

A new way forward for the regulation of the private military and security industry

Shannon Bosch^{*} & Matthew Kimble^{**}

Abstract

Today, private military and security contractors (PMSCs), with their specialised skills and ability to deploy rapidly, outnumber traditional armed forces in conflict zones. Questions around their status, what they can be contracted to do, and their regulation under existing international law, are becoming more pressing. The domestic regulatory regime has proved to be inconsistent, jurisdictionally limited, and notoriously slow to enforce accountability against PMSCs. Since the draft PMSC Convention was tabled in 2009, it has failed to mature into a binding international convention. The year 2014 saw the proposal of an independent ISO-type certification process for PMSCs. In this article, we argue that a multi-layered, complementary, best-practice approach, which draws on existing industry self-regulation, the draft PMSC Convention, robust domestic enforcement on the basis of *aut dedere aut judicare*, and independent accreditation processes can collectively constitute a new way of regulating this industry.

INTRODUCTION

The recent beheadings of Peter Kassig, Alan Henning and David Haines at the hands of ISIS have drawn media attention to the gruesome plight of vulnerable aid workers¹ and has yet again raised the thorny issue of whether

^{*} BA (Hons), LLB (University of Natal); LLM (Cambridge); PhD (UKZN). Senior Lecturer in Law: Howard College School of Law, University of KwaZulu-Natal; Attorney of the High Court of South Africa.

^{**} LLB (UKZN); LLM (UKZN); Candidate Attorney.

¹ Eggleston & McDougall 'Autonomous territories/Israel – Ramallah: evacuation of a casualty by Palestinian Red Crescent's volunteers' Independent report (3 December 2010), available at: <http://www.icrc.org/eng/assets/files/2011/expert-roundtable-protection-humanitarian-personnel-report-2010-03-12.pdf> (last accessed 12 December 2014) at 1; Perrin 'Humanitarian assistance and the private security debate: an international humanitarian law perspective: on the edges of conflict', available at: http://www.croixrouge.ca/cmslib/general/oteoc_ben_perrin.pdf (last accessed 15

relief workers should employ the services of private military and security companies (PMSCs) in the performance of their humanitarian mandate. Nation states like the United States, Australia, Canada and the United Kingdom are already heavily reliant upon PMSCs in operating and deploying their armed forces.² In addition, many 'private corporations, international and regional inter-governmental organisations, as well as non-governmental organisations'³ are simply unable to operate in situations of armed conflict without receiving training from PMSCs in emergency and evacuation procedures.⁴ Even the United Nations (UN) has increased its expenditure on services provided by PMSCs by seventy-three per cent in one year.⁵ The past decade has witnessed a boom in the private military and security industry,⁶ which is estimated to be worth US\$200 – 300 billion annually,⁷ with over 500⁸ PMSCs operating in over fifty states.⁹ In short, as

December 2014) at 9 & 22; Gillard 'Business goes to war: private military/security companies and international humanitarian law' (2006) 88/863 *International Review of the Red Cross* 525; Spearin 'Private security companies and humanitarians: a corporate solution to securing humanitarian spaces?' (2001) 8 *International Peacekeeping* 20, 21 & 26.

² Salzman 'Private military contractors and the taint of a mercenary reputation' (2008) 40 *International Law & Politics* 859.

³ Singer 'Humanitarian principles, private military agents: some implications of the privatised military industry for the humanitarian community' in Wheeler & Harmer (eds) *Resetting the rules of engagement: trends and issues in military-humanitarian relations* (2006) HPG Report, available at: <http://www.brookings.edu/research/articles/2006/02/defenseindustry-singer> (last accessed 18 August 2014) at 3; Perrin n 1 above at 21.

⁴ Spearin 'Private, armed and humanitarian? States, NGOs, international private security companies and shifting humanitarianism' (2008) 39 *Security Dialogue* 363; Gillard n 1 above at 525.

⁵ Pingeot 'Dangerous partnership: private military & security companies and the UN' (June 2012), available at: http://www.globalpolicy.org/images/pdfs/GPF_Dangerous_Partnership_Full_report.pdf (last accessed 15 of December 2014) at 7.

⁶ Pillay 'Opening remarks by Ms Navi Pillay, UN High Commissioner for Human Rights at the panel on the use of PMSC by the UN, organised by the working groups on the use of mercenaries' 5 March 2014 (Geneva), available at: http://psm.du.edu/media/documents/international_regulation/united_nations/human_rights_council_and_ga/wg_on_mercenaries/reports_and_statements/pillay_remarks_mar-2014_re-uploaded.pdf (last accessed 4 December 2014).

⁷ Holmqvist 'Private security companies: the case for regulation' (2005) *Stockholm International Peace Research Institute (SIPRI) Policy Paper* 9 at 7; Singer n 3 above at 3; Keilthy 'Private security firms in war zones worry NGOs' (2004), available at <http://reliefweb.int/report/afghanistan/private-security-firms-war-zones-worry-ngos> (last accessed 15 December 2014).

⁸ 'There is no exhaustive list of companies operating in the international private security sector, and a notorious lack of verifiable data on the magnitude of the industry' (Holmqvist 'The private security industry, states and lack of an international response' Prepared for the Seminar on Transnational and Non-State Armed Groups convened by

the use of PMSCs is becoming more prevalent and deemed mainstream,¹⁰ the questions around their status and regulation under international law are becoming more pressing.

One explanation for the boom in the PMSC industry can be attributed to PMSCs' unique rapid response to crisis situations, while bureaucratic processes could hinder governments from taking swift action.¹¹ When the threat of the Rwandan genocide was looming, Executive Outcomes drafted a plan to have troops on the ground within two weeks at a cost of US\$600 000 per day. The eventual plan followed by the UN, resulted in troops arriving much later than those of Executive Outcomes and a cost escalation of US\$3 million per day. The human cost was some 600 000 Tutsi lives lost. PMSCs have the capacity to deploy highly skilled personnel, often with 'special op's credentials', at very short notice.¹² In fact, Lilly has gone so far as to say that PMSCs will be the world's future peacekeepers.¹³

That said, with speed have also come reports of PMSCs involved in summary executions, the reckless injuring and killing of civilians, participation in rendition flights,¹⁴ and other joint covert operations that violate basic human rights, such as subjecting detainees to arbitrary detention, human trafficking, resorting to torture, engaging in inhuman and

the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University (9–10 March 2007) at 7).

⁹ Singer n 3 above at 3; Bosch *The combatant status of private military and security contractors in international armed conflicts, in light of the international humanitarian law prohibition against civilian direct participation in hostilities* (PhD thesis University of KwaZulu-Natal 2013) ch 6.

¹⁰ Lytton 'Blood for hire: how the war in Iraq has reinvented the world's second oldest profession' (2006) Summer *Oregon Review of International Law* 307.

¹¹ Bosch & Maritz 'South African private security contractors active in armed conflicts: citizenship, prosecution and the right to work' (2011) 14/7 *Potchefstroom Electronic Review* 73; Avant 'Private security companies' (2005) 10 *New Political Economy* 126.

¹² Avant n 11 above at 126; Gaston 'Mercenarism 2.0? The rise of the modern private security industry and its implications for international humanitarian law enforcement' (2008) 49/1 *Harvard International Law Journal* 227.

¹³ Lilly 'The privatization of peacekeeping: prospects and realities in peace keeping evolution or extinction?' (2000) 3 *UNIDAR*, available at: http://www.unidir.org/bdd/fiche-periodique.php?ref_periodique=1020-7287-2000-3-en (last accessed 19 July 2014); Cameron 'Private military companies: their status under international humanitarian law and its impact on their regulation' (2006) 88/863 *International Review of the Red Cross* 573.

¹⁴ There is evidence that PMSC rendered detainees from Tuzla, Islamabad and Skopje to detention facilities in Cairo, Rabat, Bucharest, Amman or Guantanamo. Gomez del Prado 'The privatization of war: mercenaries, private military and security companies' available at <http://www.globalresearch.ca/the-privatization-of-war-mercenaries-private-military-and-security-companies-pmsc/21826> (last accessed 4 December 2014).

degrading treatment,¹⁵ and interfering with the right to self-determination.¹⁶ In addition, states have been slow to hold these PMSCs and their employees accountable for their actions. Instances of criminal prosecution for violations committed by PMSCs have been scant¹⁷ and protracted – creating the impression that PMSCs may violate international humanitarian law (IHL) with impunity.¹⁸ On 22 October 2014, a US Federal jury handed down manslaughter and murder convictions to the four Blackwater employees who had killed seventeen Iraqi civilians – some of whom were children – when they fired machine guns and threw grenades into a busy Baghdad traffic circle in 2007.¹⁹ As Ms Arias, the Chair 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 (‘the working group’) points out, ‘the difficulty in bringing a prosecution in this case shows the need for an international treaty to effectively regulate PMSCs when states outsource security to these corporations in transnational conflicts’.²⁰

With PMSC personnel fast outnumbering traditional armed forces on the ground in conflict situations,²¹ it is questionable whether one can continue to discredit the PMSC industry with pejorative labels like mercenaries or

¹⁵ The Abu Ghraib scandal, which emerged with photos of hooded and naked detainees, wired with electrodes and being abused – at the hands on CACI Titan personnel – are a case in point. Morgan ‘Professional military firms under international law’ (2008) 9 *Chicago Journal of International Law* 213 & 214; Isea, Schwartz & Nakamura ‘Private security contractors in Iraq: background, legal status, and other issues’ (2004), available at www.opencrs.com/document/RL32419/ (last accessed 28 October 2013) at 8; Gomez del Prado ‘A United Nations instrument to regulate and monitor private military and security contractors’ (2011) 1 *Notre Dame Journal of International, Comparative, and Human Rights Law* 17.

¹⁶ Gomez del Prado n 14 above.

¹⁷ In a study by the UN working group, only Cuba, France and Montenegro reported specific convictions for mercenarism. Human Rights Council ‘*Annual 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/24/45), Twenty-fourth session, Agenda item 3 (1 July 2013), available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Legislation/A-HRC-24-45.pdf> (last accessed 4 December 2014).

¹⁸ Gomez del Prado n 15 above at 18.

¹⁹ Office of the High Commissioner for Human Rights (OHCHR) ‘Blackwater convictions: “The exception, not the rule” – UN expert body calls for global regulation of private security’, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15217&LangID=E> (last accessed 4 December 2014).

²⁰ *Ibid.*

²¹ Bosch n 9 above at 154.

‘dogs of war’.²² It is widely acknowledged that a blanket ban on the activities of PMSCs ‘is neither practicable nor necessary’.²³ Instead, it is very likely that PMSCs will be a permanent feature in all ‘humanitarian, peacekeeping, and peace-enforcement operations’,²⁴ and other states, like the US, have through their legislation, given a strong indication of their desire to continue to use the PMSC industry.²⁵ As such, there is an urgent and pragmatic need for IHL to address the issues of ‘where the modern PMSC fit into existing international law’,²⁶ for example, when might their services be employed and what activities they could undertake.²⁷ Crucially, guidance is needed on how international law will regulate their activities to enforce some accountability for the actions of their personnel when they ‘bear arms, operate places of detention, conduct interrogations and protect military facilities’ in a way that will not violate IHL²⁸ or international human rights law.²⁹ Most of the recent literature in this field deals exclusively with analysing the stalled Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies (‘draft PMSC convention’).³⁰

In exploring these issues we begin with a brief analysis of existing international law provisions which impact upon the PMSC industry and its employees. We then turn to what can be gleaned from the various domestic responses to concerns about the need to regulate this industry. We then analyse the draft PMSC convention and discuss its influence on the debate about regulating this industry. Lastly, we turn our attention to the most

²² Joachim & Schneider ‘New Humanitarians? Frame appropriation through private military and security companies’ (2012) 40 *Millennium Journal of International Studies* 383.

²³ Human Rights Council ‘Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination’ A/ HRC/15/25 (2 July 2010), available at: <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf> (last accessed 15 February 2014) at par 7; Perrin n 1 at 6.

²⁴ Singer n 3 above at 3.

²⁵ Gomez del Prado n 15 above at 25.

²⁶ Lytton n 10 above at 307; Shearer ‘Outsourcing war’ (1998) 112 *Foreign Policy* 76; Salzman n 2 above at 854 & 861–2; Krahnmann ‘Security governance and the private military industry in Europe and North America’ (2005) 5 *Conflict, Security and Development* 259.

²⁷ Pillay n 6 above.

²⁸ Shearer n 26 above at 77; Morgan n 15 above at 214; Salzman n 2 above at 861.

²⁹ Pillay n 6 above.

³⁰ Perrin ‘Mind the gap: lacunae in the international legal framework governing private military and security companies’ 2012 *Criminal Justice Ethics* 299; Juma ‘Privatisation, human rights and security: reflections on the draft international convention on regulation, oversight and monitoring of private military and security companies’ (2011) 15 *Law, Democracy & Development* 182; Gomez del Prado n 15 at 17.

recent developments in this arena – the independent International Organization for Standardization (ISO) certification process – before making some cautionary and concluding remarks on how to proceed.

THE PMSCs AND INTERNATIONAL LAW

Neither IHL treaties nor international human rights treaties make any specific reference to PMSCs and the contractors they employ.³¹ This omission is to be expected since many of these international treaties were drafted before the boom in the PMSC industry.³² For some, their omission is put down to the fact that individuals employed by PMSCs are simply mercenaries – to be dealt with by the two international anti-mercenary treaties.³³ The official UN position, expressed through the working group established pursuant to the UN Commission on Human Rights Resolution 2005/2, is that PMSCs are operating legally in a ‘grey zone, which is not defined at all, or at the least not clearly defined by international legal norms’.³⁴ There have been attempts to fit these new actors into the existing

³¹ ICRC ‘The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict’ (Montreux Document) (2008), available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/montreux-document-170908> (last accessed 14 July 2014) at 37. Although it has been suggested that the 1907 Hague convention can be interpreted to prevent PMSC from incorporating or operating from the signatory states’ territory (Private Security Monitor ‘Generally Applicable International Law’, available at: http://psm.du.edu/international_regulation/generally_applicable_international_law.html (last accessed 4 December 2014).

³² Perrin (ed) *Modern warfare: armed groups, private militaries, humanitarian organizations, and the law* (2012) at 8.

³³ 1977 Convention for the Elimination of Mercenarism in Africa (XXXIX) Annex II Rev 3 OAU CM/817 (OAU Mercenaries Convention), 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (1989) 2163 *UN Treaty Series* 75 (A/RES/44/34) (UN Mercenary Convention). The Mercenary Convention entered into force on 20 October 2001, but only 33 States had become party to the convention and very few of those are the major powers (Fallah ‘Corporate actors: the legal status of mercenaries in armed conflict’ (2006) 88/863 *International Review of the Red Cross* 603; Ralby ‘A brief explanation of the private security regulatory initiatives – UN initiatives’, available at <http://irconsilium.com/a-brief-explanation-of-the-private-security-regulatory-initiatives-u-n-initiatives/> (last accessed 4 December 2014).

³⁴ Mancini, Ntoubandi & Marauhm ‘Old concepts and new challenges: are private contractors the mercenaries of the twenty-first century?’ in Francioni & Ronzotti (eds) *War by contract: human rights, humanitarian law and private contractors* (2011) at 340; Morgan n 15 above at 213, 217 & 218; Rona ‘Remarks by Gabor Rona, UN Working Group on the Use of Mercenaries’ (Montreux Conference 13 December 2013), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14105&LangID=E> (last accessed 4 December 2014).

IHL categories like ‘armed civilians’,³⁵ those accompanying them ‘supply contractors’,³⁶ or ‘members of the armed forces’ or ‘militias’.³⁷ Each of these attempts has failed to provide wholly satisfactory categories for these new actors.³⁸ At best, one can conclude that they are still occupying primary civilian status³⁹ with its attendant restrictions on any actions amounting to direct participation in hostilities.⁴⁰ However, their armed presence in the theatres of conflict, as well as their combat fatigues, do little to reassure that a satisfactory resolution will be achieved.⁴¹ It also does not help that PMSCs are continually re-inventing themselves, taking on multiple identities, combining business, military and humanitarian agendas, and adapting to the specific needs of their clientele.⁴²

While they may inhabit a ‘grey zone’, closer analysis confirms that the personnel of PMSCs seldom fulfil the complex definitional requirements for mercenarism – as set out in the two international mercenaries’ conventions⁴³

³⁵ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1979) 1125 *UN Treaty Series* 1391 at articles 50 and 51.

³⁶ 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GC III) of August 12 1949 (1950) 75 *U.N. Treaty Series* 135 at article 4A.

³⁷ GC III article 4A(1) and (2); AP I article 43. ‘They cannot be considered soldiers or supporting militias under IHL either, since they are not part of the army or in the chain of command, and often belong to a large number of different nationalities’ (Gomez del Prado n 14 above; Morgan n 15 above at 218).

³⁸ For more on this, see Bosch n 9 above.

³⁹ Ishøy *Handbook on the practical use of international humanitarian law* (revised edition) (2008) at 107; De Nevers ‘Private security companies and the laws of war’ (2009) 40 *Security Dialogue* 173; Henckaerts & Doswald-Beck (eds) *Customary international humanitarian law Volume 1: Rules* (2005) at 11; Goldman & Tittmore ‘Unprivileged combatants and the hostilities in Afghanistan: their status and rights under international humanitarian and human rights law’ (2002) *ASIL Task Force Paper*, available at www.asil.org/taskforce/goldman.pdf (last accessed 21 February 2014) at 1 and 23; Whippman ‘Redefining combatants’ (2006) 39 *Cornell International Law Journal* 701.

⁴⁰ Rogers ‘Unequal combat and the law of war’ (2004) 7 *Yearbook of International Humanitarian Law* 22; Bosch ‘Private security contractors and international humanitarian law – a skirmish for recognition in international armed conflicts’ (2007) 16/4 *African Security Review* 34; Bosch ‘Private military and security contractors: a face-off with the notion of direct participation in hostilities, in international armed conflicts’ (2013) 37/2 *Journal for Juridical Science* 1–34.

⁴¹ Gaston n 12 above at 233.

⁴² Joachim & Schneiker n 22 above at 368; Perrin n 32 above at 15; Spearin n 4 above at 364; Kidane ‘The status of private military contractors under international humanitarian law’ (2010) 38/3 *Denver Journal of International Law and Policy* 364; De Nevers n 39 above at 170.

⁴³ As Gomez del Prado points out many times, those hired by PMSCs are ‘legally operating in foreign countries under contracts of legally registered companies’ (Gomez del Prado n 14 above).

or article 47 of the 1977 Additional Protocol I to the Geneva Conventions of 1949.⁴⁴ That is not to say that some individuals who have engaged in mercenary activities have not subsequently been employed by PMSCs.⁴⁵ This lingering suspicion has driven some countries, like South Africa, to introduce measures to ban, or at least heavily regulate, the activities of PMSCs.⁴⁶

In response to the media frenzy that has besieged the big names in the PMSC industry – like Blackwater and Executive Outcomes – several PMSCs have attempted to showcase the important role they play in ensuring human rights and providing stability within regions. There is hope that if they clean up their act in terms of their IHL and human rights compliance, they can win work from ‘blue chip’ clients like humanitarian organisations.⁴⁷ In fact, the PMSC industry, as a collective, has slowly⁴⁸ sought to distance itself from the stigma associated with the illegitimate activities of mercenaries, and PMSCs are hard at work to regain and maintain respectability within the international community.⁴⁹ This they are attempting to achieve through forming associations and professional institutes⁵⁰ aimed at promoting collaborative and institutionalised self-regulation⁵¹ – for example, the

⁴⁴ Singer ‘War, profits and the vacuum of law: privatized military firms and international law’ (2004) 42 *Columbia Journal of Transnational Law* 531; Gumedze ‘Towards the revisions of the 1977 OAU/AU Convention on the Eliminations of Mercenarism in Africa’ (2007) 16/4 *African Security Review* 24.

⁴⁵ So, for example, the security industry operation out of Sierra Leone has a reputation for being heavily ‘polluted’ by ex-mercenaries. Working Group ‘Status Report on Anglophone Africa: Comprehensive Study and Analysis of National Legislation’, available at:

<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx> (last accessed 29 November 2014) (hereafter referred to as the Anglophone African study).

⁴⁶ Regulation of Foreign Military Assistance Act 15 of 1998 (FMA); The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 (PMA).

⁴⁷ Perrin n 32 above at 21; Joachim & Schneiker n 22 above at 367 & 387–388; Leander ‘The market for force and public security: The destabilizing consequences of private military companies’ (2005) 42 *Journal of Peace Research* 609.

⁴⁸ Krahnmann n 26 above at 262.

⁴⁹ McCoy ‘Organisational frames for professional claims: Private military corporations and the rise of the military paraprofessional’ (2012) 59 *University of California Press* 322 at 338.

⁵⁰ Gumedze ‘The elimination of mercenarism and regulation of the private security industry in Africa’ (2008) 147 *ISS Monograph Series* 4.

⁵¹ McCoy n 49 above at 338; Bearpark & Schulz ‘The private security challenge in Africa: problems and options for regulation’ (2007) 139 *ISS Monograph Series* 82.

International Code of Conduct for Private Security Providers' Association.⁵² However, the lack of perceived objectivity raises questions of whether self-regulation really ensures the necessary level of accountability.⁵³

In terms of international law, there is no prohibition on the outsourcing of some state security functions to PMSCs,⁵⁴ although there is some controversy surrounding the outsourcing of 'inherently state functions'.⁵⁵ Even in this grey zone where states, corporations and sometimes individuals contract the services of PMSCs, their dealings are subject to several rights or duties under international law. These include state responsibility⁵⁶ for the actions of these PMSCs, provisions which determine when individuals can face criminal prosecution for their actions,⁵⁷ laws which prohibit the use of certain weapons,⁵⁸ international human rights laws,⁵⁹ and IHL. This is not a

⁵² There is also the British Association of the Private Security Companies (BAPSC) and the Association of the Stability Operations Industry based in the USA.

⁵³ Gumedze 'Pouring old wine into new bottles? The debate around mercenaries and private military and security companies' (2008) 147 *ISS Monograph Series* 37.

⁵⁴ The working group's study of PMSCs notes that 'international law does not contain any provisions which address the outsourcing of State functions to PSCs'. Human Rights Council 'Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies', Second session, Geneva, 13–17 August 2012, A/HRC/WG.10/2/CRP.1, available at: <http://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitarySession2.aspx> (last accessed 15 February 2014).

⁵⁵ The draft PMSC convention refers to these as 'fundamental state functions' and defines them as 'functions that a State cannot outsource or delegate to non-State actors', citing examples of 'waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence and police powers, especially the powers of arrest or detention, including the interrogation of detainees' (Article 2(k)).

⁵⁶ International Law Commission 'Draft articles on state responsibility', available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (last accessed 4 December 2014). The commentary on the articles goes so far as to cite the example of PMSCs that are hired to run a detention centre.

⁵⁷ While PMSC employees can be held criminally liable by the territorial states, in many instances the territorial state may simply be unable or unwilling to pursue the prosecution of ordinary crimes. Moreover, in many instances a status of forces agreement affords the PMSC employee immunity from domestic criminal prosecution (Perrin n 30 above at 228). That said, universal jurisdiction for war crimes (genocide and crimes against humanity are probably unlikely, given the special elements attached to these grave crimes) does afford every nation state the authorisation to prosecute the employees of PMSCs.

⁵⁸ Convention on the prohibition on the development, production, stockpiling and use of chemical weapons and on their destruction (1974) *UNTS* 45.

⁵⁹ This includes the International convention for the protection of all persons from enforced disappearance (2006) 2716 *UNTS* at 3, the Convention against torture and other cruel, inhumane or degrading treatment or punishment (1984) 1465 *UNTS* at 85, and the International convention on civil and political rights (1976) 999 *UNTS* at 171.

lawless environment, ‘certain well-established rules and principles do... regulate both the activities of PMSC staff, and the responsibilities of the States that hire them’⁶⁰ in times of conflict – even if there are still legal issues with the enforcement of international criminal law⁶¹ against PMSCs and their employees. This notwithstanding, some inherent difficulties surface⁶² when PMSCs are contracted to non-state actors – undoubtedly influenced by the prevailing state-centred view of international human rights law. Even the Montreux document concedes that PMSCs are bound by international human rights law only in so far as it is ‘imposed upon them by applicable national law’.⁶³

On the other hand, unlike other international law regimes, IHL demands compliance with its provisions from ‘all individuals who find themselves in a territory in which there is an armed conflict (international or non-international), whether they are State or non-State actors’.⁶⁴ Moreover, many of the IHL provisions can now be said to have crystallised into customary international law, rendering them legally binding on all PMSCs.⁶⁵ So, while there certainly is a body of international laws that applies to PMSCs, there are many issues which require further research, for example:

whether and when security contractors can be directly targeted in hostilities; the degree to which private security personnel are permitted to participate directly in hostilities; and what consequences might follow from their actions if they do participate directly in hostilities.⁶⁶

⁶⁰ Montreux Document n 31 above at 37.

⁶¹ The ICC will not exercise jurisdiction over PMSCs and the provisions for attributing criminal liability to a PMSC are not yet certain under international law (Perrin n 30 above at 228).

⁶² When PMSCs are contracted by non-state actors, their actions which would amount to a violation of human rights were they committed by the state, will not be classified as a violation of IHRL – without a link to the state and its obligations under human rights treaties. There is little impetus for states, subject to their treaty obligations, to legislate and regulate the activities of PMSCs extra-territorially (*id*) Montreux Document n 31 above at 26(d).

⁶³ Perrin n 30 above at 228.

⁶⁴ Cameron ‘International humanitarian law and the regulation of private military companies’ (2007), available at: <http://www.baselgovernance.org/fileadmin/docs/pdfs/Non-State/Cameron.pdf> (last accessed 20 August 2013) at 2); Kidane n 42 above at 364; Montreux Document n 31 above at 37; Scheimer, ‘Separating private military companies from illegal mercenaries in international law’ (2009) 24 *American University International Law Review* 642.

⁶⁵ Spearin n 1 above at 22.

⁶⁶ Cameron n 13 above at 582; Gaston n 12 above at 243.

There have been many international responses aimed at addressing the grey area PMSCs inhabit. In 2000, a new initiative, entitled the Voluntary Principles on Security and Human Rights,⁶⁷ was launched to provide guidelines for those oil, gas and mining companies who make use of PMSCs. The most recent guidelines emerging from these voluntary principles were released in 2014, and exhort companies, NGOs and governments to uphold these principles in their operations, in who they hire, and within their territories.⁶⁸ Even humanitarian agencies have put forward guidelines on how best to select a private security company.⁶⁹ In this Good Practice Review, humanitarian agencies are encouraged to insist that relief organisations ensure that ‘due diligence’ is carried out⁷⁰ before contracting the services of a PMSC. Moreover, in the interests of state sovereignty, relief organisations are advised to obtain the necessary authorisation from the state on whose territory their activities will take place, before employing PMSCs to provide armed protection.⁷¹ In 2009 the Parliamentary Assembly of the Council of Europe (PACE) called for a PACE directive on regulation of the PMSC industry.⁷² In October 2010 the Inter-Agency Security Management Network (IASMN)⁷³ set up a working group to look into drafting a UN policy setting out guidelines for UN agencies making use of PMSCs. In 2012 the UN Department of Safety and Security published guidelines for UN departments on their use of armed security services. The guidelines require that PMSCs contracted by the UN, come with a ‘clean human rights record and that their activities are in line with international human rights norms’.⁷⁴ In 2011 the Human Rights Council adopted the Guiding Principles on Business and Human Rights, which exhort business enterprises (including

⁶⁷ Available at <http://www.voluntaryprinciples.org> (last accessed 18 February 2015).

⁶⁸ Private Security Monitor ‘Voluntary principles on security and human rights’, available at: http://psm.du.eduu/international_regulation/global_standards_codesofconduct/voluntary_principles.html (last accessed 4 December 2014).

⁶⁹ Entitled the ‘Good Practice Review 8’ (Security Management Initiative ‘Private Military And Security Companies and Humanitarian Action’ (2009) Professional Development Brief, available at <http://www.gcsp.ch/Emerging-Security-Challenges/New-Issues-in-Security/Publications/GCSP-Publications/Security-Management-Initiative/Professional-Development-Brief-Series/Private-Military-and-Security-Companies-and-Humanitarian-Action> (last accessed 15 February 2013) at 7).

⁷⁰ Perrin n 32 above at 31.

⁷¹ *Id* at 28 and 30.

⁷² PACE ‘Private military and security firms and erosion of the state monopoly on the use of force’ Recommendation 1858 (2009).

⁷³ Inter-Agency Security Management Network, which is ‘a policy body composed of the heads of all security departments across the UN system’ (Pingeot n 5 above at 38).

⁷⁴ Pillay n 6 above.

PMSCs) to ensure respect for human rights through proper vetting and training of their employees in human rights obligations, and establishing mechanisms to ensure accountability through monitoring and reporting of violations.⁷⁵

The first international attempt to define the relationship between PMSCs and states – detailing not only legal norms, but also business, regulatory and administrative practices⁷⁶ – is contained in the Montreux Document, which evolved from a joint initiative of the International Committee for the Red Cross (ICRC) and the Swiss government, and was intended as a non-binding ‘compilation of existing IHL related to PMSC’⁷⁷ and best practices. It was adopted by seventeen states in 2008, and provides clearly that PMSCs do not operate in a legal vacuum, and that states are responsible for regulating the extra-territorial conduct of PMSC-related businesses registered in, or operating out of their territory.⁷⁸ The Montreux Document claims to offer assistance with the formulation of internal policies for relief organisations, regarding their use of PMSCs.⁷⁹ In terms of the Montreux Document, the IHL status of these PMSCs ‘depends on their exact employment and functions’,⁸⁰ as well as the time, location and prevailing circumstances surrounding their actions.⁸¹ The Montreux Document fails in that it is limited by the existing state-centric human rights law regime, and the limitations inherent in most domestic criminal jurisdictions which are ineffective in the regulation of PMSCs⁸² extra-territorially. For the Montreux Document to succeed, it must rely heavily on the assumption that increasing state responsibility over the actions of PMSCs will necessarily result in more effective domestic regulation of PMSCs and the realisation of remedies for victims.⁸³

⁷⁵ *Ibid*; Rona n 34 above.

⁷⁶ Cockayne ‘Regulating private military and security companies: the content, negotiation, weaknesses and promise of the Montreux document’ (2008) 13 *Journal of Conflict and Security Law* 402.

⁷⁷ ICRC n 31 above at 36 & 39; Gillard ‘Private Military/Security Companies: the Status of their Staff and their Obligations under International Humanitarian Law and the Responsibilities of States in Relation to their Operations’ (2005) *Third Expert Meeting on the Notion of Direct Participation in Hostilities* Geneva at 2.

⁷⁸ Cockayne n 76 above at 403.

⁷⁹ Montreux Document n 31 above at 43.

⁸⁰ *Id* at 36 and 39; Gillard n 77 above at 2.

⁸¹ Kidane n 42 above at 412 and 419; Montreux Document n 31 above at principle 24.

⁸² Perrin n 30 above at 228.

⁸³ *Ibid*.

The second international attempt to fill the void in international law with regard to the private military security industry, is the International Code of Conduct for Private Security Service Providers (ICOC).⁸⁴ The ICOC is a multi-stakeholder initiative designed to establish principles for the private military security industry that can ultimately be translated into industry standards against which PMSCs can be held accountable.⁸⁵ To date, over 500 private military security companies have signed the ICOC,⁸⁶ and along with the Montreux Document, these two texts represent a strong indication of the trend towards regulation of the private military security industry.⁸⁷

While these self-regulatory initiatives are laudable and go some way to clarifying the status of PMSCs in international law, they are ‘not legally binding and cannot be considered as complete solutions for the problems concerning PMSCs’.⁸⁸ The ICOC, for example, lacks a complaints mechanism and the ability to conduct field audits of PMSCs.⁸⁹ What is needed is a legally binding treaty that spells out clearly ‘the minimum content of states’ due diligence obligations, and to ensure that PMSCs respect international humanitarian and human rights law’.⁹⁰ Of course, while an international treaty would be useful in helping to formulate a coordinated regime for regulating this industry, enforcement of any treaty requires states to exercise, on domestic level, their jurisdiction over their nationals and those in their territory. At present the ‘home states’ of PMSCs are often happy to benefit economically from PMSCs, but are reluctant to regulate their conduct abroad.⁹¹

In July 2005 a working group was established pursuant to the UN Commission on Human Rights Resolution 2005/2, in order to continue the

⁸⁴ ICOC ‘International code of conduct for private security service providers’, available at icoc-ppsp.org (last accessed 18 February 2015).

⁸⁵ Wallace, ‘International code of conduct for private security service providers’ (2011) 50 *American Society of International Law* 90.

⁸⁶ Crook ‘Contemporary practice of the United States relating to international law’ (2013) 107 *American Society of International Law* 213.

⁸⁷ Gaston n 12 above at 232.

⁸⁸ OHCHR n 19 above.

⁸⁹ Rona n 34 above.

⁹⁰ Patel ‘Speech delivered on the work of the working group’, available at: www.ohchr.org/Documents/HRBodies/.../A-HRC-WG-10-2-CRP-1.doc (last accessed 8 December 2014).

⁹¹ Perrin n 30 above at 228.

mandate of the Special Rapporteur on the Use of Mercenaries.⁹² In 2008 the mandate of the working group was expanded to include PMSCs, since they had increasingly taken over many services which had historically fallen within the realm of states.⁹³ It is hoped that by consolidating many of these international provisions into a single international convention, greater levels of more consistent compliance will result in genuine accountability.⁹⁴

EXISTING DOMESTIC REGULATION OF THE PMSC INDUSTRY

The PMSCs were not the only ones who felt the aftershock of the actions of Executive Outcomes.⁹⁵ Countries like South Africa suddenly found themselves on the receiving end of unwelcome media attention by virtue of their connection to some of the more infamous PMSCs. The end of apartheid provided the PMSC industry with a pool of highly skilled, white, Afrikaner, ex-military personnel⁹⁶ – who, disaffected with the new dispensation, were eminently available for hire by PMSCs. The government's response was swift and harsh. They labelled these PMSC employees 'mercenaries' and enacted legislation⁹⁷ aimed at banning these companies from their territory, and also threatened to prosecute and render the South African (SA) citizens employed by PMSCs *persona non grata* should they participate in the PMSC industry⁹⁸ without stringent authorisation.⁹⁹

The United States (US) – another prolific supplier of private military and security contractors¹⁰⁰ – took a more measured approach, enacting legislation¹⁰¹ to regulate and license the import and export of military articles

⁹² OHCHR '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', available at: ohchr.org (last accessed 18 February 2015).

⁹³ Rona n 34 above.

⁹⁴ Gumedze n 53 above at 37; Holmqvist n 7 above at 47–48.

⁹⁵ 'Executive Outcomes', available at globalsecurity.org (last accessed 18 February 2015).

⁹⁶ From the disbanded SADF 32 Battalion.

⁹⁷ See n 46 above; Mancini, Ntoubandi & Marauhm n 34 above at 340.

⁹⁸ Bosch & Maritz n 11 above at 102.

⁹⁹ Ortiz 'Regulating private military companies: states and the expanding business of commercial security provision' in Assassi, Wigan & Van der Pijl (eds) *Global regulation. managing crises after the imperial turn* (2004) 215; Messner 'Working towards effective legislative and regulatory solutions for the private security industry in Africa' (2008) 147 *ISS Monograph Series* 152; Franklin 'South African and international attempts to regulate mercenaries and private military companies' (2008) 17 *Transnational Law and Contemporary Problems* 253.

¹⁰⁰ Holmqvist n 7 above at 50.

¹⁰¹ Arms Export Control Act (AECA), the Uniform Code of Military Justice 1950 (UCMJ) and the Military Extraterritorial Jurisdiction Act 2007 (MEJA).

and services by PMSCs, under the watchful eye of the International Traffic in Arms Regulations (ITAR) and the Bureau of Political-Military Affairs.¹⁰² The mechanism provided under the Arms Export Control Act (AECA) is generally considered effective, although there are concerns about the details of the process, the lack of a follow-up review of the contracts, and the fact that decisions to grant contracts are based solely on foreign policy considerations.¹⁰³ The concerns about the accountability of these actors have been partially addressed in the legislation extending US jurisdiction to PMSCs and their personnel when such personnel commit offences outside the borders of the US.¹⁰⁴ It also extends the ambit of application beyond those serving on contract with the Department of Defence.¹⁰⁵ Attempts by the United Kingdom (UK) to regulate PMSCs have stalled since the Foreign Enlistment Act of 1870 came in for criticism in the Diplock Report.

The Foreign Enlistment Act of 1870 came under criticism¹⁰⁶ in the Diplock Report.¹⁰⁷ The most recent word on the UK stance is set out in the 2002 *Green Paper on Private Military Companies: Options for Regulation*.¹⁰⁸ In short, the *Green Paper* argues that there is little point in outlawing the industry, not only because of its inevitable growth, but also because of the potential benefits that the regulation and use of the industry could bring.¹⁰⁹ The *Green Paper* also comments that the most effective way to compel

¹⁰² Ortiz n 99 above at 212; Franklin n 99 above at 253; Singer n 44 above at 539.

¹⁰³ Sandoz 'Private security and international law' in Cilliers & Mason (eds) *Peace, profit or plunder?: the privatisation of security in war-torn African societies* (1999) at 217. Senate Armed Services Committee report 'Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan', which was approved in 2010; Franklin n 99 above at 253.

¹⁰⁴ Ebrahim 'Going to war with the army you can afford: The United States, international law, and the private military industry' (2010) 28 *Boston University International Law Journal* 195; Underwood, 'Jealousies of a standing army: The use of mercenaries in the American Revolution and its implications for congress's role in regulating private military firms' (2012) 106 *Northwestern University Law Review* 344.

¹⁰⁵ Scheimer n 64 at 621.

¹⁰⁶ Barrie 'Private military firms and mercenaries: potential for liability under international law' (2005) 12 *TFLR – International Law* 343.

¹⁰⁷ Beyani & Lilly 'Regulating private military companies: options for the UK government' (2001) *International Alert*, available at: http://www.ssrnetwork.net/uploaded_files/3542.pdf (last accessed 20 September 2013) at 29; Kwakwa 'The current status of mercenaries in the law of armed conflict' (1991) 67 *Hastings Int'l & Comp. L. Rev.* 82.

¹⁰⁸ Whyte 'Lethal regulation: State-corporate crime and the United Kingdom government's new mercenaries' (2003) 30 *Journal of Law and Society* 586.

¹⁰⁹ *Id* at 587.

disreputable PMSCs to amend their behaviour, is to award lucrative government contracts to reputable PMSCs.¹¹⁰

In order to understand the legal climate around PMSCs, 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, undertook three studies aimed at exploring the domestic regulatory responses to the PMSCs in the regions of Anglophone Africa,¹¹¹ Francophone Africa¹¹² and Anglophone Asia.¹¹³ The detailed reports emerging from these studies, reveal interesting commonalities in the domestic approach to regulating this industry. By discussing these briefly, we hope to arrive at a better understanding of whether a wholly domestic response can propose an effective regulatory regime for the PMSC industry.

In all three studies, the domestic legislative approach of the states concerned with regulating the PMSC industry, was either non-existent or very diverse.¹¹⁴ The terminology and definitions used to refer to the PMSC industry were inconsistent,¹¹⁵ and in most instances the legislation was aimed only at the security services¹¹⁶ and did not address military services.¹¹⁷ Almost without exception, the territorial scope of all the domestic legislation

¹¹⁰ Walker & Whyte 'Contracting out war?: Private military companies, law and regulation in the United Kingdom' (2005) 54 *International and Comparative Law Quarterly* 651, 660 & 661.

¹¹¹ Anglophone Africa study n 45 above. This study looked at Ghana, Mauritius, Sierra Leone, The Gambia, Nigeria, Uganda and Kenya.

¹¹² Working Group 'Analysis of eight Francophone African countries', national legislation on PMSCs', available at:

<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx> (last accessed 29 November 2014). This study looked at Burkina Faso, Cameroon, Côte d'Ivoire, the Democratic Republic of Congo, Mali, Morocco, Senegal, and Tunisia (hereafter referred to as the Francophone African study).

¹¹³ Working Group 'Comparative analysis of the regulation of private military and security companies in eight Asian countries', available at:

<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx> (last accessed 29 November 2014). This study looked at China, India, Malaysia, Pakistan, the Philippines, Singapore, Sri Lanka and the United Arab Emirates (hereafter referred to as the Asian study).

¹¹⁴ Anglophone African study n 45 above at 36; Asian study n 113 above at 32.

¹¹⁵ Francophone African study n 112 above at 4; Anglophone African study n 45 above at 36; Asian study n 113 above at 32.

¹¹⁶ Understood to mean 'guarding and protection provided to persons and goods'. Francophone African study n 112 above at 4; Anglophone African study n 45 above at 36–37; Asian study n 113 above at 32).

¹¹⁷ Francophone African study n 112 above at 4; Anglophone African study n 45 above at 41; Asian study n 113 above at 32.

was limited to the country's domestic jurisdiction,¹¹⁸ with only one country (India)¹¹⁹ opting to regulate the importing or exporting of PMSC services through the extra-territorial application of its domestic legislation. The notion that PMSCs which export their services are under an obligation to 'respect the sovereignty and laws of the country of operations', is seldom mentioned in domestic legislation.¹²⁰

Most domestic legislation and regulations giving effect to the legislative provisions, set up a licensing regime for PMSCs seeking to offer security services.¹²¹ Despite sharing this commonality, the licensing systems were nevertheless divergent, and the individual or government departments responsible for granting such a licence varied from country to country.¹²² Most lacked a 'single dedicated body' responsible for maintaining a register¹²³ of such licensing, and very few provided for any subsequent monitoring of the activities of PMSCs¹²⁴ once licensed.

As for the provisions aimed at employees, only four countries required the individual employee to be licensed as well,¹²⁵ and by and large, it was assumed that these personnel would be nationals of the country in question.¹²⁶ The main requirement in the legislation is that the employee must not have a criminal record.¹²⁷ Very few countries had legislation requiring the additional need to prove good moral conduct.¹²⁸

What the three studies also revealed was that most of the domestic legislation placed more emphasis on acts that violated the provisions

¹¹⁸ Francophone African study n 112 above at 4; Anglophone African study n 45 above at 40; Asian study n 113 above at 32.

¹¹⁹ Asian study n 113 above at 32.

¹²⁰ Francophone African study n 112 above at 4; Anglophone African study n 45 above at 38; Asian study n 113 above at 29.

¹²¹ Francophone African study n 112 above at 6; Anglophone African study n 45 above at 37; Asian study n 113 above at 29.

¹²² Anglophone African study n 45 above at 37.

¹²³ Francophone African study n 112 above at 5; Anglophone African study n 45 above at 27; Asian study n 113 above at 11.

¹²⁴ Francophone African study n 112 above; Anglophone African study n 45 above; Asian study n 113 above at 13.

¹²⁵ Asian study n 113 above at 29; China, Philippine, Singapore and the UAE.

¹²⁶ Francophone African study n 112 above; Anglophone African study n 45 above; Asian study n 113 above.

¹²⁷ Asian study n 113 above at 9 and 12; Francophone African study n 112 above at 5–6; Anglophone African study n 45 above at 15.

¹²⁸ Asian study n 113 above at 9.

regarding ‘the scope of permitted activities, licensing, authorisation, recruitment and other administrative processes’¹²⁹ than any ‘oversight mechanisms’ aimed at ensuring compliance with international human rights obligations or IHL.¹³⁰ Sanctions were usually administrative in nature, involving ‘warnings, fines, temporary suspension of the company’s activities, withdrawal of authorisation, and seizure of weapons and firearms’.¹³¹ Unfortunately, in most cases, there were no provisions providing remedies for victims.¹³²

Once licensed, there is very little reference to any monitoring of the conduct of PMSCs, or the provision of mechanisms to ‘ensure the accountability of PMSC personnel for violations of the law’¹³³ and remedies for victims.¹³⁴ Likewise, there are no provisions for criminal cooperation, universal jurisdiction, extradition arrangements, the transfer of criminal proceedings, and mutual legal assistance between countries, which would ensure that violations of human rights and IHL are investigated, prosecuted, and punished.¹³⁵

All three studies¹³⁶ mention the absence of any reference in the domestic regulation that would oblige the PMSC industry to adhere to international human rights law or IHL. There is no proof required of a PMSC’s compliance with international human rights or IHL before the granting of licences – or the renewal of licences. No mention is made of observance of international human rights law and IHL in the selection criteria for employees, the obligation to provide mandatory training materials, and monitoring activities.¹³⁷ In all three studies, concern was expressed that this lacuna – found in almost every piece of domestic legislation – suggests that neither PMSCs nor their employees would be held accountable for violations

¹²⁹ Francophone African study n 112 above at 14; Asian study n 113 above at 20–22.

¹³⁰ *Id* at n 112 above at 15–16; Asian study n 113 above at 21.

¹³¹ *Id* at n 112 above at 15; Asian study n 113 above at 15.

¹³² *Id* at n 112 above at 14–15; Asian study n 113 above at 26.

¹³³ *Id* at Francophone African study n 112 above at 16; Asian study n 113 above at 34.

¹³⁴ Asian study n 113 above at 31.

¹³⁵ *Id* at 35.

¹³⁶ Francophone African study n 112 above; Asian study n 113, Anglophone African study n 45.

¹³⁷ *Id* at 15–16; Asian study n 113 above at 19. The study revealed that only four states took into account previous human rights violations when deciding whether to deny a licence. While some domestic legislation required some degree of training, there is little or no reference made to mandatory training in the fields of IHL or international human rights obligations.

of international law, and those subject to such violations would be denied remedies.¹³⁸

The analysis furthermore revealed a further oversight, namely that most of the domestic legislation did not ‘include any specific provisions on PMSC personnel’s direct participation in hostilities’¹³⁹ and the limitations of the ambit of their services – especially when it comes to combat-type services.¹⁴⁰ Each legislative system approaches the issue of the use of force and the rules of engagement and firearms in a different way. Some expressly prohibit the use of force, except in self-defence, others permit force, subject to the relevant laws and regulations, while yet others refer to the exception that any force must be ‘adequate, mandated and proportional’.¹⁴¹

Other topics that are seldom addressed in the legislation are general arms-control licensing procedures, arms transfer limitations, the acquisition of weapons, and minimum training requirements.¹⁴² Moreover, the lack of reference to prohibited mercenary activity¹⁴³ has also raised concern. In fact, the analysis revealed that while many countries were party to the international anti-mercenary treaties, none of the Francophone or Anglophone African states studied, had regulations on the prohibition of mercenary activities at national level – let alone the necessary ‘enforcement and accountability mechanisms’.¹⁴⁴ This is mirrored in the domestic legislation aimed at PMSCs, which makes little or no reference to the ‘prohibition of either mercenaries or mercenary-related activities’.¹⁴⁵

As the working group has correctly pointed out – and their analysis in the three studies confirms this – ‘while there are common elements in the laws of these countries, the diverse contexts at the national level affect the way in which PMSCs are regulated and the regulatory approach of each country

¹³⁸ Asian study n 113 above at 31.

¹³⁹ Francophone African study n 112 above at 2.

¹⁴⁰ *Id* at 10.

¹⁴¹ *Id* at 14; Asian Study n 113 above at 19.

¹⁴² Francophone African study n 112 above at 17; Anglophone African study n 45 above at 39; Asian study n 113 above at 30.

¹⁴³ Francophone African study n 112 above at 17; Anglophone African study n 45 above at 38; Asian study n 113 above at 3.

¹⁴⁴ Francophone African study n 112 above at 17; Anglophone African study n 45 above at 38; Asian study n 113 above at 3.

¹⁴⁵ Francophone African study n 112 above at 17; Anglophone African study n 45 above at 38; Asian study n 113 above at 3.

varies significantly¹⁴⁶ in scope and complexity.¹⁴⁷ In some instances, like South Africa, a particularly harsh domestic regulatory response has resulted in PMSCs ‘charter shopping’¹⁴⁸ and to relocating their operations to countries with less onerous legislation, or has merely driven the industry underground.¹⁴⁹ There is no denying that the patchwork of diverse and inconsistent domestic regulatory regimes has serious jurisdictional limitations that only a coordinated international response can hope to overcome effectively.¹⁵⁰ The domestic responses reveal systematic inadequacies relating to the registration and licensing of PMSCs. Without standardised, effective and transparent oversight mechanisms that hold PMSCs and their personnel accountable ‘to the government of their country of origin, registration or their country of operation’,¹⁵¹ human rights will continue to be violated, and victims will be left without criminal and civil remedies.¹⁵²

PROPOSED INTERNATIONAL CONVENTION FOR THE REGULATION OF PMSCs

The PMSC industry is multi-national¹⁵³ and trans-national¹⁵⁴ by nature, and those employed in it are ‘international, mobile, and largely anonymous’.¹⁵⁵ The existing patchwork of national legislation only offers, at best, a patchy domestic response to an industry which is able to relocate to and re-incorporate in territories where the domestic regime is weak and regulation is lax.¹⁵⁶

¹⁴⁶ Human Rights Council, n 17 above.

¹⁴⁷ Private Security Monitor ‘National Regulations’, available at: http://psm.du.edu/national_regulation/index.html (last accessed 4 December 2014).

¹⁴⁸ Perrin n 30 above at 228.

¹⁴⁹ Holmqvist n 7 above at 42.

¹⁵⁰ Asian study n 113 above; Ortiz n 99 above at 211.

¹⁵¹ Francophone African study n 112 above.

¹⁵² OHCHR ‘Guiding principles on business and human rights’, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last accessed 4 December 2014); OHCHR ‘UN expert group calls for robust international regulation of private military and security companies’, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13940&> (last accessed 4 December 2014); Francophone African study n 112 above.

¹⁵³ Morgan n 15 above at 240.

¹⁵⁴ Patel n 90 above.

¹⁵⁵ Holmqvist n 8 above at 7; De Nevers n 39 above at 175; Francophone African study n 112 above.

¹⁵⁶ Irvin ‘Rethinking the role and regulation of private military companies: what the United States and United Kingdom can learn from shared experience in the war on terror’ (2011) 39 *GA J Int'l & Comp L* 463.

An effective response to the PMSC industry, which ensures real accountability for violations of international law,¹⁵⁷ must be legally binding and able to operate at an international level.¹⁵⁸ The working group is of the opinion that an ‘international convention’ which sets out the ‘minimum standards’ for ‘licensing, authorising, selecting and training PMSC personnel’,¹⁵⁹ remains the most efficient solution to the challenge of regulating PMSCs.¹⁶⁰

In July 2009 the working group tabled a draft PMSC convention for distribution.¹⁶¹ The draft convention is comprehensive, and most of the 51 articles have been included to address the shortcomings under the disjointed domestic regimes. The provisions in the draft PMSC convention have been analysed extensively.¹⁶²

The draft PMSC convention’s ‘inherent value is in defining the content of countries’ international human rights obligations and requiring countries to take legislative, administrative and other measures to ensure PMSCs and their personnel are held accountable for violations’.¹⁶³ With an international convention stipulating how nation states enact their domestic legislation, this will ‘ensure effective scrutiny, accountability and the availability of remedies for violations’¹⁶⁴ of IHL and human rights law, in a more effective and consistent manner than existing domestic legislation and self-regulation currently afford.

¹⁵⁷ OHCHR n 152 above.

¹⁵⁸ Morgan n 15 above at 240; Messner, n 99 above at 148–149; Gaston n 12 above at 241.

¹⁵⁹ Francophone African study n 112 above; OHCHR n 152 above.

¹⁶⁰ OHCHR n 152 above. The working group can also hear individual complaints against PMSCs, violations of the Montreux document can be referred to the working group, and the working group can conduct state visits.

¹⁶¹ Human Rights Council n 17 above

¹⁶² Gumedze ‘Addressing the use of private security and military companies at the international level’ (2009) 206 *ISS Paper*; Perrin n 30 above; Juma n 30 above; Gomez del Prado n 15 above.

¹⁶³ Rona n 34 above. In so far as this goes, it is hoped that its mere existence will assist those states who are drafting or amending their domestic legislation to take cognisance of these international guidelines – even while the convention remains in draft form.

¹⁶⁴ Francophone African study n 112 above.

The convention claims to apply to ‘States,¹⁶⁵ inter-governmental¹⁶⁶ organisations and non-state actors, including private military and security companies¹⁶⁷ and their personnel’¹⁶⁸ – in both the import and export provision of military and security services.¹⁶⁹ Each of these parties can express its consent to be bound by the provisions in the convention by ratification, formal confirmation, and communication of support,¹⁷⁰ depending on its international legal personality. This is a novel notion in international law, which usually applies a state-centric approach to treaty obligations.¹⁷¹

Several significant international law principles are to be found at the core of the draft PMSC Convention. These are: observance of the rule of law,¹⁷² respect for state sovereignty¹⁷³ and IHRL,¹⁷⁴ and, importantly, state responsibility and control¹⁷⁵ over PMSCs acting in violation of these principles¹⁷⁶ – including the obligation to inform those contracting with PMSCs when their licence has been revoked.¹⁷⁷

For the first time, the draft PMSC convention establishes that ‘inherent state functions [that] cannot be outsourced’,¹⁷⁸ and that instances where force or excessive use of firearms,¹⁷⁹ will be deemed illegal.¹⁸⁰ The convention prohibits certain activities¹⁸¹ and reinforces the prohibition of mercenary activities.¹⁸² The illicit trafficking in firearms is also regulated.¹⁸³

¹⁶⁵ The draft PMSC convention defines and distinguishes ‘contracting states’ from ‘territorial states’ and ‘home states’.

¹⁶⁶ Articles 30 & 45.

¹⁶⁷ Article 31. The Act defines and distinguishes private security services and private military services.

¹⁶⁸ Article 3(1).

¹⁶⁹ Articles 15 & 17(5).

¹⁷⁰ Article 44

¹⁷¹ Gumedze n 50 above at 10.

¹⁷² Article 5.

¹⁷³ Article 6

¹⁷⁴ Article 7

¹⁷⁵ Article 13

¹⁷⁶ Article 4.

¹⁷⁷ Asian study n 113 above.

¹⁷⁸ Ralby n 33 above.

¹⁷⁹ Articles 11 & 19.

¹⁸⁰ Article 10

¹⁸¹ Article 8

¹⁸² Article 9

¹⁸³ Article 12

Building around these legal principles, the draft PMSC Convention goes on to address the practical issues of states legislating for the licensing¹⁸⁴ and regulation¹⁸⁵ of conduct, in line with the treaty's obligations.¹⁸⁶ The treaty regime is aimed at providing a monitoring and oversight function for PMSCs and the personnel of private military and security companies.¹⁸⁷

The convention also dedicates several articles to the imposition of criminal¹⁸⁸ liability,¹⁸⁹ the establishment of jurisdiction,¹⁹⁰ and, where necessary, extradition¹⁹¹ or transfer of criminal proceedings¹⁹² as well as mutual legal assistance¹⁹³ upon breach of the convention. A significant addition to the convention are the articles that provide for remedies¹⁹⁴ for victims of convention offences, and obligations to notify the citizenry of the outcome of proceedings.¹⁹⁵

Lastly, the convention addresses the institution¹⁹⁶ of international oversight and monitoring mechanisms through the establishment of an international committee¹⁹⁷ which can receive state reports¹⁹⁸ and complaints,¹⁹⁹ conduct inquiries,²⁰⁰ and issue interpretive comments.²⁰¹ Provision has also been made for the appointment of a Conciliation Commission.²⁰²

The resolution proposing the draft PMSC convention was adopted by 32 votes for, twelve votes against, and three countries abstaining.²⁰³ The draft PMSC convention has received mixed responses, garnering support from the

¹⁸⁴ Articles 16 & 17.

¹⁸⁵ Article 15

¹⁸⁶ Article 14

¹⁸⁷ Article 18

¹⁸⁸ Article 21

¹⁸⁹ Article 28

¹⁹⁰ Articles 22 & 23.

¹⁹¹ Article 24

¹⁹² Article 26

¹⁹³ Article 25

¹⁹⁴ Article 29

¹⁹⁵ Article 27

¹⁹⁶ Articles 35 & 39.

¹⁹⁷ Articles 32 , 41 & 42.

¹⁹⁸ Article 33.

¹⁹⁹ Articles 37 & 40.

²⁰⁰ Article 36.

²⁰¹ Article 43.

²⁰² Article 38.

²⁰³ Gomez del Prado n 14 above.

African group, four BRICS members (Brazil, Russia, China and South Africa), the Organization of the Islamic Conference, and the Arab Group,²⁰⁴ but drawing serious criticism²⁰⁵ from the major Western powers who are exporters of seventy per cent of the PMSC industry.²⁰⁶ Some have argued that it is biased against the PMSC industry and ‘at odds with the Montreux Document’ and the ICOC.²⁰⁷ One very notable aspect is the ‘acceptance that PMSC and their employees are distinct from mercenaries’,²⁰⁸ which is significant given that the draft PMSC convention came from the working group tasked with an anti-mercenary agenda.

The draft PMSC convention did not ‘gain sufficient support to proceed’,²⁰⁹ despite the text of the draft having been ‘weakened in order to pass the resolution by consensus’,²¹⁰ and in 2010 the Human Rights Council, after lengthy negotiations, established an open-ended inter-governmental working group (OEIGWG) to consider the possibility of developing an international regulatory framework on the regulation, monitoring and oversight of the activities of PMSCs. In 2013 the Human Rights Council extended OEIGWG’s mandate for a further two years to fulfil its obligation to promote ‘a legally binding instrument regulating and monitoring’ the PMSC industry at national and international level,²¹¹ in a way which will garner support from the ‘Western group’²¹² (primarily the US and the UK). The OEIGWG will provide a ‘forum for all stakeholders to receive inputs’ on the draft PMSC convention and the ‘proposal submitted to the Parliamentary Assembly of the Council of Europe, the Montreux Document and the ICOC.’²¹³

It is acknowledged that a lack of consensus on the part of countries and their reluctance to cooperate timeously with the OEIGWG, shows ‘that the international community is not yet ready to adopt a detailed treaty on this matter’.²¹⁴ While a regime based upon the adoption of an international

²⁰⁴ *Ibid.*

²⁰⁵ Human Rights Council n 23 above at par 7; Perrin n 32 above at 6.

²⁰⁶ Ralby n 33 above; Gomez del Prado n 14 above.

²⁰⁷ Ralby n 33 above.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ Gomez del Prado n 14 above.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ Asia study n 113 above at 35.

convention will take time to develop and secure state ratification, this does not detract from the importance of an international regulatory system coming into being. The mere process of tabling an international convention which enjoys the support of the United Nations, will hopefully encourage more countries to implement domestic legislation, and will clear up conflicting approaches to the PMSC industry.²¹⁵ However, ‘what the world needs is implementation of a new law’, and, as Juma²¹⁶ points out, the draft PMSC convention still requires countries to carry the burden of enforcing the regulatory regime. Moreover, the licensing regime suggested by the draft PMSC convention might be prohibitively expensive and burdensome for some countries.²¹⁷ Nevertheless, the draft PMSC convention has been a worthwhile endeavour²¹⁸ in crystallising thoughts and encouraging debate around issues which have always been highly disputed.

A NEW APPROACH TO REGULATING THE PMSC INDUSTRY

With a domestic regulatory regime that is fragmented, inconsistent and slow to enforce international law against PMSCs and their employees (both at home or acting extra-territorially), and an overly optimistic proposed draft international convention which has not garnered the support of the major powers, the project of regulating the private security industry has stalled. One aspect that should not be discounted is that, at an industry level, many PMSCs are eager to re-claim their reputation as law abiding, human rights-focused and distinct from mercenaries. To this end, the initiatives which gave us the self-regulating Montreux Document and the ICOC,²¹⁹ have been well-received by individual PMSCs. Moreover, when humanitarian organisations and the UN are looking to hire PMSCs they are increasingly required to exercise due diligence for evidence of the observance of international law and industry good business practices,²²⁰ before awarding contracts. So, while self-regulation alone may not be sufficient to ensure accountability from PMSCs, it is a means by which they are seeking to prove their credentials.²²¹ One could argue that this is perhaps the best aspect to

²¹⁵ Gaston n 12 above at 243.

²¹⁶ Juma n 30 above at 184.

²¹⁷ *Ibid.*

²¹⁸ *Id* at 185.

²¹⁹ Crook ‘Contemporary practice of the United States relating to international law’ (2013) 107 *American Society of International Law* 213.

²²⁰ Scheimer n 64 above at 641, Holmqvist n 7 above at 46.

²²¹ Gaston n 12 above at 242.

build upon when seeking to regulate the industry – given the legal quagmire which has surrounded domestic and international attempts at regulation.

To this end, 2014 has seen some interesting developments emanating from the ISO, which had already developed standards to deal with issues of security and risk management in its ISO 26000 standard.²²² ISO 26000 is a guidance system that addresses issues of human rights and compliance with the UN Principles on Business and Human Rights, in its policy on ‘corporate responsibility’. To date, there is no standard that deals specifically with the PMSC industry, ensuring respect of IHL or international IHRL comparable that of ISO 26000. The American National Standards body (ANSI) saw this gap and established a new project committee (PC 284) to embark on this project in 2014.²²³ The vision of the PC 284 is to deliver a certifiable standard to ‘which organisations (like PMSCs) can demonstrate their conformance through a third party certification audit’.²²⁴

The focus of the standard will be on the observance of human rights and international law – ‘it’s about companies knowing and showing that they respect human rights’.²²⁵ The committee is using the Montreux Document, the ICOC, and ANSI PSC 1²²⁶ (a guide drafted in 2012 entitled the Management System for Quality of Private Security Company Operations). When PSC 1 was drafted, its aim was to operationalise the ICOC as a ‘certified management system standard’.²²⁷ Many in the PMSC industry see the new ISO standard as complementary to the existing ICOC.

By drawing on these three sources, the new certification standard will take cognisance of existing legal obligations, industry best practices, international human rights responsibilities, and the legal limitations set out in IHL. When

²²² Available at <http://www.iso.org/iso/home/standards/iso26000.htm> (last accessed 25 February 2015).

²²³ Available at http://www.iso.org/iso/iso_technical_committee?commid=4857900 (last accessed 15 February 2015).

²²⁴ De Winder-Schmitt ‘Private Security Monitor Commentary: A new twist to management standards, bringing in human rights’ (2014), available at: <http://psm.du.edu/commentary/index.html> (last accessed 4 December 2014).

²²⁵ *Ibid.*

²²⁶ Available at: <https://www.asisonline.org/Standards-Guidelines/Standards/published/Pages/Management-System-for-Quality-of-Private-Security-Company-Operations-Requirements-with-Guidance.aspx> (last accessed 26 March 2015).

²²⁷ *Ibid.*

the new standard is complete, it will be up to each state's domestic standards body or PMSC licensing body²²⁸ to elect to accept the new ISO standard. Once accepted, PMSCs can apply to be audited by accredited certification bodies in order to determine that they meet the requirements of the new ISO standard. It is envisaged that the accreditation authority will receive reports and conduct ISO-type audits and field inspections²²⁹ – calling on information from foreign offices, embassies and the military to verify that PMSCs are adhering to the standards. The British government, together with the UK Accreditation Service, has run a pilot project to develop accreditation bodies to audit PMSCs against PSC 1. Olive Group (a renowned private security company), has, through this process, already received its PSC 1 accreditation.

Some are critical of adopting an approach that portrays human rights abuses as “disruptive events” that constitute a management risk to be avoided’. While this approach aims to instil a human rights ethos in the company's management systems, critics are concerned that the human rights audit should not become a tick-box exercise. They recommend that the auditing bodies ‘glean information from the field and capture actual human rights impacts on the ground’²³⁰ – before awarding certification. There have also been concerns around the cost involved in establishing a domestic licensing system, particularly for Third World countries where the PMSCs are particularly active. In this way, perhaps an ISO-type accreditation, implemented at international level and at the cost of the PMSCs, could alleviate this financial burden on the poorer nation states.

CONCLUSION

There can be no dispute that there is an urgent need to regulate the grey zone inhabited by the booming PMSC industry. Any initiative – even a non-binding code of good business practice²³¹ that can increase accountability for the respect of IHL and IHRL – is to be lauded, however imperfect it may be.

Some states have made more progress with regulation than others, but there are still many areas which remain contested and unclear. It is not surprising,

²²⁸ National Conventional Arms Control Committee in South Africa, *International Traffic in Arms Regulations in the United States*.

²²⁹ Scheimer n 64 above at 642; Holmqvist n 7 above at 46.

²³⁰ De Winder-Schmitt n 224 above.

²³¹ Gumedze n 53 above at 37.

given these ambiguities, that the domestic regulatory regime has been found to be inconsistent, jurisdictionally limited, and notoriously slow to enforce accountability. The draft PMSC convention also received a very cool reception, and the OEIGWG now have an uphill battle ahead to get the industry's most prolific user states on board. While the PMSC industry has taken some significant steps towards establishing self-regulatory codes of conduct and standards,²³² these are viewed with some reservation as regards their ability to ensure true accountability. Perhaps the recent task of formulating an ISO-type standard will provide some much-needed stability to the regulation project, while nurturing further consensus among states.

It is argued that these multi-layered, complementary, regulatory initiatives, 'involving industry self-regulation, international standard setting, robust national legislation'²³³ and independent accreditation standards, should be viewed as viable and valuable means of improving accountability in the PMSC industry.²³⁴

From PMSCs' point of view, greater regulation will bring not only legal certainty as to the status of PMSC personnel under IHL,²³⁵ but, crucially, will bolster their reputational legitimacy.²³⁶ However, legal recognition must also come with the acceptance on the part of PMSCs that their personnel are subject to certain legal rights and responsibilities under international law, and that there may be limitations in respect of their being contracted to perform certain 'inherently state functions'.²³⁷

One of the major shortcomings of all the existing regulatory mechanisms is their collective failure to carry out prompt and effective investigation of international law violations committed by PMSCs, and to prosecute alleged perpetrators (both persons and organisations).²³⁸ For this reason, it is

²³² Brooks 'Messiahs or mercenaries? The future of international private military services' (2000) 7 *International Peacekeeping* 137.

²³³ Rona n 34 above.

²³⁴ *Ibid.*

²³⁵ For more on this, see Bosch n 9 above.

²³⁶ Holmqvist n 8 above at 4; Dumlupinar '*Regulation of private military companies in Iraq* (Thesis, Naval Postgraduate School, 2010) at 81; Messner n 99 above at 149–150.

²³⁷ Ortiz n 99 above at 211. For example: 'conduct criminal investigations, exercise any powers conferred on public security officers or on any police officer, customs officer, immigration officer, prison officer or any other public officer' (Gomez del Prado n 14 above; Asian study n 113 above).

²³⁸ Asian study n 113 above.

imperative that all regulatory regimes aim to either incorporate enforcement mechanisms with provisions which allow for the exercise of jurisdiction over violators on the basis of *aut dedere aut judicare*,²³⁹ or defer to domestic enforcement mechanisms which do so. Without the extension of jurisdiction (as illustrated by the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act in the United States) to include the criminal conduct of its citizens while operating outside their borders, PMSCs and their personnel will continue to seek out safe-haven states where prosecution can be avoided, or will dissolve and reappear with a clean slate in another part of the world. In the meantime, it will be useful to refuse the proposed ISO-type accreditation to PMSCs operating out of non-prosecuting states who have not legislated to extend their jurisdiction beyond their borders.

An international regime aimed at regulating the PMSC industry will bolster the international response to the issue of mercenarism. Tighter regulations around those who can be accredited to offer private military and security services, and limiting the activities in which they can engage, will expose mercenaries operating behind the PMSC mask. By prosecuting those who operate without the required licence or accreditation, or who violate IHL and international human rights law, it will be possible to identify those with mercenary motives who have managed to evade prosecution because they have not met six complicated requirements.^{240 241} In this way, states can strike a balance between over- and under-regulation.²⁴² With greater accountability and regulation and the eradication of the mercenary stigma, relief organisations will be able to hire PMSCs without fear of violating their institutional ethical obligations, or losing their donor support²⁴³ and credibility.²⁴⁴

²³⁹ That is an obligation to prosecute or extradite.

²⁴⁰ Major 'Mercenaries and international Law' (1992) 22 *Georgia Journal of International and Comparative Law* 110.

²⁴¹ Scheimer n 64 above at 642–643; Holmqvist n 7 above at 46; Dumlupinar n 236 above at 87.

²⁴² Bosch & Maritz n 11 above at 102; Major n 240 above at 110.

²⁴³ So, when Africa Confidential (1996) 'revealed that the now-defunct Executive Outcomes was providing security and information to an international aid agency; the agency subsequently went quiet in the face of its donors' disapproval' (Singer n 3 above at 9–10).

²⁴⁴ Joachim & Schneiker n 22 above at 383; Stoddard, Harmer & Haver 'Providing aid in insecure environments: trends in policy and operations' (2006) 23 *Humanitarian Policy Group and Center on International Cooperation Report* 4; Singer n 3 above at 3.

A few interesting policy and practice implications have emerged from the debate. Regulation and accreditation will inevitably demand that PMSCs and their personnel undergo training in the new operational guidelines,²⁴⁵ IHRL,²⁴⁶ IHL, and, most crucially, be knowledgeable as to which activities amount to ‘inherent state functions’ as prerequisites for obtaining a licence or accreditation.²⁴⁷ Similarly, any accreditation must require compliance with arms control laws regarding the illegal acquisition of weapons and illicit trafficking in arms,²⁴⁸ while adhering to the UN Register of Conventional Arms.²⁴⁹ Those states or organisations awarding contracts to PMSCs should be encouraged to do so only to those with either domestic licences or international accreditation. States should further insist that corporations operating on their soil engage only contract licensed or accredited PMSCs to lower their risk of state liability for international law violations. Similarly, all foreign PMSC companies should be prohibited from engaging in security services on foreign soil unless they have international accreditation. To this end, it may even be beneficial to provide accredited PMSC personnel with their own recognisable insignia,²⁵⁰ and PMSCs should be required to display their accreditation visibly in a conspicuous place.²⁵¹

Alongside training and enforcement mechanisms, there is also a practical onus on states to cooperate and share information for which PMSCs have received domestic licences or international accreditation, and take seriously their duty to revoke licences in case of violations of IHL or IHRL.²⁵² In order to prevent individuals from engaging in mercenary activities, it will also be necessary for PMSCs to ‘keep an internal data register’.²⁵³ Some have gone so far as to suggest that PMSC personnel should be required to apply for accreditation at individual level. It stands to reason that true accountability requires not only enforcement, but also the provision of remedies for victims, and, to this end, some have suggested that PMSCs should be insured against valid legal claims against them or their agents.

²⁴⁵ Krahmann n 26 above at 262.

²⁴⁶ Asian study n 113 above.

²⁴⁷ *Ibid.*

²⁴⁸ Francophone African study n 112 above.

²⁴⁹ Schreier & Caparini ‘Privatising security: law, practice and governance of private military and security companies’ (2005) Occasional Paper 6 *Geneva Centre for the Democratic Control of Armed Forces* 116.

²⁵⁰ Scheimer n 64 above at 643.

²⁵¹ Asian study n 113 above.

²⁵² *Ibid.*

²⁵³ *Ibid.*

Admittedly, there is still considerable scope for further engagement and dialogue over the more difficult issues. The OEIGWG will have to interrogate the draft PMSC convention's definition as to which actions are considered 'inherent[ly] state functions'.²⁵⁴ There are also some concerns that licensing or accreditation will bring additional administrative burdens – which will cripple the rapid deployment upon which the PMSCs pride themselves.²⁵⁵ Over and above, more also needs to be done regarding enforcement at domestic level.

Although the time may not be opportune for an international convention, and political will may be lacking, this does not mean that the draft PMSC convention will be recorded as stillborn. Regardless of the suspicions surrounding the PMSC industry, it should be commended at the very least, for engaging with the ICRC and other stakeholders to develop the self-regulatory ICOC and the Montreux document. Domestic regulatory regimes may be inconsistent and slow to realise true accountability, nevertheless, thanks to the self-regulatory guidelines and the draft PMSC convention, domestic legislators embarking on legislation to regulate the PMSC industry, or amending existing legislation, now have access to several best practice sources, to guide them.

It is hoped that with a more coherent approach to the PMSC industry from both an international (ISO-type accreditation) and domestic (licensing) level – albeit via diverse avenues – it will be possible to arrive at a safer, more accountable world. Licensing and accreditation are just one side of the coin, and no accountability is complete without true enforcement. Here the political will of states is paramount in assisting victims with remedies and to close the net on those violating international law.

No one can know whether hiring a PMSC might have saved the lives of Peter Kassig, Alan Henning and David Haines, but at least with a regulatory regime in place to give some definition to the grey zone, relief organisations would have the freedom to make that decisions. As for the victims of

²⁵⁴ Ortiz n 99 above at 211. For example: 'conduct criminal investigations, exercise any powers conferred on public security officers or on any police officer, customs officer, immigration officer, prison officer or any other public officer' (Gomez del Prado n 14 above; Asian study n 113 above).

²⁵⁵ Avant n 12 above at 126.

Baghdad's Nissour Square incident, greater regulation might have saved them on that fateful day in 2007 as they entered a busy traffic circle and were gunned down – it certainly would have prevented them having to wait seven long years to see justice done.