

DANIEL THÜRER & MALCOLM MACLAREN*

Military Outsourcing as a Case Study in the Accountability and Responsibility of Power

Die Welt ist nach der 'Wende' nicht sicherer und friedfertiger geworden. Es haben sich bloß die Gewichte der Bedrohungen und Gefahren verschoben. Die Staaten hinken wie üblich mit ihren Konzepten und Maßnahmen gegen diese Herausforderungen hinterher. - Hanspeter Neuhold¹

Foreword: Explanation of Project

The outsourcing of state functions and the globalization of business activities are well-known trends in contemporary affairs. Decisions on public order and the use of public power are increasingly being taken by (foreign) corporate bodies and shareholders instead of by (local) governments and citizens; by stock exchanges and markets rather than by parliaments and populace as formerly. The outsourcing of security functions by states and international organizations to 'private military companies' ('PMCs') exemplifies these trends and, more importantly, their potentially negative consequences. Military outsourcing can pose serious challenges to world order, state governance, and the rule of law. Three unsettling incidents among many may be cited from recent history, namely:

* With the assistance of Catherine Chammartin, Sarah Dobler, Paul Wegmann, Felix Schwendimann & Idir Laurent Khier. References to events and internet websites are up to date as of 15 August 2006.

¹ H. Neuhold, *Grundlagen und Rahmenbedingungen internationaler Sicherheit auf universeller Ebene*, in W. Hummer (ed.), *Sicherheit und Terrorismus – Rechtsfragen aus universeller und regionaler europäischer Sicht*, 21 at 52 (2005).

- the training and advising of the Croatian army by a US company during the armed conflict in the former Yugoslavia, when the conflicting parties were barred from receiving any military aid from governments. Shortly thereafter, a Croatian and Bosnian-led offensive turned the tide of the conflict, leading to the Dayton Peace Treaty, in which Croatian and Bosnian independence was secured. The US government, which had licensed the company in question, could deny that it had directly intervened in the conflict.²
- the abuse by guards and interrogators of detainees at the US-run Abu Ghraib prison in Iraq. An official investigation concluded that contractors were involved in a third of the incidents and that these resulted from poor supervision, confused lines of authority, and improper procedures. In contrast to their military counterparts, who have been sentenced to prison time by US courts, none of the contractors implicated has yet been punished.³
- the failure of legislative oversight of questionable dealings by the US and UK governments in Colombia⁴ and Sierra Leone,⁵ respectively. The ‘private’ nature of the military activities there has meant that executive acts and omissions in foreign affairs have been removed from public view and insulated from full political discussion.

The character of military outsourcing as a worldwide public-private concern was behind the decision of Professors Daniel Thürer and Hans Casper von der Crone to set up a working group on the phenomenon of PMCs⁶ composed of

² See, further, D. D. Avant, *Think Again: Mercenaries*, 2004 (July/August) Foreign Policy 20, available at http://www.foreignpolicy.com/story/cms.php?story_id=2577&print=1.

³ Major General George R. Fay’s investigation into the Abu Ghraib scandal describes the PMCs’ involvement and is available at <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>; see, regarding the scandal’s aftermath, CorpWatch, *Iraq: Contractors Implicated in Prison Abuse Remain on the Job*, available at: <http://www.corpwatch.org/article.php?id=11282>.

⁴ The US Congress has set constraints on the number and tasks of US troops in Colombia. PMCs operating there under government contract are under no such constraints. The administration has been accused of using them to avoid congressional oversight. (See further, S. Fidler & T. Catán, *Private companies on the frontline: ‘Who takes responsibility if one of these guys shoots the wrong people?’*, Financial Times, 12 August 2003, at 9.)

⁵ The ‘Sandline Affair’ concerned the violation by an eponymous British PMC of a UN arms embargo on behalf of its state employer, Sierra Leone, and the British government’s acquiescence in Sandline’s violation. (See further, UK Government, Report of the Sierra Arms Investigation, available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029395708>.)

⁶ There is no generally accepted international legal definition of PMCs and the differences between PMCs, private security companies, and mercenaries can in practice be hard to ascertain. For present purposes, such definitions are ultimately academic. We are concerned more with the activity than the actor, namely the private provision of public services relating to the use of armed force. These may include combat activities, protection of property and persons, training/advice/planning, logistic/technical assistance, intelligence services, and supply of equipment. See, for an elaborate typology distinguishing activities of PMCs according to their lethality

researchers from their chairs in public international and private national law at the University of Zurich. The following paper is the first fruit of the group's collaboration. It takes a critical look at military outsourcing and at possible mechanisms for ensuring the effective control of this special industry. The co-operation between the university chairs has led to a paper that is focused on principles informing the law in both realms. Fundamental societal values and ideas of accountability and responsibility came up repeatedly during our discussions. The regulation and monitoring of PMCs has accordingly been analyzed as a new challenge to long-standing legal principles posed by a change in circumstances. In formulating a response to this challenge, we have drawn upon regulatory possibilities from both public international and private national law. The regime by which we propose to make PMCs answerable for their activities is a hybrid construct that seeks to realize the potential for effective control offered by mechanisms from both legal realms.

1. Phenomenon of Military Outsourcing

[A] starting point is to acknowledge that, although Iraq has been the best publicized of the cases in this area, it is not the first and will not be the last.
– Philip Alston⁷

The provision of public security functions by private parties is by no means novel, as the 500th anniversary of the Swiss Guards' protection of the Pope recently reminded us. Privatized and contract-warfare predates the mass mobilisation and the conduct of war by nation-states, this political entity being a relatively new – approximately 200 year old – apparition.⁸ The rise of the nation-state and the idea that defence should be provided only by directly raised and maintained armed forces led to a decrease in the use and legitimacy of mercenaries. Indeed, the idea of states as providers of security against internal and external threats was the *raison d'être* for (per Hobbes) and became constitutive of modern statehood (per Jellinek).

Since the end of the Cold War, the private military industry has developed rapidly: it has grown in scale; it is involved much closer to the battlefield; and it is made up increasingly of publicly quoted companies. There exists today a multitude of PMCs, which are active around the world and which are

(high to low) and their intended objects (public or private), C. Kinsey, *Corporate Soldiers and International Security: The Rise of Private Military Companies* (2006).

⁷ P. Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in P. Alston (ed.), *Non-State Actors and Human Rights*, 3 at 9 (2005).

⁸ See, regarding the transformation of European warfare in the sixteenth and seventeenth centuries, D. Parrott, *Military Outsourcing – Early Modern Style*, 2005 (May) *Oxford Historian*, 24 *et seq.*

estimated to generate more than US\$ 100 billion in annual revenue.⁹ They are fully-constituted companies (*i.e.* legal entities with a corporate structure) and not individuals selling their military services on an *ad hoc* basis as previously. PMCs carry out military tasks alongside regular soldiers in many cases.¹⁰

The rapid development of the industry is essentially the result of an interplay of supply and demand. On one hand, the Cold War's end led to the demobilisation of a large number of military personnel. On the other, it led states to seek political and financial cost-savings or to compensate for shortcomings in their own armed forces in struggles against insurgents by contracting such personnel.¹¹ International peace operations are also supported by PMCs largely due to the state community's failure to commit own resources to solving the increased number of humanitarian crises today.¹² Military outsourcing will not end as long as governments (and international organizations) are unwilling or unable to perform the services that PMCs offer.

In light of this reality, the role that PMCs play in the relevant intervention, occupation, or peace operations should remain a matter of concern.¹³ As will be explained (Section 2), their activities can have grave effects on international stability, human rights and humanitarian law, as well as on democratic processes. Military outsourcing threatens to devalue fundamental legal goods. The potential for control of the industry through the market will then be examined (Section 3). Neither market forces nor self-regulation show themselves capable of serving the public interest in this context; they produce too many 'bad goods' and fail to attend to 'externalities'. For its part, the existing legal framework on national and international levels (see Section 4) was not, with few notable exceptions, drafted with PMCs in mind. Under-regulated and under-monitored growth of the industry has accordingly led to a serious lack of accountability and responsibility. (Inter-) national rules and mechanisms must be consciously developed in keeping with the changing circumstances, and the paper will conclude with a recommendation as to how states should respond to the phenomenon of PMCs. It takes the specific form of a proposal for a regime based on an international standard contract and an

⁹ P. W. Singer, *Peacekeepers, Inc.*, 119 Policy Review (2003), available at <http://www.policyreview.org/jun03/singer.html>.

¹⁰ See, for cases of this, P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* 88 *et seq.* (2003).

¹¹ The US, British, Canadian, and Australian militaries would struggle to wage war without such private companies. (F. Schreier & M. Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* 1 (2005), available at http://www.dcaf.ch/_docs/op06_privatisingsecurity.pdf.)

¹² See, generally, J. Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study* (2006), available at: <http://www.ipacademy.org>.

¹³ See, for a discussion of the rationale behind developing relations between the humanitarian and business worlds, G. Carbonnier, *Corporate responsibility and humanitarian action*, 83 *International Review of the Red Cross* 947 *et seq.* (2001).

international dispute settlement mechanism (Section 5) and the general form of a call for a reaffirmation of the primacy of law and politics over the forces and values of the market (Section 6). This response is intended to ensure that PMCs are accountable and responsible to those they serve and to those most affected by their activities.

2. Military Outsourcing as Policy Challenge

The old proverb used to be that ‘War is far too important to be left to the generals.’
For international law in the 21st century, a new adage may be necessary: War is far too important to be left to the C.E.O.s. – P. W. Singer¹⁴

2.1. Exercise and Control of Power in Community Under Rule of Law

In whatever context power is exercised, there is a risk that the power will be abused. In particular, excessive power has a tendency to corrupt those who wield it. As Jacob Burckhardt argued long ago, a community under the rule of law must watch over any accumulation of power and, when necessary, limit it. In order to control power, the ideas of accountability and responsibility must be realized in governance: this in turn involves ensuring an on-going process of public participation, transparency, and official justification as well as the end result of perpetrators being held to answer for breaches of obligations.

The preceding applies equally to the interstate and state legal order and equally to private parties and governments. The corollary is that corporations should in principle be held accountable and responsible as regards international law in the same way that they are as regards national law, and that there is no fundamental difference in the nature of the humanitarian and human rights obligations falling upon corporations as compared with governments. The functions and real power of a given organization are more relevant for the application of fundamental rights than the organization’s attribution to the public or private sphere.

Today, private parties are being asked to undertake a broad range of state functions, whose delegation or transferral had once been unimaginable. A prominent example is the outsourcing of the waging of war and the provision of security. Traditionally the state exercised a ‘monopoly on violence’; in contemporary conflicts an apparently unlimited role is being accorded to PMCs. Concern about the effects of power is especially warranted when the exercise of power relates to the application of force: PMCs require closer public oversight than ordinary corporations due to the nature and potential

¹⁴ P. W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 *Columbia Journal of Transnational Law* 521, at 549 (2004).

consequences of the tasks that PMCs are delegated. The military tasks carried out in high-risk situations can change the ‘strategic landscape’ of an armed conflict,¹⁵ involve humanitarian and human rights law as well as raise important foreign policy issues.¹⁶

2.2. Potentially adverse effects of PMCs’ activities

The potentially adverse effects of PMCs’ growing power on the international system, national societies, and the rule of law are manifold and serious, as the incidents cited at the outset indicate. An uncontrolled military industry:

- poses a threat to world peace and stability by accelerating the end of the exclusive entitlement of states to use force in international relations. Normative concerns that led states to establish this pillar of the modern international system in the aftermath of the Thirty Years War and to try to end the use of mercenaries in the 20th century remain relevant. State control is the most effective means of limiting violence and its loss might well lead to an increase in the incidence and intensity of conflict, by rendering recourse to arms easier, by providing additional means with which to fight and by making equilibrium between the conflict parties harder to reach.¹⁷ In particular, there is the danger that PMCs could aid a corrupt regime in suppressing a people’s right to self-determination or lend support to rebels, warlords, organized criminals, and terrorists in undermining legitimate regimes; that the growth of the private military industry might weaken the enforceability of arms control / reduction agreements through the resultant links between PMCs and armed forces; and finally, that the employment

¹⁵ Such activities include defeating an insurgency, ending a war, undertaking peacekeeping operations, and rescuing a besieged government. (K. A. O’Brien, *Regulating Private Military and Security Activities: Specifying Regulatory Requirements*, Background Paper, Conference on Market Forces: Regulating Private Military Companies, New York University School of Law, 24 March 2006, at 10, with authors.)

¹⁶ Our concern might be therefore described as with the ‘political’ and ‘social’ aspects of the use of force rather than with the ‘functional’: *i.e.* with a shift resultant from military outsourcing in the relative power of actors who use force or in the way that its use reflects societal values, rather than with a shift in the effectiveness of the use of force, respectively. (See, regarding this typology, D. D. Avant, *The Market for Force: The Consequences of Private Security* (2005).)

¹⁷ See:

[w]here once the creation of a military force required huge investments in both time and resources, today the entire spectrum of conventional forces can be obtained in a matter of weeks, if not days. [...] Clients can undertake operations, which they would not be able to do otherwise, simply by writing a check.

(Singer, *supra* note 9.)

of PMCs will lead to small arms proliferation and contribute to greater instability in particular areas.¹⁸

- raises risk of violations of rights under (inter-)national law. The application of force can have grave consequences for human life, security, and liberty. Contractors, like public authorities, are in a position to drastically infringe the rights of individuals and to exact bodily harm. However, the murkiness of PMCs' legal position (see Section 4) allows PMCs and their state employers to escape the strictures on human rights and humanitarian law, *i.e.* to operate beyond the control exerted by training and sanction that these bodies of law foresee. This is not to say that PMCs necessarily engage in misconduct more often than their public counterparts, just that the likelihood of misconduct (and impunity) is greater given that PMCs are to a large extent not bound by the same strictures.¹⁹
- undermines democratic processes in Western countries.²⁰ More specifically, civilian political control of PMCs is lacking to the extent that PMCs are not integrated into the regular armed forces. The widespread contracting between government authorities and PMCs and the recourse to outsourcing of security functions by the executive have rendered legislative oversight impossible.²¹ These trends disturb the legitimacy of PMCs' activities and upset checks and balances in government.²² Public participation in elementary questions of war and peace is an aspect of the freedom of citizens of Western countries or, more specifically, of their right as taxpayers and soldiers to have a voice in decisions that concern them. One cannot help but suspect that governments may profit from – and are therefore not

¹⁸ See, further, S. Makki *et al.*, *Private Military Companies and the Proliferation of Small Arms: Regulating the Actors* (2001), available at http://www.smallarmssurvey.org/files/portal/issueareas/security/security_pdf/2001_Makki_et_al.pdf.

¹⁹ An investigation of all the publicly available US military and reconstruction aid contracts in Iraq revealed that none require that contractors receive training in or even that they obey international human rights and humanitarian law. (L. A. Dickinson, *Public Law Values in a Privatized World*, 31 *Yale Journal of International Law* 383, at 403 *et seq.* (2006), available at <http://www.amnestyusa.org/annualreport/dickinson.pdf>.)

²⁰ See, generally, M. Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 *Boston College Law Review* 989, at 1022 *et seq.* (2005). The outsourcing of peace and stability operations by international organizations also undermines political control.

Given that such operations have generally been governed by international consensus as derived through a UN mandate, [outsourcing] may place them outside such international consensus and therefore outside such restrictions or controls that may exist through international law.

(O'Brien, *supra* note 15, at 5.)

²¹ Apparently it is not officially known how many private contractors are currently in Iraq or what exactly the scale of the US commitment is there.

²² The idea of democratic accountability is well expressed in the location of the war power in the US and Swiss constitutions in the legislature together with the executive.

unhappy with or even deliberately exploit – the currently opaque process of diminished public oversight. Governments can thereby pursue geopolitical interests without deploying own troops, exercising power in a sensitive area with little need for explanation. Finally, in situations where a government considers going to war, PMCs could try to influence that decision in their favor.²³ PMCs might have a particular interest in raising demand for their services that runs counter to the general interest.

The preceding is not to imply that PMCs' participation in crisis situations can never have positive effects. Indeed, PMCs are actively supporting internationally-sanctioned peace operations around the world, providing the security necessary for political reconstruction and community reconciliation that states themselves are unwilling or unable to provide. This activity is not *per se* a threat to world order. Even so, PMCs' participation must fulfil certain democratic and humanitarian standards in this context as well, which has not always been the case.²⁴

The challenge facing contemporary policymakers is to ensure an *encadrement* for PMCs that recognizes the role played by this newer non-state actor in contemporary affairs and that at the same time protects the principles upon which the national and international legal orders are based.

3. Limited Means of Market in Control of PMCs

The business of business is business and nothing but business. – Remark attributed to former General Motors President Alfred T. Sloan

Respecting for the sake of argument the prevalent liberal view that the state should only intervene in the event of market failure, we ask what potential the market has to control the conduct of PMCs. Can the logic of the market – Adam Smith's 'invisible hand' – guide participants to trade in the publicly most beneficial manner, or is regulation – 'the visible fist of government' – needed to ensure respect for and realization of the societal values concerned?²⁵

²³ E.g. ten leading PMCs spent more than \$32 million on lobbying the US government in 2001. (See P. W. Singer, *Warriors for Hire in Iraq*, Salon.com, 15 April 2004, available at http://archive.salon.com/news/feature/2004/04/15/warriors/index_np.html.)

²⁴ A prominent example is that of the violations during the Bosnian peacekeeping operation. Employees of DynCorp, a US PMC contracted to perform police duties for the UN, were implicated in rape and child prostitution rings. These employees were transferred out of Bosnia and have never been criminally prosecuted. (Minow, *supra* note 20, at 1017.)

²⁵ See, generally, D. Thürer, *Globalisierung der Wirtschaft: Herausforderung zur "Konstitutionalisierung" von Macht und Globalisierung von Verantwortlichkeit – Oder: Unterwegs zur "Citizen Corporation"?*, Zeitschrift für Schweizerisches Recht 107 *et seq.* (2000).

3.1. Control by Market Forces

As far as *supply* is concerned, it must be acknowledged that there are many PMCs who will strive to provide security services in compliance with national and international legal obligations. Nonetheless, it cannot be excluded that there are also PMCs willing to provide these services in violation of the same. (This holds true among PMC staff as well, who can range from highly-decorated ex-soldiers to hired assassins.) As far as the *demand* for security services is concerned, it can come from legitimate actors in legitimate conflicts (ideally in the context of a UN-sanctioned peace operation), but it can also come from illegitimate actors in illegitimate conflicts (*e.g.* pariah states in support of terrorism). In short, the relevant market does not distinguish between so-called good and bad goods, and it cannot be assumed that PMCs that do not respect national and international legal obligations will go out of business. The additional, newer market force of *reputation* may work to control a company's conduct by giving companies an incentive to behave ethically and morally at the risk of not winning contracts in future. The effectiveness of reputation as a control mechanism is, however, conditional on, among other things, there being transparency in the relevant market (which in the case of the private military industry cannot be relied upon, as monitoring of troops in the field may be difficult) and there being an expectation from customers of certain service standards (as noted, states and international organizations may not always demand law-abiding conduct from PMCs).

3.2. Self-Regulation by Industry

Given this market failure in the form of the production of bad goods (*i.e.* abuses committed by PMCs), how far might mechanisms of self-regulation, 'pure' or 'steered', serve to control the industry?

The principal advantage of voluntary codes of conduct lies in the standards that they set for measuring corporate behavior: a PMC that violates a code would find it difficult to win new contracts – that is again, if states factor in compliance when choosing whom they wish to employ. *Self-regulation* can also be advantageous in that regulations are elaborated by industry participants who know best their desires and capabilities and in that self-regulation avoids potentially complex and costly state regulation. The principal disadvantage lies in the inability to enforce the rules agreed directly and in the absence of sanctions. Self-regulation can also be disadvantageous in that it lacks democratic legitimization and often transparency.

For its part, *steered self-regulation* constitutes a middle way between pure self-regulation and state regulation: public authorities assist private parties in the development of self-regulation and negotiate terms with them. An example is the 'Voluntary Principles on Security and Human Rights' of 20

December 2000 from the extractive sector, which was initiated by the UK and US governments in conjunction with human rights organizations, labour unions, and British and American companies concerned. The code sets out obligations that extractive industry companies should ensure respect for when employing ‘private security companies’ (‘PSCs’) and standards that PSCs are expected to observe in their activities.²⁶

In applying these mechanisms to the industry, one comes to the conclusion that self-regulation will not suffice to control PMCs effectively. First, the threat of state regulation is not a strong incentive in industries such as this in which state employers do not attach the same importance to a PMC’s reputation and where the companies can, having few fixed assets, readily relocate to jurisdictions where the regulation is laxer. Second, self-regulation can be effective only as regards a particular concern, *i.e.* PMCs’ respect for international humanitarian law (‘IHL’), and not as regards ‘externalities’, *i.e.* the effects of the private military industry on world peace and stability and on democratic processes. The public interest must be served under *all* circumstances. Finally, it is unlikely that public opinion would consider self-regulation of PMCs acceptable given a widespread suspicion that the players in this industry are self-serving, profit-maximizing actors who regulate themselves only to prevent more direct and effective government intervention.²⁷ Instead of serving as the exclusive basis for any authorization of PMC activities, codes of conduct could be used to reinforce the rule of law by helping companies to internalize rules and principles. Codes of conduct would then complement public measures in this industry,²⁸ as they do in others.

4. Deficiencies in Current System of Regulating and Monitoring PMCs

‘Who takes responsibility if one of these guys shoots the wrong people?’ –
Subtitle of Financial Times article²⁹

As just explained, state regulation of PMCs is unavoidable in order to ensure the effective control of their activities. The question arises to what extent PMCs (as company and as staff) and their employers (here states) can

²⁶ Available at http://www.state.gov/www/global/human_rights/001220_fsdr1_principles.html. See, further, A. Clapham, Human Rights Obligation of Non-state Actors 308 *et seq.* (2006).

²⁷ A. Bearpark, *The Future of the Market and its Role in Regulation*, Background Paper, Conference on Market Forces: Regulating Private Military Companies, New York University School of Law, 24 March 2006, at 3, with authors.

²⁸ *E.g.* two trade associations, the International Peace Operations Association and the British Association of Private Security Companies, have obligated their members to uphold certain standards of conduct (available at <http://www.ipoaonline.org> and <http://www.bapsc.org.uk>).

²⁹ See Fidler, *supra* note 4.

currently be held to answer for their outsourcing and for any conduct of PMCs that gives rise to damage. There are in essence five means by which the private military industry is regulated and monitored, directly and indirectly, nationally and internationally.³⁰ Upon examination each shows itself wanting as an effective means of ensuring accountability and responsibility. The existing means provide few clear rules about what constitutes misconduct, even fewer rules about its consequences, and no real sanctions. Moreover, the complex international activities and skilful dealing of PMCs and their employers can escape regulation and monitoring. Finally, their ineffectiveness is exacerbated by the subcontracting of services to further PMCs, as subcontracting attenuates what accountability and responsibility there is.

4.1. Home State Legislation

Some states do regulate the *domestic* private security industry and do outlaw mercenarism in keeping with international conventions (*infra*), but such rules do not govern the conduct of PMCs operating internationally. Although some states do have a formal system of regulation (*e.g.* South African³¹ and US³² law require all locally-based PMCs to receive approval / obtain a license before selling military services abroad), many other states do not (*e.g.* the UK, home to some of the largest PMCs in the world, has yet to pass its own measures).³³ Further, the authorization requirements that do exist provide some public oversight at point of application but limited means to supervise PMCs once authorization has been granted.

³⁰ Following generally the typology in: International Institute for Strategic Studies, *Private Security Companies: Under-regulated Growth*, 11 IISS Strategic Comments (2005), available at <http://www.iiss.org/stratcom>.

³¹ The South African *Regulation of Foreign Military Assistance Act* (1998, currently being revised) states that government authorisation for the sale of military services abroad may not be granted if it would, *inter alia*, “result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered.” (Available at <http://www.info.gov.za/gazette/acts/1998/a15-98.pdf>.)

³² The applicable law in the US is the *Arms Export Control Act* of 1968: licenses must be obtained from the State Department under the *International Traffic in Arms Regulation* and exports of defence services of over US\$50 million must be notified to Congress. (Available at <http://www.pmdtc.state.gov/aeca.htm>.)

³³ The UK government has merely investigated various regulatory possibilities in a Green Paper. (Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation* (2002), available at <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf>.) *See*, for an overview of the legal situation in other countries, Annex B of the Green Paper.

4.2. Host / Hiring State Legislation

PMCs may be subject to the national laws of the states in which they operate or by whom they are hired. Indeed, PMCs fall *prima facie* under their jurisdiction. Few host or hiring states, however, have as of yet passed specific legislation; these companies are only exposed to general domestic law. The national laws that do regulate the employment of PMCs ‘inland’ are of limited effectiveness. Many of the host states are by definition weak: they seek PMCs’ help in establishing stable governance. Such states are incapable of exercising effective legal, political, or military control over misbehaving PMCs, especially if they are fighting against the government.³⁴ Even in well-established rule-of-law states like the US that employ PMCs, such control has for other reasons proven deficient,³⁵ leaving PMCs unaccountable for committing what would be serious crimes in other circumstances.

4.3. International Conventions on Mercenarism

As noted, states tried to end mercenarism in the second half of the last century. The main instrument dealing specifically with mercenaries, the UN International Convention against the Recruitment, Use, Financing, and Training of Mercenaries of 1989,³⁶ seeks to control individuals taking part in armed conflict on behalf of a foreign state for significant financial gain by prohibiting the use of mercenaries and criminalizing both resort to and participation of mercenaries in hostilities. The effectiveness of this universal prohibition is limited by the low number of states party to the convention (28) and their identity (*e.g.* not including the UK or US). Moreover, the convention’s exacting, cumulative definition of mercenaries (*inter alia* that they are not permanent members of a state’s armed forces and that they are in the employ of a foreign state) allows staff of PMCs to escape the conventions’ reach without difficulty.

³⁴ According to the current Iraqi licensing regime, PMCs operating in Iraq must declare themselves willing to respect the law and human rights and freedoms of all Iraqi citizens. They are subject to rules providing for the removal of their licenses and/or the loss of a bond in the event of the violation of national or other applicable law. The relevant regulation also provides that all “Contractors”, “Private Security Companies”, and “International Consultants” are granted immunity from criminal legal responsibility in Iraq with respect to all acts and omissions. Criminal prosecution is left to the discretion of the home state authorities. PMCs’ activities abroad are, however, typically not monitored at home. (Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq, doc. CPA/ORD/27 June 2004/17, available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf.)

³⁵ See, for a description of the lacunae in the US legal order hindering criminal prosecutions of PMC staff, Singer, *supra* note 14, at 537 *et seq.*

³⁶ Available at <http://www.icrc.org/ihl.nsf/INTRO?OpenView>.

4.4. International Humanitarian Law³⁷

IHL is the principal source of relevant rules.³⁸ It does not address the legality or legitimacy of PMCs or of states' outsourcing of certain activities to them; it aims rather to regulate the conduct of those involved in an armed conflict. Hiring, home and host states as well as PMC employees have consequent, concurrent responsibilities under IHL. These include obligations to comply with and ensure respect for basic rules of military conduct as well as to face responsibility for and to punish any violations.

This body of law was, however, not drafted with private military contractors in mind. PMCs themselves do not have a status under IHL, and IHL is based on material provisions that are in part unclear as regards the status of their staff.³⁹ Contracts between PMCs and the state must be analyzed case by case, and the status of staff as combatants or otherwise depends on the nature of their relationship with the state that hires them and of the activities that they carry out. Moreover, this body of law is notoriously often violated and hard to enforce against any actor in an armed conflict. The reasons are manifold. There is no international tribunal with compulsory jurisdiction; IHL must largely be enforced through state courts instead. Such proceedings are, however, rarely commenced and the obstacles to their success are high. In the host / hiring state, the courts may not be functioning due to a conflict or the enforcement of IHL may be thwarted by the non self-executing nature of IHL-principles or by assertions of sovereign immunity. In any third state (including the home state), courts tend to be reluctant to get mixed up in such politically charged matters and to exercise extra-territorial jurisdiction, and any proceedings would be complicated by the presence of evidence and witnesses in the country where the alleged violation occurred.⁴⁰ Lastly, the overwhelming majority of states (and the International Criminal Court (ICC) for that matter) do not recognize the criminal responsibility of companies (as opposed to their staff).

³⁷ The authors are grateful for insights on IHL and PMCs provided by Emanuela-Chiara Gillard, Legal Advisor, International Committee of the Red Cross.

³⁸ It is not to be forgotten that certain human rights treaty provisions are non-derogable in the context of armed conflict. IHL may, however, be considered the *lex specialis* in the present context. (See, for a discussion of how US government's military outsourcing in the war on terror is "fuelling serious human rights violations and undermining accountability", Amnesty International USA, *Governments Worldwide Attack Human Rights in the Name of Fighting Terror with Deadly Consequences*, Press Release, 23 May 2006, available at <http://www.amnestyusa.org/news/index.do>.)

³⁹ See, further, N. Boldt, *Outsourcing War – Private Military Companies and International Humanitarian Law*, 47 *German Yearbook of International Law* 502, at 512 *et seq.* (2004); A. McDonald, *The Legal Status of Military and Security Subcontractors*, in R. Arnold & P.-A. Hildbrand (eds.), *International Humanitarian Law and the 21st Century's Conflicts*, 215 at 226 *et seq.* (2005).

⁴⁰ As the Economist newspaper concretely noted, the standards of proof required by US courts

4.5. International Responsibility of States

The general rules of state responsibility (in the form of the International Law Commission Articles on the Responsibility for States for Internationally Wrongful Acts of 2001) provide that a state is responsible for the conduct of its own organs, of persons or entities exercising elements of governmental authority, and of persons or entities controlled by the state. In the present context, this means that states cannot absolve themselves of their various international obligations by outsourcing security tasks to PMCs. Even if PMCs are not working as state agents, states still have a duty to ensure respect for international law and to exercise due diligence: they must act to prevent and punish violations committed by individuals or entities operating on or from their territory. The situation, as Alston notes, is “about as close as one could possibly get to replicating all the elements that underpin the classic doctrine of state responsibility for [humanitarian and] human rights violations.”⁴¹

However, as the ILC Articles are largely a general expression of the specific rules of IHL relating to state responsibility, their effectiveness is reduced by similar factors.⁴² The Articles make no provision for PMCs’ activities or for the complicated relationships between the contractors and the host, hiring, and home states. Instead, the Articles are dependent on states accepting responsibility for and on prosecuting the misconduct of PMCs but do not address actual power-dynamics either between states or between states and PMCs. Accordingly, relying on state responsibility alone is likely to continue to be ineffective in addressing problems arising from the growing role of PMCs.

5. Policy Proposal: An Alternative, Hybrid Regime for Accountability and Responsibility

An immediate response to the issue of private security firms in the context of armed conflicts is to label them mercenaries and hence suggest that they are tainted with illegality and illegitimacy. [...However,] the focus may be shifting from criminalization to new forms of regulation and accountability. – Andrew Clapham⁴³

are “unlikely to be met in Iraq – or in any other war zone, for that matter.” (*Dangerous work: Private security firms in Iraq*, Economist (European ed.), 10 April 2004, at 41 *et seq.*)

⁴¹ Alston, *supra* note 7, at 10.

⁴² Following generally C. Lehnardt, *Private Military Companies and State Responsibility*, in S. Chesterman & C. Lehnardt (eds.), *Market Forces: Regulating Private Military Companies* (forthcoming 2007).

⁴³ Clapham, *supra* note 26, at 299, 301.

PMCs have emerged in the last decade as especially powerful – in the truest sense of the word – international corporate actors. Both conventional systems of accountability and responsibility (*i.e.* private market discipline and public oversight) show themselves ineffective in controlling the industry. As a result, abuses of IHL among other adverse effects can occur and go unpunished. The underlying legal goods of peace, humanity, and democracy must be better protected.

In principle, control of the private military industry can be effectuated by various mechanisms at various levels. One regulatory ‘option’ shows itself on closer inspection to be illusory. However desirable, an outright – as opposed to a partial – ban on PMC activity would be unenforceable and even counterproductive.⁴⁴ The prohibition of PMCs as ‘modern-day mercenaries’ is unlikely to find support among states because home states’ business interests would suffer and hiring states would have one fewer policy instrument at their disposal. Accordingly, the policy challenge is how to ensure that PMCs fulfill appropriate roles in (inter-) national affairs.

We urge that national policymakers undertake to draw up a regulatory and monitoring regime based on an international standard contract that makes clear the rights and responsibilities of PMCs and their employers. It may seem anathema to mix the private and public in this regulatory realm as a means of control. Realism – and at the same time creativity – in recommending policy are, however, demanded, given that governments are unlikely to reassume the outsourced functions, that traditional forms of control have proven inadequate to the challenges, and that an absolute prohibition on PMCs is not viable. The very government contracting that is the basis of military outsourcing could well be the basis of an alternative accountability and responsibility mechanism.⁴⁵ Such a regime would effectively leverage off of the commercial dependency of PMCs on governments, both to win new contracts and to ensure fulfillment of existing ones. Contractors would thereby have a real incentive to comply with the law and states the possibility of controlling their activities. Lastly, the envisaged regime would allow for a certain degree of flexibility in the regulation and monitoring of PMCs rather than the ‘one-size-fits-all’

⁴⁴ Attempts to eliminate PMCs through national legislation “tend only to drive them and their clients further underground, away from public oversight.” (Singer, *supra* note 14, at 535.)

⁴⁵ See, further regarding PMCs and contracting, Clapham, *supra* note 26, at 303 *et seq.*, and Dickinson, *supra* note 19, at 385 *et seq.* See, regarding the potential use by states of contractual terms to enhance observance of public values by private providers, J. Freeman, *Extending Public Law Norms Through Privatization*, 116 *Harvard Law Review* 1285 *et seq.* (2003) (in the context of national administrative law); and B. Oswald, *Accountability of Contractors on Peace Operations: Suggestions for Better Governance*, Background Paper, Seminar on Challenges of Peace Operations, Beijing, 3-5 November 2004, at 46 *et seq.*, available at http://www.challengesproject.net/roach/images/pdf/beijing_sem_doc1.pdf#search=%22bruce%20oswald%20accountability%20beijing%22 (in the context of international peace operations).

approach of industry-wide regulation: while a standard contract would serve as a template with pre-drafted clauses, authorizations could be tailored to the particular company and assignment.⁴⁶

A standard contract could be the basis of a comprehensive and uniform regime; its terms could serve to close the gaps in the current patchwork of regulation and monitoring. Moreover, it could incorporate the internationally recognized best practices of existing national legislation (see Section 4), such as authorization upon commitment to comply with (inter-) national law and posting of bonds in case of violation.

Specifically, the *material* obligations imposed by the contract would at a minimum require PMCs to:

- respect fully any legal prohibitions or constraints on their activities. Here policymakers or, better, the general public must ask themselves where the limits on delegation of public security functions to private parties lie. To our minds, there should be certain national and international limits to military outsourcing.⁴⁷ Combat activities, detaining civilians, or interrogating prisoners of war by PMCs should be, for example, subject to restrictions – when not forbidden – internationally. Other security functions, though of lesser concern, should be more clearly and closely controlled.
- comply with international humanitarian and human rights law in their activities like their military counterparts. PMCs would vet and register staff to ensure that they have not committed violations of IHL or relevant criminal offences in the past; PMCs would provide their staff with general and task-specific training in IHL; and PMCs' standard operating procedures and rules of engagement would be made to comply with IHL.
- fulfill performance benchmarks. Such terms require specific, tangible results to be demonstrated in the performance of a contract, thereby providing compliance incentives and an evaluation framework for PMC activities.⁴⁸

The *procedural* obligations imposed by the contract would include requiring PMCs to:

- obtain national licenses from an industry licensing authority to offer security services in general as well as to operate in specific armed conflicts abroad.

⁴⁶ See, regarding the international standard contract generally, C. M. Schmitthoff, *The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions*, 17 *International and Comparative Law Quarterly* 551 *et seq.* (1968).

⁴⁷ An exception to any prohibition on offensive military operations by PMCs might arguably be made in the context of peace and stability operations. (See further, O'Brien, *supra* note 15, at 17.)

⁴⁸ None of the publicly available Iraq contracts for military services contains clear performance benchmarks. (See further, Dickinson, *supra* note 19, at 411.)

- ensure availability of sufficient funds for victims of violations by contractors (e.g. by taking out insurance against possible claims upon being authorized to do business,⁴⁹ by posting a bond for specific contracts,⁵⁰ or by allowing governments to withhold payment under certain conditions).
- establish internal mechanisms for investigating any alleged violations by employees and to cooperate in any official investigation into the unlawful use of force.
- submit themselves and their employees to civil and criminal prosecution in the event of misconduct. Prosecution would be carried out in a pre-designated, relevant⁵¹ national jurisdiction.⁵² Upon exhaustion of local remedies, recourse might be permitted to an international dispute settlement mechanism to settle contractual or tortious disputes relating to PMCs' activities. Such a mechanism would be open to states and victims of misconduct by PMCs (and on the principle of vicarious liability by states) and could take the form of an international arbitration centre (e.g. the Permanent Court of Arbitration⁵³ or a new centre)⁵⁴ and of a standing or *ad hoc* international claims commission.⁵⁵ In parallel to a two-level system of civil redress, the ICC's jurisdiction might be extended to legal persons to complement national criminal punishment.⁵⁶

By combining such material and procedural obligations, sanctions could be imposed on military contractors (companies and staff) for operating without

⁴⁹ The danger of PMCs trying to avoid liability by taking on a new corporate name and structure when accused of violations of the law must be minimized.

⁵⁰ Ideally, the bond would be in proportion to the actual contract and would be liable to forfeit in whole or in part upon violations by the company or its staff.

⁵¹ *I.e.* of the home, host, or hiring state of the PMC in question, each of which jurisdiction has particular advantages and disadvantages. If host state jurisdiction is foreseen, PMCs should be required to open a subsidiary in the host state, so as to facilitate possible civil claims.

⁵² None of the publicly available Iraq contracts for military services contains a provision for 'third-party beneficiary suits', enabling contract beneficiaries or other interested parties to sue in US courts for breach of contract. (See further, Dickinson, *supra* note 19, at 421.)

⁵³ The Permanent Court of Arbitration in the Hague administers arbitration, conciliation, and fact-finding in disputes involving various combinations of states, private parties, and international organizations. All types of disputes can be settled within its framework.

⁵⁴ There is precedent for the international arbitration of a contractual dispute between a PMC and a state, namely that between Sandline International and the Government of Papua New Guinea. The dispute was litigated under UNCITRAL rules and ended in a settlement. (See <http://www.sandline.com/site/>.)

⁵⁵ See, regarding the establishment of international claim commissions generally, S. Furuya, *A Model Statute of an Ad Hoc Compensation Commission: Preliminary Analysis of Some Issues to be Addressed*, Report, Committee on Compensation for Victims of War, International Law Association Conference, Toronto, June 2006, at 22 *et seq.*, available at http://www.ila-hq.org/html/layout_committee.htm.

⁵⁶ Such an attempt failed during the negotiations over the Rome Statute but might be made again at the 2009 convention of states party.

having obtained the necessary authorisations or for operating in breach thereof. There is a precedent for this approach in many hiring states in government procurement and public expenditure laws that require companies to meet certain standards in their operations before the companies can be eligible for public monies. National authorities to certify PMC staff and contracts as well as to supervise their conduct⁵⁷ would have to be created in home states under the proposed regime. The means by which arms exports and the domestic private security industry are currently regulated in Western countries might serve as models in designing the licensing scheme.⁵⁸ To complement national initiatives, a forum for inter-state communication, cooperation, and, at best, regulatory coordination regarding the industry might be established at the international level.⁵⁹ International mechanisms and standards could avoid the ‘first-mover’ problem, prevent a ‘race to the bottom’ among regimes in home states, and lay the groundwork for a universal approach. The funding necessary for the establishment of such national and international bodies could be collected from PMCs seeking a license, if the industry is in fact sincere about its desire for regulation.⁶⁰

Direct benefits for the observance of international humanitarian and human rights law before as well as after a breach could be expected from the adoption of the regime proposed. The common goal of these bodies of law to promote human welfare by protecting individuals from abuse of power would be advanced by enhanced control of the private military industry. In addition, the envisaged regime would open up dealings between PMCs and the state according to principles of oversight, transparency, and participation. The national licensing authority would scrutinize the activities of PMCs; all of its decisions would be subject to review by a cabinet member; and this official would be required to report to the legislature regularly. Such an arrangement would be desirable not only according to the idea of democratic accountability but also according to the Kantian theory of republicanism as peace strategy.⁶¹ Finally, to the extent that PMCs came under the authority’s

⁵⁷ Contractual monitoring might be undertaken by NGOs that are in the conflict area in question as well as by governmental entities.

⁵⁸ See further, C. Schaller, *Private Sicherheits- und Militärfirmen in bewaffneten Konflikten: Völkerrechtliche Einsatzbedingungen und Kontrollmöglichkeiten 22 et seq.* (2005), available at http://www.swp-berlin.org/common/get_document.php?id=1387#search=%22schaller%20%22private%20military%22%22.

⁵⁹ See, regarding the development of international supervisory mechanisms, *Id.*, at 25. So far, concern with the consequences for human rights of PMCs’ activities has led to the UN Working Group on the use of Mercenaries being mandated to monitor the effects of “private companies offering military assistance” on the “enjoyment of human rights” and to “prepare draft international principles that encourage respect for human rights on the part of those companies in their activities.” (Commission on Human Rights Res. 2005/2, available at <http://www.ohchr.org/english/issues/mercenaries/index.htm>.)

⁶⁰ IISS, *supra* note 30.

⁶¹ See further, Neuhold, *supra* note 1, at 25.

purview, the government could no longer claim not to know about what their companies were up to – and indeed, that it did not approve of these activities. The government, by virtue of the authority's scrutiny of locally-based PMCs' activities, would be held to answer for upholding the international prohibition of the use of force, the principle of non-intervention, the law of self-determination, Resolutions under Chapter VII of the UN Charter, and other measures for international peace and stability.

6. Outlook

[A]s long as states do not want non-state actors to be directly accountable for human rights violations, they will not become accountable. When states want them to become accountable, they can achieve this by establishing the required institutions and procedures. – August Reinisch⁶²

Assuming that the regulatory and monitoring regime proposed does structure the contractual relationship between the hiring government and the PMCs in ways that encourage the realization of societal values, what are the possibilities and prospects of the regime's coming into being? The need for efforts to be undertaken to bring PMCs under control is urgent – and that not only so as to limit the adverse effects of their activities as soon as possible. This newer global industry finds itself at a critical juncture in its development; the relationship between PMCs and states – or rather the market and (inter-)state means of controlling the industry – has not yet taken on fixed contours, which flux offers a range of regulatory options. Moreover, there is currently widespread interest and concern about PMC activities in the aftermath of recent scandals; the public attention necessary for the success of initiatives may be still counted upon. Finally, many PMCs themselves would apparently be open to a tighter controlled industry.⁶³ The benefits for the industry would certainly be considerable. The obligations prescribed by the standard contract would provide for the clarity sought by PMCs of their legal position; licensing would confer legitimacy on the industry, which currently suffers from a negative image internationally;⁶⁴ and authorization of particular PMCs would attest to the quality of the contractor's services, an approbation generally desired by market players.

⁶² A. Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in P. Alston (ed.), *Non-State Actors and Human Rights*, 37 at 87 (2005)

⁶³ Remarks of D. Brooks, President, International Peace Operations Association, Conference on Privatization of National Security, Princeton University, 9 October 2004, at 26 *et seq.*, available at <http://www.wps.princeton.edu/ppns/conferences.html>.

⁶⁴ See, regarding PMCs' public image, K. R. Nossal, *Global Governance and National Interests: Regulating Transnational Security Corporations in the Post-Cold War Era*, 2 Melbourne Journal of International Law 459, at 474 *et seq.* (2001).

Having said all that, the introduction of broad-based measures for the tighter control of the private military industry hinges upon states. It can be presumed on the basis of previous efforts in this area that any negotiation among states would be protracted; the chances of reaching agreement are, however, for diplomats and politicians ultimately to assess.⁶⁵ A consensus-building strategy can be proposed here. The impression that states are currently engaging in short-sighted policymaking regarding military outsourcing is hard to avoid, using PMCs to advance their own, short-term interests. Instead of this approach, the longer-term, systemic interests of states in international stability and in the common observance of international legal obligations might be successfully appealed to, and the concomitant need for and responsibility of states to provide for means and mechanisms to protect these fundamental legal goods made clear.⁶⁶ At a minimum, state employers of PMCs might be reminded of their interest in avoiding the increased risk of negative publicity and legal liability that reduced control of PMCs' activities brings: for example, the US reputation abroad has been badly tarnished by contractors' misconduct and subsequent impunity.

For its part, the Swiss federal government recognizes the necessity of more effective regulation and monitoring of the private military industry, possibly through a licensing regime that includes adequate training of staff, parliamentary oversight, constraints on outsourcing of certain activities to PMCs as well as sanctions for violations.⁶⁷ Together with the International Committee of the Red Cross, Switzerland has initiated an international process that is intended to encourage dialogue between states about the use of PMCs,

⁶⁵ The skeptical reaction of states to the South African regulation does not, however, bode well for reform efforts:

Diese Zurückhaltung legt die Schlussfolgerung nahe, dass viele westliche Regierungen an der eindeutigen Klärung des Status und der zulässigen Aufgaben nicht interessiert sind, weil sie selbst Dienstleistungen in Anspruch nehmen, die in dieser völkerrechtlichen Grauzone liegen.

(U. Petersohn, *Boomender Markt privater Militärfirmen*, Neue Zürcher Zeitung, 7 June 2006, at 7.)

⁶⁶ But *cf.* Dickinson,

one might think that these proposals to reform the government contracting process are unrealistic because one of the main reasons government privatize is precisely to *avoid* the kind of accountability I propose. Yet governments are not monolithic, and there are undoubtedly many people within bureaucracies, such as contract monitors, who honestly wish to do their job and would therefore welcome (and lobby for) contractual mechanisms that increase accountability.

(Dickinson, *supra* note 19, at 388 *et seq.*, emphasis in original.)

⁶⁷ C. Schraner Burgener, Direktion für Völkerrecht, Eidgenössisches Departement für auswärtige Angelegenheiten, cited in C. Spénlé, *Lässt sich rechtsstaatliche Verantwortlichkeit privatisieren? – Tagungsbericht ICJ – Schweizer Sektion 2005*, Jusletter, 15 August 2005, Para. 36.

to clarify and strengthen the international legal obligations of state and non-state actors in this context and to study national and international regulatory models.⁶⁸ The country can plausibly undertake this initiative on the basis of its long-standing, widely acknowledged neutral and humanitarian tradition and as a complement to the current Foreign Minister Micheline Calmy-Rey's pursuit of 'an active neutrality'. We propose that in addition Switzerland offer itself as a home to any new dispute settlement mechanism that is agreed, drawing upon its experience in arbitration (*e.g.* inter-state, federal, and sports) and in the settlement of claims (*e.g.* UN Claims Commission).

Beyond agreement on the form of an international standard contract what is called for from states is ultimately a reaffirmation of the primacy of law and politics over the forces and values of the market. States and PMCs have diverging perspectives on the provision of security: where states are to ensure the public welfare (directly or indirectly), a corporation seeks to satisfy its shareholders. We cannot reasonably expect PMCs to comport themselves legally *tout simple*: relying on market forces and business ethics in this context is dangerously naïve, as the scandals cited at the outset illustrate.

So far, the prevailing response of states to the negative consequences of military outsourcing has been to leave PMCs unaccountable, that is, to deny a connection to any misconduct and to abstain from prosecuting contractors.⁶⁹ At most, governments have (explicitly or implicitly) pleaded *force majeure* as justification for their policies, *i.e.* that capitalism and globalisation compel them to outsource security tasks and that controlling the industry effectively is impossible for the same reasons (*i.e.* due to competition between national regimes and the threat of corporate relocation to a laxer jurisdiction).⁷⁰ In fact, this trend – and the resultant problems – is to a significant degree a matter of political choice: governments have deliberately abdicated responsibility.

The outsourcing of public functions to private parties offers potential benefits but also runs certain risks. Who should undertake particular functions in this context as in other is a matter for consideration and discussion. According to Swiss constitutional law, some public security tasks cannot be outsourced to private parties (*e.g.* the use of firearms, which is incompatible with the right to life), while others may only be outsourced in a proportionate way. The general rule is that the more security functions restrict fundamental rights, the less private parties can take over such a task.⁷¹ Regardless which functions

⁶⁸ See Bericht des Bundesrats zu den privaten Sicherheits- und Militärfirmen, 2 December 2005, at 681 *et seq.*, available at <http://www.admin.ch/ch/d/ff/2006/623.pdf>.

⁶⁹ *E.g.* the US Department of Justice has dismissed two, brought one indictment, and left open 17 of the 20 known cases of alleged misconduct by civilians in the war on terror that were forwarded by the Pentagon and CIA to it for investigation. (Amnesty International, *supra* note 38.)

⁷⁰ Nossal, *supra* note 64, at 459.

⁷¹ See further, M. Guery, *Die Privatisierung der Sicherheit und ihre rechtlichen Grenzen*, Zeitschrift des Bernischen Juristenvereins 273 *et seq.* (2006).

are deemed delegable, accountability and responsibility in a state under the rule of law can by definition never be delegated or transferred. Such a state cannot absolve itself from its national and international legal obligations by outsourcing tasks to non-state actors: either it undertakes the public functions itself, or it is to ensure that these are carried out by private parties in conformity with the law. Contracting out and privatization should, as argued in the US context, “be accompanied by an insistence on public values following private dollars. The content of those values, in turn, should stem from the Constitution and from public debate.”⁷²

Single states and states as a group must reassert themselves as guarantors of the public interest. A ‘world government’ in the present context is not necessary, to say nothing of the possibility or desirability of a large, expensive, and omnipotent regime. A network of institutions rather than the current patchwork would suffice: means and mechanisms of accountability and responsibility controlling PMCs could be put in place that operate in conjunction with one another on different regulatory levels.⁷³ To that end, existing institutions would have to be strengthened (*e.g.* in Western countries, fundamental values that are already constitutionally fixed must be consistently applied and enforced) and new institutions would have to be built into the international system (*e.g.* an arbitration centre for disputes arising out of PMC activities).⁷⁴ In the (re-)design of these institutions, the potential of market forces and self-regulation to contribute to the governance of the industry should not be left undeveloped; private means and mechanisms might well complement domestic legislation and international standards. At all events, it is sensible to consult widely – including within the private military industry – as part of any reform process, so as to ensure that the capabilities and legitimate interests of all parties concerned are taken into consideration in any lawmaking.⁷⁵

⁷² Minow, *supra* note 20, at 998.

⁷³ See, regarding the potential to develop a body of law to govern corporate conduct that comprises public-private mechanisms on the national and international levels, R. G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in P. Alston (ed.), *Non-State Actors and Human Rights*, 177 *et seq.* (2005).

⁷⁴ For its part, extraterritorial legislation may prove an attractive mechanism for a decentralized enforcement of international law, provided that states’ effort at ensuring compliance with international law is genuine. *E.g.* the *Alien Tort Claims Act (ATCA)* provides that district courts shall have original jurisdiction in any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the US. Two class action lawsuits have been filed under *inter alia* the *ATCA* against US-based PMCs, accusing them of having conspired with US officials to abuse detainees in Iraq. In rulings in the last year, the DC District Court held that *ATCA* confers jurisdiction but does not create a cause of action; a cause of action must be found in the law of nations. Since the law of nations does not, according to the court, apply to private actors such as the defendant PMCs, the claims filed under *ATCA* were dismissed. (See http://news.findlaw.com/andrews/bf/gov/20060717/2006717_alrawi.html; see generally, C. Hailer, *Menschenrechte vor Zivilgerichten – die Human Rights Litigation in den USA* (2006).)

⁷⁵ There is otherwise the risk that the resultant law will prove ineffective and even that PMCs

We hope by the preceding paper to provoke a public discussion about the regulation and monitoring of the private military industry in future. The exact timing, format, content etc. of the regime proposed here need to be worked out. The proposal is also admittedly ambitious, requiring agreement among states on both material and procedural aspects of regulation and monitoring. It seems evident to us, however, that decisive, coordinated action is imperative, given the serious challenges posed by military outsourcing, and that the goal of a comprehensive regime is appropriate, in order to ensure the effective control of PMCs. Whatever regime is ultimately agreed, it must emphasize fundamental societal values and ideas of accountability and responsibility in the use of force.

will refuse to submit to it. In addition, company representatives might conceivably participate alongside legislators, government officials, NGOs, and academics in any control mechanisms thereby established.