



## PRIVATIZATION WITHOUT REGULATION: THE HUMAN RIGHTS RISKS OF PRIVATE MILITARY AND SECURITY COMPANIES (PMSCS) IN MEXICO\*

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*ABSTRACT. The use of private military or security companies is a growing phenomenon in Latin America. In recent years, increased violence and insecurity in Mexico has made the nation an attractive market for PMSCs. The privatization of security has changed how security is provided in ways that can be either positive or negative depending on how the industry is regulated. This note examines how the privatization of security has functioned in Mexico by examining the nation's two main private security categories —domestic and multinational PMSCs— who work for either private clients or the United States (US) and/or Mexican governments under the Merida Initiative. After discussing how Mexican law attempts to regulate the industry, this note analyzes whether or not existing regulation is sufficient to permit these organizations to act as a “force multiplier” to increase the overall sense of security. In light of evidence suggesting that domestic and multinational PMSCs do not respect Mexican law, it appears that most of the private security market in Mexico fails to be a “force multiplier”. Moreover the presence of a non-state actor authorized to use force and not controlled adequately add greater complexity to an already complicated human rights situation. This note concludes by discussing how Mexico's failure to implement existing regulations on PMSCs amounts to a failure to respect its obligations under international law.*

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RESUMEN. *El uso de compañías militares y/o de seguridad privadas (CMSP) es un fenómeno creciente en América Latina. El aumento de la violencia y la inseguridad en México en los últimos años ha hecho que sea un mercado atractivo para las CMSP. La privatización de la seguridad cambia la forma de proveer seguridad, que puede ser positiva o negativa dependiendo de cómo los proveedores de seguridad están regulados. Esta nota examina cómo la privatización de la seguridad está funcionando en México, analizando los dos principales actores en el mercado de la seguridad privada en México —CMSP nacionales e internacionales— que trabajan para clientes privados y, en el caso de las CMSP internacionales, para los Estados Unidos o México bajo la Iniciativa Mérida. Después de discutir cómo la ley mexicana intenta regular estas CMSP, esta nota evalúa si la regulación existente es suficiente para permitir que las CMSP en México actúen como un multiplicador de fuerza que aumenta la seguridad. A la luz de la evidencia que sugiere que las CMSP nacionales e internacionales no respetan las leyes mexicanas, parece que la mayor parte del mercado de la seguridad privada en México sigue siendo no regulada ni controlada, lo que no sólo no le permite ser un “multiplicador de fuerzas”. La presencia de un actor no estatal autorizado a usar la fuerza y no controlado de forma adecuada añade una mayor complejidad a la ya complicada situación de los derechos humanos. Esta nota concluye con una discusión sobre el fracaso de México para implementar la legislación existente sobre CMSP, incumpliendo sus obligaciones estatales en virtud del derecho internacional.*

PALABRAS CLAVE: *Derecho internacional, derechos humanos, seguridad privada, regulación, México, Estados Unidos.*

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#### I. INTRODUCTION

The use of private military or security companies (PMSCs) is a growing phenomenon in Latin America. Unlike in Iraq and Afghanistan, however, the rules are different in Latin America. In Iraq, PMSCs have been involved in massive violations of human rights as in Abu Ghraib, where contractors have

been implicated in both torture and civilian massacres. In Latin America and the Caribbean, PMSCs' activities are less visible and (perhaps for this reason) less controversial. Many PMSCs assist international organizations during humanitarian operations, such as in Haiti after the massive earthquake in 2010. Other companies, however, regularly participate in the so-called "war on drugs," providing intelligence, logistical support, and training to support the Colombian and Mexican armed forces. Contractors also work for private enterprises that provide security services in risky situations all over the region.

PMSCs can be defined as "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."<sup>1</sup>

The deterioration of the security situation in Mexico during the last decade has increased the nation's demand for security services, generating new business opportunities for PMSCs and resulting in greater demand by the private sector than by the government.<sup>2</sup> As we shall see, this privatization changes how security is provided in ways that can be either positive or negative.<sup>3</sup> For example, privatization often reduces the amount of control by the authorities over security services, thereby creating human rights concerns.<sup>4</sup> This said, the proliferation of security services and providers that occurs as a result of privatization —when well-regulated— can also act as a "force multiplier," by increasing the overall sense of security.<sup>5</sup>

The first part of this note focuses on the Mexican private security market and the law that currently regulates this market. Private security in Mexico is comprised of three main components. First, Mexico City's government<sup>6</sup>

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<sup>1</sup> Montreux Document, Art. 9, Sept. 17, 2008, I.L.M. *available at* <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/inlta/humlaw.Par.0057.File.tmp/Montreux%20Document%20%28e%29.pdf>.

<sup>2</sup> *See* Alberto Cuenca, Ignacio Alvarado & Jorge Torres, *Seguridad privada, negocio sin control*, EL UNIVERSAL, May 24, 2010, *available at* <http://www.eluniversal.com.mx/nacion/177912.html>. *See also* SMALL ARMS SURVEY, STATES OF SECURITY (2011), *available at* <http://www.smallarms-survey.org/publications/by-type/yearbook/small-arms-survey-2011.html>.

<sup>3</sup> *See* PETER WARREN SINGER, CORPORATE WARRIORS, THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003) (on PMSCs activities); *see also* DEBORAH AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY (2005); ELKE KRAHMANN, STATES, CITIZENS AND THE PRIVATIZATION OF SECURITY (2010).

<sup>4</sup> *See* SIMON CHESTERMAN & CHIA LEHNARDT (EDS.), FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, (2007) (on the effects of PMSCs' activities on international humanitarian law and human right law); *see also* FRANCESCO FRANCONI & NATALINO RONZITTI (EDS.), WAR BY CONTRACT (2011).

<sup>5</sup> Rita Abrahamsen & Michael C. Williams, *Security Sector Reform: Bringing the Private In*, 6 CONFLICT, SECURITY & DEVELOPMENT, 1, 17 (2006).

<sup>6</sup> Mexico City refers here to Mexico, Federal District.

maintains a unique quasi-public security force called the “auxiliary police”.<sup>7</sup> This police corps is composed of police officers whose official function is to work for private clients.<sup>8</sup> Even though the auxiliary police participate in the privatization of security, this paper does not focus on their activities as they are subject to the same regulations and controls as regular police. Instead, we shall focus on the remaining two players in the Mexican private security market—domestic and multinational PMSCs who work for private clients and, in some cases US and/or Mexican public agencies under the Merida Initiative.<sup>9</sup>

With regard to domestic and multinational PMSCs, Mexican law on private security requires, among other provisions, that security companies officially register both their entities and employees and that non-Mexican citizens are prohibited from bearing arms. In reality, however, neither domestic nor multinational companies respect this law. As a result, most private security functions remain unregulated, not only failing to be a “force multiplier” but also adding greater complexity to an already complicated human rights situation.

In light of this observation about the private security market in Mexico, the second part of this note will discuss how Mexico’s failure to adequately regulate PMSCs runs counter to the nation’s obligations under international law. Specifically, this note focuses on the Mexican government’s obligations under the American Convention on Human Rights to prevent, prosecute, and remedy human rights violations, which obligations have been found relevant even in cases of violations of human rights committed by a private actor.<sup>10</sup>

## II. PRIVATE SECURITY IN MEXICO: THE LIMITS OF THE LAW

The wave of violence which has gripped Mexico in recent years, has for obvious reasons, increased demand for private security. In addition to the auxiliary police, the Mexican private security market is comprised of do-

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<sup>7</sup> See Cuerpo de Seguridad Auxiliar Urbano del Estado de México (Policía Auxiliar) [Urban Auxiliary Security Corps of Mexico City (Auxiliary Police)], Gobierno del Estado de Mexico available at <http://www.region-6.com.mx/cvauem.htm> (last visited feb. 8, 2013).

<sup>8</sup> *Id.*

<sup>9</sup> The U.S. Congress has appropriated \$1.5 billion since the Merida Initiative began in fiscal year 2008. The US supports “comprehensive justice sector reforms” including training of federal police forces. The US used to outsource security cooperation. See U.S. Dept. of State, Bureau of Public Affairs, *The Merida Initiative: Expanding the U.S./Mexico Partnership* (2011), available at [www.state.gov/documents/organization/158009.pdf](http://www.state.gov/documents/organization/158009.pdf); see also William Márquez, *¿Privatiza Estados Unidos la guerra contra las drogas?*, BBC MUNDO (Washington), Jan. 16, 2012, available at [http://www.bbc.co.uk/mundo/noticias/2012/01/111208\\_ecuu\\_pentagono\\_guerra\\_drogas\\_mercenarios\\_wbm.shtml](http://www.bbc.co.uk/mundo/noticias/2012/01/111208_ecuu_pentagono_guerra_drogas_mercenarios_wbm.shtml).

<sup>10</sup> See *Mapiripán Massacre v Colombia*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 134, ¶111 (Sept. 5, 2005).

mestic PMSCs and multinational PMSCs. Mexican state and/or federal law *should* regulate all domestic *and* multinational PMSCs that provide private security services in Mexico. As discussed in the two following sections, however, the reality is differs widely, since domestic PMSCs largely fail to comply with national laws and multinational PMSCs actively evading them. As a result, existing laws do not provide even a minimal amount of private market oversight.

### 1. *Domestic PMSCs*

The Mexican Constitution states in Article 21 that security is a state function,<sup>11</sup> and Article 122 gives the Legislative Assembly the power to regulate private security services.<sup>12</sup> As an illustration of the Assembly's discretionary power, several federal laws, including the General Law of the National Public Security System, explicitly contemplates the existence of private security.<sup>13</sup> Other federal laws however —most notably the Federal Law on Private Security— seek to regulate private security.<sup>14</sup> While other federal and state laws address private security, this paper mostly focuses on the Federal Law on Private Security —the hallmark piece of legislation on private security regulation in Mexico that serves as a reference point for all other regulation.<sup>15</sup>

The Federal Law on Private Security subjects private security to public oversight by making the states responsible for the regulation of PMSCs.<sup>16</sup> Although the law is clear and demanding<sup>17</sup> its implementation is a great failure.

The principal problem faced by the Mexican state is that 80% of PMSCs are not registered, despite both federal and state laws that require PMSCs to register with the Ministry of Public Security (Secretaría de Seguridad Pública).<sup>18</sup> The National Private Security Council (Consejo Nacional de Seguridad Privada) estimates that up to ten thousand unregulated private security

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<sup>11</sup> Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Art. 21, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.). Art. 21 states: “La seguridad pública es una función a cargo de la Federación, el Distrito Federal, los Estados y los Municipios”.

<sup>12</sup> *Id.* Art. 122 c) base primera V (i).

<sup>13</sup> Ley General del Sistema Nacional de Seguridad Pública [L.G.S.N.S.P.] [General Law of the National System of Public Security], *as amended*, Arts. 150-152, Diario Oficial de la Federación [D.O.], 2 de Enero de 2009 (Mex.).

<sup>14</sup> *See* Ley Federal de Seguridad Privada [L.F.S.P.] [Federal Law on Private Security], *as amended*, Diario Oficial de la Federación [D.O.], 6 de Julio de 2006 (Mex.).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* Art. 2 §1.

<sup>17</sup> Markus-Michael Müller, *Private Security and the State in Latin America: The case of Mexico City*, 4 BRAZILIAN POL. SCI. REV. 131, 148 (2010).

<sup>18</sup> Ignacio Alzaga, *Sin permisos, 87% de empresas de seguridad*, MILENIO, April 29, 2012, available at <http://www.milenio.com/cdb/doc/noticias2011/41b7fb1f83d1281726928ecb267920bc>.

firms operate in the country, meaning that up to 600,000 guards fall outside the legal framework.<sup>19</sup> In fact, there are more PMSCs and PMSC employees working *outside* of the law than those working within its framework.<sup>20</sup>

Various factors contribute to the failed implementation of the Federal Law on Private Security including, for instance, differences between the laws in the different states or the lack of capacity of the state or federal governments. While these are genuine concerns and difficulties, there are two other factors that are more unique to Mexico that have also contributed to the failed implementation. The first one concerns the relatively casual relationships between PMSCs and their employees, and the second one concerns the training and the background of the employees of PMSCs working in Mexico.<sup>21</sup>

One of the reasons that the implementation of the Federal Law on Private Security has been unsuccessful has been the low level of commitment by employees to Mexico-based PMSCs. PMSCs in Mexico often do not provide steady work to their employees; instead, they provide short-term contracts lasting between several months and a week.<sup>22</sup> With such short-term employment contracts, PMSCs often find that it is not cost-effective to invest in their employees. The Federal Law on Private Security requires PMSCs to invest in human resources; all employees, for example, must be registered and properly trained. The way the private security market works, however —with short-term demand and high turnover— often undermines the objectives of the Federal Law on Private Security. Despite well-intentioned regulations, most PMSCs are unregistered, staffed by untrained employees with little job security and little commitment to the company for whom they work.

Other unique challenges in Mexico include the training and background checks of PMSC employees. Article 27 of the Federal Law on Private Security forbids PMSCs from hiring anyone who was fired from a public security institution (*e.g.*, police, military) for a serious offense, negligent endangerment, or working while intoxicated, among other violations.<sup>23</sup> Despite this prohibition, however, many ex-police officers with inadequate training or criminal histories seek employment at PMSCs; and evidence indicates that such individuals have been successful in obtaining work.<sup>24</sup> Again, the law itself is not necessarily a failure but rather its enforcement.

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<sup>19</sup> José Antonio Belmont, *Operan 10 mil firmas de seguridad privada fuera del marco legal*, MILENIO, October 26, 2012, available at <http://www.milenio.com/cdb/doc/noticias2011/96a40c0d7cd67d4dae4f7a38e280a72>.

<sup>20</sup> *Id.*

<sup>21</sup> Interview with Carlos Mendoza, Security consultant, in Mex. City (Sept. 6, 2012). See also PATRICIA ARIAS, *SEGURIDAD PRIVADA EN AMÉRICA LATINA: EL LUCRO Y LOS DILEMAS DE UNA REGULACIÓN DEFICITARIA* 54 (2009) (On relationships between PMSCs and their employees).

<sup>22</sup> Interview with an anonymous, in Mex. City (Sept. 16, 2012).

<sup>23</sup> Ley Federal de Seguridad Privada [L.F.S.P.] [Federal Law on Private Security], as amended, Art. 27, Diario Oficial de la Federación [D.O.], 6 de Julio de 2006 (Mex.).

<sup>24</sup> Jorge Medellín, *La seguridad privada*, in ATLAS DE LA SEGURIDAD Y LA DEFENSA DE MÉXICO,



Although Mexican laws such as the Federal Law on Private Security contemplate and seek to address several of the challenges posed by the privatization of security in Mexico, such regulations are only adequate on paper. In real life, implementation of the laws falls short, resulting in deficient regulation of private security. Ultimately, “formal laws do little to regulate private police in a country where the regulators —*i.e.* the public police— themselves are corrupt.”<sup>25</sup> As a result, domestic PMSCs do not work as a force multiplier in Mexico—they are more a source of worries and corruption than a useful actor working to improve the security situation.

## 2. *Multinational PMSCs in Mexico*

Multinational PMSCs provide services to two categories of clients in Mexico: private and public. The private sector includes foreign, transnational, and Mexican companies, as well as wealthy individuals, who contract multinational PMSCs for “kidnapping resolution and ransom negotiation services, among others, often as part of broader ‘risk management’ contracts.”<sup>26</sup>

The second main category of clients, states, is public. Multinational PMSCs operate in Mexico largely under the guise of the Merida Initiative—the 2007 agreement between the US and Mexico that concretized a plan for cooperation in fighting drug trafficking and increasing security in the region.<sup>27</sup> At the time the agreement was signed, the Mexican Foreign Affairs Minister explained to the public that the Initiative did not provide for the presence of US troops and military consultants.<sup>28</sup> “The [US] Congress has appropriated \$1.5 billion since the Merida Initiative began in fiscal year 2008” to support “comprehensive justice sector reforms” including training of federal police forces.<sup>29</sup> These monies have funded maintenance, logistics, equipment, training and support, among other items,<sup>30</sup> services provided mostly by PMSCs based in the US.<sup>31</sup>

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146, 148 (Raúl Benítez Manaut, Abelardo Rodríguez Sumano & Armando Rodríguez Luna eds., 2009).

<sup>25</sup> DIANE E. DAVIS, LAW ENFORCEMENT IN MEXICO: NOT YET UNDER CONTROL 22 (NACLA Report on the Americas, 2003).

<sup>26</sup> Nick Miross, *As Kidnappings for Ransom Surge in Mexico, Victims’ Families and Employers Turn to Private U.S. Firms Instead of Law Enforcement*, WASH. POST, Feb. 26, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/26/AR2011022603384.html>.

<sup>27</sup> See RAÚL BENÍTEZ MANAUT (ed.), *CRIMEN ORGANIZADO E INICIATIVA MÉRIDA EN LAS RELACIONES MÉXICO-ESTADOS UNIDOS* (2010) (on the Merida Initiative).

<sup>28</sup> Armando Luna, *La iniciativa Mérida y la guerra contra las drogas. Pasado y presente*, in *CRIMEN ORGANIZADO E INICIATIVA MÉRIDA EN LAS RELACIONES MÉXICO-ESTADOS UNIDOS*, 31, 44 (Raúl Benítez Manaut ed. 2010).

<sup>29</sup> U.S. Dept. of State, Bureau of Public Affairs, *The Merida Initiative: Expanding the U.S./Mexico Partnership* (2011), available at [www.state.gov/documents/organization/158009.pdf](http://www.state.gov/documents/organization/158009.pdf).

<sup>30</sup> Telephone interview with an employee of PMSC (June 12, 2012).

<sup>31</sup> William Márquez, *¿Privatiza Estados Unidos la guerra contra las drogas?*, BBC MUNDO, Jan.

PMSCs contracted under provisions of the Merida Initiative work directly either for the Mexican or US government. Employees of PMSCs that work directly for the US government are considered part of the US mission in Mexico and benefit from the same treatment as other US government employees — *e.g.*, they benefit from immunity from prosecution by the Mexican government.<sup>32</sup> The other PMSCs contracted under the Merida Initiative usually work for the Ministry of Public Security; their job consists mostly of training the federal police.

Regardless of whether they serve private or public clients, multinational PMSCs face two legal hurdles: first, under Mexican law, solely Mexican citizens may establish and own a PMSC; secondly, there are severe restrictions for keeping and bearing weapons.<sup>33,34</sup> Rather than complying with these limitations, however, Mexico-based PMSCs found a way to sidestep the law: they establish bases in neighboring countries and work remotely or travel for short periods of time.<sup>35</sup> This is possible because the “Mexican private security market, unlike in Iraq or Afghanistan, does not require the show of force or high-caliber weapons. Work in Mexico is based more on contacts, prevention and intelligence.”<sup>36</sup>

By managing operations from abroad, these PMSCs have been successful in evading Mexican law. Even if PMSCs’ activities within Mexico make them subject to Mexican law, it is not clear that there would be capacity or will on the part of the Mexican government to implement or enforce the law; the latter — will to enforce the law — is of particular concern given that PMSCs working under the Merida Initiative are among those who use these tactics to evade Mexican law.

This reality of PMSCs operating outside the law raises concerns about accountability and respect for human rights. In fact, despite working with mul-

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16, 2012, available at [http://www.bbc.co.uk/mundo/noticias/2012/01/111208\\_ccuu\\_pentagono\\_guerra\\_drogas\\_mercenarios\\_wbm.shtml](http://www.bbc.co.uk/mundo/noticias/2012/01/111208_ccuu_pentagono_guerra_drogas_mercenarios_wbm.shtml).

<sup>32</sup> Diplomatic and consular protection are regulated by the Vienna Convention on Diplomatic Relations, Apr. 18, 1961; Vienna Convention on Consular Relations, Apr. 24 1963, and the Convención Consular entre los Estados Unidos Mexicanos y los Estados Unidos de América, U.S.-Mex., Jul. 17, 1943.

<sup>33</sup> Ley Federal de Seguridad Privada [L.F.S.P.] [Federal Law on Private Security], as amended, Art. 25 § I, Diario Oficial de la Federación [D.O.], 6 de Julio de 2006 (Mex.). The nationality limitation has been under discussion, but remains unchanged to the date of writing this note (December 2012). See Enrique Méndez, *Extranjeros podrán participar en las empresas de seguridad privada*, LA JORNADA, Apr. 11, 2012, available at <http://www.jornada.unam.mx/2012/04/11/politica/003n2pol>.

<sup>34</sup> See Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Firearms and Explosives] as amended, Diario Oficial de la Federación [D.O.], 11 de Enero de 1972 (Mex.).

<sup>35</sup> Telephone interview with an employee of PMSC, (June 12, 2012); Interview with Armando Luna, member of Colectivo de Análisis de la Seguridad con Democracia, in Mex. City (September 13, 2012).

<sup>36</sup> Interview with Manager of PMSC, in Wash. DC (October 18, 2012).



tinational PMSCs only a short time, Mexico has already witnessed negative effects stemming from PMSC operations under the Merida Initiative. PMSCs that provide training to Mexican police, for example, have been accused by the media of training Mexican police in torture techniques.<sup>37</sup>

As noted by Human Rights Watch<sup>38</sup> and Amnesty International,<sup>39</sup> the human rights situation in Mexico is really complicated, including several cases of torture and disappearance<sup>40</sup> by public forces have been reported. Moreover,

[s]upervision and accountability mechanisms for police officers, military personnel, prosecutors, forensic scientists, medical examiners or judges as well as defence lawyers and representatives of the national and state human rights commissions remain inadequate and judicial reforms have largely failed to address the impunity that results from this lack of accountability.<sup>41</sup>

The result is that in Mexico, PMSCs, not only do not work as a force multiplier, helping the overall sensation of security, but also raise concerns about respect for human rights. These concerns raise questions about the Mexican state's obligations, which will be discussed in the next part.

### III. STATES' RESPONSIBILITY FOR PMSCS' ACTIVITIES

In Mexico, PMSCs, both domestic and multinational, operate largely unconstrained by existing federal and state laws because companies purposefully disobey or evade application of these laws. This part focuses on the Mexican state's obligations under the Inter-American System of Human Rights con-

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<sup>37</sup> "One of the videos, obtained two weeks ago by the newspaper El Heraldo de León, shows police appearing to squirt water up a man's nose, a torture technique once notorious among Mexican police. They then dunk his head in a hole that an unidentified voice on the video says is full of excrement and rats. In another video, an unidentified English-speaking trainer asks a police agent to roll in his own vomit. The English-speaking man belonged to a private U.S. security company hired to help train the agents." In Fox News, *Report Mexico cop in torture case fired*, July 19, 2008, available at [http://www.foxnews.com/printer\\_friendly\\_wires/2008Jul19/0,4675,MexicoPoliceTorture,00.html](http://www.foxnews.com/printer_friendly_wires/2008Jul19/0,4675,MexicoPoliceTorture,00.html). See also Deborah Bonello, *Mexican police in 'torture' class?*, L.A. BLOGTIMES (July 1, 2008, 12:57 PM), <http://latimesblogs.latimes.com/laplaza/2008/07/mexican-police.html>.

<sup>38</sup> HUMAN RIGHTS WATCH, MEXICO: NEITHER RIGHTS NOR SECURITY KILLINGS, TORTURE, AND DISAPPEARANCES IN MEXICO'S "WAR ON DRUGS," (2011) available at <http://www.hrw.org/reports/2011/11/09/neither-rights-nor-security-0>.

<sup>39</sup> AMNESTY INTERNATIONAL, KNOWN ABUSERS, BUT VICTIMS IGNORED: TORTURE AND ILL-TREATMENT IN MEXICO (2012), available at <http://www.amnestyusa.org/research/reports/known-abusers-but-victims-ignored-torture-and-ill-treatment-in-mexico>.

<sup>40</sup> HUMAN RIGHTS WATCH, MEXICO'S DISAPPEARED, THE ENDURING COST OF A CRISIS IGNORED (2013), available at <http://www.hrw.org/sites/default/files/reports/mexico0213webwcover.pdf>.

<sup>41</sup> AMNESTY INTERNATIONAL, *supra note* 39, at 25.

cerning human rights violations; as the Inter-American jurisprudence clarifies, a complex internal situation does not limit these obligations, and finally, these obligations are also binding when the human rights violation is committed by a private actor.

The American Convention on Human Rights (AC), adopted in 1969, is the pillar of the Inter-American System of Human Rights, ratified already by Mexico which has also accepted the jurisdiction of the Inter-American Court of Human Rights (IACtHR). For this reason, the legal framework established by the AC and IACtHR are useful reference points in analyzing Mexico's obligations.

The legal framework of the AC, IACtHR and Inter-American Commission of Human Rights (IAComHR) require that parties to the convention "ensure" the enjoyment of human rights by preventing, investigating, prosecuting, and remedying all human rights violations, and adopting internal measures, as modify domestic law if necessary.

In its first influential case, *Velásquez-Rodríguez vs. Honduras*, the IACtHR interpreted the first article of the AC, which imposes on each state a "legal duty to take reasonable steps to prevent human rights violations."<sup>42</sup> The Court defined "prevention" to include "all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts."<sup>43</sup>

The same case further held that each state party has a "legal duty... to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."<sup>44</sup>

The next state obligations is to give citizens the access to "an effective remedy" and to investigate and prosecute the perpetrators of human rights violations. In the case *Fenelon vs. Haiti*, the IAComHR ordered a "complete and impartial investigation to determine accountability where lies the responsibility for the actions denounced; [as well as] sanction[s for] those responsible for the denounced actions."<sup>45</sup>

The Court has been forced to rule extensively on these matters, as governments have frequently ignored their obligation to prosecute human rights violations.<sup>46</sup>

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<sup>42</sup> *Velásquez Rodríguez v Honduras*, Merits, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.4, ¶ 174 (Jul. 29, 1988).

<sup>43</sup> *Id.* ¶ 175.

<sup>44</sup> *Id.* ¶ 174.

<sup>45</sup> *Fenelon v Haiti*, case 6586, Inter-Am. Comm'n H.R., Report No 48/82, OAS/Ser.L/V/II.61, doc. 22, rev.1, ¶3 (1982). This formulation is repeated in several further cases, *see for instance* *Pierre et al. v Haiti* case 2646, Inter-Am. Comm'n H.R., Report No 38/82, OAS/Ser.L/V/II.61; Doc. 22, rev.1 (1983).

<sup>46</sup> HÉLÈNE TIGROUDJA & IOANNIS K. PANOUSSIS, *LA COUR INTERAMÉRICAINNE DES DROITS DE L'HOMME: ANALYSE DE LA JURISPRUDENCE CONSULTATIVE ET CONTENTIEUSE* 165 (2003).

In the case of Paniagua Morales et al. vs. Guatemala, the Court noted that impunity is common in Guatemala and that

...the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.<sup>47</sup>

Human rights law permits certain rights to be suspended under certain circumstances, such as war or even situations of internal tensions.<sup>48</sup> However, Article 27 of the AC lists several rights that are protected even in “time of war, public danger, or other emergency that threatens the nation’s independence or security;”<sup>49</sup> the Court has expanded on this list in subsequent rulings.<sup>50</sup>

In the case of Castillo Páez vs. Peru, the Court states that domestic situation cannot serve as limitations to the state obligation to prosecute. In this case, Peru tried to argue that its obligations were limited because of the situation of internal tension produced by the activities of the armed group *Sendero Luminoso* (Shining Path); however, the Court responded that

...the Peruvian state is obliged to investigate the events that produced [the violations]. Moreover, on the assumption that internal difficulties might prevent identification of the individuals responsible for crimes of this kind, the victim’s family still have the right to know what happened... It is therefore incumbent on the state to use all the means at its disposal to satisfy these reasonable expect-

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<sup>47</sup> Paniagua Morales et al. v Guatemala, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 37, ¶ 173 (Mar. 8, 1998).

<sup>48</sup> See Art. 27 of the American Convention, Art. 15 of the European Convention of Human Rights, and Art. 4 of the International Covenant on Civil and Political Rights.

<sup>49</sup> Organization of American States, American Convention of Human Rights, Art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 12.

<sup>50</sup> In several cases the Court extends the list of non-derogable rights: for example, the prohibition of torture is considered by the Court as *jus cogens*, the right to mental and physical integrity (related with article 5) as an absolute right that cannot be suspended under any circumstance and the right to access to justice as a norm *jus cogens*. See Maritza Urrutia v Guatemala, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.103, ¶ 92 (November 27, 2003) (on torture); see also Tibi v Ecuador, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.114, ¶ 143 &145 (Sept. 7, 2004); Massacre de la Rochela v Colombia, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.163, ¶ 132 (May 11, 2007); Bueno Alves v Argentine, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.164, ¶ 76 (May 11, 2007). See Case of Ximenes Lopes v Brazil, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.149, ¶ 126 (Jul. 4, 2006), (on physical integrity). See Case of Goiburú & al. v Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.153, ¶ 131 (Sept. 22, 2006) (on the right to access to justice).

tations. In addition to this duty to investigate, there is also the duty to prevent... and to sanction those responsible for them. These Obligations on Peru shall remain in force until such time as they have been fully performed.<sup>51</sup>

Mexico's situation may be considered internal tension. Since President Felipe Calderón declared "war" on organized crime in 2006, security has deteriorated, resulting in significantly more fatalities and increased violence.<sup>52</sup> Even under these circumstances, however, IACtHR case law, particularly *Castillo Páez vs. Peru*, suggests that this situation would not exempt Mexico from its obligations under AC provisions.

The last relevant state obligation concerning possible violations of human rights by PMSCs is the obligation to adopt internal measures in order to guarantee the rights included in the AC. In other words, states have the obligation to implement or modify domestic legislation in case of legal vacuum or insufficient legislation.<sup>53</sup> The Court explained this obligation in the case of *Castillo Petruzzi vs. Peru*:

...[t]he general duty under Article 2 of the American Convention implies the adoption of measures of two kinds: on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those guarantees.<sup>54</sup>

As discussed above, Mexico does not lack domestic legislation—it lacks implementation of the legislation. Although the result of the current situation in Mexico—the non-control of PMSCs—is ultimately the same than a non-regulation, but the solution is different. Given the current situation, regulations must be promulgated to prevent practices such as operating businesses from abroad; practices should be developed that require the registration of both businesses and employees.

Finally, the states' obligations to prevent, investigate, prosecute, and remedy any violations of human rights are also valid if the violation has been committed not by the state but by a private actor. Although the Court "recognized that a State cannot be responsible for every human rights violation committed by individuals subject to its jurisdiction,"<sup>55</sup> it affirmed, in the case of the *Mapiripán Massacre*, that: "...the attribution of responsibility to the

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<sup>51</sup> *Castillo Páez v Peru*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 34, ¶ 90 (Nov. 3, 1997).

<sup>52</sup> See HUMAN RIGHTS WATCH, *supra* note 39.

<sup>53</sup> *TIGROUDJA AND PANOUSSIS*, *supra* note 46, at 172.

<sup>54</sup> *Castillo Petruzzi v Peru*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.52, ¶ 207 (May 30, 1999).

<sup>55</sup> *Valle Jaramillo et al. v Colombia*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No 192, ¶ 78 (Nov. 27, 2008). See also the *Pueblo Bello Massacre v Colombia*,

State for the acts of individuals may occur in cases in which the state fails to comply with the obligations *erga omnes* contained in Articles 1 and 2 of the Convention, owing to the acts or omissions of its agents when they are in the position of guarantor.”<sup>56</sup>

In the case of PMSCs in Mexico, this would mean that Mexico is responsible for human rights violation committed by PMSCs in its territory. For instance, the Mexican state is responsible for the contents of the training provided to Mexican police by multinational PMSCs.

In the Inter-American System, Mexico has the obligation to prevent, investigate (effectively), prosecute, and punish any party responsible for human rights violations under its jurisdiction. Despite the ongoing “war” against narco-trafficking in Mexico, this internal situation cannot limit these obligations—Mexico must ensure that human rights are respected in its territory. Considering the current violence and tension, an appropriate use of PMSCs could act as a force multiplier and increase safety and security; however, in order to achieve this objective, effective regulation—beginning with implementation of the existing laws—is an absolute necessity.

#### IV. CONCLUSION

The recent proliferation of security services and providers in Mexico raise many issues concerning their role in both security and human rights violations. Some authors argue that PMSCs have the potential to increase the sense of security in areas where they operate.

This note discussed the failure of the Mexican authorities to implement existing law to regulate the activities of domestic and multinational PMSCs operating in Mexico. Moreover, PMSCs add greater complexity to an already complicated human rights situation.

In light of this conclusion, this note discussed in its last section how Mexico’s failure to adequately regulate PMSCs operating in its territory constitutes a failure on the part of the Mexican state to respect its state obligations under international law. As a party to the American Convention on Human Rights, Mexico has to ensure all persons subject to its jurisdiction full enjoyment of their rights according to the Convention. These obligations are to prevent, investigate, prosecute, and remedy any violation of human rights and they are binding even in cases of violations of human rights committed by a private actor. Considering these state obligations and the current situation of regulation and control of PMSCs in Mexico, there is a need for an improvement of the implementation of the Mexican laws on private security.

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Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 140, ¶ 123 (Jan. 31, 2006).

<sup>56</sup> *Mapiripán Massacre v Colombia*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 134, ¶ 111 (Sept. 5, 2005).

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