



Beyond Market Forces: Regulating Private Military and Security Companies

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Trygve Lie Center for Peace, Security & Development
International Peace Institute
777 United Nations Plaza, 12th Floor (corner of 44th St and 1st Avenue)

WARREN HOGE: Good afternoon. I am Warren Hoge, the Vice President and Director of External Relations at IPI, and I want to welcome you to this policy forum on “Regulating Private Military and Security Companies”.

These companies never seem to be far from the headlines. Many of you would have seen in recent weeks the controversy over the question of whether the United States Congress should bar contractors from taking part in interrogations. Some of them, like Blackwater, have prompted public reproach for their alleged involvement in human rights abuses and violations of international humanitarian law around the world. But with many governments and private clients overstretched, private military and security companies are also an increasingly frequent sight, protecting diplomats and humanitarians and even occasionally providing support services to the United Nations and other international organizations.

The question that arises is a simple one. How can and should the conduct of these companies be governed? Should we rely on states to control them, given that they often operate in places where governmental capacity is weak? Or should we rely on market forces?

It is our distinct pleasure today to welcome in the audience a number of senior diplomats as well as representatives from the United Nations, academia, and civil society to discuss the important question of how these companies might best be regulated. We are also very pleased to welcome the members of – and let me take a deep breath here – the UN Human Rights Council’s 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, hereafter referred to simply as the ‘Working Group’.

Our panelists today include the current Chairperson-Rapporteur of the Working Group, Ms. Shaista Shameem, who is an Associate Professor of Law at the University of Fiji. She served as the Director and later Chairperson of the Fiji Human Rights Commission over a 10-year period until this past April. She will be joined on the panel by Ambassador Peter Maurer of Switzerland, well known to many of you, and a member of IPI’s Advisory Council. The final speaker will be IPI’s Senior Associate, James Cockayne, who is the lead author of a new IPI

volume *Beyond Market Forces: Regulating the Global Security Industry*, which we are launching today and which you will find copies of on the credenzas on the side.

James has advised me that we don't have quite as many copies as we have guests, but the entire thing is downloadable from our website www.ipinst.org.

All three of our speakers bring substantial expertise to this difficult and controversial topic. As Ambassador Maurer will explain in more detail, the Swiss government has been at the forefront of efforts in the last four or five years to ensure the application of existing principles of humanitarian and human rights law to the activities of private military and security companies. Working with the International Committee of the Red Cross, the Swiss government led a process of consultation over the last few years that resulted in the adoption last September of the Montreux Document by 17 states. Among them, the United States, Great Britain, Iraq, Afghanistan, China, France, South Africa, and Sierra Leone. Copies of the Montreux Document are on your chair.

The Working Group that Ms. Shameem chairs has a mandate from the United Nations Human Rights Council in Geneva to consider this very question of how these companies might best be regulated, particularly at the international level. As Ms. Shameem will explain in more detail, the Working Group is currently developing a draft international convention on this topic.

And finally, our own James Cockayne has played an important role in encouraging policy development on these issues over recent years. James was one of two NGO advisers working with the Swiss government since 2006 to develop the Montreux Document, and today, we launch this major research study he has led here over the last year. It includes 30 case studies of efforts to regulate other global industries and draws lessons for the regulation of this industry. I would encourage you to have a quick look at the back jacket where you will find some remarkable testimonials to the book's value.

We are looking forward to a fruitful exchange on this timely matter, which by the way, is on the record, and I would like to ask in Mr. Peter Maurer to lead off the discussion followed by Shaista Shameem and then James. Peter?

PETER MAURER: Thanks a lot, Warren, colleagues and friends. It's a pleasure to be here on this distinguished panel.

As you can easily imagine, IPI has not invited me because of the Swiss guards in the Vatican or because of the historical experience of mercenaries in Swiss history where, till the 19th century, mercenaries represented often the sole source of non-agricultural income of ordinary men in rural areas in Switzerland. So, I'm not advocating today for the advantage of mercenaries in initial capital accumulation, but the economic history of my country is certainly a reminder to all of us, not to look at the issue of PMSCs only in terms of legal and moral imperatives, but to ask and to consider also its economic drivers.

I'm here today because of our policy efforts, as Warren mentioned, to mitigate the negative impact of PMSCs over the past couple of years. We have, as Warren mentioned, worked in cooperation with the ICRC starting in 2006, and in a clearly humanitarian perspective, on a text containing rules and good practices relating to private military and security companies operating

in conflict: our so-called Montreux Document. This has led to an initial understanding of 17 countries – which number has grown to 31 countries at the present moment. But we have also supported self-regulation efforts of the industry which in the first step led to the industry's statement last month in which stakeholders of the industry committed to self-regulation steps on the basis of the Montreux Document. I will come back to both the Montreux and the self-regulation document of the industry a little bit later.

With a slightly different but related perspective, we have also supported research on the use of PMSCs by humanitarian agencies and NGOs. Very frankly, to our surprise, we see that such use – despite rhetoric – is much more widespread than expected. Having consulted humanitarian agencies, you see that they ponder positive and negative factors of their engagements with PMSCs quite squarely. Some of them think deterrent security gains, better security management, cost effectiveness are on the positive side, while lack of accountability, insufficient coordination as well as physical, financial and reputational risk flow from insufficiently regulated PMSCs and engagement with them.

More generally, we have supported other initiatives, in particular, John Ruggie, with his mandate as a special adviser for human rights in multinational companies and trying to operationalize this concept of states' duty to protect human rights abuses by third parties including business – which of course, squarely ties into the effort of regulating PMSCs and companies' duty to respect – which ties in with self-regulatory efforts of the companies and greater access by victims to effective remedy.

We are also supporters of the Global Compact in the broader field of engagement with, in particular, the principles for responsible investments. While this is much more general than just PMSCs, it's also relevant in guiding and trying to mitigate and frame the activities of PMSCs. We have supported FAFO's work on guidelines for business in conflict, in particular, the Red Flag Project, which has been recently published. And we are just at the moment in a pre-assessment stage to starting a regulation and certification effort of natural resources in cooperation with the International Secretariat of the Great Lakes regions. Just to mention you the breadth of activity before, I will focus specifically on the Montreux Document.

Now, coming to our effort in a humanitarian perspective, let me just, at the outset, remind ourselves what three important premises of ours were when we started to work together with ICRC. First, that company responsibility and voluntary codes of conducts are no substitute for state action. CSR is supplementary and not a substitute for primary state responsibility. Second, whatever we engaged and we did over the past couple of years should contribute to the objective of enhancing implementation of IHL -- international humanitarian law and human rights law. We strongly believe, this is my third premise, that addressing this broad range of issues needs cooperation, support, recognition, and compromise between different stakeholders: states, international organizations, civil societies, business associations, and of course, the companies themselves.

Let me turn briefly to the Montreux Document a little bit more in detail and just tell you why we finally decided not to go immediately for a comprehensive approach including everybody but make a selection of states. It's because the phenomenon of PMSCs is largely limited to a couple of countries contracting PMSCs and a couple of countries in which PMSCs are deployed and used. So, we tried to bring a selected number of countries together, states particularly affected by

PMSCs, states with a particular interest in humanitarian law and human rights law, as well as private military security companies and civil society.

As I mentioned beforehand, our approach has been humanitarian and tries to translate the legal obligations from the Geneva Conventions, ICRC's customary law studies, UN and EU Codes of Conduct, national legislation and industry standards into two main parts, which you will easily detect in opening the Montreux Document. The document states 27 pertinent international legal obligations relating to PMSCs in the body of law at the present moment existing, identifying clear state responsibility for respect, due diligence, and remedy; it is also a clear statement of obligation of PMSCs, their personnel and superiors, a strong message against the attempt of states to steal themselves out of responsibility by contracting important functions to PMSCs. The document is, at the same time and in second part, a compilation of 73 good practices. When we started, we didn't know that 73 and 27 is exactly 100. So, it's easy to remember when you read through the document and to memorize the 100 things you should memorize from the Montreux Document. [Laughter.] But it touches on key issues, the use of force, direct participation, and training. It makes clear the kind of services which may not be contracted out, sets criteria for selection and authorization of PMSCs, touches labor rights, subcontractors, and terms of contracting and authorizations, monitoring compliance and accountability. These are the broad chapters under which the 73 good practices compiled in the Montreux Document are basically summarized.

One of the advantages of the Montreux Document is certainly that it makes a clear distinction and gives definition on what the contracting state is, a territorial state, and a home state. Through this definition, it was important to stop the blame game normally starting when problems arise where the ones would say, "Well, you have contracted them," the other would say, "Well, this is the company's responsibility," and the third would say, "We can't do anything." So, the Montreux Document, in clearly trying to make the distinction who is responsible for what, is probably an important interpretation of the present body of law into state responsibility.

The document – and I think this is a second significance – is a public reaffirmation of the applicability of IHL through diverse group of countries, 27 key legal provisions, I mentioned them. It's a strong message against the idea that PMSCs operate in a legal vacuum and the document provides soft standards to 73 good practices, which helped concretize and implement the general legal framework. It reunites in one document two key approaches relevant for today's discussions, state-backed normative regulatory and industry-backed regulation and harmonization of practices.

The process leading to the Montreux Document, I won't hide from you, was a difficult one. And why was it difficult? Because the subject, the issue at the outset, is a relatively new one. The phenomenon is maybe an old one, but the manifestation of the subject in today's conflict reality is a difficult one. The fact that we decided to include state, industry, ICRC, NGOs, the private sector, of course, added to the complication in finding consensus. Also, of course, it was complicated because you walk always a fine line between legitimizing something you don't want to legitimize and trying to mitigate the negative impact of a business. So, the balance between the two fine lines is a difficult one. No surprise that it took us quite some time to find compromise even in a small group of the original 14 countries.

Now that we have a document decided upon, what do we want to do next? Many of you have seen, we have circulated the document in the General Assembly, we will continue to do advocacy for the document and to rally state support behind the document. We are planning several regional meetings in order to sharpen our understanding on what, in specific regions, the documents will look like. To my knowledge, the first meeting coming up will be in and around Latin America, but other regional meetings will follow, and we are very happy to have other European countries also as sponsors of such regional meetings.

We are fully aware that the Montreux Document – and that’s the reason why I mentioned at the beginning the breadth of activities which we undertake overall – has its limitations. It’s a typically humanitarian mitigation effort and does not address the root causes of the problem. It needs to be complimented by other initiatives. Selected numbers of government have been involved. Unfortunately, also, we have seen one or two withdrawals or skepticism at the end of the process, but we hope to gain momentum in the future.

So, once again, we are well aware that once you start a complex phenomenon in a humanitarian perspective, you come up with a limited result. It’s clearly a mitigation result. It doesn’t address the root causes and prevention.

One of the spin-offs of the Montreux Document clearly has been the rallying of business associations. Last month, again, at Lake Geneva, we got a statement of the industry and the commitment to work and to develop a code of conduct and we are very hopeful that in a reasonable timeframe – and by reasonable, I mean, maybe in a year’s time – we will come up with a complement to the Montreux Document which would be a self-regulation of the industry. The main industry associations covering areas of PMSCs, the Pan-African Security Association, the British Association of Private Security Companies, and the International Peace Operations Association have committed to, as it says, work for this code of conduct which would address as the quote says, “broader stakeholder concerns and serve all our clients, governments, and otherwise in a transparent, professional and ethical manner.” That’s the aim of the code of conduct to be developed.

Let me just conclude in saying how important it seems to us that humanitarian mitigation efforts are complemented by others, but also, that the relatively new phenomenon is not just dealt with in a linear one-dimensional way but that we try out different approaches to frame the issues. I think it is important to look at it in the human rights, IHL perspective. It’s also important to look at the economic drivers of PMSCs. It’s important to look at conflict realities of peacebuilding and prevention of conflicts. These are different approaches which are important to try to operationalize around the phenomenon in order to get a stronger grasp on the negative impact of PMSCs.

I will stop it here and look forward to the discussion and, of course, in particular, to my other two fellow panelists.

WARREN HOGE: Thank you. In the back, I’m looking at five empty seats up here in the front and I would encourage you to please to feel free, very good. Come forward and take them, there is one here and one there and then three in the middle. Shaista?

SHAISTA SHAMEEM: Thank you very much. I want to express my thanks to the IPI for inviting the Working Group to this seminar, this high-level policy forum, I think you expressed it as, and I'm very grateful to you for doing that because, particularly, to be on the same panel as the Swiss ambassador because this is a very important development not just for the Working Group but also in terms of consolidating our position and our views on the mechanisms that are currently required, or are now required, to ensure that international human rights law is respected amongst a broad range, a broad spectrum of actors, both state as well as non-state actors, and that is really the underlying philosophy of the current work of the Working Group in this area.

The Working Group is working on an international convention, human rights convention, and this work was really triggered by the various resolutions of the Human Rights Council. In the early days, with respect to our mandate, it had to do with, as you know, mercenaries, but also, conscious of the fact that there were new manifestations of this phenomenon which weren't exactly falling within the overall umbrella, if you like, of mercenaries, but at the same time, was actually activity that was taking place in the international arena and that was cause for concern because a whole lot of human rights violations were taking place as a result of these activities of non-state actors.

The question that arose initially which triggered the attention, clearly, of the Human Rights Council, but more broadly of the human rights community, was that if human rights violations were carried out by non-state actors, who is actually, ultimately responsible for those? This is where the activities of the private security and private military companies – there are various ways of defining those terms, but generally speaking, as a description – came under scrutiny, under the scrutiny of the human rights community and was given to the Working Group to articulate further. In particular, there was reference, specific reference in a resolution of the 10th session of the Human Rights Council and I will read this to you because, it's quite long but it's very important, because that is what triggered our attention or our responsibility and for the Working Group to “consult with international governmental organizations, NGOs, academics, and member states” and it was a sort of an incremental approach to this, not all at once, “on the content and scope of a possible draft convention on private companies offering military assistance, consultancy, and other security related services on the international market, a model law...”, which is specifically stated, “and other legal instruments”, and this is what was said, resolved at the 10th session of the Council. Since that time, the Working Group has been, apart from paying attention to the rest of the mandate which includes the activities of mercenaries in various areas of the world, most of the attention of the Working Group has been paid to articulating and drafting a convention, which is, of course, in draft form, as I said, but that will look at the specific area that is clearly of concern to the Human Rights Council.

We have finished or completed a draft. I think for us it is draft 17 but for the rest of the world it is the first draft which has been circulated to NGOs and is about to be circulated to other stakeholders as well, and we're waiting for feedback from the NGOs so that we can refine our ideas and thoughts further. So, because it has not been circulated yet to states, we are not able to give you a copy in the same way that the Montreux Document has been circulated to everyone, but I can share with you at least some elements of the draft.

Currently, the draft has seven parts. There is an extensive preamble which actually includes a reference in glowing terms to the Montreux Document and the initiative that has taken place already. The preamble also contains a signal for the states to recall their duty to respect human

rights and particularly in their relationship with private actors. This is something that is in the preamble, and specifically, with respect to accountability and transparency in their relations between the public interest that is represented by states and the private interest that is represented by private actors like private security and military companies. So, there is this understanding in the preamble itself that those two interests may not coincide, but it actually reminds the states of the public interest I mentioned, which is, that in their government's capacity, they need to take care of and be made aware of the international responsibility to respect, and their duty to respect, human rights.

The Working Group has followed with interest the development of the Montreux Document and has taken part in various fora that have been organized around, particularly around... in Switzerland and has participated in those workshops and seminars. But in line with the signal from the Human Rights Council that a draft convention on PMSCs is possibly required, in the preamble, we also state that self-regulation, while important and a significant step and initiative, is not sufficient to ensure human rights and humanitarian law are respected by personnel of private security and private military companies, particularly in their relationship with the state because there is this gray area of contracting out certain functions, which I think, historically, people thought were state functions, but over time and clearly, as a result of various situations and the issue of the development of warfare and conflict over the last century and also this century, has been somehow let go of, perhaps without even realizing. So, it is very important that the draft actually contains an element which recalls that fundamental responsibility of the state to do certain things as a matter of public interest.

Now, I just want to, very briefly in detail, look at the main or talk to you about the main differences between the Montreux Document and the draft convention. The first difference is that... There are about 10 of them and I'm aware of the time and I'll go through them quickly. We can perhaps revisit them later on.

The first one is that states are reminded of their prime responsibility for protecting human rights. The first part of the convention actually outlines the purpose of the convention, which is to reaffirm and strengthen the principle of state responsibility for the legitimate use of force. So, it is reminding the states of their fundamental responsibility for the legitimate use of force, and this is something which is a methodological issue that is discussed or surveyed in the first part of the convention.

Another part in the preamble contains a set of provisions which outlines what are inherently governmental functions which a state cannot outsource to private entities and I noted from the ambassador's talk earlier that he has also referred to the Montreux Document in that regard. Some of the things that are inherently state functions cannot be outsourced as a matter of international law. This provision in the convention is in some detail. It is taken not only from international law but also from the developments that have taken place recently in some states to continue defining what are inherently governmental functions and what, as a matter of development, experience or even perhaps these gaps in the international law which are able to be outsourced.

There is also in the preamble and the first parts of the convention an application to both state and non-state actors, and this is a matter that is still under discussion between members of the Working Group: the concept of application. How far, as you know, conventions apply to states,

bind states, but how far they can also apply to non-state actors is a methodological conceptual point that we are continuing to discuss. There are some provisions, which at the moment, loosely refer to sanctions that can be imposed by states that clearly breach the elements of the convention, there are reporting obligations, and also, some mention of criminalization of certain activities. There's also, in the convention, a complaint's mechanism – with the Complaints Committee, an International Oversight and Monitoring Committee – that has been established, and also, a conciliation mechanism that is part of that set of articles. And there is, towards the end, the possibility of ratification of the convention not only by individual states but also by intergovernmental organizations.

So, these, in a way, are some differences that I think extend the provisions of the Montreux Document. There are some differences between the Montreux Document and the convention, but our draft sees the process really in three parts, and it is not denying the importance of self-regulation at all or even of codes of conduct that have already been established by private security companies as a way of curbing human rights violations that you know from experience have already occurred and that everyone is aware of.

The first part is acknowledging and affirming that self-regulation is extremely important. So, codes of conduct and statements of principles, standards and so on are contained in the first part, complete information of those, we agreed that those are extremely important. The second part, which is also in the Montreux Document, is the responsibility of the states to ensure the domestic legislation is in confirmation with things like international humanitarian law and international human rights law. In addition, taking from the resolution of the Human Rights Council, we also will be proposing, which is not actually drafted right now but it's a work in progress, a Model Law which will be annexed to the convention to assist states who do not know how to go about drafting domestic legislation to be able to do that. The third part, of course, is the international regulatory mechanism, which contains sanctions for states which abdicate their responsibility against the public interest, and that is something that is derived from the whole idea and the concept and the definition of the nation state, what are the responsibilities of the nation state, and is a way of reclaiming sovereignty issues, which in many countries, not all clearly, but in many countries has become a little bit tenuous as a result of the specific and particular experiences of those countries.

Currently, as I said, the draft is being looked at, considered by NGOs and the feedback from NGOs will be very useful because it will allow us to further refine and fine tune the draft before the states, nation states, member states of the UN, are given an opportunity to provide their views. But one of the things that we have noticed, the Working Group has noticed as we work towards the development of the draft convention, that more and more individual states are putting in place regulations to ensure that the relationship with non-state actors who are engaging particularly in fields of conflict have a set of principles or a set of regulations to define the parameters of responsibility of both those actors. I think this is the most interesting development that I myself, personally, have observed: states realized that sort of the 'free market forces' idea was fine for a time, but it hasn't, perhaps in the human rights field and especially when it comes to violations of human rights, it actually hasn't worked out to the extent that the international community would like in practice. And states, and we noticed this, we have recently been on an official mission to the United States and we have spent the past week in Washington, and not just the United States but many other states, we have noticed, are putting in place more and more regulations and more and more internal domestic laws to ensure that, first of all, that their

relationship with the non-state actors like private security companies are defined much more clearly so that everyone knows their responsibility, but also that there are sanctions to be imposed within domestic legislation to ensure that if there are any breaches of human rights out there, because it's a matter of reputation of the states as well that are contracting for their services, if there are any breaches out there, that they are being dealt with and there are issues clearly of jurisdiction and so on. So, states themselves, individually, are being put in a position of defining and redefining their position with respect to contracting of certain services particularly in areas of conflict.

I think that probably is where I should stop. So, thank you very much. Thank you everyone for your attention.

WARREN HOGE: Thank you, Shaista. We'll go now to James Cockayne and of course, we will have ample time afterwards for conversation, for questions, for discussion. So, we'll hear more from you, Shaista, later on. James?

JAMES COCKAYNE: Thanks Warren.

About seven years ago, I was working for the Australian government and about 11:00 one Tuesday night, I found myself deep in the bowels of a secure facility of the Australian Defence Forces. I had two big video screens in front of me, I and a lot of other people. On one video screen, we had a bunch of lawyers sitting in Whitehall. It was 3:00 for them, that's why we had to meet at 11:00 p.m. because on the other video screen was a bunch of lawyers from Washington D.C. It was 7:00 a.m. for them. So I'm not sure who got the rawest deal [Laughter.]

That night on the agenda of this legal working group that was working on legal aspects that might flow from a then-mooted invasion of Iraq, on the agenda that night was a discussion of the application of the Geneva Conventions following any such invasion. One of the ideas that was floated that evening was that because military contractors do not form part of the regular state armed forces, they were not subject to the Geneva Conventions.

Now, you can imagine that raised, with many people on each of those screens and in the facility that I was located at, a number of red flags. But at the time, it was just one of many red flags that we were dealing with and its import didn't really become clear. It's only in retrospect that we can see the true importance and the true context in which that kind of move occurred: a broader shift to try and move military and security services beyond the existing national and international systems of oversight and accountability that we have built up, not only over decades, but at the national level over centuries. There were terrible impacts that flowed from that kind of approach. We know, for example, of the unlawful involvement of contractors in torture and prisoner abuse in a number of facilities. We know also that unfortunately, a minority of contractors have been allegedly engaged in human rights violations such as the shooting death of 16 or 17 civilians in Nisoor Square just under two years ago in Baghdad. And as a result, those kinds of terrible incidents have overshadowed the very positive contribution that many private military and security companies, many of them made up of local actors, have made to the security of populations worldwide both inside and outside armed conflict.

Things have come a long way, frankly, in those seven years. Just last week, the US Department of Defense issued an Interim Final Rule that, and I quote, "establishes policy, assigns

responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping and conduct of personnel performing private security functions under a covered contract during contingency operations.” It also “assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of private security companies and private security company personnel.”

What’s interesting in particular about this Interim Final Rule, when you look at it closely, is that the structure and at some level, the actual content, their strong resemblance is to the same kinds of standards that were presented by the Swiss government and ICRC’s excellent efforts over a number of years in the Montreux Document. And we see the same standards popping up and being reflected in national regulation, in many other places. Right now, the United Kingdom government is also undergoing a domestic review of its regulation for this industry and it places the Montreux Document front and central. Just a couple of months ago, a colleague who is now a serving ambassador in Pakistan, rang me to give me a hard time because they’ve been in the process of hiring a private military and security company to provide close protection work, to provide close protection services for all their diplomats in Pakistan and they had to drop the contract and start all over again because their legal advisers back at headquarters had told them they needed to do it a different way in order to comply with the Montreux Document. So, we slowly see these standards getting traction and finding a place in the practice of states.

So, why do we need anything more then? Why do we need something like an international convention or why would we need other forms of hybrid regulation? Well, the basic problem is a structural one, that the people most affected by the activities of private global companies that use force as a central part of their business plan or have the potential to use such force, are not necessarily at present well-connected to the mechanisms that control those companies. Now, that’s a problem with national militaries everywhere, but we’ve slowly, over time, developed systems that hold states accountable for the activities of those militaries for better or worse. We don’t have the same kinds of systems in place yet at the national or international level for this industry. The private nature of the relationship under law means that the services being performed are removed from public oversight and democratic accountability in a way that they’re not, if they’re performed by public actors. And the globalized nature of the industry means that it is possible for some contractors to remove their management services, their recruitment, their profit-taking offshore to escape effective national oversight if they so choose.

So, while we are seeing improvements at the national level, particularly where states have strong mechanisms of control such as a military presence in theater, there are a number of areas that are still unaddressed by effective national and international regulation. For example, we don’t yet have effective international, or in some cases, national controls on private-private relationships involving this industry where the industry contracts, for example, with the extractive industries involved in many zones of weak governance around the world. We don’t have mechanisms that address situations that go beyond armed conflict. The Montreux Document is limited to situations of armed conflict. We don’t have mechanisms that address the short or long-term potential impacts of this kind of business on the communities they’re operating in. And perhaps most crucially, we don’t have mechanisms that prevent the negative costs of some minority of operators falling on the majority of operators in the industry that don’t necessarily subscribe to the ways of doing things that that minority subscribes to.

But what we do have, I would argue, is a very big window of opportunity right now for three reasons. First of all, because of the valiant efforts of the Swiss government and the ICRC, we have now, in the Montreux Document, something approaching a consensus baseline of detailed administrative standards and practices from which to work. Second, and this is absolutely crucial and what separates this industry from many, many others, we have very, very strong support from key parts of the industry, a number of representatives of which are here today, for more effective regulation of the industry. They understand very well that effective regulation is in the long-term interest of their industry. It is not in the interest of their industry to allow a few bad apples to poison the prospects of effective business going forward. Third, we have convergence amongst key states, home states such as the US and the UK and others, but also host states such as Iraq, Afghanistan, Sierra Leone, and many others that have agreed to the Montreux Document standards.

As Ambassador Maurer reflected, this window of opportunity was crystallized in a statement at a meeting that the Swiss government, again convened in Nyon just a couple of months ago, which indicated the support of many of these stakeholders for the development of a global code of conduct with an effective international oversight body attached to ensure effective implementation and enforcement. And this is perhaps the key question. How do you build a system of effective implementation and enforcement of these standards that are now emerging at the international level? This is where, I'm very proud to say, our study that we're launching today, *Beyond Market Forces*, which you can download from the website as Warren said, steps in. We were asked to undertake this study by a number of states and industry actors involved in the Montreux process over a year ago.

They were looking ahead, were reasonably confident that the Montreux process would lead to some kind of outcome and asked us to think about what we could learn from other industries about how to build an effective implementation and enforcement mechanism at the international level. The research was conducted here over the best part of the last year and I'd like to single out a few people here at IPI who have really done a stellar job: Alison Gurin, who has been an excellent administrative support and researcher on the team; Adam Lupel and Ellie Hearne, I'm not sure if they're here today, but they're our publications team here and you'll see it's quite a meaty tome at 333 pages. They've done a really incredible job of getting it ready for release today. Thank you to them for all their sterling efforts.

What we do in the book is that we look at many other global industries and think about how they developed effective implementation and enforcement mechanisms that combine state sovereignty, on the one hand, with market forces on the other. If you're not inclined to read through all 333 pages, there's a cheat sheet of the policy recommendations on your chairs and there's a slightly longer 20-page version, I think, on the credenzas. We looked at the financial, extractive, garment and textile, chemical, toy, toxic waste, sporting, veterinary, slave and security sector industries (going back to the 1850's in the case of the slave trade).

And what we identified were four key design principles that you might need to bear in mind to build an effective implementation and enforcement mechanism for this industry.

First of all, as both of our speakers have emphasized today, you have to have a mechanism that assists states to discharge their existing legal duty to protect human rights. You shouldn't build something, we must not build something, that competes with states' regulatory capacity, nor that

gives them a free ride. Secondly, even as we have to focus on the state duty to protect, if it's going to be effective, it has to involve all relevant stakeholders. That means, it does have to have a place for the industry not only in the design but the operation of this oversight mechanism. But it might also need to bring in clients and the insurance industry, and perhaps most important of all, the communities that are directly affected by the operations of these companies, which at present are largely cut off from the oversight and accountability mechanisms that are being put in place for this industry. Third, you need a system of smart incentives and what I mean by that is a need to tie, for example, market access to certification by independent third-party certifiers – an idea interestingly that is currently being considered by the Armed Services Committee of the House of Representatives here in the United States – or by creating a rating system for example like the rating system used in the global credit markets. Fourth, coming back to this question of the need to tie the impacts on effective communities back to oversight and accountability, we need to build stronger grievance mechanisms, and there's important work being done in the mandate given to Professor John Ruggie, mentioned by Ambassador Maurer before, that offers them design principles for what kinds of grievance mechanisms have proven effective in other global industries.

Now, when we take those four design principles and look at the kinds of ways they've played out in different industries, we find five different models emerging – and these are not mutually exclusive. These could be combined in different ways, and I'll just run through them at the headline level.

First of all, we might think about some kind of global watchdog for the industry, something like an ombudsperson. We can see in some industries that there are elements of a watchdog emerging. For example, the NGO Geneva Call, which serves something like that role in relation to non-state armed groups that use anti-personnel mines or, one might argue, that the International Committee of the Red Cross plays a kind of a watchdog role in relation to the use of force by national militaries.

A second model would be to use accreditation, certifications, or rating regimes. These have been used widely in the textile, toy, and credit industries, but there's a problem in applying that kind of model to an industry that often operates in highly insecure situations. How are you going to effectively audit and certify those kinds of activities in those locations? That's a real design challenge.

A third possibility is to use the model of conciliation, mediation, and arbitration schemes. For example, we see this in the sports industry. But again, there are limitations to how far we can go in applying this model. Do we really want serious human rights violations to be subject to arbitration or even conciliation, or are they the kinds of disputes that ultimately it is the responsibility of states to deal with, to ensure victim's rights to an effective judicial remedy is met. There maybe other forms of disputes though, like labor disputes, that can be effectively dealt with through that kind of mechanism.

A fourth model, taken for example from the Organization for the Prohibition of Chemical Weapons or the toxic waste industry, toxic waste disposal industry, is the harmonization scheme, and this might be the kind of direction that a code of conduct would push in.

The fifth and perhaps most controversial model is what in the book we call a “club”, a system where peers enforce standards amongst themselves on each other to protect their own reputations. This can have a very important socializing power as we’ve seen, for example, from the existing industry associations. But the danger is that that kind of approach is seen by outsiders as highly self-serving and just creating additional obstacles to effective accountability.

So, what we learned is that there are many, many different ways to tailor this kind of effective implementation and enforcement arrangement to the specific economic and legal incentives that structure this industry.

Finally, I just want to make a couple of comments about how this fits into the multilateral discussion and in particular, the discussion of a possible international convention. Many of you will know that the multilateral discussions on this issue, going back some 30 years, have been highly politicized and highly polarized. I would argue that the UN Working Group, with its mandate from the Human Rights Council, now has a huge opportunity to overcome these historical divisions and through this mandate, to develop a draft convention, put in place a legal framework that will allow the meshing of a variety of different approaches to regulation that can be tailored to ensure an effective outcome.

We also shouldn’t overlook the role of UN operational entities in this discussion. To date, they’ve largely been marginal. I would say very simply that I don’t think there is any real prospect of private military and security companies serving in the frontline of peacekeeping missions any time soon. Over a decade ago, Kofi Annan concluded that the world wasn’t ready for privatized peacekeeping. It’s still not. But that shouldn’t mean that we are oblivious to the very important role that many private military and security companies are playing at what I would call the second rank level, freeing up national troops to play key frontline roles. We see these kinds of companies, for example, providing security analysis and training, local private security companies are often key in providing site security and in some cases, convoy support services, and humanitarians operating under a UN security umbrella come into contact with these kinds of companies in a wide variety of theaters and playing a wide variety of functions.

So, there’s a real need for the UN’s operational entities to set the bar high in the standards they use to address these companies and there may be value in them looking, for example, to the Montreux Document as a source of guidance on the kinds of standards they should be incorporating into their procurement activities. But the ultimate bottom line is that there is a huge opportunity here, and there’s an alignment of stars, that really signals a very rare and unique possibility to effect, to see change in the effective control of this industry. I would encourage all of you to grab it with both hands.

Thank you.

WARREN HOGGE: Thank you James, and thanks all three of you for being so succinct and to the point. We now have more than 30 minutes, and I would like to invite questions from the floor. If you would raise your hand. James Paul, in the back, wait for the—and if you would introduce yourself even though I just did.

JAMES PAUL: Yeah. Jim Paul from Global Policy Forum and thanks for this very, very interesting panel. I wanted to hear a little more concretely about cases of companies and

company actions that the panelists regard as thoroughly legitimate cases, or one or two cases of such instances where the panelists regard companies' activities as illegitimate and therefore outside of what should be accepted. And perhaps also, one or two cases where we're right in the middle and where difficult decisions have to be made. I think that would help us to, help me anyway, to understand, to move from the generalities to the specifics. Thank you.

PETER MAURER: Just one example. You can add others. It would be illegitimate for PMSCs to run military prisons. It's clearly a sovereign task. We have clearly identified this according to law and it'd be perfectly legitimate for PMSCs to guard buildings of the UN or any other actor in the field. But let's add examples.

JAMES COCKAYNE: Let me add a few examples. I mean, most private military and security companies are making most of their money, the vast majority of their money, from activities that most of us, I think, would probably think are not controversial. Most of the companies, although it's hard to quantify the industry, are providing guarding services to sites often in secure locations protecting against crime or potentially higher-level onslaught in situations around the world. Some are providing close protection to diplomats, for example. If those companies are operating with oversight from the host state and have all the necessary authorizations and subscribe to the reporting obligations and so on, there's no reason why we should see that as illegitimate. If the state has taken a sovereign decision to allow private companies to undertake those services, I don't see that there is any question of the right of the state to organize security in that way. Many of the other types of activities that international private military and security companies provide are, for example, security theater analysis, anti-kidnapping services, and so on. I would say that most of those types of activities are down the legitimate end of the spectrum, if I can put it that way.

At the illegitimate end, or the controversial end, are the cases where it seems that a client has contracted a company to undertake some form of combat operations which, over the last couple of hundred years, we've tried very hard to limit to the purview of the state. Now, the gray line, of course, and this is what we saw in Iraq, is where a client employs a contractor to undertake what it considers as defensive operations but given the nature of the environment in which it's operating may mean that it gets drawn into taking direct part in hostilities. And that is where the system of accountability and oversight becomes absolutely crucial, and we see this, still, as a very thorny issue that states are grappling with.

I mentioned that last week the Department of Defense issued this Interim Final Rule which really makes great strides in consolidating the approach of the United States Armed Forces to regulating these companies. In the same week, US Central Command indicated that it would be looking to consolidate security contracts in Afghanistan to allow for one contractor to provide perimeter security around Forward Operating Bases in Afghanistan. Now, that's a difficult policy question whether we should have private companies providing those services because these are Forward Operating Bases. The very name tells you that they are likely to come under attack from enemy forces, which means that, essentially, the United States government will be contracting a company to undertake what could easily become direct participation in hostilities. Defensive, perhaps, but placed in a location where they may well be drawn into direct participation in hostilities which has real consequences for democratic oversight of their activities and real consequences for the ability of affected populations to ensure that misconduct is held to account.

WARREN HOGE: Peter, you said you want to have an add-on?

PETER MAURER: Just very briefly in terms of definition of the Montreux Document. One of the key points in the Montreux Document is the definition that PMSCs are considered civilians under the law, which means that they have to operate and are obliged to operate under the obligations of the Geneva Conventions ruling civilians and not military forces as was exactly the example James has brought. Of course, there is a fine line on when we have the case of direct participation, but in terms of the document, it is important to note because this defines also what is legitimate and illegitimate.

SHAISTA SHAMEEM: The definition, it's still under discussion, but one of the provisions in the very first part of the convention, the draft convention, is outlining fundamental state functions and these inherently governmental functions which we have derived from international law, but also, we've noticed development in national legislation as well recently, certainly discussions about that, and we think that some of those functions that could not be outsourced would be waging war and/or combat operations, taking prisoners, lawmaking, espionage, intelligence, and we're having a discussion at the moment whether that should be further refined to actionable intelligence-gathering and police powers. And especially, in terms of police powers, the powers of arrest or detention and including the interrogation of detainees. So, the interrogation of the detainees is also currently under consideration because we have taken note of the developments in the United States recently about whether or not, for example, linguists who are interpreting would be considered to be part of the interrogations. So, perhaps we will refine that further to "enhanced interrogation of detainees." So, that's what the current situation is, but as I said, it's a work in progress.

Thank you.

WARREN HOGE: Thank you very much. We're going to go to the back of the room and then to the front of the room. Ambassador Puri, would you please introduce yourself?

AMBASSADOR MANJEEV SINGH PURI: Mr. Hoge, thank you very much and thank you very much also to IPI for organizing this event and inviting me. I'm very grateful to you. Also, thank you very much to the distinguished panel. You know, for me, this has been quite a learning experience, and I'm very happy standing at the back of the room, listening to all these distinguished panelists speak.

May I try and understand this a little better? When you're talking about states actually running away from what, most other people in the world would assume to be their responsibility and doing it under some sophisticated guise of the absence of laws or regulations of some kind or the other, in fact, very interestingly, if we went about making some kind of a listing of which state has more sophisticated systems of law than the ones that would appear at least in this room to have the most sophisticated system, would find the greatest excuse that they are outside the [unintelligible] of all this. You know, in most other countries in the world, nobody would have the kind of questions that Mr. Cockayne raised, barring the [unintelligible] that you hired. If by any chance, our armed forces were in operation and there were people there, believe me, the chaps who work for them including contractors, certainly, are hand and foot bound to it, and we are responsible for it. I think this goes absolutely without saying. I think I don't know what the

draft convention is about since you want to keep it away from states, for the time being, which is fair enough, but frankly speaking, I'd like to know what are the [unintelligible] of the matter. I mean, if the issue is people's unwillingness to act, you know, by all general standards, there's quite great clarity that they should be acting and I think we should work on that. If the convention helps, well and good, I have no issue on that at all. We are quite for it. I mean, in fact, in some senses, we are standing in front of you. We are with you in various ways but we don't know the details, and as I said, devils sometime lie there. So, I'd like to know a little bit more. But I want to thank you very much otherwise for this whole thing for me, of course, has been illuminating and we look forward to further interaction with you, Madam, the special rapporteur and all the others in the matter. Thank you.

WARREN HOGE: Thank you very much. Shaista, would you like to talk about the convention a bit more? I mean, I just thought...

SHAISTA SHAMEEM: The ambassador from India has actually put me in a difficult position because...

WARREN HOGE: That's why I called on you.

SHAISTA SHAMEEM: ...we have five members of the Working Group and I'm only speaking on a certain thing and I was told, "Do not deal with the details at the moment because it is not with states." So, it is against protocol at the moment to do that, Mr. Ambassador. I can only share with you what I have already in terms of what the major elements are, but they will be with states within months.

WARREN HOGE: James, please.

JAMES COCKAYNE: Mr. Ambassador, you raise an excellent point. I think we have to acknowledge that there's a mixture here of both unwillingness and inability and, as you say, the devil lies in the details. So, the question is how do we engineer the incentives to ensure that states become more willing, that private clients become more willing to exert the leverage they have, that the willing industry is allowed to assert the leverage that it has, and that all of these put together are effective – because I think we have to acknowledge that in many cases, many of the most controversial cases, were talking about something that's very hard to regulate. It operates in a place that's highly insecure. That's the whole point of many of the services they provide.

So, for example, one of the problems that the United States has encountered in asserting its very sophisticated legal machinery is the poor incentives, very simply stated. The very poor incentives for domestic prosecutors to get engaged in the kinds of investigations that require them to travel to highly insecure environments, that have nothing to do with their local constituents who might be reelecting them in a few years, that are extremely expensive, that result in terrible evidence in terms of the security of evidence and so on, and that lead to, quite understandably, fairly weak prosecution cases quite often. There are just very bad incentives for following through. So, we have to think about what the incentive structures are, what the leverage is, where the leverage is, and build a system that can fill in those gaps in both unwillingness and inability.

MICHELE GRIFFIN: Thank you. Michele Griffin from DPA. This is bringing back a lot of memories. I remember in the mid 1990s, Executive Outcomes and some of the kind of

conversations that happened around then and Kofi Annan talking about not being ready to privatize peace. And it's interesting to me actually that the discomfort level that I think was widely felt back then, the pendulum seems to have swung a little bit to a much greater comfort level following events in Iraq and Afghanistan, particularly with the idea of PMSCs. And my question is actually more of what's politically likely than legally possible here from a UN perspective with respect to peacekeeping and peace operations more broadly. We, I don't believe, have a kind of articulated policy of precisely where the line is and what we can use PMSCs for and what we can't, but I think it is fairly widely understood and close to what James and other panelists have mentioned with respect to what kinds of support functions, logistics functions, close protection functions are contractible to PMSCs and what kinds of war-fighting or peacekeeping functions are not. But my question is, in light of the problems we have drumming up troops and police these days and the fact that that kind of terrain doesn't look any more promising in the future than it has over the last couple of years, how likely is it just in the views of the panelists politically that we might come under pressure to kind of step across that line?

JAMES COCKAYNE: Would you like go first?

PETER MAURER: That's always difficult to speak about, likelihood, but I want to come back on one point Manjeev Puri just made beforehand. I mean, what is the size of the phenomenon. For the present moment, three countries are contracting 85% of PMSCs. This doesn't look to me like a broad phenomenon necessarily being and having to be regulated, and in a broad UN framework, it's an important issue because of the two or three countries doing what they are doing with private military companies and, of course, because of the abuses which we have seen over the past couple of years – and it is important to state that there is no escape from responsibility and this is important politically. But I would consider it rather unlikely given the market and the financial situation that public services in the world would start to contract to a broad extent private military companies and use them for their different security services. I can't see a broad phenomenon because plausibility would tell me that either you lose money in doing this or states would pay too much. So, only very rich countries at the end of the day can eventually try to tweak the margins and have some privately run services which are in the gray line between public and private activities.

SHAISTA SHAMEEM: First of all, I want to just make a very short reaction to the ambassador. I think that it is absolutely correct that maybe three countries are involved, have other locations for their companies, but the repercussions of that is far reaching and it's much more global so that the countries maybe located in one particular area of the world but the activities are in the south group of countries or the developing countries or where the conflicts are bearing and so therefore, there is this kind of continuum. What's interesting from our investigation and inquiry is that it has the effect, the end result, of encouraging the development of small, it may be, maybe not international, but the development of private security companies and private military companies within those countries themselves, within the third world countries themselves. So that, for example, two of our group went on a mission to Afghanistan not so long ago and found that there was this sudden fluidity between the establishment of small local companies who had previously been warlord-type of people, and more extension into kind of regulated by government but gathered up by the government now. So, it isn't something that is just confined in terms of the location of those industries or the headquarters of those industries

in certain countries and, therefore, it doesn't involve everyone. The human rights implications of those are in fact much more far-reaching.

Going now to your point which is like, you can't see too many people signing up for military service these days which is absolutely correct and this is the reason why it's been so difficult for countries who have declared war on other countries to send their soldiers there, and it's very important that they're able to call upon the private security industry to assist in some way. But our draft convention actually reclaims the responsibility for the legitimate use of force on the states themselves as a matter of public interest. So, what happens is that even if you do contract private security companies and you may only contract them for certain limited sense or broader functions but not those limited functions that are inherently governmental, then you should be totally held responsible for anything that goes wrong. I mean, that is an issue. The convention does not want to eliminate the use of private companies at all, although some governments are kind of using it as a two-stage approach. They think there should be more accountability and transparency on the way to stopping outsourcing altogether. Now, the jury is out on that because we're still having discussions with a whole range of different countries with different perspectives. These different perspectives actually do come from the places, the locations of these governments. For example, the western group may think differently to, let's say, eastern group or the southern group. So, there are different perspectives on this issue altogether just to what extent you can outsource and what elements you can outsource.

JAMES COCKAYNE: Michele, it's a great question. I would suggest that what is most likely to cause a shift in UN practice is a scandal. We might be harsh and say that that the current approach to this issue at the operational level is "Don't Ask, Don't Tell". And the danger with that kind of approach is that there is, at least potentially, the possibility of reputational risk spillover from a contractor that is working with the UN either on that operation misbehaving or in some other operation, nothing to do with the UN, misbehaving, and then having spillover negative effects for the UN. But absent that kind of scandal, I'm not sure that there are structural shifts likely to occur in the politics that would lead to a change in this balance because, despite the rhetoric of a number of the more extravagant companies and despite the name of the International Peace Operations Association – whose President Doug Brooks, who we're honored to have with us today – most of these companies are not operating, are not providing services that fit clearly in the frontline peacekeeping role. And even when they are, I wouldn't say that they're peer competitors with the types of countries that are providing those services right now.

As we know, the main troop contributing countries operate on a very different business model with, frankly, much lower labor costs than most of these companies are prepared to provide or offer. Where there is a major impact and where I do think the UN will be drawn in, in coming years, is exactly on this point of the impact that the industry has on the provision of security at the local level often in non-conflict situations. You mentioned Executive Outcomes. What happened to Executive Outcomes wasn't simply that the guys in charge decided there was no money to be made from this industry and got out of it. Instead, they disbanded Executive Outcomes and went off and founded joint ventures with local authorities throughout Africa. So, there is, as Ms. Shameem was saying, a blurring of the public/private provision of security in those places with very, very important implications for security sector reform and for peacebuilding, and I think that is one area that the UN will slowly be drawn into dealing with this phenomenon.

WARREN HOGE: I now have four questioners, so I'm going to go two at a time. The first is John Hirsch and then Doug Brooks, if you would go second, and we'll take them both at once.

JOHN HIRSCH: First of all, thank you all very much, also about the tremendous hard work that's gone into the publication and also into the Montreux declaration. I kind of want to ask sort of each of you kind of a little interrelated question since you made the point about all of this being for the purpose of humanitarian mitigation. First of all, Madam, I wonder if you agree with that idea that this whole thing is a humanitarian mitigation effort. In other words, that the situation is already enormous and this is a mitigation convention and then your remark about definition of the declaration as being a self-regulation of the industry and the point that you, Madam, made that that's not good enough whether you also really believe that self-regulation is not the answer. And this relates to, if I may, James, to your point about the "club" and whether the club is not a version of self-regulation. I keep thinking of the financial collapse here in the United States and Alan Greenspan and how we were, Americans, assured in the world for 30 years that self-regulation was a right way forward. So, who are going to be the regulators in this accountability and oversight issue? So, maybe you could flesh that out a little more. That's plenty, thanks.

WARREN HOGE: And then Doug Brooks?

DOUG BROOKS: Thank you. Doug Brooks from IPOA. It's an honor to share a question segment with Ambassador Hirsch, who was actually US ambassador to Sierra Leone at the time of Executive Outcomes.

First of all, just to emphasize that the industry is fully supportive of the Montreux Document and the process that's been moving forward related to it. I think that's been incredibly successful and I think we've seen a lot of good things that have been very pragmatic. A couple of issues I think—well, what's interesting about it was that the industry really didn't have a problem with the Montreux Document. The real difficulty I think was getting all the states to agree to what their responsibilities are. The industry was pretty much onboard months before it was finished but it really took a lot of detailed negotiations – and full credit to ICRC as well others that helped bring it all together. I did want to touch base on the forward operating base issue and what you can use private security for. With the FOBs, they want to use private security, they want to use local nationals to do the security, and that seems to me to be a better option perhaps than using Germans or Dutch or other NATO militaries which are essentially putting targets in front of a target and also, militaries have a tendency to reply with far greater force than private security. Some of you may recall a UN unit in Haiti that was ambushed in a dense slum and fired 20,000 rounds of ammunition to get out. The issue really is not whether it's private or public but rather if there's some sort of accountability and there's some sort of reality in terms of relations to the local nationals. I think whether you're wearing camouflage or blue jeans, whether you're military or civilian, there has to be an accountability and I think that's something that the Montreux Document actually does address quite well.

The other point, clients count. I think one of the real important issues is that we see clients are hiring companies without paying attention to the company's standards, to their own codes of ethics and so on. Too often, the company, the clients, simply look at the bottom line, what is the cheapest company they can hire and if that's going to be the model for your procurement process, I guarantee, you're going to get what you pay for. And unfortunately, even at IPOA

where we try to get high-end actors under one umbrella, under a code of conduct, we'll have NGOs that will help us put it together and then go in the field and hire Thugs-R-Us to do their own security, so I think there's an issue there.

Finally, I guess, just to the point on the origins of IPOA, which was basically supporting UN and African Union operations in Africa and making sure that the UN and AU had the support they needed, be it logistical, medical, or security and to make sure that the companies, the countries, and the companies that are doing that work are operating under an ethical and professional umbrella and IPOA's goal, we have over 60 companies from around the world that are members now that do everything from security aviation, demining, and everything else. The idea is "let's get them all under one umbrella" and yes, it's self-regulation but we've always pointed out and I think this point was made by the panel quite well, it still takes governments. We cannot throw anybody in jail. We can address other companies from a financial aspect and an ethical aspect, but we can't throw them in jail and that takes governments and I think that's something that's been lacking a bit in the past.

WARREN HOGE: Would you start, Peter and then we'll just go in this order and then I have two more questions after that.

PETER MAURER: Just very briefly. Yes, indeed. I agree that self-regulation is not sufficient, that it needs state regulation. The question I think which came out very clearly today is at what level, how exactly, with which institutions attached to any regulation. These are basically the real questions which are upfront today, but I fully agree that state self-regulation is insufficient and you need other areas from policy pressure to other legal instruments to come in.

Well, I think you made the point of accountability as a—that's the crucial issue, yes. I'll stop it here.

WARREN HOGE: Shaista, would you like to...

SHAISTA SHAMEEM: Yes, and I fully endorse what the ambassador has said, the Swiss ambassador has said and also, your question is a very valid one and that is that—well, clearly, from my presentation you would have noted that we think that self-regulation is a very, very important part of the whole framework, the legal framework, that is being developed both nationally, internationally, and as well as regionally actually. I didn't mention regions, but there are some significant developments taking place regionally and this in fact links to what Doug Brooks was saying about—because they have developed, IPOA has developed over time an extensive code of conduct provisions and we have known IPOA's work for quite some time and fully endorse the kind of industry-controlled and self-regulated mechanisms that they have been developing because before that there was nothing. So, this is an extremely important development which then led to the Montreux, associated with the Montreux Document, and that really, the two sides fit very well together.

What the UN Working Group has been given responsibility to do is to now translate that into an international framework which would also have regulatory mechanisms to be able to act if things go wrong. This is what is very important because self-regulation, as you correctly pointed out, we have the free market forces out there but we know with the economy, it hasn't worked and there are some serious problems with free enterprise running rampant, so now we have lessons

immediately from our context. So, this is why it's very important to look at an international framework which contains all of those sanctions and teeth, I suppose you could call it, which will allow the companies to be even more accountable and to allow the states to take their responsibility to ensure that companies that they contract with are accountable.

I just used a very small example, but we noticed that there, and this is also, we had this conversation with IPOA, and that is, there are many companies who operate and who are contracted by governments to do a certain task from conflict zones. They violate human rights and undertake criminal activities which we know about. Then, because they are being held to account, they close down the company and form another company and the same people work across different companies and some of them kind of disappear into various regions and nobody can trace them. We found one particular company that had about 10 different names and so you're thinking you're dealing with one particular company but in fact, you're dealing with personnel from the company beforehand and IPOA is very aware of that and it has taken certain actions to ensure that the information is provided, that the individuals from this particular company also emerge in some other places and to be able to curb that, but it's beyond sort of like a club thing. I mean, all you can do in a way, if you self-regulate, is throw somebody out of the club, but that person might turn up somewhere else and even the club may not be aware that that person is turning up somewhere else.

So, we really need an international mechanism which draws the states back into a reclaiming of this sovereignty over the use of force and reassessing their capabilities as far as, particularly, in conflict areas, because that's where the human rights violations actually take place, or at least they are publicized, and that's where it comes to the attention of the international community.

JAMES COCKAYNE: I'll jump in. Very briefly -- accountability is a great thing. Who wouldn't be for it? I guess the question is: accountability to whom? When we're talking about these contracts, we have to understand that there are numerous different stakeholders, each of which might have very different ideas of what the companies should have been doing. There are the home states, there are the host states, there are the employees, their families, there are the clients as well and each of them might have competing claims to accountability. So, to me, the crucial issue of accountability is that until the parties that are directly affected by the operations of these companies, in particular, clients and the communities in which they operate, have access to effective accountability systems, you will not see a shift in behavior of those companies. Now, the clients obviously have the contract and that can take them so far if they're prepared to use it as Doug Brooks pointed out. But what we're missing is any kind of mechanism that allows the communities, the civilians affected by these companies, to provide direct and effective input into the control of these organizations, and there are obvious reasons why many states don't want to provide those kinds of mechanisms. So, it's easy for us to conclude that since it's difficult for states to regulate this, they will welcome international oversight and accountability. I don't think we should be naïve that that will come easily. There are many reasons why many states would be quite hesitant to allow international oversight of the activities they're contracting these companies to undertake. They'd rather keep it, frankly, in-house and provide the remedies their own way.

In the United Kingdom at present, there is a policy review looking at how the United Kingdom should regulate its industry, and it is looking at a hybrid model of state regulation and industry regulation. We know from the experience here in the United States that there are shortcomings to

self-regulation, and I may differ here with Doug on the effectiveness of the IPOA code of conduct.

Let me just, very quickly, recount one case: the case of the incident concerning Blackwater in Nisoor Square just short of two years ago that I referred to the outset of my intervention earlier. After that case arose, after there were allegations in the media that Blackwater had unlawfully fired on and killed 16 or 17 civilians, there was a question whether Blackwater, a member of the International Peace Operations Association, would be held to account through the existing grievance mechanisms that IPOA has in place. Unfortunately, Blackwater withdrew from IPOA before any such investigation could be completed by the enforcement mechanism. So Blackwater wasn't even thrown out of IPOA. It left quite happily and continues to receive contracts from many, many clients as a result. There are many in the industry who are not happy with that state of affairs, who are not happy with the kind of incentive structures that that kind of approach takes, that that approach results in, but it is incumbent on us to be realistic about the incentive structures of states and why they might allow others to become involved in holding these companies to account, and it's also incumbent on us to be realistic about the economic forces that motivate many of these actors and what leverage there might be to induce many of them to change their behavior. Ultimately, they have a responsibility to their shareholders, so the best thing we can do is to find ways to reward those companies that behave well and penalize, at a market level, those companies that behave badly. To do that, we have to start thinking about certification, rating schemes, accreditation schemes, and we need the accountability mechanisms, the grievance mechanisms for the affected communities, to feed the information back into this system so that we actually know what these companies are doing in the situations that are currently beyond our sight.

WARREN HOGE: Go ahead. There are some people who won't get a chance to ask a question.

DOUG BROOKS: Yeah, just real quick. Yes, Blackwater did withdraw. It was interesting because at least two NGOs have come up to us and said their withdrawal cost them and, as you know, the Blackwater [unintelligible] got in, but they had to change their name. They have not gotten any new contracts and, in fact, have been barred from getting certain kinds of contracts. So, in effect, I can't say that it was all because of the withdrawal from IPOA, but it was certainly not a commercial boost to them and last we hear, they are selling off chunks of the company. So certainly, it doesn't seem to have helped them by withdrawing from IPOA.

JAMES COCKAYNE: Tiniest two finger to that. There is just a question of causality there, Doug. Was it, their withdrawal from IPOA, the media or attention to what they allegedly did in Nisoor Square that had this impact, really?

WARREN HOGE: I think there are these two questions. I'll have to ask you to come forward and just speak to us privately afterwards because I'm out of time right now. I was told by a colleague that somebody in the elevator coming up here said, "IPI, best sandwiches, best conversation." [Laughter.] I don't know about the sandwiches today, though I think they were pretty good, but thanks to you all for your excellent questions and thanks to this excellent panel. The conversation has really been first rate. Thank you very much.

