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1. Introduction

“PMSCs are more than ambiguous entities that pique our curiosity: their prominence draws attention to larger theoretical issues at the heart of contemporary political life”

Indeed, “journalists, academics and NGOs have long expressed their concerns about PMSCs’ shadowy nature, their lack of accountability and their human right abuses”¹. A 1999-study² led by Cillers and Cornwell from the Pretorian *Institute for Security Studies* highlighted the links between “PMSCs and the exploitation of resources in Angola and Sierra Leone”³. In 2006, the Norwegian research group Fafo concluded that the industry “is largely unregulated and unaccountable”⁴. The US Commission on Wartime Contracting published a report in 2011 which begins by saying that “at least \$31 billion, and possibly as much as \$60 billion, has been lost to contract waste and fraud in Iraq and Afghanistan”⁵, due to “poor oversight by the U.S. government”⁶. Numerous cases of aggressive behaviour, violence and cultural insensitivity have been recorded⁷. In 2010, after a man died following abusive behaviour from G4S employees, the company lost its contract on deportation of rejected asylum seekers⁸.

¹ PINGEOT, L., *Dangerous Partnership: Private Military Companies & Security Companies and the UN*, New York: Global Policy Forum, 2012, p. 18.

² CILLERS J., CORNWELL R., “From the Privatisation of Security to the Privatisation of War?”, pp. 227-245 in *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies*, Cillers J., Mason P., (eds). Pretoria: Institute for Security Studies, 1999.

³ PINGEOT, L., *Dangerous Partnership: Private Military Companies & Security Companies and the UN*, New York: Global Policy Forum, 2012, p. 18

⁴ JENNINGS M. K., *Armed Services: Regulating the Private Security Industry*, Oslo: Fafo, 2006, p. 57 [online] Available at: http://www.fafo.no/media/com_netsukii/532.pdf, accessed the 28/03/2018.

⁵ Commission on Wartime Contracting in Iraq and Afghanistan, “Final Report to Congress. Transforming Wartime Contracting: Controlling costs, reducing risks”, August 2011. Washington: Commission on Wartime Contracting in Iraq and Afghanistan, p. 1.

⁶ *Ibid.*

⁷ DUNIGAN M., “US Control of Contractors in Iraq Is Vital”, *RAND Corporation* [online], February 1st, 2012. Available at: <https://www.rand.org/blog/2012/02/us-control-of-contractors-in-iraq-is-vital.html>, last accessed on the 13-08-2018.

⁸ LEWIS P., TAYLOR M., “G4S loses UK deportations contract”, *The Guardian* [online], published on October 29, 2010. Available at: <https://www.theguardian.com/uk/2010/oct/29/g4s-deportations-contract-reliance>, last accessed on the 13-08-2018.

Lou Pingeot explains that there is “ample evidence of extreme violence and abusive conduct by PMSC employees in conflict zones”⁹.

These recent events are just the tip of a much broader phenomenon: the outsourcing of military functions. Although they have penetrated the public sphere, the media and the public haven’t shown a particular interest in the use of private military and security companies. Similarly, the literature in political science hasn’t extensively treated the subject, and it scarcely named in books resuming theory of international relations. My thesis will try to challenge this situation, by taking a juridical approach based on transparency, aimed towards regulation efforts. In other words, my work will be focusing on trying to link the theory of International Relations with developments in Private Military Companies by mostly looking regulation attempts. First, I will delve in historical events to bring out the links and differences between mercenarism and private military and security companies. Then, I will try to link the outsourcing of military services and explain how and why it is an essential phenomenon in International Relations theory. Third, I will show how State and non-State actors have tried to regulate the industry for the last 20 years, while also focusing on Self-regulation. In order to do that, I will study the Montreux Document, two PMC associations, and the International Code of Conduct for Private Security Providers (ICoC). Finally, I will highlight new developments for PMCs in Russia and China, two countries where the industry is growing at different paces.

The annex section provides additional information on regulation at the State and international levels, although they are incomplete. The first annex gives an overview of regulation in various countries and regions of the world, although it isn’t exhaustive. The ambition of the first Annex was to provide an account of how countries hosting most PMCs were tackling regulation at their level. The second Annex

⁹ PINGEOT L., *op. cit.*, p. 15.

analyses international negotiation at the UN level, by providing an account of negotiations on a legal framework for PMCs.

2. A brief history of mercenarism

Debates over mercenarism are legion and have occurred throughout history. Machiavelli himself warned heads of State, believing that “mercenaries and auxiliaries are useless and dangerous; and if one holds his State based on these arms, he will stand neither firm nor safe”¹⁰. His arguments and point of view are still used today by many authors of the contemporary literature on International Relations, worried about the gradual outsourcing of military functions. However, elaborating a definition of the concept of mercenarism is a daring quest. Following the criteria used, the spectrum that this notion encompasses can vary from one field of analysis to another¹¹.

Etymologically, the term “mercenarism” comes from the Latin word *merces*, meaning “salary” or “retribution”. Elke Krahmann defines it as being the phenomenon in which actors involve themselves in armed conflicts abroad, while following a lucrative goal¹². However, such a definition obscures the actions of some mercenaries, for example those who have taken part in conflicts occurring in their home State¹³. Indeed, in their book “The Evolution of International Security Studies”, Barry Buzan and Lene Hansen oppose “old wars” (mostly inter-State conflicts), to “new wars”, with the latter taking place within the States, and wherein sometimes, private military companies may operate¹⁴. A report from the Senate of the United States of America notes that these firms have employed several individuals from the local population where they conducted operations¹⁵. Laurie Nathan defines mercenaries

¹⁰ MACHIAVELLI N., *The Prince*, Chapter XII, p. 52.

¹¹ KALMAN J., « Mercenaries Reloaded: Applicability of the Notion of Mercenaries in Relation to Private Military Companies and Their Employees », *Acta Juridica Hungarica*, 2013, Vol. 54, No. 4, p. 368.

¹² KRAHMANN E., « From ‘Mercenaries’ to ‘Private Security Contractors’: The (Re)Construction of Armed Security Providers in International Legal Discourses », *Millennium*, 2011, Vol 40, Issue 2, pp. 343 – 363.

¹³ One of the most striking examples remains Congo, where a great deal of people, after the country’s independence, joined militias, sometimes for financial reasons. For more information, see BAKER P. S., “Mercenaries and the Congo Crisis,” *Saber and Scroll*, 2013, Vol. 2 : Iss. 1, Article 9, available at : <https://digitalcommons.apus.edu/saberandscroll/vol2/iss1/9>.

¹⁴ BUZAN B., HANSEN L., *The Evolution of International Security Studies*, 2011, Cambridge: Cambridge University Press, p. 233.

¹⁵ Committee on Armed Services, Senate of United States of America, 111th Congress, 2nd Session, « Inquiry into the role and oversight of private security contractors in Afghanistan: Report together with additional views

as people who, in exchange for a salary, serve under the banner of a foreign army or a group, leading to an armed conflict, whether they participate directly in the conflict or not¹⁶. She also adds that they often evade the spectre of authority, leading to a lack of protection from the governments employing their services. One of the most concise definition was attempted by the Geneva Convention, wherein it was established that

(1) “ *A mercenary is any person who (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.*

(2) *A mercenary is also any person who, in any other situation: (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is*

», Washington, 28 September 2010, p. iv, p. 8, p. 10, p. 38. Available at : https://fas.org/irp/congress/2010_rpt/sasc-psc.pdf, last accessed on the 13/08/2018.

¹⁶ NATHAN L., « Lethal Weapons: Why Africa needs alternatives to hired guns », *Track Two*, 1997, Vol. 6, No. 2, pp 10-12.

not a member of the armed forces of the State on whose territory the act is undertaken.”¹⁷

Long before the advent of public and regular armies, the use of mercenaries was relatively common. In fact, permanent armies are fairly recent when compared to global History. Their emergence coincides more or less with that of the Westphalian nation-State, at the end of the Thirty Years War¹⁸. Mercenaries present the advantage of being extremely useful when a State doesn't possess a regular army. Holger Hestermeyer believes that mercenarism had several golden ages. The first one began directly after the Peloponnesian war; the second, during a long period starting roughly encompassing the Middle Ages until the 18th century. Given that the use of mercenaries presents an inexpressible amount of historic cases, and that it is not my intent to provide an accurate description of the use of mercenaries through the Ages, we shall limit ourselves to a brief analysis of three key-periods that represent a symbolic interest in our subject: The Hundred Years War; the Thirty Years War; and the contemporary period, starting from 1960 until our days. Although sources concur on the fact that the earliest trace of the use of mercenaries dates back to 2094 – 2047 B.C.¹⁹, each of these three periods are of particular importance. Firstly, because during the Middle Ages, the feudal State transforms itself to become the centralized kingly State. Secondly, because the Thirty Years War ends by the Westphalian Treaties, which establish the foundations of our Westphalian Nation-States. Thirdly, even though mercenaries were made illegal in several countries relatively shortly after the emergence of regular permanent armies and the Westphalian Treaties, they reappeared during the 1960s and afterwards in the 1980s under various shapes. This report does not aim to provide a thorough analysis of each

¹⁷ United Nations General Assembly, *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* (A/RES/44/34), 72nd plenary meeting, 4 December 1989 [online]. Available at: <https://www.un.org/documents/ga/res/44/a44r034.htm>, last accessed on the 15-04-18.

¹⁸ HESTERMEYER H. P., « Mercenaries », *Max Planck Encyclopedia of Public International Law*, 2010, Oxford: Oxford University Press, p. 2. Available at : <https://www.academia.edu/16735555/Mercenaries>, last accessed on the 09/11/2017.

¹⁹ SINGER, P.W., *Corporate Warriors: The Rise of the Privatized Military Industry*, 2002, Cornell University Press: Ithaca, p. 20.

period but will highlight the reasons as to why the use of mercenaries was much more common than today. It will also try to reveal the links (or their absence) between mercenarism and international relations, during these three periods of time.

The Middle Ages saw the advent of two sorts of soldiers: those constituting short-term armies; and those who sold themselves to the highest bidder in order to fulfil the technical necessities that these “part-time” soldiers couldn’t handle. Those necessities included for example the complex use of crossbows²⁰, or the mechanisms of intricate pieces of artillery that appeared a few decades after. However, the majority of these were composed of “freelance” individuals, who offered their services to the belligerents in exchange for money. Slowly but surely, a particular way of military thinking expanded in the Old Continent: the quality of soldiers is better than their quantity. Poorly trained city militias couldn’t stand up to the well-trained, well-equipped mercenaries, whose discipline even allowed them to withstand cavalry charges²¹. P.W. Singer presents the hypothesis that the growth of the market and the availability of mercenary soldiers allowed their employers to wage war on a much more frequent basis²². The late-thirteenth century saw the advent of the “condottieri”, who offered their men and services through contract – a “*condotta*”, hence their name – to those who could afford them. These troops essentially consisted of the “scum of society” (criminals, debt-ridden peasants)²³, coming from poor and overpopulated States, such as German States, the Netherlands and Swiss cantons²⁴.

²⁰ Crossbows were incredibly costly tools, but were extremely appreciated in warfare, especially Genoese crossbows, which will later be replaced (after the Battle of Crecy), by English crossbows.

²¹ LATZKO, D. A., « The Market for Mercenaries », article submitted at the Eastern Economic Association Meetings, Crystal City, Virginie, April 14th, 1997, cited in SINGER, P.W., *Corporate Warriors: The Rise of the Privatized Military Industry*, 2002, Cornell University Press: Ithaca, p. 261.

²² SINGER, P.W., *Corporate Warriors: The Rise of the Privatized Military Industry*, 2002, Cornell University Press: Ithaca, pp. 20-21.

²³ OPELLO, W. C. Jr., *War, Armed Force and the People: State Formation and Transformation in Historical Perspective*, 2016, Rowman & Littlefield: New York, p. 70.

²⁴ These States provided the most popular regiments of what has been, from the 16th to the 18th century, one of the most important European markets.

The instability slowly progressed at the dawn of the fourteenth century and crystallized itself in the Hundred Years War (1337 – 1453). This century of small conflicts and continuous hostility saw the deterioration of the order established by centralized control in numerous European States. As the State chests were emptying, contracts for freelance soldiers became scarce. Since these mercenaries had no home nor work to return to, they banded together and formed companies, whose numbers could sometimes come close to thousands of people. Such companies allowed them to travel safely and improve their employment rate by selling themselves as a group. However, they placed a heavy burden on rural areas, and peasants were often blackmailed and extorted. Therefore, Singer believes that such dramatic inconveniences played an important role in the lands devastation, at least as much as war itself²⁵. The King of France thus decided to form an army to subjugate these uncontrollable hordes of mercenaries. Threatened, the mercenaries decided to unite and formed the Great Mercenary Companies army and stood against the kingly army at the battle of Brignais in 1362. Interestingly, they prevailed. But according to Singer, since they didn't have any political agenda, their unity dissolved quickly²⁶. The French nobles came up with an odd plan which temporarily worked: they launched several campaigns in Hungary and Spain wherein they employed the mercenaries, thus keeping them away from their land. Italy became a much more fertile soil for employment and extortion²⁷. However, the French population didn't get rid of the problem, as mercenary companies continued to harass French merchants at the borders. Using their despair, King Charles VII convinced French nobles to pay a special tax in order to hire certain mercenaries to destroy the other companies. He then hired then on the long term, creating the first permanent army for centuries²⁸.

²⁵ SINGER, P.W., *op. cit.*, p. 24.

²⁶ SINGER, P.W., *op. cit.*, p. 25.

²⁷ From 1338 until 1354 a 10 000-strong mercenary force, called the "Great Company", practiced extortion and racket throughout the Italian boot.

²⁸ SINGER, P.W., *op. cit.*, p. 26.

Indeed, the Thirty-Years War was an auspicious period for the recruitment of mercenaries. However, it was far more than this. It became an essential point in the history of international relations, and mostly considered as the foundation of modern international relations, since it is at its end that our States take root. During the 17th century, European armies were largely composed by mercenary companies, often ran by men from the *bourgeoisie* or lesser nobles that P.W. Singer calls “mercenary entrepreneurs”²⁹. For example, the Swedish crown bought the services of an entire armada to Louis de Geer; and Albrecht von Wallenstein decided to use his own fortune to raise a 100,000-strong army to help the Roman Emperor Ferdinand II³⁰. These relations between mercenarism and Heads of State submit a rather interesting question: how did military entrepreneurs influence the policies of these States of yore?

Notwithstanding the fact that mercenaries have been part of the most popular soldiers, the Westphalian Treaties began to seal their end. My hypothesis is that this specific mode of conflict, that is to say personal conflicts, and the instability that came with them were critical in certain aspects of the Westphalian Treaties. I believe that these factors helped to push forward the legal concept of nations’ sovereignty, and the institutionalisation of the armies. Indeed, after these treaties the Old Continent saw the progressive emergence of armies made of citizens rather than contractors, and the wars of kings became the wars of the people. This emergence was also made possible by technological breakthroughs in weapons³¹, such as muskets. These progressively required less and less training to be used, which struck a blow to the technical advantage of mercenary soldiers. Furthermore, conscription allowed to put together much bigger armies. Eventually, a specific

²⁹ HOWARD M., *War in European History*, London: Oxford University Press, 1976, p. 29 cited in SINGER, P.W., *op. cit.* p. 26

³⁰ PAROTT, D., « Had a Distinctive Template for a ‘Western Way of War’ Been Established before 1800 ? » in *The Changing Character of War*, Hew Strachan and Sibylle Scheipers (eds.), Oxford : Oxford University Press, 2011, p.57 cited in OPELLO, W. C. Jr., *War, Armed Force and the People : State Formation and Transformation in Historical Perspective*, New York: Rowman & Littlefield, 2016, p.70.

³¹ A ce sujet, lire OPELLO, W. C. Jr., *War, Armed Force and the People: State Formation and Transformation in Historical Perspective*, New York: Rowman & Littlefield, 2016.

thought developed across European States: if rulers waged war for their personal gain, then they were nothing more than criminals³² and should be held responsible to their State for any form of violence emanating from their jurisdiction. Elke Krahmann, in her book *States, Citizens and the Privatization of Security*, explains that two key-mechanisms helped prevent private and collective abuses of power: (1) the centralisation of the control on collective violence in the hands of the government, and (2) the dawn of citizen-soldier armies³³. The era of the French Revolution and Napoleonic wars signed the end of the mercenaries' importance in war for at least two centuries. Singer explains this phenomenon by the emergence of a sufficiently efficient and capable State system in terms of governance. This tremendously reduced the influence, flexibility and *marge de manoeuvre* of non-State actors in Europe³⁴.

However, if the end of mercenarism seemed nigh in the 17th century, the practice survived at least until the European concert and the battle of Waterloo³⁵. Eventually, as European States slowly cracked down on mercenary practices, mercenaries were incorporated into companies like East India, Hudson Bay and Royal Africa. Therefore, we can assume that mercenarism didn't disappear from the globe but rather established itself in other parts of the world. Such was the case of India whose political and governance structures were slowly dislocating³⁶. The disintegration of the Indian State allowed these companies to take over a large portion of the Indian peninsula. Afterwards, as their tentacular influence expanded, their quarrels followed their expansion throughout south-eastern Asia. Eventually, Singer believes they progressively met their end during the 19th century due to four factors: (1) the slow stabilisation of the south-Asian political

³² VAN CREVELD M., *The Rise and Decline of the State*, Cambridge University Press: Cambridge, 1999, p. 161 cited in SINGER, P.W., *op. cit.* p. 31

³³ KRAHMANN E., *States, Citizens and the Privatization of Security*, Cambridge: Cambridge University Press, 2010, p. 2.

³⁴ SINGER, P.W., *op. cit.* p. 32.

³⁵ German units were composed by mercenaries hired for that battle. See: *Ibidem*, pp. 32-33

³⁶ ZAIDI A., « European Mercenaries in the Indian Armies: AD 1750–1803 », *Studies in History*, 2011, Vol. 27, n° 1, pp. 55-83.

environment (2) which lessened the conflicts' frequency and importance, (3) and therefore diminished the revenue coming from such conflicts. Another factor would be (4) the governmental wardship under which India was put³⁷. Some of these companies showed an impressive longevity, the champion being the East India Company. It lasted for 258 years before being dissolved by the British Empire which incorporated some of its members into its army³⁸.

Mercenaries were also implanted in Africa, a continent whose inhabitants had to endure the yoke of the "last mercenaries". As an example, the Rhodesian northern lands and southern mines were under the control of the British South Africa Company. In the dawn of the 20th century, the Westphalian State system spread throughout the globe. Mercenaries had to survive in weak States, especially in Latin America as well as Africa. The decolonisation process in Africa offered them a chance of resurgence: Thomas Turner explains that freelance mercenaries reappeared in 1960, recruited in Belgium by the security police³⁹ to serve in Katanga. He adds that as to avoid a complete dependence on Belgium, Katangan leaders also recruited in France, Rhodesia and South Africa. Mining companies based in Katanga informally hired mercenaries – mostly ex-soldiers – to fight for the Katangan secession⁴⁰. On the same page, he explains that the hiring of mercenaries was a way for several groups and people to protect colonial interests in the areas they occupied before. When the United Nations ousted Belgian officials and officers, they also indirectly allowed mercenaries to take control of the *gendarmerie* until the cancellation of the Katangan secession process in 1963. Afterwards, they moved to more profitable pastures and were involved in several African countries⁴¹, sometimes at the service of the power in place, sometimes

³⁷ SINGER, P.W., *op. cit.* p. 36.

³⁸ KRAHMANN E., *States, Citizens and the Privatization of Security*, Cambridge: Cambridge University Press, 2010, p. 53.

³⁹ TURNER T., « Mercenaries », in *Oxford Companion to Politics of the World*, Krieger J., Joseph W. A., Kahler M., et al. (eds.), Oxford: Oxford University Press, 1993, pp. 580-581

⁴⁰ SINGER, P.W., *op. cit.* p. 37.

⁴¹ These countries include Nigeria, Soudan, Angola, Guinea, Equatorial Guinea, Benin, Togo, Seychelles as well as the Comoros.

planning *coups d'états*⁴². Singer concluded his analysis on the role of mercenaries in former colonies by explaining that the use of mercenaries is the symbol of the inherent racism linked to the will of preserving colonial interests, impeding the possibility for these States to access full self-determination⁴³. This claim is shared by Lou Pinget, who agrees on that in her reports on the use of Private Military and Security Companies by the UN. She explains that private mercenary groups which operated in European colonies after World War II⁴⁴ were hired by “colonial governments and business interests to carry on clandestine operations against nascent local trade unions, organizations critical of colonialism and especially independence movements”⁴⁵.

Although mercenaries and private military companies seem intuitively linked, how can we conceptually differentiate the two? Elke Krahmann considers that mercenaries are established on an ad hoc basis, are dangerous, volatiles and do not concern themselves with reputation, national and international laws. However, she believes that private military companies are different⁴⁶. The distinction lies in the fact that PMCs are legal, with permanent structures, head offices and managerial structures. They are subject to national and international legislation – although quite lacking, according to many – of the European continent and North America where most of them reside⁴⁷. Schreier and Caparini explain that mercenaries are limited in terms of capabilities and are “lacking the professionalism and discipline that come from prior organization, integration, and doctrine”⁴⁸. Overall, mercenaries are “unable to provide anything other than direct combat

⁴² TURNER T., « Mercenaries », in *Oxford Companion to Politics of the World*, Krieger J., Joseph W. A., Kahler M., et al. (eds.), Oxford: Oxford University Press, 1993, pp. 580-581.

⁴³ SINGER, P.W., *op. cit.* p. 37

⁴⁴ PINGEOT, L., *Dangerous Partnership: Private Military Companies & Security Companies and the UN*, New York: Global Policy Forum, 2012, p. 10.

⁴⁵ *Ibidem*.

⁴⁶ KRAHMANN E., *States, Citizens and the Privatization of Security*, Cambridge: Cambridge University Press, 2010, p. 6.

⁴⁷ KRAHMANN E., *op. cit.*, p. 7.

⁴⁸ SCHREIER F., CAPARINI M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*. Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005 [online], p. 17. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/op06_privatising-security.pdf, last accessed on the 20-03-2018.

at the small unit level and some limited military training. They regularly remain dependent on their host communities for logistics and support. Large-scale or long-term training and consulting missions are, like engineering and logistics, mostly outside their scope”⁴⁹.

Two precursors are of particular interest in our analysis. The first one is the Pinkerton agency: founded in 1850, it engaged from 1870 and onwards in corporate espionage, strike breaking, undercover investigations as well as other similar activities. However, “after Pinkerton employees staged an armed attack on steel company strikers at Homestead in 1892, the US Congress passed the Anti-Pinkerton Act, which limited government hiring of strike-breakers and other employees of these companies”⁵⁰. Eventually, Pinkerton was acquired by the industry giant Securitas in 2001. The interest of this short history of Pinkerton agency is twofold: first, it shows that mercenaries aren’t only linked to developed countries and failing States, but also to developed States. Second, mercenaries share obscure links with private military firms and private security firms. Some PMCs also provide security services, meaning that PMCs and PSCs (private security companies) are closely intertwined. As we will see *infra* through the analysis provided by Carolyn Gallaher, PMCs’ mainly use short contracts to hire personnel which they can select in a database for either military or security work⁵¹.

The second ones key precursors are private mercenary groups, which were formed of “personnel who had served in colonial military and intelligence services”⁵². They were involved in “seizure of natural resources, secession movements, and attacks on political parties and leaders”⁵³. Pingeot notes that “contemporary PMSCs retain important links with natural resource exploitation”⁵⁴. Recently, according to the

⁴⁹ SCHREIER F., CAPARINI M., *idem*.

⁵⁰ PINGEOT, L., *idem*.

⁵¹ GALLAHER, C. « Risk and Private Military Work », *Antipode*, 2012, vol. 44, n°3, pp. 783-805.

⁵² PINGEOT, L., *op. cit.*, p. 10.

⁵³ PINGEOT, L., *idem*.

⁵⁴ PINGEOT, L., *op. cit.*, p. 11.

New York Times, the Syrian government has contracted with private Russian companies⁵⁵. Bennet, Kingsbury et al. believe that these companies “have Kremlin connections to carry out security operations for the Assad regime in Syria in exchange for a share of oil, gas and mineral production in territory won back from rebels”⁵⁶. The activities of private military firms cover the entire spectre of military functions, and many authors have tried to establish typologies helping to classify and differentiate private security companies and private military firms (usually referred to as the “private military industry”). Christopher Kinsey, for example, believes they can be positioned on a spectre comprised of two axes: the means used to attain their goals, from non-lethal to lethal; and the object of protection, from public to private⁵⁷. However, this fails to address situations and contracts where the mission does not concern protection, but other functions, such as logistics or military operations. Singer presents his three categories typology, where military firms can be distinguished according to the type of services offered, ranging from “military providers”, “military consultants” to “military support firms”⁵⁸. Trevor Taylor presents another typology, revolving around a graphical conceptualisation of deployed military operations and the roles of the contractors taking part in it.

⁵⁵ BENNET J., KINGSBURY K., *et al.*, “The Spoils, and Profits, of Conflict”, *New York Times*, published on July 10, 2017. Available at: <https://www.nytimes.com/2017/07/10/opinion/kremlin-syria-private-business.html>, last accessed on the 18-04-2018.

⁵⁶ BENNET J., KINGSBURY K., *et al.*, *idem*.

⁵⁷ KINSEY C., *Corporate Soldiers and International Security*, p. 10 cited in KRAHMANN E., *op. cit.*, p. 8.

⁵⁸ SINGER, P.W., *op. cit.* p. 93, cited in, KRAHMANN E., *ibidem*.

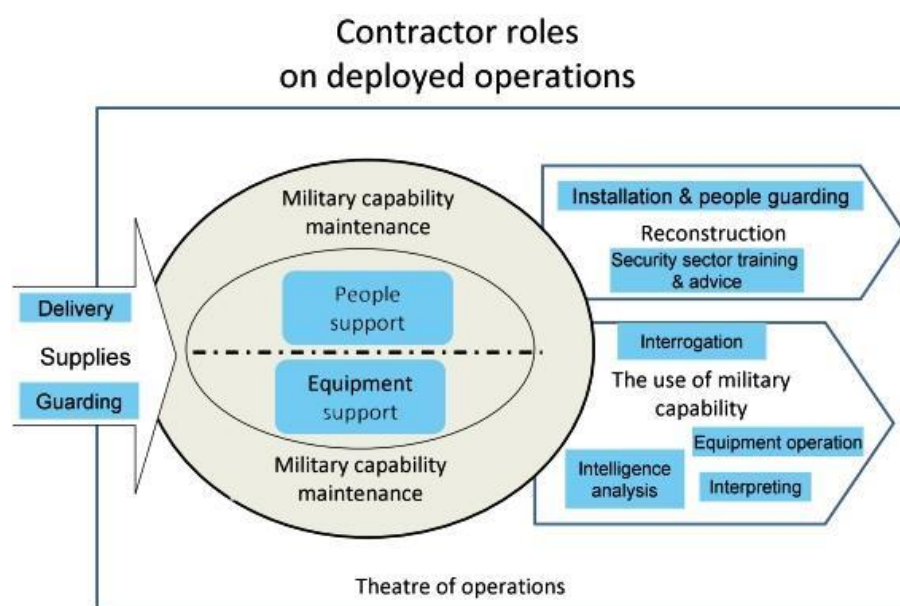


Figure 1: A classification of contractor activities on deployed military operations.

Source: TAYLOR Trevor, “Private security companies in Iraq and beyond”, *International Affairs*, 2011, Vol. 87, No. 2, p. 447.

As previously stated, the 1990s saw PMCs truly thrive and one of the most memorable events of this decade was the “Tempest Operation”, which impressed a great number of military observers⁵⁹. After being cornered by the Serbians, better trained and equipped by the Yugoslavian army, Croatian forces launched a *blitz* operation. They demonstrated a level of cohesion and efficiency which had never been observed among them before. After their victory, Croatian military officials publicly thanked MPRI (Military professional Resources Incorporated), a PMC based in Virginia, United States. The company always denied any implication in the conflict, although previous employees admitted to the contrary⁶⁰. These legal and organised companies still offer their services on a contractual basis, which greatly differ from freelance mercenaries. According to Krahmann, these firms appeared after several changes occurred in the security environment,

⁵⁹ SINGER, P.W., *op. cit.* p. 5.

⁶⁰ SINGER P.W., *ibidem*.

budget cuts, and offer and demand forces in the market. Gallaher supports this thesis but pushes her analysis further by highlighting the fact that the rise of neo-liberalism coincides with the dawn of a geoeconomical order, which came to replace the geopolitical order⁶¹. It is of utmost important to underline the fact that there isn't a clear line between the two orders: one is declining, but still resisting; while the other continues to develop. Ettinger and Walter Opello Jr. support a similar idea, explaining that the advent of neo-liberalism and the neo-liberal State have allowed the birth and growth of private military firms⁶². These States possess armies almost entirely made up of volunteers, where conscription does not exist anymore. Moreover, they also rely on outsourcing, a practice where neo-liberal States ask private military firms to operate certain specific functions of the entire military spectrum, comprising even the act of war itself⁶³. This poses serious questions on the democratic control of the use of force⁶⁴.

In his article, Aaron Ettinger dates the birth of PMCs in the middle of the 80s, where the Reagan and Thatcher eras prevailed on the international scene with the help of their "there is no alternative" doctrine. This hypothesis concurs with that of Singer, who said in 2001 that "fuelled by the collapse of the centralized systems in the Soviet Union and in Eastern Europe, and by successes in such places as Thatcherite Britain, privatization has been touted as a testament to the superiority of the marketplace over government"⁶⁵. This neoliberalist doctrine laid the ground for the political support and the intellectual infrastructure which allowed the extension of neoliberal ideas concerning the privatisation of military functions⁶⁶, a thesis that Elke

⁶¹ GALLAHER, C. « Risk and Private Military Work », *Antipode*, 2012, vol. 44, n°3, pp. 783-805.

⁶² OPELLO, W. C. Jr., *op. cit.*, p. 197; ETTINGER A., « Neoliberalism and the Rise of the Private Military Industry », *International Journal*, 2011, Vol. 66, n°3, pp. 743-764.

⁶³ KRAHMANN E., *States, Citizens and the Privatization of Security*, Cambridge: Cambridge University Press, 2001, p. 1; OPELLO, W. C. Jr., p. 197.

⁶⁴ KRAHMANN E., *op. cit.*, p. 3.

⁶⁵ SINGER P.W., "Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security", *International Security*, 2001, Vol. 26, No. 3, p. 197.

⁶⁶ ETTINGER A., « Neoliberalism and the Rise of the Private Military Industry », *International Journal*, Vol. 66, n°3, p. 753.

Krahmann also supports⁶⁷. One of the most shining example of this process was the LOGCAP (Logistics Civil Augmentation Program), authorized by general John A. Wickam, which laid the foundation for the use of PMCs. This document establishes concepts, responsibilities, policies and procedures concerning the use of civil contractors with the goal of replacing soldiers and local workers during *wartime conditions*⁶⁸. The main idea was to enlarge the armed forces while delegating non-core tasks, while staying vague about what the concept of *wartime conditions* specifically referred to. However, in a seemingly prophetic manner, the document of general Wickam anticipated the problems that American army would later be confronted to, saying that “*it is probable that deficiencies in any of these efforts will result in increased costs and may result in less than desired contractor performance levels*”⁶⁹.

From 2001 onwards, Ettinger notices that the Quadrennial Defence Reviews insisted for a redesign of the support structure to better integrate private contractors⁷⁰. In 2002, Donald Rumsfeld thunderously qualified the Pentagon bureaucracy as a “threat for the security of the United States”⁷¹. He firmly believed in a “more entrepreneurial approach” which would transform operational practices in the next decade⁷². The outsourcing ascended to unprecedented levels, especially in Iraq, until 2006. That year, scandals erupted concerning financial abuses and human tragedies committed by several PMCs, and among them, the infamous Blackwater. A part of the administration even qualified such financial abuses of “wastes” from the Department of Defence⁷³.

⁶⁷ KRAHMANN E., *op. cit.*, p. 85.

⁶⁸ ETTINGER A., *ibidem*.

⁶⁹ US Army, « Logistics civil augmentation program (LOGCAP) », regulation 700-137, 1985, p. 22 *cited in* ETTINGER A., *ibidem*, p. 754.

⁷⁰ The Quadrennial Defence Review, initiated in 1996 by the Congress, analyses strategic objectives and threats in a prospective stance.

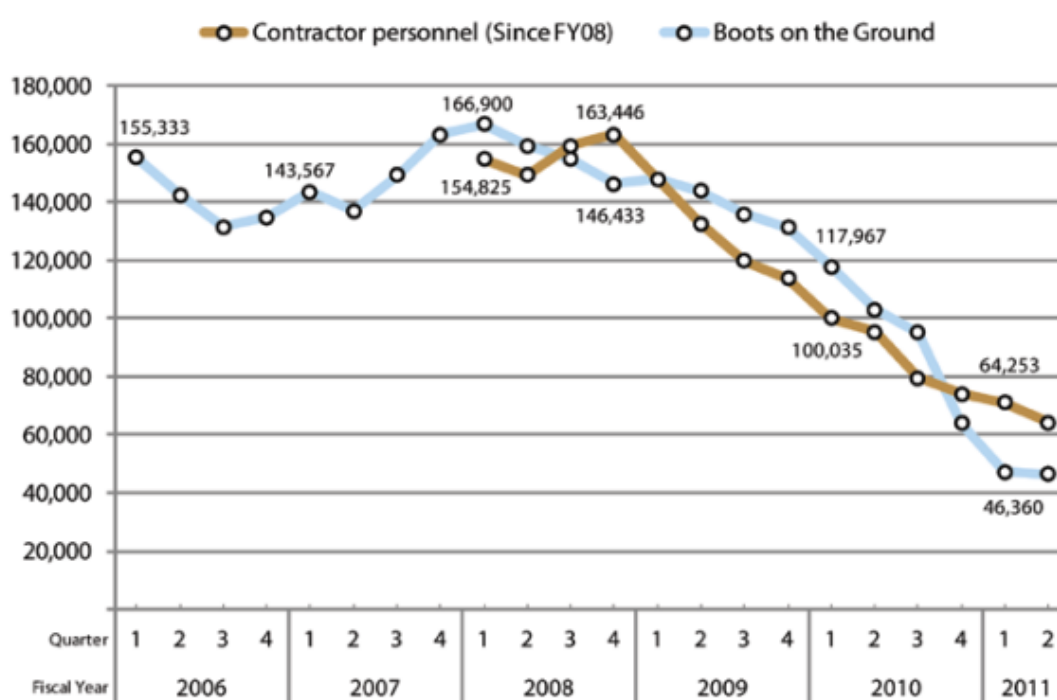
⁷¹ SCAHILL J., *Blackwater: The Rise of The Most Powerful Mercenary Army*, New York: Nation Books, 2007, p. 50 *cited in* ETTINGER A., *ibidem*, p. 755.

⁷² RUMSFELD, D. H., « Transforming the Military », *Foreign Affairs*, May 1st, 2002, n°81, p. 20-32.

⁷³ « DoD wastes billions »; Government Accountability Office 07-145, Washington, 2006, *cited in* ETTINGER A., *ibidem*, p. 758.

One of the bluntest statements of the 2011 report from the Commission on Wartime Contracting is that “American agencies over-rely on contractors for contingency operations” in Iraq and Afghanistan. It also is the title of the reports’ first section. Numerous accounts⁷⁴ show the balance between contractors and US military personnel. Figure E-1 highlights the near 1:1 ratio that US military forces and contractors have held over the years.

Figure E-1. Boots on the Ground vs. contractor personnel in Iraq²

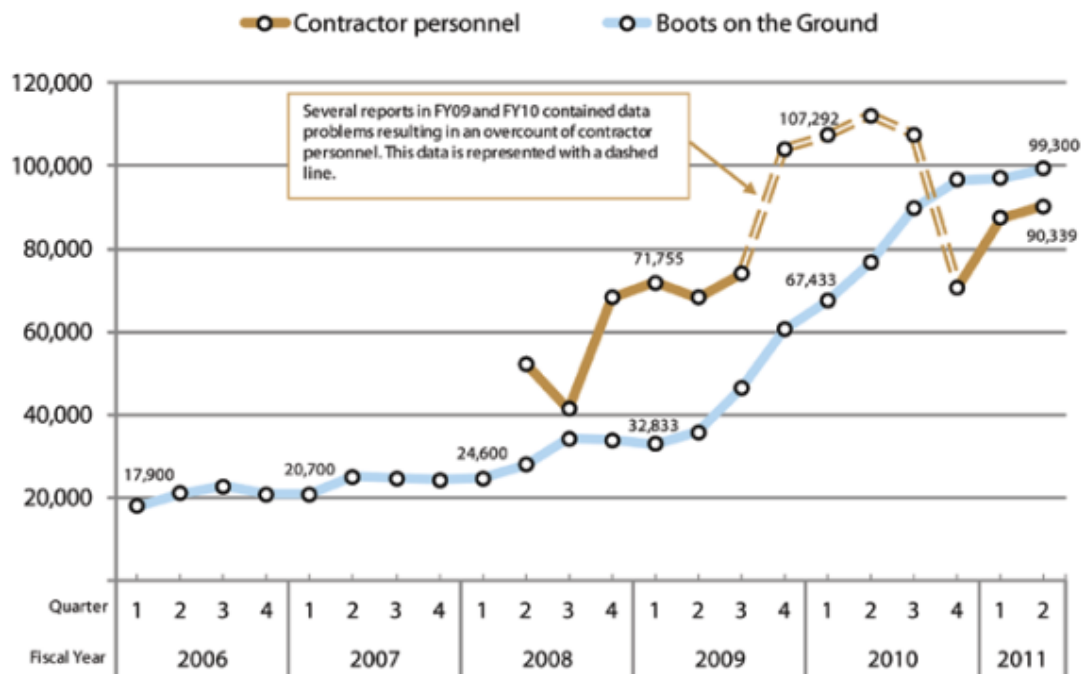


Source: Military Boots on the Ground—Congressional Research Service Request for Boots-on-the-Ground (BOG) for Iraq/OND and Afghanistan/OEF, prepared by Office of the Chairman, Joint Chiefs of Staff (JCS). Final two BOG data points are for January 10, 2011 and May 11, 2011 as reported by Defense, Joint Staff, Summary and Monthly Boots on the Ground Reports to Congress; Defense Contractor employees—Contractor Support of U.S. Operations in the USCENTCOM area of responsibility, Iraq and Afghanistan, prepared by DASD (Program Support) quarterly February 2009 to present, prepared by Under Secretary of Defense for Acquisition, Technology and Logistics (AT&L) prior to February 2009.

Source: Commission on Wartime Contracting in Iraq and Afghanistan, “Final Report to Congress. Transforming Wartime Contracting: Controlling costs, reducing risks”, August 2011. Washington: Commission on Wartime Contracting in Iraq and Afghanistan, p. 200

⁷⁴ Commission on Wartime Contracting in Iraq and Afghanistan, “Final Report to Congress. Transforming Wartime Contracting: Controlling costs, reducing risks”, August 2011. Washington: Commission on Wartime Contracting in Iraq and Afghanistan, pp. 200-205

Figure E-5. Boots on the Ground vs. contractor personnel in Afghanistan

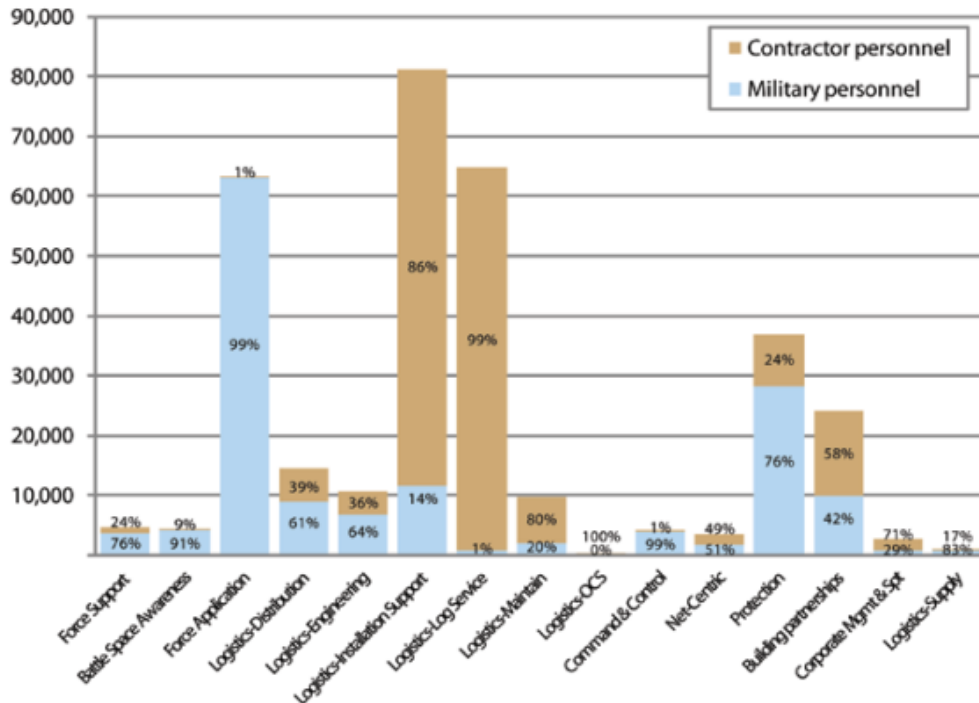


Source: Military Boots on the Ground—Congressional Research Service Request for Boots-on-the-Ground (BOG) for Iraq/OND and Afghanistan/OEF, prepared by Office of the Chairman, JCS; Defense Contractor employees—Contractor Support of U.S. Operations in the USCENTCOM area of Responsibility, Iraq and Afghanistan, prepared by DASD (Program Support) quarterly February 2009 to present, prepared by Under Secretary of Defense for Acquisition, Technology and Logistics (AT&L) prior to February 2009.

Source: Commission on Wartime Contracting in Iraq and Afghanistan, “Final Report to Congress. Transforming Wartime Contracting: Controlling costs, reducing risks”, August 2011. Washington: Commission on Wartime Contracting in Iraq and Afghanistan, p. 205.

In the case of Afghanistan, contractors have clearly outnumbered US army personnel for more than one year, as shown in Figure E-5. However, as alarming as this sounds, it must be underlined that most of these tasks were logistical ones, the prominent one being base support. Figures E-2 and E-3 show the variety of tasks performed by PMSCs. Contractors were mostly hired in Iraq for fields such as “Logistics – Installation Support” (86%), “Logistics – Log Services” (99%), “Logistics – OCS” (100%), and “Logistics – Maintain” (80%).

Figure E-2. JCS military and contractor personnel by function in Iraq
Third quarter FY 2008

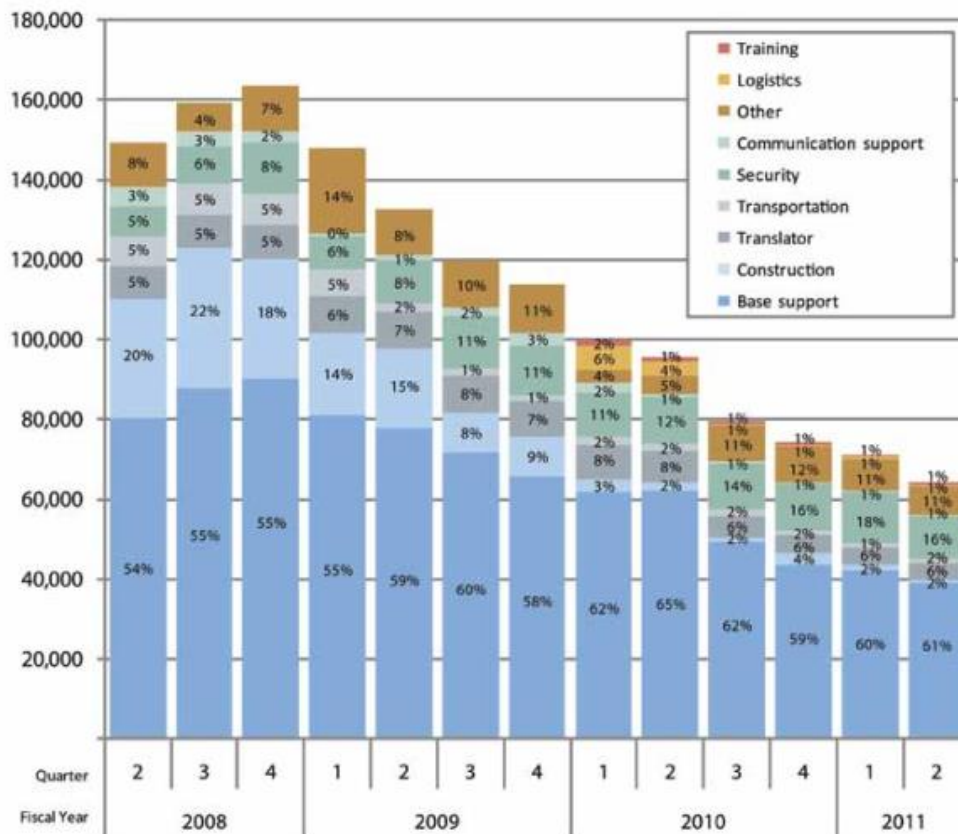


Source: CJCS Dependence on Contractor Support in Contingency Operations Task Force Report, “An Evaluation of the Range and Depth of Service Contract Capabilities in Iraq and Implications for OCS Planning,” presented to Commission by CAPT Pete Stamatopoulos, Supply Corps, U.S. Navy JS J-4 Chief, Logistics Services Division, March 24, 2010, 21.

Source: Commission on Wartime Contracting in Iraq and Afghanistan, “Final Report to Congress. Transforming Wartime Contracting: Controlling costs, reducing risks”, August 2011. Washington: Commission on Wartime Contracting in Iraq and Afghanistan, p. 201.

As Figure E-2 shows, contractors were indeed involved in the fields of “Force Support” (24%), “Protection” (24%) and “Force Application” (1%), although in a smaller proportion than other fields presented before.

Figure E-3. Defense contractor personnel by function in Iraq



Source: Defense Contractor employees—Contractor Support of U.S. Operations in the USCENTCOM area of responsibility, Iraq and Afghanistan, prepared by Deputy Assistant Secretary of Defense (Program Support) quarterly February 2009 to present, prepared by Under Secretary of Defense for Acquisition, Technology and Logistics (AT&L) prior to February 2009.

Source: Commission on Wartime Contracting in Iraq and Afghanistan, “Final Report to Congress. Transforming Wartime Contracting: Controlling costs, reducing risks”, August 2011. Washington: Commission on Wartime Contracting in Iraq and Afghanistan, p. 202.

Nevertheless, stating that the United States used contractors in unprecedented numbers in these two countries isn’t an overstatement. Karli Johnston believes that “PMCs in these areas have enjoyed almost total impunity and have been involved in incidents mired with controversy”⁷⁵. In 2002, contractors already represented a tenth of the forces sent by the US in Iraq. In the Gulf War, they were merely

⁷⁵ JOHNSTON K., “Private Military Contractors: Lessons Learned in Iraq and Increased Accountability in Afghanistan”, *Georgetown Journal of International Affairs*, 2009, Vol. 10, N° 93, p. 93.

representing a hundredth.⁷⁶ The reason for this meteoric rise, according to Johnston, is that relying on PMSCs allows the US to avoid relying on multilateral coalitions. Allied forces are often slow to deploy and not as easily interoperable with American forces. Spearin and Johnston explain that PMSCs are “usurping traditional allied state roles and upsetting traditional alliance dynamics”⁷⁷, which exaggerates “the fissure between the United States and its allies”⁷⁸.

The American overreliance on PMSCs led to various abuses, that will be addressed in part 3, “Criticism and Regulation”. However, among these cases, the Nisour Square Massacre played an important role on putting the spotlight over one of the most infamous private military firms: Blackwater. On September 16, 2007, a U.S. embassy convoy, escorted by Blackwater contractors, passed through the Nisour Square. Somewhere between 11.30am and noon, a bomb exploded near an unfinished Mosque, about 1 mile from the Nisour Square. Contractors that were posted through the Nisour Square to stop the traffic claimed that a Sedan was approaching despite warning shots having been fired. They then proceeded to fire lethal shots at the vehicle which continued to approach. They set off stun grenades to clear the scene, while unleashing “an overwhelming barrage of gunfire even as Iraqis were turning their cars around and attempting to flee”⁷⁹ in which 17 Iraqis died. A few minutes later, at 11:53, the convoy was hit by an explosive device and sustained fire from an estimated 8-10 persons⁸⁰. After a lengthy investigation and trial, three of the contractors involved in the shooting were convicted in 2014 and sentenced to 30 years in prison. A fourth contractor, a sniper, was convicted of murder and

⁷⁶ SPEARIN C., “American Hegemony Incorporated: The Importance and Implications of Military Contractors in Iraq”, *Contemporary Security Policy*, 2003, Vol. 24, No. 3, pp. 26-47, 28; SCAHILL J., “Bush's Shadow Army”, *The Nation*, 15 March 2007, cited in JOHNSTON K., *op. cit.*, pp. 94-95.

⁷⁷ SPEARIN C., “American Hegemony Incorporated: The Importance and Implications of Military Contractors in Iraq”, *Contemporary Security Policy*, 2003, Vol. 24, No. 3, p. 34.

⁷⁸ JOHNSTON K., *op. cit.*, p. 95.

⁷⁹ GLANZ J., RUBIN A. J., “From Errand to Fatal Shot to Hail of Fire to 17 Deaths”, *New York Times* [online], October 3, 2007. Available at: <https://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html>, last accessed on the 9-07-2018.

⁸⁰ Bureau of Diplomatic Security, “Spot Report – 091601-01”, Baghdad: U.S. Embassy [online], September 16, 2007. Available at: <http://i.a.cnn.net/cnn/2007/images/09/16/17sept07.pdf>, last accessed on the 9-07-2018.

received a life sentence. However, the sentences were thrown out by a federal court in August 2017 which ordered that three of the contractors would need to be resentenced. The sniper's conviction was thrown out entirely. As underlined by the New York Times, "the ruling is a setback to the effort (...) to demand stiff consequences for the shooting in Baghdad's Nisour Square"⁸¹.

In 2010, the Quadrennial Defence Review underlined the need for a "more systemic approach" concerning contracts with "private military firms in the field of Defence"⁸². In 2011, the Commission on Wartime Contracting of the Senate concluded its report by arguing that "profound reforms" must be undertaken regarding a practice that became a part of national security⁸³.

⁸¹ APUZZO M., "In Blackwater Case, Court Rejects a Murder Conviction and Voids 3 Sentences", *The New York Times* [online], published on August 4, 2017. Available at : <https://www.nytimes.com/2017/08/04/world/middleeast/blackwater-contractors-iraq-sentences.html>, last accessed on the 9-08-2018.

⁸² ETTINGER A., *ibidem*, p. 758.

⁸³ ETTINGER A., *ibidem*, p. 763.

3. Mercenarism and the field of International Relations

a. Introduction

Surprisingly, mercenaries and private military firms are remarkably absent from some of the most illustrious books treating about theories of International Relations. They are absent of “Theory of International Relations” by Battistella, and scarcely analysed in Buzan and Hansen’s “The Evolution of International Security Studies”⁸⁴. Moreover, in 2005, Schreier and Caparini explained that even though “States no longer enjoy a monopoly on the means of violence, (...) [such an approach has been] almost totally absent in current professional literature and academic studies”⁸⁵. Only P.W. Singer, in 2001, argued that this new phenomenon showed a “new fungibility of power” and “new complexities in the balances of power”. He states that “economic assets can now be rapidly transformed into military threats, making economic power more threatening”⁸⁶. However, this claim needs to be qualified, as power isn’t as easily transferrable as this assertion would make it seem.

One could argue that the agents of mercenarism are non-essential objects of study, more practical than theoretical, and as such aren’t vital to an understanding of the theory of International Relations. However, Schreier and Caparini believe that such a development “will affect international relations in several critical ways, ranging from the introduction of market dynamics and disruptions into security relations to the policy impact of alternative military agents”⁸⁷. My goal is thus to

⁸⁴ BUZAN B., HANSEN L., *The Evolution of International Security Studies*, Cambridge: Cambridge University Press, 2010 p. 233.

⁸⁵ SCHREIER F., CAPARINI M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*. Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005 [online], p. 12. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/op06_privatising-security.pdf, accessed on the 20-03-2018.

⁸⁶ SINGER P.W., “Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security”, *International Security*, 2001, Vol. 26, No. 3, pp. 209-210.

⁸⁷ SCHREIER F., CAPARINI M., *idem*.

support Singer, Schreier and Caparini, as well as to challenge the near-absence of such developments in reference publications. I will examine the growth of PMCs, in order to demonstrate that the study of mercenarism and the private military industry is useful to understand certain transformations occurring in Westphalian States and therefore in International Relations. To that end, we will first investigate Elke Krahmann's book "States, Citizens and the Privatization of Security", while using elements present in Carolyn Gallaher and Aaron Ettinger's publications. Both researchers examine the incursion of neo-liberalism in the State as a way of explaining the emergence of PMCs after the ban placed on mercenaries by the Geneva Convention.

b. Progressive transformations and developments in International Relations theory

Carolyn Gallaher⁸⁸, relying on the work of Cowen and Smith⁸⁹, believes that the geopolitical order is in decline and is leaving its predominant position to a geoeconomical order. On the one hand is the geopolitical order. It is defined as a system where States maintain a sacrosanct division between the judicial and military domains in their inner organisation⁹⁰. Using the Social Contract theory as the basis for her reasoning, she explains that in such an order, States legitimised their monopoly on the legitimate use of violence by the frame of its use. It would thus protect its citizens against external threats, while protecting citizens from one another. On the other hand, the geoeconomical order relies on two assumptions: First, it is marked by an economical imperative of accumulation. This obligation operates in an environment of competitive rivalry between States, corporations and individuals.

⁸⁸ Carolyn Gallaher is an associate professor in the School of International Service at the American University in Washington, D.C.

⁸⁹ COWEN D., SMITH N., « After Geopolitics? From the geopolitical social to geoeconomics », *Antipode*, Vol. 41., n°1, pp. 22-48.

⁹⁰ GALLAHER, C. « Risk and Private Military Work », *Antipode*, 2012 vol. 44, n°3, p. 792.

There, domination manifests itself by gaining and extending one's market shares⁹¹. Second, this order legitimates itself by using the theory of trickle-down economics. This theory highlights the social usefulness of the geoeconomical order, and therefore its extension by war⁹². Both theses constitute, according to Gallaher, the foundation for the rise of new norms used to declare war on other nations.

Using the arguments put forward by Cowen and Smith, she explains that the rise of neoliberalism, linked to that of the geoeconomical order⁹³, has blurred the line between the judicial and military systems. The first one became more militarised, with paramilitary units using military-grade material. The latter became more judicial, due to the appearance of “new wars”⁹⁴ in gray-zone conflicts⁹⁵. In these conflicts, the military often ends up managing civilians during some (post-) conflict periods. However, it is worth noting that “new wars” aren't solely synonymous with “State failure”. In her article, Yelda Kaya explains that because the PMCs' biggest clients are the richest States, these companies aren't *only* about state failure anymore⁹⁶. Focusing on State failure as a context to describe PMC's activities would result in a short-sighted analysis that wouldn't represent the complexity of their implication in international relations. Only by employing a larger perspective, including both countries hosting PMCs headquarters and countries where they are operating will generate a comprehensive analysis.

It is especially when private military companies are involved in “new wars” that it constitutes a risk for both the civilians and the

⁹¹ GALLAHER, C. *op. cit.*, p. 789.

⁹² *Ibidem*.

⁹³ GALLAHER, C. *op. cit.*, pp. 790-791.

⁹⁴ Intra-State conflicts involving State and non-State actors. See BUZAN B., HANSEN L., *op. cit.*, p. 233.

⁹⁵ Gray zone conflicts will be delved into later, at p. 32. Shortly put, the “gray zone” is an area where various forms of low-intensity conflicts occur. These conflicts often take place near or in urban areas.

⁹⁶ YELDA KAYA, S., “Private Contractors in war from the 1990s to the present”, p. 613, in ZÜRCHER, E.-J., (ed.), *Fighting for a living: A Comparative Study of Military Labour, 1500-2000*, Amsterdam: Amsterdam University Press, 2013, 704 p.

contractors, according to Gallaher⁹⁷. To summarize, she argues that both the involvement of neoliberalism in the State and the rise of the geoeconomical order present risks for individuals that the State wants to protect – or at least shelter from conflicts – as well as for the contractors themselves. The argument of neoliberalism's incursion is also deployed by Elke Krahmann. She believes that the rise in power of the private military industry is due to changes in the security environment and to structural constraints⁹⁸. According to her, the end of the Cold War has contributed to the rise of the private military industry by two specific ways. Firstly, due through massive terminations and numerous budget cuts, a great number of former soldiers and military officials became jobless, creating a qualified workforce available on the market. Secondly, and related to the former argument, these terminations and budget cuts created a demand in military expertise and personnel. This demand came from the realization that the world was not becoming a pacific place due to the Cold War ending⁹⁹. However, James Carafano disagrees and presents the idea that the Cold War “downsizing argument” employed by Krahmann is nothing more than a myth¹⁰⁰. He explains that the military was underfunded after the end of the Vietnam War (due to the public debt constantly rising¹⁰¹), and that even though personnel and equipment were in short supply, there were no plans for modernization nor training programs.

Further in her book, Krahmann claims that the United States and Europe have responded differently to the question of the extent of control that the State should have on the military realm. More specifically, she highlights a debate which was focusing on the extent

⁹⁷ The ISOA - International Stability Operations Association - is a lobby that has written a code of conduct, in 2011, to which certain PMCs submit themselves voluntarily. For a more thorough analysis of the ISOA's code of conduct, see GALLAHER C., *op. cit.*, pp. 795-801.

⁹⁸ KRAHMANN E., *States, Citizens and the Privatization of Security*, Cambridge: Cambridge University Press, 2010, p. 9.

⁹⁹ BUSH, G. H. W., « Towards a New Order », Speech to Congress, 11 September 1991, *cited in* KRAHMANN E., *idem*.

¹⁰⁰ CARAFANO J. J., *Private Sector, Public Wars: Contractors in Combat – Afghanistan, Iraq and Future Conflicts*, Santa Barbara: Praeger Publishers, 2008, p. 43.

¹⁰¹ CARAFANO J. J., *op. cit.*, p. 53.

of State control on the use of armed forces, and on the means that citizens could use to uphold government and military responsibilities¹⁰². Coming back to the Social Contract Theory, she lays out that two ideological traditions have prevailed in this debate, traditions that we will briefly resume. On the first hand, republicanism, which posits that “individuals are essentially interdependent” and that the “community is best placed to ensure the defence and wellbeing” of its citizens¹⁰³. In this tradition, the government is centralised and possesses a monopoly on determining what belongs to the realms of national and international security. Each and every security function, as well as their financing and supply, are solely managed by the State. Citizens are the elective force controlling the government and participate to the defence of the State by their integration in the armed forces. On the other hand, there is liberalism. This doctrine postulates that citizens are autonomous individual entities whose interests, rights and freedom must be protected from State interference. In order to counterbalance the State, liberalism suggests the limitation and fractioning of functions and powers of the State and the armed forces, more specifically concerning the supply and control of means and use of legitimate collective violence¹⁰⁴. The liberal State sees its resources and political powers dispersed in a plurality of private and governmental actors¹⁰⁵. This State model, designed to protect the individual’s life, freedom and self-determination rights, is structured by norms such as the limitation of the State sovereignty, self-governance and *laissez-faire*.

In the middle of the 20th century, liberalism profoundly redefined itself. One of the reasons for its transformation was the “perceived overstretch of the modern welfare or ‘warfare’ State and the growing

¹⁰² KRAHMANN E., *op. cit.*, p. 11.

¹⁰³ KRAHMANN E., *op. cit.*, p. 12.

¹⁰⁴ KRAHMANN E., *op. cit.*, p. 13.

¹⁰⁵ HUNTINGTON S.P., *The Soldier and the State. The Theory and Politics of Civil-Military Relations*, Cambridge, MA: Belknap Press of Harvard University Press, 1957; SARKESIAN S.C., WILLIAMS J.A. and BRYANT F.B., *Soldiers, Society and National Security*, Boulder, CO: Lynne Rienner, 1995, pp. 13-15 cited in KRAHMANN E., *ibidem*.

disillusionment with the Republican model of centralized government”¹⁰⁶. It is under the impulse of Milton Friedman’s work and position as Reagan’s economical advisor that neoliberalism was progressively put in place. Krahmann suggests that while neoliberalism shares several fundamental principles with liberalism, they differ on two points¹⁰⁷: first, the degree of application of liberal principles to the institutions and practices of the State, of citizenship and armed forces. Second, Friedman puts forward the use of the market in order to counter the concentration of the means and control over collective violence in the hands of the State. Therefore, the outsourcing of public functions towards private actors “serves to limit the scope and powers of government, and the dispersion of capabilities and the competition between the State and the market establishes a balance of power”¹⁰⁸. As such, she considers that the privatisation of the military industry and the outsourcing of public functions by the armed forces seem to meet the ideals of Friedman, concerning the dispersion of coercive means between private and public actors¹⁰⁹. The interest of these approaches is that they are linked to one another: both the geopolitical order and republicanism are linked by their centralisation model, putting the State in the focus of preoccupations and power, while neoliberalism and geoeconomical order interact in a logic of limitation and counterbalancing of the State power.

According to these authors, PMCs are thus born from the advance of neoliberalism in the State realm. Gallaher states that the hierarchical model of western PMSCs reflects the neoliberal segmentation of work: higher-ups and officials are often former high-ranked officials of Western armies, while troops and logistics are usually comprised of contractors from developing countries¹¹⁰. Krahmann gives the contractor several characteristics: first, the contractor has no ultimate

¹⁰⁶ KRAHMANN E., *op. cit.*, p. 34.

¹⁰⁷ KRAHMANN E., *op. cit.*, p. 34.

¹⁰⁸ KRAHMANN E., *op. cit.*, p. 35.

¹⁰⁹ KRAHMANN E., *op. cit.*, p. 36.

¹¹⁰ GALLAHER C., *op. cit.*, p. 791.

responsibility to defend the State by using his own life and is solely linked to the State by a temporary contract. Second, the contractor has no shame admitting that financial gain is its primary motive, where the professional soldier believes that it's patriotism that motivates him before anything else¹¹¹. Finally, private contractors do not possess collective and professional identity which might ensure their conformity to professional military norms¹¹². Krahmann pursues by saying that certain of these contractors haven't even followed basic military training and that the absence of a group identity comes from the fact that contractors work under short contracts (from two to six months), and that for different firms. Moreover, "more than 80 percent of the contractor employees [in Defence, State, and USAID operations in Iraq and Afghanistan] were local or third-country nationals, not U.S. citizens"¹¹³.

In general, contractors are brought together because their records and competences are held in a database¹¹⁴. These competences are required for a specific mission, which they are sometimes sent to with very little training and preparation¹¹⁵. From an operational point of view, it seems to be a disadvantage, but the neoliberalist point of view considers the opposite. According to neoliberalism, the fragmentation of resources and influences allows for the emergence of two phenomena. The first one is a downsizing of military forces and the second one is a mixing of civilian and military occupation spheres. Neoliberalism postulates that this is necessary to achieve better democratic control and accountability of armed forces.¹¹⁶ But by doing so, it creates a second phenomenon, which "favours the alienation of political and military roles within the private military contractor

¹¹¹ KRAHMANN E., *op. cit.*, p. 47.

¹¹² *Ibidem*.

¹¹³ Commission on Wartime Contracting in Iraq and Afghanistan, "Final Report to Congress. Transforming Wartime Contracting: Controlling costs, reducing risks", August 2011. Washington: Commission on Wartime Contracting in Iraq and Afghanistan, p. 18.

¹¹⁴ For a more detailed account of such databases, see YELDA KAYA, S., "Private Contractors in war from the 1990s to the present", pp. 613-638, in ZÜRCHER, E.-J., (ed.), *Fighting for a living: A Comparative Study of Military Labour, 1500-2000*, Amsterdam: Amsterdam University Press, 2013, 704 p.

¹¹⁵ KRAHMANN E., *op. cit.*, p. 47

¹¹⁶ KRAHMANN E., *op. cit.*, p. 48.

model”¹¹⁷, through the divorce between military functions and the political role of the private contractor. Contractorization is seen as “a threat to healthy civil-military relations within developed States”¹¹⁸.

Other theoretical changes had been foretold at the start of the 21st century. In 2001 already, P.W. Singer wrote that the privatization of military means had – and will have – important consequences on the theory of International Relations. One of these consequences is a “new fungibility of power”. Fungibility refers to the degree of interchangeability of an object. While analysing the fungibility of political power resources, David A. Baldwin explains that “no political power resource begins to approach the degree of fungibility of money”¹¹⁹. Singer adds that PMCs might affect international security through, among other consequences, “the ability of PMCs to transform limited economic power into military might”¹²⁰. Therefore, he adds, economically-rich but population-poor regions of the globe may acquire “highly specialized capacities (e.g., expertise in information warfare), but they may even be able to skip a whole generation of war skills”¹²¹. Consequently, they may not only be able to buy military power or “strength” (which refers to the means of power), but also the power to use it “efficiently” and “effectively”¹²². In contrast with the claims of Singer, Baldwin still separates money – which he conceives as a “generalized means of exercising purchasing power” – from political power¹²³. Political power, in its intangible and particular form, cannot be wholly controlled by economic power.

¹¹⁷ KRAHMANN E., *ibidem*.

¹¹⁸ TAYLOR T., « Private security companies in Iraq and beyond », *International Affairs* [online], 2011, Vol. 87, No. 2, p. 453. Oxford: The Royal Institute for International Affairs. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2346.2011.00982.x/pdf>, last accessed on the 20/03/2017.

¹¹⁹ BALDWIN D. A., “Power Analysis and World Politics: New Trends versus Old Tendencies”, *World Politics*, 1979, Vol. 31, n°2, p. 166.

¹²⁰ SINGER P.W., “Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security”, *International Security*, 2001, Vol. 26, No. 3, p. 209.

¹²¹ SINGER P.W., *op. cit.*, *idem*.

¹²² KINDLEBERGER, C. P., *Power and Money*, New York: Basic Books 1970, p. 56, p. 65, *cited by* BALDWIN D. A., *op. cit.*, p. 173.

¹²³ BALDWIN D. A., *op. cit.*, p. 165.

It is absolutely critical to define and limit the scope of power here. As Lasswell and Kaplan have indicated, “failure to recognize that power may rest on various bases, each with a varying scope, has confused and distorted the conception of power itself, and retarded inquiry into the conditions and consequences of its exercise in various ways”¹²⁴. Susan Strange believes that the Weberian conception of power does not account for power relations in the contemporary world¹²⁵. If, as Singer claims, money could transform power in terms of fungibility, it would be in limited ways. Indeed, as Guzzini shows, power is not as easily transferrable from one domain to another¹²⁶. In the case of PMCs, this conception of power would be limited to the realms of *realpolitik* and arguably of Waltz defensive neo-realism. In this approach, the first priority for States is to increase their security either by creating alliances or by enhancing their military capabilities, since the world isn’t considered as peaceful, but rather, conflict-ridden, where States can never be sure about the intentions of other States. These conflicts are not to be considered as fully-fledged wars but should be rather seen as varying in intensity. A concept rising in popularity in these recent years is the ‘gray zone conflicts’, which “are neither war nor peace, but instead lie somewhere in between”¹²⁷, according to Nora Bensahel. In these areas, she contends that the defining characteristic is ambiguity, “about the ultimate objectives, the participants, whether international treaties and norms have been violated, and the role that military forces should play in response. Such ambiguities enable adversaries to pursue their interests while staying below the threshold that would trigger a military response – and, if they remain ambiguous enough, they might avoid any response”¹²⁸. The concept of ‘gray zone

¹²⁴ LASSWELL H.D., KAPLAN A., *Power and Society*, New Haven: Yale University Press, 1950, p. 85, *cited by* BALDWIN D. A., *op. cit.*, p. 167.

¹²⁵ STRANGE S., *States and Markets*, London: A&C Black, 1998, p. 24-25, *cited by* BATTISTELLA D., *op. cit.*, p. 475.

¹²⁶ GUZZINI, S., “Fungibility of Power Resources”, In K. Dowding (Ed.), *Encyclopedia of power* [online], 2011, p. 267. Available at: <http://sk.sagepub.com/reference/power/n151.xml>, last accessed on 9-08-2018.

¹²⁷ BENSAHEL N. “Darker Shades of Gray: Why Gray Zone Conflicts Will Become More Frequent and Complex”, *Foreign Policy Research Institute* [online], February 13, 2017. Available at: <https://www.fpri.org/article/2017/02/darker-shades-gray-gray-zone-conflicts-will-become-frequent-complex/>, last accessed on 9-08-2018.

¹²⁸ BENSAHEL N., *idem*.

conflicts' fits undoubtedly well in defensive neo-realism, since it is linked to the uncertainty of other States actions. Therefore, it is necessary to avoid taking actions that might trigger reactions from other States, but States will still try to pursue their interests nonetheless. Bensahel believes that "We need to start thinking about conflict and warfare in a far more holistic way than simply as primarily military in nature. We need to develop a range of possible strategies and responses for a world where the distinction between war and peace may be very unclear – and may no longer be a meaningful distinction at all"¹²⁹. The increase of PMCs' use for the last decades seem to indicate that military forces are slowly transforming themselves to be able to respond to such changes. Thus, the neo-realist approach allows to understand the progressive use of contractors in armies as a consequence of the will to render said armed forces more efficient, and of the modification of conflicts' nature. The numerous reforms highlighted in Annex 1 and part one tend to confirm this hypothesis.

In sum, the transfer of several 'State' functions to private actors constitutes an important change in International Relations, by redefining certain aspects of the Westphalian State. These aspects mostly focus on the monopolisation of violence by the State, but they also transform relations between the citizen and the soldier. In other words, the emergence of PMCs implies that States themselves are changing. From the 1980s until 2010, the multiple changes indicated that States were headed towards the Neoliberal pole. However, careful analysis has shown that this transformation wasn't complete. It has also highlighted that both State and non-State actors have slowly but progressively questioned the benefits and risks that the use PMCs involves. As we shall see in the next section, these interrogations stem from scandals, abuse and fraud. In response, criticism has risen, as well as various attempts at regulating the private military industry – which are partly analysed in Annex 1. I have also shown that PMCs are involved in power dynamics as well as in the rising of new forms of

¹²⁹ BENSAHEL N., *idem*.

conflicts. However, we have seen that the conception of power has to be precisely and cautiously defined. Therefore, the use of PMCs can indeed be understood as a part of International Relations theory rather than a side-phenomenon.

4. Criticism and Regulation

a. Insubordination, Violence and Careless Behaviour

In August 2009, the New York Times revealed that the Central Intelligence Agency had hired Blackwater employees in 2004, in order to hunt down several Al-Qaida leaders¹³⁰. However, although “the C.I.A. spent several million dollars on the program, [it] did not successfully capture or kill any terrorist suspects”¹³¹. During the Iraqi war, Blackwater received “millions of dollars in government contracts, growing so large that the Bush administration said it was a necessary part of its war operation in Iraq”¹³². But it was also the source of controversy, as several of its employees “were accused of using excessive force on several occasions, including shootings in Baghdad in 2007 in which 17 civilians were killed”¹³³ according to Iraqi sources. American sources estimate that there were 14 civilians killed¹³⁴. In May 2009, the US military was “investigating Blackwater’s killing of civilians in Afghanistan (...), and reports are emerging that the company may be implicated in the CIA’s extraordinary rendition program”¹³⁵. In 2015, “a judge in Washington imposed lengthy sentences on four former employees”¹³⁶. Moreover, “Blackwater is being investigated by the Justice Department for possible crimes

¹³⁰ MAZZETTI M., “C.I.A. Sought Blackwater’s Help to Kill Jihadists”, *New York Times* [online], published on August 19th, 2009. Available at: <https://www.nytimes.com/2009/08/20/us/20intel.html>, last accessed on the 18-04-2018.

¹³¹ MAZZETTI M., *idem*.

¹³² *Ibidem*.

¹³³ *Ibidem*.

¹³⁴ CHARLIER M.-D., “La guerre sous-traitée à des entreprises privées: Mercenaires d’Etat en Afghanistan”, *Le Monde Diplomatique* [online], published in February 2010. Available at: <https://www.monde-diplomatique.fr/2010/02/CHARLIER/18793>, last accessed on the 18-04-2018.

¹³⁵ ‘Rendition’ is the action of transferring a prisoner from one country to another, outside of the judicial extradition framework.

¹³⁶ The Editorial Board, “Justice for Blackwater Victims”, *New York Times* [online], published on April 14th, 2015. Available at: <https://www.nytimes.com/2015/04/15/opinion/justice-for-blackwater-victims.html?rref=collection%2Ftimestopic%2FBlackwater%20Worldwide>, last accessed on the 18-04-2018.

ranging from weapons smuggling to manslaughter”¹³⁷, as well as being sued “in federal courts by scores of Iraqi civilians for alleged war crimes and extrajudicial killings”¹³⁸. Despite these controversies, as of May 2009, “the Obama administration [continued] to keep Blackwater on the government’s payroll”. Yet, Scahill believes that it would be “a mistake to think that Blackwater is the only problem”¹³⁹. Indeed, he firmly asserts that “Blackwater [was] but one fruit on the poisonous tree of military outsourcing. It is imperative that Congress confront the intimate linking of corporate profits to US wars and lethal, covert operations”¹⁴⁰. After the ‘Iraqi scandals’, Blackwater changed its name to Xe Services in 2009, and afterwards changed it again to ‘Academi’. The company was sold in 2011 to USCT Holdings, reportedly for about \$200 million, according to the Washington Post¹⁴¹.

In an article published in 2010¹⁴², two journalists from the New York Times found that employees of a PMC called “Custer Battles” fired several shots to a civilian car and a crowded minibus that came close. After realizing their mistake, they handed out cash to the civilians present at the scene to avoid disciplinary action before fleeing. The documents scrutinized by the journalists also reveal that “contractors often shot with little discrimination — and few if any consequences — at unarmed Iraqi civilians, Iraqi security forces, American troops and even other contractors”¹⁴³. Therefore, “far from providing insurance against sudden death, the easily identifiable, surprisingly vulnerable pickup trucks and S.U.V.’s driven by the security companies were magnets for insurgents, militias, disgruntled Iraqis and anyone else in search of a target”¹⁴⁴. What’s more, in 2012, a RAND study titled

¹³⁷ SCAHILL J., “Flushing Blackwater”, *The Nation*, published on September 14th, 2009, p. 5.

¹³⁸ SCAHILL J., *idem*.

¹³⁹ SCAHILL J., *op. cit.*, p. 6

¹⁴⁰ SCAHILL J., *idem*.

¹⁴¹ SORKIN A. R., PROTESS B., “Blackwater Founder in Deal to Sell Company”, *New York Times* [online], published on December 16th, 2010. Available at: <https://dealbook.nytimes.com/2010/12/16/blackwater-founder-in-deal-to-sell-company/>, last accessed on the 18-04-2018.

¹⁴² GLANZ J., W. LEHREN A., “Use of Contractors Added to War’s Chaos in Iraq”, *New York Times* [online], published on October 23rd, 2010. Available at: <https://www.nytimes.com/2010/10/24/world/middleeast/24contractors.html>, last accessed on the 18-04-2018.

¹⁴³ GLANZ J., W. LEHREN A., *idem*.

¹⁴⁴ *Ibidem*.

“Hired Guns”¹⁴⁵ found that although contractors provided very useful skills and competences, “nearly one-quarter of U.S. military personnel surveyed in the study said they observed contractors in Iraq hindering military personnel. Twenty-five percent of these respondents said they observed armed contractors failing to coordinate with military commanders. Nearly 50 percent of State Department personnel who interacted with armed contractors did not think the contractors understood or were sensitive to Iraqis and their culture”¹⁴⁶. The security industry, according to Pingeot, “is extremely nervous about negative judgments”¹⁴⁷, and has repeatedly condemned such actions, which “violates company norms and company rules”¹⁴⁸. In the absence of strong and international regulation, different responses have emerged in several countries¹⁴⁹.

¹⁴⁵ COTTON S. K., *et al.*, “Hired Guns : Views About Armed Contractors in Operation Iraqi Freedom”, RAND Corporation, National Security Research Division [online], 143 p. Available at: https://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG987.pdf, last accessed on the 18-04-2018.

¹⁴⁶ DUNIGAN M., “US Control of Contractors in Iraq Is Vital”, *RAND Corporation* [online], February 1st, 2012. Available at: <https://www.rand.org/blog/2012/02/us-control-of-contractors-in-iraq-is-vital.html>, last accessed on 13/07/2018.

¹⁴⁷ PINGEOT L., *op. cit.*, p. 15.

¹⁴⁸ PINGEOT L., *idem*.

¹⁴⁹ A non-exhaustive overview can be consulted in Annex 1.

b. Regulation

i. State and Inter-State Regulation

The concerns that were addressed to PMCs as well as the scandals they were involved in led to a consensus over the fact that the regulation of the industry represents a major challenge¹⁵⁰. The reasons for this consensus between journalists, academics and NGOs are subtler than an accumulation of scandals and criticism, because they also rely on inherent characteristics of the PMCs. Yelda Kaya explains that the difficulty to create procedures to prosecute and punish contractors for their wrongful deeds stems from the fact that they fall outside of the military courts' jurisdictions and aren't part of the military chain of command¹⁵¹. However, she notes that slight modifications¹⁵² have been made. Indeed, contractors may fall under military jurisdiction during *times of declared war* – a quite nebulous specification – as well as during “contingency operations”, according to changes made to the US Uniform Code of Military Justice in 2007. Despite these improvements, she specifies that in all the other cases they cannot be court-martialled, and they cannot be prosecuted in Iraqi courts for crimes committed on Iraqi soil. As for international law, Yelda Kaya argues that it is directed towards national armies, and therefore contractors seem outside of its jurisdiction¹⁵³. Schreier and Caparini tend to believe that “the failure of international law to establish the exact legal status of PMCs and PSCs effectively defers the problems to the national level”¹⁵⁴.

Renée de Nevers reveals a paradox regarding regulation at the national level. According to her, “if governments perceive control over the use of force as one of the core prerogatives of the State, then we

¹⁵⁰ YELDA KAYA, S., “Private Contractors in war from the 1990s to the present”, p. 616, in ZÜRCHER, E.-J., (ed.), *Fighting for a living: A Comparative Study of Military Labour, 1500-2000*, Amsterdam: Amsterdam University Press, 2013, 704 p.

¹⁵¹ YELDA KAYA, S., *op. cit.*, p. 704.

¹⁵² *Ibidem*, footnotes.

¹⁵³ *Ibidem*.

¹⁵⁴ SCHREIER F., CAPARINI M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*. Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005 [online], p. 104. Available at: https://www.dcaf.ch/sites/default/files/publications/documents/op06_privatising-security.pdf, accessed on the 20-03-2018.

would expect regulation in this area to be stronger than regulation of activities that do not have potentially lethal consequences”¹⁵⁵. However, she notes that “the industry’s rapid growth has outpaced government efforts to control their activities”¹⁵⁶, a remark supported by the 2011-report from the Commission on Wartime Contracting. Therefore, she explains that there is a crucial need to study the self-regulation efforts, since the governments that are most reliant on PMCs failed “to develop State-level regulation for the industry”¹⁵⁷.

In 2005, Schreier and Caparini wrote in their general analysis on the use of PMCs that “few States have attempted to find solutions to this problem”¹⁵⁸. Cornwell and Cillers believe that PMCs allows powerful States to “avoid being seen too close to where the trigger is pulled, while [they] are passing on the ammunition from the shadows”¹⁵⁹. Finally, Deane-Peter Baker and James Pattison state that “the use of PMSCs, even for humanitarian intervention and peacekeeping, may make it more difficult to sustain effective legal and political instruments to govern warfare, over both states and PMSCs”¹⁶⁰. Therefore, the blur on regulation and legal obligations for PMCs cannot be dismissed, since it sometimes seems difficult to determine what laws apply in which case. This complex system may benefit States as they can back out of any responsibility by explaining that the legal obligations are unclear. These claims have led State and non-State actors to convene around 2005 to address these issues, which gave birth to the Montreux Document.

¹⁵⁵ DE NEVERS, R., *op. cit.*, p. 219.

¹⁵⁶ *Ibidem*.

¹⁵⁷ DE NEVERS, R., *op. cit.*, p. 221.

¹⁵⁸ SCHREIER F., CAPARINI M., *idem*

¹⁵⁹ CILLERS J., CORNWELL R., “From the Privatisation of Security to the Privatisation of War?” in *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies*, Cillers J., Mason P., (eds). Pretoria: Institute for Security Studies, 1999), p. 243, cited in PINGEOT, L., *Dangerous Partnership: Private Military Companies & Security Companies and the UN*, New York: Global Policy Forum, 2012, p. 18.

¹⁶⁰ BAKER, D.-P., PATTINSON, J., “The Principled Case for Employing Private Military and Security Companies in Interventions for Human Rights Purposes”, *Journal of Applied Philosophy* [online], 2012, Vol. 29, No.1, p. 2. Hoboken: Wiley-Blackwell. Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-5930.2011.00548.x/full>, last accessed on the 18-03-2017.

The Montreux Document

Described as an “intergovernmental statement”, this Swiss initiative aims to articulate “the most pertinent international legal obligations with regard to PMSCs” and to address “the prevailing misconception that private contractors operate in a legal vacuum”¹⁶¹. It was created by the Government of Switzerland and the International Committee of the Red Cross in cooperation with 18 other countries¹⁶², as well as actors from the civil society and of the PMSC industry. As of today, 54 countries have signed it, as well as three international bodies: the European Union, the North Atlantic Treaty Organization, and the Organization for Security and Co-operation in Europe. The document is divided in two parts: the first focuses on the international legal obligations of States regarding PMSC. The second part describes seventy-three “good practices”, in order to guide and aid States by clarifying international law and ensuring compliance with it. As indicated in its introduction “it does not endeavour to establish new regulations but simply seeks to provide guidance”¹⁶³ on legal and practical obligations in relation with existing international law. Furthermore, it is underlined that “this document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law”¹⁶⁴. In other words, it has no legally binding power on its own. These two remarks lead to an important question: how can guidance provide effective regulation? To answer it, we shall first analyse the negotiation process wherein the

¹⁶¹ *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*, Geneva: International Committee of the Red Cross, Swiss Federal Department of Foreign Affairs, 2008, p. 5.

¹⁶² 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 the United States of America.

¹⁶³ *The Montreux Document*, p. 5

¹⁶⁴ *The Montreux Document*, p. 9

elaboration of the document took place. Afterwards, we shall briefly describe it and address its characteristics and implications.

The main author to have extensively addressed and analysed the Montreux negotiations is James Cockayne. He is the sole first-hand source on the subject having published an article on these negotiations. Cockayne explains that he has “a particular perspective on this process, having served as a source of informal advice to the convenors of the Montreux process between mid-2006 and September 2008”¹⁶⁵. The first steps of the Montreux Document can be traced back to the 2005 discussions between the Swiss Foreign Ministry and the ICRC. At the time, according to Cockayne, they were debating on the need for a broad and international dialogue on the application of International Humanitarian Law (IHL) and human rights law (HRL) to PMSCs¹⁶⁶. Two approaches were studied: the first one was to discuss with members of the industry to establish a ‘code of conduct’, while the other approach was to create an intergovernmental debate to clarify the international norms on the activities of PMSCs. The ICRC, in cooperation with the Swiss Foreign Ministry, set up two meetings (16–17 January 2006, in Zurich, and 13–14 November 2006, in Montreux), with 16 states, the European Commission, the ICRC, the British Association of Private Security Companies (BAPSC), the International Peace Operations Association (IPOA), as well as civil society actors and academic experts. These meetings discussed the identification of elements of practice to be recommended to States and to the industry, in order to prove that “contrary to popular and some academic discourse

¹⁶⁵ COCKAYNE, J., “Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document”, *Journal of Conflict and Security Law*, 2009, Vol. 13, No. 3, p. 402.

¹⁶⁶ I found it very hard to ascertain the fact that these discussions took place, since I can hardly find any direct evidence of it. The ICRC was indeed studying the subject in 2005 and published a document on a “Meeting on the Notion of Direct Participation in Hostilities”, which discussed PMSCs among other subjects. These discussions involved “forty legal experts representing the military, government and academia, as well as international and non-governmental organizations”. However, none of the governments involved in this meeting have been named. Source: *Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report*, International Committee of the Red Cross, TMC Asser Institute [online], 23 – 25 October 2005, Geneva, 90p. Available at: <https://www.icrc.org/eng/assets/files/other/2005-09-report-dph-2005-icrc.pdf>, last accessed on the 02-07-2018.

(...), PMSCs and individuals are all subject to quite extensive international legal obligations”¹⁶⁷.

Early on, some States expressed their doubts regarding certain sections of the draft that was born of these discussions, especially on standards and elements of recommended regulatory practices. Their main arguments were that no practice could be recommended in the absolute, due to the variety of internal governmental and administrative traditions and contexts. Therefore, they “signalled that they would not agree to a document that established binding standards”¹⁶⁸. Spring and Summer 2007 saw the Swiss FDFA and the ICRC undertake diplomatic consultations with what Cockayne analyses as a strategy that combined a ‘conservative approach’, with the extensive involvement of governmental and non-governmental experts. A myriad of academics, additional industry representatives and civil society organisations became more significantly engaged. What was underlined during these consultations was that “few diplomatic delegations appeared fully aware of the extensive regulatory arrangements already in place in the United States and other jurisdictions”¹⁶⁹. Cockayne believes that this was the consequence of the fragmentation and obscurity of such information. These debates and consultations bore fruit as a 100-page document was issued, combining diverse existing practices. The massacre of the Nisoor Square in 2007 created “strong incentives for states to be seen acting to improve regulation of the industry”¹⁷⁰. Despite that, several points remained unresolved.

Two main groups were holding rival positions; the first one, which included the US, “sought to reduce the prominence of human rights language in the draft text, (...) [while showing] a broader scepticism about the extraterritorial reach of obligations engendered in human rights conventions”¹⁷¹. The second one, mostly comprised of

¹⁶⁷ COCKAYNE, J., *op. cit.*, p. 418.

¹⁶⁸ COCKAYNE, J., *op. cit.*, p. 419.

¹⁶⁹ COCKAYNE, J., *op. cit.*, p. 420.

¹⁷⁰ COCKAYNE, J., *op. cit.*, p. 421.

¹⁷¹ COCKAYNE, J., *idem*.

non-governmental actors (with sparse support from governmental actors), pushed “for stronger human rights language, in particular for stronger statements on States’ due diligence, prevention and remedial obligations under human rights law”¹⁷². After negotiations in April 2008, the actors holding these positions couldn’t agree on common grounds. A few months later, States decided to modify the process of negotiation, resulting in the exclusion of non-governmental actors, with the exception of the ICRC¹⁷³.

The draft resulting from this new process was met with stinging criticism from Amnesty International and the International Commission of Jurists, who claimed that “the current draft falls short, in substantial respect’ of the Swiss Initiative’s stated goal of clarifying state and PMSCs obligations”¹⁷⁴. Cockayne adds that these remarks have had little to no impact on the final Montreux Document, which was substantially alleviated in terms of State obligations, in order to emphasize “its non-binding nature”¹⁷⁵. More importantly, changes were made in the area of the State’s remedial obligations, which were toned down. Such changes, “as Professor Andrew Clapham has pointed out, (...) might also strengthen the case for the development of a global code of conduct to be developed to accompany the Montreux Document”¹⁷⁶. This thought would later materialize in the form of the International Code of Conduct for Security Providers. Although there are debatable aspects in the Document, improvements were made on several subjects¹⁷⁷.

The pertinent international legal obligations relating to private military and security companies are regrouped in the first part of the document. These steadily refer to States as having obligations to respect

¹⁷² *Ibidem*.

¹⁷³ Cockayne even says that “at one point, one government delegation is even said to have proposed excluding the ICRC – despite the fact that it was a co-convenor of the Initiative”, COCKAYNE, J., *op. cit.*, p. 422.

¹⁷⁴ Amnesty International and International Commission of Jurists, ‘Comments on the Swiss Initiative draft text dated 13 August 2008’, 29 August 2008, *cited by* COCKAYNE, J., *op. cit.*, p. 423, footnotes.

¹⁷⁵ COCKAYNE, J., *op. cit.*, p. 423.

¹⁷⁶ COCKAYNE, J., *op. cit.*, p. 425.

¹⁷⁷ They include suspects’ extraditions, obligations of fair trials, the implementation of a provision stating that it is good practice to limit of the number of PMSC operatives on a State’s territory.

international law, international human rights law and international humanitarian law (which applies “in times of war”). However, as the debate analysed in Annex 2 (see p. 48 and pp. 63-64) has shown, such obligations are difficult to uphold when misconduct happens on foreign soil. The problems of jurisdiction, investigation, as well as sovereignty and international cooperation pile up on each other.

In addition to this process, different countries have taken different approaches on PMSC regulation. As underlined in Annex 2, some countries rely mainly on self-regulation by the industry, an approach which has been heavily criticized by Renée de Nevers and Nigel D. White, among others¹⁷⁸. The Draft Convention was the focal point of the entire debate of Annex 2, where two basic groups can be distinguished: countries advocating for and against self-regulation. The countries advocating against it have mostly endorsed the Montreux Document, which they believe to be irreconcilable with the idea of an international legally-binding document. Nigel D. White shares this idea, believing that “there are clear problems in compatibility between the Montreux Document and the Draft Convention as regards combat roles and other functions performed by PMSCs away from the front-line including detention”¹⁷⁹. Regarding responsibility of the State on the actions of contractors, White points out that it is “very difficult in reality to establish that a contracting state is directly responsible for the wrongful acts of PMSCs”¹⁸⁰. There is no mechanism ensuring that cooperation between the States will function in the event of misconduct on foreign soil. Therefore, he believes that “given the weaknesses of international law in imposing direct responsibility on states, organizations, or corporations for the wrongful acts of individuals

¹⁷⁸ DE NEVERS, R., “The Effectiveness of Self-Regulation by the Private Military and Security Industry”, *Journal of Public Policy*, 2010, Vol. 30, No. 2, pp. 219-240; WHITE N. D., “The UK and the Regulation of PMSCs”, Unpublished paper, Office of the United Nations High Commissioner for Human Rights [online], November 28th, 2015, 13 p. Available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Event2015/NigelWhite.pdf>, last accessed on the 21-04-18.

¹⁷⁹ WHITE, N. D., “Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs”, *Criminal Justice Ethics*, 2012, Vol. 31, No. 3, p. 237

¹⁸⁰ WHITE, N. D., *op. cit.*, p. 238.

working for the latter, the spectre is raised of a legal black hole in which PMSCs operate with impunity despite the existence of human rights law and international humanitarian law”¹⁸¹.

Faiza Patel indicates that there is no mechanism that requires States to translate “‘good practices’ (or other similar rules derived from broad international obligations) into national legislation. Five years after the document was agreed upon, only one country — Switzerland — is close to incorporating the “‘good practices’” into law”¹⁸². Accountability also remains a crucial issue for which the Montreux Document does not provide clear answers nor guidance. If it does indeed lay out criteria for accountability and remedy, “neither the Code of Conduct nor the Montreux Document provides effective remedies in cases of human rights violations”¹⁸³. Remedies are understood as legal ways which actors affected by PMSCs may use to uphold their rights. The access to such remedies is a foundational principle of the United Nations Guiding Principles on Business and Human Rights. Once again, the issue of cooperation looms over this problem. Countries and actors are supposed to cooperate in order to facilitate effective legal remedies in case of PMSCs misconduct. Such a process is hazardous, since White believes that “it is accurate to say that states have no obligation under international law to apply and enforce their laws extraterritorially”. Nonetheless, States “still have due diligence obligations within their own jurisdictions to ensure that corporations based there (including ones such as PMSCs that operate overseas) are human rights compliant”¹⁸⁴. But he notes that “there is a fair degree of leeway in how due diligence should be implemented”¹⁸⁵. Patel concludes that “unless courts are able to hold contractors liable for human rights abuses, there is little to prevent governments (or other

¹⁸¹ WHITE, N. D., *op. cit.*, p. 243.

¹⁸² PATEL, F. “Regulating Private Military and Security Companies: A Comprehensive Solution”, *Proceedings of the Annual Meeting (American Society of International Law)* [online], Vol. 107, International Law in a Multipolar World, American Society of International Law, p. 202.

¹⁸³ PATEL, F., *idem*.

¹⁸⁴ WHITE, N. D., *op. cit.*, p. 244.

¹⁸⁵ WHITE, N. D., *op. cit.*, p. 243.

companies) from continuing to enter into relationships with these contractors”¹⁸⁶. Despite these shortcomings, the document does represent an improvement, since its “criteria for selection, for instance, include references to the company’s past conduct – the UN considers only the conduct of employees to be hired under a contract – and to the welfare of the company’s personnel, which the UN guidelines currently ignore”¹⁸⁷.

Another important point that stands out while analysing the Montreux Document is that national law will govern PMSCs actions abroad. As James Cockayne noted it, “the Document was ‘*persuasive* in law’, but now it falls to States to make it ‘*binding* in law’”¹⁸⁸. White underlines that this was done in order “to ensure that private actors within their jurisdictions do not violate human rights law”¹⁸⁹. In Annex 1, I will therefore analyse legislation in the U.S., South Africa, the U.K., Germany, and France, which host most of the PMSCs headquarters. This investigation will point out towards the differences in national legislation and the potential consequences of such disparities. Another point that relates to both analyses in Annex 1 and 2 is that of weak States. White explains that “if a state is weak, or simply fails to recognize its obligations, the framework is undermined unless there is a mechanism at the international level that could help ensure that states take action to ensure that PMSCs do not violate human rights”¹⁹⁰. But the development of such a mechanism has been blocked by proponents of a softer approach on regulation.

These staggering issues, among other reasons, have pushed the UN to set up a working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples

¹⁸⁶ PATEL, F., *op. cit.*, p. 202.

¹⁸⁷ PINGEOT L., *Contracting Insecurity: Private military and security companies and the future of the United Nations*, Global Policy Forum: New York, 2014, p. 19.

¹⁸⁸ COCKAYNE, J., “Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document”, *Journal of Conflict and Security Law*, 2009, Vol. 13, No. 3, p. 427.

¹⁸⁹ WHITE, N. D., *op. cit.*, p. 246.

¹⁹⁰ WHITE, N. D., *op. cit.*, p. 247.

to self-determination. This group has issued several recommendations concerning regulation of PMSCs which have been debated upon by States in the *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*. This group has debated once a year over the course of six years to find common grounds on which to build a regulatory framework. Striking differences between advocates for and against an international legally-binding document have emerged, which are analysed in Annex 2. This debate is essential, as it allows to understand the geographical and political structure of those differences. They are articulated around different conceptions regarding regulation and self-regulation, highlighted throughout the annex.

The Montreux Document presents several weaknesses. As Marie-Louise Tougas noted, despite the significant step forward that the Montreux Document represents, “it leaves some important questions unanswered”¹⁹¹. The first one is the vagueness of “direct participation in hostilities” (DPH) concept, which is mentioned throughout the Document pertaining the protection granted by IHL to contractors in combat. The second one relates to the role of civilians in such activities in compliance “with states’ obligation to respect and ensure respect for IHL”¹⁹². Another issue is the fact that the difference made between direct participation in hostilities and “self-defence” remains unclear, as “the boundary between self-defence and DPH is often blurred in conflict areas”¹⁹³. These blurred lines within international documents allow ambiguity to persist in gray conflict zones. White also identifies a certain number of weaknesses. First, he notes that it fundamentally isn’t “by itself obligatory for States”¹⁹⁴, since it isn’t an international legally-binding document. Second, “the document does not attempt to

¹⁹¹ TOUGAS, M.-L., “Some Comments and Observations on the Montreux Document”, Yearbook of International Humanitarian Law, 2009, Vol. 12, p. 342.

¹⁹² TOUGAS, M.-L., *op. cit.*, p. 344.

¹⁹³ TOUGAS, M.-L., *op. cit.*, p. 344.

¹⁹⁴ WHITE, N. D., *op. cit.*, p. 249.

regulate the industry. Rather, it serves to remind states of their obligations when engaging PMSCs or allowing them to operate from or in their territories”¹⁹⁵. Third, the Montreux Document mainly focuses on international humanitarian law – in other words conflict situations – “when it is arguably more likely that PMSCs will be more readily deployed to post-conflict situations in which international human rights law is applicable”¹⁹⁶. Finally, he points out that it “does not itself establish any international mechanism for regulation of the due diligence obligations of either states or PMSCs”¹⁹⁷.

ii. Self-Regulation

Another answer explored by States and PMSCs alike is the self-regulation of the private military and security industry. De Nevers defines self-regulation as “one form of sectoral governance, in which private actors design security guidelines outside the governmental decision-making arena. Its key features are its voluntary nature, and its reliance on constraints that go beyond existing regulation”¹⁹⁸. Another definition, given by Gunningham and Rees, lays out self-regulation as “a regulatory process whereby an industry-level (as opposed to government or firm-level) organization sets rules and standards (codes of practice) relating to the conduct of firms in the industry”¹⁹⁹. The fact that States have mostly failed to develop comprehensive State-level regulation “makes it especially important to understand the effectiveness of PMSC self-regulation”²⁰⁰. Renée De Nevers notes that as of August 2010, “PMSC self-regulation has relied primarily on codes

¹⁹⁵ WHITE, N. D., *idem*.

¹⁹⁶ WHITE, N. D., *op. cit.*, p. 249.

¹⁹⁷ WHITE, N. D., *idem*.

¹⁹⁸ DE NEVERS, R., “The Effectiveness of Self-Regulation by the Private Military and Security Industry”, *Journal of Public Policy*, 2010, Vol. 30, No. 2, p. 220.

¹⁹⁹ GUNNINGHAM N., REES J., “Industry Self-Regulation: An Institutional Perspective”, *Law and Policy*, Vol. 19, N° 4, pp. 364-365, *cited in* DE NEVERS, R., *op. cit.*, p. 222.

²⁰⁰ DE NEVERS, R., *op. cit.*, p. 221.

of conduct established by industry trade associations”²⁰¹, such as the International Code of Conduct for Security Providers of 2010. Both the International Peace Operations Association (IPOA) and the British Association of Private Security Companies (BAPSC) have advocated for self-regulation, yet “neither has established [mechanisms] that would enable the associations or outsiders to evaluate member companies’ compliance with the standards they set”²⁰².

The lack of State action reinforces an essential dilemma, highlighted by De Nevers: “Companies are unlikely to act without the threat of State intervention, (...) but even weak self-regulatory efforts may reduce State efforts to establish regulations. This is particularly true in the absence of public pressure for greater controls”²⁰³. In other words, when self-regulation takes place, no matter at which degree, States are less likely to regulate the industry. This is especially the case when the public sphere isn’t responding to the issue, either because it isn’t aware of it or because it doesn’t feel concerned by it. In the quasi-absence of State regulation, the industry’s actors and international bodies are left with themselves to create and enforce regulation.

But why would industries self-regulate in a context of a near-absence of State regulation? What could compel them to restrain themselves in such a “soft form of regulation”²⁰⁴ when the industry isn’t comprehensively regulated yet? There are two explanations for such an occurrence, which are defensive and reputational reasons. Defensive reasons refer to seeking to avoid further regulation by governments, by creating and shaping their own pre-emptively. Reputational reasons refer to the will to “preserve a positive image, or to restore public trust”²⁰⁵. But De Nevers adds that such measures can also “be intended

²⁰¹ DE NEVERS, R., *idem*.

²⁰² GALLAHER C., *op. cit.*, p. 796.

²⁰³ DE NEVERS, R., *op. cit.*, p. 222.

²⁰⁴ WHITE N. D., “The UK and the Regulation of PMSCs”, Unpublished paper, Office of the United Nations High Commissioner for Human Rights [online], 2015, p. 5. Available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Event2015/NigelWhite.pdf>, last accessed on the 21-04-18.

²⁰⁵ DE NEVERS, R., *op. cit.*, pp. 222-223.

to counter regulatory pressures from ‘multi-stakeholders’ rule-making processes at both the national and international level”²⁰⁶. One could argue that governments wouldn’t trust this form of regulation, since it would mainly be managed by its members, casting doubt over both its legitimacy and efficiency. Counter-intuitively, Nigel D. White writes that the UK authorities were “attracted” to this form of regulation, since it would relieve them from undertaking the burdensome task of elaborating and enforcing a regulative legislation²⁰⁷. Not only that, but “the industry itself would police it based on their superior knowledge of the work, something that could be enhanced by external monitoring, and it would establish standards of behaviour within the industry”²⁰⁸. The success of self-regulation in modifying corporate demeanour and appeasing the concerns of the public is conditioned by five elements, according to De Nevers.

First, once *standards* have been determined, the industry group will go public with these in order to quell public complains that would lead to government efforts to regulate the industry. Second, standards require means of *reporting* the behaviours of firms participating in self-regulatory frameworks, which is done through the creation of associations – such as the IPOA or the BAPSC. These groups ensure that companies meet “reporting requirements detailing their compliance with industry standards”²⁰⁹. Third, coupled to reporting is *monitoring*, which can be done through inspection or audits, either via actors internal to the industry, or via government agencies or independent monitoring organizations. Often a point of contention, determining who will monitor companies is often decided by the levels of competition and secrecy needed. It can also be determined by other companies unwilling to participate and submit themselves to accept industry claims, unless they can scrutinize them beforehand. Fourth, in case of non-compliance with industry norms and standards, *sanctions* are to be

²⁰⁶ DE NEVERS, R., *op. cit.*, p. 223.

²⁰⁷ WHITE N. D., *op. cit.*, p. 5.

²⁰⁸ WHITE N. D., *idem.*

²⁰⁹ DE NEVERS, R., *idem.*

undertaken. But De Nevers believes that even though “formal and non-formal sanctions can each play a role, the problem of adverse selection makes formal sanctions critical”²¹⁰. If a company or association does not know what sanctions have been given in other situations, they are left with asymmetric information. They cannot know what they are risking in specific cases and may decide not to abide by the rules since sanctions haven’t been specified. In the absence of such sanctions, companies whose behaviour does not meet the industry’s standards may want to join the organization without modifying their attitude, trying to profit from some form of “association fallacy”, honour by association, and improve their reputation. Sanctions thus play an essential role when assessing the legitimacy and credibility of a self-regulatory framework. Informal sanctions may also play a role, mostly through “shaming by embarrassment”, or faced with the threat of formal regulation or sharing confidential information²¹¹. Fifthly, sanctions must be counterbalanced with rewards only awarded to participating companies, as a way to prevent free riding. I shall thus further analyse two of the most popular associations, while using the work of Carolyn Gallaher and Renée de Nevers. Afterwards, I will analyse the International Code of Conduct which was partly born from their efforts.

²¹⁰ *Ibidem*.

²¹¹ DE NEVERS, R., *op. cit.*, p. 224.

(1) The International Peace Operations Association (IPOA) and the British Association of Private Security Companies (BAPSC)

The International Peace Operations Association (IPOA, formerly Int. Security Op. Ass.), was registered in 2000 as a PMF lobby. A year after its founding, it published a 5-page code of conduct meant to create high standards for the industry. This was partially the consequence of the fact that Sierra Leoneans, according to IPOA's founder Doug Brooks, "had lost any faith in the capability of the UN to provide actual security"²¹². He thus firmly believed that holding PMFs to higher standards would legitimize their use and actions. This code was, according to Gallaher, "a sub-political effort to delineate these standards"²¹³. Not much has been written about the foundation of the BAPSC. Launched in 2006, it claims that industry leaders realized "that there was an urgent need to raise standards of operation and advocate self-regulation"²¹⁴. The association's website is awfully scarce in charter and documents, and only states that it serves as an intermediary for the International Code of Conduct which it endorses.

Both the IPOA and the BAPSC have been subject to criticism. De Nevers notes that "the IPOA's self-regulatory code contains several flaws: it lacks regular reporting requirements, it is reactive rather than proactive in evaluating members' behaviour and it has no provisions for internal or external monitoring of corporate behaviour"²¹⁵. In addition to that, the IPOA monitoring mechanism is based on a 'fire alarm' model, which relies on citizens or interest groups to report bad behaviour. Such a model has been depicted as "unrealistic" since a lot of PMSC business takes place "in war zones, where few independent observers can monitor their actions or bring complaints"²¹⁶. Moreover, she believes that there is "little evidence that the IPOA's enforcement

²¹² BROOKS, D., "From humble beginnings in Freetown: The origins of the IPOA Code of Conduct and its importance for the industry", *Journal of Peace Operations*, 2002, Vol. 3, No. 5, p. 8.

²¹³ GALLAHER, C. "Risk and Private Military Work", *Antipode*, 2012, vol. 44, n° 3, p. 794.

²¹⁴ British Association of Private Security Companies, *About Us*, available at: <http://www.bapsc.org.uk/about-us.html>, last accessed on the 03-07-2018.

²¹⁵ DE NEVERS, R., *op. cit.*, p. 228.

²¹⁶ DE NEVERS, R., *idem*.

mechanism has been used, or that any companies have been expelled from the association for poor behaviour”²¹⁷. She concludes by explaining that “the association is asking clients either to accept ethical claims without corroboration, or to police company behaviour on their own. This suggests that the IPOA's code may be effective in public relations, but it is ineffective in self-regulation”²¹⁸.

Carolyn Gallaher has also heavily criticized the IPOA’s mechanism through a “risk management” perspective. She believes that there is no management nor oversight of the problems arising when PMCs subcontract their employees to other firms, which would then be legally responsible for them. Moreover, it doesn’t constrain companies to effectively describe the job that contractors have been hired to do. Neither does it explain that security operations can become or comprise aspects of military operations. In other words, it means that there’s a lack of tools to effectively manage accountability, the general lack thereof as well as the lack of employees’ protection on the field²¹⁹. Therefore, she stresses the fact that regulation should indeed protect civilians, but contractors as well. The analysis of the BAPSC by Renée De Nevers left her perplexed, to the point where she believes that “its ability to contribute to PMSC regulation remains unproven”²²⁰. Although it established guidelines and principles for members, “there is no guarantee that members will adhere to principles”²²¹, and sanctions will be handled internally²²², although until March 2009, no sanctions had been imposed by the organization. Even though “the multi-stakeholder nature of this process may limit their influence on the final product” it grants “the process greater legitimacy in the long run”²²³.

²¹⁷ *Ibidem*.

²¹⁸ DE NEVERS, R., *op. cit.*, p. 231.

²¹⁹ GALLAHER C., *op. cit.*, p. 224.

²²⁰ DE NEVERS, R., *op. cit.*, p. 231.

²²¹ DE NEVERS, R., *idem*.

²²² DE NEVERS, R., *op. cit.*, p. 233.

²²³ DE NEVERS, R., *op. cit.*, p. 234.

De Nevers concludes by saying that neither the IPOA nor the BAPSC have “established a framework for self-regulation that would enable outsiders to evaluate member companies’ compliance with the standards they have set”²²⁴. She instead believes that both have been able to forestall State regulation on the issue. And the lack of public pressure to regulate PMSCs makes the emergence of new State regulation efforts unlikely. Nigel D. White shares the same conclusion, once again stressing the lack of transparency and clear governmental oversight to oversee human rights abuse by the PMCs²²⁵.

(2) The International Code of Conduct for Private Security Service Providers (ICoC) and the ICoC Association.

Concerns about accountability, impunity, reputation and the rule of law, as well as the impetus of the Montreux Document have lead fifty-eight leading PMSCs to sign, on November 9, 2010, the International Code of Code of Conduct for Private Security Service Providers (ICoC). As of today, it claims to have 128 members: seven governments, 95 “private security companies” and 26 civil society organizations.

The Code was described by Colonel David Wallace as “a founding instrument for a broader initiative to create better governance, compliance, and accountability for private security contractors. The code is a multi-stakeholder initiative intended to set forth commonly agreed upon principles for the worldwide private security industry, and to establish a foundation to translate those principles into related standards”²²⁶. It is comprised of two main sections: the first one establishes several principles regarding the conduct of the personnel²²⁷, while the second one is addressed to the security providers’

²²⁴ DE NEVERS, R., *op. cit.*, p. 235.

²²⁵ WHITE N. D., *op. cit.*, p. 247.

²²⁶ WALLACE, D. A., “International Code of Code of Conduct for Security Providers”, *International Legal Materials*, 2011, Vol. 50, No. 1, p. 90.

²²⁷ It includes rules for the use of force, detention, apprehending persons, human trafficking, sexual exploitation and abuse or gender-based violence

management. It contains specific commitments that PMSCs (regardless of how they call themselves) will have to abide by²²⁸. The Code is supervised by the International Code of Conduct Association, or ICoCA. Membership implies submitting to regular reporting, monitoring and assessment on performance, which help the ICoCA to develop performance and compliance indicators with regards to the standards set forth in the ICoC. Recently, the Association stated on its website that it does no longer recognizes the “signatory status”: companies that signed the Code but have not applied for Membership are no longer fulfilling their commitments as signatories. Nigel D. White describes the Code as having, on applicable human rights standards, “well-developed and quite specific rules on the use of force and on detention” as well as other prohibitions²²⁹.

However, the Code presents certain gaps and weaknesses, notably on economic, social and cultural rights, which are “of concern because, for instance, the activities of a PMSC may well impact on cultural rights”²³⁰. Moreover, although it does include provisions on effective, “fair and accessible” remedies, this grievance mechanism is essentially a self-regulatory mechanism. White believes that “all remedies will be at the whim of businesses, unless there is some form of supervision of the Code of Conduct either by an oversight body set up within the code itself or by states in fulfilment of their obligations under international law”²³¹. Article 67 of the ICoC does indeed illustrate this, by explicitly stating that signatory companies will “establish procedures for their Personnel and for third parties to report allegations of improper and/or illegal conduct to designated Personnel”²³². They are also required to take “appropriate disciplinary action” and “cooperate with authorities”. Patel also adds that the Code “likely will not capture smaller and mid-

²²⁸ These commitments include selection and vetting of personnel and subcontractors, policies and personnel contracts, training and management of weapons, and grievance procedures.

²²⁹ WHITE N. D., *op. cit.*, p. 249. Other criteria include torture or other cruel, inhuman or degrading treatment; sexual abuse and gender-based violence; human trafficking; slavery and forced labor; child labor; discrimination.

²³⁰ WHITE N. D., *op. cit.*, p. 250.

²³¹ WHITE N. D., *idem*.

²³² WALLACE, D. A., “International Code of Code of Conduct for Security Providers”, *International Legal Materials*, 2011, Vol. 50, No. 1, p. 103.

size companies, particularly those operating out of developing countries”²³³. Another weakness lies in the lightness of regulation. The Code only envisages sanctions as suspension and exclusion from the ICoC by decision of a *potential* 12-strong executive board. This process was designed by a Steering Committee – a temporary board consisting of a small group of stakeholders – in 2012. White believes that such a process has “not been proven to be effective in other codes of conduct”²³⁴.

²³³ PATEL, F. “Regulating Private Military and Security Companies: A Comprehensive Solution”, *Proceedings of the Annual Meeting (American Society of International Law)* [online], Vol. 107, International Law in a Multipolar World, American Society of International law, p. 202.

²³⁴ WHITE N. D., *op. cit.*, p. 251.

5. Recent developments

a. Foreword

As was demonstrated before through careful analysis, western State and non-State actors have established guidelines for the use of PMCs. These guidelines hold no legally-binding power, and PMCs remain under fiery criticism from other countries and non-governmental actors of the world. They have brought forward claims that PMCs are granted some form of immunity, and have been involved in numerous scandals of violence, allegations of fraud, embezzlement, cultural disrespect and violence.

For the last decades, western countries have mainly been hosting headquarters of these PMCs. Africa, the Middle East, as well as South America have mainly been private military firms' theatre of operations. Most claims highlighting the need for a legally-binding framework come from the countries in which PMCs are operating. Indeed, most of the contractors in these countries are used in the field of logistics, support, camp building and maintenance, as well as guarding: mostly non-combatant activities. Therefore, a hypothesis can be drawn from this situation: western countries might not see the immediate need for a legally-binding framework which would restrict their possibilities of action. However, it doesn't mean that they roam freely doing what they want to. The realist anarchy is somewhat counterbalanced by 'guidelines' (established by the Montreux Document) that every host country seems to follow more or less. In this perspective, the countries who have signed the Montreux Document seem to respect the 'guidelines' contained therein. But as we have demonstrated, these guidelines are only useful if every country limit itself to non-combatant roles, an area whose boundaries aren't firmly established. This allows countries to participate in "gray zone conflicts", because the ambiguity of such conflicts allow some form of plausible deniability. As we shall see in the next section, Russia heavily relies on PMCs to conduct

operations that remain deniable. China does remain discrete and unwilling at present to allow its PMCs to carry weapons. But its One Belt One Road Initiative creates a new market whose security needs are steadily increasing. Will these newcomers play by the western rules? The following section will provide, I hope, parts of the answer.

b. The New Players

i. China

Beijing has set itself two milestones to achieve its military reforms. By 2020, it wishes “to complete military mechanization and full informatization [able to] deal with the threat posed by high-tech, precision warfare demonstrated by the United States during the first Gulf War in 1991”²³⁵. By 2049, it wishes to become a rich, strong and fully-developed great power, with improved capabilities in several domains. These realms include artificial intelligence, big data, quantum communications and computing, nanotechnology, hypersonic vehicles, directed energy weapons, battlefield robotics, and “key disruptive technologies that could allow the PLA to leapfrog past the current advanced militaries”²³⁶.

However, how do PMSCs fit into these plans? The answer lies in the activities of Chinese companies in foreign countries. A lot of Chinese firms go abroad, especially in regions where the rule of law cannot be guarantee safety for Chinese employees. According to Zi Yang, “the 2004 murder of eleven Chinese workers in Afghanistan by local gunmen was the catalyst that changed Chinese perceptions on commercial activities abroad”²³⁷. Investors began to inquire on security risks and protection for the firms they were involved into. It was at this time that the Chinese PSCs entered the waltz, and have grown to represent “a multi-billion RMB industry”²³⁸. According to Zi Yang, these security firms number around 4000, and employ around 4.3 million personnel²³⁹. It was only in 2010 that a legal definition and framework were introduced through the “Regulation on the Administration of Security and Guarding Services”. This regulation

²³⁵ Unknown author, “In a Fortnight: Chinese Perceptions of the “Third Offset” Strategy”, *China Brief: A Journal of Analysis and Information*, The Jamestown Foundation, October 2016, Vol. 16, N° 15, p. 1

²³⁶ MCCAULEY K., “The PLA accelerates modernization plans”, *China Brief: A Journal of Analysis and Information*, The Jamestown Foundation, January 2018, Vol. 18, N°1, pp. 17-18.

²³⁷ YANG Z., “China’s Private Security Companies: Domestic and International Roles” *China Brief: A Journal of Analysis and Information*, The Jamestown Foundation, January 2018, Vol. 18, N°1, p. 16

²³⁸ YANG Z., *op. cit.*, p. 16.

²³⁹ There are no reliable sources on unregistered PSCs.

“categorized PSCs into two types: security companies and security companies engaged in the armed escorting services”²⁴⁰. However, Yang explains that there is a near absence of armed security services, due to “the government’s long-held concern over allowing civilian firearm ownership”²⁴¹. The legal inability to own and operate firearms makes these firms lag behind their occidental counterparts, even though their personnel mostly presents the same background. Apart from martial arts champions, police and army veterans constitute the bulk of these PSCs.

Although the government holds a firm grip over the use firearms in PSCs, there still is a possibility to purchase some abroad. But this solution isn’t often exploited, since “armed contractors might accidentally provoke or escalate conflict with the locals—leading to diplomatic troubles”²⁴². To avoid such cases, most of Chinese PSCs personnel remains unarmed, which leaves them with two precarious possibilities whenever caught in armed raids. They can either call for the unreliable local security forces, or pay criminals to go away, which creates a possibility that they will return later. Although Chinese PSCs can use weapons on high seas for defensive reasons, the strict legal framework means that they “will not likely catch-up to Western competitors in the near future”²⁴³.

However, recent reports are showing Zi Yang’s assumption won’t necessarily reveal themselves to be true. A 2017 article by the Financial Times²⁴⁴ reveals that the line between the PLA and its veterans working as private security contractors is blurry. Moreover, it states that the expansion of China’s commercial interests “has led to shifts in the country’s traditionally cautious foreign policy”²⁴⁵. These shifts have led to the establishment of the first foreign PLA military

²⁴⁰ YANG Z., *op. cit.*, p. 16.

²⁴¹ YANG Z., *idem.*

²⁴² YANG Z., *op. cit.*, p. 17.

²⁴³ YANG Z., *op. cit.*, p. 18.

²⁴⁴ CLOVER C., “Chinese private security companies go global”, *Financial Times* [online], published on February 26th, 2017. Available at: <https://www.ft.com/content/2a1ce1c8-fa7c-11e6-9516-2d969e0d3b65?mhq5j=e1>, last accessed on the 10-07-2018.

²⁴⁵ CLOVER C., *op. cit.*

base in Djibouti, but “Beijing looks for ways to protect its assets abroad without resorting to an imperialistic foreign policy”²⁴⁶. In that aspect, PSCs seem ideal, although they remain closely monitored by authorities. This has led PSCs to adopt a hands-off strategy regarding armed missions. Most of these are carried out by locals hired by Chinese PSCs, with strict exceptions under which “Chinese security staff can borrow guns from the local security staff”²⁴⁷. These exceptions came into being after violent incidents in Juba, the South Sudanese capital, which prompted Xi Jinping to call for “improved safety risk evaluation, monitoring and prewarning, and the handling of emergencies”²⁴⁸.

Alessandro Arduino, researcher and author of “China’s Private Army: Protecting the New Silk Road”, believes that the role played by Chinese PSCs in the protection of the Silk Road is growing. They are no longer only local security companies but have evolved into “international companies able to manoeuvre abroad in high-risk areas”²⁴⁹. They now play an important role in protecting the Belt and Road Initiative (BRI), which aims to promote economic development and exchange between China and over 60 countries located in Asia, Africa, the Middle East and Europe. Arduino believes that the multiple threats looming over several projects, and more notably the “\$63 billion China-Pakistan Economic Corridor (CPEC), [are] going to force Beijing to adapt and change its decades-old principle of non-interference”²⁵⁰.

One of the answers that Beijing could provide may rest on its rapidly developing PSC industry. However, such dependence could lead to various risks. Even though the use of PSC may provide plausible deniability, Arduino explains that “Chinese PSCs can be perceived as

²⁴⁶ CLOVER C., *op. cit.*

²⁴⁷ DEXI T., contractor with Dingtai Anyuan International Security & Defense, interviewed by CLOVER C., *op. cit.*

²⁴⁸ CLOVER C., *op. cit.*

²⁴⁹ ARDUINO A., “China’s Private Army: Protecting the New Silk Road”, *The Diplomat* [online], published on March 20, 2018. Available at: <https://thediplomat.com/2018/03/chinas-private-army-protecting-the-new-silk-road/>, last accessed on the 10-07-2018.

²⁵⁰ ARDUINO A., *op. cit.*

an extension of the PLA”, because their ranks are filled with former PLA officers²⁵¹. He believes that it may result in “several scenarios related to the perception of a possible Chinese hidden agenda and indirect power projection”²⁵². From the Chinese perspective, it is of utmost importance that the government remains in control of the companies employing these PSCs. If they do not, State-owned companies “with their private armies could not only protect their interests abroad but also could leverage their newly acquired capabilities against Chinese internal political power plays”²⁵³. But as of today, “Chinese PSCs are neither an extension of the PLA nor an armed wing of the Chinese Communist Party”²⁵⁴. This leaves several questions unanswered. Are PSCs going to negotiate on behalf of the Chinese government? Will Beijing establish a clear code of conduct for Chinese PSCs? As Zi Yang has pointed, “although some still favor Chinese PSCs due to language and cultural affinity, others would rather award Western firms with contracts, even if it means doubling the costs”²⁵⁵. Therefore, “the role model may be established by new actors that are perceiving the BRI market for force as a very lucrative opportunity, namely Russia’s private military security companies”²⁵⁶.

ii. Russia

The situation of PMCs (ChVK, for *Chastnye Voennye Kompaniy*) in Russia has quickly changed in the past few years. In 2011, the Russian Federation delegation to the UN declared that it did “not allow for the possibility of establishing private military companies on its territory”²⁵⁷. However, a 2016 report from Oxford Analytica indicated

²⁵¹ ARDUINO A., *op. cit.*

²⁵² ARDUINO A., *idem.*

²⁵³ *Ibidem.*

²⁵⁴ *Ibidem.*

²⁵⁵ YANG Z., *op. cit.*, p. 18.

²⁵⁶ ARDUINO A., *op. cit.*

²⁵⁷ *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, First Session: Summary of the First Session*, Geneva: United Nations Human Rights Council, A/HRC/WG.10/1/4, Chairperson-Rapporteur: Luvuyo L. Ndimeni, May 23-27, 2011, Geneva, p. 11.

that while there still is “no legislative basis for PMCs, and serving as a mercenary abroad is illegal, the industry already exists and is expanding”²⁵⁸. In five years, the country would have gone through having no market for PMCs to a growing industry. But several facts contradict the Russian delegation’s declaration.

The main drive behind their emergence is political, since Vladimir Putin believes they allow Russia to pursue “national interests without the direct involvement of the state”²⁵⁹. As we have stated earlier, they can be quickly deployed without the need for democratic approval – which is the case in a lot of States around the world. Indeed, “under the Russian constitution, any foreign deployment of Russian service members into combat must be publicly approved by the upper house of parliament”²⁶⁰. In 2007 already, Russia major corporations – namely Gazprom and Transneft – were granted the legal right to equip their security forces with weapons²⁶¹. In 2009, a report from Lieutenant Commander Cindy Hurst indicated that indicated that “the number of security forces, excluding Russia’s armed forces, exceeds 2.5 million men. There are clearly more security forces than there are soldiers in Russia’s regular army”²⁶². There is still a problem when trying to establish differences between Russian PMCs and PSCs, because “some of these companies are unquestionably “mercenary”-type forces and cannot be considered simply “security companies,” which indicates that the authorities in some cases are turning a blind eye to them”²⁶³. Oxford Analytica’s report explains that “the PMCs now in existence emerged

²⁵⁸ Oxford Analytica Daily Brief Service, “Russia: Private military forces emerge”, Oxford: Oxford Analytica [online]. Available at: <https://search.proquest.com/docview/1759425794?accountid=17194>, last accessed on the 11-07-2018.

²⁵⁹ PUTIN V., cited by Oxford Analytica Daily Brief Service, *op. cit.*

²⁶⁰ FELGENHAUER P., “Private Military Companies Forming Vanguard of Russian Foreign Operations”, *Eurasia Daily Monitor* [online], 2017, Volume 14, N° 36, available at: <https://jamestown.org/program/private-military-companies-forming-vanguard-russian-foreign-operations/>, last accessed on the 11-07-2018.

²⁶¹ HARDING L., “Russia votes to allow private armies for energy giants”, *The Guardian* [online], published on July 5, 2007. Available at: <https://www.theguardian.com/world/2007/jul/05/russia.oil>, last accessed on the 11-07-2018.

²⁶² HURST C., “The Militarization of Gazprom”, *Military Review* [online], September-October 2010, p. 61. Available at: <http://www.dtic.mil/dtic/tr/fulltext/u2/a529212.pdf>, last accessed on the 11-07-2018.

²⁶³ EKLUND N., ELFVING J., “Russian Private Military Companies – Redwater?”, *Eurasia Daily Monitor* [online], 2017, Vol. 14, N°39. Available at: <https://jamestown.org/program/russian-private-military-companies-redwater/>, last accessed on the 11-07-2018.

out of the domestic private security sector, which is extensive, closely linked to state security services”²⁶⁴. Eklund and Elfving present conclusive evidence of the links between the Wagner ChVK and the Kremlin, shedding more light on what may have appeared as an open secret. What wasn’t so clear until now was the war that the FSB and the GRU are waging against the Defence Ministry. Both intelligence agencies “want to make sure that they, rather than the defence ministry, control ChVK”²⁶⁵. This is because “the Kremlin has increasingly come to rely on PMCs in various “hybrid” (New Type) warfare scenarios and other regional conflicts”²⁶⁶. The conflict opposing the intelligence agencies to the Defence Ministry “is now set to become public with new force”, with both sides simultaneously presenting pieces of draft legislation to the Duma²⁶⁷.

*“It matters a great deal how [ChVK] will be used. If the defence ministry gains the upper hand, that will make them part and parcel of the army, whatever terms are employed; but if they are controlled by the FSB or the GRU, they will constitute a military force that Moscow can deploy where it wants, even if that conflicts with conventional military plans”*²⁶⁸.

While the idea of legalising PMC’s started gathering support in 2011-12, it was facing difficulties on the issue of regulation, leading many of them to operate outside Russian jurisdiction²⁶⁹. In February 2017, when asked about the status of a ChVK legislative proposal before the Duma, Russian Defence Minister refused to comment on the matter²⁷⁰. As of March 2018, ChVK were still illegal in Russia which

²⁶⁴ Oxford Analytica Daily Brief Service, *op. cit*

²⁶⁵ GLOBLE P., “Russian Siloviki Fight for Control of Still-Illegal ‘Private’ Military Companies”, *Eurasia Daily Monitor* [online], 2018, Vol. 15, N°46. Available at: <https://jamestown.org/program/russian-siloviki-fight-control-still-illegal-private-military-companies/>, last accessed on the 11-07-2018.

²⁶⁶ GUSSAROVA A., “Russia Pushes CSTO Countries to Legalize Private Military and Security Companies”, *Eurasia Daily Monitor* [online], 2018, Vol. 15, N°15. Available at: <https://jamestown.org/program/russia-pushes-csto-countries-to-legalize-private-military-and-security-companies/>, last accessed on the 11-07-2018.

²⁶⁷ GLOBLE P., *op. cit*.

²⁶⁸ GLOBLE P., *op. cit*.

²⁶⁹ EKLUND N., ELFVING J., *op. cit*.

²⁷⁰ EKLUND N., ELFVING J., *op. cit*.

provides very important advantages. It “ensure[s] deniability, commercialize[s] the loss of human life and thus help[s] preserve public secrecy regarding Russian military operations abroad. The major disadvantage is the lack of control”²⁷¹, and the fact that the growing numbers of Russian casualties in Syria “has put increasing pressure on the Kremlin to provide additional support to the Armed Forces fighting abroad”²⁷². This support could easily come from ChVKs. The ‘volunteers’ fighting in Ukraine have been recruited “through front organisations run or influenced by the Federal Security Service (FSB) or the military's Main Intelligence Directorate (GRU)”²⁷³. These ‘volunteers’ have been used as proxies in hostilities in the Donetsk and Luhansk regions of Ukraine to “provide the Kremlin with plausible deniability of any involvement”²⁷⁴. The now infamous “Wagner” ChVK, led by a former Spetsnaz²⁷⁵, “has been involved in fighting in Donbas and has reportedly been heavily involved in fighting together with pro-al-Assad forces in Syria”²⁷⁶.

Felgenhauer claims that Russian ChVK differ from occidental PMCs. While PMCs are mainly performing auxiliary tasks, “the Russian volunteers – including the Wagner ChVK – are frontline fighting forces, armed with heavy weapons and even armour”²⁷⁷. Russian authorities still deny any implications with these ChVKs and do not publish reports on ChVK casualties in order not to upset Russian public opinion²⁷⁸.

Several actors and events have tried to incur changes in the legal stagnation. Anna Gussarova reports that Russia is pushing members of the Collective Security Treaty Organization (CSTO) to legalize PSCs

²⁷¹ EKLUND N., ELFVING J., *op. cit*

²⁷² GUSSAROVA A., *op. cit.*

²⁷³ Oxford Analytica Daily Brief Service, *op. cit.*

²⁷⁴ FELGENHAUER P., *op. cit.*

²⁷⁵ EKLUND N., ELFVING J., *op. cit.*

²⁷⁶ FELGENHAUER P., *op. cit.*

²⁷⁷ FELGENHAUER P., *op. cit.*

²⁷⁸ Victor Ozerov declared: “We did not vote to send special forces to Libya or Egypt, so there are none. ChVKs are and will stay illegal in Russia. If they are registered offshore, Russia is not legally responsible for anything” OZEROV Victor, chair of the FC Defense Committee, *cited by FELGENHAUER P., op. cit.*

and PMCs. What's more, "the country's Federal Security Service (FSB) and Ministry of Defense have more recently stepped up their own efforts to push through the law" on ChVKs²⁷⁹. In addition to that, she reports that Russian Foreign Minister Sergei Lavrov has publicly declared the need to protect Russians who participate in ChVK operations abroad. The proposed CSTO law on PMCs still remains unclear on the attribution of a "combatant status" to PMCs. According to Anna Gussarova, the Russian State Duma is in contradiction with the draft law on this very specific point since Duma representatives "believe PMC personnel could protect allies from external aggression and participate in counter-terrorism operations"²⁸⁰. If this proposed CSTO law was to be approved, it "will speed up Russia's ongoing domestic debate about passing its own PMC law"²⁸¹. It would also prompt important and hazardous changes in Russian allies' dynamics, as Gussarova believes that CSTO members "will need to be wary of the potential challenges they could increasingly face in supporting Russian operations abroad"²⁸².

²⁷⁹ GUSSAROVA A., *op. cit.*

²⁸⁰ GUSSAROVA A., *op. cit.*

²⁸¹ GUSSAROVA A., *op. cit.*

²⁸² GUSSAROVA A., *op. cit.*

6. Conclusion

What evolutions have changed the PMC sector since 2008? State and Non-State actors have increasingly taken into account the challenges that came together with the use of PMCs. Although its use does present several advantages in an era where deployment quickness is crucial, PMC use also comes with downsides. Some of them have been involved in numerous controversial cases, ranging from fraud to manslaughter. The Nisoor square massacre and the Middle East scandals have served as an impetus to drive the process of regulation forward, giving birth to the Montreux Document. This document, although it represents a first step in PMCs regulation, still remains lacking on several aspects, especially pertaining to its non-binding nature. Its negotiation process also wasn't devoid of any criticism, since non-State actors were excluded from its final steps. Throughout the pages of this work, we have demonstrated that the main States hosting PMCs aren't willing to establish firm regulation, or – in certain cases – any regulation at all. On the one hand, some States enjoy the plausible deniability offered by the use of PMCs, they also fear the costs and the potential international legal implications that they incur. On the other hand, some believe that an international legally-binding document is needed to create a firm grip on the industry and create a foundation to tackle present and future problems. Self-regulation has also been used by States to step back on State regulation. Various scholars have highlighted that whenever Self-regulation takes place, there are less chances to see State regulation happen. Despite P.W. Singer's popular book, the subject of PMCs remains but a side note in International Relations literature. However, as we have seen, the emergence of this phenomenon is linked with several others: Singer presented the redefinition of power in terms of fungibility; new wars; gray zone conflicts; the progressive emergence of (neo)liberalism and the decline of republicanism. The remaining uncertainty is the role that PMCs will play in future geopolitical events.

What I have tried to show throughout my thesis, is that I believe that the outsourcing phenomenon is here to stay. States hosting and contracting PMCs enjoy their uses and their questionable discretion, which allows for risky moves on the international scene, as the events involving the Wagner ChVK have shown. Full-scale wars are less likely to happen than proxy wars and new wars which occur on a regular basis. It is in these “contingency operations” that private military firms will deploy their power and advantages. Moreover, it is my belief that PMSCs will play a bigger role in China’s BRI and pearl necklace strategies. Although the fact that many PMSC are controlled by the Chinese authorities isn’t a secret, they still have a different impact than the PLA. A PLA deployment on foreign soil is different than that of a PMSC deployment, which could play in China’s favour, provided that it establishes a very firm grip on the industry. However, its careful foreign policy still shows a reluctance to use them. Despite cultural affinities, Chinese companies tend to prefer occidental PMCs, a tendency which could spread through the new silk road. Russia, on the contrary, enjoys and uses PMCs on multiple points and even on the frontlines. Vladimir Putin has publicly stated his support for their use, but they still remain illegal for two reasons. First, because their illegality offers plausible deniability for the government. Second, because the Kremlin and the Ministry of Defence are fighting a bitter war for the control of ChVK. The regulation law will attribute the oversight of ChVK to either one of them, which will play a bigger role in Russia’s future geopolitics, especially on the BRI scene. The main feature is that Russia and China’s private military firms are partly or completely state-owned. In this aspect, they differ greatly of western-based PMCs. This difference is also shown in the way there are being used in Russia. Such developments undoubtedly indicate that they will become important in future international relations.

My thesis isn’t exempt of limitations. First, I primarily used legal sources, while deploying arguments from neo-realist perspectives. This may appear as contradictory, but I firmly believe that legal documents,

negotiations and evolutions are a specific kind battlefield. Thereon, States manoeuvre to direct the events in their favour. Therefore, these events partly show the interests of States on the international scene, and how they interact with each other, as well as their positions towards future possibilities. While I have tried to provide a global account of the situation on regulation, further research might have to delve into political evolutions on specific parts of the world, such as South America, Europe, the Middle East and Asia. It could allow for a more detailed overview. But other fields of study could also shed new light on the phenomenon. For example, Gallaher's article has pointed towards a more cultural and individual approach to study contractors, PMCs and their relations with populations. On a broader scale, the influence of occidental mercenaries in Asia and Africa after the Westphalian Treaties could also be of interest in neo-colonialist approaches. PMCs and their evolutions could also incur changes in the concept of power in International Relations Theory.

My approach, which was mostly based on legal developments of regulation in the private military industry, allows to establish a dire conclusion. Today's international legal framework on the private military industry is unable to cope with the future developments of these dim wars and blurry conflicts. The unwillingness to provide an international legally-binding document will only result in the increase of gray-zone conflicts, which may become, if they haven't already, the new standard of war.

7. Annex

a. Annex 1: An analysis on Regulation in the U.S., South Africa, the U.K., Germany, France, and perspectives on European and United Nations approaches.

i. Foreword

This analysis will examine several States which have deployed public regulation or extensive legal obligations for PMSCs, and whose laws may be consulted. These efforts present interesting developments and tendencies in terms of regulation which I hope to bring out with the help of the existing literature on the subject. Moreover, I will also point out to the approaches that the United Nations and the European Union have deployed on the subject.

ii. The United States

In the US, the “US Arms Export Control Act of 1968 regulates both arms brokering and the export of military services”²⁸³, the latter having been included in the 1980s, after the State Department discovered that “a number of private companies were giving military training to individuals from countries with which the US did not have good relations”²⁸⁴. Schreier and Caparini state that

“The Act stipulates the purposes for which weapons and services may be transferred; these range from self-defence to internal security. defence services are defined as including the provision of and assistance in the design, manufacture and use of defence equipment, any provision of technical data on that equipment, any provision of military advice, and any training of foreign units and forces, both regular and irregular. Training includes that delivered by

²⁸³ SCHREIER F., CAPARINI M., *op. cit.*, p. 105.

²⁸⁴ *Ibid.*

correspondence courses and media of all kinds, and through exercises. Brokering defence services to close US allies such as NATO members is exempt from the constraint, while brokering activities to countries “under US embargo and those subject to special regulations for reasons of national security”²⁸⁵ is prohibited.”²⁸⁶

They conclude by stating that according to them, the US private military industry is very competitive and marked by “scant oversight”. Moreover, the DCAF explains that “US companies providing military services to foreign nationals in the US or overseas are required to obtain a license from the US State Department under the International Transfer of Arms Regulations (ITAR)”²⁸⁷. Krahmann highlights the procedure by which contracts are usually awarded, which mainly uses the A-76 Circular. This circular, introduced in 1966, “has laid the foundations for the outsourcing of military services”²⁸⁸ in the USA, and is comprised of 5 stages²⁸⁹. First, the military identifies a function which could be outsourced to the private sector. Second the armed forces notify Congress of the impending evaluation. Third, the military base evaluates and states the type of work, the work hours and skills required. At the fourth stage the military issues a public statement and invite bids from private companies while at the same time, the military prepares a competing bid. Finally, the military and private sector bids are analysed, and if a private sector bid is 10 million lower than the military bid, the contract is awarded to the private bidder²⁹⁰. Krahmann underlines that this process has “contributed to the progressive expansion of private sector provision of military services”²⁹¹. In fact, in

²⁸⁵ SANDOZ, Y., “Private Security and International Law”, in Cilliers & Mason (eds), *Peace, Profit or Plunder? The Privatization of Security in War-Torn African Societies*. South Africa, Halfway House, Institute for Security Studies, 1999, pp. 216-217, cited in SCHREIER F., CAPARINI M., *op. cit.*, p. 105.

²⁸⁶ *Idem.*

²⁸⁷ DCAF Backgrounder, “Private Military Companies”, Geneva Centre for the Democratic Control of Armed Forces [online], 2006, p. 5. Available at: http://psm.du.edu/media/documents/reports_and_stats/think_tanks/dcaf_backgrounder_private_military_companies_eng.pdf, last accessed on the 18-05-2018.

²⁸⁸ KRAHMANN E., *States, Citizens and the Privatization of Security*, Cambridge: Cambridge University Press, 2010, p. 121.

²⁸⁹ *Idem.*

²⁹⁰ *Ibidem.*

²⁹¹ *Ibidem.*

2005, the executive branch of the US administration had to give “Congress advance notice of sales valued at \$50 million or more”, regardless of what party is handling the sale. However, “many contracts naturally fall under this amount, while larger ones are easily broken up to do so”²⁹².

iii. South Africa

Caparini and Schreier have also analysed South Africa, because it “has adopted the clearest position on the regulation of private military companies and their supply of military assistance services abroad”²⁹³ through the South African Regulation of Foreign Military Assistance Act (FMA), enacted in 1998. The purpose of the FMA is – apart from creating a legislative basis in order to deal with mercenaries, PMCs and PSCs – to regulate foreign military assistance²⁹⁴. These authors provide a detailed account of the possibilities and limitations the act allows and enforces:

“The Act is applicable to “a natural person who is a citizen of, or permanently resident in, the Republic, a juristic person registered or incorporated in the Republic, and any foreign citizen who contravenes any provision of this Act within the borders of the Republic”. The FMA provides that no person within South Africa or elsewhere may recruit, use or train persons for, or finance or engage in, mercenary activity. Mercenary activity is defined as “direct participation as a combatant in armed conflict for private gain”. Any PMC based in South Africa is compelled to seek government authorization for each contract it signs, whether the operation is local or extraterritorial.

The Act introduces a sentence of no more than 10 years’ imprisonment and a fine of no more than 1 million rand for nationals or foreigners resident in South Africa who participate in military missions outside South African territory unauthorized by the State. It

²⁹² SCHREIER F., CAPARINI M., *op. cit.*, p. 105

²⁹³ SCHREIER F., CAPARINI M., *op. cit.*, p. 107

²⁹⁴ It is defined in the document as including “advice and training; personnel, financial, logistical, intelligence and operational support; personnel recruitment; medical or paramedical services; or procurement of equipment”.

defines jurisdiction of private companies and imposes limits on the freedom of security companies to deal with military matters. It regulates, but does not prohibit, the existence of these companies which employ mercenaries and provide foreign military assistance. Requests to supply such assistance and all arms related materials are scrutinized by the National Conventional Arms Control Committee (NCACC), chaired by a minister from a government department having no direct links with the defense industry. The NCACC has the power to refuse an application, or to grant a license. Decisions are based on principles of international law, including human rights law. Licenses may be revoked should there be a change in circumstances in the recipient State”²⁹⁵.

However, the law isn’t unproblematic. The Act itself depends upon the existence of “armed conflict”. Moreover, “to date, the Act has been enforced only to a limited degree and controversy has surrounded its practical application. The criteria to render FMA have been described as vague and subjective, raising the possibility that the courts may consider them to be vague and invalid”²⁹⁶. Furthermore, the government approval of each contract makes it responsible for the actions of PSCs and PMCs, “as it has licensed them and thus allows the potential escape from international legal controls”²⁹⁷ which are, as we have seen, subject to heavy criticism. But even on the national level, in 2005, “beyond South Africa and the US, there [was] little regulation of PMCs and PSCs”²⁹⁸.

iv. European States

In Europe, “in general, governments use both public-private partnerships and national regulation as governance mechanisms to control their private military industries”²⁹⁹. They differ from one country to another and range from the outsourcing of single functions

²⁹⁵ SCHREIER F., CAPARINI M., *op. cit.*, p. 107

²⁹⁶ SCHREIER F., CAPARINI M., *op. cit.*, p. 107.

²⁹⁷ SCHREIER F., CAPARINI M., *op. cit.*, p. 108.

²⁹⁸ SCHREIER F., CAPARINI M., *op. cit.*, p. 109.

²⁹⁹ SCHREIER F., CAPARINI M., *op. cit.*, p. 110.

to fully government-owned private companies. In fact, “All European countries that employ public-private partnerships to shape the outsourcing of military services have embraced the belief that private companies are able to provide military support at better value for money than their national armed forces can”³⁰⁰. But each country has various positions on whether and how it should control the private military industry, but the consensus is that “where the State has less control of private security forces, it also has less ability to hold such actors accountable when violations occur”³⁰¹, especially when private actors easily cross borders, undermining the enforcement of national and international law. We will thus analyse the different responses that the UK and Germany have provided to the PMC’s emergence, as well as self-regulation attempts. Such attempts comprise – among other things – the Montreux Document, which “lays out State responsibilities under international law regarding the conduct of private military and security companies”³⁰², and the International Code of Conduct for Private Security Service Providers (ICoC).

i. The United Kingdom

One of the most prominent authors to have “recently” written on PMC regulation in the United Kingdom is Elke Krahmann, with her book “States, Citizens and the Privatization of Security”, published in 2010. In this book, she details, after a theoretical analysis on the emergence of PMCs, regulation in the United States, the United Kingdom and Germany. She demonstrates that the ideal, “whether under the label of Thatcherism or the Third Way, (...) has been to convert the State from a provider of defence to a manager of defence”³⁰³. She also questions “whether Neoliberalism has indeed improved democratic control and accountability in the UK”³⁰⁴,

³⁰⁰ *Idem.*

³⁰¹ BUZATU A.-M., BUCKLAND S. B., “Private Military & Security Companies: Future Challenges in Security Governance” in *DCAF HORIZON 2015 WORKING PAPER No. 3*, Geneva: Geneva Centre for the Democratic Control of Armed Forces, p. 18.

³⁰² DE NEVERS, R., *op. cit.*, p. 234.

³⁰³ KRAHMANN E., *States, Citizens and the Privatization of Security*, Cambridge: Cambridge University Press, 2010, p. 117.

³⁰⁴ KRAHMANN E., *idem.*

highlighting that “private contractors have become permanent components of the armed forces, requiring new mechanisms of control and accountability”³⁰⁵. She concludes that “instead of dealing with these issues, the complexity of PFI (Private Finance Initiative) contracts, off-the-book accounting and the lack of public information about the military have further removed private military contractors from public scrutiny”³⁰⁶, and the weakening of the armed forces capacity to regulate themselves have “widened the gap between soldier and society”³⁰⁷. In 2011, Trevor Taylor noted that PMC regulation is “a topic that the UK government has found difficult. After the publication of a green paper in the 1990s³⁰⁸, no further efforts at legislation have been made”³⁰⁹, although Nigel D. White explains that “the government reengaged with the issue of regulation in 2009 (...) [through] a two tiered system: a government-backed system of self-regulation at the national level and adherence to regulatory norms at the international level”³¹⁰. However, international regulatory norms such as the ICoC and the Montreux documents only create a non-binding framework for States and an international self-regulation for PMSCs, whose issues will be addressed later in our paper.

The Green Paper, named ‘Private Military Companies: Options for Regulation’, provided a convincing rationale on the benefits of regulation.

“Bringing non-State violence under control was one of the achievements of the last two centuries. To allow it again to become a major feature of the international scene would have profound consequences. Although there is little risk of a return to the

³⁰⁵ *Ibidem*.

³⁰⁶ KRAHMANN E., *op. cit.*, p. 117-118.

³⁰⁷ *Idem*, p. 118.

³⁰⁸ Which was actually published in 2002 by the UK Foreign and Commonwealth Office and was titled ‘Private Military Companies: Options for Regulation’.

³⁰⁹ TAYLOR, T., « Private security companies in Iraq and beyond », *International Affairs* [online], 2011, Vol. 87, No. 2, p. 451. Oxford: The Royal Institute for International Affairs.

³¹⁰ WHITE N. D., “The UK and the Regulation of PMSCs”, Unpublished paper, Office of the United Nations High Commissioner for Human Rights [online], 2015, p. 6. Available at: <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Event2015/NigelWhite.pdf>, last accessed on the 21-04-18

circumstances of the 17th and 18th centuries when privateers were hard to distinguish from pirates, and Corporations commanded armies that could threaten States, it would be foolish to ignore the lessons of the past. Were private force to become widespread there would be risks of misunderstanding, exploitation and conflict. It would be safer to bring PMCs and PSCs within a framework of regulation while they are a comparatively minor phenomenon”³¹¹.

Nigel D. White, while using Stanger’s book³¹², notes that “Within a short space of time PMSCs changed from being a ‘minor phenomenon’, to constituting a major one. The situation of violence and conflict that followed the 2003 US/UK invasion of Iraq was demonstrated the extent of contractors’ involvement”³¹³. The Green paper thus submitted several options, four of them analysed by White:

(1) A full or partial ban on private military activity abroad which as he explains would encounter several problems. First, enforcing such legislation would inevitably have to face the difficulty of “assembling evidence and mounting a successful prosecution in British courts”³¹⁴. Second, defining what the term “military activity” encompasses poses a particular problem seeing the size of the military functions’ scope. Third, that “it was an unwarranted interference with individual liberties”³¹⁵, and would deprive governments in need of support from such firms. And finally, “it would ‘deprive British defence exporters of legitimate business’, given that the provision of services is normally a necessary part of export sales”³¹⁶.

³¹¹ UK Foreign and Commonwealth Office, ‘Private Military Companies: Options for Regulation’, Green Paper [online], Session 2001-2002, HC 577 (Green Paper 2002), p. 20. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228598/0577.pdf, last accessed on the 21-04-2018.

³¹² STANGER A., *One Nation under Contract: The Outsourcing of American Power and the Future of Foreign Policy*, New Haven, CT, and London: Yale University Press, 2009, 242 p.

³¹³ STANGER A., *op. cit.*, pp. 2-4 cited in WHITE N. D., “The UK and the Regulation of PMSCs”, Unpublished paper, Office of the United Nations High Commissioner for Human Rights [online], 2015, p. 2.

³¹⁴ WHITE N. D., *op. cit.*, p. 3.

³¹⁵ WHITE N. D. *idem*.

³¹⁶ *Ibidem*.

(2) A ban on recruitment for military activity abroad, which “would help to prevent PMSCs from engaging in mercenary-like behaviour or, perhaps more accurately, in the recruitment of mercenaries”³¹⁷.

(3) A licensing regime for military services, which the Green Paper outlines as such:

“Legislation would require companies or individuals to obtain a licence for contracts for military and security services abroad. The activities for which licences were required would be defined in the legislation. They might include, for example, recruitment and management of personnel, procurement and maintenance of equipment, advice, training, intelligence and logistical support as well as combat operations. It would for consideration whether or not to include consultancy services on security measures for commercial premises – a larger number of small consultants exist in this field; or to establish a threshold for contracts so that only those above a specified value required a licence. For services for which licences were required, companies or individuals would apply for licences in the same way as they do for licenses to export arms (though not necessarily to the same Government Department). Criteria for the export of services would be established on the same lines as those for the export of arms”³¹⁸.

As Nigel explains, such a licensing system would make it “difficult to know or prove that the terms of the licence were being breached”³¹⁹, a problem which would presumably also be encountered with “an arms export licence, for instance, one that prohibits the arms exported from being used against a civilian population”³²⁰.

(4) Self-regulation, through a voluntary code of conduct which would be written “in consultation with companies, their clients, the

³¹⁷ *Ibidem*.

³¹⁸ UK Foreign and Commonwealth Office, ‘Private Military Companies: Options for Regulation’, Green Paper, Session 2001-2002, HC 577 (Green Paper 2002), p. 24.

³¹⁹ WHITE N. D., *op. cit.*, p. 4.

³²⁰ WHITE N. D., *op. cit.*, p. 5.

government and NGOs”³²¹, and would cover “respect for human rights, respect for international law (including international humanitarian law), respect for sovereignty, and provide for transparency by allowing access to monitors while working overseas”³²². However, as White notes it, such an approach to regulation would lead to several issues highlighted by the Green Paper: potential conflicts in Foreign Policy, or damage to UK interests or policies should a PMC support an unfriendly government; the potential inability of the association to identify responsibility in conflictual overseas situations; and the difficulty of disciplining its most important members.

In April 2009, the British government declared it opened a consultation period for a new regulatory approach of the private military industry. This regulatory approach had two sides: “a government-backed system of self-regulation at the national level and adherence to regulatory norms at the international level”³²³. The reference to international regulatory norms was mostly pointing to non-binding initiatives such as the gestating ICoC and the Montreux Document. In summary, the UK regulatory system seemed thus to be purely voluntary.

Four problems have been identified within this voluntary system. The first one is that “the industry is essentially being given the task of being a judge in its own cause”³²⁴. This problem still persists, even though the UK authorities have created the SCEG in 2012. It is a national system of monitoring, inspection and enforcement, which is separated from the industry association, consisting of a mixture of industry and government representatives. Without these industry representatives, Nigel White fears that “a truly independent body would not include the industry at all”³²⁵. Second, sanctions fall short in terms

³²¹ WHITE N. D., *idem*.

³²² *Ibidem*.

³²³ BOHM A. SENIOR K., WHITE A., “The United Kingdom” in BAKKER C., SOSSAI M. (éds), *Multilevel Regulation of Military and Security Contractors*, 2012, Oxford: Hart Publishing, p. 316.

³²⁴ WHITE N. D., *op. cit.*, p. 6

³²⁵ WHITE, N. D., *idem*.

of securing compliance. The main sanction is exclusion, but it can't forbid an excluded PSC from trading. Third, the amount of flexibility available when considering applicable standards. Indeed, since international standards from IHL, human rights or principles from international law have not been made for PMSC, there is "a certain amount of picking and choosing, adapting and interpreting". The final problem lies in the limited willingness shown by the UK government to "engage with its positive responsibilities under human rights law to ensure that private actors within its jurisdiction respect human rights"³²⁶.

ii. Germany

The privatization and outsourcing of military services in Germany, although largely unnoticed both nationally and internationally, has been underway since the Kohl government (1982-1998). Germany mostly uses public-private joint ventures to provide military services, "such as the white fleet, clothing stocks, army maintenance and repair, and IT"³²⁷. Despite being under pressure to reform its defence and security sector to generate military savings, the German government "has so far resisted calls for the professionalization of its armed forces and the abandonment of the ideal of the citizen-soldier". Indeed, the successive German governments have "prioritized the centralized control of the private provision of military services over increased savings", partly resisting the Neoliberalist dogma³²⁸. In 1998, the Ministry of Defence "identified a wide range of military core functions which would a priori be excluded from market-testing between the armed forces and the private sector"³²⁹. However, Kohl's successors would favour a Neoliberal reform, although it would eventually be toned down. Thus, even though Germany has incorporated several parts of the Neoliberal discourse, "the strength of Republican ideals related to social market

³²⁶ WHITE, N. D., *op. cit.*, p. 7.

³²⁷ KRAHMANN E., *op. cit.*, p. 156.

³²⁸ KRAHMANN E., *idem*.

³²⁹ KRAHMANN E., *op. cit.*, p. 161. These included defence political function, military intelligence, military leadership, combat and local support, logistics...

democracy and the citizen-soldier have tempered the transformation of the roles and relations of the State and the soldier”³³⁰. This led to the creation of public-private joint ventures to supply entire service categories for the Bundeswehr, which are “the most innovative development with regard to military privatization in Germany”³³¹, according to Krahmann. The possibilities for public-private joint ventures are limited to four service segments of the German armed forces: clothing supplies, the white fleet, army repairs and maintenance, and IT. All cases of military public-private joint ventures “have combined continued governmental control through full or partial State ownership with a formal privatization and private industry investments”³³². However, the German Ministry of Defence has also engaged in medium-term contract periods, collaborative teams of soldiers and contractors, and a “train-the-trainer” approach³³³. The ambition of maintaining a balance between Republican ideals and Neoliberalist policies, “in spite of growing international security demands and a tight budgetary policy, (...) has not noticeably decreased over the past decade”³³⁴. Germany has tried to find a compromise between these two models, but while “the mixing of the two models has contributed to safeguarding democratic accountability”³³⁵, it can also undermine “democratic oversight due to unclear lines of accountability and increasing bureaucracy”³³⁶ while preventing real savings.

In sum, in European States, “legislatures cannot easily control what is outsourced or scrutinize subsequent performance because of commercially confidential information. The result, coupled with the end of the citizen soldier and declining public knowledge of the

³³⁰ KRAHMANN E., *op. cit.*, p. 165.

³³¹ *Idem*, p. 166.

³³² *Ibidem*.

³³³ For a more detailed account of these practices, see KRAHMANN E., *op. cit.*, pp. 165-177.

³³⁴ KRAHMANN E., *op. cit.*, p. 177.

³³⁵ *Idem*, p. 193

³³⁶ *Ibidem*.

military, is a weakening of the power of public authorities to direct the military sector”³³⁷.

iii. A European approach?

However, a European approach is possible, according to Mirko Sossai. In 2008, a three-year research conducted by scholars from seven European universities resulted in a series of recommendations, “EU Regulatory Action in the Field of Private Military and Security Companies and Their Services”³³⁸. Sossai resumes the thirteen recommendations by highlighting that

*“the suggested options consider the adoption of both legally binding and non-legally binding instruments, covering on the one hand the harmonization of national measures regulating private military and security services within the internal market, and on the other hand the regulation, in the context of the Common Foreign Security Policy, of the export of such services to third countries”*³³⁹.

The EU would thus have to regulate the activities of PMSCs based *within* the territory of its members. In order to be able to do that, it would have to expand “the material scope of the instruments governing the exports of certain goods to include private military and security services”³⁴⁰, notably via the CFSP framework, through the widening of Common Position 2008/944’s scope. This position “defines common rules governing the exports of military technology and equipment. The main advantage of extending such rules to military and security services is that this would exploit the potentialities enshrined in Common Position 2008/944”³⁴¹, especially regarding the assessment and

³³⁷ TAYLOR, T., *op. cit.*, p. 453.

³³⁸ SUR S., WHITE N., MARAUHN T., *et. al.*, “EU Regulatory Action in the Field of Private Military and Security Companies and Their Services”, *Priv-War*, March 2011 [online] Fiesole: European University Institute. Available at: http://priv-war.eu/wp-content/uploads/2013/03/Priv-War_Recommendations-FINAL-.pdf, last accessed on the 21-04-18

³³⁹ SOSSAI, M., « A European Approach to the Regulation of PMSCs », *Proceedings of the Annual Meeting (American Society of International Law)*, 2013, Vol. 107, International Law in a Multipolar World, p. 206 Washington D.C.: American Society of International Law.

³⁴⁰ SOSSAI, M., *idem*.

³⁴¹ SOSSAI, M., *op. cit.*, pp. 206-207.

attribution of licenses. Sossai lists several elements upon which the decision to attribute a license should be based on:

“(a) the internal situation in the country, in particular whether serious violations of human rights and humanitarian law have been established; (b) the history and track record of the recipient (State or private entity); (c) the existence of a clear risk that the military and security services might be used for internal repression; (d) in a situation of armed conflict, the possibility that the provision of services might amount to direct participation in hostilities; and (e) the risk that the PMSC’s personnel might be involved in the commission of serious violations of humanitarian law”³⁴².

But as Sossai notes, the Priv. War recommendations do not stop there. They also address the possibility that “the EU itself and member States might be the ‘contracting entities’ in the context of the Common Security and Defence Policy”³⁴³, and argue that “EU regulatory action should cover at least three different areas: the provision of private military and security services in peacetime on member States’ own territory, including training activities; the employment of PMSCs by the EU itself (for example, through the EU force Commander or the Head of Mission) and by the member States in the framework of an EU-led crisis management operation; and the resort to PMSCs in the same context by third States participating in the missions”³⁴⁴.

v. The United Nations

In the 1990s, as states were progressively resorting to PMCs, the UN climbed on the bandwagon, “when the Security Council mandated ambitious peacekeeping missions in Somalia, the Balkans and Sierra Leone”³⁴⁵. In 1987, it had created a Special Rapporteur’s mandate on the use of mercenaries as a means of violating human rights and

³⁴² SOSSAI, M., *op. cit.*, p. 207.

³⁴³ SOSSAI, M., *idem.*

³⁴⁴ *Ibidem.*

³⁴⁵ PINGEOT, L., *Dangerous Partnership: Private Military Companies & Security Companies and the UN*, New York: Global Policy Forum, 2012, p. 22.

impeding the exercise of the right of peoples to self-determination, whose work led to the adoption of the UN Convention against the Recruitment, Use, Financing and Training of Mercenaries. Yet, “key officials saw private companies as the logical solution when the organization’s peacekeeping and relief efforts faced difficulties”³⁴⁶. What’s more, “there was little discussion in the organization about the advisability and possible negative consequences of such moves”³⁴⁷. The UN encountered several problematic situations through the use of contractors, which Pingeot depicts as such:

“In [1992], the UN hired four security firms, including DSL and DynCorp, to provide services for the peacekeeping operation in Bosnia. These contracts involved about 2,000 personnel and lasted for a four-year period. Company staff drove armored cars, provided “security” at borders (where clashes were common) and they undertook other high-risk tasks. They wore UN civilian uniforms, carried UN identification, and even were said to have access to “classified” intelligence.

Soon after deployment, a serious scandal erupted in the Bosnia mission. DynCorp personnel, working as police officers under US contract but UN command, were found to be involved in sex trafficking and organized prostitution. Worldwide media coverage followed. That scandal caused great embarrassment to the UN and symbolized the disarray in peacekeeping that led to a sharp decline in operations in the mid-1990s. Yet, the hiring of controversial security companies continued”³⁴⁸.

Afterwards, the UN pursued in hiring contractors, though in “less visible roles, even though many member states were not enthusiastic”³⁴⁹, says Lou Pingeot. Even “top UN leadership were also opposed to expansive new security privatization, especially the

³⁴⁶ PINGEOT, L., *op. cit.*, p. 20.

³⁴⁷ PINGEOT, L., *idem*.

³⁴⁸ PINGEOT, L., *op. cit.*, p. 22.

³⁴⁹ PINGEOT, L., *op. cit.*, p. 23.

outsourcing of peacekeeping forces that some PMSC lobbyists were urging”³⁵⁰. How can we explain the continuous use of contractors by the UN? Pingeot posits that the events of September 11th, 2001 created “new fears in the organization about the protection of UN personnel and premises”³⁵¹. In addition to that, the organization faced pressures “to outsource, “streamline,” and make itself more “efficient,” especially in the security sector”, and in peacekeeping, as Pingeot highlights:

In 2002, the UK Parliament’s Select Committee on Foreign Affairs noted approvingly that Private Military Companies “already provide extensive support to intergovernmental organizations such as the United Nations,” concluding that “the idea of hiring PMCs to do the job [of peacekeeping] has obvious appeal.” A 2005 US Senate appropriations bill on US contributions to UN peacekeeping similarly insisted that the UN can no longer afford to ignore the potential cost-savings that private companies with proven records of good services and good behaviour can offer.”³⁵²

Pingeot concludes by noting that UN data is “incomplete” because it is “impossible” to get exhaustive numbers on either the companies used by the UN and the amount spent on their services. The partial information fails to show the bigger picture, which points towards, according to her, “a steady rise in the number of security company contracts from 2006/7 to the present”³⁵³. Jenny S. Lam believes that “there has been a tremendous expansion in the use of PMCs for peacekeeping”³⁵⁴ operations and Other scholars, such as Deane-Peter Baker and James Pattison, express their concerns. These mainly revolve around “the use of PMSCs for a wide range of peace operations, from more traditional peacekeeping missions by the UN to robust military interventions by states (and so we shall sometimes use the catch-all term

³⁵⁰ PINGEOT, L., *idem*.

³⁵¹ *Ibidem*.

³⁵² PINGEOT, L., *op. cit.*, p. 23.

³⁵³ PINGEOT, L., *idem*.

³⁵⁴ LAM J. S., “Accountability for Private Military Contractors Under the Alien Tort Statute”, *California Law Review*, Vol. 97, No. 5, October 2009, p. 1459.

‘intervention for human rights purposes’). This is because it is no longer so easy to draw a clear line between humanitarian interventions and peacekeeping missions”³⁵⁵, and because PMSCs’ have the potential to “lack legal and democratic accountability (mentioned at the beginning of this article) [as well as] potentially problematic intentions”³⁵⁶ other than humanitarian, which could come into conflict with other profit-driven intentions.

³⁵⁵ BAKER, D.-P., PATTINSON, J., “The Principled Case for Employing Private Military and Security Companies in Interventions for Human Rights Purposes”, *Journal of Applied Philosophy* [online], 2012, Vol. 29, No.1, p. 3. Hoboken: Wiley-Blackwell.

³⁵⁶ BAKER, D.-P., PATTINSON, J., *op. cit.*, p. 15.

b. Annex 2: Analysis of the 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.

i. Introduction

The negotiations that I will be analysing stem from the interest that international organizations, and more particularly the UN, are expressing towards them, as stated in Lou Pingeot's report "Dangerous Partnership: Private Military Societies and the UN"³⁵⁷. The "blatant human right abuses" which go "unpunished" are due, according to her, to a "legal void"³⁵⁸. This legal void might explain the negotiations I am going to examine. The opening of negotiations was voted upon in 2010³⁵⁹ at the fifteenth session of the UN Human Rights Council, and launched in 2011. Interestingly, the 2010 vote showed a geographical fracture between most of the countries hosting PMCs headquarters, which voted against the measure; and countries where (but not exclusively) PMSCs operated, which voted in favour³⁶⁰. Surprisingly, China and Russia voted in favour. Switzerland, Norway and the Maldives abstained.

The negotiations' main objective of these open-ended negotiations is to provide answers to the following: "What regulations should be put in place in order to create a legal framework, which would enable States

³⁵⁷ Pingeot L., "Dangerous Partnership: Private Military Societies and the UN", Global Policy Forum: New York, 2012, 47 p.

³⁵⁸ Pingeot L., *op. cit.*, p. 7.

³⁵⁹ United Nations Human Rights Council, "Resolution adopted by the Human Rights Council, 15/26, 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", October 7 2010, Geneva.

³⁶⁰ The countries in favour were Angola, Argentina, Bahrain, Bangladesh, Brazil, Burkina Faso, Cameroon, Chile, China, Cuba, Djibouti, Ecuador, Gabon, Ghana, Guatemala, Jordan, Kyrgyzstan, Libyan Arab Jamahiriya, Malaysia, Mauritania, Mauritius, Mexico, Nigeria, Pakistan, Qatar, Russian Federation, Saudi Arabia, Senegal, Thailand, Uganda, Uruguay, Zambia.

The countries against were Belgium, France, Hungary, Japan, Poland, Republic of Korea, Republic of Moldova, Slovakia, Spain, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

and other non-state actors to supervise and oversee PMCs”. Since International Law contains flaws and legal voids regarding their activities, numerous countries are taking part to these talks. Several elements are at stake: the regulation of the industry; security (regarding the employees as well as people affected by their activities); legal responsibility. However, these are open-ended negotiations, meaning the concerned join them voluntarily, but they also have no obligation to stay in the process, nor do they have a set goal. UN negotiators include representatives of several countries, several NGOs³⁶¹, representatives of working groups regarding the use of mercenaries, and “resource persons” meaning experts on the subject, coming mostly from think-tanks and associations. Furthermore, these negotiations have not yet resulted in a final outcome, which will complicate the overall analysis. Another problems stems from the scarcity of documents surrounding the first, second and third rounds of negotiations. Although background documents are present, the analyst is often left with only the summary, which sometimes does not name the delegation intervening. Some reports and articles, such as Lou Pingeot’s³⁶², do provide partial analysis on the negotiations, but relying on the same data as those that this article will exploit. Despite these shortcomings, I hope to present compelling and comprehensive answers to understand the process and advancements of these negotiations.

Methodologically speaking, I will provide a chronological, round-by-round analysis. As the official summaries already encapsulate the content of interventions, I will not resume them again, but will provide precise references to these summaries. All sessions took place in Geneva, in the Palais des Nations. Parties taking part to the negotiations will be listed in the annex, round by round, as well as other possible speakers and stakeholders.

³⁶¹ These NGOs include the International Commission of Jurists, the International Peace Messenger Cities, the International Organisation on the Elimination of Racial Discrimination, the International Service for Human Rights, Mani Tese, and the ‘Organisation de la mutualité des volontaires africains’.

³⁶² PINGEOT L., *Contracting Insecurity: Private military and security companies and the future of the United Nations*, Global Policy Forum: New York, 2014, 28 p.

The official data available in the annex was rearranged for understanding purposes. By cross-referencing available data, I managed to add States that left the negotiations, States that returned into the negotiations, as well as States entering the negotiations at a specific session, in order to see if there was a distinguishable pattern.

ii. Analysis

(1) *Human Rights Council – October 7, 2010*

As explained *infra*, the negotiations were established through a vote in October 2010, at the United Nations Human Rights Council. Interestingly, the vote showed a partial – but nonetheless distinguishable – geographical fracture between most of the countries hosting PMSCs headquarters, who voted against the measure; and the countries where (but not exclusively) PMSCs operated, who voted in favour. Surprisingly, China and Russia voted in favour. Switzerland, Norway and the Maldives abstained. A few years prior, Blackwater, a U.S.-based company, was involved in several scandals. During the Iraqi war, Blackwater received “millions of dollars in government contracts, growing so large that the Bush administration said it was a necessary part of its war operation in Iraq”³⁶³. But it was also the source of controversy, as several of its employees “were accused of using excessive force on several occasions, including shootings in Baghdad in 2007 in which 17 civilians were killed”³⁶⁴ according to Iraqi sources, while American sources estimate that there were 14 civilians killed³⁶⁵. But Blackwater isn’t the only PMC flagged for the problems it caused abroad. In an article published in 2010³⁶⁶, two journalists from the New York Times found that employees of a PMSC called “Custer Battles”

³⁶³ MAZZETTI M., “C.I.A. Sought Blackwater’s Help to Kill Jihadists”, *New York Times* [online], published on August 19th, 2009. Available at: <https://www.nytimes.com/2009/08/20/us/20intel.html>, last accessed on the 18-04-2018.

³⁶⁴ MAZZETTI M., *idem*.

³⁶⁵ CHARLIER M.-D., “La guerre sous-traitée à des entreprises privées: Mercenaires d’Etat en Afghanistan”, *Le Monde Diplomatique* [online], published in February 2010. Available at: <https://www.monde-diplomatique.fr/2010/02/CHARLIER/18793>, last accessed on the 18-04-2018.

³⁶⁶ GLANZ J., W. LEHREN A., “Use of Contractors Added to War’s Chaos in Iraq”, *New York Times* [online], published on October 23rd, 2010. Available at: <https://www.nytimes.com/2010/10/24/world/middleeast/24contractors.html>, last accessed on the 18-04-2018.

fired several shots to a civilian car and a crowded minibus that came close, and used cash to avoid disciplinary action before leaving the scene. The documents scrutinized by the journalists also reveal that “contractors often shot with little discrimination — and few if any consequences — at unarmed Iraqi civilians, Iraqi security forces, American troops and even other contractors”³⁶⁷. Boggled down in the mud, it isn’t surprising that the United States voted against such negotiations taking place.

(2) First Session – May 23-27, 2011

Foreword

Compared to the next negotiation rounds, the documents surrounding the first, second and third rounds are scarce. The bulk of the first negotiation is contained in a 12-page summary, while the other documents are mainly resources who were made available for negotiators prior to the session³⁶⁸. Therefore, as documents are only tools to the negotiators, the only way to examine the first round’s negotiation process *per se* is to use the 12-page summary.

In addition to that, the report often doesn’t specify which delegations said what in some sections³⁶⁹, obscuring the possibility to write an exhaustive report. However, it is possible to somewhat bypass this issue to create groups, whose composition is unknown, to show the oppositions taking place. The problem remains that parties are not fully identified, and as such, some of the changes in their attitudes, actions, thoughts and beliefs throughout the negotiations remain shrouded by a veil of mystery.

³⁶⁷ GLANZ J., W. LEHREN A., *idem*.

³⁶⁸ These documents include the Montreux Document, an international initiative on the creation of a legal framework for PMSCs; a 4-page statement by the Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination on the need of an International Convention on PMSC; a 43-page report by the same Working Group; a 27-page report on the issue of human rights and transnational corporations and other business, by the Special Representative of the Secretary-General John Ruggie; and a note from the UN Secretary-General.

³⁶⁹ Such as the introductory remarks (point III), and the point on Law and practice in relation to PMSCs (point IV.A), from pages 5 to 9.

Finally, while the official document lists the delegations present at the Working Group meetings, it *does not* list the delegations attending the first session of the negotiations. Apart from delegations who expressed themselves and were quoted in the document, it is unclear who actually participated to this first round.

Analysis

The discussions have mainly revolved around the convention proposal – which has been erected as a key issue – and created different groups as well as possible outcomes. The benefit of an international convention is that prosecuting can be done through an international court of Justice, which can lead to mobilize teams from international organizations to gather evidence. Enhancing national legislation and cooperation leaves States with their own resources and relies on resolving crimes ‘case by case’. This allows powerful States to avoid their sovereignty to be encroached on, and could also provide a ‘safer haven’ for PMSCs. This is because international criminal prosecuting can require significant resources. For example, for crimes committed in Iraq, some PMCs under government contracts could only be prosecuted for their actions in American courts, not in Iraqi courts³⁷⁰. Two groups have emerged as opposite poles during the first round of this negotiation.

The group showing reserve against the international convention is mainly comprised of States having taken part in the Montreux negotiations, such as the United States, the United Kingdom, and Switzerland. The European Union, the United Kingdom and Spain do seem to join the group but have shown less fierce reactions towards the international convention draft. They mentioned the lack of consensus and as such the need to explore other options. The United States stance

³⁷⁰ The gathering of evidence would need for prosecutors to go to Iraq, and the legal intricacies of such a prosecution, which did happen in 2015, has proven a headache. For more information about the prosecution, see The Editorial Board, “Justice for Blackwater Victims”, *New York Times* [online], published on April 14th, 2015. Available at: <https://www.nytimes.com/2015/04/15/opinion/justice-for-blackwater-victims.html?rref=collection%2Ftimestopic%2FBlackwater%20Worldwide>, last accessed on the 18-04-2018.,

has evolved during this round. First, it stated that an international conventional convention would not cover all the gaps, before outright rejecting it. The United States' power comes from two things: first, the open-ended negotiation requires a consensus for an outcome to be adopted, and one of the outcomes preferred by certain States is blocked by the United States. This polarizes the negotiations around the draft proposal. Second, and related to the first, the U.S.'s cost of no-agreement is close to nil, since they had already secured support by previous negotiations on self-regulation through the International Code of Conduct (to which I will refer to as "Code of Conduct" or "ICoC"), and the Montreux Document. The best alternative to the negotiated agreement (BATNA), is to leave things as is, with little repercussions or consequences. At worst, the U.S. would simply lose this platform of negotiation. The core negotiators at Montreux that are involved here stand by the US' side. Moreover, as these UN negotiations are not 'crucial' – in the sense that they do not concern pressing situations that threaten vital interests of a State – the diplomatic and geoeconomical consequences of a no-agreement seem small. As such, the United States position seems unbudgeable. However, the "against pole" (meaning the group against the possibility of an international convention) in itself does propose alternatives through "closing the gaps" of the Code of Conduct and the Montreux Document, promoting cooperation, and enhancing national legislation.

The group advocating for the international convention is made up of Algeria, Honduras, and the African Group, which is represented by Nigeria. Aside from Algeria, none of its members have explicitly criticized the Montreux Document or the Code of Conduct. They have mostly pointed towards the human rights violations, the 'impunity' from which PMSCs sometimes benefit, and highlighted the need for an international legally binding instrument. The position of these States leaves them with two main choices: either they drop the international convention draft, support the initiative regarding the Montreux Document and the Code of Conduct – documents they didn't negotiate

on – and try to patch up their gaps, or they maintain their position of pushing for the convention and try to influence the States that have not yet expressed their disapproval towards the convention possibility.

The Russian Federation assumes a peculiar position, as it doesn't express itself on the draft convention, but compares its national legislation and non-existing outsourcing of military functions to States that do outsource them. Its delegation emphasizes that such functions should stay in the sole hands of the State.

(3) Second Session – August 13-17, 2012

Foreword

From the 1st until the 12th page (!) of the 18-page summary, the rapporteur does not mention which delegations said what, only referring to them as “some delegations” or “a number of delegations”. As it occurs a second time, it is probably a tool employed by the rapporteur to anonymize negotiators, for various reasons that have not been specified. This poses a threat to the analysis, as negotiation dynamics cannot be inferred from incomplete data that anonymizes actors and parties.

Analysis

This session saw new delegations taking part to the negotiations, offering new opportunities for the parties polarized around the convention draft. However, 23 countries that did participate in the first session did not return for the second round. Among them, Honduras and Zimbabwe had intervened in the first session, and had supported the idea of an international legally binding instrument.

After the European Union congratulated everyone for their inputs without taking a stand, it hinted – without stating it bluntly – that several proposals fell outside the scope of the UN Human Rights Council and pointed towards other forums of discussion for it. It encouraged the

parties to strive for an inclusive outcome through a multi-stakeholder approach, such as the Montreux Document and the ICoC have done. Belgium added an interesting intervention, stating that a legally binding international document that did not gather enough ratifications wouldn't solve the problem. Such a stance can be analysed as an attempt to diminish the appeal of slamming the door by highlighting the opportunity that these negotiations represent. It might also be a statement used to deter States that wish for an international, legally-binding document from pursuing this goal, by highlighting its potential inefficiency.

States that were mentioned in the previous session remained on their previous positions. Actors that joined the negotiations, or did not express themselves before, assumed five positions: criticizing other initiatives external to these negotiations; expressing their support for one of the poles to various degrees; criticizing one of the pole without expressing support for the other; not expressing one's support; and recalling the negotiations' limits.

Quickly summarized, the negotiations went as such: Egypt, Venezuela and Pakistan seemingly joined the African Group, both heavily criticizing the non-binding initiatives that are the Code of Conduct and the Montreux Document. Only Venezuela expressed its support for a legally binding document. Canada doubted the use of a binding international instrument and believed time was needed to assess non-binding initiatives. China, one of the core negotiators of the Montreux Document, expressed its openness to an international, legally-binding instrument while doubting the power of national legislation when it comes to transnational and mobile actors. Russia used the 'Belgian argument', pointing towards the fact that since few States had signed on to the Montreux Document, it couldn't be considered a very strong and effective instrument. Interestingly, after August 2012, 13 more States had signed on to the Montreux Document. France recalled that the mandate of the Council had limits that shouldn't be trespassed, but didn't express its support to either of the initiatives.

As a conclusion, three points of this specific round present a particular interest in terms of analysis: First, the interventions of the previously ‘mute’ States³⁷¹, which show that the debate remains polarized on the convention draft, with either side refusing to give in. Second the departure of a nearly third of the States that had taken part in the first round, with among them Honduras and Zimbabwe. With 30% of the parties refusing to return to the second round of the negotiation, questions arise. Will these delegations return? How will the result’s legitimacy be affected? As these are open-ended negotiations, the situation could still change, but these sudden departures could signal a disagreement with the unbudgeable position of the United States, and the support of their Montreux allies. Another question, regarding the form of the negotiation, stand apart. Since the negotiations are not ‘vital’, could quitting possibly be done with little repercussions? Departing from the negotiations seems to be a symbolic gesture, and the cost of quitting and then re-entering seems close to naught. Moreover, States could hide behind having to work in other forums on more pressing matters, thus showing that these negotiations are of little value to them, since the United States have shown themselves inflexible on the convention draft. Finally, it is important to remind ourselves that several countries have much more diplomats than others, and have thus more personnel to dispatch to a plethora of negotiation processes than other, smaller countries. The third interesting point is the apparent consensus, which is more of an agreement on the disagreement. Both sides agree that the other’s input has value, but they believe that their own proposal is better. In the end of the document, the remaining States expressed their desire to pursue the negotiations in a “constructive spirit”, while adjusting their recommendations concerning the substance of the negotiation and the possibility of the international regulatory framework, whose shape is still undetermined.

³⁷¹ Which were anonymously referred to, or simply didn’t participate in the debate.

(4) Third Session – July 21-25, 2014

Foreword

This session has seen a daunting decrease in interventions where delegations were specified. Put together, they do not even cover a single page. I therefore present my most sincere apologies for the shortness and scarcity of this analysis.

Despite this, around six pages of anonymized debate between the parties have been transcribed. This pushes me to see this anonymization process as a way for parties to obscure external analysis of the sessions. Indeed, closed-quarters negotiations may help negotiators, as it allows for more freedom and leeway in their proposals than with constant public scrutiny. Nonetheless, in this case, it may also be a tactic from several delegations to prevent those that have walked away from negotiations to see and understand how the process unfolds, and point fingers when they return. The ‘come-and-go’ parties would have to approach other delegations more or less blindly to gather information, for which a price may have to be paid.

Analysis

Contextually speaking, the document refers to the growing support, and the important progress achieved by the Montreux Document and the Code of Conduct, who had gathered, in 2014, signatures from over 700 companies. The main content of the delegation’s interventions, when they were named, was to point towards the vast growth in scope of the PMSCs service over the last decades (Pakistan); to put forward each country’s legal advancements (the U.S., Switzerland) and challenges encountered in terms of national legislation and the extraterritorial nature of some of PMSCs’ activities (South Africa). China still maintains its openness towards the discussion over an international instrument especially concerning extraterritorial activities.

Extraterritorial activities of PMSCs thus remain a focal point of discussion, as certain countries cannot afford to bolster their legislation to ensure criminal jurisdiction out of their territory for certain crimes. The U.S. maintains its positions and uses its progress on national legislation to demonstrate the fact that specific legislation can be used abroad. However, it does not mention nor recognize the difficulties of other States in that case, only pushing towards “cooperation”. This may lead certain States to believe they are not heard, and could make them walk away from negotiations, as several countries that were advocating for an international convention have done.

The ‘anonymized’ debate focused on national legislation, so the US influence can be felt throughout the negotiation, and more particularly on the agenda-setting. In fact, its evolution reveals a battle of influence on its position during the session. The agenda setting is agreed upon on the first day of the negotiation. During the first session, the topic on the possibility of an international regulatory framework was held on the third day of the negotiations. For the second session, it was discussed on the second day of the negotiations. For the third, the draft programme of work was not provided, but from what could be excerpted from the session summary, it took place on the fifth meeting, which is the last day. Strategically, placing it on the last day presents real interests. For example, during previous sessions, highlighting the progress that has been, and still could be done on national legislation throughout the participants, may undermine the attractiveness of an international convention. Moreover, from an individual and behavioural point of view, negotiators may feel tired and might not listen as carefully than they did at the start of the session.

The disagreement on the draft convention and the usefulness of an international legally-binding instrument remains. The ‘against group’ underlined the insufficient consensus over this initiative, which would undermine its legitimacy and efficiency. The ‘convention group’, rather than dismissing the idea, suggested that the working group should focus on the elements needed to create a legally binding instrument and still

consider the draft of a possible convention. Despite these disagreements, areas of agreement can be discerned, as both groups recognized the importance of wide international support and, surprisingly, consensually agree on the importance and usefulness of non-binding initiatives. However, they still disagree on the exhaustiveness and power of such initiatives.

(5) Fourth session – April 27th - May 1st, 2015.

Foreword

This session proposes a much richer documentation than any other before it. It proposes access to the opening statements documents from a lot of countries, although sometimes only in the country's language (this is the case for Cuba, Mexico and China). Moreover, not every country has issued an opening statement, meaning that only the submitted statements are available for analysis. Plus, delegations may sometimes refer to other statements that weren't submitted to the Chairperson-rapporteur. However, anonymized debates still occur regularly throughout most the summary, obscuring a lot of areas for the analyst. From page 8 until page 21, no delegations are named. Pages 21 until 25 are annexes.

Analysis

Two of the most interesting points of the fourth session were the intervention of Brazil and Switzerland, for various reasons. A particular anonymized intervention highlighted a conflict, by explaining that a specific “sponsor” had tried to “divide the council” and undermine consensus after trying to build it³⁷² on the draft convention, which I suspect to be Brazil. The reasons for this is that their delegation's official statement, adopting a hardliner approach, brazenly threw Montreux and ICoC supporters into the spotlight, explaining that they have tried to hinder and obstruct progress towards the drafting of an

³⁷² A/HRC/30/47, p. 5, paragraph 11.

international legally binding document. It shows that trust was at its lowest when parties were aware that others were trying to drown the consensus. Without naming them, it criticized the arguments employed by the U.S., saying supporting and promoting improvement in domestic legislation and self-regulatory initiatives such as the Montreux Document and the Code of Conduct mustn't be used as a pretext to rein in efforts to draw up an international legally binding document. Although it represents a heavy blow towards the progression to a consensus, it does underline the fact that this issue still continues to polarize parties. Despite that, Brazil argues that the two views are not exclusive nor incompatible with one another and could serve to complement each other.

On another note Switzerland's intervention showed change in its position towards convention. While it had been discreet about its opinion on an international legally-binding document and pointed towards the broad support of self-regulatory initiatives, it mentioned that it was open to discussions on an international convention. This declaration carries a symbolic weight, as Montreux is in Switzerland, and may act as a potential shift in negotiations, possibly trying to create a consensus between parties that had been disagreeing on the convention draft since the start of the negotiations.

The European Union failed to mention the convention while recognizing the Montreux Document and the ICoC and expressed its regret towards certain delegations that wouldn't allow for consensus. When examining the work programme, an international legally binding instrument isn't even mentioned but only hinted at as an "initiative" on the first meeting of the first day of the session. The problem here is that a negotiation day is comprised of two negotiation sessions of three hours each. On the first session of the first day, the parties had to open the session; elect the chairperson-rapporteur, adopt the agenda, timetable and programme of work; and address the first topic wherein lies the subject of the international legally-binding document.

Delegations have continuously intervened on various topics, but as they weren't named, negotiation analysis was severely hampered.

The group showing reserve and criticism towards the ICoC and the Montreux Document, especially the African Group, South Africa, Pakistan and Iran, pointed towards the fact that both of these failed to address the complexities of the problem, including the non-existence of a victim-based approach. In addition to that, the African Group mentioned that none of the experts had explicitly ruled out an international legally binding document. South Africa and Brazil pointed at the U.S's argument that countries should try to enhance their domestic legislation and cooperate with one another. What's interesting here is that these delegations use the weakness of certain countries, their inability to achieve complete sovereignty over their territory – in the sense that they have trouble overseeing and monitoring PMSCs – to demonstrate that the U.S. approach is ineffective and unrealistic for them. Nonetheless, most of these countries did appreciate the guidance and foundations that these voluntary initiatives offered. The Working Group has presented a summary of the different concerns in eight points, pushing forward the idea of the convention draft, at the request of Pakistan, notably, as well as the African Group.

As a conclusion for this session, few evolutions are notable, which can be seen in the consensus. It can be summarized as considering the possibility of an international regulatory framework, including the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, and other approaches and strategies, including international standards, and the way in which they might interact to protect human rights.

Foreword

Once again, anonymized debate has taken place, and occurred almost on the entirety of the document. Only Switzerland and the United States have issued public statements. This seriously hampers my analysis' possibilities. What is interesting is that the draft of the session summary has taken the entirety of the negotiations' last day. Therefore, it is reasonable to assume that delegations have expressly asked for the anonymization of their interventions. The question is why would they do so?

Analysis

The Chairperson-Rapporteur noted that a convention draft was inherent to these negotiations, since it had been requested upon in 2005 by the Commission on Human Rights. However, she stressed out that it would only concern the encouragement of respecting of human rights principles. It also surprisingly added that it would close the process if there was no indication of progress. This can be analysed as a structural pressure for the parties to find a solution but can be criticized as menacing the parties won't necessarily coerce them into progressing forward. It might in fact compel some States to walk away, which would enable progress, but would mean that consensus would be restricted to a few States. As a consequence, few States might recognize and respect the outcome of a process wherein a general consensus hasn't been found.

Given the lack of a strong accountability framework and of mechanisms for effective remedies, the Working Group on mercenaries supported an international binding instrument to regulate the activities of private military and security companies. In its view, an international binding instrument was the best option forward in ensuring that human rights, particularly of those belonging to vulnerable groups, were fully protected wherever private contractors operated.

In of the few available statements, India criticized the limits of the ICoC and Montreux Documents, as the first still did not provide solutions to accountability issues for human rights violations committed by PMSCs, and the latter wasn't compelling enough. However, it did not point to a specific solution, but rather to pursue constructive talks.

The E.U., surprisingly, issued a bold statement, worth analyzing. It first recalled the mandate of these negotiations, which is “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”³⁷³. It also reminded the parties of the possibility of closing the negotiation if no progress has been achieved. It pointed towards missed opportunities to build consensus, and explained that almost no progress had been made during these negotiations, while other initiatives did. Finally, it reminded parties that they should not lose sight of the objectives of these negotiations. Usually dim and timid in its statements, the E.U. explicitly criticized the lack of advancements. Both pointing towards the need to achieve progress and the possible closure of the negotiations, the E.U. added weight to the Chairperson-rapporteur pressure and tried to remind parties of their responsibilities.

Finally, the U.S. concluded the session by mentioning its successful prosecution and conviction of four civilian contractors who perpetrated the massacre of the Nissour Square. This served as a foundation to deliver the argument that strong national legislation can deliver accountability and protect human rights, and the new international law is not needed. However, the U.S. fails to mention the political, economical and symbolical power of its country. Its argument thus falls short of convincing power, as it cannot be replicated by all of the other countries. Another argument is that such a legally-binding document might take years and significant manpower to achieve, resources that could produce more practical and consequential power to produce

actual changes on the ground. Once again, the U.S. considers that the lack of consensus buries the option of establishing such a document, while this consensus was mainly blocked by itself. It points towards self-regulative attempts as the ICoC and the Montreux Document and the need to enhance them to deliver results, instead of subsuming them by a legally-binding international document. Without stating bluntly, within its discursive attempt lies an endeavour to compel other States into choosing solutions which it supports, rather going for a positive ‘Tit for Tat’ approach.

Despite these obstacles, the Working Group issued a document, named “Discussion document: Elements for an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies. It consists of 8 points and tries to build upon the general consensus. Despite it being named a “framework”, some of the points actually seem to point towards legal obligations, such as determining which services may be carried out by PMSCs, which ones can be exported, regulation on PMSCs... But it remains unclear if these points are descriptive or normative, as it does not specify international norms but only points towards the existence of legal mechanisms. In other words, it doesn’t seem to compel States to have specific legal mechanisms, but only to ensure that they exist. Moreover, it only is discussion document, and may not result in anything concrete. But a consensual document remains a step for this group.

(7) Sixth Session: May 22-26, 2017

Foreword

For this last documented session, the summary was only nine pages long, and few other documents were available concerning the States' intervention: the Cercle de Recherche sur les droits et devoirs de la personne humaine; the E.U. statement, several opening remarks from the Chairperson-Rapporteur and UN officials. Here also, the secrecy prevails, with very few explicit mentions of delegations.

Analysis

As stated by the Chairperson-Rapporteur, “the sixth session was devoted to drafting conclusions and recommendations by the intergovernmental working group for submission to the Council”,³⁷⁴. This session being the last, combined to the statement from the Chairperson-Rapporteur, this creates a structural pressure for the parties. Such a pressure which will bear fruit, since the documents later mentions an “emerging consensus” to work on the discussion document. Furthermore, it also mentions that delegations *wanted* to agree, so there was an emerging consensus as well a common desire to present results, which is surprising because the negotiations felt stuck at the fifth session, with several delegations criticizing others towards the lack of progress. In fact, this seemed to have mainly been caused by the Chairperson-Rapporteur, who urged delegations to avoid “divisions among delegations on the question of whether an international regulatory framework would be legally binding or not”,³⁷⁵, a point upon which the delegations agreed, and decided to ‘free’ discussion on whether to recommend the creation of a legally-binding document. These divisions were still apparent at the start of the negotiations, with both groups advocating for, or showing reserve against the idea of a legally-binding document.

³⁷⁴ A/HRC/36/36, p. 4

³⁷⁵ A/HRC/36/36, p. 7.

The question of why the consensus emerged is disclosed within the document. The first will, throughout the negotiations, was to progress through consensus. However, adjacent to the “legally-binding” bone of contention, was the formulation to other initiatives (notably the ICoC and the Montreux Document). The Chairperson-Rapporteur stated that if no consensus was reached, she would the different formulations to a vote. A vote would mean that delegations’ votes would be equal, and negotiation would be transformed. Negotiations are based on mutual consensus, so that each and every party could exchange concessions. The menace of a vote forces thus delegations to find consensus on this issue and can have an influence on other issues as well, such as the legally binding characteristic. Structurally, the delegations advocating against the specific mention of other initiatives would thus be reinforced. The reason why is that will a small set of States can block a consensus, they cannot block a vote in the same way. As a consequence, when modifying the structure of the negotiations, you might pressure them into giving greater concessions. But this is a risky move, as it could be considered as a unilateral move from the mediator, which would in this line of thought, be stepping away from its impartiality, with possible daunting consequences.

Despite the risks of this move, the parties were able to propose a consensus text that was inclusive of the different positions that had been articulated. Small differences of opinion emerged, notably on the fact that the ICoC and the Montreux Document weren’t considered, by India and Algeria as “stakeholders with relevant expertise” and wanted their opinion to be reflected in the document. In itself, however, the text merely recognized the differences of opinion between the parties, as well as different stakeholders which expertise would be necessary to establish a framework. It asked the Human Rights Council to consider the establishment of a new intergovernmental working group for a period of three years to create an international regulatory framework. Simply put, it took six years to progress from the “possibility” of an international framework, to the demand for its elaboration. Moreover,

its nature is still to be debated, as parties couldn't agree. Therefore, this document seems to be more of an agreement that would cover up a fundamental disagreement, as I presume that the debate on the nature of the framework will occur again if the Human Rights Council approves of the creation and mandate of a new intergovernmental working group.

iii. Conclusion: Open-ended negotiations and secrecy

The work program has known significant evolution on the duration of the discussion on the session's summary. While on the first and second sessions, it was discussed during a 3-hour afternoon, the fourth and fifth sessions saw an entire day planned for it. In addition to that, the delegations' anonymization in the document progressed from session to session. Such a correlation could indicate that throughout the years, delegations grew to be more cautious. But a question remains: why the secrecy? What could compel States to be secretive in these specific negotiations?

While analysing State secrecy³⁷⁶ around governmental negotiations, Pozen posits that negotiators have “more freedom to consider and debate different options, to take risks, to change their minds, to rely on experts (...). Counterintuitively, secrecy can (...) lead to more informed regulation”³⁷⁷. Kucik and PELC, in the *British Journal of Political Science*, declare that “when bargaining is conducted in public view, negotiators are vulnerable to influence by powerful domestic interests. These domestic pressures create incentives to adopt more aggressive stances, which significantly reduce the prospects for compromise between parties”³⁷⁸.

³⁷⁶ POZEN, D. E., (2010) “Deep Secrecy”, *Stanford Law Review*, Vol. 62, No. 2, 2010, pp. 257-339.

³⁷⁷ POZEN, D. E., *op. cit.*, p. 277.

³⁷⁸ KUCIK J., PELC, K. J., (2016) “Measuring the Cost of Privacy: A Look at the Distributive Effects of Private Bargaining”, *British Journal of Political Science*, Vol. 46, No. 4, p. 861.

And indeed, as soon as mentions of the United States' delegation decreased, a consensus slowly emerged, faintly in the fourth, but more explicitly in the fifth and sixth session. Although the value of this consensus can be debated upon, as can that of my argument be slightly overstated, the United States may very well have refused to achieve it. As stated before, their cost of no-agreement wasn't that high, seeing as the stakes of these negotiations weren't immense. Moreover, their BATNA was to return to their ICoC and Montreux Document, which partners grew exponentially during the years of the negotiations. In fact, it isn't an overstatement to say that the value of their BATNA grew during the negotiations themselves, which could have served as a way to highlight the Montreux and ICoC initiatives among other goals. Moreover, if PMSCs aren't a trending topic in the public sphere of European countries, the United States have known a different situation. The outsourcing phenomenon, along with PMSCs, came to light with the crimes committed by Blackwater (now known as Academi) employees. Therefore, it might be understandable that the United States might have wanted to progressively avoid showing that they were reticent to an international legally-binding document.

Another point mentioned by Kelc and Kucik is that “bargaining in public grows intractable as a greater number of parties with heterogeneous preferences are allowed to influence the outcome”³⁷⁹. In other words, privacy increases the odds to achieve an agreement. However, they note that “When institutions protect the privacy of bargaining, they make it more likely that those bargains will be reached, but do so at the cost of equity”³⁸⁰, as they explain that it provides opportunities for members to discriminate against one another, and might affect the distribution of the gains in international negotiations. Here, I believe that it was the Chairperson-Rapporteur who created the conditions for a change in the situation. By threatening to turn the

³⁷⁹ KUCIK J., PELC, K. J., *op. cit.*, p. 864.

³⁸⁰ KUCIK J., PELC, K. J., *op. cit.*, p. 865.

negotiations into a vote, on one specific issue at a specific moment, she created the conditions for a consensus to emerge for all the other issues, while the initial basis for the negotiation was to consider the possibility to create an international framework.

Finally, the ICoC and Montreux Document's supporters have often cast a shadow on these negotiations. If during the diagnosis of the situation, they recognized these initiatives, their advocates quickly became obstacles for other parties. By their actions, some have heightened the levels of distrust between the parties, stalled the negotiations, or tried to undermine arguments, notably those in favour of remedy mechanisms for the victims, by relying on the possible future enhancements of these two self-regulating mechanisms. However, both groups have finally convened of a consensus by freezing its most controversial points, and mostly by the intervention of the Chairperson-Rapporteur.

iv. Additional Information

This section provides information that was available but was reworked by myself for clarity purposes. It establishes a list of participants and non-participants for each session, showing which countries decided to enter the negotiations at some point, or to quit the negotiation and sometimes return.

(1) UN vote on the open-ended negotiations, 2010

The countries in favour were Angola, Argentina, Bahrain, Bangladesh, Brazil, Burkina Faso, Cameroon, Chile, China, Cuba, Djibouti, Ecuador, Gabon, Ghana, Guatemala, Jordan, Kyrgyzstan, Libyan Arab Jamahiriya, Malaysia, Mauritania, Mauritius, Mexico, Nigeria, Pakistan, Qatar, Russian Federation, Saudi Arabia, Senegal, Thailand, Uganda, Uruguay, Zambia.

The countries against were Belgium, France, Hungary, Japan, Poland, Republic of Korea, Republic of Moldova, Slovakia, Spain, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

The countries who abstained were the Maldives, Norway and Switzerland.

(2) First Session, 2011

Representatives of the following States members of the United Nations attended the working group's meetings: Afghanistan, Algeria, Angola, Argentina, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Costa Rica, Côte d'Ivoire, Cuba, Czech Republic, Ecuador, Egypt, Equatorial Guinea, Estonia, France, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, India, Iran, Iraq, Israel, Italy, Japan, Jordan, Lebanon, Malaysia, Mexico, Morocco, Netherlands, New-Zealand, Nigeria, Norway, Pakistan, Peru, Poland, Portugal,

Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Slovenia, South Africa, Spain, Sweden, Sudan, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela (Bolivarian Republic of), and Zimbabwe.

Among them, Afghanistan, Algeria, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Canada, Costa Rica, Côte d'Ivoire, Czech Republic, Egypt, Equatorial Guinea, Estonia, Germany, Greece, Haiti, Honduras, India, Iran, Iraq, Israel, Italy, Lebanon, Morocco, Netherlands, New-Zealand, Norway, Peru, Portugal, Romania, Slovenia, South Africa, Sweden, Sudan, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, Venezuela (Bolivarian Republic of), and Zimbabwe were not present in the 2010 vote.

The following intergovernmental organizations were represented at the meetings of the working group: African Union, European Union.

The United Nations Children's Fund (UNICEF) and the World Health Organization (WHO) participated in the session as well.

The following non-governmental organizations (NGOs) in consultative status with the Economic and Social Council were represented: Agence Suisse de Coopération au Développement Economique Nord-Sud, Al-Hakim Foundation, Association of World Citizens, International Commission of Jurists, International Peace Bureau, and the World Federation of Trade Unions.

The following experts 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 (Working Group on the use of mercenaries) attended the session as resource persons: Chairperson-Rapporteur, Mr. José Luis Gómez del Prado (Spain), Mr.

Alexander Nikitin (Russian Federation), Ms. Najat Al-Hajjaji (Libyan Arab Jamahiriya), Ms. Amada Benavides de Pérez (Colombia), and Ms. Faiza Patel (Pakistan). The other invited resource persons were: Ms. Anne-Marie Buzatu, Programme Coordinator, Geneva Centre for the Democratic Control of Armed Forces; Mr. Nils Melzer, Legal Adviser, International Committee of the Red Cross; and Mr. Gerald Pachoud, Special Adviser to Mr. John Ruggie, Special Representative of the Secretary General for Business and Human Rights.

(3) Second Session, 2012

Representatives of the following Member States attended the meetings of the second session: Algeria, Angola, Argentina, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Bulgaria, Canada, Chile, China, Republic of Congo, Cuba, Cyprus, Czech Republic, the Democratic People's Republic of Korea, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Germany, Greece, Guatemala, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Japan, Lesotho, Lithuania, Malaysia, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Philippines, Portugal, Qatar, Republic of Korea, Russian Federation, Rwanda, Saudi Arabia, Senegal, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Turkey, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Venezuela (Bolivarian Republic of). The African Union and the European Union participated in the session as well. The International Committee of the Red Cross also participated.

Representatives of States that participated in the first session but did not return for the second session. States in bold are States that did intervene during the negotiations and were identified in the official summary: Afghanistan, Bosnia and Herzegovina, Brazil, Côte d'Ivoire, Costa Rica, Cyprus, Equatorial Guinea, Ghana, Haiti, Honduras, Iraq, Jordan, Lebanon, New-Zealand, Peru, Poland, Romania, Swaziland,

Thailand, the former Yugoslav Republic of Macedonia, Ukraine, Zimbabwe.

Representatives of States entering the negotiations: the Republic of Congo, the Democratic People's Republic of Korea, Ethiopia, Finland, Indonesia, Ireland, Lesotho, Philippines Lithuania, Senegal, Sri Lanka, Syrian Arab Republic, Tunisia,

The following non-governmental organizations in consultative status with the Economic and Social Council were represented: International Commission of Jurists, International Peace Messenger Cities, International Organisation on the Elimination of Racial Discrimination, International Service for Human Rights, Mani Tese, and the Organisation de la mutualité des volontaires africains.

Pursuant to Human Rights Council resolution 15/26, Faiza Patel, Chairperson-Rapporteur 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 attended the session as a resource person. Other invited resource persons were James Cockayne, Co-Director of the Centre on Global Counterterrorism Cooperation; Patricia Feeney, Executive Director of Rights and Accountability in Development (RAID); Nils Melzer, Research Director of the Competence Centre for Human Rights at the University of Zurich, and Chris Sanderson, chairman of the Security in Complex Environments Group of ADS. Stuart Groves participated as a regional expert.

(4) Third Session, 2014

Representatives of the following States attended the meetings of the third session: Algeria, Angola, Argentina, Austria, Australia, Bolivia (Plurinational State of), Brazil, Burundi, Cambodia, Canada, Chad, Chile, China, Colombia, Cuba, the Czech Republic, Ecuador, Egypt, Ethiopia, Finland, France, Germany, Greece, Guatemala, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Japan,

Jordan, Luxembourg, Libya, Madagascar, Mali, Mexico, Morocco, Mozambique, Namibia, Niger, Pakistan, the Republic of Korea, the Russian Federation, Saudi Arabia, Senegal, South Africa, South Sudan, Spain, Sri Lanka, Sudan, Switzerland, Syrian Arab Republic, Thailand, Tunisia, United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela (Bolivarian Republic of).

Representatives of States that participated in the second session but did not return for the third session: Azerbaijan, Bahrain, Bangladesh, Belgium, Bulgaria, Cyprus, the Democratic People's Republic of Korea, Estonia, Lesotho, Lithuania, Malaysia, Netherlands, Nigeria, Norway, Philippines, Portugal, Qatar, Slovenia, Swaziland, Sweden, Turkey, Uruguay.

Representatives of States re-entering the negotiations after not participating in the second session: Iraq, Jordan, Thailand.

Representatives of States entering the negotiations: Bolivia (Plurinational State of), Cambodia, Chad, Colombia, Luxembourg, Libya, Madagascar, Mali, Mozambique, Namibia, Niger, Rwanda, South Sudan, United Arab Emirates.

The African Union, the European Union and the United Nations Department for Safety and Security (UNDSS) also took participated in the meetings.

The following non-governmental organizations were represented: The Coalition for the Control of Private Military and Security Companies (Control PMSCs), the International Commission of Jurists and the International Fellowship for Reconciliation.

The following experts were invited to give presentations and participate as resource persons: Patricia Arias, Chairperson-Rapporteur 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 (Working Group on the use of mercenaries); Patricia

Feeney, Rights and Accountability in Development; Sabelo Gumedze, South Africa Private Security Industry Regulatory Authority; Christopher Kinsey, King's College London; Sorch MacLeod, University of Sheffield; Mehari Taddele Maru; and Natalino Ronzitti, LUISS University. The International Committee of the Red Cross (ICRC) and the Centre for the Democratic Control of Armed Forces were also invited to give presentations and participate in the session.

(5) Fourth Session, 2015

Representatives of the following States attended the meetings of the fourth session: Algeria, Argentina, Australia, Bangladesh, Belgium, Brazil, Colombia, China, Cuba, Egypt, France, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Ireland, Italy, Japan, Jordan, Kazakhstan, Latvia, Libya, Luxembourg, Mexico, Morocco, Namibia, Norway, Pakistan, Panama, Paraguay, the Republic of Korea, Russian Federation, Saudi Arabia, Senegal, South Africa, Spain, Sri Lanka, Sudan, Switzerland, Syrian Arab Republic, Thailand, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam.

Representatives of States that participated in the former sessions but did not return for the fourth session: Afghanistan, Azerbaijan, Bahrain, Bosnia and Herzegovina, Bulgaria, Côte d'Ivoire, Costa Rica, Cyprus, the Democratic People's Republic of Korea, Equatorial Guinea, Estonia, the former Yugoslav Republic of Macedonia, Ghana, Haiti, Honduras, Iraq, Lebanon Lesotho, Lithuania, Malaysia, Netherlands, New-Zealand, Nigeria, Peru, Philippines, Poland, Portugal, Qatar, Romania, Slovenia, Swaziland, Sweden, Turkey, Ukraine, Uruguay, Zimbabwe.

Representatives of States re-entering the negotiations after not participating in the former session: Belgium, Norway.

Representatives of States entering the negotiations: Kazakhstan, Latvia, Viet Nam, Panama, Paraguay.

The following international and intergovernmental organizations were present: World Trade Organization, African Union, European Union, the International Committee of the Red Cross.

The following non-governmental organizations and special procedures of the Human Rights Council were present: 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, American Association of Jurists, Colombian Commission of Jurists, Centre for Socio-Economic Development.

(6) Fifth Session, 2016

Representatives of the following States attended the meetings of the fifth session: Algeria, Argentina, Australia, Austria, Azerbaijan, Belgium, Brazil, Colombia, China, Cuba, Egypt, Georgia, Greece, Guatemala, Honduras, India, Iran (Islamic Republic of), Iraq, Ireland, Japan, Kazakhstan, Kuwait, Mexico, Morocco, Nicaragua, Norway, Pakistan, Peru, the Philippines, the Russian Federation, Saudi Arabia, Slovakia, South Africa, Spain, Switzerland, the Syrian Arab Republic, Tajikistan, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

Representatives of States that participated in the former sessions but did not return for the fifth session: Afghanistan, Bahrain, Bosnia and Herzegovina, Bulgaria, Côte d'Ivoire, Costa Rica, Cyprus, the Democratic People's Republic of Korea, Equatorial Guinea, Estonia, the former Yugoslav Republic of Macedonia, Ghana, Haiti, Lebanon, Lesotho, Lithuania, Malaysia, Netherlands, New-Zealand, Nigeria,

Poland, Portugal, Qatar, Romania, Slovenia, Swaziland, Sweden, Turkey, Ukraine, Uruguay, Zimbabwe.

Representatives of States re-entering the negotiations after not participating in the former sessions: Austria, Honduras, Iraq, Peru, the Philippines, Slovakia

Representatives of States entering the negotiations: Tajikistan, Kuwait, Nicaragua,

Representatives of the State of Palestine, the European Union and the United Nations Educational, Scientific and Cultural Organization also attended the meetings. Furthermore, members of Cercle de recherche sur les droits et les devoirs de la personne humaine and the European Law Students' Association participated in the meetings.

The following experts were invited to give presentations and to participate as resource persons of the fifth session: member 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, Elżbieta Karska; Legal Officer at the International Committee of the Red Cross (ICRC), Helen Obregón Gieseken; Programme Manager at the Geneva Centre for the Democratic Control of Armed Forces (DCAF), Alice McGrathCrégut; Programme Manager at DCAF, Jean-Michel Rousseau; interim Executive Director of the International Code of Conduct Association (ICoCA), Anne-Marie Buzatu; Adviser on business and human rights at OHCHR, Lene Wendland; Member of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Surya Deva; Senior Legal Adviser at the International Commission of Jurists, Carlos Lopez; President of Lumière synergie pour le développement (Senegal), Aly Marie Sagne; Coordinator of the Somalia Initiative at the African Centre for the Constructive Resolution of Disputes (ACCORD), Kwezi Mngqibisa; researcher at the University of Basel,

Anna Petrig; and Director at Security in Complex Environments Group (SCEG), Paul Gibson.

(7) Sixth Session, 2017

Representatives of the following States attended the meetings of the sixth session: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Colombia, Croatia, Cuba, Ecuador, Egypt, Estonia, Finland, France, Germany, Guatemala, India, Iran (Islamic Republic of), Iraq, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Malaysia, Morocco, Panama, Peru, Qatar, the Russian Federation, Saudi Arabia, South Africa, Spain, Switzerland, the Syrian Arab Republic, Tunisia, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Venezuela (Bolivarian Republic of).

Representatives of States that participated in the former sessions but did not return for the sixth session: Afghanistan, Bahrain, Bosnia and Herzegovina, Bulgaria, Côte d'Ivoire, Costa Rica, Cyprus, the Democratic People's Republic of Korea, Equatorial Guinea, Estonia, the former Yugoslav Republic of Macedonia, Ghana, Haiti, Honduras, Lebanon, Lesotho, Lithuania, Netherlands, New-Zealand, Nigeria, the Philippines, Poland, Portugal, Romania, Slovenia, Slovakia, Swaziland, Sweden, Turkey, Uruguay, Zimbabwe.

Representatives of States re-entering the negotiations after not participating in the former sessions: Malaysia, Qatar, Ukraine.

Representatives of States entering the negotiations: Jamaica.

Representatives of the State of Palestine, the European Union and the International Committee of the Red Cross were also present. Furthermore, representatives of Aspida Risk Management, the Association of World Citizens, Cercle de recherche sur les droits et les devoirs de la personne humaine, the Geneva Centre for the Democratic

Control of Armed Forces, Geneva for Human Rights, the International Commission of Jurists and United Villages were present.

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