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# The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention

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## 1. Introduction

The killing of 17 Iraqi civilians in Nisour Square, Baghdad on 16 September 2007 by armed employees of the United States-based Blackwater company shone a spotlight on the activities of private contractors in conflict and post-conflict zones around the world. The limited mechanisms and forms of accountability for human rights violations by private military and security contractors (PMSCs) at both the national and international levels were starkly revealed by this incident, and, in part, contributed to parallel efforts to bring some uniformity to very uneven national regulation (currently ranging from severe restrictions in South Africa,[1] to forms of licensing in the United

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1 Caparini, 'Licensing Regimes for the Export of Military Goods and Services', in Chesterman and Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) 168.

States (US),[2] to self-regulation in the United Kingdom (UK)[3]) by means of international standards and regulation.

The first international approach to be mentioned is the Swiss/International Committee of the Red Cross (ICRC)-initiated Montreux process, which is centred upon the Montreux Document endorsed on 17 September 2008 by 17 states (including the US, the UK, France, China, Iraq, Afghanistan, Sierra Leone and South Africa). This Document affirms the international obligations under international humanitarian law and international human rights law of states in which PMSCs are based (home states), as well as states who engage PMSCs (contracting states), and those where they carry out their functions (territorial or host states). In addition to identifying 'hard' laws binding under custom or treaty, the Montreux Document also lists 'soft standards in the form of 73 "good practices", which may lay the foundations for further practical regulation of PMSCs through contracts, codes of conduct, national legislation, regional instruments and international standards'.[4] Though it invokes a mixture of hard and soft law, the Document itself is not in the form of a treaty and, as recognised in its Preface, is therefore 'not a legally binding instrument and so does not affect existing obligations of States under customary international law or under international agreements to which they are parties'.[5] As a piece of soft law, adopted outside any formal organisational structures, its claim to identify existing obligations while proposing good practice may seem be wholly constructive, but there are problems with the Montreux Document, not least in the fact that an *ad hoc* group of 17 states clearly cannot represent the wider international community. Having said that, the involvement of the ICRC does increase its legitimacy, as does the fact that it is open to other states to endorse (the total number of states supporting the Document is now 35).[6]

2 For the complex US national laws regulating PMSCs, see Huskey and Sullivan, 'The American Way: Private Military Contractors and US Law after 9/11', PRIV-WAR – The United States of America, National Report Series 02/08, 30 April 2009, available at: http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-02-08-usa.pdf [last accessed 23 November 2010].

3 Alexander and White, 'The Regulatory Context of Private Military and Security Services in the UK', PRIV-WAR – the United Kingdom, National Report Series 01/09, 30 June 2009, available at: http://priv-war.eu/wordpress/wp-content/uploads/2009/08/nr-01-09-uk.pdf [last accessed 23 November 2010].

4 Cockayne, 'Regulating Private Military and Security Companies: The Content, Negotiations, Weaknesses and Promise of the Montreux Document' (2008) 13 *Journal of Conflict and Security Law* 401 at 404.

5 Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 17 September 2008, A/63/467-S/2008/636, at para 3, available at: www.eda.admin.ch/psc [last accessed 23 November 2010].

6 Information on Swiss Department of Foreign Affairs website, available at: http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html [last accessed 23 November 2010]. Russia was involved in the negotiations that led to the Document but has not endorsed it. See Gomez del Prado, 'Private Military and Security Companies and the UN Working Group on Mercenaries' (2008) 13 *Journal of Conflict and Security Law* 429 at 443; Cockayne,

The international law obligations identified, and good practices proposed in the Montreux Document are mainly applicable to states, and, while PMSCs and their personnel do not completely escape from those obligations,[7] the Document does not attempt to regulate the industry, rather it serves to remind states of their obligations when engaging PMSCs or allowing them to operate from or in their territories. Furthermore, though human rights obligations are included, the focus is on the application of the *lex specialis* of international humanitarian law to PMSCs in situations of armed conflict, when it is arguably more likely that PMSCs will be more readily deployed to post-conflict situations, where the *lex generalis* of international human rights law will be applicable. The full title of the Document reflects this bias—the 'Montreux Document on Pertinent International Legal Obligations and Good Practices of States related to operations of Private Military and Security Companies during Armed Conflict'. Gomez Del Prado, a member of the United Nations (UN) Working Group on the Use of Mercenaries, argues that the Document 'recognizes *de facto* this new industry and the military and security services it provides', and further that it 'legitimises the services the industry provides, which still remain unmonitored and unregulated'.[8] Cockayne, on the other hand, while recognising the weaknesses of the Document, argues that it seems poised to 'provide a set of generally respected standards on which other regulatory initiatives might be built'.[9] It is important to note that in August 2010 the Swiss government put forward for consultation a Draft International Code of Conduct for Private Security Service Providers. This draft envisages PMSCs signing up to comply with a range of standards relating to using force, detention, and basic human rights, and being subject to the scrutiny of an oversight mechanism, the form and competence of which is to be negotiated by representatives from industry, governments and civil society.[10]

In contrast to the soft law Montreux approach, the second development in proposed international regulation of PMSCs, and the one subject to comment here, takes the form of a Draft Convention on Private Military and Security Companies ('Draft Convention'),[11] put forward to the Human Rights Council

supra n 4 at 425. The industry was well-represented in the negotiations, del Prado, ibid. at 443. The Swiss Government disseminated the Montreux Document at the UN: see Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General, 6 October 2008, A/63/467-S/2008/636, but it has not been endorsed by the General Assembly or Security Council.

7 See Montreux Document, supra n 5 at Part I.E, paras 22–6.

8 del Prado, supra n 6 at 444.

9 Cockayne, supra n 4 at 427.

10 See http://www.dcaf.ch/dcaf/Projects/About?lng=en&id=122292 [last accessed 23 November 2010].

11 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 self-determination, 2 July 2010, A/HRC/15/25 at Annex. For the text of the Draft Convention, see: http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf [last accessed 23 November 2010].

by the UN Working Group on the Use of Mercenaries in July 2010. There are a number of substantive differences between the Montreux Document and the Draft Convention that will be highlighted below, but it is worth mentioning at this stage that the scope of the Draft Convention is not confined to situations of armed conflict, thereby putting human rights law and protection at the fore.[12] One of the purposes of this article is to evaluate whether the Draft Convention will deliver this goal.

The UN Working Group was established in 2005 by the UN Commission on Human Rights as one of its special procedures,[13] replacing the Special Rapporteur on the use of mercenaries. The Working Group's mandate, in part, is to study PMSCs and to propose legal principles that would encourage such actors to respect human rights in their activities. Though the Working Group has emerged from the UN's historical concern with prohibiting mercenarism in all its forms, its approach to the issue of PMSCs has not been so prescriptive. This was shown in the debates within the Working Group when it discounted the possibility of extending the prohibition on mercenaries, found in the 1989 UN Convention against the Recruitment, Use, Financing and Training of Mercenaries, to PMSCs.[14] Though mercenarism is generally considered to be unlawful in international law, only 30 states have ratified this Convention, with none of the permanent members of the Security Council becoming parties. The lack of support for the existing treaty regime, and the opposition from powerful states that any attempted extension would provoke, led the Working Group to take the approach of drafting a new convention. Of course one of the problems the Working Group will have in promoting the Draft Convention is the Group's traditional concern (reflected in its title) with extending and entrenching the prohibition on mercenaries and mercenary activities. Just as the Montreux Document's legitimacy is undermined by the fact that it is promoted by those hosting and using PMSCs, so the Draft Convention is arguably tainted by its creator's history.

There is little doubt that the Working Group is critical of the Montreux Document. In its report to the March 2009 session of the Human Rights Council the Working Group stated that 'while it is a good promotional document on existing international humanitarian law, the Montreux Document has nevertheless failed to address the regulatory gap in the responsibility that States have with respect to the conduct of private military and security companies and their employees'.[15] This led the Working Group to propose a treaty, to

12 Article 3(3), Draft Convention.

13 HRC Res 2005/2, The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 7 April 2005, E/CN.4/2005/RES/2005/2. See also HRC Res 7/21, Mandate 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, 28 March 2008, A/HRC/RES/7/21.

14 del Prado, supra n 6 at 440.

15 21 January 2009, A/HRC/10/14, at para 44.

be supplemented (at a later stage) by a 'model [domestic] law on PMSCs that would assist national authorities in the elaboration and adoption of domestic legislation to regulate and control the activities of PMSCs'.[16] Though there is a nod to the Montreux Document of 2008 in the preamble of the Draft Convention prepared by the Working Group, there are significant differences between the Document and the Draft Convention, both in terms of the former's focus on the activities of PMSCs in armed conflict, and its definition of (permissible) military and security services, which seems to conflict is some parts with the prohibited activities of the Draft Convention, for example in prisoner detention, and also includes within it acts which would involve PMSCs in armed conflict such as the operation of weapons systems.

It is clear that for successful regulation of PMSCs, as with any other attempt to regulate non-state actors, there needs to be a synthesis between international standard setting, supervision and accountability, and robust national systems of licensing and regulation.[17] The Montreux Document is arguably deficient not only as an international instrument, but also as a base upon which to build national regulation. The question is whether the Draft Convention fares any better. This comment addresses six key components of the Draft Convention and then considers the prospects for its future in the light of the growing momentum of the Montreux process.

## 2. Inherent Governmental Functions

The premise underlying the Draft Convention is that there are inherently governmental or state functions that should not be delegated or outsourced.[18] This is based on a particular understanding of the role of the state, a view that might not be shared by all governments, especially those with the most aggressive approaches to privatisation. It contrasts with the Montreux Document, which only identified prohibitions on contracting states outsourcing activities that international humanitarian law assigns to states, such as exercising the power of the responsible officer over prisoners of war or internment camps.[19] The importance of the Draft Convention's premise is evidenced in its opening provision, which states that the purpose of the treaty is to

16 del Prado, supra n 6 at 440.

17 The Priv-War project is focused on the further possibility of regional (EU) regulation. See Den Dekker, 'The Regulatory Context of Private Military and Security Services at the EU Level', PRIV-WAR Report – European Union, National Reports Series 04/09, available at: http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-04-09-eu.pdf [last accessed 23 November 2010].

18 See preamble (at 9) which expresses concern about the 'increasing delegation or outsourcing of inherently State functions which undermine any State's capacity to retain its monopoly on the legitimate use of force.'

19 Montreux Document, supra n 5 at Part 1A.2.

'reaffirm and strengthen State responsibility for the use of force' and to 'identify those functions which are inherently governmental and which cannot be outsourced'.[20] The 'Definitions' section defines inherent state functions which are 'consistent with the principle of State monopoly on the legitimate use of force', and cannot be outsourced or delegated to non-state actors. These functions include:

> direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees.[21]

Given the presence of private operators in the Abu Ghraib prison in recent years this constitutes a timely attempt by the drafters to draw a line between what is governmental and what is not, but the width of this provision seems to encroach on functions already being performed by private contractors and will no doubt lead to opposition to the Convention from states where the PMSC industry is largely based.

While the Montreux Document views PMSCs as civilians and frowns upon them directly participating in hostilities (though not directly prohibiting them from so doing),[22] it assumes that all other services can legitimately be performed by such actors. The Montreux Document states that 'military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, building and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel'.[23] There are clearly problems of incompatibility between the Montreux Document and the Draft Convention in this regard.

There are problems though with the Draft Convention's underlying premise that there are functions that can only be performed by the state. Advocates of the free market might dispute such an assertion especially given the lack of rationale in the Convention beyond the state's monopoly on the use of force. While this monopoly might be accepted, some of the prohibited activities are not clearly derived from it. The issue is essentially one of ideology. However, it is pertinent to note that one of the main advocates of a 'minimal state' accepts the need for a monopoly on the use of force within a state's jurisdiction accompanied by the protection of all individuals within that jurisdiction, thus ruling out (largely on the grounds of efficiency) a system whereby protective

20 Article 1(1), Draft Convention.
21 Article 2(i), Draft Convention.
22 Montreux Document, supra n 5 at Part 2, paras 1, 24 and 53.
23 Ibid. at Part 1, para 9.

services are only rendered to those who contract for them.[24] This would suggest that the drafters are right to try to redraw the line between governmental functions and those that can be outsourced, though it may be that the horse has bolted in some countries, especially ones, the US and the UK, where the PMSC industry is well-developed and influential.[25]

While debates will ensue over the list of governmental activities, it is clear that the term 'waging war and/or combat operations' within the Draft Treaty needs tightening to deal with thorny issues likely to arise in practice (for example the possibility of private contractors operating weapons systems, or driving ammunition lorries, or guarding military facilities, thus becoming military targets and potentially engaging as combatants). Furthermore, as well as defining activities that cannot be undertaken by PMSCs, the Draft Convention might have provided a list of activities that are clearly permitted subject to compliance with relevant international law, for instance, protection services (humanitarian convoys, maritime convoys, close protection); guarding services (supply depots, embassies, refugee camps); and transport services (humanitarian aid, refugees). While it will be objected that such a list cannot be exhaustive it could be developed by the jurisprudence of the proposed Oversight Committee and would help to eradicate grey areas of PMSC activity.

While operating within these contexts, there still remains the possibility of PMSCs using force, and it is on this issue that the Draft reveals that the state's monopoly on the use of force cannot be absolute. Although prohibiting the use of force by PMSCs to overthrow a government or to otherwise violate a state's sovereignty, a position that reflects the Working Group's concern with mercenary activities,[26] the Draft Convention recognises that PMSCs will often need to carry arms and thus attempts to impose limitations on the use of force by PMSCs but it does not prohibit it altogether. When using force PMSC employees must exercise restraint, minimise damage, injury and loss of life, and may only use force to defend themselves from 'imminent unlawful threat of death or serious bodily injury', to defend persons they are contracted to protect under similar circumstances; to resist abduction; and to prevent the commission of a 'serious crime that would involve or involves a grave threat to life or of serious bodily injury'.[27] This final provision would apparently allow PMSCs to defend civilians under imminent threat of serious injury, and mirrors the move in the UN towards mandating peacekeepers to protect civilians.[28] While the Working Group is strongly in favour of maintaining the state's monopoly over the use of force, it pulls back from the full application of this

24 Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974) at 113.
25 But see the unclear applicability of the 'inherently governmental' limitation within the US in Huskey and Sullivan, supra n 2 at 13.
26 Article 8(1)(a)–(d), Draft Convention. This provision also prohibits attacks on civilians.
27 Article 18(3)(4), Draft Convention.
28 White, 'Empowering Peace Operations to Protect Civilians: Form over Substance?' (2009) 13 *Journal of International Peacekeeping* 327.

principle when faced with the moral dilemma of how to effectively protect vulnerable civilians in post-conflict or conflict situations (where both the host state and visiting states forces are quite often under-staffed and under-equipped) thus allowing PMSCs some latitude in this regard. The idea of PMSCs using force may be distasteful, but if it is used in a regulated manner to protect the human rights of vulnerable people then it should not be prohibited.

## 3. Prohibited Activities

In general though, the Draft Convention is restrictive on the types of activities that can be carried out by PMSCs. State responsibility, and possibly individual responsibility, is engaged if PMSCs undertake functions that would either be inherently governmental per se,[29] or perform legitimately outsourced activities that violate the standards of international human rights law or, where applicable, international humanitarian law.[30] State parties are required to take such

> legislative, administrative and other measures as may be necessary to ensure that PMSCs and their personnel are held accountable for violations of applicable national or international law.[31]

Each state party is required to enact offences under national law prohibiting acts carried out by PMSCs that are either in furtherance of inherently state functions, violating international standards (under international human rights law, international criminal law and international humanitarian law), or other provisions of the Draft Convention such as those limiting the use of firearms. Furthermore, unlicensed or unauthorised PMSC activities should also be made an offence under national law.[32] As well as creating offences leading to punishment, the Draft Convention requires that state parties regulate the activities of PMSCs by adopting and implementing national legislation.[33]

In a formula common to many suppression conventions, each state party is required to establish jurisdiction over the above offences when the offence is committed within its territory, or on board a ship or aircraft registered under its laws, or when the offence is committed by its nationals, and also permits the assertion of jurisdiction when the victim is one of its nationals.[34] Furthermore, each state party is required to establish jurisdiction when the offender is present within its territory and it does not extradite such a person to

29 Article 9, Draft Convention.
30 Articles 7, 10, Draft Convention. See also Article 11 which prohibits arms trafficking by PMSCs.
31 Article 5(2), Draft Convention.
32 Article 19, Draft Convention.
33 Article 12, Draft Convention.
34 Article 21, Draft Convention.

any other state party asserting jurisdiction over such a person.[35] This *aut dedere aut judicare* approach follows the methods used in various human rights and anti-terrorists treaties, but its weakness is shown by the Lockerbie affair, where the state in which the alleged offender is found exercises only token jurisdiction over the offence. However, in contrast to the Montreal Convention in issue in the Lockerbie affair, the Draft Convention does include limited overview of national prosecutions by requiring the state in question to communicate the final outcome to the Oversight Committee that would be set up if the treaty came into force.[36] Presumably the Oversight Committee would be able to consider the efficacy and fairness of any prosecutions communicated to it under the state reporting procedure (see below).[37]

In contrast to the traditional approach to state jurisdiction, the Draft Convention is much stronger on the issue of PMSCs purporting to hide behind a cloak of immunity. Each state party is required to take measures to investigate, prosecute and punish violations and to ensure effective remedies to victims, ignoring immunity agreements when they purport to cover violations of human rights law or international humanitarian law.[38] This is clearly a response to the immunity given to PMSCs in Iraq by the Coalition Provisional Authority in the period 2004–2008,[39] which contributed significantly to the view that PMSCs escape accountability both nationally, because of their immunity, as well as internationally, due to the lack of compliance mechanisms that address the wrongdoings of non-state actors.[40]

## 4. International Supervision

Supervision and regulation of PMSCs should occur at both the international and national levels to be effective. At the international level the Draft Convention, if adopted and in force, will provide for some basic rules applicable to the activities of PMSCs and those states/organisations that employ them, and a means of supervision by a Committee on the Regulation, Oversight and Monitoring of Private Military and Security Activities (Oversight Committee).

35 Article 21(5), Draft Convention.
36 Article 27, Draft Convention.
37 Article 32, Draft Convention.
38 Article 23(1)(2), Draft Convention.
39 Coalition Provisional Authority Order 17, 27 June 2004, gave immunity to US Department of Defense Contractors (approximately 100,000 in Iraq). The Iraq/US State of Forces Agreement of 17 November 2008 stated at Article 12(2) that 'Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.' This came into force on 1 January 2009.
40 On the development of corporate social responsibility at international level, see White and MacLeod, 'EU Operations and Private Military Contractors: Issus of Corporate and Institutional Responsibility' (2008) 19 *European Journal of International Law* 965 at 977–84.

This supervisory scheme basically follows the model of various UN human rights treaties from the International Covenants of the mid-1960s onwards.

The proposed Oversight Committee, consisting of international experts,[41] shall receive reports from state parties on the legislative, judicial, and administrative or other measures they have adopted to give effect to the Draft Convention; and the Committee shall make observations and recommendations thereon.[42] Unfortunately, no provision has survived the consultation and drafting process which would have allowed the committee to issue interpretative comments on the provisions of the Convention, arguably a desirable competence given the ambiguities in the draft, for example, on the applicable rules of responsibility and imputability for actions of PMSCs employed by governments (reviewed below). In deciding not to broaden the Committee's competence, the Working Group may have been wary of it taking opportunities to comment on other instruments in its jurisprudence.

Two further proposed methods of supervision and accountability by the Oversight Committee are to be welcomed. Under an inquiry procedure, if the Committee receives reliable information which appears to contain well-founded indications of 'grave or systematic violations' of the Convention, and after receiving observations from the states where the offences occurred and where the companies are registered, it may launch a confidential inquiry undertaken by one or more members of the Committee. Such an inquiry could, with the agreement of the states concerned, undertake an onsite visit. The findings are to be transmitted to the states concerned and the proceedings will be confidential, though a summary may be given in the Committee's annual report after consulting the states concerned.[43] In another welcome proposal, if the inquiry procedure has not produced a satisfactory solution, the Draft Convention envisages the use of a Conciliation Commission of five persons drawn from the Committee and/or elsewhere, with the consent of the parties to the dispute, with a view to achieving an amicable solution on the basis of respect for the Convention.[44] Having a range of potential avenues for resolving disputes and claims may help to ensure that accountability is possible even in the most sensitive of situations. However, unfortunately, the focus of the inquiry and conciliation processes seems to be on states, and not on the victims of violations.

Having said that, in addition to a state complaints procedure,[45] which, if other human rights treaties are any guide, is unlikely to be used, the Draft Convention thankfully contains an individual and group petition procedure

41 Article 29, Draft Convention.
42 Articles 31–2, Draft Convention. The Committee is also requested to establish and maintain an international register of PMSCs: see Article 30.
43 Article 33, Draft Convention.
44 Article 35, Draft Convention.
45 Article 34, Draft Convention.

which state parties may opt in to. Individuals or groups claiming to be victims of a violation by state parties (that have indicated their consent to the process) of any of the rights contained in the Convention may bring a petition. The lack of redress against PMSCs directly in the Convention is remedied by the requirement that each party implement in its national law legislation giving effect to the Convention, thus giving complainants local remedies that must be exhausted before a complaint is made to the Committee. The Committee shall forward its suggestions and recommendations, if any, to the Party concerned and to the petitioner.[46] Though the remedy seems weak, this is standard in this type of procedure, and, given the evidence from the various UN human rights committees, can be successful if the Committee performs its tasks with impartiality and bases it decisions on accepted interpretations of international law. If the Oversight Committee establishes its legitimacy then its decisions will generally be accepted by state parties, and it will be the job of the governments of state parties to enforce these decisions against PMSCs based in or operating on their territory, or employed by them.

## 5. National Regulation

Effective regulation of PMSC activities cannot be undertaken by a UN sponsored, treaty-based Oversight Committee operating at the international level; such a body primarily facilitates the implementing of common international standards, with some limited accountability. Rather, effective control and accountability of PMSCs is dependent on a system of national regulation and enforcement. The Draft Convention requires state parties to 'establish a comprehensive domestic regime of regulation and oversight over the activities in its territory of PMSCs and their personnel including all foreign personnel, in order to prohibit and investigate illegal activities as defined by this Convention as well as by relevant national laws'.[47] To facilitate this, state parties are required to establish a register and/or a governmental body to act as a national centre for information concerning possible violations of national and international law by PMSCs. State parties shall investigate reports of violations of international humanitarian law and human rights norms by PMSCs and ensure prosecution and punishment of offenders, as well as revoking licences given under the national licensing system required by the Draft Convention.[48]

The Draft Convention envisages national licensing regimes,[49] which should cover trafficking in firearms[50] and the import and export of military and

46 Article 37, Draft Convention.
47 Article 12(1)(a), Draft Convention.
48 Article 13(1)(5)(6), Draft Convention.
49 Article 14, Draft Convention.
50 Article 11, Draft Convention.

security services,[51] but there is little detail in the Draft Convention on whether licences should be general to companies or specific to individual contracts. To avoid the development of vastly different national licensing regimes, and consequent problems of forum shopping, it may be necessary to specify some minimal conditions that rule out the possibility of a company being granted an open-ended and unsupervised licence. Such conditions may be developed in the jurisprudence of the Oversight Committee, which is required to be kept informed about licensing regimes by those parties that import or export PMSC services.[52] The requirement that state parties each have a register of PMSCs operating within their jurisdiction, and establish a governmental body responsible for its maintenance and to exercise oversight over their activities,[53] is equally lacking in detail and again could lead to a very weak system of registration and licensing.

However, what is clear from the Draft Convention is that a national (and international) system of self-regulation is not sufficient. The statement in the preamble that codes of conduct are 'not sufficient to ensure the observance of international humanitarian law and human rights law by the personnel of these companies' should be strongly supported. The position of the UK Foreign and Commonwealth Office (FCO) under the previous Government was in contradiction to this, given its strong advocacy of a code of conduct and self-regulation for the UK PMSC industry, with oversight of the code being proposed to be given to the British Association of Private Security Contractors (the industry body). As a major user of PMSCs, as well as the state of registration of a large number, the UK needs to be brought into a more effective international regime. In addition to national self-regulation, the UK FCO consultation document of 2009, and follow up documents, also envisaged a relatively weak international secretariat overseeing the implementation of the Montreux Document's non-binding norms, which is a long way from the regime proposed by the Draft Convention.[54] It remains doubtful whether the new UK coalition Government will depart from this regrettable position given both its concern for cost-cutting measures (even a minimal licensing system will be more expensive than a system of self-regulation) and its ideological support for privatisation and outsourcing.

51 Article 15, Draft Convention.
52 Article 15(3), Draft Convention.
53 Article 16, Draft Convention.
54 Foreign and Commonwealth Office, 'Consultation on Promoting High Standards of Conduct by Private Military and Security Companies Internationally' (April 2009); Foreign and Commonwealth Office, 'Public Consultation on Promoting High Standards of Conduct by Private Military and Security Companies Internationally: Summary of Responses' (December 2009); and Foreign and Commonwealth Office, 'Private Military and Security Companies: Summary of Public Consultation Working Group' (April 2010).

## 6. State Responsibility

Being treaty based, the obligations and responsibilities for the acts of PMSCs are placed largely on the shoulders of state parties, be they home, host or contracting states. However, in an unusual but welcome move, recognising their objective international legal personality as well as the fact that they increasingly are using the services of PMSCs, international organisations can also ratify the treaty and become bound by its provisions.[55] Although earlier drafts did extend their obligations to PMSCs themselves, the current Draft only applies to states and intergovernmental organisations.[56] Furthermore, the lack of direct responsibility and accountability for PMSCs in the treaty is reflected in the fact that PMSCs cannot become parties to the treaty, although they 'can communicate their support'.[57] Essentially, it is the responsibility of state parties to ensure the liability of PMSCs for the commission of the offences identified under the Draft Convention, and further that any legal persons held liable under national laws 'are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including fines, economic sanctions, prohibitions of further employment, obligation to provide restitution and/or compensation of victims'.[58]

The emphasis on state responsibility in the Draft Convention is focused further in Article 4(1), which provides that 'each State party bears responsibility for the military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the state'. Thus host and home states seem to bear responsibility for PMSC activities within their jurisdiction, but the Draft Convention does not go into secondary levels of responsibility to consider when those activities turn out to be violations of international law whether the state should be responsible for the acts themselves, or for failing to act diligently to prevent their commission. The Drafters are content to refer to the International Law Commission's (ILC) Articles on State Responsibility of 2001 in the preamble and so could be said to have incorporated the secondary rules of responsibility (particularly those concerning attribution of conduct) into the Convention. On the issue of attribution, according to the ILC's Articles wrongful acts of private actors can be attributed to a state either when such actors are empowered by that state to 'exercise elements of governmental authority', or when they are 'acting under the instructions of, or under the direction or control of, that State in carrying

55 Articles 40–2, Draft Convention.
56 Report of the Working Group 2010, supra n 11 at para 75, where the Working Group stated that the 'key responsibility should lie with the State parties to the convention and the intergovernmental organizations that would adhere to the instrument'.
57 Article 41(2), Draft Convention.
58 Article 20, Draft Convention.

out the conduct'.[59] Given that the Draft Convention seems to prohibit the former, providing that 'no State party can delegate or outsource inherently State functions to PMSCs',[60] those states contracting with PMSCs would appear to be only directly responsible for the acts of PMSCs when they are acting under the instructions, or direction or control, of the state. In these circumstances, it is difficult to see how the host or home states can be held responsible for the wrongful acts of PMSCs above the level of a due diligence test that applies to the protection of all human rights laws within their territories.

Though the Draft Convention is silent on the issue of due diligence obligations of state parties, it is worthwhile speculating on the duties of the home, host and contracting states, given that, for the Convention to work, the Oversight Committee will have to develop its jurisprudence to identify precisely when and how such states are responsible for the wrongdoings of PMSCs. Arguably, it is inadequate for the Draft Convention simply to provide that each state party is responsible for the military and security activities of PMSCs registered or operating in their jurisdiction.[61] Admittedly, the Draft Convention's provisions on licensing and regulation, as well as punishment, at the national level can be said to enable states to fulfil their due diligence obligations to ensure to the best of their abilities that private actors within their territory are not violating human rights, but it is still useful to unearth the conceptual basis of those obligations under international law.

First, applying the well-known principle of international law identified by the International Court of Justice in the *Corfu Channel Case*,[62] the home state in which the PMSC is based should be responsible for knowingly allowing its territory to be used for unlawful acts against or in other states. Thus, if the UK has information that one of the many PMSCs with headquarters in the UK has engaged, or is likely to engage, in conduct that will violate international law, then it has breached this obligation towards the state in which the violations have occurred, and the individuals who have been injured therein.

Second, under the well-established principle established by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case, the host state, where private actors operate, has an obligation to exercise due diligence to protect anyone within its jurisdiction from human rights abuse whether committed by state agents or private actors. As the Court stated:

> an illegal act which violates human rights and which is . . . not directly imputable to a State (for example, because it is the act of a private

59 Articles 5 and 8, ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001, Report of the International Law Commission on the work of its fifty-third session, A/56/10, at ch.IV.E.1 (2001).
60 Article 4(3), Draft Convention.
61 Article 4(1), Draft Convention.
62 Merits, ICJ Reports 1949 4 at 22.

> person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[63]

Admittedly, many host states will be in the post-conflict stage and weak, but they must not turn a blind eye to human rights abuses by private actors acting within their territory, and therefore must try to bring the perpetrators to justice. Third, in relation to those states contracting with PMSCs, in addition to directly imputable acts discussed above, according to the Committee on Economic, Social and Cultural Rights such states have a duty to 'prevent third parties from violating' rights 'in other countries, if they are able to influence these parties by way of legal or political means'.[64] Although this was stated in a General Comment on the right to health, there is no reason why this should not be applicable to other human rights abuses committed by private actors. Certainly, the moral argument is strong, but the precedential value of the Committee's Comment may not be fully accepted outside that context. If a state is going to contract with a PMSC to help its troops in a foreign country, it should be prepared to ensure to the best of its ability that those contractors do not commit human rights abuses in that country. The Draft Convention does go some way towards this when it requires that state parties ensure that any contracted PMSCs are 'trained in and respect international human rights and international humanitarian law'.[65]

It is argued here that due diligence obligations are necessary particularly when the contracting state does not itself assert effective national jurisdiction over such actors, beyond the enforcement of its contractual rights. This obligation would be strengthened further when the contracting state knows that the host state has a weak judicial system and enforcement mechanisms. Given that it is the contracting state that is responsible for the presence of PMSCs on the territory of another state, it would be incongruous for it not to have due diligence obligations when both the home and host state do. It might be argued further that, before it contracts with a PMSC for services to be rendered in the host state, the contracting state has a duty to ensure that the host state has satisfactory laws, courts and enforcement mechanisms for holding PMSCs to account for human rights abuse if it is not prepared to assert jurisdiction over them itself. If these guarantees are not present then the state should not contract with the PMSC in question.

63 IACtHR Series C 4 (1988) at para 172.

64 General Comment No 14: The right to the highest attainable standard of health (art. 12), 11 August 2000, E/C.12/2000/4 (2000); 8 IHRR 1 (2001), at para 39. See Nolan, 'The Nexus between Human Rights and Business: Defining the Sphere of Corporate Responsibility', in Farrall and Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge: Cambridge University Press, 2009) 217 at 220.

65 Article 4(2), Draft Convention.

However, while it is possible with varying degree of certainty to identify these obligations on home, host and contracting states, neither the Montreux process nor the Draft Convention makes a great deal of progress towards implementing them. Indeed, the Draft Convention's mention of 'due diligence' is in relation to state parties ensuring that PMSCs 'apply due diligence to ensure that their activities do not contribute directly or indirectly to violations of human rights and international humanitarian law'.[66] While there is increasing recognition that corporate actors have 'due diligence' obligations under human rights law,[67] they already exist under international law for states. The principles of state responsibility are notoriously abstract and do not concern themselves with practical means and methods of implementation and enforcement. It is one thing to say that states are responsible for wrongful acts committed by them, or responsible in certain circumstances for failing to prevent the wrongful acts of private actors, but it is altogether far more difficult to make such liability stick at the international level. However, the Montreux Document does contain clauses that in effect recognise due diligence obligations,[68] as well as the imputation of conduct to a state on the basis of PMSCs exercising elements of governmental authority, or acting under the instructions or direction or control of a state.[69]

## 7. Right to an Effective Remedy

The preamble of the Draft Convention states that:

> the victims of violations of international humanitarian and human rights [laws] committed by the personnel of PMSCs, including but not limited to extrajudicial, summary or arbitrary executions, disappearances, torture, arbitrary detention, forced displacement, trafficking in persons, confiscation or destruction of private property, right to privacy, have the right to a comprehensive and effective remedy in accordance with international law.[70]

As discussed in Sections 4 and 5, the Draft Convention generally envisages that such remedies will be found in the national systems of the contracting parties, with the Oversight Committee ensuring this through state reports and, where applicable, by allowing individual petitions. It is arguable whether these together represent an 'effective remedy'. While generous in its creation of

66 Article 7(2), Draft Convention.
67 John Ruggie, UN Special Representative for Business and Human Rights, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', 7 April 2008, A/HRC/8/5 (2008).
68 Montreux Document, supra n 5 at Part I, paras 4, 10 and 15.
69 Ibid. at Part I, para 7(c)(d).
70 Preamble at 15, Draft Convention.

a number of techniques and mechanisms of oversight and dispute settlement, the Draft Convention's protection of the individual victim is still premised on the traditional paradigm of gaining the consent of states to an optional petition procedure at the international level, as a supplement to remedies that the victim should gain (if the Convention is in force for the state in question) before national courts and mechanisms. Bearing in mind that violations will be committed by PMSCs and therefore non-state actors, such state-focused mechanisms at the international level do not provide enough coverage so as to allow victims to seek effective remedies denied to them at national level.

Given the weaknesses of many national legal systems, the victims of human rights violations at the hands of PMSCs should have direct access to justice, using models such as the Kosovo Ombudsman, the office of the ombudsperson created by the Security Council for individuals targeted by sanctions,[71] or the World Bank Inspection Panel. The creation of an ombudsman-type mechanism would add another layer of accountability to those proposed by the Draft Convention, but it would guarantee that victims have the opportunity to access justice. If included, along with the other proposed mechanisms of dispute settlement outlined in the Draft Convention, this would represent a genuine attempt to take a human rights approach to regulate a growing problem. As it is, there is a recognition in the Draft Convention that a remedial mechanism is required at the international level, but it takes the form of a provision that requires states to 'consider establishing an international Fund to be administered by the Secretary General to provide reparation to victims of offences under this Convention and/or assist in their rehabilitation'.[72] This seems a long way from an effective remedial system, but it would be a start.

## 8. Conclusion

The Draft Convention was forwarded by the UN Working Group on the Use of Mercenaries for consideration by the Human Rights Council at its 15th session in September 2010. Overall, the Draft Convention constitutes a reasonable basis on which to address the growing use of PMSCs in conflict and post-conflict zones around the world. Structurally, the Draft Convention reflects the weaknesses of international law in not addressing PMSCs themselves, instead it attaches obligations to those states contracting with PMSCs or having them on their territories (either as home states or host states). Furthermore, it fails to fully reflect the growing recognition of the need to

71 SC Res 1904, On continuation of measures imposed against the Taliban and Al-Qaida, 17 December 2009, S/RES/1904 (2009).

72 Article 28, Draft Convention.

have credible access to justice for individual victims;[73] in this case, victims of human rights violations at the hands of PMSCs, reflecting a traditional approach to the position of individuals in the international legal order, although the Draft Convention's optional complaint system is to be welcomed as is the suggested creation of a compensation fund.

The real problem though lies in the Draft Convention's chances of success when faced with the Montreux Document and ongoing process. There are some real incompatibilities between the substantive provisions (especially as regards the disagreement as to what can be outsourced to PMSCs) as well as the form of the two international instruments. There is a danger that international hard (treaty) law if it is adopted will attract a different clientele of states than the soft law of the Montreux process. States connected to the PMSC industry are more likely to stick with and entrench the Montreux process, and those opposed to PMSCs as a modern form of mercenarism are more likely to support the Draft Convention process. It may be possible to bridge the divide if the Montreux process develops its recent focus on promulgating codes of conduct for the PMSC industry, in effect attempting to impose due diligence obligations on PMSCs, leaving the identification and development of state obligations and responsibilities including ones of due diligence to the Draft Convention process. It is too early to predict whether such synergy between the two international processes will develop.

The debates in the Human Rights Council in September and October 2010 on the Working Group's report and Draft Convention were not encouraging in this regard, although ultimately the Draft Convention, or at least a process for its further development, survived. On 1 October 2010, the Human Rights Council adopted a Resolution by 32 votes to 12 with three abstentions establishing an intergovernmental open-ended working group to elaborate a legally binding instrument on the regulation, monitoring and oversight of the impact of the activities of PMSCs on the enjoyment of human rights, on the basis of the Draft Convention proposed by the Working Group.[74] Most developing states on the Council, including those representing the African Group and the Organization of Islamic Conference, but also Russia and China, supported the Working Group's report and the idea of a binding treaty on the international regulation and monitoring of PMSCs, pointing in support to both the unwillingness of states to accept responsibility for PMSCs and the lack of accountability when human rights abuse has been committed by such contractors. There was strong opposition from the US and the UK, as well as the EU. These

73 See generally, Francioni (ed), *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007).

74 27 September 2010, A/HRC/15/L.22. For a summary of the Human Rights Council meeting and voting, see Press Release of 1 October 2010, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10407&LangID=E [last accessed 23 November 2010].

objections were based on questioning the need for a new treaty given the existence of international standards and initiatives (clearly meaning the Montreux process), as well as objecting to the Council's competence over a matter which was not centrally one of human rights.[75] In a separate but related issue, these states clearly did not like the link between PMSCs and mercenaries made in the resolution extending the mandate of the Working Group adopted on 30 September 2010.[76] Thus, the prospect of a human rights-focused treaty on PMSCs remains, but the debates in the Council reflect deep ideological and political differences on the role of private contractors that will prove very difficult to overcome.

75 See summary of Human Rights Council debates in Press Releases of 14 September 2010, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10327&LangID=E [last accessed 23 November 2010] and http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10328&LangID=E [last accessed 23 November 2010].

76 A/HRC/15/L.31, adopted by 31 votes to 13 with three abstentions: see Press Release of 30 September 2010, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10398&LangID=E [last accessed 23 November 2010].