Commercializing War: Private Military and Security Companies, Mercenaries and International Law

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Abstract

This paper addresses the growing involvement of foreign and private military, defense and security firms and mercenaries, particularly in the countries with the least effective control of their often remote and dangerous resource rich territories. Private military and security companies pride themselves as responses to the failure of national, regional and international public governance structures to play effective roles in maintaining peace and security.

This paper shows that international law rules on regulating the use of violence of non-State actors is divided between those cases like terrorism, where the state responsibility has been laid down in mandatory terms by the Security Council. By contrast, the regulation of private military and security companies has not attracted the same kind of categorical obligations on the part of States. What we see then is how the commercialization of violence has created differing responses in international law and institutions to the violence meted out by non-State actors – between those defined as terrorists and are currently stringently regulated, on the one hand, and those which define themselves as providing security, order and other ancillary services, who are currently not as stringently regulated under international law.

In addition, this paper shows a divide between vigorously pursuing individuals responsible for commission of crimes against bodily integrity in the international criminal context, and much less of a focus on the economic actors who are often complicit as accessories to those crimes.

The paper argues in favor of tougher regulatory controls through new international legal framework and national standards backed up by a concurrent multilateral commitment to dealing with mercenaries as decisively as with other non-State actors who wield violence.
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Commercializing War: Private Military and Security Companies, Mercenaries and International Law

Introduction

The commercialization of war has greatly expanded and accelerated with the end of the twentieth century and the beginning of the twenty-first century. While the work of mercenaries and mercenary-like groups is not new, the commercialization of war is increasingly becoming privatized within corporations with global operations operated by former military professionals offering a whole range of services. This paper discusses this commercialization of war, and the limits and potential for holdings its wielders accountable for violations international law.

While transnational commerce has been increasingly militarized, States have lost their monopoly over the use of legitimate force, particularly in poor countries where violence and war have increasingly become commercialized. Thus, investors and States buy the services of paramilitary and other groups like they would buy other inputs to enable them to do what they do. Entrepreneurial paramilitaries, irregular groups, transnational security firms, bandits and irregulars, among others, supply this market of violence for profit. For example, the now defunct Executive Outcomes is alleged to have received mineral concessions for bringing a rebellion to an end and restoring order for the Sierra Leonean

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government in the 1990s.\(^3\) The Sierra Leonean Truth Commission noted that these concessions had led to the ‘mortgaging of the nation’s assets.’\(^4\) In addition to governments with no effective control of their territory and no armies to speak of, huge multinational corporations interested in guarding their investment, as well as non-governmental and intergovernmental organizations, are among the consumers of this private market of security provisioning and warriors.\(^5\)

While commercialization of war has thrived, the opprobrium against mercenary violence has also grown. Yet, this high level of opprobrium has not been accompanied by a correlative heightening of the attendant international legal rules to hold violators accountable.\(^6\) That, however, has not been because due to a lack of effort to heighten the obligations of States to root out violence in the hands of private actors in all instances. For example, the United Nations has increased the obligations of States to deal with terrorists and terrorist groups, which pose a threat to international peace and security. However, no analogous heightening of the responsibility of States to curb the violence of other non-State actors, such as mercenaries, as well as private military and security companies has occurred. Thus, threats posed by non-State actors that are more likely to threaten powerful countries are subject to enhanced international legal scrutiny through the very real possibility of mandatory United Nations Security sanctions. This, by

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\(^3\) But see Michael Grunberg, *A Sierra Leone Contract: Letters to the Editor*, INT’L HERALD TRIB., Aug. 28, 2001 (noting that the Contract between Executive Outcomes and Sierra Leone which ran from May 1995 to January 1997 ‘did not include a sharing of mining profits’ and that Sierra Leone was required to only make ‘purely monetary’ payments).


\(^6\) Joana Abrisketa, Comment, *Blackwater: Mercenaries and International Law*, PRIDE, Oct. 2007 (noting that international law needs to adapt and evolve in the same way that the nature of armed conflict is changing).
contrast, is not the case for private military companies and mercenaries who largely operate in, and threaten weak and poor countries. This is due to the fact that they are often conducting their activities without nearly any similar scrutiny, such as the mandatory decisions of the Security Council.\(^7\)

In addition to exploring the foregoing theme, this paper examines the proliferation of efforts at self-regulation in the private military and security industry, and the international legal regime that applies to this group of non-State actors. I also argue that individuals who stand behind private security and companies that violate international humanitarian and human rights law can be prosecuted as accessories for complicity to such violations.\(^8\)

In effect, I argue in favor of closing the apparent gap between the high likelihood for prosecution of crimes causing violations of bodily integrity, such as killings and mutilations, versus the low likelihood for prosecution of economic actors in war who finance or provide arms to those who engage in crimes causing violations of bodily integrity.

Commercializing War and Deferring Accountability

Perhaps the most dramatic example of the commercialization of war is the hiring of the now defunct Executive Outcomes, a private military firm, by the government of Sierra Leone.

\(^7\) U.N. Charter art. 25 (which provides that “The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. Article 24 of the Charter gives the Security Council, the primary responsibility for the maintenance of international peace and security).

\(^8\) But see, Allison Danner and Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law,” 93 California Law Review 75 (2005) (arguing unlimited uses of joint criminal enterprise liability theories are likely to lead to guilt by association which would in turn undermine the legitimacy and effectiveness of international criminal law).
Leone in 1995. Overwhelmed by a rebellion led by the Revolutionary United Front (RUF), the Sierra Leonean government turned to Executive Outcomes. Executive Outcomes was the second private military firm that the government hired to deal with the violent RUF rebellion, in which hundreds of thousands had been displaced, maimed or killed in one of the most brutal episodes of senseless mayhem. For its efforts, Executive Outcomes is reported to have been paid in mineral concessions, as the Sierra Leonean government was reportedly bankrupt. Within a short time of being hired, Executive Outcomes restored some order in the country. It also reportedly deployed its ‘battalion-strength force’ and its huge collection of armored vehicles, combat fighter aircrafts and gun ships to eventually remove the RUF from the diamond rich fields of Sierra Leone. Executive Outcomes had familiarity operating in African war zones, having done so before in Angola in 1997 with one of its companies, Teleservices. Notwithstanding, Executive Outcomes’ quick success in putting down the RUF insurgency, the international community rallied against the hiring of a private military firm by a government. While the International Monetary Fund, an ardent supporter of privatization, provided Sierra Leone financing to pay off Executive Outcomes, it nevertheless made its financing conditional on the Sierra Leonean government of President Kabbah reducing defense spending. This, together with the Abdjian Peace Agreement of 1996, resulted in

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9 SINGER, supra note 5, at 45 (arguing that “[t]he newest eave of private military agents are commercial enterprises first and foremost. They are hierarchically organized into registered businesses that trade and compete openly (for the most part) and are vertically integrated into the wider global market place. They target market niches by offering a wide variety of military skill sets. The very fact that a coherent industry made up of these companies is identifiable provides evidence of their distinction”).

10 The Sierra Leonean government had initially hired Gurkha Security Guards, a South African security firm. Its leader, Robert Mackenzie, was killed in an RUF ambush following which the Gurkha Security Guards declined to engage the RUF further. Their contract was cancelled and Executive Outcomes hired. See GREG CAMPBELL, BLOOD DIAMONDS: TRACING THE DEADLY PATH OF THE WORLD’S MOST PRECIOUS STONES 74-75 (2004).

11 Michael Chege, Sierra Leone: The State that Came Back from the Dead 25:3 WASH. Q. 147, 155 (2002).
Sierra Leone ending its contract with Executive Outcomes and its withdrawal from the country in January 1997.\textsuperscript{12} With the decrease of military spending, and due to the impact of the war on the economy, Sierra Leone had no access to additional funds to pay Executive Outcomes.\textsuperscript{13} As soon as Executive Outcomes left Sierra Leone, the country burst into a full-scale civil war again. A U.N.-supported ECOMOG peacekeeping force replaced Executive Outcomes.

Another example of the commercialization of war is the outsourcing of several military related functions in the conduct of recent inter-state wars by the United States military. This commercialization or privatization of military functions in the United States began in the mid-1980s. Commercialization coincided with the rise of neo-liberal economic reforms, which are strongly committed to market solutions for social problems, including the supply of government services. Thus, while the international financial institutions and western governments condemned the hiring of private military firms in Sierra Leone in the mid-1990s, the biggest military spender in the world since the 1980s has been increasingly privatizing a range of military services. In addition, war veterans from any number of countries have been hired to fight in foreign wars. For example, Gurkha

\textsuperscript{12} Sierra Leone TRC, supra note 4, at ¶ 405. See also Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of 30\textsuperscript{th} art. 12 (Nov. 30, 1996) (requiring the withdrawal of Executive Outcomes From Sierra Leone within five months of the signing of the Agreement) available at http://www.sierra-leone.org/abidjanaccord.html.

\textsuperscript{13} Sierra Leone TRC, supra note 4, at ¶ 405 (noting that the cancellation of the Executive Outcomes contract saddled the country with substantial financial obligations and noting that the Sierra Leonean government conceded to pressure in the Abidjan Peace Agreement of 1996 to terminate its contract with Executive Outcomes). See Grunberg, supra note 3 (noting that under the contract Sierra Leone owed Executive Outcomes US $ 31 million and that he helped negotiate the payment of the balance after the contract was terminated).
Security Guards, the firm that was initially hired by the Sierra Leonean government, was under the command of a U.S. veteran of the Vietnam War.\textsuperscript{14}

So even in the United States where the government largely maintains the monopoly of violence, several military functions have been commercialized. These include basic support functions, such as laundering soldiers’ attire, providing dining services and refueling military vehicles and aircrafts; but this commercialization has also spread into roles such as interrogating prisoners and conducting combat. Defense industry companies argue their services in training, providing logistical support and advice are legitimate and non-combative and they do in fact provide services that were traditionally performed by national militaries, which operate under civilian control. When one of these defense industry firms employed by the U.S. government got sued for wrongful deaths by their contract employees, it unsuccessfullly argued that it could not be sued, since its supply of military services formed part of the military operations under the command of the President of the United States. In its view, courts had no jurisdiction to review its operations.\textsuperscript{15} This argument in turn raises a question we will return to later - whether these companies for hire are legally unaccountable under international law as well.\textsuperscript{16}

In this context, it is noteworthy that private military contractors have argued in favor of commercializing the provision of humanitarian assistance since international responses to

\textsuperscript{14} CAMPBELL, supra note 9, at 77.
\textsuperscript{15} Brief for Appellants, Blackwater Security Consulting v. Nordan (No. 06-857), 2005 WL 3730928 (C.A.4). Blackwater in effect argued that “The judiciary may not impose standards on the manner in which the President oversees and commands the private component of the total force in foreign military operations,” id. at Page 17. Blackwater also invoked the political question doctrine arguing that since it was performing a classic military function, its role was not subject to civilian control,” id. at 18.
\textsuperscript{16} Domestic courts are the primary enforcers of international law, see MARY O’CONNELL, THE POWER AND PURPOSES OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF INTERNATIONAL LAW 392 (2008).
humanitarian crisis are often too slow, expensive and ineffective. These contractors have therefore argued in favor of addressing humanitarian crisis, such as the genocide in Darfur, Sudan and the piracy menace off the coast of Somalia, for a fraction of the price that organizations such as the United Nations may expend on such responses.

Recently, the United States Department of Justice charged the multinational Chiquita Brands International, Inc. with the offense of engaging in transactions with a specially designated global terrorist group – the United Self Defense Forces of Colombia (AUC) – that has engaged in assassinations and guerilla activities. Chiquita paid AUC and other violent groups with the knowledge and approval of senior Chiquita Executives, even with awareness that those payments were prohibited under U.S. law. These payments were made as protection money so that Chiquita’s banana farms could not fall within the control of this and similar groups. Chiquita pleaded guilty to paying this group over $1.7 U.S., between 1997 and early 2004.

The Chiquita case illustrates the use of violent private security forces by business owners, including plantation owners, ranchers and miners, since the Colombian State and its military have no control over many parts of the country – particularly in rural areas. This is really the story in many weak States. Thus, the regulation of private military companies and paramilitary groups, such as those in Colombia, would ideally include the conduct of

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18 Id. at 348-49.
20 This is the English translation for “Autodefensas Unidas de Colombia.”
21 Press Release, Department of Justice, Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay $ 25 Million Fine (March 19, 2007).
both these suppliers of violence, as well as the consumers who pay for it.\textsuperscript{22} This would include petroleum corporations involved in oil exploration and mining operations from Burma\textsuperscript{23} and Sudan,\textsuperscript{24} to Nigeria,\textsuperscript{25} who have also been alleged to funnel resources to government or paramilitary groups in the past to deal harshly with dissidents protesting or sabotaging their investment operations.

The foregoing examples are not intended to be an exhaustive list. They are simply illustrative. The British Parliament’s Green Paper on Private Military Companies of 2002 compiled a long list of Africa’s experience with mercenary, military and private security and defense companies from the 1950s to the 1960s.\textsuperscript{26} This comprehensive list indicates the extent of the involvement of foreign and private military defense and security firms, and mercenaries, particularly in the countries with the least effective control of their often

\textsuperscript{22} See Katie Kerr, \textit{Making Peace With Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process} 37 UNIV. MIAMI INTER-AM. L. REV. 53 (2005) (arguing in favor of a role for the international community to force the hand of Colombian government to take tougher sanctions against paramilitary groups including withholding financial aid and public disapproval by the United States and the European Union; the possibility of extradition for trial to the United States coupled together with the government’s discretion not to extradite paramilitaries and others who are willing to demobilize among other options).

\textsuperscript{23} Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2002) (where Unocal is alleged of being complicit in the forced labor, rape and murder of Burmese workers by security workers the company hired to help build a pipeline).

\textsuperscript{24} See John Harker, \textit{The Human Security in Sudan: The Report of a Canadian Assessment Mission (Prepared for the Minister of Foreign Affairs)} (2000) (investigating Talisman Energy, a Canadian Corporation’s involvement together with the Sudanese state owned joint venture firm in financing military operations and providing aircraft to attack and displace residents living in the locality of the Talisman operated oil fields).

\textsuperscript{25} See Wiwa v. Royal Dutch Petroleum Company, 226 F.3d. 88 (2000) (plaintiffs alleging Royal Dutch and Shell Nigeria coercively appropriated land for oil development without adequate compensation and with the support of Nigerian military and police resulting in torture, a violation of the law of nations).

remote and dangerous resource rich territory.\textsuperscript{27} In addition, this Green Paper noted, the ratio of private security guards to police is 10:1 in less developed countries as compared to a ratio of 3:1 in developed countries.\textsuperscript{28}

*International Law and Mercenaries*

Article 47 of the First Additional Protocol to the Geneva Conventions defines a mercenary extremely narrowly. To be regarded a mercenary under the protocol, one has to be: specifically recruited to fight in an armed conflict in which he or she takes part in and is motivated to do so by the desire for private gain. Such a person should also be neither a national of a party to the conflict, nor resident in the territory of a party to the conflict. In addition, such a person should not be a member of the armed forces of a party to the conflict, and should not have been sent by a state which is not a party to the conflict on official duty as a member of the armed forces. This definition is cumulative in the sense that a mercenary must fulfill all elements of the foregoing criteria. This definition may also pose a difficulty in determining whether the motivation for involvement in mercenary or mercenary-like activities. A person could be motivated by mixed motives – a pecuniary and a non-pecuniary purpose, in which case determining the motivation was for private gain becomes problematic. In addition, mercenaries may, and indeed have been known, to be motivated by other motivations including religious and

\textsuperscript{27} Notably, in its decision in Congo v. Dem.Rep. Congo, ICJ, ¶ 304 (2005), the I.C.J. strongly suggested that the duty of due diligence or vigilance expected of a government with respect to rebel activity that may result in violating the rights of a neighboring state may be lower if the geographical terrain was remote and difficult.

\textsuperscript{28} *Id.* at 9.
ideological or in which case, the question of whether one is a mercenary becomes open to interpretation.

The Organization of African Unity’s Convention for the Elimination of Mercenarism in Africa defines a mercenary as someone who is not a national of the State, against which his or her actions are directed and is employed, enrolled, or willingly linked to a person, group or organization whose aim is to forcibly overthrow a member government. The definition further includes mercenaries as those who aim to undermine the independence, territorial integrity or normal working institutions of such a state; or blocks in any way the activities of a liberation movement recognized by the Organization of African Unity (now renamed the African Union). This definition may be argued to exclude the activities of entities such as Executive Outcomes, whose primary goal was not interfering with the independence of the Sierra Leonean State, but rather to help it restore order. Further, Executive Outcomes’ role in the mid-1990s in seizing oil facilities from rebels and providing security to the Angolan government has been argued to fall outside the scope of the Convention.

The UN General Assembly’s International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, which came into force in 2001 largely follows the OAU and the First Additional Protocol’s definition of a mercenary. In addition, by

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30 This, of course, raises the question whether a government may invite a private military company to play such roles when it has been unable to do so itself. It is much clearer under international law that a state may invite another state to assist it in self defense against another state, see Military and Paramilitary Activities in and against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. 14 (June 27).

2001 only 21 countries had ratified or acceded to the Convention further eroding its utility in addressing the mercenary menace. As such, none of these Conventions adequately applies to mercenarism that is not inspired by profit or pay, but for ideological, religious or such other non-monetary reasons. The problem is that the Convention’s definition of mercenarism leaves out instances in which non-State actors may engage or further combat.

Hague Convention No.V Respecting the Rights and Duties of Neutral Powers and Persons in the Case of War on Land of 1907 makes it illegal for neutral powers to form and recruit mercenary armies on their territory.\(^3\) However, it does not prohibit the passage of mercenaries through the territory of a neutral.

The argument that international law does not prohibit all instances of mercenarism or the provision of private military services is based on a literal or textualist interpretation of current rules of international law. According to this argument, those forms of mercenarism not explicitly prohibited, such as those not inspired by a profit motive, are permissible. To make such a claim would be to invoke the kind of high positivism exemplified in the Permanent Court of International Justice, (PCIJ), decision in the *Lotus* case. In *Lotus*, the PCIJ held that, where there was no rule of international law prohibiting a particular conduct, then it was permissible since it would be inappropriate to make any presumptions against the sovereignty of a State.\(^3\) This effectively acquiesces to the

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\(^3\) Bruno Simma, *Termination and Suspension of Treaties: Two Recent Austrian Cases* GER.Y.B. INT’L L.1978, 74 n.24. (noting that a Lotus argument is akin to the availability of an international gray zone in which States operate with ‘international legal freestyle). See Justice Weeramantry’s opinion in *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8) (expressing skepticism to the applicability of the Lotus approach where no clear rule of international law is available).
permissibility of mercenarism inconsistently with the prohibition of the use of force especially given that this prohibition is recognized both as jus cogens, as well as a corner-stone principle of Charter of the United Nations. In some recent cases, mercenaries still pose the threat of deposing governments in weak States inconsistently with current anti-mercenarism international law rules or providing arms to rebel groups that pose a threat to governments and which reign terror on citizens.

In addition, the payment of mercenaries or private security and military companies by governments with natural or mineral resources is inconsistent with both the letter and spirit of the international legal norms on permanent sovereignty over natural resources, and the principles relating to the right to development. International law is now understood to establish a right to use natural resources for national development. Further, private military companies, mercenaries and others privately engaged in combat in the shadows of war in weak states, often operate without being accountable for the violations of international law, including of human rights, the plundering of resources

36 E.g., Sir. Mark Thatcher was fined and given a suspended sentence for bankrolling the purchase of a helicopter that was to be used in a coup attempt in Equatorial Guinea in 2005. South Africa and the United Kingdom knew of the impending coup and did nothing See Steve Bloomfield, Mercenaries Acquitted in ‘Wonga Coup Case’, THE INDEP. (Feb. 24, 2007) (reporting the outcome another related case). See also Peta Thornycroft, Mercenaries Accused of Plotting to Overthrow Equatorial Guinea Government Sentenced in Zimbabwe, available at http://www.voanews.com/english/archive/2004-09/a-2004-09-10-29-1.cfm?renderforprint...
38 Nico Schrijver, Sovereignty Over Natural Resources: Balancing Rights and Duties, (1997) 269
and emerging rules against official corruption. This contrasts sharply with the kind of liability that governments may incur for war destruction. Thus, another reason to bring these private actors under a legal regime of accountability is to remove the double standards between holding governments accountable for war destruction, while having little or nothing for private actors engaging in similar conduct.

Clearly, while the treaty regimes banning mercenary conduct are narrowly-tailored and private military companies and mercenaries often operate without accountability, these non-State actors are, nevertheless, subject to international law, including both international human rights and humanitarian law, a topic I return to below. In my view, the current ban on mercenarism in the U.N. and OAU Conventions ought to be given a purposive and contextual construction to include instances of mercenary activity that, while not explicitly prohibited, are nevertheless inconsistent with the prohibition of mercenarism. Indeed, as we saw above, there are other norms of international law, including the prohibition of the use of force and the related values of territorial integrity and political independence of states that are as relevant to understanding the ban of mercenarism.

For the moment, what is clear is that the United Nations Security Council has enhanced the obligations of States to take measures to prevent terrorism. These obligations have

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effectively changed the low threshold due diligence obligation.⁴² States had until the U.N. Security Council Resolution 1373 of 2001 to prevent their territory from being used to launch terrorism conduct in other States to requiring States to compulsorily take all measures to prevent terrorism.⁴³ This resolution was framed in very categorical terms such as should and shall repeatedly. This categorical language emphasizes the obligations of States to prevent and suppress terrorist financing⁴⁴ and refrain in the provision of active or passive support of terrorism.⁴⁵ In Resolution 1735, the Security Council authorized States to freeze the financial or economic assets or funds of non-State actors including individuals, groups and entities suspected of terrorism.⁴⁶ Indeed, these two resolutions are two of several resolutions declaring the Council’s view that terrorism constitutes ‘one of the most serious threats to international peace and security.’⁴⁷ The Security Council has not similarly heightened the duty States to counter mercenarism as it has with reference to terrorism.

A counter-argument may be made that Resolution 1373, and the Counter-Terrorism Committee it established, may have been an expression of a hegemonic international law to the extent that in so doing, the Security Council failed to balance the United Nations’ twin mandates of maintaining international peace and security, on the one hand, and

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⁴² Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 Am. U. L. Rev. 217, 210ff (1976-77) (arguing the duty of due diligence is not absolute but rather requires only that the State exercises best possible efforts and therefore this has something to do with the capacity of a State and as such responsibility only attaches when a State fails to take reasonable steps under the circumstances). *Congo v. Dem. Rep. Congo*, I.C.J. (2005).


⁴⁴ *Id.* at ¶ 1(a).

⁴⁵ *Id.* at ¶ 2(a). But see Jimmy Gurule, Unfunding Terror: The Legal Response to the Financing of Global Terrorism, (2009) (arguing in favor of more effective international efforts to unfund terrorists).


ensuring the protection of fundamental rights and freedoms, on the other.\textsuperscript{48} This notwithstanding, Resolution 1373 demonstrates a commitment to holding States liable under particularly high thresholds of responsibility for the conduct of non-State actors that might even be remotely attributable to them. In addition, the Security Council has not shied away from exercising its authority, particularly in the economic sanctions area, over non-State actors. Thus, non-State actors, such as terrorists who threaten powerful countries and their interests, are subject to enhanced international legal scrutiny through the very real possibility of mandatory United Nations Security sanctions; while those like private military companies and mercenaries, who threaten weak and poor countries, are conducting their activities without nearly any similar scrutiny or enhanced responsibility from the Security Council. In addition, both the United States and the United Kingdom, two of the primary source countries of private military and security companies, do not favor a ban or stringent international regulation of these companies.\textsuperscript{49} This attitude is perhaps a reflection of their ambivalence towards the efficacy of rules of international law shaping the behavior of these firms, but it is also consistent with the view that these militarily powerful countries may view some of these private firms as contributing to, rather than undermining global security. If this is the case, then the security of rich and powerful countries arguably comes before those of poor and weaker countries. As such, threats posed by mercenarism and rogue military companies, particularly for poor countries, do not receive the same international attention and regulatory oversight as do threats to rich and powerful countries such as transcontinental terrorism does.

The Accountability of Economic Actors in War

The operations of the violent paramilitaries and the involvement of military and private security and military firms in extrajudicial killings, as well as the breakdown of order in weak States exemplifies an unfortunate normalization of violence and the unaccountable exercise of power by non-State actors over unregulated zones of commerce and disorder. Thus, while mercenary activity is inconsistent with and operates outside prevailing rules, both national and international law, the danger that statutory incorporation of a business that behaves like a mercenary may give it a kind of respectability that distinguishes it from unincorporated entities like paramilitary groups that are no less violent and that operate outside the realm of official law. Yet, both paramilitaries and incorporated military and security companies often operate within this zone of unregulated commerce and disorder that often defies the boundary between the legal and non-legal.

Incorporation ought not to be used as a disguise for the conduct of individuals. The Nuremberg Tribunal took this into account when it noted that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes, can the provisions of international be enforced.”50 In other words, the corporate shield is a veil that hides conduct that is directly traceable to individuals. Incorporation does not and cannot displace the individual criminal responsibility under international law.

Thus, while some private military companies distinguish themselves as respectable rather than rogue investors, both formal and informal groups operating in zones of unregulated

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50 Trial of the Major War Criminal Before the International Military Tribunal, Nuremberg, 14 November 1945-10October 1946, published in Nuremberg, Germany, 1947 at 223.
commerce and disorder operate in a market place where violence is for sale, but where individual responsibility under international law still exists.\textsuperscript{51} Thus, while incorporation may, for some entities, be simply a way of disguising their mercenary character,\textsuperscript{52} individual criminal responsibility is not displaced by such incorporation. The limitations we have seen above with reference to defining mercenaries that makes this market of violence appear largely unregulated, therefore has less to do with the innate inadequacies of existing rules. Rather, war zones and other areas of lawlessness have increasingly become subject to the new norms and institutions, such as those related to the Rome Statute of the International Criminal Court. In addition, there have been ad hoc tribunals charged with seeking individual criminal responsibility from Rwanda, to the former Yugoslavia, as well as mixed courts from Sierra Leone to Cambodia. These courts and tribunals continue to generate a growing jurisprudence on individual responsibility for crimes against humanity, genocide and war crimes.\textsuperscript{53}

The prosecutions in these tribunals have primarily focused on crimes related to “bodily integrity such as killings, mutilations, summary executions,” sexual assault\textsuperscript{54} and genocide which only indirectly focuses on the responsibility economic actors\textsuperscript{55} including mercenaries and private military and security companies which often supply the arms in these conflicts. While noting the inadequacy of current rules of international law to deal

\textsuperscript{51} For the definitional issues and categorizations of companies involved in the supply of private force, see Sarah V. Percy, \textit{This Gun’s For Hire: A New Look at an Old Issue} 58 INT’L J. 721 (2003).

\textsuperscript{52} JANICE THOMSON, MERCENARIES, PIRATES AND SOVEREIGNS: STATE BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE 90 (1994).

\textsuperscript{53} See Antonio Cassese, International Criminal Law, 2\textsuperscript{nd} Ed., (2008)


\textsuperscript{55} \textit{Id.} (giving the example of trade in diamonds in Sierra Leone which fueled the war, ‘there was little existing law’ could contribute to holding those responsible).
with the responsibility of economic actors, William Schabas has proposed charging such actors with complicity in crimes against humanity, war crimes and genocide under theories such as joint criminal enterprise.\(^{56}\) However, there have been few, if any, instances in which the often clandestine activities of the corporations involved arms dealing and the purchase of conflict resources, as well as their financiers and bankers have been charged with international criminal responsibility for their conduct.

This compartmentalization of crimes involving bodily integrity, on the one hand, from those of an economic nature, such as the illicit plundering and looting of mineral and other resources is artificial and it does not reflect the reality in war-torn countries.\(^{57}\) Take the example of the wars in the Democratic Republic of Congo, where the State has failed or been disabled from having effective control. Here, the International Court of Justice found Uganda liable for preventing the looting, plundering and exploitation of the natural resources of the Democratic Republic of the Congo.\(^{58}\) Looted resources, such as diamonds, would then find their way into markets outside the Democratic Republic of Congo through globally-linked marketing, transportation and banking networks. In return, money and weapons flow back into such war economies from non-state actors, thereby contributing to the continued sustenance of the further violent extraction of resources.

In July 2003, the Prosecutor of the International Criminal Court acknowledged reports of the involvement of companies from African, Middle Eastern and European countries, as

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56 Id. at 426-29.
well as organized crimes groups, which had financed their exploitation of the natural
resources of the Democratic Republic of Congo through the international banking
system.\textsuperscript{59} He promised not only to investigate, but to prosecute and punish those involved
in these crimes. While the Statute of the International Criminal Court does not confer
jurisdiction to prosecute corporations, individual criminal responsibility could be pursued
for corporate actors.

There are precedents for charging individuals with complicity for war crimes such as
pillage against corporate actors. For example, in criminal proceedings against a Dutch
national, Frank Cornelis Adrianus Van Anraat before the Netherlands Court of Appeal,
the defendant was found guilty for complicity as an accessory to a violation of the laws
and customs of war that resulted in the death and grievous bodily harm, which was also
part of a systematic policy of terror and wrongful acts against a population or specific
group thereof. Van Anraat had formed a company to engage in trade in chemicals, a
lucrative business he learnt about while living in Iraq. He sold the chemical raw material
for mustard and nerve gas to the Iraqi government of Saddam Hussein between 1980 and
1988. This raw material was used to produce mustard gas, an asphyxiating and poisonous
gas that the then Iraqi President Saddam Hussein and others proceeded to use against the
Kurdish population, thereby causing not only death but terror as well. Van Anraat was
sentenced to a seventeen-year term of imprisonment in 2007.\textsuperscript{60}

\textsuperscript{59} Press Release, Prosecutor of the Int’l Criminal Court, Communications Received By the Office of the
\textsuperscript{60} Criminal Proceedings Against Van Anraat, Hague Ct. Rep. (May 9, 2007) (Cause-list Number 22-
000509-06). But see, The Vietnam Association for Victims of Agent Orange/Dioxin et al. Dow Chemical et
supplying U.S. government a herbicide used in the Vietnam war. The Court held in part that the herbicide
was not illegal in wars prior to 1975 under the War Crimes Act of 1996 and held against applying the
Hague Convention IV Respecting the Laws and Customs of War on Land against the military use of the
The Nuremberg prosecutions of German industrialists are another precedent illustrating the potential for individual responsibility of corporate actors. For example, in *The Flick Case*, Flick and Steinbrinck were charged with contributing money, as well as their influence and support to the SS, a criminal organization with knowledge of its criminal activities. While the Nuremberg Tribunal noted that they did not approve or condone the SS’ activities, the Tribunal nevertheless found them guilty for lending their reputation and large contributions to it while knowing its atrocities and for their failure, like others, to withdraw their contribution and membership.\(^{61}\) Weiss was charged and convicted for initiating orders for increased production of freight cars for military purposes, with the approval of Flick, and for using large numbers of prisoners of war from Russia, who they had procured for this purpose.\(^{62}\) Flick was also convicted for the crime of economic plunder.\(^{63}\)

This Nuremberg Tribunal rejected the defendants claim that “international law is a matter wholly outside the work, interest and knowledge of private individuals,” and held that international law binds private individuals as much as it binds governmental officials.\(^{64}\) The Nuremberg judgment in *The Flick Case* therefore, shows the availability of international criminal and humanitarian law to pursue corporate and other economic....

\(^{61}\) *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council No. 10, Oct 1946-April 1949* Vol. VI.

\(^{62}\) The violations here included the Hague Regulations of 1907 and the Prisoners of War Convention (Geneva, 1929)

\(^{63}\) For a full account, see Mathew Lippman, *War Crimes Trials of German Industrialists: The Other 'Schindlers,'* 9 TEMP INT’L & COMP. L.J. 195 (1995).

\(^{64}\) *Id.* at 200.
actors for violations of international humanitarian and human rights law, rules that today unquestionably apply to both international and non-international armed conflicts.

As late as the 1990s international agreements between the United States on the one hand, and the government of Germany and German insurance companies, on the other established a fund for the payment of Holocaust victims whose insurance policies had been confiscated or cancelled by these companies and the Nazi government. The United States federal government leveraged diplomacy and prevailed over California’s preference of using litigation to get compensation for the victims.65

These precedents show that the plundering, pillaging and looting of mineral resources and private property can subject corporate actors to individual criminal responsibility under international law and international humanitarian law. Such prosecutions would bring individuals behind mercenary firms and other non-State actors, who operate outside any democratic or legal controls, potentially within the prospect of being held liable. Such a possibility would be a helpful deterrent for weak States without effective control of foreign paramilitaries, as well as rogue security and military services firms.66

*The Limits of Self Regulation for Private Military and Security Companies*

Private military and security companies have sought to distinguish themselves from what they regard as rogue or mercenary suppliers of military services. These private military

65 See Garamendi v. U.S. Dist. Ct., No. 05-73652 (9th Cir. 2005) (denying mandamus).
and security companies have even formed industry associations. In this section, I will discuss the efforts of these industry associations to self regulate.

One of these industry associations is the International Peace Operations Association (IPOA). IPOA distinguishes itself from rogue military service or mercenary providers by its commitment to providing professional military services transparently and subject to a Code of Conduct that encourages members to “follow all rules of international humanitarian law and human rights law,” as well as all ‘applicable international protocols and conventions’ applicable to their work.\(^{67}\) IPOA also established an enforcement mechanism under a Standards Committee that can issue non-legally binding decisions.\(^{68}\) Anyone or any organization can lodge a complaint against an IPOA member. However, the only corrective measure issued against a member of the IPOA who has been found to violate provisions of the IPOA’s code of conduct is suspension from the IPOA.\(^{69}\)

Two other industry groups are the British Association of Private Security Companies (BAPSC) and the Private Security Company Association of Iraq. The BAPSC’s Charter obliges its members to “comply with international statutes, with due regard for ethical practice and standards of governance, balancing the provisions of security services with the legitimate concerns of those that are or may be affected by the delivery of those


\(^{69}\) Section 1.4 of the IPOA’s Enforcement Mechanism, supra note 65. Similarly, if the subject matter of the complaint is subject to ongoing litigation, the Standards Committee is empowered to suspend the enforcement mechanisms until the litigation results are made public, id. at Section 1.7.
services.” Yet, although the Charter states that members are obliged to comply with international statutes, it is not at all clear if this refers to international law and even if it does, it is not clear at all what the BAPSC’s commitment to upholding international law is.

While self-regulation within the private military services industry is laudable, its effectiveness as a matter of international law is demonstrated by the fact that IPOA’s Code of Conduct simply encourages, rather than requires its members to conduct their activities in accordance with their international legal obligations, while that of the BAPSC merely makes reference to what it terms ‘international statutes’ without more.

Private military companies and the IPOA have argued strenuously that insecurity, particularly in weak States, justifies the necessity for their kind of professional and efficient military services, but self-regulation does not nearly begin to address the concerns that arise where the provision of such security services may lead to or result in violations of existing rules of international human rights and humanitarian law.

It is not simply a conjecture that the provision of these services has often been accompanied by violations of international humanitarian law and international human rights law, not to mention of general international law in situations of armed conflict.

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70 Charter of the British Association of Private Security Companies.
71 The Foreign Affairs Committee of the United Kingdom Parliament has also concluded that self regulation of private military companies is insufficient, see SELECT COMMITTEE ON FOREIGN AFFAIRS, PRIVATE MILITARY COMPANIES: NINTH REPORT (Oct. 2002). See also MADELAINE DROHAN, MAKING A KILLING: HOW CORPORATIONS USE ARMED FORCE TO DO BUSINESS, 324 (2004) (concluding that voluntary codes of an industry or individual corporation will not work based on a review of several codes and their scanty reference to human rights and lack of effective sanctions regime).
The inefficacy of self-regulation alone to ensure military service providers comply with international law and that rogue providers are outlawed is evidenced by the fact that Blackwater USA, which joined the IPOA in 2004, decided to withdraw from the Association in October, 2007 after it came under scrutiny for its lethal use of force against civilians in Iraq. As a result, Blackwater USA continues to face numerous lawsuits alleging it to be a mercenary army and to have violated international law in its work.\(^73\) Blackwater USA’s withdrawal from IPOA came after the IPOA initiated an independent review of whether Blackwater USA had “processes and procedures that were fully sufficient to ensure compliance with the IPOA Code of Conduct.”\(^74\)

Another reason to be skeptical of self-regulation of private military or security companies is that they often operate in countries experiencing conflict or which are under occupation. As a result, State weakness in such cases makes it unlikely that self-regulation will result in compliance with rules of international law, inadequate as these may be for regulating these firms. For example, in 2004 the Coalition Provisional Authority, which oversaw Iraq’s occupation, issued a memorandum on the Registration Requirements of Private Security Companies that made no reference whatsoever to international law.\(^75\) Instead, the memorandum simply provided for a registration, vetting

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\(^73\) In one incident in Nisoor Square in Baghdad, Iraq on 16\(^{th}\) September, 2007, Blackwater employees allegedly shot and killed 17 Iraqi civilians. Two days later, Blackwater was barred from operating in Iraq. Suit was filed against Blackwater alleging Blackwater violated the human rights of the deceased by engaging in extrajudicial killings and war crimes and that the corporation operated in an atmosphere where its financial interests prevailed over human life, see Atban v. Blackwater USA, No. 1:07-CV-01831 (D.D.C. filed Oct. 11, 2007).

\(^74\) Press Release, IPOA Statement Regarding Membership Status of Blackwater USA (Oct. 12, 2007), available at http://ipoaonline.org/php/index.php?option=com_content&task=view&id=156&Itemid=80 (last visited Jan. 2009). In mid-February 2009, Blackwater changed its name to Xe in what was widely regarded as a rebranding initiative as a result of the adverse publicity surrounding the allegations of misconduct by its employees.

\(^75\) Coalition Provision Authority Memorandum Number 17, Registration Requirements for Private Security Companies, (PSC) (Iraq) CAP/MEM/26 June 2004/17.
and licensing framework with an accompanying Code of Conduct that included a hortatory list of terms such as honesty, sincerity, fidelity and morality.\textsuperscript{76} The Code further provided that the companies would “conduct all operations within the bounds of legality, morality and professional ethics.”\textsuperscript{77} Given the antiseptic attitude of the Coalition Provisional Authority and the Allied Forces in Iraq at the time to conducting the operations there in accordance with international law, these generic honorific references to legality could hardly have been construed as committing private security companies to international law. In any event, by Executive Order, the United States had effectively exempted all the activities of private military companies from being sued in the United States, where a suit may have been brought for a violation of the law of nations.\textsuperscript{78} Blackwater USA was further immunized from suit in Iraq under the Coalition Provisional Authority’s Order No. 17.\textsuperscript{79} In addition, private security forces in Iraq were permitted to carry weapons with authorization and to use deadly force not only in self-defense, but also to defend persons who they had been contracted to defend and to prevent “life-threatening offences against civilians.”\textsuperscript{80} Such a broad writ for the use of deadly force by non-state actors for profit has been a major moral objection to the privatization of military and police functions.\textsuperscript{81} Private military and security companies were eventually

\textsuperscript{76} Id. at Code of Conduct for Private Security Companies Operating In Iraq, Annex B. See also Section 9(3) of Memorandum 17, which provided that private security companies “must comply with applicable criminal, administrative, commercial and civil laws and regulations, except those provided by law.”

\textsuperscript{77} Id.


\textsuperscript{79} See Coalition Provisional Authority Order No. 17 (Revised) (Status of the Provisional Coalition Authority, MNF-Iraq and Certain Missions and Personnel in Iraq) § 2 CPA/MEM/26 June 2004/17.

\textsuperscript{80} Id. at Annex A § 2.

\textsuperscript{81} Sarah Percy, Morality and Regulation, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 13, 14-18 (Simon Chesterman & Chia Lehnhardt eds., 2007).
brought under Iraqi law in a Status of Forces Agreement signed between the government of Iraq and the United States at the end of 2008.\textsuperscript{82}

The foregoing goes to show that private military and security companies enjoy very broad freedoms as commercial actors to enter into contractual relationships with States, without their services being explicitly subjected to international law. Given the contracts between States that need the services of private military and security companies invariably include a right to sue for breach of contract, such contracts in effect give these private actors the right to sue these States for failure to pay them for delivery of these services, even if the provision of these services and subsequent conduct violates international law. In effect, militarily weak States contracting for the services of these corporations are doubly disadvantaged. First, given their own utter governance failures, as well as the failure of multilateral or regional initiatives to help them out when they need help, they are vulnerable to domestic or regional paramilitary groups who control parts of the territory. Alternatively, these States may decide to procure the services of external military and security companies to maintain order or to perform specific functions which they are unable to perform. This vulnerability to private wielders of violence was demonstrated by the Sierra Leone Truth and Reconciliation Commission’s observation that the United Nations abandoned Sierra Leone at its hour of need in the thick of war in the early 1990s.\textsuperscript{83} While the Commission made no excuses for the governance failures of the Sierra Leonean State or the use of mercenaries in conflicts, the

\textsuperscript{82} The Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, of 17th November 2008 restored Iraq’s sovereignty over private military companies.  

\textsuperscript{83} Sierra Leone TRC, supra note 4, at ¶¶ 367, 406.
Commission concluded that Sierra Leone’s decision to procure the services of Executive Outcomes was necessitated by a “desperate state of affairs.”

This resulting asymmetry between militarily weak and poor states, on the one hand, and private military security firms from the first world, on the other, gives these firms inordinately unequal power over these weak.

Emerging Rules and Norms to Regulate Private Security Companies

Regulation in the home countries where private military, security firms, mercenary groups and individuals originate is an important part of the available governance options. These options include bans on groups and individuals engaging in mercenary activity abroad that engage in the overthrow of governments and combat for pay; registration of all firms and individuals serving in private military and security roles abroad; and the licensing of individual security and military contracts on a case by case basis.

Registration could be preconditioned on the commitment of legitimate defense firms not to recruit employees who have been engaged in violations of international human rights or humanitarian law before or those who have been mercenaries. Regulation would also ideally include monitoring and evaluation systems, as well as a complaints mechanism, all ideally paid for by the defense and security industry or jointly funded with the government in question. Such national regulation would be an important tier in the movements towards heightened international regulation. Such international regulation would be required since not every country is likely to have such legislation and as such

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84 Id. at ¶ 404. See also Mark Malan, Treading Firmly on the Layered Response Ladder: From Peace Enforcement to Conflict Termination Operations in Africa 6 AFR. SECURITY REV. (1997).
companies are likely to incorporate in those countries with no regulation of private security or military firms.

South Africa, which is a primary source of private military and security companies, has already passed an anti-mercenary law.\textsuperscript{85} It bans direct or indirect participation, initiation or furthering of combat for private gain in an armed conflict. This includes the training, financing, recruiting and using of combatants for private gain not only in an armed conflict, but also in a coup d’etat, uprising or rebellion against any government. Participation in an armed conflict by a South African must be licensed. South Africans are prohibited from enlisting in the armed forces of a foreign state or any armed force, unless authorized to do so. Unlike the current international conventions on mercenarism, the South African law is broader in scope. For example, in addition to the foregoing prohibitions, Section 3(10) of the Act prohibits the provision of “any other act” that furthers the interest of any party to armed conflict. By focusing on conduct that furthers conflict as opposed to specific prohibited mercenary activities, the Act addresses the definitional shortcomings of the United Nations and Organization of African Union Conventions on Mercenarism.

The United States also has a regulatory framework for private military companies which, in part, gives the President the power to “control the import and export of defense articles and defense services and to provide foreign policy guidance to person of the United

\textsuperscript{85} The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of armed Conflict Act 27 of 2007.
States involved in the export and import of such articles and services.\textsuperscript{86} The International Traffic in Arms Regulations in turn specifies the kind of services and articles that may be provided by U.S. firms. Firms providing military or security services abroad are required to be registered and a license for every contract is required. The United Kingdom’s House of Commons in 2002 recommended a licensing system like that of the United States.\textsuperscript{87} While the United States and South Africa have been important source countries for mercenaries and their legislation is welcome, having rules of international law that would be apply to countries with no similar national regulation would close the gap in source countries and potentially protect weak states that would by themselves be incapable of regulating rogue private military and security firms or mercenaries that can mobilize more military power than these States can.

One important initiative to provide guidance on the operation of private military and security companies is the Swiss Initiative sponsored by the Swiss government, the International Committee of the Red Cross and Military and Security Companies. It was drafted collaboratively with government and non-governmental organization representatives. This initiative resulted in the Montreux Document in September 2008 and at the end of the drafting process was approved by all 17 countries that drafted it including Sierra Leone, Germany, Iraq, South Africa and the United Kingdom.\textsuperscript{88} The Montreux Document provides an exhaustive list of international legal obligations and


\textsuperscript{87} SELECT COMMITTEE ON FOREIGN AFFAIRS, PRIVATE MILITARY COMPANIES: NINTH REPORT (Oct. 2002). The U.K.’s Foreign Enlistment act makes it illegal for British subjects to join the armed forces of any state warring with another state at peace with Great Britain.

\textsuperscript{88} MONTREUX, DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES (Sept. 17, 2008) [hereinafter MONTREUX DOCUMENT].
good practices for private military and security companies as well as for their contracting, sup

90 home

territorial States. The Montreux Document is perhaps the most comprehensive compilation of the obligations of all these States under international humanitarian and human rights agreements, as well as under customary international law. The Document does not therefore create legal obligations, and it makes clear that the duty to comply with the obligations they have undertaken is upon the States. The Document notes the mirror obligation of territorial, home and contracting States to ensure respect for international humanitarian law and its implementation, including the enactment of legislation providing sanctions of its violation. In addition, the Document notes the obligation of these States to investigate, prosecute, extradite or surrender persons who have committed international law crimes, such as torture or hostage takings. The Document further notes that private military and security companies and their personnel, regardless of their status, are obliged to comply with both international humanitarian and human rights law, as well as relevant national laws including those relating to labor, immigration and tax. In Part Two, the Document then proceeds to provide a lengthy description of good practices relating to private military and security companies for contracting, territorial and home States, including the factors that a contracting State

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90 Contracting States are defined as “States that directly contract for the services of PMSCs, including as appropriate, where such a PMSC subcontracts with another PMSC.” Id. at ¶ 9(c) of the Preface.
91 Home States are defined as “States of the nationality of a PMSC i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principle place of management is the ‘Home State.’” Id. at ¶ 9(e) of the Preface.
92 Territorial States are simply defined as the “States on whose territory PMSC’s operate.” Id. at ¶ 9(d) of the Preface.
93 The Document also notes the obligation of ‘all other States’ to ensure compliance with international humanitarian law and to refrain from encouraging or assisting its violation by any party to an armed conflict.
94 The Document notes that superior responsibility attaches to governmental officials whether military or not as well as directors and managers if PMSC personnel are “under their effective authority and control” and that ‘superior responsibility is not engaged solely by virtue of conduct.” Id. at F (Superior Responsibility).
ought to take into account in determining whether or not to procure the services of private military or security companies. These practices include some of those we examined in the first paragraph of this section above and its aim is to harmonize these practices on a regional and international level.

Amnesty International USA has supported the Montreux Document, but has also noted that its references to international law are inadequate insofar as they do not precisely detail the due diligence obligation and responsibility of States to protect and respect human rights including protection from abuse by transnational corporations.94 Amnesty International also noted the absence of a reference to international human rights, the United Nations Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights in the Montreux Document.95 These Draft Norms were adopted by consensus by the United Nations Human Rights Council in June 2008.96 The IPOA welcomed the Montreux Document as providing private military and security companies guidance on how to engage in “ethical operations in conflict, post-conflict and disaster relief operations.”97 Clearly, IPOA did not understand, at least based on its Statement, the Montreux Document as requiring private military and security companies to conform their conduct to norms of international human rights. In fact, the Montreux Document does not have any binding legal

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94 AMNESTY INTERNATIONAL, PUBLIC STATEMENT ON THE MONTreUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO THE OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (Oct. 14, 2008).
96 UN Human Rights Committee General Comment No. 31 CCPR/C/21/Rev.1/Add.13
commitments or any enforcement mechanism, an issue we noted that arises with reference to the Codes of Conduct of private military and security companies.

Clearly, the Montreux Document fills an important gap by providing a comprehensive list of international legal rules and good practices relating to the operations of military and security companies. However, it is important to note that efforts to bring the operations of multinational corporations, to conform to the best interests of the countries where they operate now date back more than a few decades. The challenges being posed by military and security companies can therefore be regarded as yet another iteration in the relations between poor countries and investors from richer countries.

Conclusions

The commercialization of war through contracts between private military and security companies, on the one hand, and governments, on the other, has been shrouded in secrecy and the lack of an effective international legal framework for curbing mercenary activity. States claim to have a right to engage in defense and security contracting without public, parliamentary or other oversight because matters of national security are necessarily non-public. Yet, many States express strong outrage in opposition to mercenary groups and corporations providing military and security services, such as combat, running prisoner of war camps and other functions traditionally understood to be under the command of national military and security services. Sarah V. Percy has referred to this state of affairs

98 See, e.g., Jeffrey Leonard, Multinational Corporations and Politics in Developing Countries 32 WORLD POL. 454 (1980).
as constituting a strong norm against mercenarism, which has paradoxically produced a weak and ineffective law against mercenarism. 99

This paper shows the growing involvement of foreign and private military, defense and security firms and mercenaries, particularly in the countries with the least effective control of their often remote and dangerous resource rich territories. The reliance on private security firms and contractors to maintain order and effective control over the territory of weak and poor states is comparable to the kind of control that rogue non-state actors, like the Revolutionary United Front, had in Sierra Leone in the early 1990s. Sierra Leone hired a private military company to help it restore order as the country became enveloped in chaos, and with no regional or multilateral intervention to avert it. While the hiring of Executive Outcomes was roundly condemned by Western and non-Western States, this paper has shown that, notwithstanding these strong objections to mercenarism, particularly by poor and weak States, these States are nevertheless more likely to rely on the private providers of force and other military and security firms in the absence of effective regional and multilateral responses to state failure. Precisely because of the lack of effective preventive multilateral and regional solutions, the underlying causes of fragility and weakness of poor States provide an ideal atmosphere within which the private use of force and violence can thrive. Private military and security companies, as we have seen in this paper, pride themselves as responses to the failure of these structures of national, regional and international public governance to play effective roles in maintaining peace and security.

However, while rich countries have effective domestic legal regimes containing the operations of both mercenary groups as well as military and security firms within their territories, it is in their operations in weak and poor states that raise the most concern; especially for purposes of ensuring compliance with international legal obligations, such as the non-use of force as well as international human rights and humanitarian law. In addition, the natural mineral resources of these countries are vulnerable to mercenary groups and security and military firms.

This paper has also shown that international law on regulating the use of violence of non-State actors is divided between those cases like terrorism, where the state responsibility has been laid down in mandatory terms by the Security Council. By contrast, the regulation of private military and security companies has not attracted the same kind of categorical obligations on the part of States. What we see then is how the commercialization of violence has created differing responses in international law and institutions to the violence meted out by non-State actors – between those defined as terrorists and are currently stringently regulated, on the one hand, and those which define themselves as providing security, order and other ancillary services, who are currently not as stringently regulated under international law.

In addition, this paper has shown a divide between vigorously pursuing individuals responsible for commission of crimes against bodily integrity in the international criminal context, and much less of a focus on the economic actors who are often complicit as accessories to those crimes. Yet, as we saw above, such a policy that largely leaves out corporate actors who may be held individually liable is not inevitable. Individuals were
charged and held responsible for war crimes in the Nuremberg Trials as well as in the recent Van Anraat trial under Dutch law. International and national criminal justice systems could do well to close the artificial gap between those responsible for directly engaging in war crimes, and those indirectly involved in so doing by providing access to arms, finance and markets for violently extracted resources that cause crimes to bodily integrity in the first place.\textsuperscript{100}

While an argument may be made for legitimate private military and security companies to help weak States, private military and security companies ought not be a substitute for having national militaries under civilian control.\textsuperscript{101} After all, private military operators are profit-driven and may not afford the kind of outlays necessary to sustain a well-functioning, disciplined and equipped military. By contrast, well-functioning governments may and have often done so even in poor countries. As such, the market for military and security functions should not be a substitute for national militaries. Indeed, countries with such militaries under civilian control are less likely to fall into the kind of chaos and disorder that necessitates hiring of private providers of military services, including combat. Further, as private military companies are for profit entities and unlike national armies that are paid even during peacetime, private military companies do not have the same incentive to end wars without which they have no business.

\textsuperscript{100} Laura A. Dickinson, “Filartiga’s Legacy in an Era of Military Privatization,” 37 Rutgers Law Journal 703, 709 (2006) (noting that there are few ideal venues to hold non-state actors for violations of international law accountable)

\textsuperscript{101} Civilian control over military and police functions has been crucial in African states that have experienced coups and other kinds of political turmoil. See Samuel Decalo, Modalities of Civil Military Stability in Africa 27 J. MOD. AFR. STUD. 547 (1998); Samuel Decalo, Towards Understanding the Sources of Stable Civilian Rule in Africa: 1960-1990 10 J. CONTEMP. AFR. STUD. 66 (1990).
Finally, for countries unable to provide security and military services to ward off threats to their population and resources, regional and multilateral solutions operating with the consent of the governments of such countries and under international law is a much more preferable alternative than the provision of private military force.\(^{102}\) Indeed, the often cited instances of restoration of order by Executive Outcomes in places like Sierra Leone were short-lived. Such brief restorations of order that hardly deal with the underlying political, social and economic causes of the crisis that are best addressed, not by profit-motivated private companies, but through a combination of national, regional and multilateral initiatives over a sustained period of time.\(^{103}\)

Ultimately, tougher regulatory controls through a new international legal framework and national standards while important will be ineffective without a concurrent multilateral commitment to dealing with mercenaries as decisively as with other non-State actors who wield violence.

\(^{102}\) It is difficult to draw the line between the provision of legitimate non-combat security or military services such as training, advice, intelligence gathering or logistical support since these may quickly be merge into combat and operational support for ongoing conflicts.

\(^{103}\) Perhaps in this context, these corporations can have a role. But see David Francis, *Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation* 20 THIRD WORLD Q. 319 (1999).