REGULATING THE BUSINESS ACTIVITIES OF PRIVATE MILITARY AND SECURITY COMPANIES UNDER INTERNATIONAL LAW

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ABSTRACT

In recent years jurists started to discuss the legal consequences of Private Military and Security Companies' (PMSCs) employees misconduct and the international law options of regulation. This discussion was highly motivated by the incidents occurred at the Abu Ghraib Prison, Nissor Square and the killings of Blackwater contractors in Fallujah. The existing law have been inapplicable and inadequate to address the international humanitarian law (IHL) and human rights law (HRL) violations committed by private contractors and further debate on the issue is necessary. This article seeks to discuss the existing regulation options and current efforts on regulating private contractors' activities. Three main issues will be addressed: first, whether or not self-regulation is an alternative; second, national attempts at regulations and; third, the current state of development of regulation on regional and international levels. The conclusion is that only through a multi-layered approach and joint effort (from national, regional and international levels), regulation addressing the industry and implementation will be able to succeed.

Keywords: private military and security companies, state responsibility, human rights violations, self-regulation, Montreux Document.

RESUMO

Nos últimos anos, juristas começaram a discutir as consequências jurídicas do mau comportamento de empregados das empresas privadas militares e de segurança (EPMS) e as opções de regulação do direito internacional. Essa discussão foi altamente motivada pelos incidentes ocorridos na prisão de Abu Ghraib, na Praça Nissor e os assassinatos de empregados da empresa Blackwater em Fallujah. A lei existente mostrou-se inaplicável e inadequada para tratar de violações do Direito Internacional Humanitário (DIH) e Direito dos Direitos Humanos (HRL) cometidas por empreiteiros privados e por isso promover o debate sobre a questão é necessário. Este artigo busca discutir as opções de regulação existentes e os esforços atuais para promover a regulamentação das atividades dos empreiteiros privados. Três questões

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principais serão abordadas: em primeiro lugar, busca-se verificar se a auto-regulação é ou não uma alternativa; em segundo lugar, as tentativas nacionais em regulamentos e ; terceiro, o estado atual de desenvolvimento da regulamentação em nível regional e internacional. A conclusão é que somente através de uma abordagem multi-camadas e esforço conjunto (em nivel nacionais, regionais e internacionais), a regulamentação direcionada à indústria e a implementação podem ter sucesso.

Palavras-Chave: empresas militares e de segurança privada, responsabilidade do Estado, violações de direitos humanos, auto-regulação, Documento de Montreux.

SUMMARY: 1.Introdução. 2. Is self-regulation an option? 3. Merits and shortcomings of domestic regulations. 4.Current developments on regional and international legal framework. 4.1. The regulation on regional level. 4.2 The contributions of the Montreux Document on PMSCs regulation. 4.2.1 The Montreux Document. 4.3 The first attempt at an international treaty: The draft of a possible Convention on Private Military and Security Companies (PMSCs). 5. Final Remarks

INTRODUCTION

Given the projected growth of private contractors industry since the end of the Cold War, international scholars have mainly focused the discussion on the definitional issues and legitimacy of private military and security companies (PMSCs) activities. [2] However, in recent years jurists evolved the discussion to include the legal consequences of PMSCs' employees misconduct and the international law options of regulation. This sudden evolution was highly motivated by the incidents occurred at the Abu Ghraib prison, Nissor Square and the killing of Blackwater contractors in Fallujah.[3]

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[2] Confusion still remains in determining what precisely constitutes a private company, and several terms are used to describe them, such as, private security companies (PSCs), private military companies (PMCs) and private military and security companies (PMSCs).The difficulty in building a concept of private companies relates to the fact that they are different from each other and that they provide several services in different areas of expertise for diversified clients. For instance, the defunct Executive Outcomes and Sandline offered direct combat services, while MPRI provides advisory and strategic military analysis; Kellogg, Brown & Root provides supportive and logistic services and Medical Support Solutions is a field medicine firm capable of operating in conflict situations. The definition provided by the Montreux Document, item 9 (a) on the Preface seems to be more appropriate because it defines private contractors generically, without being tied to a strict delimitation between military and security companies: "PMSCs are business entities that provide military and/or security services, irrespective of how they describe themselves. 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 weapons systems; prisoner detention; and advice to or training of local forces and security personnel." For a comprehensive discussion on the subject see: CALAZANS, Érika L. B..The Legal Status of Private Military and Security Companies Employees Under International Humanitarian Law. Anuário Brasileiro de Direito Internacional, v. VI, p. 149-180, 2011.

[3] In 2004, gross human rights violations took place inside the Abu Ghraib prison, with the involvement of

The existing law face challenges posed by the violations and abuses of International Humanitarian Law (IHL) and Human Rights Law (HRL) committed by private contractors, and this scenario led some authors to suggest that PMSCs operates in a “legal vacuum”.[4]

The idea of “legal vacuum” comes from the inapplicability and inadequacy of the international treaties addressing mercenaries to the case of PMSCs personnel.[5] Therefore, further debate and improvements on regulation are needed.

This paper will attempt to discuss the options of regulation and the current efforts on regulating the private military and security industry. Three main issues will be addressed: first, whether or not self-regulation is an alternative; second, national attempts at legal regulations and third the current state of development of regulation on regional and international levels. The conclusion is that only through a multi-layered approach and joint effort (from national, regional and international levels), regulation addressing the industry and implementation will be able to succeed.

I. **IS SELF-REGULATION AN ALTERNATIVE?**

The aim of this section is to discuss the current development of self-regulation within the PMSCs industry, namely the implementation of Codes of Conduct (CoC). It will be discussed whether or not self-regulation is a viable alternative to improve compliance and accountability of PMSCs on international level.

The PMSCs initiative on self-regulation is based on voluntary principles, which means that no external public authority imposes regulations, instead companies willingly submit to them.[6] Codes of conduct represent a form of self-regulation based on best practices and ethics declarations with the purpose to oblige PMSCs to comply with IHL rules and human rights standards.[7]

According to Professor Nils Rosemann, codes of conduct can be defined as “self-imposed corporate obligations for the adoption of normative, and therefore not

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Titan and CIAC’s employees. The human rights violations included torture, rape, sodomy and murder of Iraqi prisoners. On March 31, 2004 four employees of Blackwater were killed by small arms fire while driving through Fallujah. Their bodies were then taken out of their convoy and mutilated by Iraqis. Images of two corpses of the private contractors hanging over the Euphrates River were sent all over the world. Blackwater then faced a lawsuit filed by the victims’ families claiming that the company was responsible for their deaths.

[4] SINGER, Peter Warren, ‘War Profits and the Vacuum of law: Privatized Military Firms and International Law’ (2004) 42 [521] *Columbia Journal of transnational law*, p.521-550.

[5] CUSUMANO, Eugenio, ‘Regulating private military and security companies: a multifaceted and multilayered approach’ (2010) *EUI working papers*, PRIV-WAR project.

[6] HOPPE, Carsten; QUIRICO, Ottavio, ‘Codes of Conduct for Private Military and Security Companies’ in FRANCIONI, Francesco; Ronzitti, Natalino (eds.) *War by contract: human rights, humanitarian law and private contractors* (2011), 363.

[7] ROSEMANN, Nils, ‘Code of Conduct: tool for self-regulation for Private Military and Security Companies’ (2008) 15 Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper, 5.

necessarily legally enforceable, standards which are not part of the original core business objectives of the company."[8] In other words, these mechanisms do not carry the force of law and compliance is voluntary. Codes of conduct are not elaborated to replace existing obligations, but to complement them, including obligations that companies may otherwise not be formally required to support. In this way, CoC can be helpful means to increase legitimacy and accountability of PMSCs on international level. [9]

The industry has already presented several initiatives from individual level to major industry associations, and also in partnership with states and NGOs. For instance, Dyncorp,[10] Xe[11] and Control Risk Group;[12] have established their own codes of conduct; the British Association of Private Security Companies (BAPSC)[13] and its Charter[14] represents the CoC of affiliated British companies, the Australia Security Industry Association Ltd (ASIAL) has also established a code of conduct.[15] On international level, there are several initiatives such as the Voluntary Principles on Security and Human Rights (VPSHR)[16], the Sarajevo Code of Conduct for Private Security Companies, [17] and the International Stability Operations Association (ISOA)[18] Code of Conduct.[19] On regional level, the Confederation of European

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[8] Ibid.

[9] HOLMQVIST, Caroline, 'Private security companies: the case for regulation' (2005) 9 *SIPRI* Policy Paper, 46.

[10] See Dyncorp Code of ethics. <http://www.dyn-intl.com/code-of-ethics.aspx> at 29 July 2011.

[11] See Xe Company code of conduct. < http://www.xecompany.com> at 29 July 2011.

[12] See Control Risks website <http://www.controlrisks.com> at 29 July 2011.

[13] The British Association of Private Security Companies (BAPSC) was constituted as a recommendation of the British Government through the Green Paper on PMSCs. See the Green Paper on PMSCs: options for regulation (2002). Available at: <http://www.fco.gov.uk> Last visited on: Jult 29,2011.

[14] British Association of Private Security Companies Charter <http://www.bapsc.org.uk/key_documents-charter.asp> at 28 July 2011.

[15] ASIAL Code of conduct <http://www.asial.com.au/Codeofconduct> at 10 August 2011.

[16] The Voluntary Principles on Security and Human Rights (VPSHR) are standards of corporate social responsibility and human rights elaborated in a partnership between the governments of the United States, the United Kingdom, Norway, the Netherlands, Canada, Colombia and Switzerland and companies operating in the extractive and energy sectors and non-governmental organizations. The NGOs are Amnesty International, The Fund for Peace, Human Rights Watch, Human Rights First, International Alert, IKV Pax Christi, Oxfam, Pact, Searhc for common Ground. Additionally, the VPSHR count with the International Committee of the Red Cross, International Council on Mining & Metal and International Petroleum Industry Environmental Conservation Association as organizations with observer status. <http://www.state.gov/www/global/human_rights/001220_fsdrl_principles.html> at 28 July 2011.

[17] The Sarajevo Code of Conduct for Private Security Companies is a set of rules elaborated by companies, its clients, NGOs and governmental agencies. The Sarajevo CoC represents the most advanced set of rules specifically addressing the industry Available at: < http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=124863> Last visited on: July 28,2011.

[18] The International Stability Operations Association (ISOA) was founded in 2001 as International Peace Operations Association (IPOA) and than changed into ISOA.

[19] ISOA Principles of conduct is currently on version 12, adopted on February 11, 2009. Available at:< http://www.stability-operations.org/ > Last visited on: July 15, 2011.

Security Services (CoESS) and the Trade Union Federation, Uni-Europa[20] issued a CoC for the private security sector.[21]

Most Codes of Conduct in the PMSC industry address the issues of transparency, accountability, relationship with clients, personnel protection and employees' safety, IHL norms and human rights standards. For instance, the ISOA Code of Conduct 2009 [22] requires affiliated companies to "refuse to engage any unlawful clients or clients who are actively thwarting international efforts towards peace."[23] Regarding the issue of transparency, the Saravejo CoC requires companies to register employees and make background checks in order to achieve high standards of employees. [24] Concerning the issue of human rights, the VPSHR demands that firms shall not employ individuals implicated in human rights abuses to provide private security services, and companies must respect the human rights instruments, such as the Universal Declaration of Human Rights (UDHR).[25]

Regarding the training and knowledge of IHL and HRL standards, the Private Security Association of Iraq (PSAI) Charter on Article 48, item f[26] require companies to abide by the rules for the use of force in accordance with the Laws of Iraq and Laws of armed conflict and all security personnel must be trained on these regulations. This illustrates that PMSCs codes of conduct tend to recall rules of other legal instruments, following common patterns of national and international law, human rights and recognized ethical rules.[27]

Although the present efforts within PMSC industry address some important problems as suggested by the examples above, several codes of conduct only offer general statements of existing rules under international law with no further explanation on enforcement mechanisms. For instance, the BAPSC Charter has no specific mechanism of enforcement and there is no formalized way of addressing

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[20] CoEss/Uni-Europa, Code of conduct and Ethics for the Private Security Sector. Available at: <http://www.coess.org> Last visited on: July 29, 2011.

[21] HOPPE, Carsten; QUIRICO, Ottavio, 'Codes of Conduct for Private Military and Security Companies' in Francioni, Francesco; RONZITTI, Natalino (eds.) *War by contract: human rights, humanitarian law and private contractors* (2011), 365.

[22] The International Stability Operations Association (ISOA) was founded in 2001 as International Peace Operations Association (IPOA) and than changed into ISOA.

[23] ISOA Code of Conduct, item 4.2.

[24] See Saravejo CoC, item 2.4.

[25] According to the VPSHR, "risk assessments should consider the available human rights records of public security forces, paramilitaries, local and national law enforcement, as well as the reputation of private security. Awareness of past abuses and allegations can help Companies to avoid recurrences as well as to promote accountability." < http://www.voluntaryprinciples.org/principles/risk_assessment> at 22 October 2014.

[26] "Article 48: The Members of the PSCAI: (…) f. will comply with the Rules for the Use of Force as defined within the Laws of Iraq and Laws of Armed Conflict, ensuring all security staff are trained in these regulations". PSCAI Charter, < http://www.pscai.org/> at 29 July 2011.

[27] HOPPE, Carsten; QUIRICO, Ottavio, 'Codes of Conduct for Private Military and Security Companies' in Francioni, Francesco; RONZITTI, Natalino (eds.) *War by contract: human rights, humanitarian law and private contractors* (2011), 372. See also ISOA CoC, Preamble.

complaints; lacking external mechanisms.[28] On the other hand, the ISOA Code of Conduct presents an elaborated and strict enforcement mechanism, following a very different model from the BAPSC's Charter. The ISOA Principles of Conduct, version 12 of 2009 on item 11.4 regarding the application and enforcement of the CoC states:

> Signatories shall have an effective mechanism for personnel to internally report suspected breaches of international humanitarian law and human rights law and violations of other applicable laws or the ISOA Code of Conduct (…)."[29]

The text recognizes the necessity of an effective mechanism for reporting misconducts and violations, but has been criticized by some scholars. Professor Eugenio Cusumano comments that the ISOA CoC system face two major problems: first, the members have no obligation to provide information, documents or cooperate with the investigation; and second, the absence of monitoring mechanisms outside the industry[30] jeopardize credibility of the oversight mechanism.[31]

Any Code of Conduct must be based on defined ideas taking under consideration their potential or actual impact on IHL and HR, [32] and if a CoC is created on concrete norms, consequences for violations can be more easily determined. Still, the binding nature of these norms of conduct will depend on monitoring mechanisms and how penalties are executed on corporate level.[33]

At the moment the enforcement mechanisms present in the industry are mostly based on the market, which includes market pressure and/or public opinion. Market mechanisms are helpful to encourage companies complying with CoC due to the risk of damaging its reputation and losing contracts. However, the reputation and affiliation are not necessarily important to companies and clients. For instance, Aegis is the company that was able to renew the most important CPA contract in Iraq even though it is not a member of ISOA. [34]

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[28] See BAPSC Charter. The only mechanism offering incentive for compliance is the membership criteria put forward in the charter.

[29] See ISOA Code of Conduct, version 12, adopted on February 12, 2009. Available at:< http://www.stability-operations.org/ > Last visited on: July 15, 2011.

[30] The ISOA Enforcement Mechanism is overseen by the Standard Committee of International Peace Operation Association (SCIPOA).

[31] CUSUMANO, Eugenio, 'Regulating private military and security companies: a multifaceted and multilayered approach' (2010) *EUI working papers*, PRIV-WAR project, 13.

[32] ROSEMANN, Nils, 'Code of Conduct: tool for self-regulation for Private Military and Security Companies' (2008) 15 Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper, 5.

[33] ROSEMANN, Nils, 'Code of Conduct: tool for self-regulation for Private Military and Security Companies' (2008) 15 Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper, p.6.

[34] ALEXANDER, K. and WHITER N, 'The regulatory context of private military and security services in the UK' (2009) Priv-War National Report. <http://www.priv-war.eu/publications> at 23 October 2011.

Professor Hoppe and Professor Quirico point out that clients have a key role to play on how PMSCs actually develop their activities. PMSCs actions will depend on the value clients put on compliance with human rights or international humanitarian law obligations expressed on codes of conduct and on the market power to bargain for theses obligations with the companies.[35] From this reasoning it is possible to infer that state, differently from other clients have the power to bargain for effective human rights standards and IHL protection. As previously discussed, states may be held internationally responsible for violations of the norms, which may provide stimulus to act. [36]

Furthermore, Professor Hoppe and Professor Quirico defends that there is no means to a CoC be effective if both the act to committing to it and the compliance are entirely voluntary and breaches remain without consequence.[37] A way to remedy this situation is to oblige companies the affiliation to an association and comply with its charter in order to develop its activities. Another enforcement mechanism is bidding the CoC to contracts with clients, which would make the firm face contractual penalties and other legal consequences for breaching contractual clauses.

Additionally, Professor Caroline Holmqvist argues “a more comprehensive way of approaching self-regulation of private security industry is through models that target industry actors but are binding at the state level.”[38] Indeed, the implementation of the voluntary compliance through state national legislation would bring more effectiveness to the initiative. Codes of Conduct correctly put into effect can help overcome difficulties in the application of human rights norms and international humanitarian law, which usually occurs due to a failure in the implementation and enforcement of existing norms.

Still, CoC enforcement is challenged by the difficulty of monitoring the conduct of PMSCs employees developing activities in conflict zones. The closer the activity is from the hearth of battle, more affected the monitoring will be; on the other hand indoors activities, i.e. detention services; are easier to supervise. Consequently, the financial burden to ensure monitoring can become too high.[39]

States and the industry itself already recognize that self-regulation should be

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[35] HOPPE, Carsten; QUIRICO, Ottavio, ‘Codes of Conduct for Private Military and Security Companies’ in Francioni, Francesco; RONZITTI, Natalino (eds.) *War by contract: human rights, humanitarian law and private contractors* (2011),.375.

[36] See HOPPE, C. Passing the buck: state responsibility for private military companies. In: European Journal of International Law, 2008, pp.989-1014

[37] HOPPE, Carsten; QUIRICO, Ottavio, ‘Codes of Conduct for Private Military and Security Companies’ in FRANCIONI, Francesco; RONZITTI, Natalino (eds.) *War by contract: human rights, humanitarian law and private contractors* (2011), 373.

[38] Caroline Holmqvist gives the example of the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, which is general to all corporate actors and the Kimberley Certification Process as biding instruments on state level. Holmqvist, Caroline, ‘Private security companies: the case for regulation’ (2005) 9 SIPRI Policy Paper.47-48.

[39] HOPPE, Carsten; Quirico, Ottavio, ‘Codes of Conduct for Private Military and Security Companies’ in FRANCIONI, Francesco; RONZITTI, Natalino (eds.) *War by contract: human rights, humanitarian law and private contractors* (2011), 377.

an overlapping form of regulation with national and international initiatives. Therefore, regulation mechanisms should complement the national and international legislation in order to efficiently address and control PMSCs operations. For instance, the British government[40] and the British Association of Private Security Companies (BAPSC) recognizes the importance to international standards to bring respectability and legitimacy to PMSCs and "argues that self-regulation has the potential to be an efficient and effective means of social control but must be complemented by national or international regulatory schemes with the necessary political will to cooperate."[41]

Some authors, such as Professor James Cockayne recognizes that the industry attempts to develop standards, but these efforts have done "little to ensure effective remedying of human rights violations by industry actors."[42] Indeed, the CoC have not yet made any impact on the corporations and employees conduct. In fact, PMSCs efforts have not overcome the general impression of poor regulation and lack of respect for international standards.[43]

Recently, a project of a universal, common code of conduct for PMSCs have been put forward, [44] providing a possible solution to the multiplication of voluntary norms which creates a fragmented regulation.[45] In fact, on November 9, 2010 took place a signatory ceremony with 58 companies signing the International Code of Conduct and today the document counts with 166 signatures.[46] The industry became aware of the importance of ethical standards due to the public reaction to gross human rights violations such as the killings at Nisoor Square in September 2007.[47]

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[40] Consultation Document: Consultation on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally. Available at: <http://www.fco.gov.uk/resources/en/pdf/4103709/5476465/5550005/pmsc-public-consultation> Last visited on: July 15,2011. See also Impact Assessment on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally, UK Foreign and Commonwealth Office, April 2009. Available at: < www.fco.gov.uk/resources/en/pdf/4103709/5476465/5550005/pmsc-impact-assessment> Last visited on: July 15,2011.

[41] Alexander, Kerry and White, Nigel. National Report Series 01/09. The Regulatory Context of Private Military and Security Services in the UK, PRIV-WAR Project, University of Sheffield, June 30, 2009, p. 17.

[42] COCKAYNE, James; MEARS, Emily Speers; CHERVENA, Iveta; GURIN, Alison; OVIEDO, Sheila and YAEGER, Dylan. Beyond marke forces: regulating the global security industry. International Peace Institute 2009, p. 43.

[43] Professor James Cockayne also believes that in some instances the conduct of PMSCs and their Coc have contributed to the idea of impunity and lack of regulation. COCKAYNE, James; MEARS, Emily Speers; CHERVENA, Iveta; GURIN, Alison; OVIEDO, Sheila and YAEGER, Dylan. Beyond marke forces: regulating the global security industry. International Peace Institute 2009, p.43-44.

[44] ROSEMANN, Nils. Code of Conduct: tool for self-regulation for Private Military and Security Companies. Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper, no. 15, 2008,pp.42-51.

[45] HOPPE, Carsten; Quirico, Ottavio, 'Codes of Conduct for Private Military and Security Companies' in FRANCIONI, Francesco; RONZITTI, Natalino (eds.) *War by contract: human rights, humanitarian law and private contractors* (2011), 363-364.

[46] On 1 August 2011 a list of 166 companies that signed the document have been released < http://www.icoc-psp.org/> at 10 August 2011.

[47] Ibid, note 41, p.44.

Meaningful efforts towards self-regulation can be found and can be taken seriously, such as the International Code of Conduct for Private Security Service Providers (ICoC), developed by the private security industry in cooperation with the Swiss government, helped by the Geneva Centre for Democratic Control of Armed Forces (DCAF) and Geneva Academy of International Humanitarian Law and Human Rights (ADH), which was well received by the industry itself, as 166 companies already signed the document.[48] The ICoC was based on international human rights and humanitarian law with the objective to set high standards over corporate practices. Still, the organizers of the ICoC recognize that it will only be successful if it can be "independently and effectively enforced."[49]

In order to be effective, any CoC elaborated by the industry must be based on IHL and HRL and overseen by an independent institution, with sufficient means to hold companies responsible for violations. Only through enforcement mechanisms going beyond the market, CoC will be able complement and fulfill gaps of national and international regulations.

II. MERITS AND SHORTCOMINGS OF DOMESTIC REGULATIONS

At this point it is clear that states have recognized the potential utility of PMSCs as supporters of armed forces or as means to implement policies in other countries, such as, United States in Iraq and Afghanistan. Several countries already have enacted specific legislation addressing the PMSCs industry. For instance, the most prominent host states' regulations are from United States and South Africa[50]; United States is also a major contracting state, while Iraq and Sierra Leone are both territorial states will specific regulations addressing private contractors.[51] Still, most national laws ignores the existence of PMSCs, focusing only on prohibiting the recruitment of mercenaries in national territory and the participation of national citizen in foreign armed forces.

In general, national legislations predict the registration of PMSC with the competent authorities; establish license regimes; determinate some measures to ensure transparency and accountability, predict insurance coverage, code of conduct and financial security.[52] Still, they are not able to abolish the lack of supervision over and accountability of PMSCs employees. For instance, South Africa's Regulation of

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[48] Fact Sheet, International Code of Conduct for private security service providers (ICoC), DCAF, ADH, Confederation Suisse, p.1.
[49] Ibid, p. 2.
[50] United States adopted in 1998 the International Traffic in Arms Regulation (ITAR) and also 1998 South Africa adopted the Foreign Military Assistance Act (FMAA)
[51] The Coalition Provisional Authority adopted Iraq's law in 2004 (CPA Memorandum 17: Registration Requirements for Private Security Companies, June 26, 2004). In 2002, Sierra Leone adopted the National Security and Control Intelligence Act, and Section 19 is dedicated to PMSCs.
[52] PARKER, Sarah, 'Handle with care: private security companies in Timor-Leste' (2009) Small Arms Survey, 6.

Foreign Military Assistance Act (FMAA) of 1998[53], which was produced as a response to the growing number of private military companies in South Africa, such as Executive Outcomes (EO), represents a theoretical advance, but in practice brought no real improvement to the regulatory context of PMSCs industry.[54]

The Regulation of Foreign Military Assistance Act (FMAA) was enacted with two objectives: ban mercenary activity[55] and regulate military assistance abroad.[56] Therefore, the recruit, use or train of persons for the direct participation in hostilities or as for the development of mercenary activities is prohibited and considered an offense. Additionally, providing foreign military assistance or security services to any party involved on an armed conflict is only permitted with the authorization of the National Conventional Arms Control Committee (NCACC).[57]

According to paragraph 9 of the FMAA, South African courts have the authority to try a citizen, a permanent resident or a company, for any violation of the provisions of the FMAA, regardless of where it took place.[58] The Act even predicts penalties such as fines and imprisonment for the offenders.[59] Still, the FMAA enforcement has been considerably limited, in fact, only a few numbers of offenders have been convicted and the penalties were considered too low. For instance, in 2003 Richard Rouget and Carl Alberts were connected with mercenary activities in Côte d'Ivoire. The first was condemned for mercenary activity with a fine of 10,000 rand, around $1400; the second was also condemned for mercenary activities with a fine of 20,000 but was released after paying 10,00 rand.[60] This example demonstrates the weak enforcement of the FMAA and the limited effectiveness of its provisions.

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[53] Republic of South Africa, Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GG), 1997.

[54] CUSUMANO, Eugenio, 'Regulating private military and security companies: a multifaceted and multilayered approach' (2010) *EUI working papers*, PRIV-WAR project 17.

[55] According to paragraph 2 of the FMAA on "Prohibition on mercenary activity, 2. No person may within the Republic or elsewhere recruit, use or train persons for or finance or engage in mercenary activity. Republic of South Africa, Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GG), 1997.

[56] "Rendering of foreign military assistance prohibited 3. No person may within the Republic or elsewhere— (a) offer to render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless he or she has been granted authorization to offer such assistance in terms of section 4; 20 (b) render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in terms of section 5." Republic of South Africa, Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GG), 1997, paragraph 3.

[57] Paragraph 4 of the FMAA establishes how to require the "Authorization for rendering of foreign military assistance." Republic of South Africa, Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GG), 1997.

[58] Paragraph 9: Extraterritorial application of Act 9. Any court of law in the Republic may try a person for an offense referred to in section 8 notwithstanding the fact that the act or omission to which the charge relates, was committed outside the Republic, except in the instance where a foreign citizen commits any offense in terms of section 8 wholly outside the borders of the Republic. Republic of South Africa, Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GG), 1997.

[59] See paragraph 8 of the Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GG), 1997.

[60] CAPARINI, Marina, 'Domestic regulation; licensing regimes for the export of military goods and services' in CHESTERMAN, Simon and LEHNARDT, Chia (eds.), *From mercenaries to market: the rise and regulation of private military companies* (2005), p.170.

The practical application of FMAA has been widely criticized, as definitions incorporated on the regulations are “too broad or too restricted”. [61] Some flaws of the Act are the definition of “security services” and “foreign military assistance”[62] are too broad; the criteria for refusing an authorization are too subjective and vague[63] and the lack of monitoring mechanisms.[64] The definition of security services is too general because it focuses on “the protection of individuals involved in armed conflict or their property.”[65] On the other hand, the FMAA has the merit of not adopting a definition of PMSCS, instead, it seeks to addresses companies’ activities, and this approach has been adopted on recent international documents, such as the Montrex Document of 2009.

South Africa’s FMAA failed to achieve its goals, and after the involvement of South Africans citizens in the attempt to overthrow the government of Equatorial Guinea in 2004, the Government drafted a legislation: the Prohibition of Mercenary Activity and Prohibition of Certain Activities in Country of Armed Conflict Bill of 2005.[66] However, the Bill is stuck in the African National Congress for possible amendments.

The United States has the most developed and comprehensive regulation to date. The approach adopted by the US legislation is to connect armed exports with

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[61] SCHNEIKER, Andrea. National Regulatory Regimes for PMSCs and their activities: benefits and shortcomings. In: JÄGER, Thomas; KüMMEL, Gerhard (eds.). *Private Military and Security Companies: changes, problems, pitfalls ad prospects*. VS Verlag Für Soziawissenschaften, Auflage, januar, 2007, p. 69.

[62] Paragraph 1 regarding definitions states: (...) (iii) ‘‘foreign military assistance’’ means military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of— *(a)* military assistance to a party to the armed conflict by means of— (i) advice or training; (ii) personnel, financial, logistical, intelligence or operational support; (iii) personnel recruitment; (iv) medical or para-medical services; or (v) procurement of equipment; *(b)* security services for the protection of individuals involved in armed conflict or their property(..).Republic of South Africa, Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GG), 1997.

[63] See paragraph 7 “Criteria for granting or refusal of authorisations and approvals 7. (1) An authorisation or approval in terms of sections 4 and 5 may not be granted if it would—

(a) be in conflict with the Republic’s obligations in terms of international law; (b) result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered; (c) endanger the peace by introducing destabilizing military capabilities into the region where the assistance is to be, or is likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region;(d) support or encourage terrorism in any manner; (e) contribute to the escalation of regional conflicts; (f) prejudice the Republic’s national or international interests; (g) be unacceptable for any other reason. (2) A person whose application for an authorization or approval in terms of section 4 or 5 has not been granted by the Minister may request the Minister to furnish written reasons for his or her decision. (3) The Minister shall furnish the reasons referred to in subsection (2) within a reasonable time”. Republic of South Africa, Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GG), 1997.

[64] CAPARINI, Marina, ‘Domestic regulation; licensing regimes for the export of military goods and services’ in CHESTERMAN, Simon and LEHNARDT,, Chia (eds.), *From mercenaries to market: the rise and regulation of private military companies* (2005),170.

[65] Paragraph 1, III (a) of the Regulation of Foreign Military Assistance Bill, Bill 54D-97 (GG), 1997.

[66] The Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill, B42-2005.

the export of security and military services. The Arms Export Control Act (AECA) is the main legal instrument and the International Traffic in Arms Regulations (ITAR) is the key legislation that implements it. The ITAR deals with the export of defense articles and defense services and requires the registration and application of licenses by companies intending to provide services or goods on the military realm. Applications must be submitted to the Department of State's Office of Defense Trade Controls (ODCT) and the Directorate Defense Trade Controls (DDTC) is the responsible to give the approval.[67] Furthermore the licensing process is complicated because several departments and offices are responsible for the administration of the process, without any "procedural consistency."[68]

The United States companies must register with the DDTC, then apply for a license for a specific sale. DDTC has the competence to approve or disapprove companies' application and they also hold the responsibility to conduct investigations of alleged violations and enforce the ITAR. Although the DDTC has a list of companies not allowed to do business with the government the oversight is precarious, because there is no governmental agencies willing to take the responsibility.[69] Additionally, its not clear how the information of violations is reported to the DDTC, in fact, there were cases that US governmental officials refused to monitor firms and their activities. That is the case of some US embassy officials that were reportedly unwilling to monitor US firms and private contractors.[70]

Another shortcoming of the ITAR is the lack of transparency of the licensing regime, since its hidden from the public, increasing the difficulty of oversight.[71] According to the ITAR:

> (…)[C]ertain information required by the Department of State in connection with the licensing process may generally not be disclosed to the public unless certain determinations relating to the national interest are made in accordance with the procedures specified in that

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[67] 22 CFR Ch. 1 (4-1-11- Edition) §123.1 Requirement for export or temporary import licenses. (a) Any person who intends to export or import temporarily defense article must obtain the approval of the Directorate of Defense Trade Controls prior to the export or temporary import, to unless the export or temporary import qualifies or an exception or under the provision for export or temporary import must be made as follows. (…).<http://www.pmddtc.state.gov/regulations_laws/itar_official.html> at 24 October 2011.

[68] HOLMQVIST, Caroline, 'Private security companies: the case for regulation' (2005) 9 SIPRI Policy Paper, 51; Avant, Deborah, 'Privatizing military training' (2002) 7 [6] Foreign Policy in Focus, < http://www.fpif.org/reports/privatizing_military_training> at 17 August 2011.

[69] PETERSON, Laura. 'Privatizing Combat: the new world order' (2002) The Center for Public Integrity. < http://projects.publicintegrity.org/bow/report.aspx?aid=148> at 24 October 2011.

[70] AVANT, Debora D., The market for force: the consequences of privatizing security (2005), 151.

[71] CAPARINI, Marina, 'Domestic regulation; licensing regimes for the export of military goods and services' in CHESTERMAN, Simon and LEHNARDT, Chia (eds.), *From mercenaries to market: the rise and regulation of private military companies* (2005).

> provision, except that the names of the countries and types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure unless the President determines that release of such information would be contrary to the national interest.[72]

The only information that the public has access is which country and what services are provided according to the contract between a private U.S company and a foreign government.[73]

Recently, the violations and abuses of HRL in Abu Ghraib prison helped to build the current general consensus about the need of more effective laws to regulate PMSCs activities and address their conduct, with adequate enforcement mechanisms to find private contractors accountability for abuses. In order to dispel the mercenary stigma from PMSCs, effective and specific legislation is needed bringing more legitimacy to them. Legitimacy is not only important for companies itself but for their clients, including states, as their own reputation and legitimacy are also affected. Regulations must also reinforce the need of organization and transparency on PMSCs activities. Clear norms with enforcement mechanisms to improve accountability are key elements to the success of national legislations. Additionally it is necessary to establish effective control PMSCs activities, bringing publicity and transparency to the operations.

Caroline Holmqvist, Andrea Schneiker and Eugenio Cusumano agree that national legislations are the most effective and easily enforced solution,[74] still, its not a long-term solution due to the transnational character of PMSCs.[75] In other words, a PMSC can easily relocate to another country with a more friendly legislation if the home state is imposing rigid rules. The authors also points that although national legislations face some shortcomings their implementation are still justified for at least three reasons: first, state are the main actors on international society; second, home states and contracting states in several occasions can be held responsible for PMSCS activities and third, national legislation can more easily be reinforced than codes of conduct or international norms.

As a conclusion, the shortcomings of national regulations are mainly for

[72] 22 CFR §126.10 – Disclosure of information (b) Determinations required by law. Section 38(2) of the Arms Export Control Act (22 U.S.C 2778).

[73] PETERSON, Laura. ‘Privatizing Combat: the new world order’ (2002) The Center for Public Integrity. < http://projects.publicintegrity.org/bow/report.aspx?aid=148> at 24 October 2011.

[74] HOMQVIST, Caroline, ‘Private security companies: the case for regulation’ (2005) 9 SIPRI Policy Paper, 54.

[75] SCHNEIKER, Andreas. National Regulatory regimes for PSMCs and their activities: benefits and shortcomings. In: pp.407-418. CUSUMANO, Eugenio, ‘Regulating private military and security companies: a multifaceted and multilayered approach’ (2010) *EUI working papers*, PRIV-WAR project; Holmqvist, Caroline, ‘Private Security Companies: the case for regulation’(2005) 9 SIPRI Policy Paper, 50-55.

three reasons. First, the transnational character of PMSCs, they can easily change their headquarters if the regulation of the home state becomes rigid or "unfriendly"; the problem can be partially solved by the joint efforts from states on regulation.[76] Second, national regulations face a problem of extraterritorial enforcement; and third, there is a lack of adequate means to monitor or oversight companies' activities abroad in order to reveal misconduct, violations of IHL and HRL abuses.[77] Notwithstanding, even facing these challenges the national regulation remains the most indispensable means to regulate the PMSC industry. The national regulation alone is not enough, but together with the implementation of international CoC and international treaties it is bound to become more effective.

III. CURRENT DEVELOPMENTS ON REGIONAL AND INTERNATIONAL LEGAL FRAMEWORK

A. The regulation on regional level

Regulations addressing the PMSCs industry on regional level are still very limited and regional organizations can play a key role on regulation, since they have the ability to reach a wider scope than national law.[78] Two particularly relevant regional organizations are the African Union (AU) and the European Union (EU), as most of PMSCs activities are developed in African countries and some European countries are the host and contracting states, such as the United Kingdom.[79]

Still, both organizations have very different institutional capacities. While the EU is very organized with strong institutional capacity, the AU is in a lower level of development with limited ability to enact regulations on PMSCs. Professor Caroline Holmqvist suggests that AU could work with the international community to formulate minimum standards for PMSCs developing activities in Africa.[80] Indeed, AU at least has the power to stimulate harmonization of national legislations in African countries.

On the other hand, EU has the potential to successfully address the regulation issue in the context of European countries. The first alternative for the EU

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[76] SINGER, Peter Warren, 'War Profits and the Vacuum of law: Privatized Military Firms and International Law' (2004) 42 [521] Columbia Journal of transnational law, 521-550.

[77] CUSUMANO, Eugenio, 'Regulating private military and security companies: a multifaceted and multilayered approach' (2010) EUI working papers, PRIV-WAR project; Holmqvist, Caroline, 'Private Security Companies: the case for regulation'(2005) 9 SIPRI Policy Paper, 50-55.; Singer, Peter Warren, 'War Profits and the Vacuum of law: Privatized Military Firms and International Law' (2004) 42 [521] Columbia Journal of transnational law, 521-550.

[78] SINGER, Peter Warren, 'War Profits and the Vacuum of law: Privatized Military Firms and International Law' (2004) 42 [521] *Columbia Journal of transnational law*, 521-550.

[79] HOLMQVIST, Caroline, 'Private security companies: the case for regulation' (2005) 9 SIPRI Policy Paper,55.

[80] Ibid.

is to promote the harmonization of national laws. The second alternative is the creation of a specific regulation and the third alternative is taking a similar approach to the United States, amending the current 1998 European Union Code of Conduct on Arms Exports (COARM) [81] to include private military and security services. Regulations created and enacted by the EU have the power to cover a large portion of the private contractors that are still not covered by any national or international regulations, setting useful basis for further developments on international level.[82]

The EU already made the first step with limited regulation of the industry. Three major examples of contributions from EU on regulation directly relevant to PMSCs are: first, the EU have promoted the harmonization of members' domestic regulation on private policing; second, EU Code of Conduct on Armaments Exports drafted on 1998 was responsible to bring transparency and harmonization to national armed services and arms exports legislations and third, joint actions have been implemented to restrict the supply of some activities, such as services related to weapons of massive destruction. [83] Still, more involvement on the regulation of the industry is needed, since the EU has a very strong regulatory capacity compared to other regional organizations and a huge demand and supply market for military and security services.

Regional regulations represent an important and relevant contribution to the regulation context of PMSCs. Still, a joint regulatory policy must be implemented: CoC, national, regional and international regulations must be implemented in order to effectively reach the PMS industry and guarantee accountability.

B. The contributions of the Montreux Document on PMSCs regulation

The transnational character of PMSCs increases the difficulties of monitoring and application of domestic regulations.[84] The national legislations are not sufficient to promote compliance and accountability for PMSCs employees' misconduct and regional initiatives are still limited. Furthermore, the current existing regulations on international level are actually inappropriate to address the issue, as they are not designed to address PMSCs. The claim that PMSCs operate in a legal

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[81] European Union – The Concil, European Union Code of Conduct on Arms Exports, 8675/2/98, Brussels, 5 June 1998. <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf> 25 October, 2011.

[82] HOLMQVIST, Caroline, 'Private security companies: the case for regulation' (2005) 9 SIPRI Policy Paper.56, CUSUMANO, Eugenio, 'Regulating private military and security companies: a multifaceted and multilayered approach' (2010) EUI working papers, PRIV-WAR project.

[83] CUSUMANO, Eugenio, 'Regulating private military and security companies: a multifaceted and multilayered approach' (2010) EUI working papers, PRIV-WAR project, 22; Den Dekker, G., 'The regulatory context of private military and security services at the European Union Level' (2009) PRIV-WAR National Report, 11-12. <http://www.priv-war.eu/publications> at 18 August 2011. CAPARINI, Marina and Cole, 'E. Regulating private security companies in Europe: status and prospects' (2007) 20 DCAF Policy Paper.

[84] CUSUMANO, Eugenio, 'Regulating private military and security companies: a multifaceted and multilayered approach' (2010) EUI working papers, PRIV-WAR project,18.

vacuum comes from the inapplicability of the treaties on mercenaries. As discussed on chapter four, the legal instruments on mercenaries, more specifically, the definition of mercenaries in Article 47 of First Additional Protocol of 1977 is very difficult to apply, since the requirements are very easily evaded. Altering the regulation on mercenaries to address PMSCs seems complex and inappropriate. In fact, private contractors are not similar to mercenaries, and the law lacks applicability even for mercenaries.

Consequently, an effective international regulation must be created to deal with the PMSCs industry, focusing on mechanisms to promote compliance and accountability for IHL violations and HRL abuses. Additionally, the regulation must also focus on the use of these companies outside the armed conflicts context, in order to be complete.

Professor Deborah Avant, points that creating an international treaty addressing PMSCs is difficult to achieve as there are too many different interests among states: "when what each government wants to control is very different, it is hard to get them to institute standard regulatory schemes together."[85]

Nevertheless, the international community together with the industry have already build the general consensus that a regulation is needed. This view is reflected on the creation of the Montreux Document of 2008 and on the Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies of 2009.

a. The Montreux Document

The Montreux Document of 2008 is an initiative of the Swiss Government together with the International Committee of the Red Cross (ICRC), industry representatives, academic experts, non-governmental organizations and representatives of 17 states,[86] including United States, Unite Kingdom, China, France, Iraq, Afghanistan, Sierra Leone and South Africa. The document is the result of a discussion on the challenges of regulation brought by the private military and security industry and state responsibility. It has the potential to provide guidance to fill gaps, improve enforceable regulation on national, regional and international instruments and provide basis to promote PMSCs accountability for violations of IHL and abuses of HRL.

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[85] AVANT, Deborah, *The emerging market and the problem of regulation* (2007), 194.

[86] The states involved on the creation and discussion of Montreux Document are: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine and United States of America. The meetings occurred in January and November 2006, November 2007 and April and September 2008. Representatives of civil society and the private military and security industry were also consulted. See Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict. <http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm> at 17 August 2011.

The Montreux Document is a statement of the most pertinent international legal obligations addressing PMSCs and states, which is helpful to retify the prevailing misconception that private contractors operate in a legal vacuum, and that states can avoid their international legal obligations by contracting PMSCs.[87]

The document represents the clearest statement to date of the legal norms and practices to improve the relationship between states and PMSCS. It deals with some important issues, such as the legal status of PMSCs personnel under the 1949 Geneva Conventions, the individual accountability of employees and the duty of state authorities to oversee and control the actions of private contractors to avoid misconduct.

However, the Montreux Document is clear on its preface that its objective is not to establish new regulations but simply to provide some guidance on several controversial legal issues, having under consideration the existing international legal norms. The document intends to be a useful instrument for government officials, international organizations, PMSC and civil society.

The preface of the document brings 9 understandings that guided the creation of the document and must guide the governmental authorities when using the text.[88] The most important points put forward on the preface are:

> a) The document was based on well-established rules of international law applied to States in the relationship with PMSCs and their operations during armed conflicts, in particular IHL and HRL.
>
> b) The document recalls existing legal obligations of States and PMSCs personnel on part one, and provides good practices for States to promote compliances with IHL and HRL on part two.
>
> c) The text of the document is not legally binding and does not affect existing obligations of States under customary international law or international agreements; especially the UN Charter.
>
> d) The document seeks to keep its neutrality and informs that is not constructed to endorse the use of PMSCS in any particular circumstance, but intends to recall legal obligations and good practices if the decision to contract a private contractor has been made.
>
> e) The paragraph 9 presents important definitions,

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[87] COCKAYNE, James, 'Regulating private military and security companies: the content, negotiation, weaknesses and promise of the Montreux Document' (2009) 13 [3] Journal of Conflict and Security Law, Oxford University Press, 403.

[88] See the preface of Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict. <http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm> at 17 August 2011.

> such as the definition of PMSCs; the personnel of a PMSC, the definition of contracting states, territorial states and home states.[89]

The part one of the document, on pertinent international legal obligations relating to private military and security companies recalls certain existing international legal obligations of states, taking under consideration the IHL and HRL and customary international law.[90] This part of the document reinforces the fact that states are responsible for the obligations they undertook as parties to international agreements, as a statement of the current *lex lata*.

Part one recalls home states, territorial states and contracting states obligations under international law, based on states duties to respect, due diligence and provide remedies for violations. Several obligations presented on the document are overlapping as one state can be classified in more than one category at the same time.[91]

Another important issue of part one is the obligations of PMSCs and their personnel and superiors. Paragraph 22 recognizes the obligation of PMSCs and their personnel to comply with IHL and HRL incorporated in national laws.[92] Paragraph 23 reinforces the fact that PMSCs must comply with the national laws of territorial states.[93] Paragraph 24 addresses the issue of their legal status, confirming the application of IHL on a case-by-case basis. And paragraph 27 addresses the superior criminal responsibility for the conduct of of PMSCs employees.[94]

The part two of Montreux Document provides guidance on what good practices might be, while dealing with PMSCs.[95] It brings 73 good practices, which

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[89] See the preface, items 1-9 of the Montreux Document, p.9-10.

[90] The Montreux Document of 2009, Part one on pertinent international legal obligations relating to private military and security companies, Introduction, 11.

[91] See Paragraph 1 to 21 of the Montreux Document of 2009.

[92]Paragraph 22: "PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable nationa law, as well as other applicable nationa law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services. The Montreux Document, p.14.

[93] Paragraph 23: "The personnel of PMSCs are obliged to respect the relevant national law, in particular the criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality. The Montreux Documen, p.14.

[94] "E. PMSCs and their personnel (…) 24. The status of the personnel of PMSCs is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved. (…) F. Superior responsibility 27. Superiors of PMSCs personnel, such as: a) governmental officials, whether they are military commanders or civilian superiors, or b) directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engages solely by virtue of a contract." The Montreux Document, p. 14-15.

[95] The good practices intend "to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationship with PMSCs operating in areas of armed conflict." See Montreux Document, Introduction of

can be used as foundation for further regulation of private military and security industry though codes of conduct and national, regional and international regulations.[96] These good practices were elaborated based on documents that are not sources of international law, such as codes of conduct, national legislation, administrative instruments, judicial and administrative decisions and regional political statements.[97] Additionally, part two addresses controversial issues, such as monitoring compliance and accountability, direct participation in hostilities, PMSCs personnel training and immunities from foreign jurisdiction. This part of the Montreux Document has the potential to become a useful source of guidance for governmental authorities when creating relevant regulations and PMSCs clients when contracting companies' services.

Overall the Montreux document represents an advance and constitutes an important source of guidance to states for creating appropriate laws to fill the gaps on international and national regulations. Nevertheless, Professor James Cockayne points three major weaknesses of the document. First, the document lacks some further guidance for PMSCs regarding the conduct they are to engage in. Second, the document lack further work on the state and corporate due diligence obligations. And third, the Montreux Document does not bring clear guidance on how states should deal with victims' claims against them and the misconduct of PMSCs. [98]

C. The first attempt at an international treaty: The Draft of a possible Convention on Private Military and Security Companies (PMSCs)

In 2009, the Working Group on the use of mercenaries as means of violating human rights and impeding the exercise of the rights of peoples to self-determination presented the Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies as the first sketch of an international treaty specifically addressing the PMS industry. However, on July 2, 2010 the Working Groups presented a report with a revised text of the proposed convention under the title: "Draft of a possible Convention on Private Military and

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Part Two, p. 16.

[96] The good practices are intended, *inter alia*, to assist States to implement their obligations under international humanitarian law and human rights law. However, in considering regulation, States may also need to take into account obligations they have under other branches of international law, including as members of international organizations such as the United Nations, and under international law relating to trade and government procurement. They may also need to take into account bilateral agreements between Contracting States and Territorial States. Moreover, States are encouraged to fully implement relevant provisions of international instruments to which they are Parties, including anti-corruption, anti-organized crime and firearms conventions. Furthermore, any of these good practices will need to be adapted in practice to the specific situation and the State's legal system and capacity. See Montreux Document, Introduction of Part Two, p. 16

[97] COCKAYNE, James, 'Regulating private military and security companies: the content, negotiation, weaknesses and promise of the Montreux Document' of 2009, 13 [3] Journal of Conflict and Security Law, Oxford University Press, p.405.

[98] Ibid., note 96, p.427.

Security Companies (PMSCs) for consideration and action by the Human Rights Council." Since this Draft Convention is the most recent development on the subject, it will be the one discussed on this section.[99]

Before discussing the Draft Convention of 2010 it is important to bare in mind that the Montreux Document is an initiative of states, which recalls the international obligations under IHL and HRL of contracting states, home states and territorial states, identifying the hard law, which is binding under customary law or treaty law. Furthermore, the Montreux Document presents the soft law, through 73 good practices, which are valuable principles to inspire legislative developments on national regulations, codes of conduct and international standards.[100]

As previously discussed, the Montreux Document faces some shortcomings, such as the fact that it is a non-binding instrument and applicable mainly to states to the situations of armed conflicts. Furthermore, it was created only by seventeen states, which can hardly represent the majority of the international community. Still, the document is open for other states to endorse, the total number of states supporting the document is constantly increasing, until now there are 36 states supporting the initiative.[101] According to Professor José Luiz Gómez Del Prado, the Montreux Document "recognizes *de facto* this new industry and the military and security services it provides", and recognizes the industry provides, which remains unmonitored and unregulated.[102]

Differently from the Montreux Document, the Draft Convention intends to become a binding international treaty, which will establish the first international regulation of the industry. Another difference between the Draft Convention and the Montreux Document is that the former's application will not be limited to armed conflict situations.[103]

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[99] 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, July 2, 2010. A/HRC/15/25 at the Annex. Available at: <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf> Last visited on: August, 28, 2010.

[100] COCKAYNE, James, 'Regulating private military and security companies: the content, negotiation, weaknesses and promise of the Montreux Document' (2009) 13 [3] Journal of Conflict and Security Law, Oxford University Press, p. 404. White, Nigel D., 'The privatization of military and security functions and human rights: comments on the UN working group's Draft Convention' (2008) 11 [1] Human Rights Law Review, 134,133-151.

[101] The countries supporting the document are: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, United Kingdom, Ukraine, United States of America, Macedonia, Ecuador, Albania, Netherlands, Bosnia and Herzegovina, Greece, Portugal, Chile, Uruguay, Liechtenstein, Qatar, Jordan, Spain, Italy, Uganda, Cyprus, Georgia, Denmark, Hungary. Swiss Department of Foreign Affairs. Available at: < http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> Last visited on: August 28, 2011.

[102] GOMEZ, J. Del Prado, Private Military and Security Companies and the UN Working Group on Mercenaries. In.: Journal of Conflict and Security Law, vol 13, no. 429, p.443.

[103] As the Montreux Document title states: "Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict".

The question here is whether or not the Draft Convention constitutes a real advancement compared to the Montreux Document. Professor Nigel D. White points that in order to find that answer it is necessary to address key elements present on the Draft Convention.[104]

The Draft Convention express its concern with "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"[105] on paragraph 9 of the preamble. The Draft Convention has an understanding that some functions are inherently governmental and cannot be target of outsourcing or delegation. This position is particularly controversial and is not shared by some states with stronger approaches to privatization, for instance the United States and United Kingdom.[106] The Montreux Document adopts a different position, which is limited to the activities that IHL assigns to states, for instance, the exercise of the power of responsible officer over a prisoner of war camp.[107]

The Draft Convention on Article 1, paragraph 2, even states that one of the purposes of the convention is "to identify those functions which are inherently State functions and which cannot be outsourced under any circumstances."[108] Still, what are inherently state functions is not clear, and Article 2-I presents a non-exhaustive list of these functions.

Article 2 (i) presents the definition of inherently state functions:

> (i) Inherently State functions: are functions which are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs under any circumstances. Among such functions are 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

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[104] WHITE, Nigel D., The privatization of military and security functions and human rights: comments on the UN Working Group's Draft Convention. In: Human Rights Law Review, vol 11, no.1, 2011, pp.133-151.

[105] 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 21 21-49.

[106] The position towards privatization of United Kingdom is so aggressive that the Green Paper recommend the self-regulation as the alternative for UK based companies.

[107] See the Montreux Document,, Part1 A.2: "Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions."

[108] Article 1-b, 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 23 21-49.

> related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State Party considers to be inherently State function.[109]

In recent years, private contractors have taken up several of the functions listed on the definition above. For instance, the presence of private contractors in the Abu Ghraib prison, or the intelligence services provided by the MIPRI, or even the combat functions undertaken by Executive Outcomes in different occasions. The provision encompasses functions already been performed by private contractors, this will certainly lead to opposition from states that strongly rely on PMSCs. Therefore, the draft convention can face difficulty to be adopted by the Human Rights Council.

The Draft Convention and the Montreux Document assumes that private contractors are civilians and cannot take direct participation in hostilities. Nevertheless, the Montreux Document also assumes that all other services that does not involve direct participation in hostilities can be performed by PMSCs.[110] On the other hand, the Draft Convention postulates the existence of functions that cannot be performed by any other entity, except by the states.

The Draft Convention imposes restriction on the types of activities that can be carried out by private contractors. Articles 5(2), 7, 9 and 19 are particularly relevant to demonstrate the restrictive approach taken.

Article 5, paragraph 2 states that its the duty of each State party to take all legislative, administrative and other measures to ensure that PMSCs are held accountable for any violation of national and international law.[111] Article 7 determinates the respect and protection of international human rights and humanitarian law and predicts state and individual responsibility for any activity that violates these standards.[112] Article 9 prohibits the delegation and/or outsourcing of

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[109] Article 2-I, 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 25, 21-49

[110] WHITE, Nigel D., 'The privatization of military and security functions and human rights: comments on the UN Working Groups's Draft Convention' (2011) 11 [1] Human Rights Law Review,138, 133-151.

[111] Article 5, paragraph 2: "Each State party shall 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. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 27 21-49

[112] Article 7: "Each State party shall take legislative, judicial, administrative and other measures as may be necessary to ensure that PMSCs and their personnel are held accountable in accordance with the convention and to ensure respect for, and protection of international human rights and humanitarian law. Each State party shall ensure that PMSCs and their personnel apply due diligence to ensure that their activities do not contribute directly or indirectly to violations of human rights and international humanitarian law(…)."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, A/HRC/15/25, 2 July

inherently state functions, but lives to each State Party to limit the scope of activities that PMSCs can develop and prohibit the outsourcing of functions, which are defined as inherently State functions.[113] Article 19 relates o criminal, civil and/or administrative offences, for instance, paragraph 3 declares that any unlicensed or unauthorized PMSCS should also be considered offenses under the national law.[114]

Article 21 prescribes that "each state party shall take such measures as may be necessary to establish its jurisdiction through domestic law over the offences set out in article 19 (…)."[115] For instance, over offenses committed in the territory of that state, on board of a vessel flying the flag of that state, the offenses committed by a national of that State. The approach taken in the Draft Convention is much stronger than the Montreux Document and directly attacks the issue of PMSCs that tend to hide behind a "cloak of immunity".[116]

The Draft Convention will provide basic rules applicable to the PMSCs activities and national and international monitoring mechanisms. The Committee on the Regulation, Oversight and Monitoring of Private Military and Security Activities will supervise the PMSCs. According to article 29 the Committee on the Regulation, Oversight and Monitoring of PMSCs will be composed of experts in the field, on their personal capacity and elected by States Parties.[117] Articles 31 and 32 determinates that experts must receive reports from states regarding the legislative, judicial and administrative or other measures which were adopted to give effect to the Convention.[118]

2010, United Nations – General Assembly, 28, 21-49

[113] Article 9 states: "Each State party shall define and limit the scope of activities of PMSCs and specifically prohibit the outsourcing to PMSCs of functions which are defined as inherently State functions". 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 29, 21-49

[114] Article 19, paragraph 3: "Each State party shall ensure that all activities of PMSCs occurring without the required licence and authorization, including the export and import of military services, pursuant to articles 14 and 15 of this convention, are offences under its national law. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 35, 21-49

[115] Article 21, paragraph 1. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 36, 21-49.

[116] Article 21, paragraph 1, a, b and c. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 36, 21-49. WHITE, Nigel D., 'The privatization of military and security functions and human rights: comments on the UN Working Groups' Draft Convention' (2011) 11 [1] Human Rights Law Review, 141, 133-151. That's the case of PMSCs that received immunity from Iraq national laws.

[117] Article 29, paragraph 1 to 10. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly,40-41, 21-49

[118] Article 31, paragraphs 1-3 and Article 32, paragraphs 1-5. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 41-42, 21-49

The Convention also proposes two other monitoring and accountability methods, which are an inquiry procedures and a conciliation commission. Article 33 relates to the inquiry procedure under which if "reliable information indicating grave or systematic violations of the provisions set forth" [119] in the Convention, the Committee shall exanimate the information. The Conciliation Commission is in Article 35, which determinates that if the inquiry procedure is not enough to resolve the issue, the Committee may appoint an *ad hoc* Conciliation Commission, with the prior consent of the States parties involved.[120] These methods seems to be more reliable than the report system, still they are strictly addressed to states.

The Draft Convention contains an individual and group petition procedure predicted on article 37, which "receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation"[121] by a state party of provisions of the convention. Professor Nigel D. White comments that this type of system "can be successful if the Committee performs its tasks with impartiality and bases it decisions on accepted interpretations of international law."[122]

National regulation to effectively oversee and promote accountability of PMSCs and state responsibility are considered important means by the Draft Convention. Article 12 relates to specific legislative regulation and determinates that "each State party shall develop and adopt national legislation to adequately and effectively regulate the activities of PMSCs."[123] The Draft Convention relies on national legislation in order to effectively control and establish accountability of PMSCs. Article 13 determinates that States Parties shall investigate and report violations of IHL and HR norms by PMSCs and ensure civil and criminal prosecution and punishment of offenders. [124] Moreover, states must revoke the licenses of PMSCs committing human rights violations or engaging in criminal activities.[125] However, how national licensing regime should be implemented lacks

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[119] Article 33, paragraph 1. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 42, 21-49

[120] Article 35, Conciliation Commission. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly,44, 21-49

[121] Article 37, paragraph 1. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 45, 21-49

[122] WHITE, Nigel D., 'The privatisation of military and security functions and human rights: comments on the UN Working Groups's Draft Convention' (2011) 11 [1] Human Rights Law Review,143, 133-151.

[123] Article 12. 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 30, 21-49.

[124] Article 13, paragraph 5, 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, A/HRC/15/25, 2 July 2010, United Nations – General Assembly, 31 21-49.

[125] Ibid, item 6.

clarity, in fact, this could lead to a very weak system of registration and licensing. Therefore, clearer provisions should be considered.

The current draft lacks provisions addressing the direct responsibility and accountability of PMSCs, since they cannot be parties to the convention, focusing on the obligations and responsibilities of host states, territorial state and contracting states and surprisingly international organization.[126] Therefore, the draft essentially relies on the responsibility of States to ensure the liability of PMSCs for any violation IHL, HRL and the provisions of the Draft Convention.

Regarding effective remedies to victims of violations of international humanitarian law and human rights committed by the personnel of PMSCs, the draft convention presents very limited options. The remedies are mostly based on state reports, national systems and the Oversight Committee. These options do not seem enough to guarantee effective remedies for the victims for three reasons. First, they focus mainly on states and not on the victims. Second, many national legal systems are weak and may not be able to promote justice, especially on state with weak institutions. Third, only though the creation of an international direct access to justice would guarantee reparation to victims of offenses under the Convention and allow their rehabilitation.[127]

The Draft Convention have many weakness and promises and its still early to determinate its failure or success. Overall, the Draft Convention constitutes a considerable advance that can serve as basis for further developments on regulating the PMSC industry, establishing accountability and monitoring mechanisms. The Draft Convention faces real challenges when compared to the Montreux Document, since they have some incompatibilities that may pose obstacles to the adoption of the treaty.

FINAL REMARKS

Private Military and Security Companies may be regulated in different venues: self-regulation, national legislations, regional regulations and international treaties. The self-regulation have been criticized as inappropriate for dealing with serious IHL violations and HR abuses; lacking monitoring and enforcement mechanisms; providing insufficient transparency and accountability mechanisms, mostly based on the market and lacking the support of states. Still, recently an international code of conduct have been put forward, which represents an advancement on the self-regulation level, since it predicts an independent and impartial committee for monitoring and oversight. This move demonstrates the industry concern to increase legitimacy as business enterprises and their awareness

[126] PMSCs direct responsibility and accountability was present in the previous draft convention. The exclusion of PMSCS reflects the state-centric approach, which prevails in the international community, confirming that only states, and international organizations can be considered subjects of international law.
[127] Article 29, A/HRC/15/25, Annex, p.39.

that only through regulation, they will be able to remain in the market in long-term basis.

National regulations face three shortcomings when regulating PMSCs: first, the transnational character of PMSCs, second, national legislation lack extraterritorial enforcement and third, there is a lack of adequate means to monitor and oversight companies developing activities abroad in order to reveal misconduct or violations of IHL and HRL abuses. Nevertheless, national regulations are the most effective means to promote compliance with the law and increase accountability for violations committed by PMSCs.

The regulation on regional level is still limited, but regional organizations have an important role on regulation since they can address a larger portion of the PMSCs industry that are still not covered by any national regulation, setting useful basis for further developments on international level.

The International level counts with two major initiatives specifically addressing the issue of PMSCs and state responsibility, namely the Montreux Document and the Draft Convention of 2010, put forward by the Working Group on the use of mercenaries as means of violating human rights and impeding the exercise of peoples to self- determination. The Montreux Document is a non-binding instrument that recalls the state responsibility and presents 73 good practices when dealing with PMSCs. However, the document face some shortcomings, such as the fact that its application is limited to armed conflict situations and it is mainly directed to states.

The Draft Convention is the first idea of an international treaty specifically addressing the issue of PMSCs. The draft regulation has made relevant advancements, but still lacks clarity in some aspects. For instance, it put limits on the activities that can be performed by private contractors, adopting a different position from the Montreux Document and this position may generate resistance from states. Another shortcoming of the Draft Convention is the lack of clear remedies for victims of violations. Still, the convention presents two welcomed monitoring mechanisms, namely inquiry procedures and conciliation commission. These mechanisms represent advancement and if an Impartial Oversight Committee and Conciliation Commission are established, they may achieve legitimacy and therefore promote compliance from states.

Overall, the Draft Convention is a welcomed initiative, but it is still early to determinate its success or failure. In conclusion, only through a joint initiative, from the industry, national legislation and international regulations PMSCs will effectively face accountability for IHL and HR violations.

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