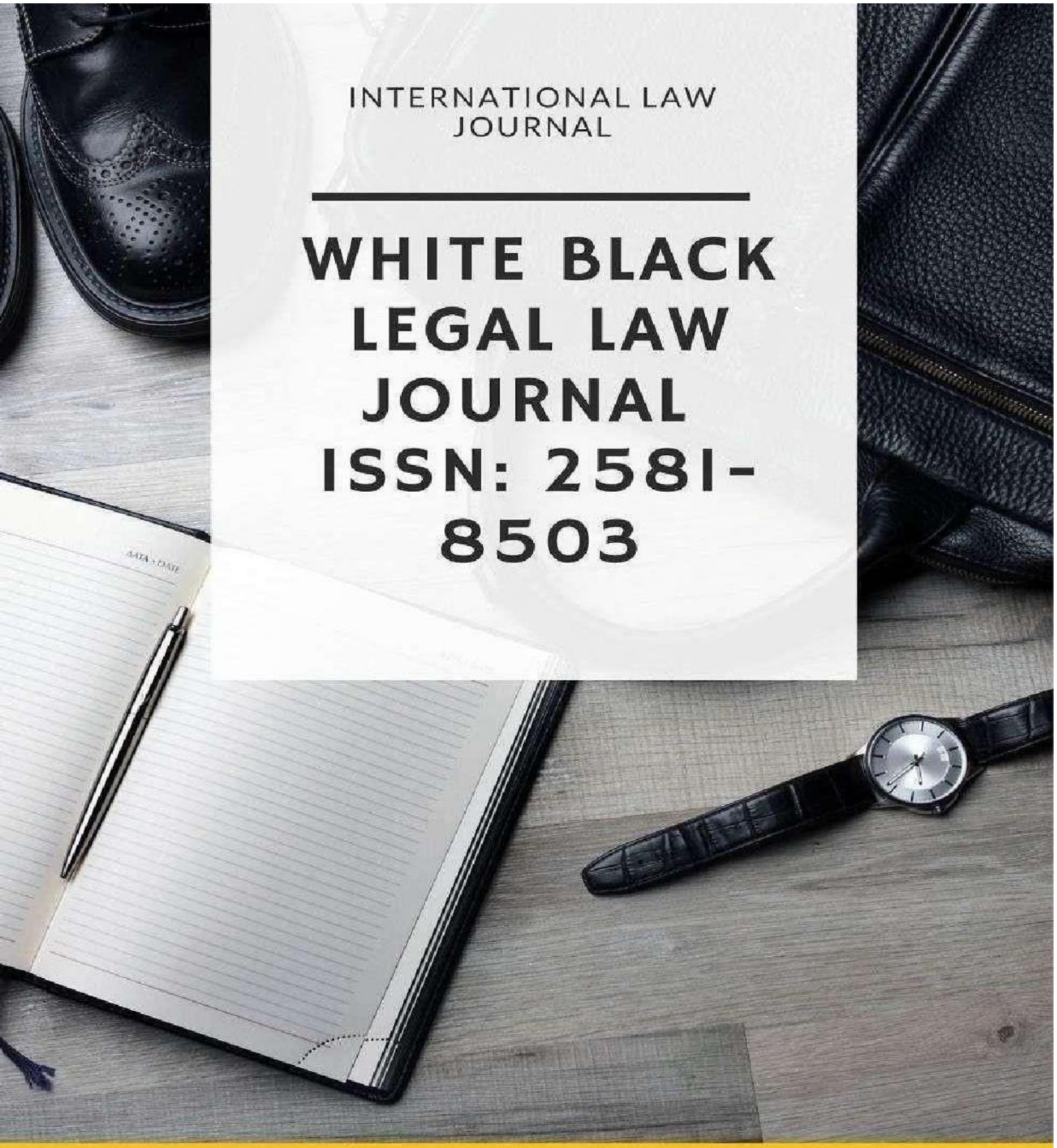

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PRIVATE FORCE, PUBLIC VACUUM: THE LEGAL IDENTITY PROBLEM OF PRIVATE MILITARY AND SECURITY COMPANIES AND THE CASE FOR A BINDING UN CONVENTION

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ABSTRACT

Private military and security companies (PMSCs) now perform functions once considered the exclusive preserve of the sovereign State, from frontline combat support to the interrogation of detainees and the protection of critical infrastructure in active conflict zones. Yet international law has failed to keep pace. Existing frameworks, most prominently the 2008 Montreux Document, offer a restatement of pre-existing obligations and a set of non-binding good practices that impose no enforceable duties on PMSCs, their personnel, or the States that deploy them. This article argues that the regulatory vacuum produced by soft-law voluntarism is structurally incapable of closing the accountability gap that defines the PMSC phenomenon. Drawing on the limitations of the Montreux framework and the failures of domestic extraterritorial jurisdiction, it proposes the core elements of a binding UN convention capable of resolving the legal identity problem at the heart of PMSC regulation: who these actors are in law, what they may do, and who bears responsibility when they cause harm.

Keywords: Private military and security companies, Montreux Document, mercenaries, international humanitarian law, soft law, binding convention, accountability, direct participation in hostilities

INTRODUCTION

The privatisation of organised violence is not a novel phenomenon in international history. What distinguishes the contemporary PMSC industry is its scale, its institutional sophistication, and, critically, its legal ambiguity.[1] Companies incorporated in stable democracies, contracting with sovereign governments, and providing services indistinguishable from military operations work across a terrain of international law designed for a world in which States held a monopoly on organised force. That monopoly no longer exists.[2]

The regulatory response has been, at best, partial. International instruments have multiplied the codes of conduct, industry certification schemes, and the Montreux Document chief among them[3] and, yet each shares a structural feature that makes it inadequate: none is legally binding on the entities it purports to regulate. The result is a system of voluntary self-governance that functions, where it functions at all, only for those actors already disposed to comply.[4]

This article proceeds as follows. Section I identifies the legal identity problem, which is the failure of existing IHL categories to classify PMSC personnel in a coherent way. Section II subjects the Montreux Document to structural critique, distinguishing what it achieves from what it cannot. Section III analyses the systemic limitations of soft-law approaches to PMSC accountability. Section IV proposes the essential elements of a binding multilateral convention. A brief conclusion addresses the political horizon.

I. THE LEGAL IDENTITY PROBLEM

International humanitarian law rests on a fundamental binary i.e., the combatants and the civilians. The Combatants may be targeted and, if captured, are entitled to prisoner of war status. The Civilians are protected from direct attack but forfeit that protection for such time as they directly participate in hostilities when they cross into active conflict conduct.[5] PMSC personnel fit neither category with precision, and the consequences of that misfit are not merely academic.

The mercenary definition in Article 47 of Additional Protocol I[6] is formally available but

[1]P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press 2003) 4–9.
[2]Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press 2005) 1–3.
[3]*International Code of Conduct for Private Security Service Providers* (Amended 2021)
[4]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 (17 September 2008)
[5]Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 Aug 1949, entered into force 21 Oct 1950) 75 UNTS 135, art 4(A)
[6] Protocol additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 Dec 1978) 1125 UNTS 3, art 43

practically useless. Its six cumulative conditions including the requirement that the individual be motivated essentially by private gain and not be a national of a party to the conflict are drafted with such specificity that virtually no contemporary PMSC contractor satisfies them.[7] The practical effect of this drafting was to exclude contracted personnel from the mercenary prohibition.[8] The definition has succeeded in that design at the cost of leaving a vast regulatory gap in its place.

The direct participation in hostilities (DPH) standard offers a more workable framework, but it brings its own difficulties. A PMSC employee who maintains the weapons systems, provides intelligence analysis, or operates surveillance platforms may or may not cross the DPH threshold depending on how closely their function connects to the actual use of lethal force.[9] The ICRC's Interpretive Guidance on DPH, while authoritative in tone, acknowledges the analytical difficulty and offers a structured criteria rather than clear rules.[10] For contractors working in active conflict zones, that uncertainty carries real consequences: it determines whether they may be lawfully targeted, and whether, if captured, they are entitled to combatant's privilege.[11]

The identity problem feeds directly into accountability. When PMSC personnel commit violations, as documented extensively in Iraq and Afghanistan[12] the question of who bears the legal responsibility depends on the threshold determinations about classification that the current law cannot resolve clearly. Are contractors State organs whose conduct engages State responsibility? Are they civilians whose offences are triable by domestic criminal courts under extraterritorial jurisdiction? Are they unlawful combatants outside the protection of IHL? The honest answer is that it depends on the facts and no one is certain, which is a workable answer only for those who benefit from impunity.

Each arm of the classification analysis produces an accountability gap. If PMSC personnel are treated as combatants, the military law and IHL should govern their conduct, but no State military code extends automatically to corporate contractors. If they are civilians who directly

[7]Protocol additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 Dec 1978) 1125 UNTS 3, art 47(2)
[8]Michael Bothe, Karl J Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) 258–62
[9]Michael N. Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5 *Chicago Journal of International Law* 511, 518–22
[10]Nils Melzer (ed), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 51–52
[11]Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 310–20
[12]Human Rights Watch, *The Way It's Supposed to Be: Abuses by Private Security Contractors in Iraq* (Human Rights Watch 2007). US Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody* (Final Report, November 2008).

participated in hostilities, they lose the protection but gain no clear accountability regime, because domestic criminal jurisdiction over extraterritorial civilian conduct is discretionary and it is rarely exercised. If they fall into the category of unlawful combatants, that category itself has no agreed definition outside the disputed post-2001 usage by the United States.[13] The identity problem is therefore not a gap to be filled at the edges, it is the central structural failure of the existing regime.

II. THE MONTREUX DOCUMENT: A STRUCTURAL CRITIQUE

The 2008 Montreux Document is the most developed multilateral instrument addressing PMSC conduct to date. Negotiated under the guidance of Switzerland and the ICRC, and now it is endorsed by more than fifty States,[14] it represents a genuine diplomatic achievement. Its structural limitations, however, are not minor defects correctable through better implementation. They are the fundamental features of its design.[15]

The Document operates in two parts. Part I restates existing obligations under IHL and international human rights law as they apply to the contracting States, territorial States, and the home States in relation to PMSCs. Part II sets out seventy-three good practices for putting those obligations into practical operation.[16] The restatement function is competently executed. The problem is that restating obligations the States already hold does not create any new accountability for the actors who cause the most concern, which is, the companies and their personnel.

The good practices are written in the discretionary language typical of non-binding instruments. States "should consider", "are encouraged to", and "may wish to" adopt domestic measures.[17] No mechanism exists to verify whether endorsing States have followed these recommendations, to hold those that have not to account, or to provide remedies for individuals harmed by conduct the good practices were designed to prevent. The Document states expressly

[13]Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 47–53

[14]Swiss Federal Department of Foreign Affairs (FDFA), *The Montreux Document – Participating States* (Feb 2026) <https://www.eda.admin.ch/en/the-montreux-document> (accessed 16 May 2026). (This confirms 61 States and three international organizations support the Montreux Document, updating the count from 58 States as of 2023.)

[15]James Cockayne, 'The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law' (2006) 88 *International Review of the Red Cross* 459, 487

[16]*Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* (UN Doc A/63/467–S/2008/636, 17 September 2008) pt I, pt II.

[17]*Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* (UN Doc A/63/467–S/2008/636, 17 September 2008) pt II, Good Practice 14.

that it does not create new international law.[18]

The accountability gap that this produces is structural rather than operational. Even a State that follows every recommended good practice at home may still allow a PMSC incorporated within its territory to operate with impunity in another State where the legal system is weak and victims have no realistic means of obtaining justice.[19] The Nisour Square massacre in 2007, in which Blackwater contractors killed seventeen Iraqi civilians in Baghdad, took ten years of litigation in United States federal courts to achieve even limited and contested accountability. The Montreux Document's good practices were in existence from 2008. They made no measurable difference to that outcome.[20]

A further structural limitation is the market incentive problem. PMSCs compete for contracts based on price and capability. Applying human rights due diligence procedures, vetting requirements, and conduct standards increases costs. In a market where the States primarily choose contractors on cost grounds, voluntary compliance systems place responsible companies at a competitive disadvantage. Soft law, without compulsory enforcement, tends to be observed by actors who would likely comply without it, while being ignored by those whose behaviour most needs to change.[21] The PMSC market reflects this problem in a clear form.

III. WHY SOFT LAW CANNOT SUBSTITUTE FOR HARD LAW

The limitations identified in Section II are not arguments for designing better soft law. They are arguments for a different kind of instrument entirely. The accountability failures in the PMSC sector which are, the identity problem, jurisdictional fragmentation, and the market incentive to avoid compliance, all require legal solutions that only binding obligations can provide.

Consider first the identity problem. The question of whether a contractor is a combatant, a civilian, or something else cannot be settled through good practices. It requires a treaty definition carrying the same legal authority as the IHL categories it is modifying or

[18] *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* (UN Doc A/63/467–S/2008/636, 17 September 2008) preamble paras 3-4, 7.

[19] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 297-330.

[20] United States v Slatten, 865 F 3d 767 (DC Cir 2017). The DC Circuit vacated manslaughter convictions; subsequent retrial proceedings remained unresolved for years. For analysis of the jurisdictional problems, see Jonathan Horowitz, "Accountability for Private Military and Security Company Employees Who Commit Crimes Abroad" (2010) 44 International Lawyer 997.

[21] This regulatory dynamic is documented in compliance theory: see Abram Chayes and Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (Harvard University Press 1995) 3-5, noting that voluntary commitments are systematically underenforced by those with the weakest compliance culture. See also Elke Krahmann, States, Citizens and the Privatisation of Security (Cambridge University Press 2010) 212-219.

supplementing. Without such a definition, the question remains fact-specific, open to dispute, and impossible to apply consistently. The ICRC's interpretive guidance assists legal scholars and military lawyers, but it does not provide a stable and enforceable basis for contractors in the field, commanders ordering their deployment, or courts assessing their conduct after the fact.[22]

Consider next the jurisdictional problem. PMSC operations typically involve a company registered in one State, contracted by a second State, operating in a third, and employing personnel from several others. Even where the domestic law permits criminal jurisdiction outside national territory, as the United States' Military Extraterritorial Jurisdiction Act does[23] the political will to prosecute contractors who supported a State's own military objectives is often absent. A multilateral convention can require States parties to establish jurisdiction, cooperate in prosecutions, and apply the principle of *aut dedere aut judicare* (extradite or prosecute), making impunity harder to sustain. This obligation already exists under the instruments such as the UN Convention Against Torture[24] but has never been extended to cover PMSC conduct, which a binding convention would do precisely that.

The counterargument that the problem is political will rather than instrument type and that a binding convention without political will is equally useless, deserves a direct response. It is true that a convention ignored by major PMSC-deploying States would change little in practice. But the argument proves too much, by the same logic, no binding instrument in international law would be worthwhile if it could not guarantee universal compliance from the outset. The practical answer is that binding obligations produce compliance through channels that voluntary arrangements cannot reach which are, domestic legal incorporation, reputational cost of formal breach, and institutional monitoring that maintains normative pressure over time.[25]

Consider finally the market problem. Binding licensing requirements, which make PMSC operations abroad conditional on State approval assessed against human rights criteria, change the competitive structure of the market in a way that voluntary systems cannot. When

[22]Michael N Schmitt, 'Precision Attack and International Humanitarian Law' (2005) 87(859) International Committee of the Red Cross *International Review of the Red Cross* 445, 540-542.

[23]Military Extraterritorial Jurisdiction Act 2000, 18 USC ss 3261-3267. The Act extends US federal criminal jurisdiction to certain contractors accompanying the armed forces abroad. Its application to non-combat support contractors has been contested and its practical use against contractors has been limited.

[24]Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 7 (obligation to submit cases for prosecution where the alleged offender is present and the State does not extradite). The structural model is directly applicable to serious PMSC violations.

[25]Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge University Press 2009) ch 1, demonstrating empirically that ratified human rights treaties produce measurable behavioural change through domestic legal and political channels, even where political will was initially reluctant.

compliance becomes a condition for entering the market rather than a reputational benefit, the incentive structure changes fundamentally. This is the same logic followed by the Arms Trade Treaty, which requires States parties to assess the export licences against human rights impact standards and to refuse licences where there is a serious risk of violations.[26] The same logic applies with equal force to the market for military and security services.

IV. ELEMENTS OF A BINDING UN CONVENTION

The UN Working Group on the Use of Mercenaries produced a draft convention text in 2010[27] that has not progressed to negotiation. That draft provides a useful starting point, though the analysis below departs from it in several respects. What follows, identifies the minimum essential elements of any convention capable of closing the accountability gap.

First, is a functional definition of PMSCs and their personnel. The definition should be based on the services companies actually provide, rather than their corporate structure, to prevent any kind of regulatory avoidance through restructuring. It should cover the companies that supply armed security, direct combat support, military training, intelligence services, and the operation of weapons or surveillance systems.[28] Definitions of personnel must also address legal status directly, specifying which PMSC functions constitute direct participation in hostilities and which do not. This removes the classification uncertainty that current IHL leaves unresolved.

Second, is the prohibition on inherently governmental functions. Certain activities such as detention authority, command of military operations, and strategic intelligence functions, must be kept entirely outside the private control. This is not an argument for dismantling the PMSC industry. It recognises that some exercises of coercive State power are constitutionally and institutionally unsuitable for private contracting. The Abu Ghraib detainee abuse cases, where the contractors were present and involved during interrogation sessions,[29] illustrate precisely why the detention authority cannot safely be delegated to private actors operating outside the military command structures. A convention should list such functions as a floor below which

[26]Arms Trade Treaty, 2 April 2013, UN Doc A/RES/67/234B (entered into force 24 December 2014), art 7. The Treaty requires assessment of whether exported arms or ammunition "could be used to commit or facilitate a serious violation of international humanitarian law."

[27]UN Human Rights Council, Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, "Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council", UN Doc A/HRC/15/25 (2 July 2010), Annex.

[28]Francesco Francioni and Natalino Ronzitti (eds), War by Contract: Human Rights, Humanitarian Law and Private Contractors (Oxford University Press 2011) 13-18, arguing for a functional rather than formal definition as the only approach capable of capturing the full range of PMSC activities. See also the draft convention (n 23), arts 1-4, which adopts a functional approach but has been criticised for being over-inclusive.

[29]US Senate Armed Services Committee (n 11). The Committee found that contractor personnel participated in detainee interrogations and that the chain of command and accountability for contractor conduct was unclear and confused.

privatisation may not go, giving the prohibition treaty-level force.

Third, is a mandatory home State licensing system. States parties must be required to approve any PMSC operations abroad through a licensing process examining the company's human rights record, the nature of the proposed contract, and the conditions in the operational area.[30] Licences must be revocable and subject to continuous reporting requirements. The Arms Trade Treaty provides a workable structural model.[31]

Fourth, is the introduction of individual criminal responsibility and a form of corporate liability. The convention should establish individual criminal responsibility for PMSC personnel who commit serious IHL violations, and for corporate officers who order, authorise, or fail to prevent such conduct. It should also create a form of corporate liability whether civil, administrative, or criminal, so that the company itself can be held meaningfully accountable.[32] The experience of the Nisour Square proceedings demonstrates that relying on national prosecutorial discretion alone leaves accountability to political contingency rather than legal obligation.

Fifth, is to establish a monitoring body with investigative powers. A treaty without a functioning enforcement mechanism is aspirational rather than operational. The convention should establish an independent monitoring body with authority to receive complaints, conduct investigations, and issue findings. Critically, the body must have access to operational areas and the ability to take testimony from PMSC personnel and affected civilians, rather than depending solely on the State party reports.[33]

CONCLUSION

The legal case for a binding PMSC convention is clear. The Montreux Document's failure is not a product of inadequate implementation it is a product of what the Document is. A non-binding instrument that restates existing law, creates no monitoring mechanism, and attaches

[30]A State-centric licensing model is proposed by Cockayne (n 13) 493-495, who argues that home State control over authorisation is the most practically achievable point of leverage over PMSC conduct, given that home States typically have the regulatory infrastructure and political incentive to act.

[31]Arms Trade Treaty (n 22), arts 6-8. The Treaty's assessment framework -weighing the risk of harm against the benefits of authorisation - can be adapted to PMSC licensing with relatively limited modification.

[32]Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, art 25(3)(b)-(d) (individual criminal responsibility for ordering, soliciting, inducing, aiding, or otherwise assisting in the commission of a crime). On the case for extending analogous provisions to corporate officers in the PMSC context, see Kai Ambos, Treatise on International Criminal Law, Vol I (Oxford University Press 2013) 119-128.

[33]Helen Keller and Geir Ulfstein (eds), UN Human Rights Treaty Bodies: Law and Legitimacy (Cambridge University Press 2012) ch 3, discussing the individual complaints mechanisms of UN treaty bodies and the operational conditions under which they are effective. The Committee Against Torture - established under the Convention Against Torture (n 21), arts 17-24 - provides a practical institutional model, including its power to undertake confidential inquiries into systematic violations.

no consequence to non-compliance cannot regulate the actors whose competitive advantage lies in operating where legal accountability is the weakest. The political obstacles to a binding convention are real and should not be minimised. The States most likely to resist it, the United States, the United Kingdom, and other major PMSC home and contracting States, have strong economic and operational interests in keeping the current system unchanged.[34]

Those obstacles are not, however, a reason to abandon the project. The 1997 Ottawa Convention banning anti-personnel landmines was concluded without the participation of the United States, Russia, or China, yet it reshaped State practice and market conditions around landmines globally.[35] The Convention on Cluster Munitions was negotiated outside the Conference on Disarmament when that body could not reach agreement, demonstrating that a determined coalition of States can still move international law forward even when major powers stand aside.[36]

People continue to be killed, detained, and subjected to systematic abuse by actors whose legal status is disputed and whose accountability is divided across jurisdictions that often lack the willingness to act. Soft law has had sufficient time to demonstrate whether voluntary rules can close the accountability gap. The evidence, reviewed in this article, is that they cannot. The legal case is made. Whether the international community chooses to act on it is a political question, not a legal one, but it is a question that can no longer be deferred.

[34]Krahmann (n 18) 212-219.
[35]Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997, 2056 UNTS 211. On the treaty's normative influence despite non-participation by major military powers, see Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines" (1998) 52 International Organization 613.
[36]Convention on Cluster Munitions, 30 May 2008, 2688 UNTS 39.