

Soldiers for Hire: Contextualising the Private Military's Legal Conundrums

Aman Sharma¹

Abstract

The industry surrounding private military and security companies (PMSCs) is a conflict-driven industry. It often operates in regions with a significant security vacuum and a lack of an efficient legal and judicial system. This underscores the importance of effective regulatory oversight that may be international, national, or an amalgamation of both. Currently, the framing and subsequent enforcement of regulations continue to be a challenge due to divergent approaches among various stakeholders. The research paper focuses on the need to develop a consensus and bring accountability to the industry due to its far-reaching consequences. The research was based on analysing the existing regulations and using primary as well as secondary sources to identify legal gaps that impede the process of ensuring accountability from the PMSCs. Furthermore, the paper contextualised the legal ambiguities by taking up case studies of prominent PMSCs that have shaped current regulations. Apart from identifying the legal ambiguities, the research also highlighted the current scope of regulations and remedies in practice. It emphasised the importance of bringing good practises together and adding new dimensions to the definition of a mercenary by promoting better training procedures, effective and detailed vetting processes, and registering both PMSCs and individual contractors.

Keywords: Private Military and Security Companies, Accountability, Extraterritorial Jurisdiction, Human Rights, DynCorp, Wagner Group, Blackwater, Montreux Document, ICoC

Introduction

The end of the 20th century saw a halt, albeit temporary, in rapid militarization around the globe. The median share of GDP allotted to military expenditure began to fall after the end of the Cold War. As a result, budgetary cuts and military downsizing policies flooded the market with military hardware and human resources. Furthermore, neoliberal ideals motivated states to analyse the costs and benefits of the outsourcing model. Outsourcing of public services to the private sector was promoted, and security too became part of the phenomenon. The advent of neoliberal principles in the 1990s and the availability of skilled soldiers led to the

¹ Aman Sharma is a student of MA Political Science from IGNOU.

corporatisation of the traditional mercenary industry. With security being viewed as a commodity of the service sector, the service providers came to be known as Private Military and Security Companies (PMSCs).

Role of PMSCs in International Conflict

PMSCs have seen significant growth since their evolution, with diversification in terms of both services and geography. Various conflicts around the globe have seen the use of PMSCs in active as well as passive roles, such as combat operations, strategic planning, intelligence collection, operational and logistical support, training, procurement, and maintenance. The combat teams of PMSCs are smaller in size, making them quicker to deploy, and the simplicity of their workflow allows for faster decision-making as compared to their conventional military counterparts. Due to the absence of political and bureaucratic intervention, the PMSCs are more adaptable to the conflict theatre as well. For instance, a curious example of the efficiency of PMSCs is Executive Outcomes (EO) and Specialised Tasks, Training, Equipment, and Protection (STTEP), which operated in Africa under Eben Barlow. They used the strategy of "relentless pursuit" with quick mounted and dismounted manoeuvres and overwhelming firepower (Barlow, 2011). The conventional military was then tasked with consolidating the gains made by the shock troops and holding on to the area. Both STTEP and EO proved highly efficient in their operations but always faced fierce criticism, primarily due to their association with mining companies and the general anti-mercenary sentiments among many African nations. Both EO and STTEP were forced to withdraw from conflict because of international pressure and African conventions that were averse to contracting mercenaries. However, many African countries have shown a renewed interest in PMSCs and are exploring different avenues available in the marketplace.

This efficiency and availability of services of PMSCs is an asset for countries, particularly with weaker state military and institutions but powerful non-state actors such as rebel militias, terrorist organisations, drug cartels, and crime syndicates. Thus, they augment the state's capacity for security operations while reducing the requirement for the deployment of state military personnel. PMSC contractors are willing to serve for a longer period of time and have proved cheaper than the average expenditure incurred by the state for conventional soldiers. Contractors are also able to absorb the number of military casualties in comparison to the state, which is answerable to the people for the deaths of its military personnel. As Peter W. Singer noted for the Iraq war, (Singer, 2007)

"There was no outcry whenever contractors were called up and deployed, or even killed. If the gradual death toll among American troops threatened to slowly wear down public support, contractor casualties were not counted in official death tolls and had no impact on these ratings. These figures mean that the private military industry has suffered more losses in Iraq than the rest of the coalition of allied nations combined. The losses are also far more than any single U.S. Army division has experienced. "

Thus, PMSCs provide a low-cost solution to an otherwise complex security demand, and with an increasing number of intrastate and interstate conflicts, the demand for PMSCs is likely to grow. The expansion of PMSCs on a global level has also demonstrated a need for better regulations around the industry. These demands were made because an increasing number of companies were embroiled in several controversies that ranged from human rights violations to corruption in the conflict zone.

Legal Provisions Around PMSCs

Since the early 20th century, there have been laws that revolved around the use of mercenaries. These laws evolved over time, but remained insufficient to address the post-cold war version of so-called mercenaries. The ever-growing number of PMSCs, each with different functions, added several layers of complexity that became very difficult to address by generic international framework. These complexities further make it difficult to assign a particular definition to these entities. While there are entities that are legitimate business organisations that can be contracted for security services, there are also entities that work directly under the influence of the state to work as proxies in a conflict zone. If the former is termed as PMSC, the latter leans more towards the definition of mercenary. This spectrum, with its two ends as PMSCs and Mercenaries, creates many conceptual ambiguities, making it difficult to prosecute the offenders.

Deploying mercenaries began to be considered illegal in the 19th century, but only in the context of the impartiality of neutral nations. According to Article 4 of The Hague Conventions (1907), a neutral state had the obligation not to allow the formation of armed expeditions or to permit recruiting to be done on its territory. However, the convention did not mention the obligation to prevent people from crossing their borders to enlist in the armed forces of a belligerent. Also, it did not impose any prohibition on the use of mercenaries by warring nations. Similarly, the Third Geneva Convention (1949) also did not address the role of

mercenaries directly. However, it provided them with prisoner of war status protections under Article 4, but only if the individual, among other conditions, is accompanying the armed force of a party to the conflict. The first attempt to define the term "mercenaries" was undertaken by the Organisation of African Unity (OAU). This led to the constitution of the Ad Hoc Committee for Expulsions of Mercenaries (1967) and the Council of Ministers' committee of legal experts (1971) under the aegis of the OAU. The committees presented their reports to the OAU's council of ministers in 1972, which were later adopted as the Convention for the Elimination of Mercenarism in Africa at Libreville in 1977. Article 1 of the convention defines the term "mercenary" with a negative connotation. It stated that the objectives of a mercenary could include overthrowing a government of a member state of the OAU or obstructing the activities of a liberation movement. The article, however, did not mention any element of private gain or monetary compensation received by a mercenary for his activities. Initially, when in 1976, the Nigerian delegation introduced a proposal for an article to be inserted in Protocol 1 on International Armed Conflicts, no consensus could be reached. The prime reason for the impasse was the divergence of approach between the third world and the western states. The former being the ones that have to endure the activities of mercenaries and the latter being the ones supplying the manpower (France, 1992). Following further consideration and debate on the matter, the first additional protocol to the Geneva Convention (1977) was adopted and the legal obligations of mercenaries were defined.

Article 47(1) of the protocol prohibited the mercenaries from qualifying as lawful combatants or obtaining prisoner of war status. The article further laid out various conditions that a belligerent has to meet to be classified as a mercenary and be denied POW status. The conditions are of critical importance because they aim to differentiate between a mercenary and a volunteer. A person enlisted into service on a permanent or long-lasting basis in a foreign army as a result of an individual enlistment or through arrangements by their national authority is excluded from the category of mercenaries and can thus claim POW status. Some notable examples of such arrangements are the French Foreign Legion, the International Legion for the Defence of Ukraine (UKR Legion), and the now defunct MAVNI programme of the USA. Another element to be classified as a mercenary is the act of direct participation in hostilities. This leads to the exclusion of individuals classified as foreign advisers and military technicians as long as they do not participate in hostilities. One more important element is the incentive that motivates an individual to participate in a conflict. A mercenary is a person that is participating in hostilities for a desire of private gain and is offered material or monetary

compensation in lieu of his combat services that is generally higher than similar ranks in the armed forces of the allied party to the conflict (France, 1992). This element was added to distinguish mercenaries from individuals that enlist solely for morals and ideals and get paid in accordance with the usual pay scale of other soldiers.

Apart from the Geneva conventions and other related frameworks, two major international initiatives, complementary to each other, were conceived. These were the Montreux document (2008) and the International Code of Conduct (2010), which were aimed at guiding the conduct of private military contractors. Currently, 58 states and 3 international organisations are signatories to the Montreux document, while the International Code of Conduct Association has hundreds of PMSCs as its members (Federal Department of Foreign Affairs of Switzerland, 2022).

Montreux Document (2008)

Although not legally binding, the Montreux documents contain a compilation of relevant international legal obligations and good practises to be followed by all the stakeholders involved in the industry. The Montreux document, conceptualised by the International Committee of the Red Cross and the Swiss government, outlines and addresses the practical aspects associated with contracting PMSCs. These practises can be implemented during an armed conflict, a post-conflict scenario, or during peacetime as well. The Montreux document is mainly divided into two sections. The first clarifies states' existing obligations under International Humanitarian Law while employing the services of PMSCs. It further divides the states into three categories: contracting, territorial, and home states, to define their obligations according to their respective assigned category. It goes on to list obligations such as protecting human rights, conducting investigations in cases of violations, and providing remedies to victims. The second section of the document consists of good practises for states related to PMSC regulation. It includes guidance on procedures, systems, and processes for contracting, licensing, and approving PMSCs to operate in a state. The guidance also includes recommendations on establishing effective monitoring mechanisms (The Montreux Document).

International Code of Conduct (2013)

After the creation of the Montreux document, PMSC too needed to be involved in the process. This led to another major initiative known as the International Code of Conduct (ICoC) for private security service providers. It is a multi-stakeholder led initiative, including the PMSCs, states, human rights organisations, academicians, and industry clients. Its aim is to translate the existing rules into principles for the PMSCs to implement during their operations. It outlines rules and principles regarding human rights, use of force, detention, and the prohibition of torture and human trafficking. It also prescribes policies for the management, such as vetting, training, weapons handling, and grievance procedures. The ICoC further requires the PMSCs to comply with these corporate good practises in their contracts for personnel, subcontractors, and clients (ICOCA, n.d.).

Case Studies

As stated by Max Weber, the concept of monopoly of violence meant a legitimate state had the right to authorise the use of force. Although historically true, the concept has been facing challenges in contemporary times with the emergence of several non-state actors. The erosion of state sovereignty due to globalisation and the outbreak of ethnic conflicts and proxy wars around the globe has led to the weakening of the idea of the state's monopoly over violence. The vacuum thus created was filled by PMSCs in a varied number of ways depending on the concerned scenarios. Although there have been several initiatives to regulate the industry, as mentioned above, the issue is the lack of convergence between international and national law on the one hand, and government regulation and industry self-regulation on the other.

There are three case studies mentioned below that illustrate different historical scenarios that developed in private military contractors' space across different parts of the world. Through the case studies, the paper attempts to contextualise the role of PMSCs in different types of conflict zones and the legal aspects (both national and transnational) associated with their role.

Study 1: Blackwater in Iraq and its role as a protective service provider for high-value individuals as well as logistics.

Study 2: Wagner in Africa as an extended arm of Russian influence in the continent.

Study 3: DynCorp in Bosnia for Law Enforcement Duties in Collaboration with the UN.

1. Blackwater

Following the invasion of Iraq in 2003, the number of military personnel deployed in the country decreased, while the number of for-hire personnel increased to around 1,60,000 by 2007. Multiple companies operating in the region hired Blackwater and other similar groups, nearing 181 in number, for jobs such as securing logistic routes or escorting highly valued individuals. Since the companies were for-profit and not aligned with the strategic objectives of the US, the contractors often carried out tasks that were to the detriment of the "Winning Hearts and Minds" strategy of the US Military (Singer, 2007).

After the Vietnam War, military leaders in the US wanted a policy to preserve the ties between the national foreign policy objectives and the will of the population at home. This gave birth to the 'Abrams Doctrine'. The doctrine's objective was to solve the problem of the mobilisation of reserve forces, which was missing during the Vietnam War. This type of mobilisation was intended to link the reserve forces to the national will for war, allowing the military to be held accountable to the people.

During the 2003 invasion of Iraq, the problem of insufficient forces needed a full-scale mobilisation of the national guard and reserves at home. This could have prompted a massive public outcry against the invasion. Employing the private military industry to fill this gap was the answer to many of the problems faced by the leaders in the executive branch. The PMSCs offered the role of reserve forces and carried out secondary duties without any political blowback at home. PMSC casualties were seldom part of the news cycle in the US and were mostly treated as expendable.

But an unintended consequence was the misalignment of objectives between the contractors and the conventional military. The outsourcing business slowly turned the logistics and operations into a for-profit endeavour with the establishment of ever expanding "green zones" and lavish military bases. Bigger bases yielded more money for the stockholders but also disconnected the forces from the local populace. A dynamic and active supply chain of resources to run these bases meant more and more convoys plying to and fro on the Iraqi roads. This made the contractors one of the most hated aspects of the USA's military occupation of Iraq.

Blackwater in particular, had a notorious reputation among the Iraqi population due to their highly visible role in escorting American officials. The firm was often accused of incidents of unruly behaviour. One such incident of alleged mistaken identity escalated to the infamous Nisour Square massacre in 2007 at the hands of Blackwater employees during escort duty. Prior to this major incident, there were numerous reported instances of abuse and unprofessional behaviour by contractors on Iraqi streets as well as in the detention centres. It was reported that 100% of the translators and up to 50% of the interrogators at Abu Ghraib Prison were private contractors from the firms Titan and CACI. The US Army found that contractors were involved in 36% of the proven abuse incidents from 2003–2004. However, while US Army soldiers involved in the Abu Ghraib abuse were court martialled, contractors and their firms still haven't been charged, prosecuted, or punished (Singer, 2004).

The agreement under which the contractors were working in Iraq explicitly mentioned at that time that the Iraqi government didn't have jurisdiction over the contractors. This made it impossible for the Iraqi government to prosecute Blackwater employees. Under the Military Extraterritorial Jurisdiction Act (MEJA), 2000, the US federal government was granted the authority to prosecute private military contractors for overseas crime. But since the employees were under contract by the state department and not the department of defence, it was unclear whether the law was applicable to them. Regardless, the Department of Justice pursued the case, and the contractors were found guilty of manslaughter in 2014 (US Department of Justice, 2019). After the Nisour Square shootings, the House of Representatives passed the MEJA Expansion and Enforcement Act of 2007 ("MEJA Expansion Act"), which would have extended the reach of MEJA to all contractors "in an area, or in close proximity to an area (as designated by the Department of Defence), where the Armed Forces are conducting a contingency operation." But the Senate failed to act on the bill, which led to its failure to become law.

But implementing MEJA in a conflict zone also has several issues. Peter W. Singer stated (Singer, 2007),

"The reality is that no US Attorney likes to waste limited budgets on such messy, complex cases 9,000 miles outside their district, even if they were fortunate enough to have the evidence at hand"

Currently, alongside MEJA, the conduct of contractors is also guided by the Uniform Code of Military Justice (UCMJ), whose jurisdiction was extended to military contractors in 2007. However, the UCMJ trial can almost certainly be challenged on constitutional grounds, and its effective implementation will be dependent on how it is interpreted in different scenarios and the government's intent to prosecute.

2. Wagner Group

According to Russian law, private military contractors are illegal and unconstitutional. After a series of debates in the Duma, the state reaffirmed the illegality in March 2018. But there are exceptions, such as Rosneft and Gazprom, the Russian state-controlled oil and gas companies, which are allowed to employ private security guards to guard their assets and are authorised to detain or kill suspects and intruders. Despite the ban on mercenary activities mentioned in Chapter 34, Article 359 of the Criminal Code of the Russian Federation, many private military contractors have flourished over time, like the RSB-Group and Moran Security Group, which are more comparable to their western counterparts. These groups do maintain their connections with the state but mostly operate on a commercial basis.

Expressing his support for PMSCs, Putin said that such firms are an instrument for realising national interests without direct participation of the state (Sysoev, 2012). There have been multiple attempts and proposals in the Russian Duma to legalise PMSCs, but none has made progress. This lack of legal status has an important upside to it. It serves as a convenient tool for the Russian federation for plausible deniability against any covert or risky actions of the groups. Illegality also serves the purpose of effective control over the activities of the groups, as disloyalty to the power centre would result in legal action. The market restrictions caused due to illegality also allow only the favourites to accrue profits from the industry and allow prosecution of outsiders. The incident involving the arrest and subsequent prosecution of mercenaries of Slavonic Corps in 2014 could be an example of one such case.

Russian PMSC activity picked up during and after the Crimean crisis, with its subsequent global expansion into Eastern Europe, the Middle East, and Africa. The group that took prominence was the Wagner Group, which first went into action during Russia's annexation of Crimea. The "little green men" that occupied the key strategic locations in Crimea in 2014 had some Wagner elements, along with Russian SOF and Spetsnaz GRU units, within them. They later moved on to support the pro-Russian separatist groups in the Donbas region.

There have been several investigations that allege that Russia's intelligence agency, the GRU, secretly funds and oversees the operation of the Wagner group, with its founder being Dmitri Utkin, a former Russian army officer. The group has also been linked to Yevgeny Prigozhin, a Russian oligarch very close to Putin. Prigozhin is also known for financing the Internet Research Agency (IRA), a troll farm involved in spreading disinformation campaigns on social media (U.S. Department of the Treasury, 2020). Several IRA-related troll accounts have been taken down by Meta and Twitter for suspicious activities around the globe, including Africa (Gleicher, 2020). In the months leading up to the 2021 Coup in Mali, a coordinated network of Facebook pages promoted pro-Russian and anti-French narratives to mobilise public support for the deployment of the Wagner Group. Similarly, before the January, 2022, coup in Burkina Faso, a network of Facebook pages was propped up to advocate for a wider revolution in the Sahel region and project Russia as a crucial partner and an alternative to France.

The group and its associated operations serve as a major foreign policy tool for the Russian state with the aim of creating African dependencies on Moscow's security apparatus to access African resources. They operate through a web of shell companies, carrying out a broad spectrum of Kremlin-backed operations across the Middle East and Africa. In return for COIN and security operations, Russia seeks payments in the form of concessions for natural resources, substantial commercial contracts, or access to strategic locations, such as airbases or ports. For instance, Wagner deployed its operatives in Sudan to quell local uprisings against Omar al-Bashir's government. As payment, a company by the name Meroe Gold was granted exclusive mining rights for gold in Sudan, which is a subsidiary of M-Invest, which itself is a subsidiary of M-Finance, founded by Prigozhin. Bashir was also in talks with Moscow to set up a naval base on the eastern coast of Sudan in 2019, a proposal still being considered by Khartoum (Fasanotti, 2022).

In 2015, the group started operating in Syria, alongside the pro-government forces in direct combat as well as defensive operations to secure oilfields. In Libya, the group has been operating since 2016, in support of forces loyal to General Khalifa Haftar. Apart from active combat services, the Wagner Group is also involved in securing mining operations of precious minerals like gold, diamonds, and uranium. The group was invited to the Central African Republic and Sudan to guard diamond and gold mines, respectively. The US treasury department has also alleged that the presence of the group in Africa is a cover to provide protection to Prigozhin's mining companies, such as M Invest and Lobaye Invest. The group

was invited to participate in the offensive against Islamic militant groups in West Africa, which ultimately led to the pull-out of French forces from Mali in 2021.

Wagner's expansion into Africa and the Middle East provides much-needed space for Moscow to pursue a dynamic and aggressive foreign policy in order to counter the influence of its western counterparts. The Kremlin is neither a signatory to the Montreux Document nor a member of the International Code for Conduct of Private Security Providers' Association. Unlike most other PMSCs, Wagner isn't a true commercial entity operating in a global marketplace and is not a legally registered entity in Russia. An officially designated operational structure does not exist and the key people, state or non-state, financing and operating the entity do not admit to their roles. Apart from nationalism, the salaries, substantially higher than the average Russian wage, remain a huge incentive for fighters to join the group.

3. DynCorp International

The success of the outsourcing model and the associated legal and regulatory frameworks put into effect have resulted in the diversification of the industry and the creation of several local PMSCs in different countries. This also led to several terminations, mergers, and acquisitions of PMSCs to increase their scope and scale of operations. For instance, Amentum, a former AECOM management service unit, was acquired by private equity firms American Securities and Lindsay Goldberg for \$2.4 billion in February 2020. Eight months later, Amentum completed the acquisition of another company called DynCorp International, resulting in a net revenue of at least \$6 billion and approximately 34,000 employees in nearly 30 countries (Wilkens, 2020). DynCorp, founded in 1946, was one of the largest government services firms in the US. Apart from providing security, it had bagged contracts for air operations, both combat and non-combat, aviation maintenance, contingency operation support, intelligence gathering, and training. It had provided its services to the US military in multiple theatres, including Iraq, Angola, Somalia, Bolivia, Colombia, Kosovo, and Kuwait.

The company was a significant player in the industry, and since its inception, it had bagged several contracts in almost every financial year. It was even responsible for providing security to former Afghan President Hamid Karzai's presidential guard and had trained most of the police forces in Afghanistan. The US Congress constituted an auditing agency named the Special Inspector General for Afghanistan to oversee government spending during the US presence in the region. According to a SIGAR report in the year 2014, DynCorp received a

total of \$2.8 billion in contracts, approximately 69% of the State Department's contracts for reconstruction work in Afghanistan (Siegel, 2017). The majority of contracts were earmarked for governance and rule of law activities like training the Afghan National Police, establishing the related infrastructure, and fielding police equipment and vehicles. As a private entity, the company has all the rights to compete for government contracts, but a well-documented history of scandals makes it a peculiar case in point.

A diplomatic cable leaked by WikiLeaks documented a conversation between the former Minister of Interior (MOI) Hanif Atmar and Assistant US Ambassador, Joseph A. Mussomeli, in 2009. The conversation was an attempt by the MOI to suppress news of DynCorp contractors hiring underage 'Dancing Boys', an Afghan tradition named "Bacha Bazi," which borders on child abuse (Boone, 2010). Although DynCorp terminated the accused employees and repatriated them back, no criminal action was taken against them in the US. This wasn't the first instance where contractors were involved in sex abuse-related crimes. The most prominent case was the Bosnia Scandal, which was discovered in the late 1990s.

In 1995, a UN mission was established in Bosnia and Herzegovina following the signing of the Dayton Accords. As a result, an international police task force was setup in the country to train and officiate law enforcement duties. When the sex trafficking scandal was unearthed in Bosnia, it was alleged that several IPTF officials and US military contractors from DynCorp were involved in the trafficking of women and collaborated with the international syndicate. Many victims identified IPTF and DynCorp employees as being involved in sexual abuse by visiting brothels, purchasing slaves, and reselling them.

DynCorp issued a statement in January 2002 stating that

"The corporation took prompt action to understand and deal with the situation, including the termination of contracts of individuals found to be involved in improper behaviour" (Human Rights Watch, 2002).

The contracts between the UN and the countries providing police officers state that member states, not local courts, are expected to initiate appropriate disciplinary or legal (civil or penal) action. The employees involved, including eight Americans, were repatriated back to their home countries. While NATO and other concerned authorities refused to waive the immunity of the contractors, the practise of quick repatriation severely hampered local investigations.

The U.S. Department of Defence confirmed to Human Rights Watch that no cases had been prosecuted under the Military Extraterritorial Jurisdiction Act as of October 2002 due to the failure to issue regulations implementing the law. DynCorp also confirmed that none of its own contractors faced prosecution:

"The company at all times cooperated with the authorities in investigating these matters...To our knowledge, no criminal action was instituted by either the U.S. Army or authorities in either country with respect to the activities of the individuals" (Human Rights Watch, 2002).

Ben Johnston, a former employee at DynCorp, stated under oath that DynCorp employees continued to purchase women. He also alleged that although some employees faced repatriation, there was nothing said at work about anything they couldn't do, so it just continued (Human Rights Watch, 2002).

Contemporary Legal Gaps in the Context of PMSCs Analysed in the Case Studies

PMSCs have the potential to severely alter the dynamics of a conflict. On one hand, they can be effective in combating a threat that grows beyond a state's capacity, as seen in the case of EO and then STTEP. On the other hand, it can give rise to cases of serious violations of rights in an unregulated security environment, as seen in the cases of Blackwater, Wagner, and DynCorp. Although there are several international conventions and regulations surrounding PMSCs, their non-binding and ambiguous nature give rise to legal vacuums. The absence of a comprehensive framework and an effective oversight body allows PMSCs to gain a monopoly over the security situation in a conflict region. As evident in the case studies, over the years, there have been attempts to exploit these gaps for the vested interests of the parties involved, while attempts to address these gaps have also been taken up at both national and international level.

But it is important to note that the transnational nature of PMSCs requires a multi-government and multi-stakeholder approach to develop a consensus. Both the Montreux document and the ICoC were aimed at solving this issue. The main objectives of the Montreux document were to encourage states to conduct effective due diligence while contacting PMSCs and further encourage PMSCs to conduct proper vetting of the individual contractors. The International Code of Conduct Association (ICoCA), an association of PMSCs, established an International

Code of Conduct (ICoC) to ensure that signatories respect IHL. However, the non-binding nature of both of these documents results in the contractors' professional debarment rather than conviction in court. The key challenge here is the lack of national will and capacity to implement existing norms at the national level. This is because the nature and work of the PMSCs often benefits the larger geopolitical interests of the governments employing them. This, according to the United Nations working group on mercenaries, becomes an impediment for effective implementation of multilateral treaties (OHCHR, 2018). For instance, the UN international convention against the recruitment, use, financing, and training of mercenaries has not been signed by any of the five permanent UN security council members, i.e., the United States, France, Russia, China, and the United Kingdom.

In the 21st century, traditional mercenaries have become less and less common. Rather than being involved in direct combat operations, most PMSCs nowadays have transformed into security companies involved mainly in defensive and support roles. Hence, there is a need to develop consistent terminologies and definitions for different elements involved in the PMSC sector. The overly restrictive existing definitions have led to few possibilities for prosecuting perpetrators involved in human rights violations and other crimes in a conflict zone. These gaps that have emerged during the contemporary conflicts make it imperative to distinguish between contractors, volunteers, foreign fighters, and terrorists. These actors often have overlapping objectives and motivations for taking part in combat. Hence, the definition should go beyond the scope of human rights violations and armed conflicts. The role of mercenaries and PMSC contractors in criminal activities such as smuggling weapons and drugs, human trafficking, and illegal mining needs to be analysed and taken into consideration to develop a more nuanced definition.

In the early 1990s and 2000s, the human rights violations involving Blackwater and DynCorp sparked a heated debate about closing regulatory gaps and punishing perpetrators of violence against civilians. Following that, several domestic and international policy and legal challenges were addressed. As a result, currently, accountability for PMSCs is available through administrative sanctions, but there is still a lack of emphasis on penal actions and enforceable remedies for victims. A consensus must be reached in order to hold the involved PMSC liable for compensation to the victim of abuse. Remedies in line with the Alien Torture Statute (ATS) of the US can be developed to prosecute contractors in their home state. ATS allows foreign nationals to seek remedies in US courts for human rights violations committed outside the

United States, but there needs to be a sufficient connection to the country. ATS was used in the case of Abu Ghraib prison abuse as well as in the lawsuit *Al Shimari, et al. v. CACI*, currently active in US court (*Al Shimari, et al. v. CACI*, 2008).

States should ensure that their domestic criminal laws extend beyond their borders to prosecute their nationals and locally-based companies for serious crimes abroad. But this is only possible if other agreements and contractual obligations do not impede the judicial process. CACI, in 2019, argued that it should be protected under the legal doctrine of "Derivative Sovereign Immunity" during the trials of the Abu Ghraib Prison case but was denied any respite by the courts (*Al Shimari, et al. v. CACI*, 2019). Also, in the case of Blackwater, MEJA was extended to prosecute contractors, and the Justice Department was successful in convictions (US Department of Justice, 2008). But on the other hand, in the absence of an efficient judicial system in the area of operation, extraterritorial investigations are challenging. These challenges then result in cases ending up in plea agreements rather than going to trials, which is what happened in *AL-Quraishi v. L-3*, the Abu Ghraib prison case (*Al-Quraishi, et al. v. Nakhla and L-3 Services*, 2012). Assigning this responsibility of oversight to the national military with which the contractors are embedded can solve this issue to some extent.

There are also discrepancies among different countries over regulations on the use of force and firearms by PMSCs. In Nigeria, STTEP was able to bypass sanctions on the country to acquire weapons and armoured vehicles. This is because there are no distinct provisions on illegal acquisition of weapons and on illicit trafficking in arms by PMSCs. The PMSCs should adhere to the international standards related to arms control licensing procedures, arms transfer, acquisition of weapons, and trafficking in arms. It is essential to establish some standard procedures for acquiring, exporting, importing, and possessing weapons by PMSCs.

Another impediment that still plagues PMSC regulations is ensuring effective compliance from several countries if they aim to use PMSCs as extended arms of state influence, as in the case of Russia and China. But unlike Russia, China allows the operation of security companies in an indirect role while banning them from direct combat roles. Among the 7000 security companies active in China, the most significant player in the sector is Frontier Service Group (FSB). A company founded by Erik Prince, the founder of Blackwater, is currently undertaking several major projects linked to the Belt and Road Initiative of China. Interestingly, FSB was founded in the year 2014 as a company that provides logistical, aviation, and security services, which coincided with the Chinese push for BRI. While Prince resigned from the positions of

executive director and chairman in 2021, CITIC Group, a Chinese state-owned conglomerate, continues to be one of the major shareholders of the company (Lam, 2018). Although there have been instances of FSB being linked to or providing facilities to some suspicious clients, there haven't been any cases reported so far that link FSB to human rights violations.

The Wagner group, now widely active in Africa and Ukraine, comes closest to a traditional mercenary group. There were reports of significant human rights abuses by Wagner mercenaries in its areas of operation, the most recent one being the Central African Republic. Like the US, the EU also sanctioned individuals and entities linked to the Wagner group, but holding them accountable is incredibly difficult as they operate either in an unregulated conflict zone or in consonance with the ruling leaders of the host state. Since the contracts of Wagner are often directed and guided by Russian state interests, it is highly unlikely it would be prosecuted for its actions both at home and in the host state. This underscores the importance of the rule of attribution as guided by the Articles on State Responsibility, 2001 (ASR), used to hold a state accountable for internationally wrongful acts. A similar direction has been pursued by the Montreux document to identify the home state of a PMSC. Thus, the principle of command responsibility may be invoked to maintain accountability (Maddocks, 2021).

Conclusion

International humanitarian law does not prohibit the use of PMSCs and mercenaries during armed conflict. Although a state that has ratified one or both of the conventions—the 1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa and the 1989 International Convention against the Recruitment, Use, Financing, and Training of Mercenaries—is required to prosecute and punish mercenaries. Furthermore, the definition of mercenaries in Article 47 of Additional Protocol 1, being restrictive in nature, does not cover PMSCs under its ambit. Thus, PMSCs are considered civilians. They are prohibited from participating in hostilities and are not entitled to combatant or POW status if captured. However, being civilians, they are accorded adequate rights under the Fourth Geneva Convention (Redaelli, 2021). Despite ambiguities, PMSCs come under the ambit of the Geneva Conventions in one way or another, but the lack of clarity over the subject often leads to exploitation of these ambiguities for vested interests by states, corporations, or individual contractors.

While the Montreux document and the ICoC continue to be the best available options for PMSC regulation, they reinforce the viewpoint that PMSCs should be regulated and not outright banned. Further, there is a divergence of views over the extent of regulations as well. Many national governments and industry stakeholders, as well as the Swiss initiatives, prescribe a more lenient approach that includes self-regulation. On the other hand, the UN advocates a more statist, hard-law position on regulating the PMSCs (Prem, 2021). It is imperative to converge the two approaches to create an all-inclusive framework that addresses, apart from international legal gaps, shortcomings in domestic regulations as well. The major challenge that remains in achieving this convergence of viewpoints is striking a balance between a state's national interest and humanitarian responsibility on the one hand and industry aspirations on the other that lean towards self-regulation.

Beyond the provisions and gaps that are mentioned in this paper, there exist a wide variety of codes of conduct, good practices, and national legislation that are worthy of further exploration. An ever-expanding network of institutions, voluntary practices, rules, and regulations always gives way to ambiguities. Instead, these can be integrated and studied to develop a more comprehensive framework for PMSCs. This may include, among other things, a better definition, a ban on certain activities, registration with national authorities, and licensing of PMSC activities abroad while establishing an oversight and judicial mechanism to investigate and prosecute human rights violations.

References

- Al Shimari, et al. v. CACI, 08-cv-0827 GBL-JFA (United States District Court for the Eastern District of Virginia September 15, 2008). Retrieved September 7, 2022, from <https://ccrjustice.org/sites/default/files/assets/Amended%20Complaint%20on%20the%20Defendants.pdf>
- Al Shimari, et al. v. CACI, 1:08-cv-0827 LMB-JFA (United States District Court for the Eastern District of Virginia February 28, 2019). Retrieved September 7, 2022, from Business & Human Rights Resource Centre: https://ccrjustice.org/sites/default/files/attach/2019/03/1150_2-28-19_CACI%20memo%20MTD%20derivative%20immunity%20web.pdf
- Al-Quraishi, et al. v. Nakhla and L-3 Services, 8:08-cv-01696-PJM (United States District Court for the District of Maryland, Greenbelt division October 10, 2012). Retrieved September 7, 2022, from https://ccrjustice.org/sites/default/files/assets/133_2012-10-

10%20A1-

Quraishi_Marginal%20Order%20approving%20Notice%20of%20Voluntary%20Dis
missal.pdf

Archibong, E. J. (2021, July 21). Private Military Contractors: Legitimate Entrepreneurs or New Fashioned Mercenaries. *Journal of Civil & Legal Sciences*, 10(7).

doi:10.4172/2169-0170.1000279

Arnpriester, N. (2017). Combating Impunity: The Private Military Industry, Human Rights, and the “Legal Gap”. *University of Pennsylvania Journal of International Law*, 38(4). Retrieved August 25, 2022, from <https://scholarship.law.upenn.edu/jil/vol38/iss4/3/>

Article 359, Mercenarism. (1996). *The Criminal Code Of The Russian Federation*. Retrieved December 15, 2022, from <http://www.russian-criminal-code.com/PartII/SectionXII/Chapter34.html>

Barlow, E. (2011, August 21). *Relentless pursuit: A neglected COIN principle?* Retrieved September 22, 2022, from Eeben Barlow's military and security blog: <http://eebenbarlowsmilitaryandsecurityblog.blogspot.com/2011/08/relentless-pursuit-neglected-coin.html>

Bodurtha, M. (2022, April 1). An Obligation to Regulate: How Private Military Companies Embolden Conflict with Impunity from the Middle East to Central Africa. *Columbia Journal of Transnational Law*. Retrieved September 15, 2022, from <https://www.jtl.columbia.edu/bulletin-blog/an-obligation-to-regulate-how-private-military-companies-embolden-conflict-with-impunity-from-the-middle-east-to-central-africa>

Boone, J. (2010, December 2). *Foreign contractors hired Afghan 'dancing boys', WikiLeaks cable reveals*. Retrieved September 15, 2022, from The Gaurdian: <https://www.theguardian.com/world/2010/dec/02/foreign-contractors-hired-dancing-boys>

Faite, A. (2004, October 15). Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law. *Defence Studies*, 4(2). Retrieved from <https://www.icrc.org/en/doc/resources/documents/article/other/pmc-article-310804.htm>

Fasanotti, F. S. (2022, February 8). *Russia's Wagner Group in Africa: Influence, commercial concessions, rights violations, and counterinsurgency failure*. Retrieved August 15, 2022, from Brookings: <https://www.brookings.edu/blog/order-from-chaos/2022/02/08/russias-wagner-group-in-africa-influence-commercial-concessions-rights-violations-and-counterinsurgency-failure/>

Federal Department of Foreign Affairs of Switzerland. (2022). *Participating States of the Montreux Document*. Retrieved September 15, 2022, from Federal Department of Foreign Affairs FDFA: <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>

- France, M. (1992). Mercenaries and International Law. *Georgia Journal of International & Comparative Law*, 22(1), 103-150. Retrieved August 22, 2022, from <https://digitalcommons.law.uga.edu/gjicl/vol22/iss1/5/>
- Gleicher, N. (2020, October 8). *Removing Coordinated Inauthentic Behavior*. Retrieved August 22, 2022, from Meta: <https://about.fb.com/news/2020/10/removing-coordinated-inauthentic-behavior-september-report/>
- Gwatiwa, T. T. (2016, December 1). Private Military and Security Companies policy in Africa: Regional policy stasis as Agency in international politics. *Scientia Militaria - South African Journal of Military Studies*, 68-81. doi:10.5787/44-2-1176
- Hammes, T. X. (2010). *Private Contractors in Conflict Zones: The Good, the Bad, and the Strategic Impact*. Institute for National Strategic Studies, Center for Strategic. National Defense University Press. Retrieved August 15, 2022, from <https://apps.dtic.mil/sti/citations/ADA536906>
- Human Rights Watch. (2002). *Hopes betrayed: Trafficking of women and girls to post-conflict Bosnia and Herzegovina for forced prostitution*. Human Rights Watch. Retrieved September 14, 2022, from https://www.hrw.org/legacy/reports/2002/bosnia/Bosnia1102-01.htm#P164_4470
- ICOCA. (n.d.). *The code*. Retrieved August 15, 2022, from ICOCA: <https://icoca.ch/the-code/>
- Lam, A. (2018, March 7). *CITIC-Group-Increases-Stake-In-HK-Listed-Frontier-Services-Group-To-40.51*. Retrieved September 15, 2022, from Nikkei Asia: <https://asia.nikkei.com/NAR/Articles/CITIC-Group-Increases-Stake-In-HK-Listed-Frontier-Services-Group-To-40.51>
- Maddocks, J. (2021, April 28). *Russia, The Wagner Group, And The Issue Of Attribution*. Retrieved September 15, 2022, from Articles of War: <https://lieber.westpoint.edu/russia-wagner-group-attribution/>
- Markusen, M. (2022, January 12). *A Stealth Industry: The Quiet Expansion of Chinese Private Security Companies*. Retrieved September 15, 2022, from CSIS: <https://www.csis.org/analysis/stealth-industry-quiet-expansion-chinese-private-security-companies>
- Mquirmi, N. E. (2022). *Private military and security companies: a new form of mercenarism?* Policy Center for the New South. Retrieved September 15, 2022, from <https://www.policycenter.ma/publications/private-military-and-security-companies-new-form-mercenarism>
- Nimkar, R. (2009). From Bosnia to Baghdad the case for regulating Private Military and Security Companies. *Journal of Public and International Affairs - Princeton University*. Retrieved September 22, 2022, from <https://jpia.princeton.edu/sites/g/files/toruqf1661/files/2009-1.pdf>
- OHCHR. (2018, April). *OHCHR*. Retrieved September 14, 2022, from Working Group on the use of mercenaries: <https://www.ohchr.org/sites/default/files/MercenarismandPrivateMilitarySecurityCompanies.pdf>

- Prem, B. (2021). The regulation of private military and security companies: Analyzing power in multi-stakeholder initiatives. In *Contemporary Security Policy*. *Contemporary Security Policy*, 345–370. doi:10.1080/13523260.2021.1897225
- Redaelli, C. (2021, November 9). The Involvement of Mercenaries and Private Military Security Companies in Armed Conflicts: What Does IHL Say? (G. Academy, Interviewer) Retrieved September 22, 2022, from Geneva Academy: <https://www.geneva-academy.ch/news/detail/482-the-involvement-of-mercenaries-and-private-military-security-companies-in-armed-conflicts-what-does-ihl-say>
- Siegel, J. (2017, July 12). *The Real Winner of the Afghan War Is This Shady Military Contractor*. Retrieved August 12, 2022, from The daily Beast: <https://www.thedailybeast.com/the-real-winner-of-the-afghan-war-is-this-shady-military-contractor>
- Singer, P. W. (2004). *The private military industry and Iraq: What have we learned and where to next?* Geneva Centre for the Democratic Control of Armed Forces (DCAF). Retrieved September 22, 2022, from https://www.files.ethz.ch/isn/14132/pp4_singer.pdf
- Singer, P. W. (2007). *Can't Win With 'Em, Can't Go To War Without 'Em: Private Military Contractors and Counterinsurgency*. The Brookings Institution. brookings.edu. Retrieved August 15, 2022, from Brookings: <https://www.brookings.edu/research/cant-win-with-em-cant-go-to-war-without-em-private-military-contractors-and-counterinsurgency/>
- Singer, P. W. (2007, October 2). *The Dark Truth about Blackwater*. Retrieved August 22, 2022, from Brookings: <https://www.brookings.edu/articles/the-dark-truth-about-blackwater/>
- Singer, P. W. (2007, January 4). *The Law Catches Up to Private Militaries, Embeds*. Retrieved August 22, 2022, from Brookings: <https://www.brookings.edu/articles/the-law-catches-up-to-private-militaries-embeds/>
- Sopko, John F. (2014). *Department of state assistance to Afghanistan*. Office of Special Inspector General for Afghanistan Reconstruction. Retrieved August 15, 2022, from <https://www.sigar.mil/pdf/special%20projects/SIGAR-14-49-SP.pdf>
- Sysoev, G. (2012, April 11). *Putin supported the idea of creating private military companies in Russia*. Retrieved September 22, 2022, from RIA Novosti: <https://ria.ru/20120411/623227984.html>
- The Montreux Document*. (n.d.). Retrieved August 15, 2022, from Federal Department of Foreign Affairs FDFA: <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html>
- U.S. Department of the Treasury. (2020, July 15). *Treasury Targets Financier's Illicit Sanctions Evasion Activity*. Retrieved August 15, 2022, from U.S. Department of the Treasury: <https://home.treasury.gov/news/press-releases/sm1058>

- US Department of Justice. (2008, December 8). *Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq*. Retrieved September 7, 2022, from US Department of Justice: <https://www.justice.gov/archive/opa/pr/2008/December/08-nsd-1068.html>
- US Department of Justice. (2019, August 14). *Former Blackwater Employee Sentenced to Life Imprisonment for Murder in 2007 Shooting at Nisur Square in Iraq*. Retrieved August 15, 2022, from <https://www.justice.gov/>: <https://www.justice.gov/usao-dc/pr/former-blackwater-employee-sentenced-life-imprisonment-murder-2007-shooting-nisur-square>
- Wilkens, R. (2020, September 25). *Amentum hits gas pedal with DynCorp acquisition*. Retrieved September 22, 2022, from Washington Technology: <https://washingtontechnology.com/2020/09/amentum-hits-gas-pedal-with-dyncorp-acquisition/355028/>
- Wilson, G. (2016, April 5). *PROXY Capabilities – The History and Future of Russian Private Military Companies*. Retrieved September 22, 2022, from Strifeblog: https://www.strifeblog.org/2016/04/05/the-history-and-future-of-russian-private-military-companies/#_ednref2