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Privatization Of Security in Armed Conflicts: Legal Challenges Faced by The Expanded Concept of Militarization

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Abstract

Today's conflicts are not limited to interstate conflicts only due to many diverse factors such as civil wars, insurgencies, and the inclusion of violent non-state actors, which makes conflicts not only protracted but also complex. The emergence and growing influence of non-state actors have significantly challenged the traditional notion of state sovereignty and the state's monopoly over the use of force. This phenomenon is particularly pronounced in regions experiencing unresolved tensions, weak or corrupt state institutions, and transnational crimes. The rising prominence of Private Military and Security Companies (PMSCs) on the battlefield has introduced new complexities. These companies often operate in a legal grey area, blurring the lines between civilians and combatants and complicating their accountability. The recent resurfacing of PMSCs in conflicts like the war in Iraq and Russia has created an environment of ambiguity and threat simultaneously. The danger of them being unaccountable and the ambiguity of putting them under some label has devastated the world. Scholars, policymakers, and legal jurists have questioned the state's responsibility to hire them and raised questions on the traditional concept of state legitimacy with the exclusive rights to use force within its borders or outside. This paper focuses on the legal standing of PMSCs and the responsibility of the hiring states. PMSCs' legal status as per international law and International Humanitarian law will be discussed with special reference to a recent issue of the Wagner group activated in the Ukrainian conflict.

Key Words: Armed Conflicts, International Humanitarian Law, International Law, PMSCs, Wagner Group

Introduction

Certainly, the conflicts today are often prolonged, complex, and expanded which not only obstructs the peace initiatives but also destabilizes regions. This in turn has severe effects on Human Rights. The prolonged and complex nature of conflicts has led to a broader concept of militarization often, encompasses human rights abuses, extrajudicial killings, torture, terrorism, and war crimes. Against this backdrop, the escalation of PMSCs further complicates these conflicts with their active involvement. United Nations Human Rights (2024) highlights the growing nexus between mercenaries, mercenary-related entities, private security actors, and the trafficking and proliferation of arms. Moreover, this notable shift in the dynamics of warfare has further complicated the matter with the involvement of PMSCs as not confined to human rights abuses, and ambiguity of their status but further leads to the proliferation of arms deals and other transnational crimes. It seems to challenge Max Weber's theory that the monopoly of violence is broadly regarded as a sine qua non for statehood. This increasing reliance of states on PMSCs constitutes a significant legal and ethical challenge to the existing legal regime of warfare. For this paper, the focus is on the inclusion of

PMSCs into the structural framework of international law and IHL and how the proliferation of PMSCs have predominantly transformed the landscape of security nationally and internationally. The emergence of PMSCs in the latter half of the 20th century, have fraught the current legal milieu with many negative settings and notions. The concept of state sovereignty is being undermined by the expansion of militarization in a way where states voluntarily relinquish their exclusive control over the use of force. However, the concept of PMSCs resurfaced prominently during the early stages of the Ukraine conflict. The Wagner Group, a private military company, gained significant attention, drawing parallels to the actions of Blackwater in Iraq in 2003. However, the emergence of PMSCs is not a new phenomenon, as they have been working in contentious areas since the Cold War era. Nevertheless, they came to prominence, particularly in the post-Cold War era when the USA seemed to have no realistic challenger to its sole power, hence, the USA started downsizing the national military for the pure reason of curtailing defence resources. This niche and a gap in the powerful market created space for PMSCs (Baylis, Smith and Ownens, 2016). Similarly, Singer (2003) observed that the post-Cold War era left a gap in global security, resulting in diminished public support for substantial defence budgets and a decreased necessity for states to deploy troops overseas. Nonetheless, PMSC activities intensified in 2001 when America started its Operation Enduring Freedom in 2001. For this paper, private military companies (PMSCs) are described, as entities that deliver military services, either directly through their personnel or indirectly through consulting or support functions Singer (2003). This includes an extensive range of activities, including but not limited to direct participation in armed conflict, training and organizational tactics, and logistical, intelligence, or non-lethal support.

These non-governmental actors now play a substantial role in military operations, challenging the conventional concept of state-controlled forces and the rule of accountability in warzones. One fundamental concern attached to the PMSCs is how the privatization of the central idea of the sovereignty of state (use of force) is taking an increasingly transnational scope without any limitations and regulations (Torroja, 2017). Previously, the legal immunity given to the PMSCs in Iraq by the Coalition Provisional Authority to have them pursue more efficiently and effectively the states' interests sparked significant debates at international forums. (Baylis, Smith, and Ownens, 2016). Despite the international community's adoption of the Montreux Document, PMSCs continue to face controversy due to their activities. The document, intended to establish ethical guidelines for PMSCs, appears to be largely ineffective and lacks the necessary enforcement mechanisms. This research will use the basic definition of PMSCs as articulated in the Montreux Document and further probe into the challenge of fitting the old definition of mercenaries to the new trends and realities.

As defined in 'Montreux Document', "PMSCs are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel." (ICRC).

Despite the efforts to establish legal frameworks for PMSCs, from the Montreux Document to the International Code of Conduct (ICoC) and the UN working group, these initiatives have failed to effectively regulate their roles and functions. The reason is that the structure and working of PMSCs is quite complex as they market themselves to Multinational Corporations as well, particularly to those who are in extractive businesses in conflicted areas. This way PMSCs not only indirectly participate in conflicts in these areas but also encourage MNCs to expand their operations in areas of conflict (Brooks, 2007). However, currently, the PMSC industry has succeeded largely in depicting itself as a new aspect of security to which the old Westphalian concepts do not apply. This paper further, aims to contribute to security studies by addressing the dilemma of privatisation of war.

Historical Background of Use of PMSCs In World's Armed Conflicts

The Use of Private Military Companies in Armed Conflict Is a Longstanding Practice

The engagement of private military contractors in warfare by states is not a recent phenomenon. Since decades private contractors have existed in various forms, from highly organized entities to individual mercenaries. As noted in Akbariman et al., (2024) between 1600 A.D. and 1800 A.D., the hiring of mercenaries was common in various regions by states to defend their borders. During this period, civilians could also join the armies of other countries regardless of their nationalities or origin. Since the 1990s, the private military companies and security services have rapidly expanded and become a prominent force in numerous armed conflicts and high-risk regions around the world. Their activities range from disaster relief efforts, such as those following Hurricane Katrina in New Orleans, to operations in conflict zones like Pakistan (Hoffman, 2023). The US government launched the War on Terror in the result of these attacks which included the invasion of Iraq. This conflict created opportunities for many private military companies, but none grew as quickly as Blackwater. This small company from North Carolina became a powerful force in the Bush administration's war on terror. While the outsourcing of security functions and the use of mercenaries has been a historical practice, as mentioned, the 2003 US invasion of Iraq, known as Operation Iraqi Freedom, marked a significant resurgence of large-scale outsourcing of warfare. A notable feature of this conflict was the substantial reliance on private military companies (PMSCs), with a staggering ratio of one PMSC personnel for every six nation-state soldiers operating in the region (Avant & Sigelman, 2010). Private PMSCs deliver a diverse range of services and can be categorised broadly into three main types: Firstly, logistical support where PMSCs deliver crucial infrastructure and support services, such as transportation, supply chain management, and base maintenance, which are essential for the effective operation of military and security forces. Secondly consulting services as they offer specialized advice and training on various subjects, including threat assessment, military operations, and security management. Their services include strategic analysis, strategy development, and the execution of training programs. Lastly, armed personnel can deploy armed personnel to perform security duties, including combat operations, protective services, and counterterrorism activities. While this aspect of PMSC operations is often controversial, it is important to recognize that some companies focus exclusively on defensive roles, while others engage in both offensive and defensive activities.

The most dangerous and worrisome are these last ones, the trigger pullers in the words of Hoffman (2023). Hoffman further emphasizes that while most analyses of PMSCs focus on their operational activities, it is important to also consider how economic globalization influences these companies, particularly in terms of their labour practices. Christopher Wood, (2013), is of the view that the profit motive is difficult to dispel from the reality of PMC. He elaborates on the structure and working of PMC through the spectrum of Social Governance theorists and realism. He has also found commonalities in addition to contrasts in both theoretical frameworks regarding the proliferation of PMCs as security actors at the transnational level. However, this paper focuses on the legality and accountability of the PMSCs.

Legal Dilemmas and Challenges of Private Contractors

The increasing reliance of states on PMSCs in preparing, managing, and operating armed conflicts has posed serious concerns regarding violations of international law. From a legal and security perspective, however, this newly adorned status of PMSCs remains argumentative. There is an ongoing deliberation over whether PMSCs should be treated like any other industry working transnationally or clear status of mercenaries should be awarded to them. However, the proponents of PMSCs assert that PMSCs are not mercenaries which means the international law existing to code mercenaries should not be applied to them (Salzman, 2008). PMSCs are widely contacted and involved to avoid legislative and public oversight, sometimes they are hired to hide the state's prints

from dubious strategic objectives and activities. Wars in Iraq and Syria have been great examples where the USA had shifted the burden of war to lower the political price. This arrangement between the PMSCs and States undoubtedly leads to various infringements of international legal framework. Lastly, the legal status of PMSCs is rather ambiguous therefore holding them accountable for crimes against individuals and other armed conflict violations under IHL can be challenging unless their action can be attributed to a state involved in conflict. For this purpose, this research analyses the absence of binding documents that are required to regulate PMSC activities and will provide a list of suggestions to make this legislation a reality. This research further argues and believes that without improved and forceful legislation, PMSCs keep on threatening the notions of constitutions, norms of international laws and rules of transparency which are pertinent for the protection of citizens nationally and internationally. Also increased reliance on privatizing militarism will make accountability more diffuse and complex to take due to the involvement of a greater number of actors holding powers from various sources.

The Prominent and debatable example set by the USA, using PMSCs extensively in Iraq and Afghanistan has been inspiring many other countries since then, among them Russia (Tor Bukkvolla & Åse G. Østensen, 2020). Russian PMSCs are playing an active role in African countries, especially in the Central African Republic (CAR), Sudan, Madagascar, Mozambique, and Libya. Their activities in Africa are not limited to fighting but include instructing local Forces, Security for Russian Business, Support in local political tempering, and participation in combat and defence arm transfers (Cragin & MacKenzie, 2020). Spearin Christopher (2017), has elaborated on the dynamics of PMSCs from land to air and sea. He suggests that it is important to analyse how PMSCs are constrained within a space. He further distinguishes that PMSCs are reserved for conducting defensive tasks and state military for highly offensive operations. Helena Torroja (2017) identifies the two contrasting views on the legislation regarding PMSCs. One group argues that there is no need to codify PMSCS as there are already enough regulations, on the contrary, the other group is in favour of laws to be further developed. She suggested that a codified treaty is required to standardize and regulate the activities of PMSCs as the existing laws are equipped only to deal with Armed conflict and in recent years PMSCs have expanded their operations beyond it.

The absence of a comprehensive international legal framework specifically governing private military companies (PMSCs) is a considerable discrepancy in contemporary international law. States often resist new regulations that might impinge upon their sovereign authority, particularly in matters related to military and security affairs. In the absence of a distinct legal regime for PMSCs, any limitations and guidelines for their deployment must be derived from the core principles of international legal framework are applicable to non-state actors. It is incumbent upon individual states and their national governments to implement these general principles by enacting specific legislation and administrative regulations that govern the use of PMSCs within their jurisdictions. Employees of a company are generally regarded as civilians unless they are officially included in the armed forces. This incorporation involves being placed under the direct command of a military officer and being subject to military discipline. In contrast, private military companies typically have contractual relationships with states, rather than being formally integrated into their armed forces (Kees, 2011). However, as per Article 51 of 'The Geneva Convention Protocol 1' (ICRC, 2022) the direct participation in hostilities by members of private military companies, in their civilian capacity, can result in the loss of their safeguard against perils arising from military operations. The concept of "direct participation in hostilities" is a critical limitation on the deployment of private military companies (PMSCs) in armed conflicts. While widely recognized, the exact definition remains elusive. Generally, the focus is on whether the actions taken directly inflict harm on the enemy. In practice, however, differentiating between security or support roles and active combat operations can be problematic. For example, civilian-military providers may be contracted to use lethal force to protect assets and individuals. During the Iraq occupation, private military contractors, armed with military-grade weapons, were allowed to take pre-emptive actions, such as stopping, searching,

disarming, and detaining civilians, if deemed necessary for their safety or as specified in their contracts. This applied regardless of whether the contracting entity was private or public. According to U.S. Army regulations, providing such security services does not constitute performing inherently governmental functions that would be classified as direct participation in hostilities. International humanitarian law, encompassing the Geneva Conventions, their additional protocols, and customary norms, typically does not acknowledge the concept of legal entity accountability. Instead, it emphasizes the responsibility of states and individuals. The framework for state responsibility within international humanitarian law is articulated in Rule 149 of the Customary Rules of International Humanitarian Law stating that 'States are also responsible for acts committed by other persons or entities which they have empowered, under their internal law, to exercise elements of governmental authority' (ICRC, 2024). A significant limitation on the accountability of private military companies (PMSCs) is the International Criminal Court's (ICC) restricted jurisdiction. The ICC can only investigate and prosecute individuals who are citizens of states parties to the Rome Statute or who have committed crimes within the territory of such states after July 1, 2002.

This jurisdictional restraint disqualifies the ICC from prosecuting companies directly and that involves PMSCs as well. However, the ICC can prosecute company executives who are responsible for crimes committed by the company (Australian Red Cross, 2016). Moreover, few cases can be used as precedents where the companies involved in criminal activities have been prosecuted for example Nexa Technologies faced allegations of supplying surveillance equipment to the government of Libya and Egypt, similarly, Lafarge was accused of complicity in war crimes, crimes against humanity, and terrorism financing for its operations in Syria (Akbariman et al., 2024). The transnational operations of PMSCs are another considerable challenge to accountability. The PMSCs are often incorporated offshore and have the nationality of another state but operate in a different state to avoid ties with a particular state. Through this transnational character they are often not subjected to the host state, such as in the Nisar Square conflict it was found that the members of Blackwater were not subject to the Iraqi regulations. Additionally, the state where the PMSCs are incorporated cannot scrutinize the offshore activities of the company.

Initially, the 'International Convention against the Recruitment, Use, Financing, and Training of Mercenaries' was deemed to apply to PMSCs, as their functions were frequently confounded with mercenaries however, as discussed earlier it is not applicable because PMSCs are not mercenaries. However, after the involvement of Blackwater in Iraq, the violation of fundamental rights in Abu Gharib in 2004, and later in Nisar Square in 2007 surfaced, intentional communities in collaboration with ICRC recognized the urgency for regulating the increasing PMSCs. Consequently, they introduced certain non-binding codes and regulations for regulating the conduct of PMSCs. Firstly, the UNGP for business and human rights provided for the protection of human rights, the states were made responsible for operating with due diligence to mitigate the adverse impact of business on human rights, and they were bound to uphold the international standards of human rights and lastly, they were to provide reparation for the infringement of civil liberties. Furthermore, the Montreux Document for the first time acknowledged the transnational aspect of PMSCs and categorized states into the 'home state' and 'host state' and defined their obligations accordingly. It also provided 'good practices' for regulating the conduct of PMSCs. Despite the non-binding status of Montreux Document, it provides for states to adhere to strict regulatory standards and provide for a mechanism for regulating PMSCs. Moreover, states are encouraged to adopt legal frameworks for improving the accountability of PMSCs lastly it also outlines some good practices for states to follow. However, the good practices in this document were not enough for the operation of PMSCs in countries with unstable governments as they failed to internalize the responsibilities in their domestic laws. Subsequently, ICoC was drafted providing for the creation of a monitoring body the ICoCA, it also lays out a complaint mechanism but most importantly it provides for the incorporation of policies in the domestic law. It is to be noted that the Montreux Document applies only to the military conflicts similarly the ICoC does not apply to private military companies. (DeWinter-Schmitt, (2017) notices

that there are gaps in the application of the existing soft laws regarding the growing role of PMSCs the gap can only be filled with joint efforts of multi-stakeholders. Lastly, the Cyber Security Division of PMSCs is further strengthening as per the Geneva Centre for Democratic Control of Armed Forces (DCAF), the increasing involvement of PMSCs in cyberspace is posing an exceptional threat to accountability, as it allows them to operate from anywhere in the world making it even more difficult to determine jurisdiction, it is an unprecedented challenge that the existing codes have fall deficient to cater. (Maurer & Hoffman, 2019). The prevailing international legal framework has proven to be inadequate to address cyber warfare, the PMSCs have the capacity to operate from anywhere in the world without being tracked. Furthermore, the absence of a robust mechanism poses a significant threat to the accountability of PMSCs, and they are benefiting from this legal ambiguity.

Case Study: Recent Conflict of Ukraine and Inclusion of PMSC

The PMSCs are often regarded as the brainchild of the US, especially with the involvement of Blackwater in Iraq. However, the recent conflict in Ukraine has unveiled the involvement of Russian Wagner, one of the largest private military apparatuses. The Russo-Ukraine conflict dates back to 2014, Moscow with the help of Wagner a PMSC annexed Donetsk and Luhansk in the eastern region of Ukraine following the annexation of Crimea. In February 2022, Russia once again invaded Ukraine in continuation of the 2014 conflict starting a full-fledged war.

The PMSCs have played a major role in the Ukraine war from providing logistic support to taking part in the combat war, they are used by the Russian Government not only to mask the involvement of the Russian army in the conflicts but to create ambiguity by using official and unofficial forces. (Foley & Kaunert, 2022). In his research paper Eric while highlighting the role played by Wagner in the Russo-Ukraine conflict states that Moscow has been using Wagner with twin objectives, to strengthen bilateral relations by providing the PMSC services to other governments and to use them as a proxy for the Russian military. The influence of Wagner has amplified significantly in Russia, now they are being used as a parallel army by Russia in Ukraine. Substantial reliance has been placed on wagers by Moscow for invasive operations, especially during the Ukraine war (Lohmus, E. H. 2023). Additionally, upon a closer look at the position of PMSCs in Ukraine, it can be observed that this conflict has an impact on the whole European region therefore, Ukraine has also procured aid from PMSCs from the European countries to support their army making Ukraine a breeding ground for PMSC (Bauer & Mueller, 2023). The reliance on the PMSCs is rapidly increasing especially during the Ukraine conflict and is going to have a massive impact on the world. States are resorting to using PMSCs instead of the military as they are cheaper as compared to the military and the casualties are not considered as war dead which in return limits the state's responsibility. However, this is creating a considerable challenge for accountability of war crimes and other infringements of IHL.

In the aftermath of the Ukraine conflict, Moscow is providing private military services to other countries as well so even after they were called back Wagner from Ukraine, they are still benefiting economically from them making a substantial contribution to the economy of Russia. Moreover, the role of PMSCs is not confined to providing security services they have penetrated other markets as well, they are involved in mining and gas extraction in different countries making their role more versatile as compared to traditional military. (Al-Marashi, 2023). With the varying roles of PMSCs, states are hiring PMSCs beyond the war zones. They are now being hired as immigration officers and are also rendering services in maritime security formally assuming the role of state military forces (Aparac, 2023). The states are using PMSC without properly determining the extent of force used by them creating a humanitarian crisis. Private security companies are not training their employees for protecting human rights therefore they are mostly going rogue we have seen that in the recent Ukraine conflict.

State Responsibility for PMSC Personnel

The 'International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)' outline the rules governing state obligations. While not legally binding, these articles clarify many aspects of state accountability and reflect customary law. The rules governing state responsibility are outlined in the 'International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)' which is not legally binding but clarifies many rules for states' accountability and reflects customary law. While ARSIWA is not legally binding and mostly reflects customary laws as its status is not of treaty. When states hire private military companies (PMSCs), three articles of attribution in ARSIWA are particularly relevant: Article 4, governs state 's obligations for the actions of state organs; Article 5, regulates state responsibility for the conduct of persons or entities exercising elements of government authority; and Article 8, regulating state responsibility for conduct controlled or directed by a state (ICRC, 2024). Both Articles 4 and 5 of ARSIWA are applicable in situations where persons exceed their authority or ignore instructions, if they are still acting in the state's official capacity. (Frauke Renz, 2020). Furthermore, the state held responsible is obligated to provide full compensation for any injuries caused by the unlawful act attributed to it. This includes all damages resulting from the state's wrong actions. Compliance with these obligations is monitored either by individual states through their mechanisms or by the United Nations Security Council under Chapter VII (International Law Commission, 2001). Furthermore, in International armed conflict, art. 91 AP I of the Geneva Convention, is a *lex specialis* and customary law stating that states are accountable for all acts committed by their military troops. Thus, acts by PMSC personnel as part of the hiring of state armed forces are always the responsibility of that state. Moreover, Article 8 of the ARSIWA addresses the ascription of wrongful acts committed under the instruction, direction, or control of a state. The terms "instruction" and "direction" imply a subordinate relationship between the state and the actor committing the unlawful act. "Control" requires a significant level of influence, suggesting a high threshold for effective control. Consequently, PMSC personnel and their wrongful acts may be attributed to the hiring state if the acts were committed under the instruction, direction, or effective control of the hiring state. Concludingly there are primarily four ways in which the wrongful acts of private military company (PMSC) personnel can be attributed to their hiring state. First, under the *lex specialis* principle, armed forces can be attributed through provisions like Article 91 of Additional Protocol I. Second, state organs can be attributed under Article 4 of the ARSIWA. Both provisions require PMC personnel to be either *de jure* or *de facto* state organs, typically by being part of or linked to the state's armed forces. Third, under Article 5 of the ARSIWA, PMC personnel's actions can be attributed to the hiring state if these contractors are officially sanctioned to exercise elements of governmental authority. Finally, Article 8 of the ARSIWA allows for attribution if PMC personnel were instructed, directed, or controlled about committing a wrongful act. The states are responsible for adhering to the International Humanitarian Law, Geneva Convention 1949 Additional Protocol of 1977 state is responsible for the breach of IHL by the PMSCs.

Conclusion & Recommendations

Undoubtedly, the increasing dependence on the PMSCs is posing a significant threat to state sovereignty. The lack of an international legal framework for regulating the PMSCs and non-binding guidelines and codes has led to massive infringement of human rights in the conflicted regions. Furthermore, the status of PMSCs as private contractors also obstructs the process, especially concerning the hiring state's accountability. Additionally, the PMSCs being civilians are not legally bound by IHL, unlike the state actors, except if their acts can be ascribed directly to a state involved in conflict. Therefore, holding PMSCs accountable for the infringement of human rights is challenging. The civilian protection generally provided during the war gets disregarded with the use of PMSCs in the time of war. Moreover, PMSCs being for-profit organizations have a distinct legal structure. Unlike other multinational corporations they are actively involved security related industries and have a greater reliance on humanitarian law at the same time they are performing the functions of conventional military forces and have the power to play around with the whole existing look and mostly as their responsibility is somewhat limited from the traditional military, they can

easily get away with their crimes the unique position that is being exploited and further hindering the accountability.

The absence of unified global standards for regulating the role of PMSCs is the preeminent obstacle to accountability, states have created their guidelines and standards making it difficult to enforce. It is recommended that efforts should be made to enact binding international regulations for the PMSCs. Efforts should be made to modify the existing principles outlined in the Montreux Document it has failed to furnish a requisite implementation mechanism for states. The Montreux Document does not provide any sanction for non-compliance therefore states are reluctant to comply with the guidelines. This was exemplified in the Nisar Square incident in Iraq, where due to lack of implementation mechanism Blackwater escaped the accountability for its actions. The work of PMSCs is kept confidential, there should be a reporting mechanism in place for ensuring transparency and accountability, and states should be barred from using PMSCs for offensive military operations. The PMSCs rather than working independently should work in collaboration with the local forces, this will ensure better compliance with the standards of IHL as states are bound by the action of their military forces. Furthermore, the domestic law of states should determine the amount of force used by PMSCs. They should not have powers to arrest and detain civilians as was done in the Mali massacre by Russian Wagner. The corporations should have an internal grievance mechanism for entertaining complaints against the PMSCs personnel, a robust internal framework for hiring, and proper policies in compliance with the IHL should be followed by the PMSCs. Intergovernmental cooperation is crucial for addressing the misuse of Private Military Security Companies (PMSCs). Some states attempt to avoid responsibility for PMSC actions by claiming they are matters of national security. However, since PMSCs are often hired by states, their actions should be considered the responsibility of those states.

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