set up a prostitution network involving the illegal trafficking of minors, brought from Romania using UN vehicles, to mention only two of the most known cases.[68]

"The PMSC industry has presented an astonishing ability to protect itself from regulatory sanctions by showing evidence of entrepreneurial efforts, such as the creation of the new ISO standard." As pointed out by Saner,[69] the "industry has the ability to fend off criticism and create new quasi-regulatory space that it can use to counter attempts to tighten regulation through new inter-governmental initiatives such as the Montreux Document and the related ICoC," and of a possible UN binding regulatory instrument.

This would wash companies clean of the stigma of being mercenaries while also giving them the position of having a monopoly in the international market, with the ability to continue executing contracts for governments, multinationals, and international organizations without any regulation or oversight.

Perhaps the time has come for the international community to ask whether the real danger posed to peace and security no longer relates chiefly to mercenaries, as it did in the 1960s. At that time, one of the main arguments put forward in the UN General Assembly and Security Council's resolutions was based on the damage to international peace and security caused by mercenary activities.

But presently, in the current decade of 2010s, the real danger comes from an assortment of different non-state groups and individuals. Taking into account the severity of the human rights violations, the International Criminal Court could consider the criminal activities of the various different types of non-State armed groups and individuals to constitute crimes of aggression (the sending of armed groups, irregulars, or mercenaries), war crimes, or crimes against humanity. PMSCs, active in modern warfare and sanctioned by States that are giving up

[66] Saner, R. *Ibid*.

[67] Saner, R. *Ibid*.

[68] Sourcewatch (2010); The Nation (2014); Gómez del Prado, J. L. (2012).

[69] Saner, R. *Ibid*.

their monopoly on the legitimate use of force to the market, are clearly among such groups.

United Nations human rights bodies have spent over two decades considering the matter of multinational companies' responsibilities—in general and as regards PMSCs in particular—and advocating the adoption of new binding international instruments to regulate their activities. The 1989 Convention is in archaic instrument, effectively dating back to the last World War.

It is necessary and urgent to adopt a binding international instrument to regulate and supervise the activities of PMSCs.

The convention project produced by the UN Working Group on Mercenaries is merely a draft. It invites Member States to sit down in an open-ended intergovernmental working group, created by the UN Human Rights Council, and seriously negotiates the actions that must be taken in order to i) safeguard their sovereignty, ii) protect human rights, and iii) establish which activities may not be outsourced by States, iv) as well as the means and type of binding regulation that is required when inherent State activities are privatized.

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José L. Gómez del Prado Former Member UN Working Group on Mercenaries; Former Senior Officer UN OHCHR in charge human rights field presences; Coordinated UN Security Council Group investigated 1994 Rwanda genocide; Senior Coordinator World Conference against Racism; Visiting Professor European and American Universities.

Private Military and Security Companies and Human Rights

Carlos Lopez

Abstract This chapter addresses the question of whether there are gaps in international human rights law in relation to the activities of PMSCs. To that end, it first examines the grounds of attribution of unlawful acts to states under human rights treaties, which are generally those of general international law. The article argues that international human rights bodies, especially at the Inter-American level, have adopted a broader concept of "agent of the state" at the regional level and draws special attention to the Committee against Torture's position that largely attributes PMSCs' acts of torture and inhuman and cruel acts to the contracting state. The chapter addresses also the nature of the state's obligations regarding PMSCs within the domestic jurisdictions, with a focus on the obligation to protect and to provide effective remedies and access to justice to victims of PMSC abuses. In this regard, there is a clear gap due to the absence in international instruments of norms regarding the civil, criminal, or administrative legal liability of PMSCs and regarding the operation of these rules in a transnational context and the so-called complex environments where PMSCs operate.

1 Introduction

Analyses of the activities of private military and security companies (PMSCs) often focus on companies that have been involved in violent incidents in conflict or postconflict zones. Thus, the immediate legal framework is international humanitarian law, with a smattering of secondary references to the international human rights system and international human rights law. Curiously, human rights abuses and violations are often cited as one of the negative aspects of these companies' actions; indeed, the bodies of the UN human rights system have addressed the matter of PMSCs' impact on both human rights and humanitarian law and have

C. Lopez (✉)
International Commission of Jurists, Geneva, Switzerland
e-mail: Carlos.lopez@icj.org

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issued varied but final opinions. Organs such as the Human Rights Council and its subsidiary bodies, such as the Working Group on the use of mercenaries or the Intergovernmental Group for the discussion of a possible international convention on PMSCs, have played an important role in the debate.

This chapter aims to analyze the phenomenon from the perspective of the observance of and respect for human rights. It is well known that human rights always apply in both peace time and times or areas of armed conflict. In its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice established that "the protection offered by human rights conventions does not cease in case of armed conflict," save through the effect of the provisions for derogation found in certain conventions.[1] Human rights conventions, and customary human rights law, thus apply not only in times and areas of conflict, where, in principle, international humanitarian law applies. The relationship between these two branches of international law is complementary, rather than conflicting, and while humanitarian law is generally observed to be the *lex specialis* with regard to human rights law in times of armed conflict, the relationship and application of the two branches of law is more dynamic and complex than it seems.[2]

There are several reasons why an analysis of the impact and regulatory gaps in the international human rights system is necessary. One is, of course, the institutional mandate of the Human Rights Council and its subsidiary bodies, essentially focused on the protection and promotion of human rights, which, while it may include the application of international humanitarian law and international criminal law, should not, as a result, neglect the human rights perspective. The other, even more powerful, reason is the significant number of negative impacts that PMSCs' activities have on human rights; the victims of these violations demand justice and redress, and national and international legal systems owe them a response. The chapter by Felip Daza, also included in this volume, reports and analyzes 108 human rights violations that have been committed by PMSCs since 2000 in 22 countries (most of which are Arab, although he notes that the cases in other regions of the world are still under investigation). The main violations are grouped in terms of those affecting the right to life and the right to physical and psychological integrity (84% of the cases); abuses of other civil and political rights, mainly fundamental freedoms (41%); crimes defined in international law (25%); and

[1]International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 Report, par. 106. See also: ICJ, *Legality of the Threat of Use of Nuclear Weapons*, 2006 Report, par. 25; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, 2005 Report, par. 216.

[2]See Sassoli, M., and Olson, L. (2008), p. 599 ss. for a detailed discussion of the complex relationship between international humanitarian law and human rights law and the application of the *lex specialis* rule lies beyond the scope of this article. For additional information.

abuses of the labor rights of PMSC employees (7%). Impacts on children's rights, health, and privacy, among other things, are also mentioned.[3]

This chapter aims to expose those areas in which there exist regulatory and protection gaps in the human rights system resulting from how PMSCs currently conduct their operations and the characteristics of the legal framework in which they do so.

2 International Human Rights Law and the Obligations of States

The human rights system comprises a number of existing obligations under general international law and various duly ratified international treaties. In addition to the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, these treaties include subsequent conventions on the rights of the child, discrimination against women, racial discrimination, the rights of migrant workers, torture, and enforced disappearance and a series of conventions concluded within the framework of the International Labour Organization on labor rights and standards.[4] Although some of these conventions might seem more relevant than others with regard to the activities of PMSCs, in fact all human rights can potentially be affected by these companies' actions.[5]

It is generally accepted that these international treaties focus primarily on states and, therefore, that the obligations they lay down are for them. Accordingly, only states can be internationally responsible for the breach of or failure to meet their obligations under each treaty.

As Daza's study shows, the services provided by the companies registering the largest number of violations include security and protection (87 cases), quasi-police and border management tasks (22 cases), and intelligence (10 cases), all of which are tasks that, Daza argues, have traditionally been considered inherent to states.[6] It is thus important first to consider the impact that PMSCs' activities have on states' human rights obligations, especially the issue of the attribution of conducts by these companies that are in breach of these obligations to the states that contract or use them, as well as the possibility for the victims of those violations to seek redress from the state.

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[3]Chapter by Daza, in this book.

[4]The international human rights treaties can be found at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx. The ILO instruments are available at: http://www.ilo.org/global/standards/lang--en/index.htm.

[5]Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (2008).

[6]Daza, F *op. cit.*, in this book.

However, the landscape of responsibilities also includes the direct responsibility of the PMSC itself. This primarily occurs under the national law of each country. The matter of whether PMSCs, like other companies, have obligations imposed directly by international law has not yet been settled; someday, an authoritative statement may be issued on whether these companies at least have obligations under international criminal law. In the meantime, this chapter limits itself to exploring the options and avenues for victims of such violations to gain access to effective remedy and redress under national law.

3 State Responsibility for Human Rights Violations Involving PMSC

Under international human rights law, the state is normally the guarantor of the rights of persons under its jurisdiction. However, it is only responsible for the conduct and violations of its own agents, who act on its behalf and, therefore, entail its international responsibility. In principle, states are not responsible for the acts of private agents. Although the vast majority of PMSCs are private entities, their conduct (which can be harmful to human rights) can in some cases be attributed to states.

Human rights treaty monitoring bodies generally use the standards of attribution of responsibility found in the treaties themselves and, also, in customary international law. The latter is codified in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), drafted by the International Law Commission.[7] Meanwhile, the bodies responsible for monitoring the implementation of human rights treaties have developed their own doctrines on matters of attribution and state responsibility, especially with regard to the commission of torture, which they apply to the respective treaty.

Article 4 of the ARSIWA provides that "[t]he conduct of any State organ shall be considered an act of that State under international law" and that "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State." Therefore, the conduct of a state organ entails the international responsibility of that state. However, PMSCs are private, and states have been reluctant to incorporate them as part of their armed forces[8] or police or explicitly into their domestic law. In this regard, states may be seeking to evade their responsibility by preventing the incorporation into their armed forces and/or police of the PMSCs they use by means of legislative acts, even though in practice the PMSCs may be acting as *de facto* organs of the state.

The International Court of Justice has established that the acts of a private agent can be attributed to the state if the private agent is acting with "complete

[7] International Law Commission, United Nations (2002).

[8] Seiberth, C. (2014), p. 83. See also: Cameron, L. (2009), p. 118.

dependence" on the state, even in the absence of specific instructions or a law.[9] In such cases, the state would be using a PMSC as a front or shell to operate directly and for its own purposes. The aim would be to avoid the political or legal responsibility that might arise if these acts potentially in violation of international law were to be interpreted as having been committed by the state itself. Some authors consider that, in practice, there is no evidence that states use PMSCs this way, making the practical usefulness of this legal scenario quite limited.[10]

Regional bodies specialized in human rights have adopted a more expansive interpretation of the concept of "agent of the state" and of attribution to the state of the wrongful act. For instance, the Inter-American Court of Human Rights found that the members of a civil self-defense patrol (a paramilitary group) should be considered agents of the state and, thus, that their actions should be imputed to the state. In *Blake v. Guatemala*, the Court found that this group had "an institutional relationship with the Army, performed activities in support of the armed forces' functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision" and that it was thus a *de facto* agent of the state.[11] The Inter-American Commission on Human Rights seems to have followed the same doctrine and has established that in "cases in which members of the paramilitary group and the army carry out joint operations with the knowledge of superior officers, the members of the paramilitary group act as agents of the State."[12] The Commission disregarded the fact that said groups had been declared illegal by the state and found that agents of the state had helped to coordinate, carry out, and cover up the massacre, such that the state was also liable for the paramilitary groups' acts.[13]

At the universal international level, the Committee against Torture, a body established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has clarified the bases on which the Committee considers states to be internationally responsible. With regard to private agents, it has noted:

> The Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, *private contractors*, and others acting in official capacity or on behalf of the State, *in conjunction with the State*, under its direction or control, or *otherwise* under colour of law.[14] (Italics are the author's.)

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[9]ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina* v. *Serbia and Montenegro),* (2007), par. 391–395, 397.

[10]Seiberth, C. (2014), p. 83.

[11]Inter-American Court of Human Rights, *Case of Blake v. Guatemala*, (1998) par. 76.

[12]Inter-American Commission of Human Rights, Riofrío Massacre, (2001) par. 51.

[13]Inter-American Commission of Human Rights, Riofrío Massacre, (2001) par. 52. See also: Inter-American Court of Human Rights, *Case of the 19 Merchants v. Colombia*, (2004) par. 118–123.

[14]Committee against Torture, General Comment No. 2 (2008) In a clear sign of openness to developments in international law, the Committee also notes that the Convention against Torture does not limit the responsibility that states or individuals can incur under customary law or international treaties.

Likewise, the Committee has observed, "[W]here detention centres are privately owned or run, the Committee considers that *personnel are acting in an official capacity on account of their responsibility for carrying out the State function*."[15]

One example of a PMSC formally and officially incorporated into a country's armed forces—and, therefore, of the case provided for under Article 4 of the ARSIWA—would be the contract signed between Sandline International and Papua New Guinea in 1997. Under that contract, Sandline undertook to support the country's armed forces in the fight against the Bougainville Revolutionary Army as "Special Constables" with military ranks commensurate with those they held within the Sandline structure and entitled to give orders to junior ranks.[16]

Article 5 of the ARSIWA offers another alternative for attributing the acts of private agents to states: "[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

The key element in this case is the nature of the activity and not the public or private character of the agent, such that a PMSC could act exercising elements of the government's authority. The difficulty lies in the lack of consensus regarding what constitutes "governmental authority" and what type of services the exercise of this authority entails.[17] There seems to be merely a certain consensus that only "intrinsic state functions" would require this type of authority, such as those related to policing, prisons, judicial administration, and the armed forces.[18] Other functions, such as education or health, would not require it. However, in its comment on this article, the International Law Commission noted that the definition of what is or requires the exercise of governmental authority depends on "the particular society, its history and traditions."[19] This position naturally does not meet the need for legal clarity as it makes an important factor in a country's international responsibility dependent on its traditions and history. In so doing, one could argue, it creates a set of *a la carte* obligations for each country.

The universe of activities and services involving the exercise of governmental authority can vary. For instance, as Special Rapporteur for the International Law Commission on the issue of state responsibility, Professor Roberto Ago considered that the drivers of vehicles used to carry troops to the front or private persons contracted for intelligence missions would fall into this category,[20] a position many would question today.

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[15]Committee against Torture, General Comment No. 2 (2008) par. 17.

[16]Cited in Tougas, M. (2014), p. 329.

[17]Seiberth, C. (2014), p. 85.

[18]Seiberth, C. (2014), citing the expert meeting's report "Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions," University Centre for International Humanitarian Law, Geneva, August 29–30, 2005.

[19]International Law Commission, United Nations, Commentary (2002) Art. 5.

[20]Ago, R. Third Report on State responsibility, (1971) par. 190.

One reasonable way to determine the content of what governmental authority involves would be to look at the obligations imposed on states under international law. Human rights treaties impose certain obligations on states; one might assume that where there exists an international obligation, there also exists, or should exist, the exercise of implicit governmental authority. However, a state's duty to ensure the realization of all rights within its jurisdiction entails different types of state involvement, not always in the exercise of its governmental authority.

The Committee on Economic, Social and Cultural Rights (ESCR Committee) has underscored that the obligations arising under the International Covenant on Economic, Social and Cultural Rights (such as the rights to health, education, or an adequate standard of living) are neutral with regard to a particular form of government or economic system[21] and thus can also be fulfilled through private means. The Convention on the Rights of the Child (1989) recognizes the role of private social welfare institutions and their obligation to safeguard the best interests of the child as a primary consideration (Art 3.1). Accordingly, the UN Committee on the Rights of the Child held a day of general discussion on the private sector and the provision of services for children.[22]

According to the Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights, even though the International Covenant on ESCRs is neutral with regard to the economic model, "as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights."[23] This position corresponds to the recognized principle of international law that states cannot evade their international obligations by shifting the responsibility for them to other agents. This principle can be found in the International Law Commission's work from the 1970s, when, discussing state responsibility for acts or omissions of other entities that exercise elements of governmental authority, the Commission wrote: "it is important that the State should not be able to evade its international responsibility in certain circumstances solely because it has entrusted the exercise of some elements of the governmental authority to entities separate from the State machinery proper."[24] The same principle has been recalled in the jurisprudence of the European Court of Human Rights. In *Costello-Roberts v. the United Kingdom*, the court rejected the state's argument that the school where corporal punishment had been applied to children was run by a private institution, observing, "...the State cannot absolve itself from its responsibility by delegating its obligations to private bodies or individuals."[25] Of course, state responsibility in the matter of

[21]Committee on Economic, Social and Cultural Rights, General Comment 3 (1991).

[22]Committee on the Rights of the Child (2002).

[23]Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) 2.

[24]Yearbook of the International Law Commission (1974), p. 282, par. 17. The ILC went on to stress that "there is already an established rule on the subject" but that the ILC was convinced that "even if that were not the case, the requirements of clarity in international relations and the very logic of the principles governing them would make it necessary to affirm such a rule in the course of the progressive development of international law." (*Ibid.*)

[25]European Court of Human Rights, *Costello-Roberts v. the United Kingdom* (1993) par. 27.

human rights does not always require direct government intervention or the exercise of direct governmental authority but rather may simply require monitoring and oversight by the state.

One final way whereby the acts of a private agent could be attributed to the state is that provided for under Article 8 of the International Law Commission's ARSIWA. According to the article, "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 instruction of, or under the direction or control of, that State in carrying out the conduct." However, although authors such as Tougas offer a generous interpretation of this article, the final conclusion inevitably seems to be the same: the mere act of contracting a PMSC is not enough for that company's acts to be considered acts of the state. There must be instructions, direction, or control by the state for an act to be attributed to it.[26] White and Seiberth have shown that, in practice, it is difficult to establish states' responsibility for the acts of private agents through the methods established by the International Law Commission. To do so, there must be effective control, which in many cases is lacking, as the companies operate independently and states avoid direct involvement in the form of instructions or direction.

The *Al Shimari v. CACI* case (better known as Abu Ghraib) provides a good example of the practical effectiveness of international law provisions. In this civil suit for damages filed in the US under the Alien Tort Statute, four Iraqi victims of torture applied by personnel of the company CACI International Inc. and CACI Premier Technology Inc. stated in their claim that CACI directed and engaged in illegal conduct, including torture, at the Abu Ghraib prison in Iraq. The company had been contracted by the US government to provide interrogation services. The abuses took place between 2003 and 2004. The lawsuit was originally filed in 2008 and is still underway, following a series of successes and procedural setbacks in various US courts.[27]

In this case, although the avenues for attributing private conduct to the state provided for under the ARSIWA do not seem pertinent, the Committee against Torture's doctrine would apply. While CACI's conduct could not be attributed to the US under the ARSIWA, under the Convention against Torture, these acts of torture and mistreatment should be imputed to the state, which would be in breach of its obligations under the Convention. For the Committee, "States bear international responsibility for the acts and omissions of their officials and others, including agents, *private contractors*, and others acting in official capacity or on behalf of the State, *in conjunction with the State*. . .."[28]

In general, the International Law Commission's draft articles suffer from a lack of an appropriate enforcement mechanism, especially at the judicial level. Insofar

[26]Tougas, M. (2014), pp. 333–335.

[27]Information about the case, the complaints, and other documents from the proceedings can be found at: http://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al.

[28]Committee against Torture, General Comment No. 2 (2008).

as they codify international customary law, they reflect the common practice of states, which is constantly evolving. The practice of the International Court of Justice and human rights bodies has proven very valuable and advanced, with the International Court having the additional advantage of being a body for the application of both customary and conventional international laws. However, the Court's jurisdiction only extends to states, and only states can bring claims against other states, which is uncommon in matters concerning the acts of private agents attributable to states. In particular, the individuals and groups affected by PMSCs' activities do not have access to effective remedy and redress before the International Court.

The Committee against Torture's practice and doctrine does not seem to have been emulated by other treaty organs. The Human Rights Committee, responsible for monitoring compliance with the International Covenant on Civil and Political Rights, generally adheres to the doctrine that, in relation to the conduct of private agents, states have an obligation of due diligence to prevent those agents from violating the rights of third parties within their jurisdiction.[29]

Separately, the cross-border activities of PMSCs pose significant challenges in terms of defining states' responsibilities to protect and guarantee human rights. PMSCs often operate in multiple countries or jurisdictions. Sometimes the company may operate through a subsidiary or business partners and sometimes directly (this is usually the case in conflict zones or complex contexts in which it is difficult for the company to set up and license a subsidiary in the host country). The complex structures that major companies tend to have, especially for their overseas operations, have a significant impact on the effectiveness of the international rules governing state jurisdiction (including the jurisdiction of national courts).

For a state to be responsible for human rights violations, the violation must not only be attributable to it but also have somehow taken place within its jurisdiction. International human rights law imposes an obligation on states to respect and guarantee the human rights of the persons within their territory or jurisdiction. The interpretation of international law on this matter has evolved over time.

The jurisprudence of courts and other international human rights bodies reveals a complex picture. The obligations of the states parties to the respective human rights treaties may extend beyond their territory to include situations or areas in which they are an occupying power (as defined under international humanitarian law), in which a state agent exercises control, or in which the state exercises governmental

[29]Human Rights Committee, General Comment 31 (2004) par. 8; Inter-American Court of Human Rights, Case of *Velásquez-Rodríguez v. Honduras* (1988) par. 166–174. See: *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties - Individual report on the International Covenant on Civil and Political Rights (Report No. III)*, prepared for the mandate of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises with the support of the Office of the UN High Commissioner for Human Rights (2007).

powers. Even in the absence of territorial control, a state could still be responsible were it to have physical control over the victims of the violations.[30]

4 Responsibility of PMSC and the Right to Effective Remedy and Redress

Unlike state responsibility, which is enforced internationally by the pertinent courts and mechanisms within the UN or regional organizations, the responsibility of a corporation as a legal entity is only enforced at the national level. There is currently no international body (court or otherwise) with the jurisdiction to determine the legal responsibility of a company or corporation. At the regional level, the statute of the African Court of Justice and Human Rights was recently amended through a protocol, although it has yet to be ratified and come into force, to grant the African court criminal jurisdiction over corporations for a number of crimes.[31]

4.1 The Legal Liability of the Corporation or Company at the National Level

The vast majority of PMSCs are business enterprises set up according to the national laws of each country. While the discussion regarding whether a business enterprise has or should have obligations under international human rights law is ongoing, in practice, for the time being the legal liability of a business enterprise as a legal person depends on the law and principles of the legal system of each country and, therefore, can vary considerably. In principle, within each country's legal order, the business enterprise's legal liability takes the form of criminal, civil, or administrative liability.

Unlike the criminal liability of a legal person, civil liability for damages is almost universally accepted.[32] However, the rules and procedures are neither singular nor uniform in all jurisdictions. The underlying liability is grounded in the concept of negligence enshrined in the principle that any damage caused by negligent behavior should be compensated. Several cases against transnational companies have been litigated this way.[33] The concept of reasonable or due diligence included in the Guiding Principles on Business and Human Rights may

[30] Seiberth, C. (2014), pp. 77–79.

[31] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev. 1 (2014).

[32] International Commission of Jurists (2008).

[33] England and Wales Court of Appeal (Civil Division), *Chandler v Cape plc*, (2012) pars. 69–80. See, generally, Muchlinski, P. (2010), pp. 148–70.

be relevant to determining whether or not the company in question acted negligently.[34]

Liability for negligent conduct is the basic mode of liability. However, this mode has certain drawbacks and limitations. Most of these limitations are found in the procedural aspect and are related to the fact that litigation in civil matters presupposes that there will be two parties to the proceedings, on equal terms, with rights and duties as citizens before the law. Therefore, each party to the proceedings must prove its claims, cover its own costs, and assume the risks of a potentially adverse outcome in the case. This gives rise to often insurmountable obstacles for groups, rural communities, and indigenous peoples who lack the necessary knowledge or capacity and resources to challenge a politically and financially powerful company on a level playing field. In the absence of appropriate procedural measures to ensure that the two parties to the proceedings are truly on equal footing, civil liability for damages can play only a limited role.

4.2 Criminal Liability of the Legal Person

Criminal law and punishment exist to protect the property, rights, and values that society deems fundamental. The purpose of criminal punishment is to protect and reaffirm social norms or values, restore order and justice, deter crime, and potentially rehabilitate offenders.

The offenses requiring criminal punishment are generally the most serious, those that harm the rights or interests that society as a whole protects. Therefore, government authorities, through the office of the public prosecutor or similar bodies, play a dominant role in investigating and punishing these offenses, and their actions do not depend entirely on private actions but rather are exercised *ex officio*.

The last two decades have witnessed substantial progress on the expansion of the criminal liability of legal persons, especially in Europe. This progress is largely the result of the existence of international treaties to fight corruption, bribery, transnational organized crime, human trafficking, the sale of children, and child pornography. However, many states have not yet incorporated this concept into their legal systems, and those that have have done so only in a limited way.[35] This is due to both doctrinal and political reasons. Some countries, such as Germany, the Russian Federation, and Poland,[36] apply a model of quasi-criminal liability that is generally pursued through administrative proceedings but results in sanctions equal in seriousness to criminal sanctions. Other countries, such as Argentina, criminally

[34]Guiding Principles on Business and Human Rights (2011). See also, International Commission of Jurists (2008) vol. 3, p. 41.

[35]International Commission of Jurists (2014), p. 24; Zerk, J. (2014), pp. 11 and 111 ff.

[36]See: International Commission of Jurists (2010), p. 9 ff.

prosecute the company's managers or owners, including in cases of complicity in crimes committed by state agents decades ago.[37]

4.3 Administrative Liability

Administrative sanctions are usually applied for the breach of orders and regulations issued by government authorities in accordance with the law. This leads to sanctions such as fines, warnings, the suspension of business or operating licenses or permits, strict time limits to comply with the obligation subject to penalty, etc. They are intended to sanction conducts in breach of the administrative rules established to protect or enable the enjoyment of certain human rights, such as rules related to health and hygiene in the workplace, health and food safety, or technical standards for mining, metallurgy, and similar activities to ensure the health and safety of the workers, surrounding communities, and environment. Most of these rules establish obligations related to conduct or process, rather than outcomes, breach of which is subject to sanction.

In some countries where companies, in their capacity as legal persons, cannot yet be held criminally liable in human rights cases, a sort of administrative or quasi-criminal liability applies, leading to fairly serious sanctions.

As the foregoing overview shows, although the legal liability of a corporation or company for human rights offenses is far more widely accepted and developed today than just two decades ago, it remains insufficient. Civil liability for damages operates through inflexible processes that limit its use in cases of human rights abuses by companies. Criminal liability is largely limited to a small number of financial crimes and, in many jurisdictions, is not provided for under national law. Finally, administrative liability, although apparently much more widespread, remains disperse and is not directly related to human rights issues.

4.4 Modes and Forms of Corporate Liability

Like other business enterprises, PMSCs generally operate under the legal form of a moral or legal person, that is, of an entity created by law and, as such, able to be the bearer of rights and obligations. Each entity that is the subject of rights and obligations is responsible solely for its own acts and not those of others. However, a crime can be committed by one, two, or more people and in different ways. Thus, a company can coperpetrate a crime along with another company, but it can also

[37]Verbitsky, H., and Bohoslavsky, J. P. (2013); CELS/Ministerio de Justicia y Derechos Humanos (2015).

abet, facilitate, or incite another company to commit it. In the latter case, the company would play an accessory role—as an accomplice.

At the same time, in today's increasingly economically integrated world, companies conduct cross-border operations and even operations in distant countries and on other continents through their own subsidiaries or through affiliates, contractors, or subcontractors. These operations have been facilitated by the many trade and investment protection agreements currently in force.

The context of globalization and transnational companies also gives rise to situations in which the parent company, usually registered in another country, is involved as an accessory, coperpetrator, or abettor of the commission of a crime by its subsidiary. This situation is further exacerbated by the fact that national courts often cannot establish jurisdiction over these companies or cases occurring in other countries. In the case of PMSCs, those companies that operate in conflict zones generally do so without setting up subsidiaries subject to the national law of the territorial country and use personnel directly hired by companies registered in other, more stable countries.

4.5 Liability of Parent Companies for the Acts of Their Subsidiaries

A typical case in the debate over companies and human rights concerns the legal liability of a parent company for the damage caused, or contributed to, by its subsidiaries in other countries. Due to the company law doctrines of separate legal personality and limited liability, as well as the fact that companies operate in different geographical locations, different legal contexts, and with different stakeholders, attributing responsibility to a parent company is always a challenge. An examination of state practices reveals three approaches to the issue of parent company liability. One involves "piercing the corporate veil," for instance, by ignoring the separation between the parent company and its subsidiaries when that separation is merely a tool to fraudulently avoid legal responsibility. A second approach is known as the "presumption of control in the integrated enterprise," whereby the acts of the subsidiary can be presumed to be acts of the parent company that controls it. A third approach indicates that the parent company can be directly liable, provided it fails to exercise due diligence in relation to the companies it controls.[38]

The report by the ICJ Expert Legal Panel on Corporate Complicity encapsulated the liability of the parent company within the broader concept of complicity.[39] In general, the basic principle is that a subsidiary's conduct will not be identified with the conduct of the parent company. In terms of liability in tort law, the parent

[38]De Schutter, O. (2010), pp. 245–284.

[39]International Commission of Jurists (2008), vol. 1.

company can be civilly liable for its own acts or omissions, provided it has acted negligently or intentionally and contributed to the harm inflicted by its subsidiary on a third party through conduct that aided, enabled, or even exacerbated that harm.[40] This principle has been reaffirmed in both legal and judicial practice, although crucial areas remain to be clarified regarding parent companies' liability for the harm caused to people who live near their subsidiaries' operations.

Recent decisions adopted by European courts in civil lawsuits point in this direction. In *Chandler v. Cape plc*, the England and Wales Court of Appeal ruled on the legal responsibility of a parent company.[41] In that case, the lawsuit was filed in relation to the harm caused to the respondent by the asbestosis he contracted as a result of exposure to dust when he worked for Cape Products, a subsidiary of Cape plc. The respondent claimed that the company Cape plc had a duty of care to him, *inter alia*, due to having contracted individuals responsible for supervising health and safety at Cape Products, specifically the transnational group's chief medical advisor. In establishing the responsibility of the parent company, the Court found that

> . . .in appropriate circumstances, the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. These circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[42]

The Court of Appeal emphatically rejected that its decision established a general principle of automatic attribution of responsibility to parent companies for all damages inflicted by their subsidiaries, limiting that responsibility solely to certain cases in which the parent company has control over relevant aspects of the subsidiary's business and its own conduct influenced or contributed to the harm caused.

In another important case, a district court in the Netherlands took a different approach in the twin cases of a group of Nigerian villagers and the organization Friends of the Earth against Shell plc and its Nigerian subsidiaries.[43] This case dealt not with the alleged harm inflicted on an employee hired by the subsidiary but rather with the alleged harm caused to the communities living in the areas surrounding the company's operations. The Court questioned the existence of a duty of care on the part of the parent company (Royal Dutch) toward the communities and

[40]International Commission of Jurists, Vol. 3, p. 46 ff.

[41]England and Wales Court of Appeal (Civil Division), *Chandler v Cape plc*, (2012) pars. 69–80.

[42]England and Wales Court of Appeal (Civil Division), *Chandler v Cape plc*, par. 80.

[43]District Court of the Hague, *Milieudefensie et al v Shell et al*, (2013).

people who lived near the operations of its subsidiaries in Nigeria, who claimed to have been harmed by the pollution that these operations caused.[44]

The Dutch Court of Appeal has recently opened the possibility for the parent company, Shell, to be held liable in this case for the harm caused by its Nigerian subsidiary by allowing the civil proceedings for damages brought against it to continue in that jurisdiction.[45]

In light of the above, the participation in or contribution of a parent company or other companies (such as those that issue purchase or sale orders) to criminal or civil offenses committed by another business enterprise is an important topic that should be addressed in a possible future international treaty. This is especially true in cross-border cases in which companies registered in one country are involved in offenses committed by other companies in other countries. Particularly important in such cases is the scope of the jurisdiction of national courts to hear and rule on cases involving companies registered in other countries. This topic is addressed below.

4.6 Jurisdiction of National Courts Over Crimes Committed by Transnational Corporations

To ensure that a company's legal responsibility is enforced, the courts of each country must exercise jurisdiction over acts constituting crimes so that civil or criminal proceedings can be brought. Defining the jurisdictional scope of national courts is crucial. Because the abuses committed are often of a transnational nature (i.e., a national company is involved in abuses committed in other countries), it is essential for national courts to be able to exercise jurisdiction over these cases in order to prevent situations of impunity. However, several cases have shown that courts often have limited jurisdiction.

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[44]District Court of the Hague, *Milieudefensie et al v Shell et al*, (2013) par. 4.34, pp. 22–23: In an opinion that the Court of Appeal seems to have rebutted, the District Court wrote:

> 4.34. The District Court finds that the special relation or proximity between a parent company and the employees of its subsidiary that operates in the same country cannot be unreservedly equated with the proximity between the parent company of an international group of oil companies and the people living in the vicinity of oil pipelines and oil facilities of its (sub-) subsidiaries in other countries. The District Court is of the opinion that this latter relationship is not nearly as close, so that the requirement of proximity will be fulfilled less readily. The duty of care of a company in respect of the employees of a subsidiary that operates in the same country further only comprises a relatively limited group of people, whereas a possible duty of care of a parent company of an international group of oil companies in respect of the people living in the vicinity of oil pipelines and oil facilities of (sub-) subsidiaries would create a duty of care in respect of a virtually unlimited group or people in many countries. The District Court believes that in the case at issue, it is far less quickly fair, just and reasonable than it was in *Chandler v. Cape* to assume that such a duty of care on the part of [Royal Dutch Shell plc] exists.

[45]The Guardian (2015); See also: Milieudefensie/Friends of the Earth Netherlands (2015).

A significant part of the debate over jurisdiction has taken place in the US, where, in an April 2003 decision in the case *Kiobel v. Shell Co.*, the US Supreme Court found that the Alien Tort Statute (ATS)—an eighteenth-century law that had been used since the 1980s as a legal basis for lawsuits against individuals and companies for serious offenses committed abroad—could not be used to adjudicate cases in which the conduct that was the subject of the claim had taken place outside the US and lacked sufficient connection with US jurisdiction for the "presumption against extraterritorial application" of laws to be waived. The Court held that, even when the claims

> touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application [...]. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[46]

Notwithstanding the views of distinguished scholars,[47] the *Kiobel* decision seems to have significantly reduced the options within this major avenue of redress for victims of corporate abuses, including those committed by PMSCs. The *Kiobel* precedent has been cited in subsequent decisions by lower courts. The impact of US court decisions is substantial, given the number of PMSCs based in the country and under US jurisdiction.

The Court of Appeals for the Second Circuit in New York subsequently dismissed cases related to abuses committed during the Apartheid era.[48] The same thing happened with the case of *Sarei et al. v. Rio Tinto plc*,[49] in which 10,000 residents of Bougainville, Papua New Guinea, sought to hold Rio Tinto liable for its alleged complicity in the human rights violations committed by the government of the South Pacific island of Bougainville. In the judgment in *Daimler AG v. Bauman*[50]—a case regarding the alleged collaboration of Daimler's Argentine subsidiary, Mercedes-Benz Argentina, with the dictatorship in power from 1976 to 1983 in the kidnapping, detention, torture, and killing of several workers—the Supreme Court held that jurisdiction could not be established over a company based solely on the relative magnitude of its operations in the jurisdiction of the state as there are companies with operations in many places worldwide.[51]

[46]Supreme Court of the United States of America, *Kiobel v. Royal Dutch Petroleum Co.,* (2013) at 1669.

[47]Cassel, D. (2014).

[48]Court of Appeals for the Second Circuit in New York, *Balintulo v. Daimler AG,* August 21 (2013), p. 20. The Court of Appeals ordered the lower court to dismiss the case.

[49]United States Court of Appeals for the Ninth Circuit, *Sarei et al. v. Rio Tinto PLC et al.*

[50]Supreme Court of the United States of America *Daimler AG v. Bauman*, (2014).

[51]Supreme Court of the United States of America*, Daimler AG v. Bauman* (2014), p. 21.

In contrast, in the EU, the Brussels I Regulation[52] establishes the automatic jurisdiction of a European country's courts over claims against legal persons domiciled in the European country, regardless of where the civil offense was committed or the harmful event occurred.

The cases against Shell in the Netherlands have also shown that a European court can have jurisdiction over a company set up or domiciled in a non-EU country, provided that there is a close connection with a claim against another company domiciled in the Netherlands. The Council of Europe also recently recommended this principle, noting:

> Member States should consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of enterprises domiciled within their jurisdiction if such claims are closely connected with civil claims against the latter enterprises.[53]

The same Council of Europe document recommends that member states consider allowing their domestic courts to exercise jurisdiction over civil claims against business enterprises not domiciled in them when there is no other effective forum to guarantee due process (*foro necessitas*).

5 Final Considerations

International law on the protection of human rights in the context of the activities of both PMSCs and business enterprises in general is clearly evolving. For now, there are few standards or legal instruments to ensure accountability or address certain aspects of the responsibility of states or of PMSCs themselves or the individuals who run or represent them. The practical application of these standards and instruments is limited due to the lack of international mechanisms to which the potential victims have recourse.

Although it is not the focus of this chapter, the prevailing approach to date among a certain segment of the international community has been to address the consequences of PMSCs' operations through the use of soft law: declarations and recommendations. While such instruments are undeniably valuable, especially as guidelines for PMSCs, the challenges posed to the system for the protection of human rights and, especially, to the right to effective remedy and redress clearly remain unsolved.

The most effective response to rights violations committed by PMSCs must obviously come from national institutional and legal systems, which are more accessible and closer to the potential victims. International practice shows that the international standards contained in international instruments adopted within the multilateral framework of the UN play an important, sometimes crucial, role in

[52]Regulation (EU) No. 1215/2012 of the European Parliament and of the Council (2012), pp. 1–32.
[53]Council of Europe (2016), par. 35.

the development and harmonization of national systems. One need only look to the impact of the various international conventions against corruption, bribery, transnational crime, and money laundering to conclude that the field of human rights and PMSCs would benefit from a similar perspective.

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Carlos Lopez is PhD in Public International Law/International Relations by the Graduate Institute of International and Development Studies, Geneva, Switzerland, and is currently the Senior Legal Advisor to the International Commission of Jurists, in charge of business corporations and human rights.

International Soft Law Initiatives: The Opportunities and Limitations of the Montreux Document, ICoC, and Security Operations Management System Standards

Rebecca DeWinter-Schmitt

Abstract Private security companies (PSCs), governments, civil society organizations, and other stakeholders of the private security industry have contributed to the development of an interlocking web of soft law initiatives—international declarations, codes of conduct, and security operations management system standards—to improve global governance of the private security industry. This chapter provides background on each initiative and examines their opportunities and limitations, to include their ability to ensure that PSCs respect applicable provisions of international human rights and humanitarian law in their operations and are held to account should they violate these laws. It concludes that rather than a forfeiture of the state's obligation to regulate the private security industry, over time we are seeing a hardening of soft law initiatives as they make their way into procurement regulations and national laws. Nevertheless, remaining gaps in the soft law initiatives warrant greater efforts to develop binding laws and regulations and to provide greater support for successful implementation of these initiatives. PSCs and their stakeholders have a significant role to play in strengthening and ensuring the continued interoperability of these initiatives.

1 Introduction: The Choice for Soft Law

The Iraq and Afghanistan wars were executed with an unprecedented reliance on private military and security contractors. For example, during recent US military operations in both countries, contractors accounted for 50% or more of

R. DeWinter-Schmitt (✉)
American University Washington College of Law, Center for Human Rights & Humanitarian Law, Washington, DC, USA
e-mail: rdewinter@rcn.com

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the Department of Defense's (DoD's) presence in the country.[1] These contractors included private security personnel who in 2012 peaked at 28,686 in Afghanistan and in 2009 peaked at 12,942 in Iraq.[2] These figures do not include security personnel working for other US government agencies and other public and private organizations.

A number of high-profile incidents, such as the alleged involvement of Titan and CACI contractors in the torture at Abu Ghraib in 2004 and the shooting of 17 civilians and injuring of many more by Blackwater guards in Nisour Square in 2007, resulted in greater scrutiny of the practice of utilizing private contractors during armed conflict. Much of the discussion focused on the adequacy of regulation of armed private security contractors and the ability to hold private security companies (PSCs) and their personnel to account should they be implicated in human rights abuses. Regulation posed challenges in light of the multiple jurisdictions involved: home states where PSCs are headquartered or from which personnel originate, contracting states hiring PSCs, and territorial states, often suffering from weak rule of law, where PSCs operate.

Efforts in 2009 by the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of people to self-determination (UN Working Group on Mercenaries) to propose a draft convention for the regulation, monitoring, and oversight of private military and security companies (PMSCs) met with resistance from the leading contracting and home states of PMSCs, in part because they did not want any limitations on their ability to use PMSCs if deemed necessary to achieve foreign policy goals. Rather, these states, to include the US, the UK, Switzerland, and Australia, favored a soft law approach to regulating PMSCs. As a result, an interlocking web of soft law initiatives—international declarations, codes of conduct, and security operations management system standards—has emerged and involves states, civil society, and companies in efforts to improve transnational governance of the industry.

This chapter examines these soft law initiatives to assess their interoperability and the opportunities and limitations of each in ultimately ensuring that PSCs respect applicable provisions of international human rights and humanitarian law and relevant national laws in their operations and are held to account should they violate these laws. It concludes that rather than a forfeiture of the state obligation to regulate the industry, over time we are seeing a hardening of soft law as these initiatives make their way into procurement regulations and national laws. Nevertheless, significant gaps in these soft law initiatives warrant greater efforts by states to strengthen binding laws and regulations and to provide greater support for successful implementation of these initiatives (Fig. 1).

[1] Peters et al. (2016), p. 1.

[2] Peters et al. (2016), pp. 4, 7.

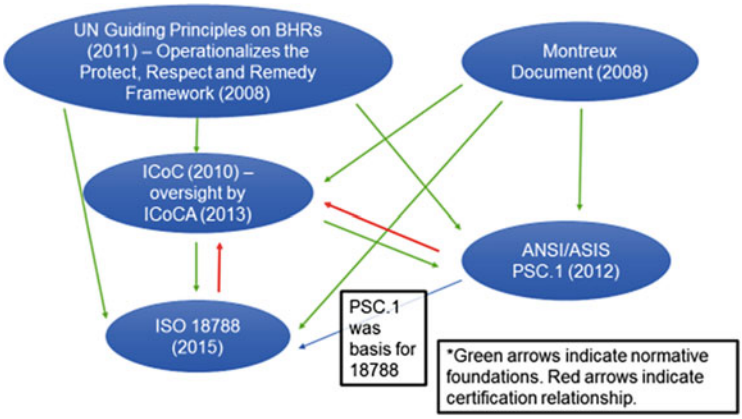

Fig. 1 Interlocking web of soft law initiatives for the responsible provision of security services. ICoC = International Code of Conduct for Private Security Providers; ICoCA = International Code of Conduct Association; ANSI/ASIS PSC.1 = ANSI/ASIS PSC.1 – 2012: Management System for Quality of Private Security Company Operations – Requirements with Guidance; ISO 18788 = ISO 18788 – 2015: Management System for Private Security Operations – Requirements with Guidance for Use

2 The UN Guiding Principles on Business and Human Rights

2.1 Normative Reference

While the UN Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework (UNGPs)[3] is not specific to the private security industry, it is worth briefly examining here as it is a normative reference for the international standard ISO 18788 Management System for Private Security Operations (ISO 18788).[4] A normative reference means that a document "in whole or in part" is referenced in a standard and is "indispensable for its application."[5] In addition, the International Code of Conduct for Private Security

[3]UN Guiding Principles on Business and Human Rights (2011).

[4]ISO 18788 is an International Organization for Standardization (ISO) management system standard. ISO standards are voluntary, consensus-based, international business standards drafted with the input of various stakeholders who utilize standards for their products and services, provide services related to standards implementation and auditing, or who have expertise or interest in a standard's subject matter. As discussed below, companies voluntarily commit to complying with management standards, although some standards can find their way into government regulations, as is the case with ISO 18788, which is incorporated into US DoD procurement requirements.

[5]ISO standards are not publicly available and must be purchased for a fee, see http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=63380. Accessed 30 Oct 2016.

Service Providers (ICoC)[6] states in its preamble that the Protect, Respect and Remedy Framework is a foundation for the ICoC and that signatory companies endorse its principles.

2.2 Origins

The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011. Although they do not create new international law, they reflect a growing international consensus that all companies, irrespective of size or where they operate, must "do no harm" and respect human rights. They were authored by a team working under the aegis of the UN Special Representative on Business and Human Rights John Ruggie, who was appointed in 2005 by then UN Secretary General Kofi Annan. According to Ruggie, he was asked "to identify and clarify standards of corporate responsibility and accountability regarding human rights; elaborate on state roles in regulating and adjudicating corporate activities; clarify concepts such as 'complicity' and 'sphere of influence'; develop methodologies for human rights impact assessments and consider state and corporate best practices."[7] Ruggie's mandate came in the wake of failed efforts to find intergovernmental consensus on the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The UNGPs are an operationalization of the 2008 Protect, Respect, and Remedy Framework and were the result of years of extensive research and consultations with governments, civil society, academics, and businesses around the world.

2.3 Protect, Respect and Remedy Framework

The UNGPs rests on three pillars: first, the state obligation to protect against human rights abuses committed by third parties, including businesses. Second is the corporate responsibility to respect human rights by undertaking a due diligence process to avoid committing harms and to address abuses that occur; this responsibility exists independently of whether states uphold their human rights obligations. Finally, both states and businesses must work to ensure that victims of human rights abuses have access to effective remedy, whether through judicial or nonjudicial mechanisms.

[6]International Code of Conduct for Private Security Service Providers (2010). As discussed below, the ICoC is a voluntary code of conduct to which private security companies commit. It was drafted through an open consultative process with input from various public and private sector stakeholders. It too is finding its way into government regulations. For example, private security companies providing their services to the Swiss government and the US Department of State must adhere to the ICoC.

[7]Ruggie (2009).

As elaborated in UN Guiding Principle 15, in practice the corporate responsibility to respect human rights entails three things for businesses:

(a) A policy commitment to meet their responsibility to respect human rights;
(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[8]

2.4 Uptake: A New Benchmark

According to the Office of the High Commissioner for Human Rights, 15 countries have created National Action Plans to implement their commitment to the UNGPs, and many more are in process.[9] A UN Guiding Principles Reporting Framework has been created to allow companies to publicly report on their efforts to fulfill their responsibility to respect human rights, and a number of companies are test piloting its implementation. Existing standards are being updated to incorporate the UNGPs, such as the OECD Guidelines for Multinational Enterprises, the International Finance Corporation's Performance Standards, and ISO 26000 Social Responsibility.[10] The UNGPs are also being incorporated into new standards; as already noted, they are a normative reference for ISO 18788, which was released in 2015. In sum, the UNGPs reflect the benchmark against which to assess whether a company is meeting its responsibility to respect human rights.

It is also worth noting that concerns about the voluntary nature of the UNGPs resulted in a Human Rights Council resolution in June 2014 to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, which is mandated to elaborate on an international legally binding instrument to regulate the activities of corporations. A recent report from the working group indicates that many business and human rights experts view the UNGPs and the creation of an international legally binding instrument as complementary endeavors.[11]

[8]UN Guiding Principles on Business and Human Rights (2011).

[9]Office of the High Commissioner for Human Rights (2017).

[10]Unlike ISO 18788, ISO 26000 is a nonauditable guidance for companies seeking to operate in a socially responsible fashion.

[11]Draft report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, October 2016, on file with the author.

3 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict

3.1 The Two-Part Swiss Initiative

The seeds for a soft law approach to regulating PMSCs were sown in late 2005, when a Swiss Federal Council report instructed the Federal Department of Foreign Affairs (FDFA) to promote an international dialogue on the challenges associated with PMSCs and to identify means to promote respect for human rights and international humanitarian law on their part.[12] In collaboration with the International Committee of the Red Cross (ICRC), the FDFA launched a series of five intergovernmental meetings and four expert meetings over the course of 3 years, which culminated in September 2008 in the release of the Montreux Document.[13] A nonbinding declaration, at the time, the Montreux Document was endorsed by 17 states. Today, 54 states and three international organizations support it. The Montreux Document recalls states' existing international legal obligations regarding the activities of PMSCs during armed conflict and details a series of good practices to assist contracting, territorial, and home states in fulfilling those obligations.[14]

The industry welcomed the Montreux Document but noted that it did not elaborate on the responsibilities of companies. Having a consensus on industry best practices was particularly important for companies operating in areas of weakened governance where states might not be meeting their Montreux commitments.[15] Thus, in January 2009, the Swiss government launched the second part of the Swiss Initiative, this time in conjunction with the Geneva Centre for the Democratic Control of Armed Forces (DCAF), to develop a code of conduct applicable to private security providers operating in complex environments. These efforts would result in the development of the ICoC, which was released in November 2010, and is discussed in greater detail below. Prior to the launch of the second phase of the Swiss initiative, the FDFA had already begun to make the case for the value of a code of conduct and elaborate on proposed elements of a code, and the US industry trade association had already developed a code for its members.[16]

[12]Rosemann (2008), p. 38.

[13]Cockayne (2009), p. 402.

[14]Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (2008).

[15]Buzatu (2015), p. 27.

[16]See Rosemann (2008) which contains draft elements of a code. In addition, the US trade association, International Peace Operations Association (later renamed the International Stability Operations Association), had already promulgated a code of conduct for its members. That code is still in place, although no longer is being updated on a regular basis as it had been in the past, in

3.2 Why a Nonbinding Declaration and a Code of Conduct?

What can explain the decision to pursue a nonbinding international declaration and an international code of conduct, both of which created no new international legal obligations for states or businesses? Firsthand participants' accounts of these processes evidence certain reoccurring justifications. Pragmatism features repeatedly. For example, even though the ICRC conditioned its participation in the Montreux process on an understanding that the Montreux Document was not intended to legitimize the private military and security industry,[17] there seemed to be a resignation to the fact that the industry was here to stay and reflective of a trend toward increased privatization of core government functions. There was also a shared sense among participants in the process that a declaration recalling existing hard law obligations of states, thereby debunking the claim that PMSCs operate in a legal vacuum, and detailing good practices for state regulation was a more expeditious way to promote governance of the industry than attempting to negotiate a treaty.[18]

Those involved in the development of the ICoC justify the code approach by referring to the need for pragmatic responses to governance gaps in traditional state-centric regulatory approaches, which are ill-suited for regulating a global industry operating across multiple jurisdictions in areas of weakened governance with limited effective state control.[19] Others focused more to the business case for a code, stressing factors such as creating clarity and agreement on expected industry standards, leveling the playing field, limiting corporate liability, attracting investments, improving brand image, and differentiating legitimate companies from the informal sector.[20]

However, the choice to develop a declaration and code is justified, it would be erroneous to characterize either as purely voluntary in nature. The Montreux Document is a hybrid between a state-backed approach that emphasizes binding obligations and an industry-backed approach that promotes regulatory harmonization in support of global business operations.[21] The first part recalls and reaffirms the hard international law obligations that apply to the relationships between states and PMSCs during armed conflict. The second part's good practices draw on a range of sources other than international law and offer guidance that is relevant beyond armed conflict and may be of use to PMSCs and their nonstate clients.

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recognition of the fact that it has largely been superseded by the ICoC and security operations management system standards.

[17]Cockayne (2009), p. 418.

[18]Cockayne (2009), p. 403.

[19]Buzatu (2015), p. 7.

[20]Rosemann (2008), pp. 24–25.

[21]Cockayne (2009), pp. 404–405.

From its earliest stages of development, the ICoC was to be given teeth through its proposed incorporation into procurement practices and licensing requirements.[22] "Co-regulation," in the sense of "mixing state and nonstate regulatory mechanisms to improve accountability," was a concept supported by the various stakeholders involved in the ICoC drafting process.[23]

3.3 Patchy Implementation of Montreux Commitments by Participating States

A report released on the fifth anniversary of the Montreux Document examining efforts by four key contracting, territorial, and home states—the US, the UK, Iraq, and Afghanistan—to meet their Montreux commitments evidenced a patchy implementation of the legal obligations and good practices and, more broadly, the limitations of the Montreux Document's approach.[24] The states were inconsistent in meeting those commitments in five key areas, including determining when services should be outsourced, exercising due diligence in selecting, contracting, and authorizing PMSCs and in monitoring their activities, ensuring accountability for wrongdoing, and providing access to effective remedy. Similarly, a study released by DCAF, which was based in part on responses to questionnaires sent by the Swiss government and the ICRC to participating states asking them to share how they have implemented the Montreux Document good practices, also evidenced a number of remaining challenges.[25] In particular, six challenges were highlighted, namely "imprecise constraints on which functions PMSCs may or may not perform," "inadequate applicability of domestic legislation to PMSCs operating abroad," "insufficient resources dedicated to authorizations, contracting, and licensing systems," "low standards for authorizations, contracts, and licenses," "weak monitoring of compliance with terms of authorizations, contracts, and licenses," and "gaps in criminal and civil legal accountability."[26] Both reports provide recommendations on how to address gaps in implementation and provide state-specific examples of successful good practices. Space limitations do not allow for a thorough discussion of those recommendations; rather, in the next section, this chapter examines the ability of the Montreux Document Forum to facilitate better uptake by participating states of the legal obligations and good practices.

[22]Rosemann (2008), p. 39.
[23]Buzatu (2015), p. 34.
[24]DeWinter-Schmitt (2013).
[25]Buckland B and Burdzy A (2015).
[26]Buckland B and Burdzy A (2015).

3.4 What Role for the Montreux Document Forum?

In December 2013, the Swiss government, ICRC, and DCAF hosted a conference to mark the fifth anniversary of the Montreux Document. At that conference, it was decided that a forum of states supporting the Montreux Document should be created. The Forum was launched a year later in December 2014.[27] DCAF serves as its Secretariat. The purpose of the Forum is to "breathe life" into the Montreux Document and to facilitate communication and informal consultation among participating states to assist them with implementing the legal obligations and good practices outlined in the Montreux Document, in part by sharing lessons learned and successful practices. The Forum is also to conduct outreach to bring in more participating states. Despite efforts by DCAF to hold regional conferences (in Chile, Mongolia, Australia, the Philippines, and Senegal) to encourage greater participation, states from the Global North outnumber those from the Global South. Western and eastern European countries, Australia, New Zealand, and the US account for 37 of the total 54 participating states, while only five hail from the African region, eight from the Asia Pacific region, and four from the Latin American and Caribbean region. It is also worth noting that the Forum's ICoCA Working Group performs the functions of the ICoCA Advisory Forum of Montreux Document Participants, a body foreseen in the ICoCA Articles of Association, which is to provide advice to the ICoCA on national and international policies and regulatory matters. The ICoCA Working Group is also meant to foster greater state participation in the ICoCA and ensure coherence between state commitments to the provisions of the Montreux Document and state expectations for appropriate, harmonized industry standards for PMSCs. That being said, the Forum does not formally endorse the ICoCA; some of the participating states, such as South Africa, take a skeptical view of the perceived "voluntary" nature of the ICoCA.

It is still early days for the Forum, and its second plenary meeting was held in January 2016.[28] Although nothing was attributed to particular participating states, discussions were held on key issues such as the meaning of "applicable national law" for PMSCs, the development of ICoCA procedures, the value of the Montreux Document in the maritime security context, as well as good practices on the determination of services that may be outsourced, procedures and criteria for the selection and contracting of PMSCs, and the authorization of PMSCs to provide services. However, it is unclear how a yearly discussion among participating states will raise the bar and encourage the hardening of the good practices through their implementation in procurement requirements and national laws and regulations when there are no formal reporting requirements and oversight of how well states are meeting their Montreux Document commitments.

[27]Information about the Montreux Document Forum and supporting documentation can be found at http://www.mdforum.ch/en. Accessed 1 Nov 2016.

[28]A third annual plenary meeting was held in April 2017, but the report of that meeting was not available at the time of publication.

3.5 Recommendations

The Montreux Document Forum could take a number of steps to facilitate the implementation of the Montreux Document commitments by participating states. States could be asked to report regularly on their implementation efforts and make those reports publicly available. A Working Group could be created with the responsibility of reviewing the reports and making recommendations for improving implementation efforts, or an independent review of those efforts could be undertaken by an outside organization comprised of independent academics and experts. Finally, considering that the Montreux Document predates the UNGPs, it would be valuable to assess its provisions against the first pillar, the state duty to protect, to see if there are any gaps. For example, the Montreux Document, unlike the UNGPs, makes no mention of states' "due diligence" obligations, although the concept is to some extent implicitly captured. The Document also does not elaborate an expectation that states engage on an ongoing basis with PMSCs to assess and address human rights risks associated with complex operating environments. Nor does the Document discuss the need for policy coherence across government departments. For example, in the US, the DoD and the Department of State (DoS) have different requirements regarding the procurement of private security services, with only the DoS requiring PSCs to be members in good standing of the ICoCA.

4 The International Code of Conduct for Private Security Service Providers and the International Code of Conduct Association

4.1 Origins and Content of the ICoC

The ICoC process represented the second phase of the Swiss Initiative. While it was clear at the outset of the process in January 2009 that the goal was to develop an international standard requiring PSCs to commit to norms of international human rights and humanitarian law, it was not yet decided how to achieve this.[29] In the course of consultations with various government, industry, civil society representatives, and academics, it became apparent by the June 2009 Nyon conference, at which the industry committed to developing an international code of conduct with effective oversight and accountability, that a multistakeholder process would lend legitimacy to the code, ensure its rigor, and enable effective coregulation. As noted above, coregulation is the concept of "mixing state and nonstate regulatory mechanisms to improve accountability."[30] After Nyon, the Swiss government and DCAF

[29]Buzatu A (2015), p. 30.

[30]Buzatu A (2015), p. 35.

organized a series of multistakeholder consultations, and two draft versions of the ICoC were opened for public comment. Fifty-eight companies signed the final version of the ICoC when it was released in November 2010. A commitment to a multistakeholder process was embedded in the ICoC, which called on stakeholders to collaborate in developing a governance and oversight mechanism. A multistakeholder Temporary Steering Committee (TSC) was created to start the process of conceptualizing such a mechanism and developing its Articles of Association, the founding charter of the proposed mechanism.[31]

The ICoC's preamble states that it rests on the foundations of the Montreux Document and the Protect, Respect and Remedy Framework, and like those documents it creates no new legal obligations or legal liabilities for signatory companies. In addition to the commitment to implement the ICoC and develop an independent governance and oversight mechanism, the ICoC contains sections on general commitments, principles regarding the conduct of personnel, and commitments regarding management and governance. The general commitments include provisions such as those dictating that the company, its personnel, and its subcontractors all operate in accordance with the ICoC, include the ICoC in contractual agreements, and undertake human rights due diligence. Principles regarding the conduct of personnel address use of force issues and capture the human rights abuses that are prohibited. The management and governance commitments cover matters relating to the integration of the ICoC into company policies and procedures, to include those pertaining to the selection and vetting of personnel and subcontractors, trainings, incident reporting, and grievance procedures.

Significantly, the ICoC contains provisions in paragraphs 5, 7, and 10 conveying the need to translate the principles of the ICoC into "operational and business practice standards." In negotiations just ahead of the November 2010 release of the ICoC, the US and UK governments and industry participants had managed to insert language about the development of national standards.[32] This was in reference to an initiative that was under discussion and about to take off in early 2011, namely the DoD-funded development of the American national security management system standard, ANSI/ASIS PSC.1-2012 Management System for Quality of Private Security Company Operations (ANSI/ASIS PSC.1), which is discussed below in Sect. 5.[33] In contrast, the Swiss government and DCAF had envisioned that the governance and oversight mechanism would bear responsibility for elaborating business practice standards based on the ICoC. The ICoC provisions on national standards ensured that ANSI/ASIS PSC.1, as well as possible subsequent standards, would remain linked to the ICoCA in some fashion or another, although exactly how would become a point of contention as discussed below.

[31] Buzatu A (2015), p. 38.

[32] This information stems from off-the-record interviews with an industry and civil society representative.

[33] ANSI/ASIS PSC.1 (2012).

4.2 Governance and Oversight Through the ICoCA

The next step of developing an independent governance and oversight mechanism took longer than the expected 18 months and involved extensive work by the TSC members, the solicitation of public comment on two draft charters, as well as the creation of three multistakeholder working groups to draw on external expertise in the areas of assessment, reporting, and oversight; resolution of third party grievances; and structure, governance, and working of the mechanism.[34] The ICoCA Articles of Association were adopted at a final drafting conference in February 2013, and the ICoCA became a Swiss nonprofit association in September 2013. Article 2.2 describes the purpose of the ICoCA as "to promote, govern, and oversee implementation" of the ICoC and "to promote the responsible provision of security services and respect for human rights and national and international law."[35] At the time the ICoCA was launched, 708 companies had signed the ICoC. Once the ICoCA membership requirements went into effect, that number dropped significantly, and currently the ICoCA has 102 member PSCs.[36]

The final ICoCA Articles of Association reflect a decision by the drafters to leave elaboration of the details of key procedures to the main bodies of the ICoCA: the General Assembly, Board of Directors, and Secretariat under the supervision of the Executive Director. The three key procedures, which reflect the core functions of the ICoCA, are certification (Article 11); reporting, monitoring, and assessing performance (Article 12); and complaints process (Article 13). The articles also detail the requirements for membership in the ICoCA's three stakeholder pillars: PSCs, civil society organizations, and governments.[37] The articles elaborate the powers of each body and voting and decision-making authorities. Significantly, the General Assembly, which is comprised of all members of the ICoCA from all three pillars, is the supreme governing body and approves key Board decisions, such as the ICoCA procedures. The 12-member Board's decisions are made by a majority of eight directors, which must include at least two votes from directors of each stakeholder pillar, thereby ensuring that no decision can be passed without the backing of all pillars.

[34] Buzatu A (2015), p. 47.

[35] ICoCA Articles of Association (2013).

[36] Most likely the number of participating companies dropped for a number of reasons. First, there was a significant consolidation in the industry as revenue streams from government contracting for the Iraq and Afghanistan wars shrunk. Second, a number of the initial signatories were maritime security companies. Many of those went out of business after the decline in piracy off the coast of Somalia. Furthermore, the ICoCA was more focused on land-based security services and never further developed the ICoC to cover the specificities of maritime security, as was initially foreseen in the ICoC. Finally, in order to become full members, companies had to provide information evidencing their commitment to and implementation of the ICoC's requirements, to include agreeing to submit themselves to certification, monitoring, and grievance procedures.

[37] Currently the ICoCA has seven participating governments (US, UK, Australia, Canada, Switzerland, Norway, and Sweden), 100 corporate members, and 18 civil society organizations.

4.3 Recent Developments in Key Procedures

While the ICoCA moved decisively to form a board and staff and set up the Secretariat and associated administrative functions in Geneva and process membership applications, the key procedures proved to be more of a sticking point. Not until July 2015 was the General Assembly able to pass a certification procedure for PSCs to become ICoCA certified, and which detailed a process for determining whether a national or international management system standard is consistent with the principles of the ICoC.[38] A Board-issued "Recognition Statement" indicates if a standard is recognized by the ICoCA. An accompanying "Annex A" details the findings of a gap analysis comparing the provisions of the ICoC and the standard. "Annex B" states what sorts of additional information the PSC must submit to the Secretariat in relation to its certification to a standard by an accredited certification body and in relation to any relevant human rights information not covered by the standard. This procedure has been described as a "certification plus" model since it allows the ICoCA to utilize for its own certification purposes management system standard certifications granted to PSCs by certification bodies—as long as gaps in human-rights-related requirements are addressed.[39] In keeping with its usual high degree of transparency and public consultation, the ICoCA Secretariat shares draft recognition statements and annexes for public comment before a final vote by the Board.

In September 2015, ANSI/ASIS PSC.1 became the first national business management system standard to be recognized by the ICoCA as a pathway to ICoCA certification. (See Sect. 5 below for a discussion of national (ANSI/ASIS PSC.1) and international (ISO 18788) security operations management system standards.) In addition to an ANSI/ASIS PSC.1 certificate, identified nonconformances, and corrective action plans, companies must submit, among other things, information about their human rights risk and impact assessment process. In 2017, ISO 18788 was recognized as another route to ICoCA certification. The Secretariat only began processing requests for ICoCA certification in November 2016, and at the time of writing only one PSC has received ICoCA certification. In part, this had to do with delays in certification pilot projects with member PSCs, as well as ongoing discussions among stakeholders about the accessibility of ANSI/ASIS PSC.1 certification for small and medium-sized PSCs and those not located in the English-speaking Global North. The Secretariat plans to examine this issue further.[40] The new deadline for PSCs to receive ICoCA certification to remain a member in good standing is September 2018.

[38]Human Analytics (2015a).

[39]DeWinter-Schmitt (2016), p. 264.

[40]For recent information on ICoCA developments, see the materials from the September 2016 Annual General Assembly meeting, available at http://icoca.ch/en/news/2016-AGA. Accessed 2 Nov 2016.

At the September 2016 Annual General Assembly, the membership voted to pass the two other key procedures—the Article 12 procedure on reporting, monitoring, and assessing performance and the Article 13 procedure on a complaints process—thereby taking an important step towards finalizing all the key operational functions of the ICoCA.[41] Details for each still need to be elaborated. For example, the Board is developing self-assessment reporting indicators based on the ICoC provisions, and the Secretariat is drafting plans for field-based reviews. The ICoCA's internal "good offices" capacity is under development, so it can advise member PSCs on their grievance procedures and refer complaints, if needed, to alternative grievance mechanisms or mediation. A form to submit a complaint is now available on the ICoCA website.

4.4 Opportunities and Limitations

4.4.1 Support for the ICoC/ICoCA

Through the incorporation of the ICoC into various contracting requirements, we are beginning to see a hardening of its principles. The UN's 2012 Guidelines on the Use of Armed Security Services from Private Security Companies requires that PSCs providing services to the UN be member companies to the ICoC. The US DoS requires its armed PSCs under the Worldwide Protective Services 2 contract to be members in good standing of the ICoCA. The Australian Department of Foreign Affairs and Trade requires PSCs to be signatories to the ICoC as a condition of tender.[42] More recently, the Swiss Federal Act on Private Security Services Provided Abroad came into effect and requires membership in the ICoCA for PSCs based in Switzerland providing or supporting security services overseas and for PSCs contracting with Swiss government agencies.[43]

4.4.2 Reaching Out to Other Industry Clients

While the ICoC/A is finding its way into a few Western government and international organization procurement requirements, its inclusion in private contracts will require active lobbying by the ICoCA Secretariat to bring on board nonstate clients of the industry, such as extractive companies and humanitarian organizations. If the Secretariat is unable to convince more state clients and nonstate clients of the value of participation, there is a danger that the ICoCA may not attain its full potential to shape the private security industry on a global scale. Rather, it could become an

[41]Human Analytics (2016).
[42]Buzatu A (2015), p. 62.
[43]Human Analytics (2015b).

example of "regulating the last war."[44] In other words, it will reflect the legacy of the Iraq and Afghanistan wars' boom in government contracting but will be ill-suited for addressing future problems that may arise as the industry adapts to changing market conditions and new conflicts.[45]

Bringing on board other industry clients will also help make the business case to PSCs that participation in the ICoCA brings value, especially in light of recent membership dues increases agreed upon at the last Annual General Assembly.[46] Currently, only about two dozen member PSCs, the majority US and UK headquartered, have an ANSI/ASIS PSC.1 and/or ISO 18788 certificate, which likely was attained to meet government contracting requirements. To flourish, the ICoCA must convince the other three quarters of its global PSC membership of the value of completing a two-step (ANSI/ASIS PSC.1 and/or ISO 18788 then ICoCA) certification process or possibly offer alternatives, such as a tiered membership process that allows companies to mature into full membership or an in-house certification route. At this point, such alternatives are still rather controversial, and companies that have gone through an ANSI/ASIS PSC.1 or ISO 18788 certification do not want its comparative value diminished or a watering down of standards.

4.4.3 Industry Best Practices

Article 12.4 states that one of the purposes of the ICoCA is to promote industry best practices. The ICoCA is well positioned to do so on a number of fronts since this is a role that the decentralized standards and certification system that supports ANSI/ASIS PSC.1 and ISO 18788, discussed in the next section, cannot fulfill. For example, both the management system standards and the ICoC require trainings on topics such as human rights, humanitarian law, and applicable national laws. Currently, there are no publicly available trainings, and PSCs are creating and offering them in-house at differing levels of quality. PSCs must also undertake human rights risk and impact assessments for the standards and for the ICoCA certification procedure. However, there is no standardized assessment methodology available to PSCs, and the quality of those assessments varies from company to company. The assessment checklist provided by the ICoCA Secretariat in Annex B of the standards recognition statements promotes a tick-the-box exercise. Without methodological standardization, certification bodies are also unaware what exactly to look for when they are evaluating PSCs' human rights due diligence policies and procedures. There is no evidence that either PSCs or certification bodies have the necessary in-house human rights subject matter expertise. Here, the ICoCA could contribute to ensuring that human rights commitments are actually met—not only

[44]Percy S (2012).
[45]Ralby (2015).
[46]See footnote 40.

could it create the tools and guidance to help PSCs implement those commitments, it could also educate certification bodies and auditors on how to improve their evaluations. Most importantly, by building out its performance assessment and field-based review capacities, the ICoCA can aid PSCs in moving from policy to practice by assessing the actual impacts of business activities, individually and collectively, in complex areas of operation and identifying means to address and remedy those impacts.

5 National and International Management System Standards for Security Operations

5.1 The Content of ANSI/ASIS PSC.1 and ISO 18788

ANSI/ASIS PSC.1 and ISO 18788 are third-party auditable risk and quality assurance management system standards that contain requirements and guidance to ensure quality security operations consistent with respect for human rights, legal obligations, and good business practices in areas of weakened governance. They are the first auditable management system standards to contain extensive human rights requirements. ANSI/ASIS PSC.1's normative references are the Montreux Document and the ICoC. ISO 18788 also adds the UNGPs as a normative reference. Both are built around the generic Plan-Do-Check-Act management system model and can be integrated into PSCs existing management systems. The management system framework is meant to foster continual improvement and entails discrete steps beginning with establishing the scope of the management system and understanding the internal and external context of the organization and clients and other stakeholders' needs and requirements.[47] The "planning" phase involves establishing a management commitment to the management system, dedicating adequate resources, and creating the needed policies and procedures. Companies must also undertake a risk assessment, understand their legal and regulatory requirements, and create the necessary strategic and risk management programs, to include establishing associated objectives and targets. The "do" phase entails operating the management system and covers elements of the standards' requirements relating to matters such as assigning roles, responsibilities, and authorities; establishing operational controls; ensuring that personnel has the necessary competencies and training; and establishing means to address disruptive and undesirable events and grievances. The "check" phase involves evaluating the system's performance through monitoring, internal audits, and testing and, as needed, developing corrective and preventative action plans. The "act" phase entails senior-level management review to identify areas for further improvement and refinement of the system.

[47] A diagram of the management framework is available in ANSI/ASIS PSC.1 (2012), p. xviii.

Human rights are embedded throughout the phases of the management system. To provide two examples, in the "plan" phase, senior-level management must create a policy commitment to respect human rights, and human rights risk analysis must be part of the risk assessment process. In the "do" phase, PSCs must take into account criminal and human rights records when selecting and vetting personnel, they must train personnel on human rights, and they must record and mitigate human rights incidents and establish grievance mechanisms. ISO 18788's human rights provisions are somewhat stronger and more closely aligned with the principles of the UNGPs.

5.2 The Development of ANSI/ASIS PSC.1 and ISO 18788

ANSI/ASIS PSC.1 is an American National Standard, whereas ISO 18788 is an International Organization for Standardization (ISO) standard. The DoD funded the creation of both, as well as ANSI/ASIS PSC.2, a standard for assessing conformity with ANSI/ASIS PSC.1, and ANSI/ASIS PSC.3, a maturity model for organizations seeking to implement ANSI/ASIS PSC.1.[48] Provisions of the 2010 and 2011 National Defense Authorization Acts required a DoD report examining the feasibility of a third-party certification requirement, an assessment of existing third-party standards and certification processes, and a plan to implement operational and business practice standards.[49] The DoD approached ASIS International, an American standards development organization, in the summer of 2010, as the ICoC was being finalized, and awarded it the contract to write ANSI/ASIS PSC.1 in March 2011. The UK Foreign Commonwealth Office (FCO) in 2013 funded a project with the UK Accreditation Service to test pilot implementation and certification to ANSI/ASIS PSC.1 and accredit the first certification bodies to audit.[50] Undoubtedly, the DoD and FCO efforts to develop, pilot, and incorporate the standard into procurement requirements in advance of the finalization of the ICoCA and its procedures created certain first-mover advantages for ANSI/ASIS PSC.1, as well as path dependencies that would force the ICoCA to establish a position on management system standards and the relationship between ICoCA and ANSI/ASIS PSC.1 certification. This caused complications and delays in the ICoCA process since it was not the route foreseen by all stakeholders, in particular the Swiss government, DCAF, and civil society organizations. As discussed above, these issues now appear largely to have been addressed, and the narrative that the management standards are the operationalization of the ICoC principles dominates current discourse.

[48]All these standards can be found on the DoD site dedicated to Private Security Companies, see http://www.acq.osd.mil/log/ps/psc.html. Accessed 3 Nov 2016.

[49]USDoD (2010).

[50]DeWinter-Schmitt R (2016), pp. 262–265.

The DoD also funded the creation of ISO 18788, under the leadership of the American standards developer ASIS International. It is largely based on ANSI/ASIS PSC.1 but offers an international version of the American standard, which will hopefully encourage the uptake of harmonized security standards around the world. However, currently, only the DoD recognizes both ANSI/ASIS PSC.1 and ISO 18788 as meeting its procurement requirements for security providers.

5.3 Not All Certification Standards Are Alike

The ICoC is a different type of certification standard than ANSI/ASIS PSC.1 and ISO 18788. As described above, the ICoC and ICoCA were created through a transparent and open process involving stakeholders from government, business, and civil society, academics, and subject matter experts. The ICoCA is a multistakeholder organization with equal representation and decision-making authority residing in its three pillars (governments, PSCs, and civil society organizations), although representation from states and civil society organizations from the Global South and nonstate clients could be increased as already discussed. The ICoCA also operates in a very transparent fashion as evidenced by the wealth of documentation available on its website, from annual reports to budgets, minutes, and procedures. In contrast, while a range of stakeholders from various countries participated in drafting both management standards, ASIS selects participants for standards development from three categories: users/managers, producers/service providers, and general interest. Civil society representation falls into the last category, while the first two represent mostly for-profit interests, except for governments. With the PSC series and ISO 18788 completed, there are limited roles for civil society organizations to play—mainly in the regularly scheduled reviews of those standards—especially when compared to the central role of civil society organizations in the ICoCA. ANSI/ASIS PSC.1 is currently undergoing its 5-year review.

The relationship between a PSC and its certification body is a for-profit relationship, although certification assessment standards like ANSI/ASIS PSC.2 and ISO 17021 are supposed to ensure independence of certification bodies and prohibit them from providing consulting services to the PSCs they audit. Currently, three certification bodies are accredited to audit according to ANSI/ASIS PSC.1 and ISO 18788; all have been accredited by the UK Accreditation Service. Management standards are supported by a marketized and disaggregated infrastructure of organizations.[51] To summarize briefly, standards development organizations, like ASIS International, create standards utilizing the guidelines of national standard bodies, like ANSI, which in turn officially recognizes standards. Standard-setting organizations charge fees for their standards. National accreditation bodies, like the

[51] DeWinter-Schmitt (2016), p. 264.

ANSI-ASQ National Accreditation Board (ANAB), create rules and have procedures for accrediting certification bodies to carry out audits to standards and may also set standards, rules, or guidance for the expected competencies of auditors. Certification bodies pay fees to national accreditation bodies to receive and maintain their accreditation. National standard bodies and national accreditation bodies belong to and are recognized by the International Accreditation Forum (IAF). All of these organizations have complaint mechanisms should a third party believe the applicable protocols for standard setting, accreditation, and auditing have not been adhered to. The ICoCA only accepts ANSI/ASIS PSC.1 or ISO 18788 certificates issued by certification bodies accredited by an IAF-recognized national accreditation body.

There are structural weak points throughout this infrastructure. For example, standards may be written without adequate stakeholder input. National accreditation bodies may not conduct rigorous accreditation of certification bodies and may be lax in exercising ongoing oversight of certification bodies and auditors. Auditors may not be adequately trained and lack the necessary competencies. Complaint mechanisms at each level are relatively nontransparent. Some possible concerns have surfaced specific to ANSI/ASIS PSC.1 and ISO 18788. Certification bodies allowable "general education" of PSCs may be bordering on consulting services to assist PSCs with attaining certification. National accreditation bodies may lack the necessary human rights expertise to accredit certification bodies, and in turn certification bodies and their auditors may lack the necessary human rights expertise to effectively evaluate PSCs. Furthermore, the entire audit process is nontransparent; certification bodies do not share their proprietary audit methodologies and will only disclose audits at the request of the PSCs. A recent study examining 13 PSCs that have received ANSI/ASIS PSC.1 certification bears out some of these concerns.[52] It found significant discrepancies in the PSCs' demonstrable conformance to four requirements of the standard, which necessitate the public sharing of information. These included the scope of their certification, which indicates the parts of the PSCs' operations that were actually audited by a certification body; their statement of conformance, the public commitment by management to respect applicable international and local laws and human rights; the availability of a grievance mechanism, which allows third parties to submit complaints to companies when they do not meet their human rights commitments; and the communication of their human rights risk assessment process. Finally, there is a broader concern that risk management may not be the most suitable approach to ensuring respect for human rights. Beyond the potential failure to bring the needed human rights expertise to bear during the human rights impact assessment process, it is questionable whether human rights risks and impacts will be uncovered if they are not directly linked to a business risk.

These types of concerns led the ICoCA to announce at the most recent Annual General Assembly that it is taking steps to improve oversight of certification bodies.

[52]Sebstead D (2016).

What that means in practice is still to be determined, but the Secretariat is requesting that member PSCs seeking ICoCA certification submit their entire audit by the certification body as part of the package of additional information. The ICoCA also discussed possibly providing human rights indicators and guidance tools that may be of value to auditors, as well as PSCs.

6 Conclusion: Closing Gaps

Views differ on how to understand the relationship among soft law governance initiatives in the private security industry; are they converging or diverging, complementary or competing? Ralby identifies more of a patchwork than a framework governing security providers, although he acknowledges nascent efforts to make elements of these initiatives work together.[53] In contrast, Avant detects a convergence among initiatives toward an effective regulatory framework facilitated by processes of the Swiss Initiative, such as problem identification, connections between stakeholders, openness in their interactions, and attention to the workability of solutions.[54] Along similar lines, MacLeod finds cross-fertilization in the influence of international business and human rights standards, such as the UNGPs, on private security initiatives through the process of norm socialization.[55] While initially the creation of ANSI/ASIS PSC.1 was viewed by some as a deliberate effort to interfere in the ICoCA process, and potentially promote a competing industry standard over a multistakeholder initiative, currently as described in this chapter, there seems to be growing linkages and interoperability between the ICoCA and the management system standards. How this relationship will develop depends on a number of factors, such as the respective uptake of each initiative among clients; reactions by both the industry and its clients to the implementation of the ICoCA certification, monitoring, and grievance procedures; the potential development of alternative certification routes; the institutional sustainability of the ICoCA; and possible revisions to the management standards as they undergo their review process. Whatever the outcome is, it is important to recognize that, on the one hand, the pathway to convergence brings with it negotiated compromises and, on the other hand, divergence brings with it potentially disruptive competition between initiatives—both would have repercussions for the actual impacts of the initiatives on human rights.

The literature on transnational governance, in particular idealist-institutional accounts, leans towards favoring the benefits of convergence.[56] If this is indeed the case, various stakeholders involved in these private security initiatives can help

[53] Ralby I (2015).
[54] Avant D (2016).
[55] MacLeod S (2015).
[56] Fransen L (2011).

promote interoperability and close gaps among them, recognizing with open eyes that each initiative brings opportunities and limitations to the table. States, like the US, can ensure that there is consistency in private security procurement requirements across government agencies. States can also give effect to their international commitments to the UNGPs and Montreux Document by fully incorporating their principles into national laws and regulations, to include procurement regulations. Civil society organizations can utilize these international declarations, code, and standards as a lens through which to scrutinize both state laws and regulations and industry practices and demand full compliance. PSCs can deploy their certifications as a market differentiator, educating their public and private sector clients on the value of their commitments to human rights principles and standards. National standards and accreditation organizations, certification bodies, and PSCs can strive to ensure that they bring in-house the needed human rights subject matter expertise. The ICoCA can assist in that process by providing tools, training, guidance, and other best practices. The ICoCA can also learn from its member PSCs the steps they undertake to incorporate high-level human rights principles into operationalized management and business practices. The state duty to protect and corporate responsibility to respect demand nothing less.

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Rebecca DeWinter-Schmitt is an expert in business and human rights, in particular pertaining to the private military and security industry. She is Director of the Human Rights in Business Program housed at American University Washington College of Law's Center for Human Rights & Humanitarian Law. Rebecca is also Senior Managing Director at the risk management consultancy Human Analytics.

Ideas on the International Minimum Standard for the Privatization, Export, and Import of Armed Coercion

Helena Torroja

Abstract This chapter argues that states should recognize the existence of such an international minimum standard, considering self-regulation (misleadingly called "co-regulation") insufficient. This standard could be established through an international convention on the minimum requirements, which could be narrower than the possible draft convention presented by the Working Group on Mercenaries in 2010. The convention would address areas requiring codification and progressive development and would contain at least the following principles: (1) armed coercion is by nature a public power (an inherently state function) and is complemented by a general international norm limiting the privatization of part of its content; (2) the norm of general international law prescribing respect for other states' sovereignty and rights also includes a general obligation of prevention and protection; (3) this general obligation gives rise to specific international obligations concerning the privatization of armed coercion, some of which are based on customary law, while others are still relatively unpracticed at the state level and should thus be progressively developed; and (4) the general international norm holding states accountable for wrongful acts committed by PMSCs complements the aforementioned system but is insufficient to regulate all the issues arising from the phenomenon. In summary, the convention would seek to promote respect for human rights in the processes and practices of outsourcing, contracting, exporting, and importing armed coercion by states. If there is insufficient maturity among states to adopt such a treaty, this international minimum standard could also be adopted as a General Assembly resolution.

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H. Torroja (✉)
Law School, University of Barcelona, Barcelona, Spain
e-mail: htorroja@ub.edu

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1 Introduction: Between Recommendations for Good Practices and Conventional Regulation

As has already been mentioned, the Working Group on Mercenaries currently has a mandate from the UN Human Rights Council to study the necessity of adopting international regulation on new forms of mercenarism. In similar vein, the UN Human Rights Council has also set up an intergovernmental open-ended working group with a mandate to study the same proposition in 2010. The debate on conventional regulation on this matter has therefore been initiated by the states themselves.

The issue is rooted in two opposing viewpoints. On one hand, some argue that there are already enough norms in international law to regulate the problem, so there is no need for any new conventional regulations. They add that a series of recommendations for good practices has already been identified, and private military and security companies (PMSCs) have already adopted their own self-regulation, in which states play a part (the International Code of Conduct—ICoC).[1] As such, they say that the variety of norms and guidelines is sufficient and no additional regulation is required. Furthermore, they neglect the fact that many of these norms and recommendations focus only on times of armed conflict.[2]

On the other hand, from the alternative viewpoint, there are those who argue that despite there being rules within general international law that regulate the problem, these rules are insufficient, incomplete, and do not address all of the underlying problems. The same people add that, in any event, a treaty to systematize and codify these rules is required, one that should also provide regulation for existing gaps by means of progressive development.

The first viewpoint is taken by the states that export most military and security services and by all those who defend the Montreux system. The second is taken by states that do not support this industry, although it should be noted that these states do not appear to be effectively unified or to have great influence. The second viewpoint is also taken by the UN Working Group on Mercenaries, which presented a draft for a possible convention in 2010.[3]

This realm is therefore one that is mainly occupied by good practice recommendations made to states and to PMSCs. We seek to analyze ways in which it may be possible to help encourage states to establish international laws on the matter. To do

[1] International Code of Conduct for Private Security Service Providers (2010).

[2] Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (2008). On the topic of armed conflicts, the first part of the Montreux Document aims to identify elements of general international law, but limits itself to state obligations in times of armed conflict. The second part of the Montreux Document identifies good practices, also for times of armed conflict. These could be considered as standards to be included in conventional regulation, as part of a progressive development of international law.

[3] Human Rights Council, 2010, A/HRC/15/25.

so, we try to identify the international minimum standard for the privatization and export of coercive power. The purpose is to offer states a basis for consensus regarding conventional regulation on this matter, something that is currently being looked at by the intergovernmental working group.[4]

To do this, we must consider the following: whether there are elements of general international law regulating aspects of the object of our attention; whether there are elements of particular international law regulating aspects of the object for which regulation is sought, so as to study a potential extension of their application to more states, through progressive development towards inclusion in a multilateral international treaty; whether there are international lacunae in general international law and in particular international law that could justify new regulation through an international treaty.

This will enable the bases to be established for their codification and progressive development.[5]

In practice, the main problems turn out to be the international lacunae, which have been identified within this doctrine and can be summarized as follows (as mentioned in the chapter by Rebecca de Winter-Schmitt[6]): precise determination of which functions can be outsourced and which cannot; the exercise of due diligence in the protection of human rights, in the selecting, contracting, and authorizing of PMSCs, and in the monitoring of their activities, with inadequate application of national legislation having been observed, in particular, in PMSCs operating abroad; a lack of sufficient resources being allocated to the system for authorizing, contracting, and licensing, as well as low standards in the application of this system; stipulating accountability for wrongful acts, addressing lacunae in civil and criminal accountability requirements, and providing access to effective remedies.

To make this proposal, the remainder of this chapter will be organized in keeping with the following considerations: the sovereign power related to the organization of armed coercion has progressively been internationalized (Sect. 2); armed coercion is by nature part of the public domain (a function inherent to the state) and is governed by a general international norm limiting the privatization of part of its content (Sect. 3); there is a norm under General International Law that prescribes respect for other states' sovereignty and rights while also incorporating a general obligation of prevention and protection (Sect. 4); regarding the issue of the privatization of armed coercion, specific international obligations can be identified

[4]Although at its recent session in Geneva, on December 12–16, 2016, there continued to be very little eagerness to address the issue.

[5]When it comes to regulation through international treaties containing obligations and rights, a distinction can normally be drawn according to what the treaties involve: codification occurs when the contents of general international law are systematized and put together in writing, while progressive development occurs when new laws are put together on a given matter. In practice, both can be used in combination in the same treaty.

[6]See the chapter by De Winter-Schmitt in this book. See also: De Winter-Schmitt (2013), Buckland and Burdzy (2015).

arising from the general obligation mentioned above, of which some are based on customary law, while others are still relatively unpracticed at state level and are therefore proposals for progressive development (Sect. 5); there is a general international norm holding states accountable for any wrongful acts committed by PMSCs and their personnel (Sect. 6); lastly, we shall offer our own final conclusions (Sect. 7).

2 The Progressive Internationalization of the Sovereign Power of Armed Coercion

The impact that PMSCs have had on the enjoyment of human rights has already been noted. We have also looked at the limitations and inadequacies of the non-binding international instruments that have been adopted to date.

Whether or not conventional international regulation on the privatization of armed force is appropriate is one of the most important matters to be addressed. In a certain sense, it requires us to ask whether the sovereign power related to armed coercion is exclusive to the state or if, on the contrary, there are certain international limits. In other words, does the management of the monopoly on the legitimate use of force have international limits?

First, it should be noted that the object for which regulation is being sought appears, a priori, to be under the states' own authority, a function to be governed internally. That is to say, *the way in which a state internally manages its capacities in terms of security* (domestically and abroad) has never been the object of international regulation. Ever since the Peace of Westphalia, the common practice among states has been to set up a national army under sovereign authority (over time becoming the authority of the government or parliament, depending on the regime), as well as a police force, the armed wing of the executive branch (again, under the authority of the government or parliament, depending on the regime). Although the creation of national armies and centralized police forces has been a common trait of modern states, the same states have still resorted to using mercenaries for certain undertakings, particularly outside or along their borders.[7] With mercenaries' operating alongside armies, the continuation of this practice shows that this usage was accepted by states as their right.

However, in the context of contemporary international law, as of 1977, states progressively decided to prohibit or limit the use of mercenaries, having witnessed mercenary interventions in various wars of decolonization. As mentioned in a separate chapter of this book, this prohibition first arrived in an African context (the 1977 OAU Convention) and, later on, in a broader context with the adoption of the 1989 United Nations Convention, although it was not ratified by many states.[8]

[7] Percy S (2007) p. 121.

[8] See the chapter by Gómez del Prado in this book.

Additionally, in the context of international humanitarian law (the 1977 Additional Protocol I to the Geneva Conventions of 1949), mercenaries were deprived of combatant status and prisoner of war rights in international armed conflicts as a way of penalizing the practice.

Compared with texts from the previous conventions, what stands out as particularly relevant is the adoption by the General Assembly in 1970 of Resolution 2625 (XXV), which contains the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." This declaration was a clear demonstration that states understood that the employment of mercenaries was a prohibited use of armed force.

Currently, the internal organization of legitimate armed force is to some degree limited by international law: groups of mercenaries cannot be established under the principle that prohibits the threat or use of force (*jus ad bellum*), *that is to say in the context of authorizing the use of armed coercion abroad*. To maintain peaceful relations, states considered it essential to prohibit the use of mercenaries, i.e. the private organization of fighters, a practice known as the contracting of mercenaries.

As such, the legitimate internal organization of armed force in part comes under internal jurisdiction *but is also partly under international jurisdiction*. In contrast with the notion that sovereign authority over armed coercion is organized internally (domestically and abroad) in accordance with the history and circumstances of each state, universal restrictions created by states have subsequently emerged. The matter to be addressed now in the international context is whether there are new state-run practices that should be limited by states in their international relations. That is, should *universal restrictions* be identified regarding the internal organization of the sovereign authority over armed coercion, especially when it is thought to be exported?

Reasons for internationalizing such regulation can be found in the nature of the object of protection. As has been discussed elsewhere already, ensuring public safety is in the global public interest.[9] This is essentially because the use of force and respect for basic human rights are concepts that are inextricably linked. In fact, sovereign centralization of the use of force ensures public safety and the protection of human rights. The link between this monopoly over the use of force and respect for human rights has a deep-rooted history, having been included in the 1789 Declaration of the Rights of Man and of the Citizen:

> To guarantee the Rights of Man and of the Citizen, a public force is necessary; this force is therefore established for the benefit of all, and not for the particular use of those to whom it is entrusted (Declaration of the Rights of Man and of the Citizen of 1789).

The modern-day concept of human security underscores the importance of this statement. The outsourcing of armed force to private entities for subsequent export must also comply with proper respect for human rights. The ultimate basis for the internationalization of this authority relates to the human right to security (which must be understood as public security), as per Article 3 of the 1948 Universal

[9]Torroja (2015), pp. 409–424. See also: Gómez del Prado and Torroja (2011), Torroja (2013).

Declaration of Human Rights. In this regard, it must be stressed that the monopoly over the legitimate use of force is an inseparable part of the obligation to respect, protect, and uphold basic human rights; a fundamental principle of general international law; and a norm of *jus cogens* in the contemporary international legal system.

3 The Nature of Armed Coercion as an Inherently State Function and the General Prohibition on Privatizing, Exporting, and Importing Some of Its Functions

In relation to the creation and contracting of PMSCs by states, as well as the authorization for their entry in a state's territory, an initial problem in the international arena is the question of whether, in terms of armed force, everything can be privatized. The question can be rephrased to ask whether there are areas of the state's coercive function that should be exempt from any form of privatization, based on general international law.[10]

In international practice and according to most in this doctrine, the answer to this is *yes*, although there is little clarity over the terminology or delimitations regarding which functions cannot be privatized.

The Working Group on Mercenaries' 2010 draft proposal for a possible international convention introduced this idea using the expression "inherently state functions."[11] This was inspired by the US expression "inherently governmental functions."[12] A preference for the word "state" instead of "governmental" was based on it being better suited for drafting a treaty aimed at regulating relationships between states rather than governments. The notion referred to the existence of areas of armed force that under no circumstance should be privatized, in contrast to others that could. This thesis, which we can call Thesis A, is outlined in Fig. 1.

However, the Working Group changed its perspective on this notion, as described in the Concept Note presented at its 2011 public session in New York:

> The Working Group acknowledges that certain functions are inherent to the State. Functions that are inherent to the State are those for which the State retains ultimate responsibility regardless of whether or not the State outsources that function. The Working Group also believes that some inherent State functions may not be outsourced.[13]

[10]Barak-Erez (2009), pp. 71 et seq.

[11]Expression from article 9 of the Working Group on Mercenaries' 2010 draft proposal for a possible international convention on private military and security companies (Human Rights Council, 2010, A/HRC/15/25).

[12]This refers to functions that can only be carried out by government employees (Chesterman 2009 p. 199).

[13]WG on the Use of Mercenaries, 2011, p. 2.

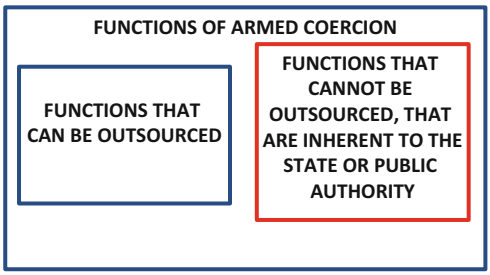

Fig. 1 Concept of inherently state functions: Thesis A. Source: Helena Torroja

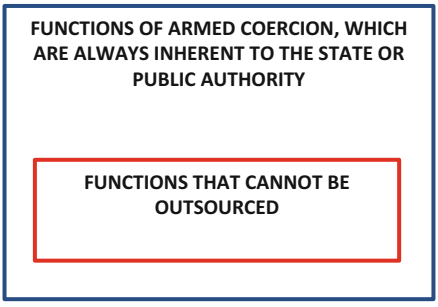

Fig. 2 Concept of inherently state functions: Thesis B. Source: Helena Torroja

This is a significant change in perspective. In a certain sense, it reflects a narrower concept, considering that in terms of the use of force—or the authority over the use of armed coercion—the authority is always incumbent to the state, which must therefore be responsible for the acts carried out, regardless of whether they are performed by a government employee or not. Within this group of inherently state functions, it is considered that there are some that cannot be outsourced under any circumstances. However, all functions relating to armed coercion would be inherent to the state. This second thesis, Thesis B, is outlined in Fig. 2.

States must reach a consensus regarding which of these two theses they agree with. It is a highly relevant question because, in terms of international responsibility, it has a strong bearing on states' accountability for the acts performed by PMSCs and their personnel. Another problem is that of which state is accountable, a matter to be studied further on, in Sect. 6.

For now, let us focus on the terminology and the concept currently adopted by the Working Group. I believe the best place to start is the commentaries made by the International Law Commission (ILC) for its Draft Articles on Responsibility of States for Internationally Wrongful Acts. Specifically, the commentary on draft Article 5 (which considers acts performed by private entities that exercise "governmental authority" as attributable to the state) asserts:

> Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions.[14]

There are two important ideas here. First, although in principle the boundaries around what is considered governmental are set by each state, there do exist some universal *limits* as to what is governmental, which do not depend on each particular society or its history and traditions. Second, although these governmental functions might be outsourced, they will always be incumbent to the state and will therefore be attributable to the state.[15] However, it is not specified or defined which functions these are.[16]

In relation to the first idea, according to general international law, there are *public authority functions* that, using the terminology currently being proposed, would be classified as *inherently state functions* that are always incumbent to the state. As such, even if they are performed by private agents, they are attributable to the state that privatized or contracted them, in accordance with each case, as we shall see.

However, whether or not there are some such state functions that can *never* be outsourced is a separate question upon which states must reach a consensus. Prominent figures in this doctrine are of the opinion that such functions do exist.[17]

The problem involves finding agreement on the list of functions. Article 9 of the 2010 draft proposal for a possible international convention by the Working Group on Mercenaries included a list that was considered to be too inclusive, with difficulties to reach a consensus generated by variances in the military terminology used by different states. Relating to this, it is worth noting the particularities of some states, such as the US, which, to interpret what counts as governmental, follows a very different logic from that followed by some other states: the basis of the US position is that everything can be privatized, and the setting aside of anything that is "inherently governmental" is established as an exception to this rule[18]; in other words, they have not chosen this expression in order to protect and

[14]ILC (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts and Commentary, paragraph 6, p. 43.

[15]The ILC asserts that in any event, when determining these governmental activities "[o]f particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances." *Ibid.*

[16]Additionally, the ILC assumes that these functions can be attributed by law to non-state entities, whether they are government agencies or private companies. Its logic is that functions can be privatized, and therefore the delimitation of government (or public) authority functions would be to determine whether wrongful acts can be attributed to the state. It uses as its basis the premise that it is possible to outsource any governmental function; it does not appear that the ILC considered the possibility that some functions cannot be outsourced under any circumstances.

[17]At least the functions involving the exercise of coercion and the armed forces must be included in the notion of governmental functions (such as maintaining law and order) in its strictest sense (De Schutter 2009, p. 31).

[18]Chesterman (2009), p. 199.

keep certain functions within the public domain, as would appear to be the most logical approach in the eyes of the Working Group on the use mercenaries.

Now let us see whether general international law has established anything in this regard. This shall be done taking into account tenets of *jus in bello*, *jus ad bellum*, and international human rights law.

In terms of *jus in bello*, the 1949 Geneva Conventions establish clear limits to privatization. It can also be considered that these limits are covered by general international law, according to the study produced for the ICRC by Henckaerts and Doswald-Beck (2006). The limits would be as follows:

- The detention or interrogation of prisoners of war or civilians in detention centers may never be outsourced (Art. 39 of the III Geneva Convention Relative to the Treatment of Prisoners of War of 1949 and Art. 99 of the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949).
- Direct participation in hostilities may not be outsourced (Art. 43 of the Additional Protocol I to the Geneva Conventions of 1949, adopted in 1977).

The first part of the Montreux Document aims to identify elements of general international law applicable to states in relation to PMSCs but limits itself to state obligations in times of armed conflict. Point 2 establishes that PMSCs must not be contracted to carry out activities that international humanitarian law explicitly assigns to a state agent or official, such as exercising the power of an official responsible for a prisoner of war camp or a detention center for civilians. This is consistent with Article 39 of the III Geneva Convention of 1949 and Article 99 of the IV Geneva Convention of 1949.

Direct participation in hostilities, however, is not mentioned in the first part of the Montreux Document, but rather only the second part, on recommended good practices. Taking into account whether a service entails direct participation in hostilities is thus considered only a good practice (for contracting states, territorial states, and home states alike). States will determine which services may or may not be outsourced, in light of factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities (Montreux Document, Good Practices 1, 24, and 53). Furthermore, "private participation in hostilities" is not defined; instead, the ICRC's "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" (Melzer 2009) should be consulted.

In the context of *jus ad bellum*, it is important to understand that the rules of general international law prohibiting states from using or threatening to use force also extend to any functions that states might want to achieve by outsourcing coercive power to be used abroad. Accordingly, under the same prohibition, the delimitation provided by General Assembly Resolution 2625 (XXV) of October 24, 1970, includes a prohibition on states authorizing or contracting PMSCs to commit acts involving the use of force or threat of the use of force in the territory of another state, as prohibited by the UN's fundamental principles. General

international law is quite clear on this matter. It is perhaps worth reiterating that the prohibition made in Resolution 2625 (XXV) covers the following:

- the "organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State";
- the "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force";
- the use of force in any way that deprives peoples of their right to self-determination and freedom and independence.

A separate question altogether is that of the territorial state giving its consent for a PMSC contracted by another state to enter its territory. In this case, it may be that there are reasons justifying its *legality*, but it would be necessary to examine the matter in full knowledge of the specific circumstances, the parties to the conflict, etc.

Finally, in the context of *international human rights law*, there are also parts of general international law that limit the privatization of inherently state functions. In this regard, as already noted (Sect. 2), it must be stressed that the monopoly over the legitimate use of force is an inseparable part of the obligation to respect, protect, and uphold basic human rights (the *fundamental principle of human dignity*); a fundamental principle of general international law; and a norm of *jus cogens* in the contemporary international legal system.

From this perspective, general international law prohibits any privatization of armed coercion that affects the exercise of basic human rights, which, within the doctrine and in practice, are understood to include at the very least the following: the right to life, liberty and security, the right to physical and moral safety, the right to a fair trial, and a prohibition on discrimination. I consider it a valid argument that making use of PMSCs in a way that could affect any of these rights is prohibited by general international law. Consequently, the apprehension or detention and interrogation of members of the population are prohibited under any circumstances,[19] but this is far from the only scenario.

In this regard, it is worth highlighting the contradictions that arise in practice from the ICoC used by private security companies for self-regulation. Indirectly, it assumes that PMSCs can perform some of the activities that, as we understand it, cannot be outsourced according to general international law. This can be seen in the case of detention activities, for which it is specified that PMSCs will only "guard, transport, or question detainees if: (a) the Company has been specifically contracted to do so by a state; and (b) its Personnel are trained in the applicable national and international law" (Principle No. 33). It can also be seen in the case of apprehending persons, which is prohibited "except when apprehending persons to defend themselves or others against an imminent threat of violence, or following an attack or

[19]Ibid., p. 202.

crime committed by such persons against Company Personnel, or against clients or property under their protection, pending the handover of such detained persons to the Competent Authority at the earliest opportunity" (Principle No. 34). This is a very important detail: the ICoC addresses these functions in the assumption that they may be carried out by private security companies, whereas the Working Group on Mercenaries' 2010 draft proposal for a possible international convention and even the Montreux Document view these as inherently state functions that cannot be outsourced under any circumstances.

Meanwhile, it is also worth pointing out that by recognizing that cases of detention require a contract specifying this function from a state and that in cases where persons are apprehended they should be handed over to the competent authority at the earliest opportunity, the ICoC equally recognizes that these are functions inherent to the public authority, inherently state functions, or inherently governmental functions. Therefore, international recognition of the limits to privatization is strengthened, as is the thesis that acts committed by these companies are to be attributed to the contracting state, as we will see look at in Sect. 6.

The list of inherently state functions that cannot be outsourced under any circumstances could be summarized as shown in Table 1.

4 A General Obligation to Exercise Sovereign Competencies (Functional Sovereignty) and a General Duty of Prevention and Protection in the Event of Privatization, Export, and Import of Coercive Power

We now move on to outline general international law for cases involving the privatization, export, and import of coercive power. The starting point is the sovereignty and independence of each state to decide whether or not to privatize the use of force and authorize its export. As a matter of fact, many states have not resorted to this practice in relation to military armed force. The stronger trend is that of privatizing domestic security, and in most cases the exporting of this service is not envisaged.

Nevertheless, we hold to our belief that it is appropriate that public international law regulates the obligations of states that decide to privatize coercive force and authorize its export. This is because *every state in our international society has the right to see this privatization and export carried out under certain legal guarantees that respect not only their sovereignty and independence, but also international human rights law and international humanitarian law*. This is worthy of being made a basis for further development.

The legal foundation is based, firstly, on the functional notion of state sovereignty and specifically on the authority that states have over territories and persons.

Table 1 Inherently state functions under general international law

Functions that cannot be outsourced under general international law		
	Function/Action	Other legal sources
Jus in bello	Officiating prisoner of war camps: detentions and interrogations during international armed conflicts	Art. 39, III GC Customary international law
	Officiating prisoner of war camps: detentions and interrogations during noninternational armed conflicts	Customary international law
	Officiating civilian detention centers: detentions and interrogations	Art. 99 IV GC Customary international law
	Direct participation in hostilities	Art. 43 AP I Customary international law
Jus ad bellum	Threat or use of force in any form or for any purpose prohibited by the fundamental principle that prohibits the threat or use of force between states, including: – the organizing of mercenaries, armed bands, or bands of irregular forces, civil strife, or terrorist acts – infringement upon peoples' right to self-determination	Art. 2.4 UN Charter Art. 51 UN Charter GA Res. 2625 (XXV), 1970 Customary international law
International human rights law	Armed coercion and violation of the right to life	GA, Universal Declaration on Human Rights, 1948 Fundamental principle of human dignity
	Armed coercion and violation of the right to freedom and security (apprehension, detention, and interrogation of persons); prohibition of forced disappearances	GA, Universal Declaration on Human Rights, 1948 Fundamental principle of human dignity
	Armed coercion and violation of the right to physical and moral safety (prohibition on torture and other humiliating and degrading treatments)	GA, Universal Declaration on Human Rights, 1948 Fundamental principle of human dignity
	Armed coercion and violation of the right to a fair trial	GA, Universal Declaration on Human Rights, 1948 Fundamental principle of human dignity
	Armed coercion and violation of the prohibition on discrimination	GA, Universal Declaration on Human Rights, 1948 Fundamental principle of human dignity

Source: Helena Torroja

And secondly, stemming from what has been mentioned previously, it is based on the general duties that all states have as regards prevention and protection.

In relation to the first fundamental point, the functional exercising of sovereignty, we may start by recalling the classical definition given by Judge Max Huber in the 1928 Island of Palmas (or Miangas) arbitral award:

> Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. [...]. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.[20]

This functional aspect of sovereignty recognizes states' right to exercise their functions on an equal footing with other states but also their duty to respect other states' rights and to comply with international law. The exercising of coercive power is therefore limited by the rights of other states and by international law, as applicable.

In this context, it cannot be forgotten that the monopoly over the legitimate use of force is inherent to the notion of the state, such that decisions over privatization affect not only the state itself but also the sovereignty that legitimizes said use.[21] It is also to be noted that the concept of sovereignty has taken on a more humanitarian focus. This has come following the process, begun in 1945, to internationalize human rights. Nowadays, human dignity is at the heart of sovereignty.[22] The notion of functional sovereignty, already rooted in classical international law, relates to another norm of general international law that we consider to be an additional legal foundation underpinning the international limits to the privatization, export, and import of armed coercion: the general duty of prevention and protection, which traditionally has been limited to acts committed in a state's territory that could affect public representatives from another state or foreigners.

This norm is often posited by those conversant in the doctrine and by those practicing the law in the context of state responsibility. Specifically, when it is not possible to attribute wrongful acts performed by an individual to the state, it is argued that general international law offers another course: that of nonfulfillment of

[20]Island of Palmas case (Netherlands v USA), United Nations, Reports of International Arbitral Awards (1928), pp. 829–871.

[21]As asserted by the Swiss Federal Council, "the state monopoly on the use of force undoubtedly constitutes the core of the state security system"; "privatisation of such tasks would call into question the existence of the State per se and certainly its legitimation as the entity responsible for public order. The privatisation of such tasks can therefore only be considered in limited specific instances and in a complementary context." *Swiss Federal Council,* 2005, pp. 9–10.

[22]Casanovas, Rodrigo (2016), pp. 451–452; Casanovas and Rodrigo (2010), p. 195. Ferrajoli (1999), p. 65.

the general duty of prevention and protection, a duty pertaining to all states (also referred to as the general duty of due diligence). This duty is a primary norm of general international law. It does not mean that the state must answer for acts committed by individuals but that it must answer for nonfulfillment of the primary norm binding it to the duty of due diligence in its territory. This has been highlighted by the International Court of Justice in the case of the United States v. Iran, in 1980,[23] and more recently in the case of the Democratic Republic of the Congo v. Uganda, in 2005.[24]

The norm indicates the duty to prevent, to monitor, and to take all measures necessary to avoid any individual acting in a way that violates international law and, furthermore, to adopt sufficient diligence as regards the repression of acts committed in the state's territory.[25] The consequences of individuals' acts can remain within the state territory or can spread further afield, causing damage to other states or international spheres, as is established in the field of international environmental law.[26] Currently, there is an argument being made for an extra-territorial application of the duty of diligence, such that it would extend to acts committed beyond state borders.

This general duty of prevention and protection, a primary norm, is always connected to, and defined by, another primary norm regulating the specific acts committed by individuals in violation of international law,[27] for example, international law on diplomatic and consular relations, international human rights law, international humanitarian law, a friendship treaty, etc. The source of the international norm does not matter (custom, general principles of law, treaty, etc.).

In light of this, it can be asserted that under general international law, there is an obligation to adopt prevention and protection measures when states decide to privatize, export, or import armed coercion, respecting also the *jus cogens* principle of respect for basic human rights, international humanitarian law, and any other norms applicable in each specific case.

[23]Case Concerning United States Diplomatic and Consular Staff In Tehran (United States of America v. Iran), Judgment, ICJ Reports (1980), paragraph 67.

[24]The ICJ ruled that Uganda held responsibility in occupied Congo territory in relation to a "lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory" (Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports (2005), paragraph 79).

[25]Rodriguez Carrión A (2004), p. 324. Remiro Brotons A et al. (2007), pp. 754–755, Diez de Velasco, M (2007), p. 833.

[26]"Trail smelter case (United States v Canada)", United Nations, Reports of International Arbitral Awards (1941).

[27]Dupuy (1995), pp. 369–370.

5 Specific International Obligations Arising from the General Duty of Prevention and Protection in the Event of Privatization, Export, and Import of Coercive Power

Having turned to customary international law to form an outline of the international obligation of due diligence regarding the respect, protection, and upholding of human rights and international humanitarian law when privatizing and exporting armed coercion, it is now time to examine in closer detail the exact content of this obligation.

The determination of the specific obligations making up the content of this general obligation is a meticulous task. Some clues can be found in certain recent international documents. For instance, one might look to the functions classified as "recommendations" for states in the second part of the Montreux Document or the "good practices" identified by the Working Group on Mercenaries in its global study of national laws and regulations relating to PMSCs.[28] The present chapter will draw on the lacunae and good practices identified by the Working Group in that study, which are quite useful: licensing, authorization, and registration of PMSCs; selection and training of PMSC personnel; permitted and prohibited activities; regulations on the use of force and acquisition of weapons by PMSC personnel; accountability for violations of the law committed by PMSC personnel; and remedy for victims.

Here it is helpful to identify a series of material areas that could serve as the focus for the debate by states regarding the existence or not of international legal obligations, as well as the advisability of promoting their future adoption for progressive development. Certainly, with regard to the issue of the privatization of armed coercion, specific international obligations can be identified arising from the general obligation mentioned above; some of these obligations are based on customary law, while others are still relatively unpracticed at state level and are therefore proposals for progressive development.

5.1 Regulation of Privatization Respecting the Principles of Legality, Transparency, and Proportionality and Ensuring Respect for Human Rights and International Humanitarian Law

In this scenario, the state would have the duty to regulate by law the privatization, export, import, and contracting of coercive force, always striving to ensure respect for human rights and sufficient prevention of violations against them or against international humanitarian law. Outsourcing of the use of force would be

[28]Human Rights Council, 2014, A/HRC/27/50; Human Rights Council, 2015, A/HRC/30/34. The DCAF Legislative Guidance Tool for States to Regulate Private Military and Security Companies is based on good practices previously identified by the Working Group on Mercenaries through these documents (DCAF 2016).

proportional to the number of police and armed forces and would be considered supplementary to the centralized coercive force.

This duty of regulation would extend not only to the state privatizing and authorizing the export of the coercive force but also to the state authorizing its import into its territory. And of course, it would also extend to the state contracting the service.

One of the problems that arises is whether home state legislation and contracting state legislation on PMSCs and their personnel both have extraterritorial effect. This may be considered a question for progressive development that states would need to find agreement on, unless it is shown that some kind of extraterritorial application already has a foundation in general international law.

5.2 *Establishment of a Central Authority and Register as a Means of Vetting*

In this scenario, each state would have to strive to ensure application of the rules adopted for the private use of coercive power both in its own territory and abroad (through progressive development, as applicable) in conformity with respect for human rights and for international humanitarian law.

As part of the progressive development, states would have to evaluate creating an international obligation to establish a central control authority in each state, with powers over PMSCs and their personnel. This central authority would be established in the home state, the contracting state, and the territorial state. Depending on the territorial structure of the state, this function could be performed by local authorities, although a single authority would always be identified for the purposes of international law.

Control would be established by means of a system of licenses, which would be issued, registered, supervised (through obligatory renovation mechanisms), and, where appropriate, revoked by the central authority.

As part of the progressive development, states would have to evaluate the need for an international mechanism to facilitate coordination between the central authorities, as well as exchanges of information.

5.3 *Establishment of a System of Licenses as a Basic Instrument for Prevention and Control*

As part of the progressive development, states would have to agree upon the obligation for each state to establish a licensing system for the creation of these companies, for entering in their territory, and for contracting them.[29]

[29]This system would be different and complementary to the state system already in place for the creation of companies in accordance with internal trade law.

The granting of licenses would be governed by internationally shared principles. Potentially, the procedure could be public and transparent, conducted in writing, with the licenses issued and registered by the central authority (or local authority, where appropriate).

One key detail is that of establishing what studies must have been completed by those seeking to work as personnel of a PMSC. States need to agree upon a specific level of university education, covering ethical and moral training on the use of force and knowledge in the fields of law, human rights, international humanitarian law, and the United Nations Principles on the Use of Force and Firearms by Law Enforcement Officials, among others (1990). In other words, thought needs to be given to whether theoretical and practical training is required providing a similar level of specialization as demanded in careers in the military or the police.

It should be taken into account that those running the companies and those working for them must not have criminal records, and they must be trained and prepared in due diligence procedures. There must be specific references to the international minimum standards as regards employment law.

The question of whether PMSCs and their personnel would be prohibited from using certain weapons is very relevant, particularly as regards weapons already prohibited by international law. States would need to evaluate whether to establish these prohibitions explicitly in the licenses and authorizations.

It would also be necessary to establish obligations as regards PMSCs and their personnel informing the central authority in the event of observing irregularities or violations of the law.

States would have to evaluate the need to establish international coordination of the licensing system, as well as to undertake not to contract companies or authorize their entry in the state's territory if the company's license does not comply with the requirements internationally agreed upon.

The license would thus constitute a key internal mechanism for demanding that PMSCs and their personnel comply with the international minimum standards that are set. The license will also provide a way of verifying that the state has adopted sufficient measures for due diligence.

5.4 Attributing Responsibility to PMSCs and Their Personnel in the Event of Violations

In this scenario, states would have to agree upon how to establish a system to attribute responsibility in the event of violations committed by PMSCs and their personnel. This would encompass a classification of the different types of potential infractions and crimes, the granting of authority to courts, the prosecution of those responsible, and the remedies provided for the victims.

Once again, the problem is that of reaching a consensus between states, not only on the details of these infractions and crimes but also on the authority of the courts, a question relating to private international law and to public international law.

We believe there to be valid arguments, according to general international law, that the establishment of a system attributing responsibility to individuals—and, where applicable, legal persons—pertains to the home state, the contracting state, and the territorial state. All three of these are linked by a duty of due diligence, which, we may recall, also covers the prosecution of crimes. This relates to general international law.

Meanwhile, in terms of progressive development, it must be determined whether there are new crimes to be classified, as well as the scope attributed to the state jurisdictional authority.

In this regard, a legal problem arises regarding the extraterritorial application of states' jurisdiction, particularly as regards the home and contracting states when PMSCs have committed violations abroad. This extraterritorial application can relate to the prescription of conducts (prescriptive extraterritorial jurisdiction) or to the attribution of jurisdiction to courts to prosecute and punish violations (adjudicative extraterritorial jurisdiction).[30] In practice, this means the adoption of the principle of active personality or nationality (of the company and its personnel in this case) in the context of internal criminal law and of the principle of universal jurisdiction for the courts.

For the purposes of defining the international minimum standard, the problem is whether this extraterritorial application is an obligation under general international law or if it is a matter for progressive development.

As noted by Professor Olivier De Schutter, the obligation to protect human rights exists beyond the territory of a state; this is founded in general international law and the general principles of law.[31] Based on Articles 55 and 56 of the United Nations Charter, as well as the general obligation of prevention, he asserts that "just as a state has no right to allow the use of its territory to cause environmental damage on the territory of another state, it should not allow a company domiciled under its jurisdiction to operate abroad in a way which causes violations of human rights."[32] As part of the same argument, De Schutter asks, "By agreeing to a PMSC being incorporated under its laws, is a state accepting a responsibility to ensure that it complies with human rights wherever it develops its activities?"[33] When this relates to the delegating of governmental authority, for us the answer is clearly "yes, of course."

To summarize, according to De Schutter, home states have an obligation of extraterritorial application (adjudicative and prescriptive), and this has a foundation in general international law. This assertion can lead to the conclusion that under

[30] De Schutter (2009), p. 36.

[31] Ibid, p. 34.

[32] Ibid, p. 35.

[33] Ibid.

their own jurisdiction, home states must regulate the principle of active personality in relation to criminal law, as well as the principle of universal jurisdiction, something that perhaps goes too far, in our opinion. In practice, it comes up against states' reluctance to attribute universal jurisdiction to their courts.

This argument will therefore have to be examined further still, and it will also be necessary to look at whether the obligation towards extraterritorial application also exists for contracting states. In any event, it can always be considered a matter for progressive development, in which case it would be up to states to decide whether they want to agree to a convention involving a commitment to practicing adjudicative and prescriptive extraterritorial jurisdiction as regards the privatization, export, and import of coercive force.

This question is very relevant when it comes to demanding that states take international responsibility in the event of PMSCs and their personnel committing violations of the law, something we shall be looking at next.

6 Recognition of the General Norm of Attributing Wrongful Acts Committed by PMSCs and Their Personnel to the State

Lastly, we must examine a different problem, which is sometimes confused with that of suppressing the wrongful acts of PMSCs and their personnel.

The problem of attributing wrongful acts committed by PMSCs and their personnel to the state is distinct from that of determining which state has the duty to exercise its jurisdiction over PMSCs and their personnel[34]—in other words, the duty to exercise sovereign authority in the regulation and monitoring of conducts, as well as the adjudication of responsibility where necessary in order to protect human rights and international humanitarian law, as mentioned in Sects. 4 and 5.

The problem we now address revolves around proving a state's international responsibility in the event of violations of international law committed by PMSCs and their personnel. In this scenario, nothing prevents an individual (or a legal person) from being considered responsible either in internal law or in international law. Depending on the circumstances, a state's responsibility may be determined in parallel or subsidiary to that of the persons involved.[35]

This matter is regulated by general international law and was rigorously systematized by the ILC's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.

[34]Ibid, p. 33.

[35]In fact, when there is an international wrongful act attributable to a state, there arises a relation of international responsibility, and subsequently an international claim demanding full reparation for the injury caused may or may not be made.

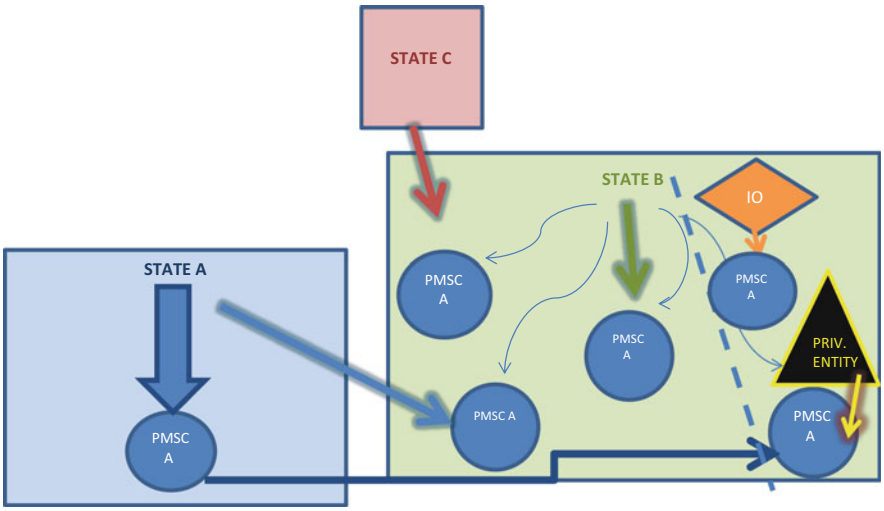

Fig. 3 Hypothetical scenarios on the transnational activities of PMSCs. Source: Helena Torroja

We shall now see how this law applies in our hypothetical scenario, which is outlined in Fig. 3.

In this illustration, PMSC A is a company incorporated in state A, the home state. We shall suppose two different scenarios:

1. PMSC A operates within state A (many companies only do security work; those doing military work are much less common).
2. PMSC A operates in another state, which we shall call state B. It does so under the following legal terms:

   (a) contracted by state A;
   (b) contracted by state B;
   (c) contracted by a third state, which we shall call state C;
   (d) contracted by an international organization;
   (e) contracted by a private entity.

In line with this illustration, we can identify the following scenarios.

Scenario 1: PMSC A is operating within the territory and jurisdiction of its home state. In this case, any attribution for its acts will conform to one of the following principles of general international law:

(a) Following Thesis A of functions inherent to the state (see Sect. 3), it is necessary to consider the nature of the armed coercion function that has been outsourced. If it is a function inherent to the state, the home state is directly responsible for the acts of the PMSC. If not, the home state may be responsible due to nonfulfillment of the general duty of prevention.

(b) Following Thesis B of functions inherent to the state (see Sect. 3), it has to be remembered that armed coercion will always be a governmental (or inherently state) power, meaning that the home state is always directly responsible for the acts of PMSCs and their personnel.

Scenario 2: PMSC A is operating in another state (which we shall call state B) under different possible mandates: contracted by state A, by state B, by state C, or by a private entity. To summarize, there are three scenarios resulting in the problem of attributing responsibility for the wrongful acts of PMSCs acting outside their home state's territory—the most common situation, as you may remember:

(a) First: attribution of the act to the contracting state (regardless of whether this is state A, B, or C).

As highlighted by De Schutter, the potential legal relations are as follows:

- A relationship as state organs: employees of the PMSC are considered part of the state's armed forces, as per Article 4 (A) (1) of the III Geneva Convention of 1949. This is a relatively exceptional scenario.[36] The state has obligations regarding control and is of course internationally responsible for any violations by these employees acting as its organs.
- A contractual relationship: the employees operate as an independent militia (Art. 4 (A) (2) of the III Geneva Convention of 1949) or as "[p]ersons who accompany the armed forces without actually being members thereof" (Art. 4 (A) (4) of the III Geneva Convention of 1949). In any event, this contractual relationship may translate into different legal relations, as described in the ILC's 2001 Draft Articles[37]:

  i. complete dependence on the state, meaning that the state is responsible for acts committed by PMSCs and their personnel, who can be classified as de facto state agents[38];
  ii. the carrying out of acts having been legally empowered with governmental authority to do so and when acting in this capacity (Art. 5, ILC's 2001 Draft Articles);
  iii. actions taken on the instructions of the state or under its direction or control (Art. 8, ILC's 2001 Draft Articles);
  iv. the carrying out of activities under governmental authority in the absence or default of the official authorities (Art. 9, ILC's 2001 Draft Articles);
  v. actions acknowledged and adopted by a state as its own (Art. 11, ILC's 2001 Draft Articles).

Following this thesis, the contracting state would always be responsible for the acts of PMSCs and their personnel.

[36] De Schutter (2009), p. 26.
[37] Ibid, pp. 26–27.
[38] Ibid, pp. 29–32.

(b) Second: attribution of the act to the territorial state (state B).

The territorial state (not the contracting state) is always under the obligation to control the activities of PMSCs acting in their national territory[39] or jurisdiction. Therefore, in application of the theory stated earlier, international law carries the obligation to adopt due diligence measures. In the event of violations of international law by PMSCs and their personnel, it may be evaluated whether responsibility should be attributed to the territorial state due to a nonfulfillment of its general duty towards prevention and protection. This responsibility may be deemed as parallel or complementary to that of the contracting state or as the greatest responsibility when the PMSC has been contracted by a private entity.

The practical problem is that, in most cases seen in practice, the territorial state's government apparatus is not working, and its situation is that of a so-called failure state. In these cases, De Schutter asks the question: "is the home state under a duty to act?"[40]

This leads us on to the last scenario, that of the PMSC's home state's potential extraterritorial obligation to protect human rights.

(c) Third: attribution of the act to the home state (the exporting state, not the contracting state)—state A.

If the PMSC has registered in a state and it is carrying out operations abroad from this state and if the territorial state cannot or does not want to perform its general duty of prevention, can international responsibility be attributed to the home state? This problem arises especially when there is not a contracting state to which responsibility can be attributed because the PMSC has been contracted by a private entity.

The answer relates directly to the obligations that states are under, as identified previously. As we have already seen, under general international law, the home state has obligations to regulate, monitor, and adjudicate responsibility in relation to the actions of its companies; at the very least, in the case of privatized armed coercion, this obligation is clear, according to the doctrine[41] to which I subscribe.

The attribution of acts to the home state can take two courses, which are analogous to those already described for scenario 1:

– Following Thesis B of functions inherent to the state (see Sect. 3), it has to be remembered that armed coercion will always be a governmental (or inherently state) power, meaning that the home state is always directly responsible for the acts of PMSCs and their personnel. In this case, a private entity is empowered by the state to exercise a function of governmental authority for the purpose of exporting these activities. *De lege ferenda*, I believe that the clearest way forward is to suppose that, in these scenarios, Article 5 of the ILC's 2001 Draft Articles applies. This is based on the fact that a function of governmental

[39] Ibid, p. 33.

[40] Ibid, p. 34.

[41] Ibid, p. 24.

authority has been outsourced for its export; whether this function is then contracted by a private entity or by another state does not alter the link to the origin, i.e. the home state, as coercion must always be incumbent to the state.

– Following Thesis A of functions inherent to the state (see Sect. 3), it is necessary to consider the nature of the armed coercion function that has been outsourced. If it is a function inherent to the state, the home state is directly responsible for the acts of PMSCs. If not, the home state may be responsible due to nonfulfillment of the general duty towards prevention. The legal problem is to determine whether this general duty has extraterritorial application, whether the home state must strive to ensure that PMSCs operating abroad respect human rights. This question brings us back to our analysis of the primary norm that is the general duty that home states and exporters of armed coercion have towards prevention, a matter discussed at the end of the previous section, to which we may turn our attention once again.

In any event, general international law on state responsibility for internationally wrongful acts need not be repeated in an international convention on the minimum standard for the privatization of coercive power and respect for human rights. This issue would not be the purpose of the convention. Rather, what is required is the codification and progressive development of the relevant primary norms, given that it is a lacuna in international law that is hindering the application of this general system of state responsibility.

7 Conclusion

This chapter has pointed out the appropriateness of states recognizing an international minimum standard as regards the privatization, export, and import of armed coercion. Said international minimum standard can be established by means of an international convention. This would address minimum requirements and would not be as long or detailed as the draft proposal for a possible convention presented by the Working Group on Mercenaries in 2010. This would mean a reduction of the previous content, from around 29 articles to no more than 20.

The convention could be supplemented by protocols and annexes, to be used for subsequently incorporating any aspects upon which consensus had not yet been reached at the time the convention was adopted. It could also include recommendations for good practices directed at states.

The convention would be addressed towards states and international organizations. It would apply in all circumstances, not being limited only to armed conflict situations. Furthermore, it would include the Martens Clause.

Much of its content would have its application in internal law, and it would mostly be made up of non-self-executing rules.

The convention would address areas requiring codification and progressive development. It has been demonstrated that there are general international law

norms relating to the issue that would be recognized by states and codified through the convention. Furthermore, the argument that this issue is covered within the laws of state responsibility and is already regulated by its norms, as argued by certain parties, has also been shown to be false. On the contrary, we have shown that for these secondary norms to be applied, the primary norms that regulate the privatization of armed coercion must first be identified and systematized. It has also been demonstrated that even though there do exist some norms in general international law, there are also international lacunae that justify progressive development.

In this regard, international recognition of this minimum standard by way of a convention is a requirement given the evolution of our contemporary international society. There is a risk of the process of international regulation becoming blurred, together with that of the regulation of business and human rights that is also being carried out in a generic manner by the Human Rights Council.[42] States are very reluctant to impose international obligations on companies. Even when legal language that is respectful of their sovereignty is used (including obligations for states towards companies contracted by them or companies created or operating under their jurisdiction, i.e. indirect obligations), they stand opposed to it. This risk and the very nature of coercive power call for a different approach. It is necessary to define states' obligations as regards respect for human rights and international humanitarian law when they privatize governmental (or inherently state) functions relating to the power of armed coercion. The companies involved are not comparable with those in businesses such as textiles or technology or those producing other consumer goods. Their product—if that is an appropriate word for what they offer—is security, something that pertains by nature to the public authority, as has already been discussed.

Were it not possible to reach a consensus among states, efforts could be made to at least recognize this international minimum standard through a General Assembly resolution.

Just as classical concepts are nowadays complemented by attributes which highlight the social flaws in current social events (for instance expressions such as decent work, inclusive development, and human security), the issue we are dealing with needs emphasizing in a similar way. The classical concept of the state monopoly over armed coercion must take on a descriptor so as to underscore current flaws. Accordingly, coercive sovereignty should nowadays be exercised by states in a way that is respectful of basic human rights. Therefore, we should move from simply coercive sovereignty to *lawful coercive sovereignty*, or *coercive sovereignty with respect for human security*.

In summary, the purpose of the convention (or, secondarily, a General Assembly resolution) would be to promote respect for human rights in the processes and practices of outsourcing, contracting, exporting, and importing armed force by states. Essentially, it is to promote the exercise of a lawful coercive sovereignty.

[42]UN Guiding Principles on Business and Human Rights (2011).

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Helena Torroja is tenured Professor of Public International Law at the Law School, University of Barcelona. She is also Academic Director of the International Studies Center (UB, Spanish Foreign Affairs Department and Caixa Banc, www.ceibcn.com) and Consultant of the UN Human Rights Office of the High Commissioner on PMSC and human rights.

Conclusions

Helena Torroja

Abstract Nowadays, privatization of the use of force for the purposes of exporting it is on the rise. PMSCs are not merely another industry, but rather an industry that provides services involving the use of force, which requires specific regulation and oversight. Despite there is a trend towards a gradual hardening of soft law regulating them through the practice of some states, systematization and setting down in writing of the norms limiting the privatization and export by states of the use of force are necessary. In the absence of a strong, internationally coordinated movement denouncing the lack of international limits agreed by the states, this phenomenon will continue to spread unchecked and without any form of control.

In the current international context of economic globalization, privatization of the use of force for the purposes of exporting it is on the rise. The first states to engage in this practice—the US and the UK—have gradually gotten other states to follow their example. There seems to be no going back. While some political leaders have expressed alarm at the disastrous consequences of this model,[1] others have quietly embraced it, for instance, as the Russian Federation has done in Syria, as noted by Mario Laborie.

As both the Syrian and Afghan cases show, the direct participation in hostilities of nonstate actors *negatively impacts all aspects of human security*, making them one of the main threats to peace and stability. The central government loses control of large parts of the territory, leading to the collapse of central government structures, as they can no longer guarantee citizens essential services related to security, health, education, or infrastructure. As a result, populations organize around prestate political structures, which develop ad hoc agreements to manage the affairs of an environment without state sovereignty. As in medieval Europe, there is a return to tribal logic and to temporary warlords, reprivatization of the law, and renewed confusion between economic exploitation and political dominance.

[1] José Luis Gómez del Prado recalls the speech of then Senator Barack Obama in 2007 at DePaul University in Chicago.

H. Torroja (✉)
Law School, University of Barcelona, Barcelona, Spain
e-mail: htorroja@ub.edu

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Thus, the massive presence of various types of nonstate actors has increased the level of violence in both Syria and Afghanistan.

PMSCs have become an essential tool for defense and security policies, both in situations of armed conflict and in peace time. Although they emerged during the occupations of Iraq and Afghanistan, today they also offer services to keep the public order on our borders or perform security work in prisons or immigrant detention centers. They have even moved into new arenas, such as the response to the refugee crisis (e.g., in 2015, the Slovene government contracted the services of PMSCs to control migratory flows on the country's border with Croatia). This vast industry is characterized by the great opacity of PMSCs and the clients who contract them. This lack of transparency has created an "architecture of impunity," with the most extreme cases occurring in 2003 and 2009 in Iraq, the scene of hundreds of human rights violations. The vast majority of human rights abuses documented by Shock Monitor affected the physical and psychological integrity of the victims. Shock Monitor also found that 87 of the 108 cases of human rights violations happened during the exercise of classic security and protection functions in operational contexts such as critical infrastructure, logistics convoys and/or escorts, and extractive industry projects. Clearly, PMSCs are not merely another industry, but rather an industry that provides services involving the use of force and the handling of advanced security weapons and technology, which requires specific regulation and oversight.

The current definition of "mercenaries" envisaged in international legal instruments is not applicable to the phenomenon of PMSCs. The companies themselves avail of this fact to evade the application of current law. Another strategy has been to take advantage of the difficulty of distinguishing between security activities and military ones on the ground. Although for some years they agreed to call themselves military and security companies, more recently some have begun to insist on the possibility of distinguishing between private military activities and private security for companies. This distinction is intentional and follows the lead of the main transnational PMSCs—almost all from English-speaking countries (the US, the UK, and Canada)—which have attracted most of the business on the international market and are steadily creating a monopoly or oligopoly. Many of these companies are members and/or founders of the ICoC Association. This association advocates self-regulation by the companies themselves. It is no coincidence that the mechanism it has proposed for certifying the companies' work will be applicable only to private security companies and not private military ones. This will afford these companies, scrubbed of the stigma of mercenarism, a monopoly position in the international market to continue performing contracts for governments, multinationals, and international organizations without adequate regulation or control.

It was precisely those states that export private armed force that first identified the social and legal problems of this practice. However, they did not want to limit themselves internationally. They thus promoted the Montreux Process, led by Switzerland and the ICRC. They claimed that, for pragmatic reasons, they were more inclined toward a political document as, in 2008, adopting an international treaty on the matter was unviable. However, more than nine years have passed, and

still no steps have been taken to support the proposal to adopt an international treaty, first tabled in the context of the Human Rights Council. Instead, the Montreux Process continues to be implemented. To this end, 2014 saw the establishment of the Montreux Document Forum, a body of states that have endorsed the document tasked solely with discussion. The forum's secretariat, DCAF, a Swiss government research center, has drafted a set of recommendations. In this regard, it is as if these states had sought to create a parallel forum to the Human Rights Council, controlled by the exporter countries. Second, the Montreux Process and its ICoC have evolved, leading to the creation of the ICoC Association. The presence of some states in this association is used by its proponents to classify the system as one of "co-regulation" as opposed to "self-regulation." Clearly, the exporter states are doing everything possible to give the system a regulatory veneer that in reality it lacks.

In this regard, DeWinter-Schmitt concludes that the trend is toward a "gradual hardening of soft law" through the practice of some states (the US, Australia, Switzerland) and the UN itself of requiring its members to be ICoC/ICoCA members. However, this strengthening can also be read elsewise as a strategy by the promoter states to prevent any attempt to adopt a binding international text limiting the privatization of armed force. In any case, DeWinter-Schmitt notes, significant gaps remain in these soft law initiatives, warranting greater efforts by states to strengthen binding laws and regulations and to provide greater support for the initiatives' successful implementation.

In fact, if the systematization and setting down in writing of the norms limiting the privatization and export by states of the use of force were not necessary, this hardening of the Montreux system would not be required. In other words, the drive by Switzerland and other exporter states to harden soft law initiatives exposes the hidden need for binding regulation. The real problem is that although this phenomenon is being promoted by only a handful of states from all of international society, its transnational consequences are nevertheless sufficiently large to qualify it as an international phenomenon. This minority of states is paralyzing the function of the Intergovernmental Group created by the Human Rights Council to study the advisability of adopting international regulations limiting PMSCs. Of course, an international regulation not supported by a broad consensus would lack real effectiveness. This is a political problem that states must solve.

That is why it is important to build a minimum consensus. With this aim, this author identifies the existence of norms of general international law, applicable in all circumstances (not only in times of armed conflict as under the Montreux Document), that put limits on the privatization of armed coercion. These norms of general international law would include, at least:

- the *right* of states for other states to consider armed coercion a function of public power (an inherently state function) and for them to respect the limits of general international law regarding the privatization of part of its content;
- the norm of general international law *requiring* states to exercise their sovereignty respecting the rights of other states—this norm includes the *general*

obligation of prevention and protection in any circumstance, including cases of privatization of armed coercion;
- the existence of certain specific international obligations that can be identified as arising from the aforementioned general obligation of prevention and protection in cases of privatization of armed coercion, of which some are based on customary law, while others are still relatively unpracticed at the state level and are thus proposals to be progressively developed—these norms are mainly related to aspects of states' internal order, such as the obligation to regulate privatization by law or the establishment of a central authority, a register, an authorization and licensing system, and a system for punishing violations by companies (including the attribution of jurisdiction to the courts even extraterritorially and the determination of the applicable law);
- finally, the general international norm of attribution to the state of the wrongful acts of PMSCs and their personnel, specified in various cases identified by the ILC in its 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.

The international minimum standard could be established in an international convention for codification and progressive development, containing at least the aforementioned norms. Some might argue that customary norms already exist and, therefore, it is not true that there is a legal gap and there is thus no need for their codification. However, this argument does not hold up as the aim of international codification is precisely to systematize, organize, and set in writing norms in order to promote their implementation by states by facilitating their identification. The purpose of this convention would be to promote respect for human rights in the processes and practice of delegating, contracting, exporting, and importing armed coercion by states. It would thus seek to promote a *lawful coercive sovereignty*. Were it not possible to reach a consensus on the adoption of an international treaty, the inclusion of this content in at least a UN General Assembly resolution should be sought.

In the absence of a strong, internationally coordinated movement of scholars, civil society, and, especially, political leaders and agents of states' external policy denouncing the described practices and the lack of international limits agreed by the states, this phenomenon will continue to spread unchecked and without any form of control.

Helena Torroja is tenured Professor of Public International Law at the Law School, University of Barcelona. She is also Academic Director of the International Studies Center (UB, Spanish Foreign Affairs Department and Caixa Banc, www.ceibcn.com) and Consultant of the UN Human Rights Office of the High Commissioner on PMSC and human rights.