Women, PMSCs and International Law

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Chapter 10

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Public consciousness of private military and security companies (PMSCs) was raised when investigations and lawsuits concerning violence perpetrated against women as civilians and employees arose (De La Vega and Beck 2006; Krahmann 2007, 105; U.S. Department of Defense 2010). These events and their aftermath exposed inadequacies in existing international and national laws to hold PMSCs accountable and to ensure effective remedies for victims. Despite concerted efforts to address these deficiencies in the law and regulation in the intervening years, progress in respect of accountability and reparations for human rights violations committed by these companies and their personnel remains limited. This chapter considers present-day initiatives to regulate PMSCs through international law, particularly as they relate to women and gender issues more broadly.

It is deeply ironic that as the implementation and enforcement of international humanitarian law and human rights law has been strengthened in the last decades, through the establishment of individual complaint procedures, specialist tribunal and courts covering breaches of human rights law, and international humanitarian law and international criminal law, there has been an erosion of these principles and protections through the privatization of governmental and intergovernmental functions. Despite an exponential increase in the contracting these activities to PMSCs since 2001, the legal regulation of these companies and their personnel has been slow and fragmented (Mancini, Ntoubandi, and 2011; Østensen 2011).
When assessing the regulation of PMSCs, legal experts have referred to the urgent need to address the “glaring gap” at the international level where they are “rarely held accountable” for violations of international humanitarian law and human rights law (UNWGM 2010a, 10). Feminist legal scholars have long highlighted the divide in law between the private sphere, which is left largely unregulated, and the public sphere, which is regulated (Charlesworth, Chinkin, and Wright 1991, 615). While this analysis was developed to expose the gendered nature of law and its adverse impact upon women, it is a useful tool for examining regulatory gaps concerning the activities of PMSCs.

The failure of the law and regulators to adequately keep up with the rapid expansion and diversification in the use of PMSCs has had a significant impact for victims of human rights violations perpetrated by PMSCs and their employees generally, and for women and girls in particular (Schulz and Yeung 2008). To explore these developments, this chapter is divided into two parts. Part one focuses on current initiatives at the international level to provide a regulatory framework for PMSCs and which encompass the obligations of states (and international organizations) in respect to international humanitarian law, human rights law, and use of force. Part two outlines the influence of civil society participation (including feminist academics, women’s NGOs, and so forth) in breaking the “silence” within international organizations and international law concerning violence against women (VAW) and girls and its potential influence upon the regulation of PMSCs. Both parts serve to highlight evolving notions of force and violence, accountability and enforcement, and access to justice and reparations within international law today.

**PMSCs and their Legal Regulation**
PMSCs do not operate in a legal lacuna. Indeed, there are various efforts at the international and national levels, state- and industry-based, to restate the existing laws and formulate good practice guidelines. The problem arises because of the multiplicity of initiatives that are not harmonized, thus regulatory gaps remain. The need to address regulatory gaps is amplified because the rise of PMSCs is eroding the effectiveness of existing international humanitarian law and human rights law norms (UNOIGWG 2011, 1).

Accordingly, this part of the chapter provides a brief overview of current major regulatory initiatives in this field:

- **Multilateral, state-based, legally binding regulation:** The UN’s draft Convention on Private Military and Security Companies (draft UN Convention) (UNWGM 2010b).

- **Multilateral, multistakeholder, self-regulatory initiatives:** The Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict (Montreux Document) (ICRC 2008), the related International Code of Conduct for Private Security Service Providers (ICoC) (Swiss Confederation 2010), and the International Code of Conduct for Private Security Service Providers’ Association Articles of Association (ICoCA Articles) (Swiss Confederation 2013a).

- **National laws.**

These legal developments are examined specifically in respect to the international responsibility for violations of international law by PMSCs and their personnel and
access to justice and remedies for victims of such violations. Victims may include civilians who come into contact with PMSCs, PMSC personnel, or members of armed forces. The discussion in this part focuses on international humanitarian law and human rights law more generally, while specific protections concerning women are covered in part two below.

**Draft UN Convention on PMSCs**

Within the United Nations, the regulation of PMSCs has primarily been driven by the Working Group on the Use of Mercenaries. By 2008, the Working Group proposed a definition of PMSCs that recognized the extensive range of activities these companies undertook during armed conflict and postconflict situations (UNWGM 2008, 1). While acknowledging the significance of the Montreux Document, discussed below, they affirmed their intention to pursue a legally binding instrument for states rather than companies (Nikitin 2009, 4).

Following consultations with states, NGOs, and academics, a draft Convention was released by the Working Group in 2010 (UNWGM 2010b). The draft reaffirms states’ obligations concerning international human rights law and requires that they establish measures ensuring transparency, accountability, and responsibility of PMSCs and their personnel, and provide mechanisms for redress for victims (UNWGM 2010a, paras.39–41). The UN Human Rights Council established an Open-ended Intergovernmental Committee to consider the possibility of a binding instrument along the lines proposed by the Working Group (UN 2010e, para.5).

The draft Convention reaffirms the obligation of states to prevent, investigate, prosecute, and punish violations of international humanitarian and human rights law and
that violations of these norms can be imputed to states, intergovernmental organizations, and nonstate actors including PMSCs.¹ However, only the legal responsibility of states parties, and intergovernmental organizations “within the limits of their competence” is extrapolated (UNWGM 2010a, paras.43–45). There is silence concerning the direct responsibility of PMSCs (UNWGM 2010a, 16; Clapham 1993). It emphasizes that states have a responsibility to protect those affected by human rights violations perpetrated by PMSCs whether they be civilians, military personnel, or PMSC employees. Like the Montreux Document before it, the draft enunciates differing obligations for contracting states (who directly contract the services of PMSCs), states of operation (on whose territory PMSCs operate), and home states (where the PMSC is incorporated, registered, or has its principal place of management) (UNWGM 2010b, Art.2). The draft Convention outlines the basic international law obligations owed by states in respect to international humanitarian law, human rights law, and use of force (Part II).

The draft UN Convention seeks to fill the current regulatory gap by affirming the application of international human rights and humanitarian law to PMSCs, that is, that they and their personnel must be held responsible for violations, and proposes a clear mode of implementation and enforcement missing from the current international and national initiatives. Under the proposed instrument, this gap will primarily be closed through the establishment of effective national legal frameworks by states parties which would cover regulation and oversight through licensing, registration, training, and vetting regarding human rights and humanitarian law norms, and regulation of the use of force (Part III).
A divergence of opinion has arisen in respect of the draft UN Convention’s engagement with the regulation of use of force in international law. Understanding of force in international law remains very limited when compared with the manifold modes of violence experienced by women and the diverse consequences of armed violence on them (Milliken, Gilgen, and Lazarevic 2009, 11–13; UN 2011b, 6–25; UN 2012a; Geneva Declaration 2012, 113–138). Reflective of its preparation by the Working Group on Mercenaries, it seeks to define the legal use of force and “inherently” state functions which cannot be contracted out to third parties, including PMSCs (UNWGM 2010b, Arts.2 and 9). Divisions have arisen between states which regarded the proposed distinction acceptable and those that favored a restrictive approach (UNWGM 2010a, 17). While the European Union argued that parts of the draft Convention were outside the competence of the Human Rights Council (UNOIGWG 2011a, 15), the proposed instrument makes clear that the regulation of the use of force must be understood within a human rights framework (UNWGM 2010b, Art.1). This way of interpreting the regulation of the use of force has the potential to move it beyond a purely statist rubric (Charlesworth, Chinkin, and Wright 1991, 22). For example, civilians, including women, have disproportionately higher mortality and injury rates arising from small arms (Farr, Myrttinen, and Schnabel 2009; UN 2012a, 13–14). The draft Convention seeks to regulate the outsourcing of the use of certain weapons, including firearms, by PMSCs (UNWGM 2010b, Arts.10 and 11).

Nonetheless, the draft Convention does endeavor to stem the erosion of controls on the use of force, through their contracting out to nonstate entities (CE 2009a). It does this in two ways: the reaffirmation of the “legitimate” use of force in its many guises as
an inherently state (or intergovernmental) function, and that states parties will be held responsible for the international wrongful acts of PMSCs and personnel in certain circumstances. The draft Convention seeks to impose responsibility on states parties to ensure criminal, civil and/or administrative penalties for violators of international humanitarian and human rights law and those engaged in inherently state functions (UNWGM 2010b, Art.19). Furthermore, states parties must provide victims with effective remedies under national law (UNWGM 2010a, 10).

The chief criticisms of the current self-regulatory scheme is its nonbinding nature and lack of effective oversight mechanisms. The proposed UN Convention would require the establishment of an international committee made up of “experts of high moral standing, impartiality and recognised competence in the field” elected and nominated by the states parties, who will oversee and monitor its implementation (UNWGM 2010a, Art.29). Three modes of triggering investigations of violations of the convention are envisaged. All are dependent on the cooperation of the relevant state or states. First, the committee would receive, investigate, and issue findings and recommendations concerning grave or systematic violations of the convention. These proceedings would remain confidential (UNWGM 2010b, Art.33). If the matter is not resolved, the committee can with the consent of the states parties appoint an ad hoc conciliation commission to hear the matter and make recommendations (Arts. 35 and 36).

Further, the committee could hear complaints against a state party brought by another, when one believes the other is not fulfilling its obligations under the proposed Convention (UNWGM 2010b, Art.34). A similar procedure is attached to existing human rights treaties, but it has not been utilized to date. Indeed, it is relatively weak compared
to the UN Convention on the Elimination of All Forms of Discrimination against Women and the UN Convention on the Elimination of All Forms of Racial Discrimination which provide states parties able to declare that disputes be resolved by referral to the International Court of Justice.²

Finally, the committee can also receive petitions from or on behalf of individuals or groups who are victims of violations by a state party. As with other human rights instruments, this only occurs if the relevant state has made a declaration recognizing its competence to receive such communications (UNWGM 2010b, Art.37). While such an international mechanism does have the potential to “give women’s voices a direct audience in the international community” (Charlesworth, Chinkin, and Wright 1991, 645), it is significantly restricted. It is the state party that decides whether it will grant competence to the committee to receive such communications, the matter is heard in closed session, and there is no explicit requirement on the committee to refer potential grave breaches of international humanitarian law or serious violations of human rights law to a competent multilateral body for further investigation.³

It is important to note that the Working Group on Mercenaries itself can receive individual communications from “a state, state organ, intergovernmental and non-governmental organization, or the individuals concerned, their families or their representatives, or any other relevant source” (HRC Res.2005/2). The UNWGM will forward the complaint to the relevant state for reply. Its opinion shall be forwarded to the state, the Human Rights Council, the relevant PMSC involved, and the complainant. The UNWGM shall follow up with the country to ensure that it is implementing its recommendations or explains its failure to do so.
The preamble and substantive provisions of the draft Convention reflect developments in international human rights law concerning the fight against impunity, that is, to ensure that perpetrators of serious violations are held to account legally and that their victims receive reparations (UNOIGWG 2011a, 14). Like the Montreux Document before it, Part IV of the Convention concerns state responsibility to impose sanctions for violations and remedies for victims. Complementary to these obligations is the proposed establishment of an international fund to provide reparations for victims and assist in their rehabilitation (UNWGM 2010b, Art.28). The creation of the fund would not absolve PMSCs and individuals who are criminally liable, from also compensating victims (Art.28(b)). The inclusion of this international fund in the draft text was “welcomed by many” (UNWGM 2010a, 16). The application of these principles pertaining to reparations as they related to women is examined in Part two below.

The very need for a binding international agreement remains highly contested. There is division between states (and the African Union) that stressed the need for a new specialist treaty covering PMSCs because existing self-regulatory frameworks do not provide effective and enforceable accountability mechanisms or avenues for redress; and those countries (and the European Union) that maintain that existing regulatory initiatives like guiding principles and model legislation should be implemented and properly assessed (UNOIGWG 2011a, 12–16).

Critical legal scholars, including feminists, have long challenged the states’ monopoly in international law-making and argued for the need to acknowledge and embrace civil society in these processes (Chinkin 1992, 292). The proposed UN Convention was prepared with feedback from nonstate actors and draws heavily from the
self-regulatory regimes like the Montreux Document, a soft-law instrument propelled by multiple stakeholders including the International Committee for the Red Cross (ICRC). While there are a number of women on the UNWGM, the involvement of UN bodies or NGOs advocating on behalf of women has not been overt in this process to date. Given the finite resources of such bodies and the persistent underrepresentation of women in the decision-making roles in the United Nations and within states, this is not unsurprising (Charlesworth, Chinkin, and Wright 1991, 23; UN 2010a). Importantly, the proposed convention would convert existing soft-law, good practice principles into binding obligations on matters that disproportionately impact “vulnerable” groups including women (cf. Chinkin 1989). The current draft’s limited explicit engagement of issues pertaining directly to women (even compared to the Montreux Document) and ongoing resistance to a binding instrument hinders efforts to fight impunity and provide all victims with effective redress.

Montreux Document and International Code of Conduct (ICoC)

Co-sponsored by Switzerland and the ICRC, the Montreux Document focuses on the obligation of states, and with the ICoC and ICoCA Articles, which center on companies, it is intended to be read as a complementary regulatory framework. It is a multistakeholder initiative that has received broad support from the United Nations, states, and the industry (UN 2008c, 3). Part I summarizes existing obligations of states, PMSCs and their personnel under international law; while Part II outlines “good practices” to facilitate states’ adherence to these obligations. The subsequent draft UN Convention borrows heavily from the Montreux Document.
The Montreux Document and good practices, ICoC for PMSCs, and the ICoCA Articles must be viewed against the backdrop of diverse, multilateral initiatives to formulate a normative framework covering human rights and businesses, the foremost being the UN Guiding Principles (UN 2011c, Annex). Prepared in response to failed efforts to impose responsibility on companies in international law, the UN Guiding Principles, endorsed by the Human Rights Council in 2011, work on the premise that there has been a fundamental shift from the public to the private spheres and this is having adverse implications for human rights and vulnerable groups including women. Like the Montreux Document, it does not create new international law obligations but seeks to provide a coherent framework of existing standards and practices, and expose gaps and facilitate future developments (UN 2011c, 5). The Montreux Document broadly follows the three pillars of the UN “Protect, Respect and Remedy” framework on Human Rights and Business. The duty of states to protect against the human rights violations of third parties, including PMSCs is covered by the Montreux Document and good practices. Corporate responsibility to respect human rights, including through international humanitarian law, is reflected in the ICoC. The requirement to provide access to effective remedies to victims of violations is intended to be realized through the ICoCA Articles and mechanisms to be developed by its Steering Committee (Swiss Confederation 2013b).

While it addresses the obligations of states and PMSCs in international law, the Montreux Document (ICRC 2008) makes clear its good practice recommendations would benefit international organizations, NGOs, and companies, including PMSCs (Preface, para.8). It covers the activities of PMSCs during armed conflict. However, the principles
and good practice guidelines were prepared on the understanding that they may also be useful in non-conflict situations (Preface, para.5).

Like the UN Guiding Principles, the Montreux Document affirms that states are the primary duty bearers regarding human rights and international humanitarian law. And like the subsequent draft UN Convention, it places the primary obligation for monitoring and enforcement of these international norms on the state. It reaffirms that under international humanitarian law and human rights law certain activities cannot be contracted out by a state and that it retains its obligations under international law even if it contracts activities to third parties (ICRC 2008, Part I.A, para.2; UN Guiding Principle 5). Furthermore, states must prevent, investigate, and punish violators of international human rights law and provide effective remedies to victims of PMSCs and their personnel (ICRC 2008, Part I, paras.4–8, 10, 15, 20). It confirms that PMSCs and their personnel are bound by applicable national laws including those imposing international humanitarian law and human rights law standards upon them (Part I, para.22). The importance of domestic law in holding PMSCs and their personnel to account is discussed further below.

Part II of the Montreux Document covering “good practices” mimics the operationalization of legal obligations of states contained in the UN Guiding Principles but is tailored for states interacting with PMSCs and their personnel. Like the Guiding Principles they are dominated by contractual-based devices. They are neither legally binding nor exhaustive, and are inappropriate when they clash with a state’s international legal obligations. They are primarily directed to the contracting state, which is encouraged to select PMSCs with no record of serious crimes including violations of
international humanitarian law, sexual offences, and violent crime (ICRC 2008, Part II, para.6). Enforcement procedures are contractually based and include termination of license for the PMSC and employment contract for its personnel, financial sanctions, and remedies for its victims. When negotiating agreements with territorial states, the contracting state must cover jurisdiction and immunity to ensure that there is adequate and appropriate civil and criminal jurisdiction and remedies concerning violations (Part II, paras 22 and 23). With respect to monitoring and compliance, it should provide for criminal jurisdiction under its national law including establishing corporate criminal responsibility and extraterritorial application covering acts committed abroad (Part II, para.19).9

Where the Montreux Document and related good practices are designed to reaffirm and elaborate upon the international humanitarian law and human rights law obligations of states with respect to their dealings with PMSCs and their personnel, the ICoC is the industry equivalent concerning the UN Guiding Principles (Swiss Confederation 2010, 3). Signatory companies are required to endorse the Montreux Document, the UN Principles, and to affirm that they will “fulfil humanitarian responsibilities towards all those affected by their business activities” (3). The ICoC also seeks to establish “common and internationally-recognized operational and business practices” (4), and an independent, external oversight and governance mechanism is being developed pursuant to the ICoC Code (Part C) and ICoCA Articles. Signatory companies must have an internal oversight mechanism and submit to auditing and verification by the tripartite Steering Committee (made up of representatives from governments, industry, and civil society). They must establish grievance procedures that
are “fair, accessible, and offer effective remedies, including recommendations for the prevention of recurrence,” and maintain sufficient funds to meet “reasonably anticipated commercial liabilities” arising from damages and claims for death, injury, or property damages (15). The ICoCA Articles provide for the establishment of a board with equal representation of member companies, affiliated civil society organizations and affiliated governments; and a secretariat, which shall administer the ICoC and implement the board’s decisions. In response to violations of the ICoC, the board is empowered to suspend or terminate the membership of a member company (Swiss Confederation 2013a, Art.13.2.7).

John Ruggie observed that effective access to remedies for victims of human rights violations by corporations is “underdeveloped” and “flawed” (UN 2010b, 7 and 18). The UN Guiding Principles affirm states have a duty to not only protect against human rights abuses by companies within their jurisdiction but also to ensure that victims of violations have access to effective remedy (UN 2011c, 25). It envisages that state-based grievance procedures can be “supplemented or enhanced” by “collaborative initiatives” (24). Unlike earlier drafts, the ICoCA Articles adopted in 2013 do not allow for third-party complaints (UNWGM 2013, 15). A complaint may be made by an individual or their representative specifying violations of the ICoC and alleged harm to one or more of the individuals arising from the violation (Swiss Confederation 2013a, Art.13.2.1). In order to ensure that nonjudicial grievance mechanisms, whether state or nonstate based, are effective, the UN Principles stipulate that they must be legitimate, accessible, predictable, equitable, transparent, rights-compatible, that is, that the results and remedies comply with international human rights norms (UN 2011c, 28–29).
While the ICoCA Articles do provide for monitoring, including a “human rights risk assessment” (Swiss Confederation 2013a, Art.12), the Working Group on Mercenaries and others charge that its grievance mechanism does not comply with the UN Guiding Principles (UNWGM 2012a, 6–7), even though participants are required to adhere to them. For example, the complainant may be provided with information concerning other possible avenues to resolve the grievance including the relevant company’s own internal grievance procedures, other existing independent dispute resolution bodies, private counsel, or law enforcement authorities. This falls short of the UN Guiding Principles requirements of actively assisting potential complainants who are seeking access to redress (UN 2011c, 31).

However, many commentators argue that the greatest deficiency of the proposed grievance mechanism lies in that it only covers procedural aspects of a company’s grievance process and not substantive elements concerning remedies for violations (UNWGM 2012a, 6; Cockayne 2012a; ICJ 2012). While the benefits of nonjudicial modes of redress are acknowledged, perhaps the primary drawback of the self-regulatory, multistakeholder codes of conduct, like the ICoC and its proposed grievance mechanism, is that they are voluntary in their membership and their modes of enforcement are not binding (UN 2011b). These significant limitations are exemplified in respect of “so-called rogue business actors” who actively and deliberately avoid any form of regulation (MacLeod 2011, 360).

Much of the language around these self-regulatory, multistakeholder initiatives is driven by managerial concepts of due diligence and risk management, rather than legal concepts of obligations and rights (Richemond-Barak 2011; UNWGM 2012b, 13). While
the UN Guiding Principles are a positive step (Cockayne 2012b), the ongoing impasse at the international level on extending legal responsibility to nonstate actors like corporations regarding human rights abuses means that an “implementation gap” remains for the effective enforcement of international law norms (CE 2012). And while the Montreux Document and ICoC’s tailoring of these principles to PMSCs is also a welcome development, the limitations of the UN Guiding Principles is exacerbated with respect to such companies. PMSCs are increasingly undertaking activities previously the exclusive preserve of states and intergovernmental organizations. Drafted prior to this shift to privatization, existing human rights and international humanitarian instruments have been found wanting. The self-regulatory initiatives concerning PMSCs cover not only human rights norms but also international humanitarian law and use of force—they address the most volatile of circumstances and impact upon the most vulnerable groups. For this reason, any regulatory regime must not only be binding, but it must also ensure that contemporary developments in these fields do not regress. Good practices and codes of conduct can only complement binding legal norms and not substitute them.

**National Legal Regime**

As noted above, the draft UN Convention on PMSCs and the Montreux Document place primary regulatory and remedial responsibility on states. Until a binding international agreement is adopted that extends responsibility for human rights violations to nonstate actors, enforcement of international humanitarian law and human rights law norms through domestic law remains imperative. There are a number of branches of national law that are potentially relevant, like criminal law, contract law, and torts, and that have been explicitly or implicitly referenced in the draft UN Convention and
Montreux Document as possible avenues for accountability and access to justice for victims of human rights abuses by nonstate actors (Dickinson 2002, 2006; Ryngaert 2008; Richemond-Barak 2011).

However, the significant limitations of these areas of law and domestic avenues of oversight, accountability, and enforcement have also been increasingly exposed (ICJ 2012a). These difficulties range from the limited number of criminal prosecutions of PMSC personnel to the lack of jurisdiction regarding corporate criminal responsibility (U.S. 2010), to civil actions stymied by protections normally afforded governments being extended to PMSCs and their activities (Ryngaert 2008). Added to these legal barriers to effective access to justice are those exacerbated by the transnational nature of PMSCs, and the volatile environments in which they operate, which hinder reporting, collection of evidence, and cooperation with relevant legal systems.

One NGO has succinctly noted, the right to effective redress is intimately related to the duty of states to investigate, prosecute, and punish human rights violations—“[t]hese tasks cannot be left solely to private mechanisms,” particularly where “the public interest and the interests of justice are at stake” (ICJ 2012b, 8, 13). Consequently, the Human Rights Council has observed, national laws can only be a part of the “proper regulation” of the impact of businesses on human rights (HRC Res.17/4(2011)). The UNWGM has pointed to the work of the Inter-American Commission on violence against women to make a similar point concerning states’ international law obligations concerning human rights violations by nonstate actors (UNWGM 2013, 16).

Violence against Women and Access to Justice
Lack of clarity about the application of international law norms and inadequacies of existing regulatory regimes covering PMSCs have reinforced concerns about transparency and accountability with respect to gender-related violence, harassment, and discrimination. While international humanitarian law and human rights law have dedicated, or “special,” provisions for women, feminist legal scholars have done much to expose the gendered nature of these branches of international law (Gardam and Jarvis 2001). In recent decades, the jurisprudence of international criminal courts has addressed large-scale and systematic sexual violence in a number of conflicts, the United Nations’ campaign of mainstreaming of women’s issues has impacted significantly on relevant human rights law (SC Res.1325(2000)), and the ICRC has sought to investigate and address women’s concerns (Lindsey 2001; ICRC 1995). This part of the chapter focuses on efforts to address violence against women to illustrate the reinterpretation of existing international human rights and humanitarian law norms through the involvement of civil society at international forums and its potential impact on the regulation of PMSCs.

**Jurisprudence of International Criminal Tribunals and VAW**

These processes are exemplified through the recent shift in the manner in which sexual violence, including rape, is perceived in international law. The ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICRC) from the 1990s to date through their interpretation and enforcement of international humanitarian law and international criminal law have been instrumental in the recognition of rape as a grave breach of international humanitarian law. When adopting the ICTY statute, the Security Council flagged “its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the
former Yugoslavia . . . including reports of . . . organised and systematic detention and rape of women.” (SC Res.827 [1994]; Gardam and Javis 2005, 148–160). Both ICTY and ICTR governing statutes list rape as a crime against humanity.\(^10\) These tribunals have elaborated on rape,\(^11\) and other sexual violence (including enslavement and sexual slavery),\(^12\) as a war crime and a crime against humanity. Significantly, they have also extended these acts to come within the definition of persecution (on the grounds of gender even though not explicitly contained in their respective governing statutes),\(^13\) torture,\(^14\) and genocide.\(^15\)

**United Nations**

Until recently, the United Nations’ response to women’s issues, particularly violence against women, was “silence” (Charlesworth, Chinkin, and Wright 1991). Today, its activities in this field fall into the areas of human rights, international criminal law, and UN reform. The Declaration on the Protection of Women and Children in Emergency and Armed Conflict adopted in 1974 and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1979 do not explicitly refer to sexual violence during armed conflict.\(^16\) Indeed, it was not only the public outrage toward the systematic sexual violence perpetrated during the Yugoslav and Rwandan wars that the international organization was spurred into action on this front. An understanding of violence against women as a violation of human rights is contained in the 1992 general recommendation on “Violence against Women” adopted by Committee on the Elimination of Discrimination against Women. The UN Declaration on the Elimination of Violence against Women of 1993 requires states to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against
women” whether perpetrated by the state or private persons.\textsuperscript{17} It acknowledges that women are especially vulnerable to violence during armed conflict. In the same year, the Vienna Declaration and Programme of Action stated that violations of the human rights of women, “including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.”\textsuperscript{18} During this period, the UN human rights bodies appointed a Special Rapporteur on Violence against Women, Its Causes, and Consequences and a Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery, and Slavery-like Practices. Their periodic reports are central to documenting the nature, extent, and prevalence of these and related issues, and fostering law reform. Feminist legal scholars and the UN Special Rapporteur on VAW have challenged interpretations of international humanitarian law that fail to acknowledge the violence occasioned by rape and other forms of sexual violence (UN 1998; UN 2008a).

The 1995 Beijing Platform of Action reiterated that states had an obligation to exercise due diligence in preventing, investigating, and prosecuting sexual violence against women by nonstate actors (UN 1995, 27). From this initiative arose Security Council Resolution 1325 adopted in October 2000, which guides the work of the UN and its member states in this area. It “emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls” (Art.11). It was augmented by the Secretary-General’s In-Depth Study on all Forms of Violence against Women of 2006, which enumerated several areas in need of reform including data collection, more effective preventative and remedial services,
comprehensive victim services, and bridging the gap between international and national laws for those seeking redress (UN 2006b, 67, 95,106; UN 2011e).

These changes have had a transformative impact not only on the substantive law but also on the manner of its implementation and enforcement. This has extended to the procedures and practices of international courts through the appointment and training of investigative and prosecutorial staff,19 and judicial officers;20 the tailoring of remedies to the requirements of women and girls (discussed further below); and the engagement of women in postconflict reconciliation and reconstruction efforts (SC Res.1325, para.8; UN 2008b; SC Res.1888(2009); SC Res.1889(2009); SC Res.1960(2010); Schnabel and Tabyshalieva 2012).

Within the United Nations, these developments have led to a broader move to mainstream issues related to women, including peacekeeping and peace-building operations (UN 2000; UN 2006a). Its organs, agencies, and member states must report on their implementation of Resolution 1325. As explained below, the United Nations is addressing some of these issues as it reviews its relations with armed private security contractors retained to undertake work on its behalf. While not specific to the organization’s retention of PMSCs, it is bound by international human rights and humanitarian law as confirmed in the 1999 Bulletin of the Secretary-General (UN 1999) and its own 2011 Human Rights Due Diligence Policy concerning UN support to non-UN security forces (UN 2013b). The UN Policy on Armed Private Security Companies and Guidelines on the Use of Armed Security Services from Private Security Companies was adopted by its Department of Safety and Security (DSS) in 2012 and requires companies
to train their personnel in human rights law and its application, and in preventing sexual harassment prior to the commencement of contractual services (UN 2012b, 10).

**International Committee for the Red Cross and Red Crescent**

The protection of women has always been part of the remit of the ICRC. During World War II, it raised awareness of the plight of female prisoners of war, and this was later incorporated into the Geneva III Convention (ICRC 1995). Its work during the Yugoslavian conflicts led to the recognition of rape as “wilfully causing great suffering or serious injury to body and health” and therefore was a grave breach under the Geneva Conventions (ICRC 1992; ICRC 1993, 337). The ICRC stressed the need to enforce existing international humanitarian law norms, to recognize that rape conducted in armed conflict was a war crime, and that investigators and prosecutors be trained appropriately.

The ICRC’s contribution to the 1995 Beijing Conference led to international recognition of the impact on women and girls because of the “us[e] [of] systematic rape as a tactic of war and terrorism” (UN 1995, 57). Its 2001 *Women Facing War* report, a global survey of the impact of armed conflict on women, highlighted specific areas of concerns for female civilians, namely, safety (e.g., personal safety, sexual violence, freedom from arbitrary displacement, and freedom of movement) and legal issues (e.g., access to effective remedy) (Lindsey-Curtet, Holst-Roness, and Anderson 2004, Part1.2). It argued for a stronger role for women in peacekeeping and stability operations, and the need to tailor military manuals and training (ICRC 2007). These moves formed the backdrop to the specific recommendations concerning women in the Montreux Document, an ICRC initiative.

**Regulation and Redress**
In 2001, UN Special Rapporteur on VAW, Radhika Coomaraswamy, referred to the “particular difficulties in enforcing international standards with regard to non-State actors” and called on the international community to ensure that they complied with international humanitarian law and human rights law (UN 2001, 15). Recent international regulatory initiatives, like the draft UN Convention, UN Guiding Principles, Montreux Document, UN-INSTRAW Tool Kit on Gender and PMSCs, and the UN Guidelines on its use of armed private security companies, have emphasized four areas of action: vetting personnel, the education and ongoing training of personnel, reporting, and investigation and accountability. They explicitly cover dealings between states and/or intergovernmental organizations and PMSCs.

First, the Montreux Document recommends that vetting the past conduct of the PMSCs or their personnel, including verified records of sexual offenses, be a prerequisite for awarding contracts (ICRC 2008, 14, 20, 25; UN 2001, 8–10). The ICoC requires signatory companies to establish selection and vetting procedures for its personnel and subcontractors that include disqualification from carrying a weapon if past conduct has included rape, sexual abuse, or trafficking in persons (Swiss Confederation 2010, 11). This is important because regulation of PMSCs remains primarily confined to self-regulation and contractual obligations (Schulz and Yeung 2008, 9). The UN-INSTRAW Report requires that PMSCs improve “vetting standards . . . to ensure those who have committed human rights violations or gender-based violent crimes be excluded” (17). The draft UN Convention does not refer to gender-based violence or women specifically, but it does require states parties to establish criteria for granting licenses and authorizations to PMSCs that take into account records or reports of human rights
violations (UNWGM 2010b, Art.14(3)). The UN Guidelines require any contractor to have signed onto ICoC and verify that there is “no evidence or suspicious of previous criminal offences or human rights violations” by its personnel (UN 2012b, para.24).

Second, these recent initiatives emphasize the need for gender awareness training. The Montreux Document requires contracting, host, and territorial states when selecting and authorizing PMSCs to take into account that their personnel are “sufficiently trained” prior to deployment and on a continuing basis regarding international humanitarian law, human rights law, and specific topics like gender (ICRC 2008, paras.128 and 130). The ICoC likewise requires companies to maintain records of training (Swiss Confederation 2010, 12). The draft UN Convention does not have a specific provision concerning gender awareness training but does cover the obligation of states parties to ensure that the PMSCs that they contract are trained in international humanitarian law and human rights law generally (UNWGM 2010b, Arts.4(2) and 14(3)). The UN-INSTRAW Review made a similar recommendation. UN Guiding Principle 7 emphasizes that states provide assistance to companies working in conflict zones to assess and address risks of abuses, particularly gender-based and sexual violence. To this end, the framework established under Res.1325 that covers training of peacekeepers is implicitly extended to PMSCs working alongside them on UN missions by the 2012 UN Guidelines (UN 2012b, para.23).

Third, ICoC stipulates that signatory companies and their personnel must report sexual or gender-based violence and human trafficking to competent military and civilian authorities (Swiss Confederation 2010, 9). The code prohibits signatory companies, and their personnel, supporting or benefiting from national or international crimes, including
“sexual or gender-based violence, [or] human trafficking,” and that they report “known or responsible suspicion[s]” of such acts to competent authorities in the country where the acts took place, country of nationality of victim, and/or country of nationality of the perpetrator. The UN-INSTRAW Review recommends that states and PMSCs develop national and international standards for monitoring and reporting sexual and physical violence perpetrated by PMSCs, particularly in the postconflict situations discussed in Valerie Sperling’s chapter in this volume (Schulz and Yeung 2008, 17). Likewise, the UN Guidelines have reporting requirements for PMSCs retained by the United Nations (UN 2012b, paras.25 and 27).

Fourth, as noted in part one, recent efforts to regulate PMSCs have emphasized the need for PMSCs’ accountability. The 2001 UN Special Rapporteur on VAW’s report called on states to prosecute perpetrators of war crimes and human rights abuses and ensure victims are eligible for compensation (UN 2001, 42). The Montreux Document asserts that the obligation to prosecute covers contracting, home, and territorial states (ICRC 2008, paras.6, 12, 17, and 21). Under the related ICoC, signatory companies and their personnel will not invoke contractual obligations, superior order, or exceptional circumstances (like armed conflict, public emergency, etc.) as justification for national or international crimes including sexual or gender-based violence or human trafficking. The code also requires these companies to facilitate these processes by reporting to competent authorities, making records of allegations and findings available on request, cooperating with official investigations, and protecting whistleblowers (Swiss Confederation 2010, 7, 15).
In his report concerning the protection of civilians during armed conflict in 2006, the UN secretary-general noted in regards to SC Res. 1325 (2000) and SC Res.1674 (2006) that “more decisive and rigorous action is needed to bridge the gap between the rhetoric of those resolutions and the reality on the ground and to treat acts of sexual violence for what they are—despicable war crimes and crimes against humanity that must be punished” (UN 2007, 13). Ruggie has also called on states to provide more comprehensive guidance to corporations operating in conflict zones (UN 2011d). The United Nations has sought to coordinate and strengthen its advocacy, accountability, and support of national efforts to prevent sexual violence and respond to victims’ needs through the UN Action against Sexual Violence in Conflict initiative. Also, under its amended memorandum of understanding with countries contributing to peacekeeping missions, the sending states have exclusive jurisdiction to investigate and prosecute offenses concerning sexual violence perpetrated by their contingent (UN 2007, 14; GA Res.61/291(2007)).

The question of accountability is closely aligned with access to justice and redress for victims. As the UN Guiding Principles indicate, the requirements of accountability enunciated under the twin pillars of states’ obligation to protect and the corporations’ obligation to respect reinforce the third pillar of obligation of states’ to provide effective remedies for victims. As examined above, this is reflected to varying degrees in the draft UN Convention, the Montreux Document, the ICoC, and the 2012 UN Guidelines covering UN contracts with PMSCs. When establishing the Working Group on Human Rights and Transnational Corporations in July 2011, the Human Rights Committee mandated that it make recommendations at the national, regional, and international levels
“for enhancing access to remedies available to those whose human rights are affected by corporate activities, including those in conflict areas” (HRC Res.17/4(2011)). Also, it is required to take into account “a gender perspective” and “give special attention to persons living in vulnerable situations” (CE 2012, 21). Likewise, the draft UN Convention on PMSCs stipulates that when imposing sanctions for violations, states parties should have “due consideration . . . to offences committed against vulnerable groups” (UNWGM 2010b, Art.19(5)). Yet, it fails to list rape and sexual or gender-based violence in the draft’s preamble of a nonexhaustive catalogue of international crimes that attract “the right to a comprehensive and effective remedy in accordance with international law.”

The Updated Principles to Combat Impunity adopted by the UN Commission on Human Rights in 2006 provide that women should participate in public consultations for the development, implementation, and assessment of reparation programs (UN 2005b). As noted earlier, much has been made of the “implementation gap” and deficiencies of the current regulatory regimes covering PMSCs. There is an emerging body of work undertaken by academics, NGOs, and the Special Rapporteur on VAW concerning reparations and women, which is starting to have an impact on the jurisprudence of international human rights courts (Rubio-Marin 2009; UN 2010d).23 Like the transformative work on violence against women before it, feminist scholars and women’s advocacy groups are promoting women- and girl-centered processes that challenge and redefine procedural and substantive reparation mechanisms. Recognizing that violence and denial of access to redress is fueled by existing, systemic inequality, reparations cannot feasibly seek to return individuals to their circumstances prior to these crimes.
Instead, the aim is transformative and seeks to “subvert, instead of reinforce . . . the root causes.” (UN 2010d, 11). It is imperative that when designing remedial processes in the context of the regulation of PMSCs, drafters and negotiators engage fully with these aforementioned developments and seek the active participation of representatives of vulnerable groups, including women.

Conclusion

Sadly, it is not surprising that the circumstances which brought the activities of PMSCs to the consciousness of the general public were acts of violence against women. By breaking the “silences” within international organizations and states and in international and domestic law, feminist scholars and women’s NGOs have raised awareness of violence and inequalities suffered by women from the familial through to the transnational spheres, which are further exacerbated when the rule of law and state authority are compromised. The regulatory or implementation gaps surrounding PMSCs have a disproportionately negative impact upon women and other vulnerable groups. As noted above, current efforts to formulate regulatory frameworks offer glimpses of awareness in this regard. However, when women-centered issues are explicitly raised by these initiatives they remain confined to the realm of nonbinding good practice guidelines. A binding, specialist, international instrument regulating PMSCs is necessary to fight against impunity—to hold perpetrators accountable and to ensure effective reparations for their victims. As the international community works its way toward this goal, drafters and negotiators must harness developments in international law concerning women from the redefinition of key concepts in international criminal law to the reconceptualization of reparations. Additionally, it is crucial that civil society’s input,
particularly in the form of women’s NGOs and UN bodies, like UN Women and relevant special rapporteurs, must be engaged in the process.

PMSCs are defined as “corporate entit[ies] which provide on a compensatory basis military and/or security services by physical persons and/or legal entities” (UNWGM 2010b, Art.2(a)).


Its preamble refers to the International Criminal Court, and Art.38(c) draft UN Convention would enable the committee to refer urgent matters to the General Assembly, Security Council, specialized committees, or request that the General Assembly or Security Council pursuant to Art.96 of the UN Charter seeks an advisory opinion from the International Court of Justice.

Referencing Reparations Principles (UN 2005a). See also the related Impunity Principles (UN 2005b).

Three, Faiza Patel (chair/rapporteur), Patricia Arias, and Elżbieta Karska, of the five members of the UN Working Group on Mercenaries who prepared the draft Convention are women.

See UN 2003a (endeavoring to establish binding international legal obligations on business for human rights violations); UN Global Compact (UNGC) 2012; EU 2006, 2 (which emphasizes corporate social responsibility (CSR)); and the OECD 2011, a hybrid model, incorporating the legal obligations of states and domestic implementation and amended in May 2011 to align itself with the UN Guiding Principles.

The operationalization of the UN “Protect, Respect and Remedy” framework was intended to provide “concrete and practical recommendations for its implementation” which have become the UN Guiding Principles (UN 2011c, 4).


Art.5(g) Statute of the International Criminal Tribunal for the Former Yugoslavia, GA Res.827 of 25 May 1993; Arts 3(h) and 4(g), Statute of the International Criminal
Tribunal for Rwanda, SC Res.955 of 8 November 1994. The ICTR statute enumerates it and other forms of sexual violence as a violation of Common Article 3 of the 1949 Geneva Conventions. The Tokyo International Military Tribunal referred to sexual crimes in its indictment, and both the Nuremberg and Tokyo Tribunals heard evidence in respect of them, but neither mentioned rape in their judgments.


12 Kunarac et al., Trial Judgment, paras.540 and 542. See UN 2006.


15 Gacumbtsi, Trial Judgment, paras.259–92; Akayesu, Trial Judgment; and Musema, Trial Judgment, para.933.

16 GA Res.34/180 of 18 December 1979, in force 3 September 198, 1249 UNTS 13, in particular Art.2.

17 GA Res.48/104, 20 December 1993, Art.4(c).


19 Art.42(9), Rome Statute; for ICTY and ICTR see UN Division for the Advancement of Women, “Sexual Violence and Armed Conflict: United Nations Response,” at http://www.un.org/womenwatch/daw/public/w2apr98.htm (accessed December 12, 2012); and Art.15(4) Statute of the Special Court for Sierra Leone requires the office of the prosecutor to give due consideration to the appointment of staff including prosecutors and investigators experienced in gender-related crimes (see also UN 2010c; UN 2011e, 21).

20 Art.36(8)(a)(iii) and (b), Rome Statute. The requirement that the Assembly of States Parties ensure fair representation of men and women and judges with legal expertise on specific issues, including but not limited to violence against women
and children which as entailed the election of at least six female and six males judges, see ICC, *Procedure for the nomination and election of judges, the prosecutor and the deputy prosecutor of the International Criminal Court*, Consolidated version ICC-ASP/3/Res.6, para.19.

21 UN Guiding Principle 7 stipulates that in respect of companies operating in conflict zones, states should withdraw support for those involved in gross human rights violations (UN 2011c).

22 Gender has been defined by the ICRC as “culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their ‘sex’” (Lindsey-Curtet, Holst-Roness, and Anderson 2004, 7).