

FEATURE**A UNITED NATIONS INSTRUMENT TO REGULATE AND MONITOR PRIVATE
MILITARY AND SECURITY CONTRACTORS**

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ABSTRACT

Member States of the United Nations (U.N.) are responsible for taking appropriate measures to prevent, investigate, punish, and provide effective remedies for relevant misconduct of private military and security companies (PMSCs) and their personnel; their responsibilities fully remain, even if States have chosen to contract out certain security functions.

The widespread outsourcing of military and security functions to private companies in situations of low-intensity conflicts, international relief, and contingency operations has been a major phenomenon in the past twenty years. The grave human rights violations in which they have been involved in Iraq and Afghanistan have been the focus of international attention and have generated debate about the roles of PMSCs, the norms under which they should operate, and how to monitor their activities.

The U.N. Working Group on the Use of Mercenaries (Working Group) has found that there is a regulatory legal vacuum covering the activities of PMSCs and a lack of common standards for the registration and licensing of these companies, for the vetting and training of their staff, and for the safekeeping of weapons. Although there are norms of international humanitarian law (IHL) and international human rights law (IHRL) that could apply in some situations, in practice, they have not been implemented. PMSCs have succeeded in creating a situation of diffused responsibility and lack of accountability through a labyrinth of contractual and insurance layers and shells.

The Working Group has arrived at the logical conclusion that a new binding international legal instrument is necessary to regulate and monitor the

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activities of PMSCs, and in 2010 it recommended to the U.N. the creation of an open-ended working group entrusted with the elaboration of a regulatory framework monitoring the activities of PMSCs.

The international instrument would stipulate, among other things, the development of a national regime of licensing, regulation, and oversight of the activities of PMSCs and their subcontractors; increased responsibility of home States (where PMSCs are registered) for the export of military and security services of PMSCs registered and licensed in their country; and that States on whose territory PMSCs operate ensure effective control over the activities of these companies.

KEY WORDS

U.N. Human Rights Council (HRC), U.N. Working Group on the Use of Mercenaries (Working Group), Private Military and Security Companies (PMSCs), Violations of human rights, Immunity, Oversight, Accountability, Regulation, Council of Europe, Swiss Initiative, Montreux Document, International Code of Conduct, International Peace Operations Association (IPOA),¹ British Association of Private Security Companies (BAPSC).

INTRODUCTION

The widespread outsourcing of military and security functions to private military and security companies (PMSCs) by governments, intergovernmental and non-governmental organizations, and multinational companies² in situations of low-intensity conflict, armed conflict, post conflict, international relief, and contingency operations has been a major phenomenon in recent years. The use of these private contractors to support operations in Iraq and Afghanistan, and the human rights violations in which they have been involved have been the focus of international attention. It has generated debate about the roles of PMSCs, the norms under which they should operate, and how to monitor their activities.

In order to address these important issues at the national and international level, the independent U.N. Working Group on the Use of

¹ In November 2010, IPOA changed its name to International Stability Operations Association (ISOA). *About ISOA*, INTERNATIONAL STABILITY OPERATIONS ASSOCIATION (last visited Apr. 13, 2011), <http://ipoaworld.org/eng/aboutisoa.html>.

² The immovable target of transnational extractive companies is oil, gold, copper, cobalt, diamonds, and a host of other minerals that a number of developing countries have in abundance. The corporate desire to extract those minerals outweighs the risk of operating in an unstable area, and the decision is made to go in. The need for security leads these multinationals to rely on a number of private military and security companies (PMSCs) and shady characters with whom they would not ordinarily do business. For example, the Canadian company Ranger Oil relied on a band of mercenaries, called Executive Outcomes, to retake its supply depot. See Madelaine Drohan, *The High Risks of Operating Abroad*, GLOBE AND MAIL, Nov. 23, 2007, available at <http://www.theglobeandmail.com>.

Mercenaries (Working Group)³ has recommended to the U.N. principles and main elements as well as a text for a possible International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies. Its recommendations are contained in two separate reports: the first was submitted in July 2010 to the HRC⁴ at Geneva and the second to the General Assembly's Third Committee in August 2010.⁵

The main aims of the proposed Convention are to reaffirm and strengthen the State responsibility in the monopoly of the legitimate use of force, identify those inherently State functions which cannot be outsourced to PMSCs under any circumstances, and to limit PMSCs' use of force and firearms according to international human rights standards.

The new Convention would stipulate the development of a national regime of licensing, regulation, and oversight of the activities of PMSCs and their subcontractors; increased responsibility of home States (where PMSCs are registered) for the export of military and security services of PMSCs registered and licensed in their country; and that States on whose territory PMSCs operate ensure effective control over the activities of these companies.

The new Convention would also provide for the establishment of an International Register of PMSCs under which States would have to report annually on imports and exports of military and security services of PMSCs and standardize information on PMSCs registered in and licensed by the State party. This obligation to share information on companies in an open and transparent way would provide greater public and parliamentary scrutiny. An international committee would monitor the measures taken by State parties to implement the Convention.

The proposed Convention would apply not only to States but also to intergovernmental organizations, within the limits of their competence, with respect to PMSCs, their activities, and their personnel. It would apply to all situations where PMSCs deploy their activities, regardless of whether the situation is considered to constitute an armed conflict or not.

³ The U.N. Working Group on the Use of Mercenaries (Working Group), established in 2005, is composed of five independent experts who provide their advice on a *pro bono* basis. There is one expert for each of the following geopolitical regions of the world: Africa, Asia and the Pacific, Eastern Europe, Latin America and the Caribbean, and Western and Others Groups.

⁴ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. Doc. A/HRC/15/25 (July 5, 2010) (by José Luis Gómez del Prado) (proposing a draft Convention, for consideration and action by the HRC) [hereinafter July 5 Working Group Report].

⁵ Working Group on the Use of Mercenaries, *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, ¶¶18–30, (2010) transmitted by Note of the Secretary-General, U.N. Doc. A/65/325 (Aug. 25, 2010) (proposing a framework for an international draft convention on the regulation and monitoring of PMSCs). See also Draft Convention *infra* Annex I (where the draft has been reproduced).

A. CONTEXT AND BACKGROUND

PMSCs are the modern reincarnation of a long lineage of private providers of physical force, including corsairs, privateers, and mercenaries.⁶ Mercenaries, which had practically disappeared during the nineteenth and twentieth centuries, reappeared in the 1960s during the decolonization period operating mainly in Africa and Asia. Under U.N. auspices, a Convention was adopted which outlawed and criminalized their activities.⁷

The current international political system, constituted in the twentieth century under the U.N. Charter, is based on a community of sovereign States. This is a modern concept originating in the Peace of Westphalia, signed in 1648, which laid the basis of what constitutes a sovereign State, namely its capacity to defend its frontiers by an army and to control domestic public order through law enforcement. The concept of the nation State was later defined in the nineteenth century by Max Weber, a German sociologist.⁸

In the course of the last two hundred years, the trend in Western countries towards strengthening the legitimate use of force as a public service seems to have been inverted. The notion of State monopoly on the legitimate use of force has evolved among Western countries in recent years during the period of anarchical globalization following the collapse of the USSR. An important change in the democracies of Western countries has operated with regard to the monopoly of the legitimate use of force in the context of the anarchical globalization of the world economy that followed the collapse of the USSR. With the fall of the Berlin Wall, the reduction of national armies and the globalization of the economy, the private military and security industry exploded into a powerful global phenomenon. The annual market revenue of the staggering security industry is estimated to be over \$100 billion.⁹

In the last twenty years there has been, primarily in Western European and North American countries and particularly in the U.S. and the U.K., a significant increase in PMSCs. PMSCs have operated in zones of low-intensity armed conflict and post-conflict situations such as Afghanistan, the Balkans, Central Africa, Colombia, Democratic Rep. of Congo, Iraq, Somalia, and the Sudan.¹⁰ They also provide services for the extractive industries which have been able to operate in such zones of instability. Parallel to this

⁶ Hin-Yan Liu, *Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company*, 15 J. CONFLICT & SEC. L., 141–168 (2010).

⁷ International Convention against the Recruitment, Use, Financing and Training of Mercenaries art. 1, December 4, 1989, 2163 U.N.T.S. 75

⁸ MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 102 (1964).

⁹ P. W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 78 (2004).

¹⁰ See, José L. Gómez del Prado, *Private Military and Security Companies and Challenges to the UN Working Group on the Use of Mercenaries* 5 (Conference on Private Military Contractors in Latin America, Conference Paper), available at <http://www.havenscenter.org/privatemilitaryconference2008>.

privatization of warfare at the international level, there has also been increased demand for private security and protection of property at the domestic level all over the world.¹¹ Some PMSCs also pose a threat to democracy itself as is shown by the activities of companies like Blackwater (now renamed as Xe) and its subsidiaries or affiliates, such as Total Intelligence, which “sought to become the ‘intel arm’ of Monsanto, offering to provide operatives to infiltrate activist groups organizing against the multinational biotech firm.”¹²

Today we are witnessing more and more the outsourcing of the use of force to the private sector as one commercial commodity, among others. This new trend to privatize security is generalizing and has already reached the U.N. Secretariat itself, which has envisaged outsourcing security functions in some given situations. Indeed, despite internal criticism, the U.N. has been one of the latest nonprofit organizations to outsource security functions to PMSCs. Foreign Policy Magazine reports that the U.N. has been in consultations with a British security firm to send additional security forces to protect them in Afghanistan.¹³ The U.N.’s top security official, Gregory Starr, has also been advocating an increase in the use of private security firms in Pakistan, where U.N. relief workers have been the target of kidnappings and killings, according to U.N. officials.¹⁴

In many countries the number of private security personnel per 100,000 inhabitants is much larger than the active police. Among these countries are; Angola, Argentina, Australia, Bulgaria, Chile, China, Colombia, Costa Rica,

¹¹ Herbert Wulf, *Reconstructing the Public Monopoly of Legitimate Force*, in PRIVATE ACTORS AND SECURITY GOVERNANCE 87, 92 (Alan Bryden & Marina Caparini eds., 2006).

¹² See Jeremy Scahill, *Blackwater’s Black Ops*, THE NATION, Sept. 15, 2010, <http://www.thenation.com/article/154739/blackwaters-black-ops>. The article references THE NEW YORK TIMES’ Sept. 3, 2010, report that Blackwater had “created a web of more than 30 shell companies or subsidiaries in part to obtain millions of dollars in American government contracts after the security company came under intense criticism for reckless conduct in Iraq.” This phenomenon is not unique to Western countries but has spread all over the world. In Peru, for instance, the Working Group was seized with a complaint of a human rights organization GRUFIDES (Sustainable Development Training and Action Group). Three Catholic priests and members of their families and forty local representatives and environmental leaders from farming communities, after having made a complaint for alleged violations of their rights by the mining company Yanacocha, were tailed and spied on by physical and electronic means; undercover approaches and infiltration; and slander, threats, and intimidation with the aim of intimidating victims, breaking them down psychologically and damaging their reputation by running slander campaigns. See also Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum Mission to Peru*, U.N. Doc. A/HRC/7/7/Add.2 (Feb. 4, 2008) (by José Luis Gómez del Prado) for a discussion of the Group’s Mission to Peru, conducted Jan. 29 to Feb. 2, 2007.

¹³ See Colum Lynch, *U.N. Embraces Private Military Contractors*, TURTLE BAY: REPORTING FROM INSIDE THE UNITED NATIONS (Jan. 17, 2010), http://turtlebay.foreignpolicy.com/posts/2010/01/17/un_embraces_private_military_contractor.

¹⁴ See Amol Mehra, *Ensuring Accountability through Supporting the Draft Convention on PMSCs*, RIGHTRESPECT (Sept. 7, 2010), <http://www.rightrespect.com/2010/09/07/ensuring-accountability-through-supporting-the-draft-convention-on-pmscs/>.

Cote d'Ivoire, Czech Republic, Dominican Republic, El Salvador, Guatemala, Honduras, Hungary, India, Ireland, Jamaica, Japan, Kenya, Luxembourg, Panama, Poland, Romania, Russian Federation, Slovenia, South Africa, Turkey and the U.S.¹⁵

The problem of accountability of PMSC personnel becomes even more complex when private military contractors are used by international organizations, such as the U.N., the E.U., or NATO. The concept of institutional responsibility of intergovernmental organizations is still elusive and should prompt the U.N. to take precautionary measures to ensure that if and when it outsources its security and protection functions, it does so in accordance with its own Charter.¹⁶

Two philosophies confront Member States of the U.N. in such important matters as the sovereignty of States and the impact of outsourcing the legitimate use of force to private contractors without regulatory and monitoring mechanisms.¹⁷

The position of Western countries in the U.N. has been a rejection of regulation and oversight mechanisms. Their position is understandable since the new booming and flourishing security industry is located in Western countries and particularly in the U.K. and the U.S. where seventy percent of PMSCs are found. Their position, however, does not appear justifiable since the aim of the new binding legal instrument is not to ban PMSCs, which at the present stage seems unrealistic. Confronted with the contemporary reality of the abrogation of fundamental responsibilities of governments, the U.N. Working Group has taken a pragmatic approach. With an aggregated estimate of contracts of over \$100 billion per year, the private military and security industry has become a ubiquitous reality.¹⁸ In addition, many of these PMSCs

¹⁵ See, e.g. *Private Security Personnel Now Outnumber Police*, AUSTRALIAN INSTITUTE OF CRIMINOLOGY (July 20, 2009), <http://www.aic.gov.au/media/2009/july/20090720.aspx>. See also NICOLAS FLORQUIN, *SMALL ARMS SURVEY 2011: STATES OF SECURITY* (forthcoming 2011). See also Working Group on the Use of Mercenaries, *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, ¶¶ 13–16, (2010) transmitted by Note of the Secretary-General, U.N. Doc. A/65/325 (Aug. 25, 2010).

¹⁶ The Draft Convention proposed by the U.N. Working Group would apply not only to States but also to intergovernmental organizations. See Draft Convention *infra* Annex I.

¹⁷ Within this context, it is interesting to note the concern in Switzerland of academics and public opinion in general regarding the existing legal vacuum with respect to PMSCs. The issue has been subject to debate in Switzerland following the recent relocation to Basel of the headquarters of the British firm Aegis Defence Services. There are currently no Swiss laws governing the activities of such firms. See *Un Vide Juridique Profite aux Armées Privées*, TSR (Aug. 10, 2010), <http://www.tsr.ch/info/monde/2358789-hamid-karzai-veut-degager-les-armees-privées.html>.

¹⁸ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 30, U.N. Doc. A/HRC/7/7 (Jan. 9, 2008) (by José Luis Gómez del Prado). See also SOURCEWATCH, www.sourcewatch.org for information on the conduct of transnational corporations related to human rights and social responsibility.

“walk a fine line of legality, with potentially illegitimate clients, business practices, and employees with dark pasts.”¹⁹ The recent case of a former Blackwater employee contracted by the CIA who killed two Pakistanis is a clear illustration of these practices.²⁰ The main purpose of regulatory and monitoring mechanisms is to establish minimum national and international standards for States in order to regulate the activities of PMSCs and their personnel and set up an international oversight mechanism given the negative impact of their activities on the enjoyment of human rights.

In addition to the negative impact PMSCs may have on the enjoyment of human rights, there is also the need to distinguish clearly the contractor’s activities from those of other non-State entities such as mercenaries, praetorian guards, paramilitaries, proxy armies, or undercover operations agents. We are facing situations very much like those of the sixteenth to eighteenth century involving pirates, corsairs, filibusters, privateers, and buccaneers.²¹

These non-State entities of the twenty-first century operate in extremely blurred situations where delineation of the appropriate role for military and that of civilians is unclear. The new security industry of private companies moves large quantities of weapons and military equipment. It provides services for military operations recruiting former soldiers as civilians to carry out passive or defensive security. According to the interpretation of some legal experts of the International Committee of the Red Cross, only a small number of PMSC employees operating in armed conflict or post-conflict situations could be considered as combatants, some as mercenaries, and the majority as civilians who would lose protection under IHL when taking “direct part in hostilities.”²²

Neither the Geneva Conventions nor the Additional Protocols define direct participation in hostilities. A further clarification has been given in the Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, which indicates that the widespread

¹⁹ P. W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* ix (2004).

²⁰ Tom Raum, *Pakistan, US Still at Impasse over Jailed CIA Man*, SALON.COM (Feb. 23, 2011), http://www.salon.com/news/feature/2011/02/23/pakistan_us_cia_impasse. See also Justin Elliott, *CIA Man in Pakistan May Not Have Immunity*, SALON.COM (Feb. 23, 2011), www.salon.com/news/politics/war_room/2011/02/23.

²¹ The 1856 Paris Declaration Respecting Maritime Law states in Article 1: “Privateering is, and remains, abolished.” Declaration of Paris (Apr. 16, 1856), in CONVENTIONS AND DECLARATIONS BETWEEN THE POWERS CONCERNING WAR, ARBITRATION AND NEUTRALITY 10 (1915) available at <http://www.icrc.org/ihl.nsf/FULL/105?OpenDocument>. The 1907 Hague Convention Relating to the Conversion of Merchant Ships into Warships further expands on this rule. Article 1 of the Convention stipulates, “A merchant ship converted into a war-ship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies.” Convention Relative to the Conversion of Merchant Ships into War Ships (1907) in JAMES BROWN SCOTT, 2 THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 423 (1909), available at <http://www.icrc.org/ihl.nsf/FULL/210?OpenDocument>.

²² Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 INT’L REV. RED CROSS 525, 532, 539, 568 (2006).

contracting out to the private sector of military functions has blurred the distinction between legitimate military targets and persons protected under IHL against direct attacks.²³ The Guidance mentions that these difficulties are aggravated where armed actors do not distinguish themselves from the civilian population, which is increasingly the case. It further states that, under IHL, PMSCs and their employees are subjected to the same criteria as for any other civilians: they are entitled to protection against direct attacks “unless and for such time as they directly participate in hostilities, even though their activities and location may expose them to an increased risk of incidental injury and death.”²⁴ However, this does not exclude the possibility that domestic law might govern the status of PMSCs and their employees differently from IHL for other situations than the conduct of hostilities.²⁵

Although the status of PMSC personnel under IHL is complex, and despite the interpretative clarifications provided by experts of the International Committee of the Red Cross, it appears that there is a vacuum in IHL. It is very hard to believe that in some situations, these individuals can be considered civilians, given that they carry and use weapons, interrogate prisoners, load bombs, drive military trucks, and fulfill other essential military functions. Those who are armed can easily switch from a passive/defensive to an active/offensive role and can commit human rights violations and even destabilize governments. They cannot be considered soldiers or supporting militias under IHL either, since they are not part of the army or in the chain of command and often belong to a large number of different nationalities.

Two concrete examples may enlighten the readers about the blurred situations and the osmosis which operates among these non-State entities. The first case concerns Simon Mann and Nick du Toit and their involvement in the attempted coup against President Obiang of Equatorial Guinea in 2004.²⁶ The second example is the case of the Israeli mercenary Yair Klein convicted by a court in Colombia for training several members of Colombian paramilitary groups and militias of drug traffickers during the 1980s and 1990s.²⁷

Both Simon Mann and Nick du Toit had previously been working “legally” for the PMSC Executive Outcomes, which operated in Angola and

²³ Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90(872) INT’L REV. OF THE RED CROSS 991, 1015 (2008), available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf> (adopted by the Assembly of the International Committee of the Red Cross in February 2009).

²⁴ *Id.* at 1035.

²⁵ *Id.* at 1012.

²⁶ Tracy McVeigh, *Ex-Mercenary Nick du Toit Tells of His Five Years in a “Living Hell” and Why He is Ashamed of War*, THE OBSERVER (June 13, 2010), <http://www.guardian.co.uk/world/2010/jun/13/simon-mann-mercenary-renounces-war>.

²⁷ Yasha Levine, *Yair Klein: Russia’s “Other” Viktor Bout*, THE EXILE, 1 (March 28, 2008), http://www.exile.ru/articles/detail.php?ARTICLE_ID=17982&BLOCK_ID=35.

Sierra Leone, providing military and security services, among other things, to the rebels, extractive companies, and the national army.²⁸

Yair Klein is a former colonel of the Israeli Army. Since he retired he has been an arms dealer in Lebanon and has trained the Medellín Cartel in Colombia.²⁹ In Sierra Leone, he sold weapons to the belligerents.³⁰ He has provided teaching and instruction to a number of non-State entities such as paramilitary groups in military and counterinsurgency techniques.³¹ In February 2001, he was convicted by the Criminal Court of the Manizales District, Colombia for “instruction in and teaching of military and terrorist tactics, techniques and methods, committed with mercenaries and accomplices” and sentenced *in absentia* to ten years in prison.³² The Colombian government made unsuccessful attempts to obtain his extradition from Israel.³³ In March 2007, Interpol issued an international arrest warrant for Mr. Klein, who was subsequently arrested in August 2007 in the Moscow airport and placed in custody until his transfer to Colombia, which had requested extradition. The authorization to extradite Klein was given by a Russian tribunal. However, the European Court of Human Rights decided to suspend the extradition procedure and ruled on April 1, 2010, that the implementation of the extradition order would give rise to a violation of Article 3 of the European Convention on Human Rights.³⁴

PMSCs and their personnel (“private soldiers”) could be categorized as combatants if they formed part of militias party to the conflict and fulfilled conditions provided in IHL, particularly in Article 4 of the Third Geneva Convention³⁵ and Additional Protocol I to the Geneva Conventions³⁶ which only applies to “armed conflicts.” For that they would have to fulfill a number of conditions such as to: (a) be commanded by a person responsible for his subordinates; (b) have a fixed distinctive emblem recognizable at a distance;

²⁸ See Elizabeth Day and Katherine Houreld, *A Boy's Own Story Gone Very Wrong*, THE TELEGRAPH (Aug. 29, 2004), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/1470458/A-Boys-Own-story-gone-very-wrong.html>; *Emprenden Estrategia Juridica Para Obtener Extradicion Del Mercenario Yair Klein Desde Rusa*, ELTIEMPO.COM (Nov. 11, 2008), <http://www.eltiempo.com/archivo/documento/CMS-4659846>.

²⁹ Levine, *supra* note 26, at 1.

³⁰ *Id.*

³¹ *Id.*

³² Klein v. Russia, Application No. 24268/08, Eur. Ct. of H.R., ¶ 8 (Apr. 1, 2010).

³³ See Day, *supra* note 27; *Emprenden supra* note 27.

³⁴ Klein, *supra* note 31, ¶ 1, 18.

³⁵ Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. Article 4 of the Third Geneva Convention refers to “persons who accompany the armed forces without being members thereof, such as...supply contractors.” See also Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications Under International Humanitarian Law*, INT’L COMM. RED CROSS (2004), <http://www.icrc.org/eng/assets/files/other/pmc-article-a-faite.pdf>.

³⁶ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict art. 83, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

(c) carry arms openly; and (d) conduct their operations in accordance with the laws of war.³⁷ The term “combatant” is frequently used, but, according to IHL, the status of combatant does not exist in non-international armed conflicts.

In general, these conditions are not fulfilled by PMSCs and their employees. Not only do they violate the laws of war by making use of excessive force and shooting indiscriminately, resulting in civilian casualties, they also use forbidden arms or experimental ammunition prohibited by international law—even white phosphorous.³⁸ Often, they circulate without identification and drive in unidentified sport utility vehicles (SUVs) with tinted glasses and no plates, behaving similarly to infamous death squads.³⁹ In Afghanistan and Iraq, the staff of PMSCs “has been extremely difficult to identify.”⁴⁰ Local populations have not had the means to file a complaint with the authorities or the contracting State.⁴¹

In accordance with Article 50 of Protocol I, in an international armed conflict, “persons that are not categorized as members of the armed forces of a party to the conflict are civilians.”⁴² As civilians, “private contractors are [thus] protected against direct attacks ‘unless and for such time as they take a direct part in the hostilities.’”⁴³ Whether they carry a weapon or not does not imply *per se* that they take direct part in the hostilities.⁴⁴

Under IHL, “direct participation in the hostilities is not restricted to situations where individuals are involved in military deployment or are armed with a view to taking an active part in combat operations. In other words, one should not assume that direct participation is necessarily restricted to a minority” of PMSCs.⁴⁵ The Geneva Conventions and their Additional Protocols do not provide a definition of “direct participation in hostilities.” However, the commentary on Additional Protocol I indicates that “‘direct’ participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁴⁶ This Commentary raises a number of questions as to the activities which are presently entrusted to PMSCs in situations of armed conflicts.⁴⁷

³⁷ Third Geneva Convention, *supra* note 34, art. 4(A)(2).

³⁸ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 51, U.N. Doc. A/HRC/7/7 (Jan. 9, 2008) (by José Luis Gómez del Prado).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications Under International Humanitarian Law*, INT’L COMM. RED CROSS 7 (2004), <http://www.icrc.org/eng/assets/files/other/pmc-article-a-faite.pdf>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 619 (1987). See also Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in*

While there are a number of logistical activities performed by private contractors, such as food or laundry services, plumbing, etc., which may not fall under direct participation in the hostilities, there are many other activities performed by PMSCs such as transportation of weapons and other military commodities, intelligence, strategic planning, or procurement of arms, for which they may lose the protection afforded to civilians under IHL. In the U.S. Naval Handbook, intelligence is classified as direct participation in hostilities.⁴⁸ When PMSCs take a direct part in the hostilities, private contractors that are categorized as civilians lose their protection but only for the duration of such direct participation.⁴⁹

Under IHL, an attack against civilian objects such as schools, hospitals, civilian houses, etc., guarded by PMSCs would be illegal, and personnel providing security to it would be entitled to the protection afforded to civilians. The situation is different for those situations in which PMSCs provide security to a military facility, a trend that we have increasingly witnessed in recent years. In situations of armed conflict, it is arguable that guarding infrastructures such as army bases, barracks or ammunition dumps constitutes *in itself* a direct participation in the hostilities. The U.S. Air Force Commander's Handbook, for instance, provides that "anyone acting as a guard for military activity" is subject to attack as long as they are on duty.⁵⁰ Therefore, private contractors would not be entitled to the protection afforded to the civilian population under humanitarian law and would not be immune from direct attack."⁵¹

One may raise the questions as to whether power plants, oil sites, or airports qualify as legitimate targets and what the implications would be for personnel of PMSCs guarding such entities. Would they be immune from military attack or would they lose the protection afforded to civilians under IHL? This situation is very different from the case illustrated above, where PMSCs are providing security to a military infrastructure. "Indeed, whilst it is arguable that providing security to an army base is *per se* a direct participation in the hostilities, guarding a pipeline or a power plant is not."⁵²

In addition, these "private soldiers" operate in all types of situations and not only in "armed conflicts" covered under IHL. The scope of the proposed draft Convention by the Working Group is precisely to apply "to all

Hostilities under International Humanitarian Law, 90(872) INT'L REV. OF THE RED CROSS 991, 1020 n.114 (2008), available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf> ("direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.")

⁴⁷ Faite, *supra* note 41.

⁴⁸ DEPT. OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.2.2 (2007).

⁴⁹ Faite, *supra* note 41.

⁵⁰ *Id.* at 8.

⁵¹ *Id.*

⁵² *Id.* at 9.

situations whether or not the situation is qualified as an armed conflict.”⁵³ For instance, the situation in Iraq is more a situation of post-conflict than that of an “armed conflict” according to IHL. These “private soldiers” exist in a grey area in many situations in that they are neither civilians nor combatants. Rather, these “private soldiers” may be considered “unlawful combatants,” similar in legitimacy to paramilitaries and terrorists.⁵⁴

The new industry also provides a number of inherently State functions such as military support and military counseling that have been outsourced by States, which do not require private contractors to carry weapons, such as interrogations, intelligence tasks, and the transport of military supplies, such as weapons, ammunition, and petrol.⁵⁵

From a political perspective, inherently State functions refer to the monopoly of the legitimate use of force by the public authorities, namely the army and the police, in a given territory. This notion has its origin in the Treaty of Westphalia and is linked to the sovereignty of a State. It was developed later by Weber in his concept of the nation-state.⁵⁶ In the twentieth century, the concept of inherently State functions has, in some cases, been widened to include not only the monopoly of the use of force by a nation but also a number of other functions of the public sector over which the State should have control. Under such an approach, in order to safeguard its sovereignty, the State should control such sectors as energy, transportation, the banking sector, education, and health. This has been the approach of many Western European socialists, communists, and those who fought in the French resistance during the Second World War for a more just society.⁵⁷ In other cases, many of these functions are contracted out from the public sector to the private sector. This movement has gained momentum with the fall of the Berlin Wall in 1989 and the disintegration of the U.S.S.R. that followed.

The policy and strategies of the Bush Administration at the beginning of the 21st century have further shaken the Weberian concept of the monopoly

⁵³ See Draft Convention, *infra* Annex I, scope.

⁵⁴ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶¶ 24, 25, 32, 57, U.N. Doc. A/HRC/7/7 (Jan. 9, 2008) (by José Luis Gómez del Prado).

⁵⁵ *Id.* ¶¶ 23–51.

⁵⁶ MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1964).

⁵⁷ This scope is also embodied in Article 1, common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which stipulates: “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development; 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.” International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171.

of the State on the legitimate use of force, in particular with the wars in Afghanistan and Iraq. Indeed, in order to be able to fight in several war theaters, the Bush Administration relied on outsourcing or contracting out to the private sector a number of traditionally public functions. In Afghanistan and Iraq, for instance, instead of sending more troops, the Bush Administration largely relied on private contractors not only for the logistics but also for a number of military and security functions carried out by private contractors. Additionally, in order to maintain the Pax Americana in Afghanistan, the Bush Administration relied on warlords paid by the CIA, which provided them with cash and weapons to do America's job.⁵⁸ The notion of the monopoly on the legitimate use of force as well as the concept of nation-building or institution-building (post-conflict peace-building), conceptualized in the 1990s in the U.N. Agenda for Peace, have been broken down by these policies.⁵⁹ Furthermore, it should be noted that contracting out functions, which may be considered inherently State functions, does not relieve States from their responsibility under international law.⁶⁰

In the U.S., a number of congressional leaders have expressed great concern, as discussed in this article,⁶¹ about the situation of contracting out military and security functions that should remain in the public sector, and they have proposed, without success so far, bills to remedy this situation. These bills have attempted to restore military functions to the public sector. In other words, these legislative efforts would put the U.S. government back on the path of conducting inherent State functions through the U.S. military and prohibiting the use of PMSCs for such activities as security, law enforcement, and intelligence.

Under U.S. law, an "inherently governmental function is one that, as a matter of law and policy, must be performed by federal government employees and cannot be contracted out because it is 'intimately related to the public interest.'" ⁶² There exist two main definitions of "inherently governmental functions" within federal law and policy:

One is a statutory definition, enacted as part of the Federal Activities Inventory Reform (FAIR) Act of 1998. This definition States that an inherently governmental function is 'a

⁵⁸ AHMED RASHID, DESCENT INTO CHAOS: THE U.S. AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN AND CENTRAL ASIA 133–137 (2008).

⁵⁹ See U.N. Secretary-General, *An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-keeping*, U.N. Doc. A/47/277 - S/24111 (June 17, 1992).

⁶⁰ See INT'L L. COMM'N, DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, art. 5, 8 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

⁶¹ See Part B of this article for a discussion about the Stop Outsourcing Security Act.

⁶² JOHN R. LUCKEY ET AL., CONG. RESEARCH SERV., R 40641, INHERENTLY GOVERNMENTAL FUNCTIONS AND DEPARTMENT OF DEFENSE OPERATIONS: BACKGROUND, ISSUES AND OPTIONS FOR CONGRESS i (2010), available at <http://www.fas.org/sgp/crs/natsec/R40641.pdf>.

function so intimately related to the public interest as to require performance by Federal Government employees.’ The other is a policy-oriented definition contained in Office of Management and Budget (OMB) Circular A-76. This definition States that an inherently governmental activity is ‘an activity that is so intimately related to the public interest as to mandate performance by government personnel.’ Other statutes and regulations that define inherently governmental functions do so either by reproducing the language of the FAIR Act or OMB Circular A-76, or by incorporating the definitions of the FAIR Act or OMB Circular A-76 by reference.⁶³

Although there is no consensus in the international community regarding “inherently State functions,” the Working Group is recommending in its proposed draft Convention on PMSCs, a number of functions intrinsically linked to the monopoly of the legitimate use of force for study and discussion among Member States of the U.N. with the objective of reaching an agreement and the adoption of a regulatory framework of the PMSCs. These functions are,

consistent with the principle of the State monopoly on the legitimate use of force which a State cannot outsource or delegate to PMSCs under any circumstances. Among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State Party considers as inherently State functions.⁶⁴

The PMSC industry is transnational in nature and is growing very rapidly, particularly since the recent conflicts in Afghanistan and Iraq. The availability of experienced security and military personnel for hire has enabled governments and intergovernmental and non-governmental organizations to get around political constraints that otherwise might limit the use of force.⁶⁵ In addition, since private military contractors are not considered to be part of a State’s armed forces, or a supporting militia under IHL, governments avoid responsibility for the tasks that they contract out to PMSCs and for the acts

⁶³ *Id.*

⁶⁴ Draft Convention, *infra* Annex I, art. 2.

⁶⁵ See Yves Engler, *La privatization de l’occupation: Les mercanaries et les ONG (Counterpunch)*, HAITI RECTO VERSO (Mar. 9, 2010), http://haitirectoverso.blogspot.com/2010_09_08_archive.html.

committed by the employees of the PMSCs. Thus, the position of the U.S. government, in addition to the problem of extraterritoriality, is that “as a general matter, acts committed by individuals must have the necessary participation of government to formally be considered as a human rights violation.”⁶⁶ This has also been a way of hiding the real number of casualties of low-intensity armed conflicts from the public.⁶⁷

In 2005, the U.N. Commission on Human Rights, the predecessor of the present HRC, created an independent Working Group of five experts to study, identify, and monitor emerging issues, manifestations, and trends regarding mercenaries and the activities of PMSCs, and their impact on human rights, particularly on the right of peoples to self-determination. The Working Group was also requested to present concrete proposals on possible new standards and general guidelines or basic principles encouraging the further protection of human rights.⁶⁸ Since then, the HRC and the General Assembly have reiterated and expanded the mandate given to the independent experts of the Working Group.

In order to assess the impact of PMSCs on human rights, the Working Group has conducted nine field missions in the past five years: in countries exporting PMSC’s activities (U.K. and U.S.); countries importing those services (Afghanistan),⁶⁹ or countries from which third nationals are contracted to be sent to conflict, post-conflict, or low intensity armed situations (Chili, Ecuador, Fiji, Honduras, Peru),⁷⁰ and countries where former employees of PMSCs have carried out mercenary activities (Equatorial Guinea). The Working Group also conducted a nine day mission to South Africa on November 10, 2010. Its report will be issued in 2011.

At the end of its visit to South Africa, the Working Group held a press conference during which it pointed out that since the period bringing an end to apartheid in 1994, South Africans had been widely employed by PMSCs operating around the world.⁷¹ It commended South Africa as one of the first countries to adopt legislation on the provision of foreign military assistance in

⁶⁶ See Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 51., U.N. Doc. A/HRC/7/7 (Jan. 9, 2008) (by José Luis Gómez del Prado) [hereinafter Jan. 9 Working Group Report].

⁶⁷ See Steven L. Schooner & Colin D. Swan, *Contractors and the Ultimate Sacrifice*, 16-18 (George Washington Univ. Legal Studies Research Paper No. 512, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677506.

⁶⁸ See G.A. Res. 2005/2, ¶ 7, U.N. Doc. E/CN.4/RES/2005/2 (Apr. 7, 2005).

⁶⁹ Press Release, High Commissioner for Human Rights, *Why Private Military and Security Companies Should be Regulated* (Aug. 2010), <http://198.170.85.29/Gomez-del-Prado-article-on-regulation-of-private-and-military-firms-3-Sep-2010.pdf>.

⁷⁰ See Jan. 9 Working Group Report, *supra* note 65.

⁷¹ See Press Release, High Commissioner for Human Rights, *South Africa: UN Experts to Discuss the Regulation of Private Military and Security Companies*, (Nov. 9, 2010), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10515&LangID=E>.

1998.⁷² Nonetheless, the regulatory regime established in South Africa for PMSCs and individuals operating in different countries have faced challenges in terms of implementation. The Working Group recommended that the government undertake the necessary steps to ensure that the regulatory regime envisaged in the legislation be strengthened and include a monitoring mechanism.⁷³ In particular, the Working Group emphasized the important role of effective implementation of the legislation of the National Conventional Arms Control Committee, which has been given the responsibility to authorize the export of military and security services to regulated countries.⁷⁴

The Working Group has reviewed a large number of allegations of human rights violations committed by employees of these companies. In the cluster of human rights violations allegedly perpetrated by employees of PMSCs, which the Working Group has examined, one can find summary executions, acts of torture, cases of arbitrary detention, trafficking of persons, serious health damages caused by their activities, as well as attempts against the right of self-determination. It also appears that PMSCs, in their search for profit, neglect security, do not provide their employees with their basic rights, and often put their staff in situations of danger and vulnerability.⁷⁵

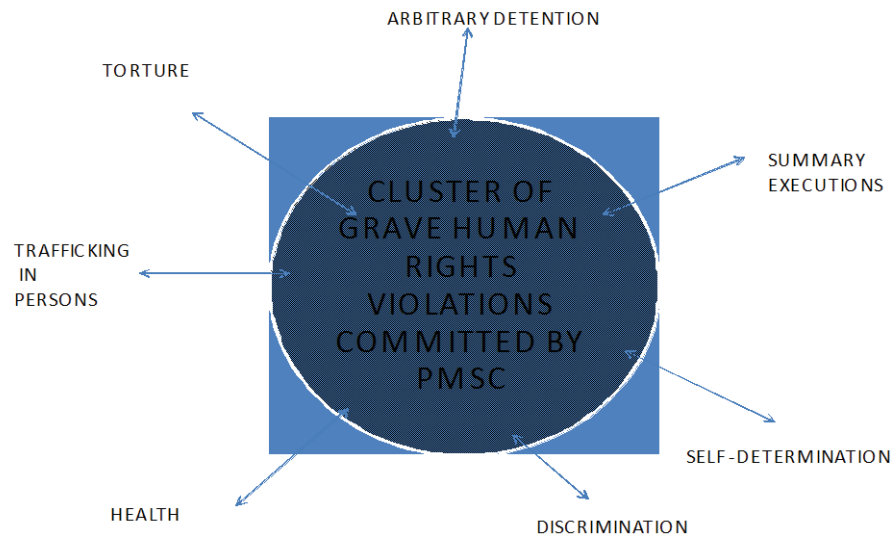
⁷² *Id.*

⁷³ Press Release, U.N. Information Centres, South Africa Should Pursue its efforts to Strengthen the Regulatory Framework for Private Military and Security Companies, Say UN Experts (Aug. 2010), <http://ssa.unic.org/south-africa-should-pursue-its-efforts-to-strengthen-the-regulatory-framework-for-private-military-and-security-companies-say-un-experts/>.

⁷⁴ *Id.*

⁷⁵ See Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-determination, Addendum, Communications to and from Governments*, ¶ 90, U.N. Doc. A/HRC/7/7/Add.1 (Feb. 13, 2008) (by José Luis Gómez del Prado) [hereinafter 2008 Working Group Communications Report]; U.N. Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Communications to and from Governments*, ¶ 24, U.N. Doc. A/HRC/10/14/Add.1 (Feb. 27, 2009) (by Alexander Ivanovitch Nikitin).

Cluster of Human Rights Violations



The following paragraphs are indicative of some of the grave human rights violations committed by personnel of PMSCs.

Summary Executions

There are also concerns over the activities and approach of PMSC personnel, their convoys of armored vehicles and their conduct in traffic, in particular their use of lethal force. On September 16, 2007 in Baghdad, employees of the U.S.-based firm Blackwater were involved in a shooting incident in which seventeen civilian were killed and more than twenty other civilians were wounded including women and children. Local eyewitness accounts indicate the use of small arms and rocket fire from a helicopter belonging to this company.⁷⁶ This incident was not the first of its kind and not the first involving Blackwater. In Najaf, in April 2004, and on several other occasions, employees of this company took part in direct hostilities. In May 2007, another incident involving the same company reportedly occurred involving guards belonging to the company and forces belonging to the Iraqi Ministry of the Interior allegedly exchanged gunfire in a sector of Baghdad.⁷⁷ Even though charges were filed against Blackwater, the federal prosecutors

⁷⁶ See Mike Baker, *In Shift, Blackwater Dumps Tarnished Brand Name*, ASSOCIATED PRESS (Feb. 13, 2009), <http://www.truth-out.org/021409B>.

⁷⁷ See Bernhard Zand, *Blackwater's Hail of Gunfire*, DER SPIEGEL (Sept. 24, 2007), <http://www.spiegel.de/international/world/0,1518,507513,00.html>.

were not able to overcome the complexities inherent in investigating events that occurred in war zones.⁷⁸

In central Baghdad, two Armenian women, Genevia Antranick and Mary Awanis were killed on October 9, 2007, when their car came too close to a protected convoy. Reports indicate that employees belonging to the private security company, Unity Resources Group (URG), fired approximately nineteen to twenty rounds of ammunition before leaving the scene.⁷⁹ In its statement, URG said its security team was approached at a high speed by a vehicle which did not stop despite warnings that included hand signals, signal flares and a warning shot in the radiator, and that the guards opened fire when the car kept rolling.⁸⁰ The family of Genevia Antranick was offered no compensation and has begun court proceedings against URG in the U.S.⁸¹

The firm was also involved in the shooting of 72-year-old Australian Kays Juma. Professor Juma was shot in March 2006 as he approached an intersection being blockaded for a convoy that URG was protecting.⁸² At 10:00 am, Professor Juma, a 25-year resident of Baghdad, who drove through the city every day, allegedly sped up his vehicle as he approached the guards and did not heed warnings to stop, including hand signals, flares, warning shots into the body of his car, and floodlights.⁸³

Torture

Seventy two Iraqi citizens, who were formerly detained at military prisons in Iraq, have sued L-3 Services, Inc. (L-3), a private military contractor which provided civilian translators for U.S. military forces in Iraq, and Adel Nakhla, a former employee of L-3 who served as one of its translators there under the Alien Tort Statute.⁸⁴ The citizens allege having been tortured and physically and mentally abused during their detention and that L-3 and Nakhla should be held liable for their actions. The plaintiffs assert twenty causes of action, among them: torture, inhuman and degrading treatment, assault, battery, and intentional infliction of emotional distress.⁸⁵

⁷⁸ See James Risen, *Efforts to Prosecute Blackwater Are Collapsing*, N.Y. TIMES (Oct. 20, 2010), <http://www.nytimes.com/2010/10/21/world/21contractors.html?pagewanted=all>.

⁷⁹ 2008 Working Group Communications Report, *supra* note 74, ¶ 7; See also José Luis Gómez del Prado, *The Privatization of War: Mercenaries, Private Military and Security Companies (PMSC)*, CENTRE FOR RESEARCH ON GLOBALIZATION (November 8, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=21826>.

⁸⁰ 2008 Working Group Communications Report, *supra* note 74, ¶ 7.

⁸¹ Jessicah Mendes & Scott Mitchell, *Who is Unity Resources Group?* ABC NEWS AUSTRALIA (Sept. 15, 2010), <http://www.abc.net.au/news/stories/2010/09/15/3012146.htm>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *Al-Quraishi v. Nakhla*, 728 F. Supp.2d 702, 714 (D. Md. 2008).

⁸⁵ *Id.*

Defendants filed motions to dismiss on a number of grounds.⁸⁶ They argued, among others,

that the suit must be dismissed in its entirety because they are immune under the laws of war, because the suit raises non-justiciable political questions, and because they possess derivative sovereign immunity. They [sought] dismissal of the state law claims on the basis of government contractor immunity, premised on the notion that Plaintiffs cannot proceed on state law claims which arise out of combatant activities of the military.⁸⁷

Nevertheless, the United States District Court for the district of Maryland Greenbelt Division decided to proceed with the case against L-3 Services. It did not accept the motions and is allowing the case to go forward.⁸⁸

Arbitrary Detention

A number of media reports have indicated that private security guards have played a central role in some of the most sensitive activities of the Central Intelligence Agency (CIA), such as the arbitrary detention and clandestine raids against alleged insurgents in Iraq and Afghanistan,⁸⁹ the involvement in CIA rendition flights,⁹⁰ and joint covert operations.⁹¹ Employees of PMSCs would have been involved in the taking of detainees from “pick-up points” (such as Tuzla, Islamabad or Skopje), transporting them with rendition flights, delivering them to drop-off points (such as Cairo, Rabat, Bucharest, Amman or Guantanamo), as well as in the construction, equipping and staffing of the CIA’s “black sites.”⁹²

Within this context, the American Civil Liberties Union (ACLU) filed a lawsuit in May 2007 against Jeppesen DataPlan Inc. (a subsidiary company of Boeing) on behalf of five persons who were kidnapped by the CIA,

⁸⁶ *Id.* at 715.

⁸⁷ *Id.*

⁸⁸ *Id.* at 768.

⁸⁹ See Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Mission to the United States of America*, ¶ 22, U.N. Doc. A/HRC/15/25/Add.3 (June 15, 2010) (by Shaista Shameem).

⁹⁰ See James Risen & Mark Mazzetti, *Blackwater Guards Tied to Secret C.I.A. Raids*, N.Y. TIMES (Dec. 10, 2009), http://www.nytimes.com/2009/12/11/us/politics/11blackwater.html?_r=1.

⁹¹ See Adam Ciralsky, *Tycoon, Contractor, Soldier, Spy*, VANITY FAIR, Jan. 2010, available at <http://www.vanityfair.com/politics/features/2010/01/blackwater-201001>.

⁹² See José Luis Gómez del Prado, *The Privatization of War: Mercenaries, Private Military and Security Companies (PMSC)*, CENTRE FOR RESEARCH ON GLOBALIZATION (November 8, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=21826>.

disappearing in overseas “dark prisons” maintained by the U.S.⁹³ Jeppesen would have participated in the rendition by providing flight planning and logistical support. On September 8, 2010, the U.S. Court of Appeals for the Ninth Circuit, sitting *en banc*, affirmed the dismissal of the complaint of five foreign nationals alleging that Jeppesen DataPlan, Inc. (Jeppesen) had violated the Alien Tort Statute, 28 U.S.C. § 1350, by assisting in their forced disappearance and torture by the CIA.⁹⁴ In so doing, the court overturned a three-judge panel decision finding that the state secrets doctrine did not warrant immediate dismissal of the case.⁹⁵

Health

The 2009 annual report of DynCorp International refers to four lawsuits concerning the spraying of narcotic plant crops along the Colombian border adjacent to Ecuador on behalf of three Ecuadorian provinces and 3,266 plaintiffs.⁹⁶

The 2009 DynCorp report states:

The aerial spraying operations were and continue to be managed by us under a State Department contract in cooperation with the Colombian government. The State Department contract provides indemnification to us against third-party liabilities arising out of the contract, subject to available funding. The State Department has reimbursed us for all legal expenses to date. The terms of the contract provide that the State Department will indemnify our operating company against third-party liabilities arising out of the contract, subject to available funding. The State Department has reimbursed us for all legal expenses to date.⁹⁷

From 1991, the State Department contracted the private company DynCorp to supply services for this air-spraying program, known as Plan Colombia, against narcotics in the Andean region. In accordance with a 1998 contract, DynCorp also provides the essential logistics to the anti-drug Office of activities of Colombia, in conformity with three main objectives: eradication of the cultivation of illicit drugs, training of the army and of personnel of the country, and dismantling of illicit drug laboratories and illicit drug-trafficking networks.⁹⁸

⁹³ See *Mohamed v. Jeppesen DataPlan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010).

⁹⁴ *Id.* at 1073.

⁹⁵ *Id.* at 1077.

⁹⁶ See DYNCORP INT’L LLC, QUARTERLY REPORT (FORM 10-Q) 19 (Feb. 8, 2010), available at <http://ir.dyn-intl.com/secfiling.cfm?filingID=950123-10-13389>.

⁹⁷ *Id.* at 19.

⁹⁸ *Id.*

During its visit to Ecuador, the Working Group received information from NGOs on the consequences of the spraying carried out under Plan Colombia on persons living in the frontier region.⁹⁹ An NGO report indicated that one third of the forty-seven women in the study exposed to the spraying showed cells with some genetic damage, and the study established the relationship between the air fumigations of Plan Colombia with damage in their genetic material.¹⁰⁰ Forty-seven women were analyzed, twenty-two in the frontier line in Ecuador and Colombia. There, the women were exposed to the glifosato mixture with POEA + Cosmuflux 411 F from the Plan Colombia air fumigations.¹⁰¹ All of the women presented genetic damage in a third of the sanguine cells as well as symptoms of intoxication.¹⁰² The control group of 25 women, more than 80 km away from the fumigated area, presented cells with scarce genetic damage; most of the cells were in good condition. The study demonstrates that when the population is subjected to this fumigation the risk of cellular damage can increase. Once permanent, the cases of cancerous mutations and important embryonic alterations are increased that prompt, among other possibilities, the rise in abortions in the area.¹⁰³

Self-Determination

The 2004 attempted coup d'état, which was perpetrated in Equatorial Guinea, is a clear example of the link between the phenomenon of mercenaries and PMSCs as a means of violating the sovereignty of States.¹⁰⁴ In this particular case, the mercenaries involved were mostly former directors and personnel of Executive Outcomes, a PMSC that had become famous for its operations in Angola and Sierra Leone.¹⁰⁵

⁹⁹ Chairperson of the Working Group on the Use of Mercenaries, Human Rights Council, *Report of the Working Group on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, Addendum, Mission to Ecuador*, ¶ 47, U.N. Doc. A/HRC/4/42/Add.2 (Feb. 23, 2007) (by Amada Benavides de Pérez).

¹⁰⁰ José Luis Gómez del Prado, *The Privatization of War: Mercenaries, Private Military and Security Companies (PMSC)*, CENTRE FOR RESEARCH ON GLOBALIZATION (November 8, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=21826>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Tracy McVeigh, *Ex-Mercenary Nick du Toit Tells of His Five Years in a "Living Hell" and Why He is Ashamed of War*, THE OBSERVER (June 13, 2010), <http://www.guardian.co.uk/world/2010/jun/13/simon-mann-mercenary-renounces-war>. See also Press Release, Office of the United Nations High Commissioner for Human Rights, U.N. Experts Visit Equatorial Guinea to Discuss the Menace Posed by the Activities of Mercenaries, U.N. Press Release (Aug. 12, 2010), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10273&LangID=E>.

¹⁰⁵ *The Cold-Blooded Blue Blood*, guardian.co.uk (June 28, 2008), <http://www.guardian.co.uk/uk/2007/may/09/equatorialguinea.world>.

The team of mercenaries involved in the coup included two employees of a PMSC, Meteoric Tactical Systems, who were providing security to diplomats of western embassies in Baghdad, including the Ambassador of Switzerland.¹⁰⁶ It also included a security guard who previously worked for the PMSC Steele Foundation, which also provided protection to President Aristide of Haiti.¹⁰⁷

A number of the persons involved in the attempted coup in Equatorial Guinea were arrested in Zimbabwe, others in Equatorial Guinea itself.¹⁰⁸ The coup was intended to overthrow the government and put another in its place in order to get the rich oil resources.¹⁰⁹ In 2004 and 2008 the trials took place in Equatorial Guinea of those arrested in connection with this coup attempt, including of the British citizen Simon Mann and the South African Nick du Toit.¹¹⁰ All foreigners linked to this coup attempt were pardoned in November 2009 by the President of Equatorial Guinea.¹¹¹ A number of reports indicated that trials failed to comply with international human rights standards and that some of the accused had been subjected to torture and ill-treatment.¹¹² The government of Equatorial Guinea has three ongoing trials in the U.K., Spain, and Lebanon against the persons who were behind the attempted coup.¹¹³

Trafficking in Persons

In 2005, 105 Chileans were providing or undergoing military training in the former army base of Lepaterique in Honduras.¹¹⁴ The instruction consisted of anti-guerrilla tactics, such as possible ambushes and deactivation of explosives and mortars, and how to avoid them. The Chileans entered as tourists and were illegally in Honduras, and they used high-caliber weapons

¹⁰⁶ Press Release, Office of the United Nations High Commissioner for Human Rights, U.N. Independent Experts Express Serious Concern at the Execution of Four Men after Concluding their Mission to Equatorial Guinea (Aug. 27, 2010), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10293&LangID=E>.

¹⁰⁷ Robert Collier, Iraq : Global Security Firms Fill in as Private Armies, CorpWatch (March 28, 2004), <http://www.corpwatch.org/article.php?id=11263>.

¹⁰⁸ McVeigh, *supra* note 103.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See, e.g. Amnesty International, *Equatorial Guinea: Submission to the U.N. Universal Periodic Review: Sixth Session of the UPR Working Group of the Human Rights Council, November-December 2009*, 4, AFR 24/005/2005 (Apr. 13, 2009), available at <http://www.amnesty.org/en/library/asset/AFR24/002/2009/en/19e4a019-8d7e-49f8-bb1a-8c3bf38d3ff6/afr240022009en.pdf>; Press Release, Amnesty International, Equatorial Guinea: Trial of Alleged “Mercenary Coup Plotters” Unfair, AFR 24/010/2005 (June 7, 2005), available at <http://www.amnesty.org>.

¹¹³ José Luis Gómez del Prado, *The Privatization of War: Mercenaries, Private Military and Security Companies (PMSC)*, CENTRE FOR RESEARCH ON GLOBALIZATION (November 8, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=21826>.

¹¹⁴ *Id.*

like M-16 rifles and light machine guns. They had been contracted by a subsidiary of Triple Canopy.¹¹⁵

They were part of a group that also included 189 Hondurans recruited and trained in Honduras. Triple Canopy had been awarded a contract by the U.S. State Department. The strong contingent left the country by air from San Pedro Sula, Honduras, in several groups with a stopover in Iceland. They then reached the Middle East, and were smuggled into Iraq.¹¹⁶

The majority of the Chileans and Hondurans were engaged as security guards at fixed facilities in Iraq.¹¹⁷ They had been contracted by Your Solutions Honduras SRL, a local agent of Your Solutions Incorporated, registered in Illinois, which in turn had been subcontracted by Triple Canopy, also based in Illinois.¹¹⁸

Human Rights Violations Committed by PMSCs Against their Employees

There are also the violations that PMSCs may commit against the “security guards” they have recruited and employed to operate in low-intensity armed conflict or post-conflict situations. The personnel of PMSCs are often the victims of wild capitalism. Within this context, it often appears that PMSCs, in their search for profit, neglect security and do not provide their employees with basic rights such as health facilities that are expected in such situations.

PMSCs often put contracted private guards in situations of danger and vulnerability, such as the “private contractors” of Blackwater, killed in Fallujah in 2004 allegedly due to the lack of the necessary safety measures that Blackwater was supposed to provide in order to carry out the mission.¹¹⁹

Likewise, there have been discriminatory acts and irregularities in compliance with the contracts of these employees, who have reported failure to meet basic health or hygiene needs, overcrowding, harsh working conditions, failure to pay their wages, abusive treatment by superiors including isolation, lack of basic necessities such as food and lodging, lack of medical treatment and poor sanitation, as well as the death of security guards in tragic circumstances.¹²⁰

¹¹⁵ *Id.*

¹¹⁶ See Chairperson of the Working Group on the Use of Mercenaries, Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, Addendum, Mission to Honduras*, ¶ 18, U.N. Doc. A/HRC/4/42/Add.1 (Feb. 20, 2007) (by Amada Benavides de Pérez) [hereinafter Working Group Report, Mission to Honduras].

¹¹⁷ *Id.* ¶ 2.

¹¹⁸ *Id.* ¶ 18.

¹¹⁹ José Luis Gómez del Prado, *The Privatization of War: Mercenaries, Private Military and Security Companies (PMSC)*, CENTRE FOR RESEARCH ON GLOBALIZATION (November 8, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=21826>.

¹²⁰ See Working Group Report, Mission to Honduras, *supra* note 115, ¶ 19. See also Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, Human Rights

B. RECENT INITIATIVES TO REGULATE PRIVATE MILITARY AND SECURITY COMPANIES

U.S. Congress “Stop Outsourcing Security Act”

The number of private contractors (207,600) utilized by the U.S. Department of Defense (DOD) for its operations in Iraq and Afghanistan is more than the uniformed personnel (175,000) in those places.¹²¹ Private contractors total 54% of the Pentagon’s workforce in these two war zones.¹²² The privatization of war and outsourcing of inherent State functions to the private sector in Iraq and Afghanistan has raised a number of issues for the U.S. Congress. According to the American Constitution, one of the fundamental responsibilities of Congress is the question of declaring war, which has largely been left to the Executive Branch since World War II.¹²³ With the abolition of the draft, only a small number of Americans are fighting in U.S. wars. The citizenry has subcontracted the war out to a professional warrior class. The citizenry and Congress in the U.S. continue to borrow large amounts of money to wage the wars in Afghanistan and Iraq, amounting to some \$3 trillion, which will have to be paid by their children and grandchildren.¹²⁴ In the first 6 months of 2010 more private contractors—hired guns—(232) have been killed in Afghanistan and Iraq than troops (195).¹²⁵

On February 23, 2010, Representative Jan Schakowsky (D-Ill.) and Senator Bernie Sanders (I-Vt.) of the U.S. Congress, introduced legislation in order to prohibit the use of private security contractors in war zones: The Stop Outsourcing Security Act.¹²⁶ According to the press release issued on that occasion, in 2009 the U.S. employed over 22,000 hired guns in Iraq and Afghanistan that protected diplomats, trained military and police officers, and

Council Report of the Working Group on the use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-determination, Addendum, Mission to Peru, ¶ 68, U.N. Doc. A/HRC/7/7/Add.2 (Feb. 4, 2008) (by José Luis Gómez del Prado).

¹²¹ See JENNIFER K. ELSEA, CONG. RESEARCH SERV., R 40764, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES (2010).

¹²² *Id.* at 11.

¹²³ The power of the executive branch to use force without Congressional approval was codified through the War Powers Resolution, passed in 1973. While it grants the President power to unilaterally use military force for sixty days without need of Congressional authorization, it also requires Congressional authorization to extend the use of force. See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§1541-48 (2006)).

¹²⁴ See Mark Thompson, *More Contractors Than Troops Now Dying in U.S. Wars*, TIME, Sept. 24, 2010, <http://swampland.blogs.time.com/2010/09/24/more-contractors-than-troops-now-dying-in-u-s-wars/#ixzz10YY3IxlS>.

¹²⁵ See T. Christian Miller, *This Year, Contractor Deaths Exceed Military Ones in Iraq and Afghanistan*, PROPUBLICA (Sept. 23, 2010), <http://www.propublica.org/article/this-year-contractor-deaths-exceed-military-ones-in-iraq-and-afgh-100923>.

¹²⁶ See Stop Outsourcing Security Act, H.R. 4102, 110th Cong. § 2(1) (2007).

maintained weapons systems, as well as participated in interrogations and intelligence gathering.¹²⁷ Representative Schakowsky underscored that the behavior of private contractors had endangered the U.S. military, hurt relationships with foreign governments, and undermined U.S. missions overseas.¹²⁸

The Stop Outsourcing Security Act would aim at restoring the responsibility of the American military to train troops and police, guard convoys, repair weapons, administer military prisons, and perform military intelligence.¹²⁹ The bill would also require that all diplomatic security be provided by U.S. government personnel and not by PMSCs.¹³⁰ Any exception that The White House might wish to introduce would, under the new Act, be subject to the scrutiny of the U.S. Congress, which would oversee the contracts.¹³¹

The legislation would also subject contracts exceeding \$5 million to U.S. Congressional oversight, and agencies with military contractors would have to report the number of contractors employed, disclose the total cost of the contracts, and make public any disciplinary actions against employees: information which is not presently available.¹³²

Representative Schakowsky and Senator Sanders indicated that the high salaries offered to contract workers in war zones both burdened U.S. taxpayers and sapped the morale of the U.S. military. While some soldiers who risk their lives for their country struggle to support their families, private security company employees are paid two or three times as much, sometimes pocketing as much as \$1,000 a day.¹³³

They underscored the way private contractors were perceived by military officers in the field who reported that those contractors operated like "cowboys," using unnecessary and excessive force uncharacteristic of enlisted soldiers. They also referred to some specific incidents provoked by "hired guns," such as the Baghdad's Nissour Square massacre of 2007, in which security guards working for the PMSC—then known as Blackwater—were accused of killing 17 Iraqis, damaging the U.S. mission in Iraq and hurting the U.S. reputation all over the world. Later that same year, they said, a security

¹²⁷ See Press Release, Vermont Senator Bernie Sanders, Release: Stop Outsourcing Security (Feb. 23 2010), available at <http://sanders.senate.gov/newsroom/news/?id=e37b6ebc-634a-4684-a27b-ad03431dc617> [hereinafter Sanders Press Release].

¹²⁸ *Id.*

¹²⁹ Dan Kenney, *Home Defense: A New Blackwater Course of Special Interest to Christian Warriors*, NO PRIVATE ARMIES (Apr. 4, 2010), <http://www.noprivatearmies.org/>.

¹³⁰ *Id.* ¶ 19.

¹³¹ *Id.* ¶ 19.

¹³² See Sanders Press Release, *supra* note 126.

¹³³ Press Conference, Vermont Senator Bernie Sanders (Feb. 23, 2010), available at <http://www.sanders.senate.gov/newsroom/media/view/?id=21ec8654-7088-4186-ab3f-c3cc6937d810>.

contractor employed by DynCorp International allegedly shot and killed an unarmed taxi driver.¹³⁴

The main reasons to enact legislation to phase out the activities of private military contractors are that: (i) the U.S. Government is increasingly relying on private security contractors to perform mission-critical and emergency-essential functions; (ii) these private security contractors operate outside the military chain of command and have a history of irresponsible and even criminal behavior, and (iii) high-ranking U.S. military officials have expressed concern that these private security contractors are hampering the ability of the U.S. to achieve the government's goals in Iraq.¹³⁵

The Bill would require, *inter alia*, that:

- within 180 days of enactment, all personnel providing security to U.S. diplomatic and consular missions in Iraq and Afghanistan are U.S. government employees, effectively banning the use of private security contractors for diplomatic security;
- the President to report to the relevant congressional committees whether executive agencies will be able to transition away from the use of private security contractors that perform mission-critical or emergency-essential functions by January 1, 2011. If the President reports that it is not possible for a particular agency to make the transition by January 1, 2011, the Bill requires that the President report why it is not possible, a target date for the transition, and a plan for transition by the target date;
- the President makes certain certifications regarding private security contractors that continue to perform mission-critical and emergency-essential after January 1, 2011;
- the relevant congressional committees may review any government contracts with private security contractors to perform mission-critical and emergency-essential functions that exist after January 1, 2011. It also provides that, with respect to any such contract, the relevant congressional committees may review the accounting practices of the private security contractor. In addition it would provide that an agency agreement with a private security contractor to perform mission-critical or emergency-essential functions may only be renewed if the President certifies that the relevant agency does not have adequate personnel to perform the duties specified in the contract and that the contractor meets certain specifications;

¹³⁴ *Id.* Senator Sanders stated that the American people had always prided themselves on the strength, conduct, and honor of their U.S. States military. He found therefore “very disturbing that now, in the midst of two wars and a global struggle against terrorism, we are relying more and more on private security contractors—rather than our own service members—to provide for our national defense.”

¹³⁵ Stop Outsourcing Security Act, H.R. 4102, 110th Cong. § 2(1)–(9) (2007).

- the relevant congressional committees may access copies and descriptions of all contracts and task orders, worth \$5 million or more for work to be performed in Iraq and Afghanistan, including contracts that were entered into between October 2001 and the date of enactment. The Bill would also provide that, within 60 days of enactment, the relevant agencies must report to the relevant congressional committees on the number of individuals working for contractors in Iraq and Afghanistan, the total cost of contracts, the total number of individuals killed or wounded while working on contracts, and a description of any disciplinary actions that have been taken against any individuals performing contracts.¹³⁶

The report of the Senate Armed Services Committee, "Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan," approved in October 2010, reveals the threat that security contractors operating without adequate U.S. government supervision can pose to the mission in Afghanistan.¹³⁷ This report finds serious gaps in fulfilling that responsibility and concludes that accountability gaps threaten the safety of civilians, U.S. troops and contractors themselves, as well as gravely undermines U.S. military missions.¹³⁸

The Senate Committee's inquiry found, in part that: (i) there are significant gaps in US government oversight of private security contractors in Afghanistan; (ii) the Defense Department has failed to enforce its policies meant to hold private security contractors' accountable and to address serious private security contractor deficiencies; and (iii) failures in vetting, training, and supervising of DOD private security contractors are putting U.S. and coalition troops as well as Afghan civilians at risk.¹³⁹

The U.S. increasingly relies on private contractors in Iraq and Afghanistan to perform a range of services, from filing paperwork to using deadly force. Private military contractors still outnumber U.S. troops there. As of May 2010, there were over 23,000 armed private security contractors in Afghanistan, and as the Committee's inquiry found, operating with inadequate government oversight.¹⁴⁰

¹³⁶ See Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, Human Rights Council *Report of the Working Group on the use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-determination, Addendum, Mission to the United States of America*, ¶¶ 68–71, U.N. Doc. A/HRC/15/25/Add.3 (June 15, 2010) (by Shaista Shameem).

¹³⁷ S. Rep. No. 111-345, x–xi (2010).

¹³⁸ *Id.* at i.

¹³⁹ *Id.* at xi.

¹⁴⁰ Press Release, Human Rights First, Human Rights First Welcomes Senate Report Calling for "Immediate Aggressive Steps" To Private Security Contractor Reform (Oct. 7, 2010), available at <http://www.humanrightsfirst.org/2010/10/07/human-rights-first-welcomes-senate-report-calling-for-immediate-aggressive-steps-to-private-security-contractor-reform/>.

The Swiss Initiative: the Montreux Document of 2008 and the International Code of Conduct of 2010

In 2006, in order to address the demand for a clarification of legal obligations under IHL and IHRL, as regards PMSCs, the Government of Switzerland and the International Committee of the Red Cross launched what has been known as the Swiss Initiative, an international process of consultations with main stakeholders: governments, the new industry of PMSCs, and civil society.¹⁴¹ The Swiss Initiative has been supported, in addition to the Swiss government, by the governments of the U.S. and the U.K. where most of the industry (70%) and the lobbies of the new security industry is located: the International Peace Operations Association (IPOA)¹⁴² and the British Association of Private Security Companies (BAPSC).¹⁴³

On September 17, 2008, the process led to a common understanding by seventeen States¹⁴⁴ known as the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict¹⁴⁵ (the Montreux Document), setting out what the signatories view as the relevant IHL and IHRL applicable to PMSCs as well as a set of good practices for them.

It should be noted that this initiative represents only part of the wide spectrum of countries and their approaches: only seventeen governments signed the Montreux Document in 2008, and it is presently supported by only thirty-four States as an instrument negotiated outside the U.N. It is a useful instrument so far as it identifies existing obligations of States, PMSCs and their personnel under IHL and IHRL. The description of the good practices section which is aimed at setting out guidelines could have proved to be a useful tool for both PMSCs, and State activities. Unfortunately, neither

¹⁴¹ *The Montreux Document on Private Military and Security Companies*, SWITZERLAND FED. DEP'T. OF FOREIGN AFFAIRS (last modified Aug. 10, 2009), <http://www.eda.admin.ch/psc>.

¹⁴² The founder of the International Peace Operations Association is Doug Brooks, a specialist in African security issues. He has been an Adjunct Faculty member at American University and an Academic Fellow and Research Associate with the South African Institute of International Affairs (SAIIA), Johannesburg.

¹⁴³ *Andy Bearpark CBE Director General*, BRITISH ASSOCIATION OF PRIVATE SECURITIES COMPANIES, http://www.bapsc.org.uk/about_us-andy_bearpark.asp (last visited Mar. 15, 2011) (The Director General of the British Association of Private Security Companies is Andy Bearpark, a former senior Official of Her Majesty's Government. He has also served as Director of Operations and Infrastructure for the Coalition Provisional Authority (CPA) in Iraq.).

¹⁴⁴ Permanent Representative of Switzerland to the U.N., Letter dated October 2, 2008 addressed to the Secretary-General of the Security Council, U.N. Doc. A/63/467- S/2008/636 (October 6, 2008) (by Peter Maurer) (Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the U.K., Ukraine, and the U.S. States of America).

¹⁴⁵ *Id.*

PMSCs nor the main governments outsourcing military and security functions, in general, have followed these good practices as models.¹⁴⁶

The Montreux Document reiterates the existing IHL and IHRL norms as well as the principle that States retain their obligations under these areas of law, even if they choose to contract with PMSCs to perform certain activities.¹⁴⁷ The State continues to have the duty to respect and ensure human rights.¹⁴⁸ Within this context, it should be noted that, according to Article 5 of the Draft Articles on the responsibility of States for internationally unlawful acts of the U.N. International Law Commission, States are not only responsible for their organs, but also for acts committed by non-State actors.¹⁴⁹ Respect for human rights implies refraining from activities that could violate human rights committed by State organs or agents and private entities attributable to them.¹⁵⁰ Therefore, the outsourcing of armed forces or police functions may imply responsibility for the State that delegates such powers: “[w]hatever the level of individual responsibility, the State will retain responsibility if violations of international law are committed by private contractors acting in a public capacity to which power has been delegated.”¹⁵¹

In addition, in accordance with the due diligence principle, States have responsibility to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by acts not only of their State agents but also those caused by PMSCs or their staff (private persons or entities) that impair human rights.¹⁵²

¹⁴⁶ As an example one could mention the government of Canada, one of the 17 signatory governments of the Montreux document. The Canadian Army outsourced the security of some of its operations in Afghanistan to at least 4 PMSCs, including Blackwater. In 2008, one Canadian soldier was shot dead in Afghanistan in a cross fire involving employees of two private military companies: Compass Integrated Security Solutions and USPI. *See Report Into Death of Canadian Soldier Reveals Mistakes*, CBCNEWS (Last Updated Jan. 29, 2009) (describing the incident and an official report which concludes the soldier was killed by insurgents). On June 16, 2009, almost a year after Canada had signed the Montreux Document, neither the Ministry of Defense nor the Ministry for Foreign Affairs would answer questions about the compliance of the private military and security companies contracted by the Canadian government in Afghanistan with the good practices contained in the Document. *See Un Silence Qui Derange*, RADIO-CANADA.CA (June 16, 2009), <http://www.radio-canada.ca/nouvelles/National/2009/06/16/002-Firmes-privees-guerres.shtml>.

¹⁴⁷ THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT ¶ 1 (2008), available at <http://www.eda.admin.ch/psc>.

¹⁴⁸ *Id.* ¶ 3.

¹⁴⁹ INT’L L. COMM’N, DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, art. 5 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

¹⁵⁰ *Id.*

¹⁵¹ Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications Under International Humanitarian Law*, INT’L COMM. RED CROSS 10 (2004), <http://www.icrc.org/eng/assets/files/other/pmc-article-a-faite.pdf>.

¹⁵² U.N. Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶¶ 16, 18–20, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter Comment No. 31].

The Montreux Document provides a number of good practices, which take into account concerns expressed by the Working Group.¹⁵³ Nevertheless, while it is a good promotional document on existing IHL, it has failed to address the regulatory gap in the responsibility that States have with respect to the conduct of PMSCs and their employees. One of the problems is that the Montreux Document has not been as broad a consultative process as required under the U.N. system. For example, States from Latin America and the Caribbean region did not participate in its work, and the unbalanced representation of Western States (nine out of the seventeen adopting States) denotes the heavy involvement of countries from where most of the security industry originates and operates. Neither U.N. Departments nor the Working Group took part in the Initiative.

As pointed out by the Working Group, the document places a heavier burden of responsibility on Territorial States, those States where PMSCs operate, than on Contracting or Home States, from where these companies originate or from where they have obtained the contracts. The limited scope of obligations for Contracting or Home States can be seen throughout the whole document. Moreover, the restrictive character of the document is illustrated by the indication that IHL is only applicable during armed conflict, and it fails to include a reference to the State obligation to protect and to apply the due diligence principle.¹⁵⁴

The commercial logic of the private military and security industry appears to be the impetus behind the Swiss Initiative document. For example, good practice 17 proposes “to consider pricing and duration of a specific contract as a way to promote relevant IHL and IHRL,” and the Initiative has therefore *de facto* recognized the validity of the new industry instead of proposing a moratorium on such recognition until the good practices which it has developed are translated into reality and pertinent mechanisms put in place. The Working Group noted that the industry lobby had played an important role in the elaboration of the Document and in the Initiative’s process in general.¹⁵⁵

Nothing in the Montreux Document indicates that States should ensure that existing laws, including criminal laws, are enforced, or that international

¹⁵³ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶¶ 47, 51, U.N. Doc. A/HRC/7/7 (Jan. 9, 2008) (by José Luis Gómez del Prado).

¹⁵⁴ Comment No. 31 [80], *supra* note 151, ¶ 8; *see also* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶¶ 56–64, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie).

¹⁵⁵ Although the Preface of the Document only indicates that “Representatives of civil society and of the private military and security industry were consulted,” the Working Group has received information that both IPOA and BAPSC played a key role in the negotiations behind scene.

standards, such as the prohibition on torture and other cruel, inhumane or degrading treatment¹⁵⁶ and requirements that PMSCs and their employees be held accountable for serious crimes, are upheld. Nor is there any provision in the document that States should strengthen government standards for procurement, contracting and management of the private military and security industry backed by an effective reporting mechanism.

For the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, the worst corporate-related human rights abuses occur amid armed conflict over the control of territory, resources or a government itself—where the human rights regime cannot be expected to function as intended and illicit enterprises flourish. Even reputable companies such as security firms protecting company installations and personnel may be involved in human rights abuses. Although businesses increasingly seek guidance from States, governments are reluctant and poorly equipped to provide such assistance. His proposed “protect, respect and remedy” framework is supposed to lay the foundations of a system for better managing business and human rights. It comprises State duties and corporate responsibilities. It includes preventative and remedial measures and involves all relevant actors: States, businesses, affected individuals and communities, civil society, and international institutions.¹⁵⁷

Finally, the approach in the paragraphs on Contracting, Territorial and Home States excludes the States from where the manpower is recruited by PMSCs, in most cases without consultations with the respective governments. It also fails to provide for a centralized system at the State level in Territorial and Home States which would be responsible for registering all private military and security industry contracts for applying common standards and for monitoring contracts.¹⁵⁸

Following the Swiss Initiative, promoted by the Swiss, the U.K. and U.S. governments, a parallel initiative was launched in June 2009. It created an International Code of Conduct for Private Security Service Providers, which was partially approved during 2010. Supporting this project are industry associations, in particular the IPOA¹⁵⁹ and the BAPSC, corporations and individual business leaders, the Swiss, the U.K., and the U.S. governments. As explained in a circular letter sent by the Head of Political Division IV, Human

¹⁵⁶ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁵⁷ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Council, *Business and Human Rights: Further Steps Toward the Operationalization of the “Protect, Respect, and Remedy” Framework*, §§ III–V, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (by John Ruggie).

¹⁵⁸ José Luis Gómez del Prado, *Private Military and Security Companies and the UN Working Group on the Use of Mercenaries*, 13 J. OF CONFLICT & SECURITY L., 429, 429-450 (2008).

¹⁵⁹ *PMCs Adopt Official Code of Conduct*, BLACK FLAG CAFE (Nov. 10, 2010), <http://cafe.comebackalive.com/viewtopic.php?f=1&t=51995&start=0>.

Rights of the Swiss Directorate of Political Affairs DP,¹⁶⁰ the final goals of this new initiative are to set high standards for the industry worldwide and to support the establishment of a voluntary enforcement mechanism to ensure compliance with such standards.

In contrast with the Montreux Document under the Swiss Initiative, the International Committee of the Red Cross has only been participating as an observer, the same as the Working Group, in the process of the International Code of Conduct. This point is important to emphasize because the way the International Code of Conduct is presented by the Swiss government gives the impression that these are not two parallel initiatives, but rather that the Code of Conduct is the follow-up of the Montreux Document, with the International Committee of the Red Cross playing the same role and having the same responsibilities as for the Montreux Document. The regional conferences organized by the Swiss government to promote both the Montreux Document and the International Code of Conduct helps to add to this confusion.¹⁶¹

On November 9, 2010 the first part of the International Code of Conduct was endorsed in Geneva by fifty-eight PMSCs¹⁶² at a conference hosted by the Government of Switzerland with the participation of representatives of industry, governments, clients and other stakeholders.¹⁶³ Participants also discussed the second goal of the initiative, namely the establishment of an independent enforcement mechanism. As of April 1, 2011, thirty-six additional companies had signed the Code of Conduct totaling ninety-four PMSC.¹⁶⁴

¹⁶⁰ For the text of the letter see INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY PROVIDERS 1 (2010), available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede150311audcodeofconduct/_sede150311audcodeofconduct_en.pdf.

¹⁶¹ The Swiss government is organizing a series of regional conferences to promote the Swiss Initiative which includes both the Montreux Document and the International Code of Conduct as a follow up to the Document. The first of such regional events will take place in Santiago de Chile on 12-13 May 2011.

¹⁶² 58 *Private Security Companies Sign International Code of Conduct for Private Security Companies*, International Code of Conduct for Private Security Companies (last visited Apr. 14, 2011), available at <http://www.icoc-ppsp.org/>.

¹⁶³ INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, ¶¶ 9–12 (2010), available at <http://www.icoc-ppsp.org/>.

¹⁶⁴ *See Id.*

**Signatory Companies of the International Code of Conduct by U.N.
Geopolitical Regional Groups¹⁶⁵**

Western European & Others (66)	Africa (17)	Asia & the Pacific (9)	Latin America (2)
Belgium (1)	Ghana (1)	Afghanistan (1)	Guatemala (1)
Canada (2)	Kenya (4)	Iraq (1)	Trinidad and Tobago (1)
Cyprus (1)	South Africa (9)	Pakistan (2)	
Denmark (1)	Sierra Leone (1)	Philippines (1)	
France (3)	Uganda (2)	Saudi Arabia (1)	
Germany (1)		UAE (3)	
Greece (2)			
Netherlands (2)			
New Zealand (1)			
Sweden (1)			
Switzerland (2)			
United Kingdom (34)			
United States (14)			

This first step in developing the Code has been the easiest one. The IPOA and BAPSC, as well as many of the PMSCs, have already elaborated codes of conduct which make reference to U.N. human rights norms and international instruments, such as the Universal Declaration.¹⁶⁶ The codes have been for more than 10 years subject to self-regulation without implementation or efficacy whatsoever.

The next step in development of the Code of Conduct implies more difficulties: governments and PMSCs promoting this second phase will have to agree and find the necessary resources for the functioning of a mechanism responsible for enforcing the Code as well as to study sanctioning PMSC employees who may have committed violations to the Code and eventually compensate the victims. Without the elaboration of this mechanism, which is to be elaborated within the next 18 months, the whole Swiss Initiative would be but a campaign of public relations. It is also planned that within 24 months a conference be convened to revise the International Code of Conduct.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* ¶ 21. For example, "Signatory companies will comply, and will require their Personnel to comply, with applicable law which may include international humanitarian law, and human rights law as imposed upon them by applicable national law, as well as all other applicable international and national law."

In conformity with Article 11, signatory companies and other stakeholders of the Code “will appoint a multi-stakeholder steering committee of 6–9 members.”¹⁶⁷ They will function as a temporary board and “will be responsible for developing and documenting the initial arrangements for the independent governance and oversight mechanism.”¹⁶⁸ According to information received by the Working Group, the steering committee has been established and is composed of three representatives from civil society (Chris Albin-Lackey, Human Rights Watch; Olver Behn, European Interagency Security Forum; Devon Chaffee, Human Rights First), four representatives from PMSCs (Michael Clark, G4S; Mark DeWitt, Triple Canopy; Estelle Meyer, Saracen International; Sylvia White, Aegis) and two representatives from governments (Josh Dorosin, U.S. State Department; David Hunt, U.K. Foreign Commonwealth Office).

Behind this project are the main lobbies of the new industry, such as IPOA and BAPSC, corporations, and directors of PMSCs who have the active support of the governments of Switzerland, the U.K., and the U.S.

This second phase of the Swiss Initiative appears like a “juvenal bath” presenting a much better image of the product PMSCs are promoting. One may raise the question as to whether it would not be more appropriate to name this second phase “operation chameleon.” Not only IPOA has changed its name, but also a number of companies appear with new names: Blackwater is Xe, Sandline is Aegis. Even the Code of Conduct is “for Private Security Providers.” Any reference to the “Montreaux Document On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security During Armed Conflicts” has been abandoned—*notwithstanding* that in Article 1 of the Preamble of the Code there is an important reference to the essential role PMSCs play in “military activity.”

The companies take the responsibility to respect the human rights of, and fulfill humanitarian responsibilities towards, all those affected by their business practices, including personnel, clients, suppliers, shareholders, and the population of the area in which services are provided. They also recognize the importance of respecting the local cultures they encounter in their work, including respect for those individuals with whom they come into contact as a result of their activities.

The purpose of the Code of Conduct is to create a baseline for the development of enforceable standards and to lay a foundation for effective enforcement of those standards. The Code commits signatory companies to abide by high standards that promote good practices as well as to monitor and assess the potential adverse human rights impacts of their activities and establish effective corporate governance frameworks, including reporting and monitoring, for preventing such adverse impacts.

¹⁶⁷ *Id.* ¶ 11.

¹⁶⁸ *Id.*

It must be pointed out that behind this operation, as a number of articles of the Code (3, 4.c) emphasize, one of the main purposes of the Code is to “protect the interests of their clients.” And as underlined in Article 14 “The Code itself creates no legal obligations and no legal liabilities on the Signatory Companies.”

The fact that among the 94 PMSC signatories of the Code one can find companies such as Blackwater,¹⁶⁹ United Resources Group, G4S and its affiliate ArmorGroup or Triple Canopy, all involved in grave human rights all violations; companies such as DynCorp, Blackwater, and Aegis, all with a troubled past; Executive Director of Triple Canopy who boasts that the code of his company has served as a model for the Code; the Swiss Department of Political Affairs, one of the main movers of the Code, was aware that in 2004 the Swiss Ambassador in Baghdad was protected by employees of Meteoric Tactical Solutions, involved in the attempted coup d’Etat in Equatorial Guinea; and the Ugandan company Saracen Uganda Ltd. allegedly involved in training paramilitaries in Puntland, Somalia, is also a signatory of the Code are not signs to inspire much confidence. However, one will have to wait for the Steering Committee to complete its work in the next 18 months to find out whether or not these signs are confirmed.

A relevant question taht could be posed to the promoters of such a Code is: why they opened to signature a code for which oversight mechanisms, such as: (i) certification; (ii) auditing and monitoring; (iii) reporting have yet to be developed. Would it not have been more logical to have developed the oversight mechanisms first before opening the Code for signature? PMSCs accepting the Code of Conduct should have had in front of them a package of obligations before signing it, which has not been the case.

The self-regulatory and voluntary mechanisms established by the International Code of Conduct have been welcomed by the Working Group as a useful but insufficient mechanism to regulate and monitor the activities of PMSCs.¹⁷⁰ The Working Group agrees with the Swiss government that these are parallel and complementary mechanisms and firmly believes that self-regulatory measures should be integrated in legally binding instruments at the national, regional and international level. The Working Group also sees favorably and as a certain guarantee that representatives from Human Rights Watch and Human Rights First are members of the Steering Committee. It hopes that they will assure that the oversight mechanisms provide the maximum of guarantees.

¹⁶⁹ Mark Mazzetti & Eric Schmitt, *Blackwater Founder Said to Back Mercenaries*, N.Y. Times, Jan. 21, 2011, at A4 (Erik Prince, the founder of Blackwater presently operating from Dubai, would be behind operations against Somali pirates carried out by the PMSC Saracen).

¹⁷⁰ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. Human Rights Council, ¶ 43, U.N. Doc. A/HRC/10/14 (Jan. 21, 2009) (by Alexander Nikitin).

However, one has to point out the insufficiency of such voluntary mechanisms, even those with oversight procedures. The Organisation for Economic Co-operation and Development (OECD) has elaborated Guidelines which establish voluntary principles for the activities of multinational enterprises. They represent standards of behavior for multinational enterprises. Adhering countries have a National Contact Point whose role is to promote and ensure the effective implementation of the OECD Guidelines, including providing good offices for the handling of specific instances.

In June 2005, the Australian National Contact Point (ANCP) for the OECD Guidelines for Multinational Enterprises received a submission from several Australian and overseas non-governmental organizations (“the complainants”) alleging that a U.K.-controlled multinational, Global Solutions Limited, in providing immigration detention services to the Australian Government through its Australian incorporated subsidiary GSL (Australia) Pty Ltd (GSL Australia), had breached the Human Rights and Consumer Interests provisions of the Guidelines.¹⁷¹ Among the allegations was the detention of children in violations of the 1989 Convention on the Rights of the Child, the indefinite and arbitrary detention of asylum seekers in contravention of Article 9 of the 1996 International Covenant on Civil and Political Rights and Article 9 of the 1948 Universal Declaration of Human Rights. GSL Australia and the complainants engaged in a constructive manner to resolving many of the issues. However, six years after the submission no substantive action has been taken.¹⁷²

For the time being, the International Code of Conduct is rather a document of “good intentions” since the oversight mechanisms to control such “good intentions” by the security industry are not yet in place. The security industry has two years to do so. Two years is exactly the time which has been allocated to the open-ended intergovernmental working group created by the HRC to consider the possibility of elaborating an international regulatory

¹⁷¹ *Human Rights Council of Australia et al vs Global Solutions*, OECD WATCH (last visited Apr. 14, 2011), http://oecdwatch.org/cases/Case_73.

¹⁷² The mandatory detention of asylum seekers in Australia and their human rights violations in detention centers run by private security companies is dealt with in the report of the Working Group on Arbitrary Detention. Working Group on Arbitrary Detention, Commission on Human Rights, *Report of the Working Group on Arbitrary Detention, Addendum, Visit to Australia*, U.N. Doc. E/CN.4/2003/8/Add.2, (Oct. 24, 2002). The objective of the visit was to inquire about the application of international human rights standards to asylum-seekers detained in several Immigration Detention Centers in Australia. The following are some of the matters of concern to the U.N. Working Group: (1) Detention of vulnerable persons especially unaccompanied young children, elderly persons, pregnant women, handicapped persons...(2) A collective depression syndrome due to the legal framework for detention with acts of self-destruction such as corporal lacerations by jumping onto the razor wire, lips sewn, suicide attempts...(3)The practice of collective or individual isolation; (4) Gross inadequacy of guarantees for lawyers and the judiciary; (5) Charges levied on detainees; (6) Delays in releasing detainees; (7) Ramification of the privatization of the centers on the legal status of detention.

framework on the regulation, monitoring and oversight of the activities of private military and security companies.¹⁷³ What a coincidence!

The Council of Europe and the European Union

Concerned by the widespread outsourcing of inherently governmental functions to the private sector and the impact of PMSCs in eroding the State monopoly on the legitimate use of force, the Parliamentary Assembly of the Council of Europe requested, in 2008, its Political Affairs Committee to carry out a study and make concrete proposals on this matter. The Report of the Political Affairs Committee, *Private Military and Security Firms and the Erosion of the State Monopoly on the Use of Force*, was submitted by its Rapporteur, Mr. Wolfgang Wodarg, Germany, Socialist Group, to the Parliamentary Assembly of the Council of Europe on December 22, 2008.¹⁷⁴ On the basis of the report, the Parliamentary Assembly recommended to the Committee of Ministers to elaborate on a Council of Europe instrument aimed at regulating the relations of its Member States with PMSCs. The Assembly indicated the minimum standards that the instrument should contain with regard to the activities of PMSCs. The Assembly also indicated its preference for a legally binding document.

The Assembly suggested that such an instrument should contain a minimum of elements with regard to the monopoly of the legal use of force and the functions and activities performed by PMSCs. In its approach, the instrument should:

- define those areas of internal and external security that must remain a sovereign function of the state and that are ‘inherently governmental’ in character;
- standardize the principles for the safeguard of the state monopoly on the use of force;
- contain a clear affirmation of the dividing line between internal and external security as established by law and the constitution;
- contain a clear indication prioritizing conflict prevention over rapid reaction as well as handling conflicts by civilian approaches instead of using force to solve conflicts.

¹⁷³ See Human Rights Council Res., 15/26, Open-Ended Intergovernmental Working Group to Consider

the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies, 15th Sess., Oct. 7, 2010, U.N. Doc. A/HRC/RES/15/26.

¹⁷⁴ Report of Political Affairs Committee, *Private Military and Security Firms and the Erosion of the State Monopoly on the Use of Force*, Parl. Eur. Doc. 11787 (Dec. 22, 2008) (by Wolfgang Wodarg).

With regard to the functioning of PMSCs, the instrument should:

- specify and define the principles for the use of PMSCs;
- determine the criteria regarding the activities, obligations, duties, responsibilities, including accountability for breaches of international humanitarian law and human rights abuses, and the areas of tasks and competences of PMSCs;
- define the criteria that must be applied to admission of PMSCs for carrying out military and security services;
- contain provisions for the establishment of a registration and licensing system for PMSCs;
- adjust and harmonize national and international criminal law (especially rules of law enforcement) regarding criminal acts committed by PMSCs and their personnel;
- introduce specific rules for PMSCs in civil law (especially as regards conditions of liability);
- set up a legal and regulatory framework for PMSCs who wish to export their services (e.g. mission and project-oriented authorizations which provide democratic oversight, control, supervision, accountability and specification of responsibilities; it would be advisable to combine such regulations with the existing arms export regimes);
- require parliamentary approval for missions of PMSCs outside their national territory, and provisions establishing co-operation, information sharing and assistance between the States involved;
- contain provisions for the application of laws and rules governing deployment of national military and police forces abroad to PMSCs as well;
- contain rules and regulations (e.g. code of conduct and requirement to register with the foreign ministry) for business companies, non-governmental or humanitarian organizations etc. who wish to contract PMSCs for their security purposes abroad;
- contain provisions obligating the PMSC sector to set up a framework for self-control, including a binding code of conduct and the establishment of a (PMSC-Ombudsman) and/or a (PMSC violations investigation team);
- contain regulations regarding: (i) an effective vetting and training system for PMSC personnel; (ii) effective oversight and investigatory system; (iii) an effective enforcement system, and (iv) the protection of social rights of PMSC employees.

In 2009, the above-mentioned report was reviewed by the Committee on Legal Affairs and Human Rights¹⁷⁵ of the Parliamentary Assembly, which in its recommendations warmly welcomed the report of the Political Affairs Committee. It made several amendments to support and further strengthen the critical approach adopted by the Political Affairs Committee and aiming at clarifying and completing some provisions of the draft recommendation from a legal point of view.

It stressed the risk of impunity raised in the recommendation pointing out that PMSC personnel have committed serious human rights violations, and the complicated contractual and diplomatic relations involved (between the staff member and the PMSC, between the PMSC and its home State, often via intermediaries, and between the home State and the State of deployment) make it very difficult, if not impossible, to bring perpetrators to justice. It indicated that any contractual clauses excluding liability are null and void, as they are in contracts to that similarly disadvantage third parties (the victims of any violations). The Committee on Legal Affairs and Human Rights intended to address the issue of impunity of PMSC personnel in its report on impunity in Europe in the framework of the periodic debate on the state of human rights in Europe.

Within this context it should also be mentioned that the European Commission has financed the Project PRIV-WAR. This is a collaborative, three-year research project financed by the European Community which was launched in January 2008. It has been coordinated by the European University Institute through the Academy of European Law in Florence and LUISS “Guido Carli” in Rome.¹⁷⁶ The project has assessed the impact of the increasing use of private military companies and security companies (PMCs/PSCs) in situations of armed conflict. It has analyzed the international responsibility and accountability of corporations. It has also examined the regulatory framework at national, European and international levels, with a view to ensuring improved compliance with international humanitarian law and human rights.

A major objective of the project has been to explore ways in which the EU could regulate or facilitate the regulation of PMCs/PSCs with a view to assure compliance with IHRL and IHL. The results of this three year project as well as the PRIV-WAR recommendations to the European Commission concerning possible options for the European Union Regulatory Action will be presented at the end of April 2011.¹⁷⁷

¹⁷⁵ Opinion of the Committee on Legal Affairs and Human Rights, *Private Military and Security Firms and the Erosion of the State Monopoly on the Use of Force*, § 1, Parl. Eur. Doc. 11801 (Jan. 27, 2009) (by Kimmo Sasi).

¹⁷⁶ The other universities involved in the project are: Justus Liebig Universität Giessen; Riga Graduate School of Law; Université Panthéon-Assas (Paris II), Centre Thucydide; University of Sheffield and Utrecht University. See *About the Project*, PRIV-WAR (last visited Apr. 14, 2011), <http://priv-war.eu>.

¹⁷⁷ *Id.*

United Nations System (Departments, Programs and Agencies)

One of the major consequences that the terrorist attacks carried out in Western countries at the beginning of the 21st Century and the occupation of Afghanistan and Iraq have had in activities of the U.N. agencies as well as other providers in relief and development operations has been an increased demand for security. The agencies of the U.N. system have been confronted with the problem that their small unit of security were unable and unprepared to assure the security for the deployment in the field of humanitarian relief and development operations, particularly that such operations need to be deployed fast and with urgency in extremely insecure environments such as Iraq, Afghanistan and Somalia and other unstable states.

The pressure for security in the respective U.N. agencies comes both from substantive humanitarian relief and development programs inside the organizations and from the security industry itself. Indeed, PMSCs have and continue to exert pressure to bear in order to expand their role into the humanitarian sphere. Counting humanitarian agencies as clients has multiple advantages for such companies as enhancing their reputation, providing distance from the mercenary label, and gaining a foothold in a potentially lucrative market.¹⁷⁸

The increasing size and spread of international humanitarian operations has contributed to greater numbers of major violent incidents against humanitarian personnel,¹⁷⁹ which has in turn prompted humanitarian organizations on occasion to outsource their security needs. Despite a number of years of acknowledged usage of PMSCs, a lack of transparency on the issue persists among humanitarian actors—and in many cases even within individual agencies. Headquarters in many U.N. agencies tend to take a hands-off approach in this area, allowing country-level managers to decide what is needed and feasible for their particular context. Local offices, operating in a policy vacuum, thus make these important decisions with little or no guidance from their headquarters (indeed sometimes even without their knowledge), and do not generally practice close oversight and monitoring of the PMSCs activities.¹⁸⁰ In 2007 the Center on International Cooperation and the Humanitarian Policy Group established a joint research team in collaboration with the U.N. Office for the Coordination of Humanitarian Affairs in order to

¹⁷⁸ Spearin, Christopher, *Humanitarian Non-Governmental Organizations and International Private Security Companies: The "Humanitarian" Challenges of Moulding a Marketplace* 8-9 (Geneva Centre for the Democratic Control of Armed Forces, Policy Paper No. 16, 2005), available at http://www.securitytransformation.org/images/documentos/382_FileContent.pdf.

¹⁷⁹ STODDARD, ABBY, ADELE HARMER, AND KATHERINE HAVER, PROVIDING AID IN INSECURE ENVIRONMENTS: TRENDS IN POLICY AND OPERATIONS 20 (2006).

¹⁸⁰ Cockayne, James (2006) *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study*, New York: International Peace Academy.

carry out a study on the use of private security companies in humanitarian operations. The study was financed by the Government of Canada.¹⁸¹

The main purpose of the research study was to shed light on a widespread but under-examined practice, and to feed into a process to establish norms and standards of usage to guide humanitarian actors. It identified the main areas of concern and/or potential increased risk, in particular the: (1) ad hoc screening of PMSCs, and the lack of systematic referencing of individual companies between humanitarian actors; (2) lack or scarce monitoring by agencies of the contracted PMSCs activities, which could potentially compromise the agency's principles, ethics, or behavioral standards, or, in the worst case scenarios, violate international legal norms; (3) lack of exclusivity in agreements, meaning that the PMSCs could have additional clients, such as belligerent parties, that may reflect poorly on the humanitarian actor's clients; and (4) little or no reference to international standards in hiring practices and scopes of work.

As has been pointed out by one expert hiring security services locally may very well compromise neutrality by feeding into conflict dynamics. It may also create new sources of conflict and insecurity by degenerating into protection rackets or sparking localized arms races. Conversely, use of international PMSCs can compromise acceptance by introducing a foreign element, and distancing the agency from the beneficiaries and host community. Increased isolation from these actors has the dual effect of increasing programming challenges and distancing the agency from one vital source of information that might otherwise enhance its security. Additionally, as one agency visibly increases deterrent measures there is a possibility that other aid actors will switch to utilizing external security measures—creating a domino effect—to ensure they are not perceived as soft targets in contexts where militant movements view aid operations as opportune objects for violence.¹⁸²

In the course of the last two years, the U.N. Security Management System (UNSMS) has been working with the view to coordinating policies and procedures regarding the outsourcing of security to the private sector for the entire U.N. system. The U.N. Security Management System is the body responsible to coordinate, through its security focal points in each of the U.N. departments, agencies and programs, the security regarding matters affecting staff, premises and operations all over the world. The UNSMS has a full body

¹⁸¹ See *Human Rights and Protection of Civilians 2007-08*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA (last modified March 10, 2011), http://www.international.gc.ca/glynberry/civilians-protection-civiles_0708.aspx.

¹⁸² COCKAYNE, JAMES, COMMERCIAL SECURITY IN HUMANITARIAN AND POST-CONFLICT SETTINGS: AN EXPLORATORY STUDY, (2006), available at http://www.securitymanagementinitiative.org/index.php?option=com_docman&task=doc_details&gid=21&lang=en; See also Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶¶ 5, 6, U.N. Doc. A/HRC/15/25 (July 5, 2010) (by José Luis Gómez del Prado).

comprising representatives of all the departments, agencies and programs. It meets twice a year and has a Steering Committee to advise it. The Steering Committee also meets twice a year prior to the meetings of the UNSMS. In October 2010 a PSM working group was set up consisting of the heads of security of ten U.N. departments, agencies and programs in order to elaborate recommendations for the whole U.N. system.¹⁸³ The proposals elaborated by this PSC body in a meeting held in Panama in December 2010 were considered by the UNSMS at its January 2011 meeting. Thirty U.N. departments, agencies and programs¹⁸⁴ agreed on the use of PSC as a measure of last resort as well as on a set of basic recommendations which will be submitted in early 2011 to the U.N. Policy Committee and the Secretary-General in order to issue the appropriate directives for the whole U.N. system. The basic recommendations may include elements such as: (1) the use by the U.N. of armed PSCs should be a measure of last resort to meet its obligations and only when no other options are available such as the protection by the host state, by other member states or using internal U.N. resources.¹⁸⁵ All U.N. agencies that have been using PDCs for a long time would need to legitimize or develop a policy. This should be done in accordance with existing approval security processes, not through the procurement but through the U.N. Security Management System; (2) The use of PSCs would be strictly for protecting people, premises and convoys, no for information gathering, intelligence or other functions; (3) U.N. departments, agencies and programs that may need to use PSC will have to choose from a list of companies that meet agreed criteria; (4) the Office of the High Commissioner for Human Rights would keep the relevant U.N. departments fully briefed on the activities of the Working Group as well as on the open ended intergovernmental working group established by the Human Rights Council to consider the possibility of a regulatory framework for PMSCs.¹⁸⁶

¹⁸³ These are: UNDPKO, UNDP, UNOCHA, UNHCR, UNOHCHR, UNICEF, WHO, FAO, WFP and WIPO.

¹⁸⁴ Two U.N. agencies did not agree on using PSC in any circumstances.

¹⁸⁵ In Afghanistan and Somalia, for instance, security has been outsourced. In Iraq, partly of the security is provided by the host state, partly by a member state present in the country and partly by internal U.N. resources.

¹⁸⁶ Information provided to the Working Group during its 12th Session held at Geneva from April 4–8 2011. Report of the Working Group to the U.N. Human Rights Council, U.N. Doc. A/HRC/18/ (forthcoming).

C. THE PROPOSED CONVENTION BY THE U.N. WORKING GROUP TO REGULATE AND MONITOR PRIVATE MILITARY AND SECURITY

The U.N. Working Group on the Use of Mercenaries

Both the Commission on Human Rights and the HRC decided to reinforce the mandate on mercenarism and related activities by transforming it into a Working Group composed of five independent experts, taking into consideration the geopolitical dimensions of the U.N.¹⁸⁷

The Working Group has not received, however, the support of Western governments. One of the main reasons given is that the question of mercenaries is too closely linked to the period of decolonization and the situation of peoples under foreign occupation. It was during this period of decolonization that the U.N. General Assembly adopted a report from its Sixth Committee, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the U.N. Charter.¹⁸⁸

The view of Western delegations is that the Sixth Committee of the U.N. General Assembly which deals with interrelations of the different branches of international law, such as international criminal law, IHL, State responsibilities, the question of mercenaries and PMSCs should be considered by that Committee and not by the HRC or the Third Committee of the General Assembly.¹⁸⁹

One among many other arguments invoked by States in favor of discussing mercenary-related matters in these U.N. forums is precisely that the right to self-determination is a fundamental human right encompassing civil, political as well as economic, social and cultural rights; that Article 1 common to the two international covenants on human rights contains the right of the peoples to self-determination and that that article is closely related to the right to development. In addition, recent events have shown the implications of the activities of PMSCs in the enjoyment of human rights.

In 2009, the HRC specifically requested the Working Group to:

- (a) Consult with intergovernmental and non-governmental organizations, academic institutions and experts on the content and scope of a possible draft convention on private companies offering military assistance, consultancy and other military security-related services on the international market . . .

¹⁸⁷ G.A. Res. 2005/2, ¶ 7, U.N. Doc. E/CN.4/RES/2005/2 (Apr. 7, 2005).

¹⁸⁸ G.A. Res. 2625 (XXV), U.N. GAOR 25th Sess., Supp. No. 18, U.N. Doc. A/8082, at 121 (Oct. 24, 1970).

¹⁸⁹ See *infra* the statements delivered by the representatives of the European Union, Norway and the U.K. to the U.N. Human Rights Council in one of the next sections of this article.

- (b) Share with Member States, . . . , elements for a possible draft convention on private military and security companies, requesting their input on the content and scope of such a convention . . . ;
- (c) Report to the fifteenth session of the Human Rights Council on the progress achieved in the elaboration of the draft legal instrument for proper consideration and action;¹⁹⁰

In order to fulfill this mandate, the Working Group has conducted a series of consultations with governments of the five geopolitical regions of the world on issues relating to the impact of the activities of PMSCs on the enjoyment of human rights, as well as regulating and monitoring the activities of PMSCs.¹⁹¹

It has also organized a series of consultations with a wide range of stakeholders on the content and scope of a possible draft Convention. In this context, an initial draft text of the Convention was circulated on July 15, 2009 to some 250 experts, academics and NGOs to provide their input on the contents and scope of the Convention. The Working Group received some 45 written submissions, comprising a total of over 400 comments.

On the basis of the comments received from the above-mentioned stakeholders and the feedback on the ideas contained in the draft elements during the regional consultations held in the five regions of the world, the Working Group drafted a new text which was shared with Member States.¹⁹²

The draft text of an international instrument, as well as the recommendation of the Working Group to the U.N. to create an open-ended working group entrusted with the elaboration of a convention, were submitted to the HRC at Geneva in September, 2010 and to the General Assembly's Third Committee in November 2010.

The argument that to employ PMSCs is more cost-effective may be true in the short term and provided that a number of socio-economic variables are not taken into consideration, such as the training in the use of weapons and counterinsurgency operations of former militaries and policemen, paid by the

¹⁹⁰ Human Rights Council Res. 10/11, The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, 10th Sess., ¶ 13 (March 26, 2009).

¹⁹¹ José L. Gómez del Prado, *Why Private Military and Security Companies Should be Regulated*, 4 Business and Human Rights Resource Center (Sep. 3, 2010), available at <http://www.reports-and-materials.org/Gomez-del-Prado-article-on-regulation-of-private-and-military-firms-3-Sep-2010.pdf>. (The first consultation for Latin America and the Caribbean was held in Panama in 2007, the second in Moscow for Eastern Europe and Central Asia in 2008. The Working Group held, thereafter, regional consultations in Bangkok in 2009 for Asia and the Pacific, in Addis Ababa for Africa in 2010, and in Geneva for the Western European and Others Group also in 2010.)

¹⁹² *Id.* The Working Group received written submissions from Australia, Azerbaijan, Belarus, Canada, Cuba, Ecuador, Egypt, Guatemala, Lebanon, Qatar, Russian Federation, Serbia, Slovenia, South Africa, Spain (on behalf of the European Union), Switzerland, Trinidad and Tobago, the U.K. of Great Britain and Northern Ireland and the U.S. States of America as well as written submissions from the institutions of the Commonwealth of Independent States (CIS).

taxpayers and not by PMSCs themselves. In this connection it is worth noting the increasing number of militaries who are attracted by the higher salaries are leaving the army in developed and developing countries to join PMSCs.

A way to decrease costs for PMSCs has been to contract more and more former militaries and policemen from developing countries at much lower salaries. Issues of reintegration and post-traumatic stress disorder in individuals returning to their communities from military/security work abroad have not been assessed either. Because of the nature of their contracts thousands and thousands of these “guns for hire” are disposable and available in the market and ready to be employed in any conflict situation.

In fact, the attractive salaries offered by PMSCs are attracting soldiers from national armies, which are suffering a hemorrhage of personnel leaving to join PMSCs. This phenomenon is affecting both developed and developing countries. In order to fight this trend, the government of Canada had to increase the salaries of its most experienced and professional military personnel.¹⁹³ The Chief of the Defense Ministry informed the Working Group during its mission to Chile that, in an attempt to discourage the recruitment of military personnel, many of whom retire before the age of 45 and saw the opportunities proposed by PMSCs to work in conflict or post-conflict areas as incentives to remain active and supplement their pensions, efforts were under way to consider lengthening the military career and offering servicemen better rewards by providing them sufficient pensions to ensure a decent retirement.¹⁹⁴

Why a new international instrument is necessary

In the course of its research the Working Group has found out that there is a regulatory legal vacuum covering the activities of PMSCs and a lack of common standards for the registration, and licensing of these companies as well as for the vetting and training of their staff and the safekeeping of weapons. While a number of rules of IHL and IHRL could apply to States in their relations with PMSCs, the Working Group has observed that there have been challenges to the application of domestic laws in particular for

¹⁹³ DAVID ANTONYSHYN, JAN GROFE & DON HUBERT, PRIV-WAR REPORT—CANADA, BEYOND THE LAW? THE REGULATION OF CANADIAN PRIVATE MILITARY AND SECURITY COMPANIES OPERATING ABROAD 10 (2009) (Men with military backgrounds trade in their uniforms to become guns for hire. They are paid as much as US\$1000 a day by private companies, governments, intergovernmental organizations, ngos or humanitarian organizations to act as bodyguards for VIPs or dignitaries and guard facilities. In 2005, the Canadian Forces increased financial benefits for members of the special forces known as JTF 2. The maximum allowances, in addition to a member’s regular pay, amount to over \$27,000 per year for the most experienced —special operations assaulters.).

¹⁹⁴ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Mission to Chile*, ¶ 13, U.N. Doc. A/HRC/7/7/Add.4 (Feb. 4, 2008) (by José Luis Gómez del Prado).

international PMSCs operating in a foreign State as well as difficulties in conducting investigations in conflict zones.¹⁹⁵ The effect of this situation is that PMSCs are rarely held accountable for violations of human rights. The accountability of private military and security contractors continues to be a challenge, with a startling lack of prosecutions. Such legal gaps need to be addressed at the national, regional, and international levels.¹⁹⁶

Another argument in favor of an international instrument relates to the very nature of the PMSC industry and the impact of the activities of these companies on the enjoyment of human rights. The services provided by PMSCs should not be considered as ordinary commercial commodities that can be controlled through self-regulation initiatives. The functions filled by PMSCs are highly specific and dangerous and involve the trade of a wide variety of military and security services requiring the elaboration of international standards and monitoring mechanisms.

For instance, as was pointed out to the HRC by the representative of the Afghan Independent Human Rights Commission,¹⁹⁷ there have been a number of cases in Afghanistan of collusion of international and security companies in government corruption and illegal businesses. Such activities included creating insecurity with the objective of securing their business and expanding contracts by providing anti-government groups with bribes to ensure the movement of military and humanitarian convoys, as well as providing havens for suspects or alleged perpetrators of human rights violations and crimes against humanity and recruitment facilities of security companies.

Within this context, the Working Group has received information indicating that PMSCs support warlords and rebel groups in some instances:

For instance, allegations suggest that in Afghanistan a number of PMSCs contracted by the Government of the U.S. have a privileged relationship with the Taliban. Others suggest that a German PMSC was considering deploying a significant number of military guards to Somalia to train warlord groups close to the self-proclaimed but not internationally recognized President of Somalia, Abdinur Ahmed Darman.¹⁹⁸

¹⁹⁵ Particularly in Iraq and Afghanistan, but also in Colombia.

¹⁹⁶ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 6, U.N. Doc. A/HRC/15/25 (July 5, 2010) (by José Luis Gómez del Prado) (proposing a draft Convention, for consideration and action by the HRC).

¹⁹⁷ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, Human Rights Council *Report of the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-determination, Addendum, Mission to Afghanistan*, U.N. Doc. A/HRC/15/25/Add.2 (June 14, 2010).

¹⁹⁸ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of*

The current instability in many countries such as Somalia, where PMSCs operate, on the one hand, and the absence of measures to monitor their activities at the international level, on the other, makes their regulation everyday more necessary. The situation in Somalia, is a prototype of such situations:

[While] southern Somalia remains a patchwork of fiefdoms controlled by rival armed groups—a political and security vacuum in which no side is strong enough to impose its will on the others—the relatively stable northern regions of Puntland and Somaliland have suffered increasing spillover from the conflict to the south in the form of targeted killings and bombing.¹⁹⁹

As indicated by the U.N. Monitoring Group on Somalia, of this country's economy depends on the increasing activity of PMSCs in the fight against piracy, the support of the African Union Mission in Somalia (AMISOM) to the Transitional Federal Government, and protection for private enterprises. Most PMSCs and their employees are unaware of the U.N. sanctions and may therefore be operating in violation of the arms embargo.²⁰⁰

Nonetheless, the U.N. resolutions which establish control and monitoring measures for international, regional and sub-regional organizations providing supplies or technical assistance remain silent about PMSCs.²⁰¹

The use of private military and security contractors carries a number of risks both in times of peace as well as during armed conflicts because they can operate as secret armies without any accountability; they are not obliged to obey any military orders or follow the military code of conduct. Rather, their only obligation is to the contract they signed and to comply with IHL on war crimes, genocide, and crimes against humanity which apply to all persons in war.

The fact that PMSC personnel are not usually “mercenaries” is also a strong argument for the adoption of a new instrument. Indeed, the definition of “mercenaries” under the two international conventions dealing with this issue does not generally apply to the personnel of PMSCs legally operating in

Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, ¶ 5, U.N. Doc. A/HRC/15/25 (July 5, 2010) (by José Luis Gómez del Prado); See also *Somali Warlord Hires German Mercenaries to Provide Security Services*, SPIEGEL ONLINE (May 25, 2010), <http://www.spiegel.de/international/world/0,1518,696580,00.html>.

¹⁹⁹ Letter dated 10 March 2010 from the Chairman of the Security Council Committee Pursuant to resolutions 751 (1992) and 1907 (2009) Concerning Somalia and Eritrea Addressed to the President of the Security Council, summary, U.N. Doc. S/2010/91 (Mar. 10, 2010).

²⁰⁰ *Id.* ¶¶ 219–20.

²⁰¹ See, e.g., S.C. Res. 1916, U.N. Doc. SC/RES/1916 (Mar. 19, 2010).

foreign countries.²⁰² Since there exists already an international convention on mercenaries it is necessary to illustrate this point. In the first place one should distinguish between *jus in bello*, the right in war, (IHL) which provides norms to be respected during conflicts but which does not ban or prohibits war and *jus ad bellum*, the right to war.

Article 47 of Protocol I to the Geneva Conventions which defines a mercenary in the participation of international armed conflicts does not prohibit them and the only sanction it imposes is that a mercenary is not entitled to the prisoner of war status.²⁰³ A mercenary, however, is entitled to the fundamental guarantees under the Geneva Conventions. The definition of Article 47 that provides the elements which must be fulfilled in order to label a person a mercenary has been copied literally into the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.²⁰⁴

According to the definition under the Convention, to be considered a mercenary the person has to fulfill the five conditions set out in that instrument: (a) been recruited to combat in an armed conflict; (b) is motivated by the desire for private gain; (c) is neither a national of a party to the conflict nor a resident; (d) is not a member of the armed forces of a party to the conflict; (e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.²⁰⁵

Each of these elements taken individually poses problems. For example: the person has had to be recruited to combat, i.e. to take part in direct hostilities. This has to be specified in the contract, which usually is not. In addition, the person may or not be taking part in direct participation in hostilities, which is not always the case. The question of proving that the person is only motivated by the desire of gain is extremely hard to prove. As to the question that in order to be a mercenary the person must not be a national or a resident of a party to the conflict excludes a large number of persons. For instance, under this criteria all the citizens of countries participating in the Iraq war (Americans, British, Dutch, etc.) would not be catalogued as mercenaries.

In addition, one has to bear in mind that the five elements of the definition are cumulative, and all of them must be fulfilled: not only one or a few. Moreover, other problems which had not been envisaged at the time have appeared now with the contracting out of military and security functions to the

²⁰² See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict art. 47(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; International Convention against the Recruitment, Use, Financing and Training of Mercenaries art. 1, December 4, 1989, 2163 U.N.T.S. 75 [hereinafter Mercenaries Convention] (setting out the definition of mercenaries). See also José Luis Gómez del Prado, *The Privatization of War*, CENTRE FOR RESEARCH ON GLOBALIZATION (Nov. 8, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=21826>.

²⁰³ AP I, *supra* note 201.

²⁰⁴ Mercenaries Convention, *supra* note 201.

²⁰⁵ *Id.*

private sectors. For instance, the definition is ambiguous or does not foresee the activities of PMSCs in armed conflicts. It does not make the distinction between active and passive participation in combat. It leaves out the training of militaries, the operational assistance to the armed forces and the strategic planning. It does not envisage how to regulate services to combatants (medical, water and electricity supply, engineering activities, or maintenance). Finally it does not deal with the protection of premises and of persons. These last two issues are dealt with in IHL but only for international conflicts. Nevertheless, PMSCs are present in all types of situations and not only in international conflicts.

One should also bear in mind that a number of soldiers and policemen contemplate PMSCs as a way to continue making lots of money after their retirement. In fact, the majority of these companies have been created or are managed by former militaries or ex-policemen for whom this is big business.²⁰⁶

The aim of such a binding legal instrument is not the outright banning of PMSCs, but rather to establish minimum international standards for States parties to regulate the activities of PMSCs and their personnel. However, taking into account that there are no common standards at the national level, Member States may wish to take the elements contained in the new international instrument as an opportunity to strengthen or establish mechanisms for the companies operating strictly at the domestic level.

In addition, taking into account the extensive outsourcing of military and security functions and the growing role of PMSCs in armed conflicts, post-conflict and low intensity armed conflict situations it is also recommended to prohibit the outsourcing of inherently State functions to PMSCs in accordance with the principle of the State monopoly on the legitimate use of force.²⁰⁷

²⁰⁶ For example, MPRI (Military Professional Resources Incorporation) was created by four former generals of the U.S. Army when they retired, among which General Carl E. Vuono, Chief of the Army during the Gulf War and the invasion of Panama; General Crosbie E. Saint, former Commander in Chief of the USA Army in Europe and General Ron Griffith. The President of MPRI is General Bantant J. Craddock. The same is true for Blackwater and its affiliate companies or subsidiaries which employ former directors of the C.I.A. such as Cofer Black, former Chief of the Counter Terrorism Center; Enrique Prado, former Chief of Operations and Rof Richter, second in command of the Social Scientists refer to this phenomenon as the *Rotating Door Syndrome*. Clandestine Services of the Company. See *Background*, THE CENTER FOR PUBLIC INTEGRITY (last updated May 20, 2004), <http://projects.publicintegrity.org/wow/bio.aspx?act=pro&ddlC=39>; Amy Farnsworth, *Romney Names Terrorism Policy Advisors*, BOSTON.COM (Sept. 13, 2007), http://www.boston.com/news/politics/politicalintelligence/2007/09/romney_names_te.html.

²⁰⁷ According to Martin L. Van Creveld, there has been a “revolution in military affaires” (RMA) in which nation-States are being replaced by “war-making entities.” MARTIN L. VAN CREVELD, *THE TRANSFORMATION OF WAR* (1991). Such trend has been on the rise for a number of years, but the magnitude of its dimension has taken dramatic and worrisome dimensions with the involvement of private military and security contractors in the wars of Afghanistan and Iraq.

In the proposed text of a U.N. Convention on PMSCs, the Working Group defines inherent State functions as those:

functions, which are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs under any circumstances. Among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State Party considers as inherently State functions.²⁰⁸

In this regard, the Working Group is concerned by the trend of outsourcing by the U.S. Government which two of its members observed during their mission in the U.S. in 2009. Indeed, the DOD authorizes its contractor personnel, when such functions are specified in the contract, to “conduct or support intelligence interrogations, detainee debriefings, or tactical questioning.”²⁰⁹ In 2010, following the human rights abuses by contractors in Abu Ghraib, the U.S. Congress recommended, in the National Defense Authorization Act²¹⁰ for Fiscal Year 2010, to ban the use of contractors in the

²⁰⁸ See HRC Resolution 15/22, Open-ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies, 15th Sess., Sept. 13-Oct. 1, 2010, art. 2, 19, U.N. Doc. A/HRC/RES/15/26 (Oct. 1, 2010). [hereinafter Annex II]. See also reference in previous paragraphs to Article 5 of the Draft Articles on the responsibility of States which stipulates that States are not only responsible for their organs, but also for acts committed by non-state actors. INT’L L. COMM’N, DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, art. 5 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

²⁰⁹ See Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, Human Rights Council *Report of the Working Group on the use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-determination, Addendum, Mission to the United States of America*, ¶ 19, U.N. Doc. A/HRC/15/25/Add.3 (June 15, 2010) (by Shaista Shameem).

²¹⁰ The Act eventually reflected a compromise. It provides that, “no enemy prisoner of war . . . or any other individual who is in the custody or under the effective control of the Department of Defense . . . may be interrogated by contractor personnel.” However, contractor personnel with proper training and security clearances may be used as linguists, interpreters, report writers and information technology technicians in interrogations provided that (a) they are covered by the same rules governing detainee interrogations as government personnel performing the same interrogation functions and (b) that Department of Defense personnel will oversee the contractor’s performance. The prohibition may be waived if such a move is vital to the national security interests of the U.S. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §1038, 123 Stat. 2190 (2010).

interrogation of detainees. Despite that recommendation, the U.S. President rejected this limitation, allowing that "in some limited cases, a contracted interrogator may possess the best combination of skills to obtain critical intelligence."²¹¹

The proposed new instrument would reaffirm the responsibilities of States regarding the activities of PMSCs.²¹² States are responsible for implementing their obligations under IHRL, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation to take appropriate measures to prevent, investigate, punish and provide effective remedies for misconduct by PMSCs and their personnel. These legal responsibilities of States, which remain even if States choose to contract out certain activities, have been emphasized by the U.N. Human Rights Committee. The Committee stated that "the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant."²¹³

"Finally, the proposed new binding legal instrument" is aimed at ensuring "that States take the necessary measures to promote transparency, responsibility and accountability in their use of PMSCs and their personnel, as well as establish mechanisms for the rehabilitation of victims."²¹⁴

Within the U.N., the HRC constitutes the best forum to address these challenges and elaborate a new international instrument aiming at the regulation, oversight and monitoring of PMSCs. Indeed, the HRC is the only forum in which civil society, academics, non-governmental organizations and human rights national institutions can interact with States on given issues through several procedures which have been established by the Council, such as open-ended working groups.

Debate at the U.N. Human Rights Council

The report of the Working Group containing the draft text of the proposed Convention to regulate and monitor PMSCs was discussed during the

²¹¹ *Mission to the U.S.*, *supra* note 107, ¶ 19.

²¹² See *infra* Annex I articles 1, 4, 5, 8-11, Rep. of the Working Group on the use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, transmitted by the Secretary-General to the General Assembly pursuant to the Commission on Human Rights resolution 2005/2 on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, art. 1, 4, 5, 8-11, U.N. Doc. A/63/325 (Aug. 25, 2010) [hereinafter *Working Group Report Pursuant to Resolution 2005/2*].

²¹³ Human Rights Comm., *Cabal v. Austl.*, Comm. No. 1020/2001, para. 7.2, U.N. Doc. CCPR/C/78/D/1020/2001 (2003).

²¹⁴ *Working Group Report Pursuant to Resolution 2005/2* *supra* note 110, art. 12-19, 28.

15th Session of the HRC, held at Geneva from 13 September to 1 October 2010.²¹⁵

Over twenty-five State delegations participated in the debate. A number of non-governmental organizations also took the floor including Advocates for Human Rights and the Afghanistan Independent Human Rights Commission. Pakistan (on behalf of Organization of the Islamic Conference), Syria (on behalf of the Arab Group), Nigeria (on behalf of the African Group), Afghanistan, Algeria, Argentina, Azerbaijan, Brazil, Chile, China, Cuba, Ecuador, Egypt, Libya, Morocco, Russian Federation, South Africa, Sudan and Venezuela expressed support for additional measures to regulate and monitor the activities of PMSCs at the national and international level as well as for the recommendation of the Working Group to establish an open-ended intergovernmental working group to elaborate a Convention on the basis of the text and the elements presented by the Working Group. In addition, many of these delegations also supported:

the holding of a high-level round table of States, under the auspices of the United Nations, to discuss the fundamental question of the role of the State as holder of the monopoly of the use of force, with the objective of facilitating a critical understanding of the responsibilities of the different actors, including private military and security companies, in the current context, and their respective obligations for the protection and promotion of human rights and in reaching a common understanding as to which additional regulations and controls are needed at the international level.²¹⁶

The E.U., U.K., and U.S. supported neither the draft Convention proposed by the Working Group nor the recommendation to establish an open ended intergovernmental working group.

The main arguments put forward by Belgium, on behalf of the E.U. were that, while acknowledging the importance that the PMSC industry should be properly regulated, it did not consider this issue as a primarily matter for the HRC. The issue of regulating PMSCs interrelates with several branches of international law such as the law of the use of force, IHL, international

²¹⁵ Office of the High Commissioner for Human Rights, *"It's high time to close the legal gap for private military and security contractors"*—UN expert body on mercenaries, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10000&LangID=E>. See also Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 6, U.N. Doc. A/HRC/15/25 (July 5, 2010) (by José Luis Gómez del Prado); See also Draft Convention *infra* Annex I.

²¹⁶ General Assembly, Human Rights Council, *Promotion And Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 7, U.N. Doc. A/HRC/7/L.7 (March 19, 2008).

criminal law and State responsibility law. Any consideration of elaborating an international regulatory framework of PMSCs should examine the existing international regulatory frameworks and should take into account all not just U.N. international and regional initiatives, such as the Montreux Document and other initiatives such as the one launched by the European Community and the Council of Europe

For the U.K., PMSCs were not primarily a human rights issue and fell outside the competence of the HRC. The U.K. also disputed the competence of the Working Group to deal with this subject. The Montreux Document had reiterated existing international law with regard to State obligations to regulate PMSCs. Therefore, no new added value would be obtained from a new international instrument regulating States obligations.

The U.K. promoted high standards of the PMSC industry in order to reduce the risks that the activities of PMSCs might give rise to IHRL or IHL concerns or have a negative impact on international security and stability. It had carefully considered regulation of PMSCs and concluded that the regulatory structure suggested in the draft convention by the Working Group would be impossible for States to enforce and would not be effective. The promotion of high standards would be best achieved through a combination of robust regulation in the U.K. through a trade association based on a Voluntary Code of Conduct agreed with and monitored by the government using its position as a big buyer of PMSC services to promote compliance with that Code and seeking an International Code for the industry consistent with the U.K. Code which would cover all aspects of PMSC organization and operation worldwide.

The U.S. took very seriously issues regarding private security companies, military contractors and their accountability. It agreed that private security providers should be accountable for their actions and that challenges did remain but they were best addressed by a strengthened implementation and oversight and best practices by the industry and not through a new human rights instrument. In addition, the draft Convention proposed by the Working Group was not an appropriate foundation for negotiations between States. It would address all matters regarding security guards anywhere and would also ban private contractors to provide knowledge transfer with military, security or police application. This would likely prohibit certain training and education activities and have an impact on the training and professionalization of national militaries and law enforcement agencies and U.N. peacekeeping efforts.

The U.S. was supportive of the Initiative promoted by the Swiss government to draft an International Code of Conduct for PMSCs. Such Code of Conduct when completed would set out best practices for private security service providers even where enforcement of the law was a challenge and should be given a chance to mature before further action was taken. Unfortunately, the resolution ill-advisedly prioritized consideration of a legally binding instrument when additional laws were what was most needed at this point. The U.S. was disappointed that their and other delegations' suggestions

to adequately address these concerns were not fully reflected in the final resolution.

The U.S. acknowledged the importance of the issues regarding PMSCs, but the Convention would not produce an effective resolution of those issues and would divert valuable time efforts and resources from a more practical approach. Furthermore, the well-intentioned resolution would risk creating new issues that have not been adequately appreciated and considered.

Switzerland, in explaining its abstention welcomed the possibility of a new binding instrument on the regulation and monitoring of PMSCs. Such an instrument would need to be adopted on the basis of a large consensus among States. It regretted that the resolution had been adopted by a vote and not by consensus. Switzerland was in favor of better regulation of PMSCs and their use in armed conflict. The Swiss Initiative was complementary to the elaboration by the Working Group of a new draft convention and the Code of Conduct could be seen as a useful transition tool before the establishment of a binding legal framework was in place. It was the understanding of Switzerland that the open ended intergovernmental working group to be established by the resolution would include in their debates the frameworks established by the Swiss Initiative.

Norway, in explaining its abstention, underscored the growing trend of using PMSCs to assume various security and military assignments as concerning in particular because the use of such companies for combat-related activities implied a risk of blurring the distinction drawn in IHL between combatants and non-combatants: thus undermining the protection of civilians as well as the security of both soldiers and humanitarian workers. There was a strong need for clearer and more restrictive regulations of State use of PMSCs for such assignments. However, Norway believed that the development of a new legal instrument in the area of IHL lied outside the mandate of the HRC.

Her Majesty's representative forgot to refer to the case of Danny Fitzsimons, a former British soldier who had been:

diagnosed as suffering from Post-Traumatic Stress Disorder (PTSD) in January 2004, while still in the army. Assessments by consultant psychiatrists in May 2008 and June 2009 reported that the symptoms had worsened. Despite this, in August 2009, he was hired by ArmorGroup and sent out to Iraq without undergoing a full medical assessment. Within 36 hours of his arrival, the incident took place in which...he killed two colleagues and injured an Iraqi.²¹⁷

ArmorGroup is a British transnational private security company operating in 27 countries and a founder and full member of the two main

²¹⁷ Paul Gerrard, *Betrayed-Post-Traumatic Stress Disorder Casualties of War*, THE SOCIALIST (Feb. 3, 2010), <http://www.socialistparty.org.uk/issue/610/8775>.

lobbies of the security industry: the IPOA and BAPSC. These two lobbies together with the governments of the U.K., the U.S., and the Swiss government have been the prime movers behind the Montreux Document. Despite these facts and that IPOA and BAPSC have codes of conduct for the private guards based on the Universal Declaration of Human Rights, no vetting procedures were applied in the case of Danny Fritzsims as is the general practice with PMSCs.²¹⁸ The legally binding Convention would aim at preventing such cases by requesting governments to regulate the industry and assume their responsibilities.

A number of contradictions were also contained in the arguments put forward by the delegations of the E.U., Norway, the U.K. and the U.S. On the one hand, they affirmed that the issues surrounding PMSCs were not solely a within the realm of human rights and disputed the competence of the HRC and its Working Group to deal with this matter. On the other hand, they fully supported the Swiss Initiative and the International Code of Conduct, the primary aim of which is the promotion and respect of human rights by the managers and employees of PMSCs.²¹⁹

It should also be pointed out that if the Working Group was not competent to deal with such matters it is difficult to understand why the governments of the U.K.²²⁰ and the U.S.²²¹ invited the Working Group to visit their respective countries and entered into a fruitful dialogue with the two independent experts of the Group who visited the U.K. and U.S. regarding

²¹⁸ Terri Judd and Tom Peck, *Security Industry to Review Vetting after Report on Murder Suspect*, THE INDEPENDENT (Aug. 15, 2009), <http://www.independent.co.uk/news/uk/home-news/security-industry-to-review-vetting-after-report-on-murder-suspect-1772618.html>.

²¹⁹ In this connection, the final version of the International Code of Conduct for Private Security Service Providers dated 9 November 2010, states that the PSC endorsing this Code commit to the following principles, as set forth in this Code: (c) *to operate in a manner that recognizes and supports the rule of law; respect the human rights, and protect the interests of their clients; (d) to take steps to establish and maintain an effective internal governance framework in order to deter, monitor, report, and effectively address adverse impacts on human rights; (e) to provide a means for responding to and resolving allegations of activity that violates any applicable national or international law or this Code, (...)*. With regard to the human rights to be respected as a matter of priority, the Code of Conduct specifically addresses: Arbitrary Detention; Prohibition of Torture or other Cruel, Inhuman or Degrading Treatment or Punishment; Sexual or Gender Based Violence; Human Trafficking; Prohibition of Slavery and Forced Labour; Rights of the Children, namely Prohibition on the worst forms of Child Labour; Discrimination; Respect for Privacy and Property; Freedom of Expression and Peaceful Assembly; Freedom of Association.

²²⁰ Rep. of the Working Group on the use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination: Rep. of the Mission of the Working Group to the U.K. of Gr. Brit. and N. Ir. (26-30 May 2008), Human Rights Council, 10th Sess., Mar. 2- 27, 2009, para. 1, U.N. Doc. A/HRC/10/14/Add.2 (Feb. 19, 2009).

²²¹ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Mission to the United States of America*, ¶ 1, U.N. Doc. A/HRC/15/25/Add.3 (June 15, 2010) (by Shaista Shameem).

matters such as the lack of accountability, oversight of PMSCs, and human rights violations committed by PMSCs.

One would be tempted to think from the statements of Western delegations that some governments are of the opinion that when a State does something wrong it is a human rights concern, but when the private sector does it, it is just business as usual.²²²

South Africa is not a Member of the HRC and therefore could not vote. It had been behind the scene as the main mover in the negotiations of the resolution and held informal consultations with all delegations in order to accommodate to the maximum extent the concerns expressed by Western States in a revised text of the resolution. South Africa emphasized the point that the mandate of the open ended intergovernmental Working Group would be to consider the possibility of elaborating an international regulatory framework. Nothing could be a substitute for a transparent and all-inclusive intergovernmental process. The intergovernmental Working Group would be a forum for all to receive input such as the Montreux Document and other suggestions²²³ as well as a dialogue to find solutions. Additionally, South African representative stated that the HRC should be the home and the platform for those needed it most and

where democracy was destroyed by the machinations of some private military security companies, whose actions in Africa had left behind destruction and suffering. This was a globalised world, where borders were collapsing. The Council must keep pace with these developments and make sure that those responsible anywhere would be held accountable, and victims would have recourse.²²⁴

²²² D. Isenberg, *Sloppy Language and Human Rights*, THE HUFFINGTON POST (Oct. 6, 2010), http://www.huffingtonpost.com/david-isenberg/sloppy-language-and-human_b_751992.html. "What I find interesting about the comments from countries like Belgium, USA, Norway, and UK was that they do not consider the issue of private military and security contractors a human rights issue. Yes, of course, some shade their response by saying (Belgium) it is not 'primarily' a human rights issue or (U.S.) that other existing laws are more appropriate for considering the issue. But, at least with respect to private security, if not private military, contractors, where the salient issue is ensuring that people with guns don't do things they should not do, they are, as a definitional issue, no different from regular military forces . . . So judging from the state's objections listed above one might be forgiven for concluding that at least some countries think that when a state does something wrong it is a human rights concern. But when the private sector does it, it is, perhaps, just business as usual? I can't help but think of George Orwell's famed 1946 essay, 'Politics and the English Language' which focused on the link between sloppy language and sloppy thinking."

²²³ See e.g. *Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe on the 'Private Military and Security Firms and the Erosion of the State Monopoly on the use of Force.'* (Dec. 22, 2008), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc08/EDOC11787.pdf>.

²²⁴ Press Release, United Nations Office at Geneva Human Rights Council Establishes Working Group on Activities of Private Security Companies, Renews Mandate on Sudan and Somalia, Statement of Jerry Matthews Matjila, South Africa (Oct. 1, 2010),

South Africa called on the HRC to send a strong signal to those private companies making profits by committing human rights violations and overthrowing governments that their actions would not be tolerated anymore.

Nigeria introduced the draft resolution with a series of amendments negotiated 30 minutes before the vote took place, taking into account all concerns expressed in order to accommodate them with the view of adopting the text of the resolution by the largest possible consensus. The mandate of the open-ended intergovernmental Working Group would be to consider and discuss the possibility of developing a legally binding instrument among other options, to serve as a regulatory framework at the international level. As in other intergovernmental processes, the main aim of the motion tabled was to enter into a discussion with all stakeholders as to how to address the problem. For that it was necessary to explore all the issues and then to move forward to negotiate. The fears expressed by a number of delegations were not founded; the resolution aimed at ensuring accountability of PMSCs operating extraterritorially.

Despite all the efforts deployed by the delegation of South Africa and the sponsors recognized both by Belgium, on behalf of the E.U. and Norway, the resolution was put to a vote by the U.S. The HRC adopted by 32 votes in favor, 12 against with 3 abstentions for the draft resolution presented by Nigeria on behalf of the African Group.²²⁵ The draft resolution had been negotiated by the delegation of South Africa that had organized a number of informal consultations in order to include the concerns of Western delegations and adopt the text by consensus. Their concerns had been included as much as possible in the revised draft.

The following delegations voted against the draft resolution: Belgium, France, Hungary, Japan, Poland, Rep. of Korea, Rep. of Moldova, Slovakia,

[http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/970F00950D5C0681C12577AF005CFEB4?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/970F00950D5C0681C12577AF005CFEB4?OpenDocument)

²²⁵ See *infra* Annex II. The text of the draft resolution was negotiated and changes made to accommodate the concerns of the Western countries right up to 30 minutes before the voting started. Cuba, Russia and Venezuela co-sponsored the new text, along with the African Group even after changes. China was awaiting instructions from the capital and could not confirm co-sponsorship. Brazil, which had submitted language very much along the text adopted could not get instructions from the capital because of the upcoming presidential elections. It is interesting to underscore that during the debate of the report of the Working Group, the representative of South Africa informed the U.N. Human Rights Council that South Africa had repatriated the corpses of 40 South African citizens killed in Iraq who had been employed as private security guards. As it has been pointed out in previous paragraphs of this article, some 2,000 private contractors have been killed in Afghanistan and Iraq from 2001 to 2010 and over 10,000 have been injured. The figures regarding the killing are most probably higher due to the fact that many cases may have not been indicated to the U.S. Department of Labor by families in developing countries or by the fact that in a number of cases the companies do not declare their employees in order to make more profits. South Africa has been the first and only State to report that its citizens employed by PMSC have been killed, though as indicated many other countries have also been affected.

Spain, Ukraine, U.K. and U.S.²²⁶ Three Members abstained: Maldives, Norway and Switzerland. The remaining 32 Members of the HRC voted in favor: Angola, Argentina, Bahrain, Bangladesh, Brazil, Burkina Faso, Cameroon, Chile, China, Cuba, Djibouti, Ecuador, Gabon, Ghana, Guatemala, Jordan, Kyrgyzstan, Libya, Malaysia, Mauritania, Mauritius, Mexico, Nigeria, Pakistan, Qatar, Russian Federation, Saudi Arabia, Senegal, Thailand, Uganda, Uruguay and Zambia.²²⁷

The title of the resolution, as adopted,²²⁸ reads now: “Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of PMSCs.” The words “on the elaboration of a legally binding instrument,” as well as “of the impact of the activities and on the enjoyment of human rights” have been deleted.

Operative paragraph 4 of the resolution was also changed to take into account Western States concerns and reads now:

*for the purpose of transparency and inclusivity to establish an open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the impact of the activities of private military and security companies including their accountability, taking into consideration the principles, main elements and the draft text for a possible convention proposed by the Working Group as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.*²²⁹

²²⁶ The United Nations geopolitical distribution in five blocks has not changed since the inception of the Organization and does not correspond to the real world in the twenty-first century. This is reflected in the voting pattern in different U.N. bodies and organs. For instance, Japan and the Republic of Korea, which belong to the Asia and Pacific Group, vote generally as Western European and other States do. Former Eastern European States, such as Hungary, Poland and Slovakia, which now form part of the European Union, vote as Western European and Other States. Countries such as Moldavia and Ukraine, which are not part of the European Union, but which aspire to be integrated in it, usually vote as Western European and Other States.

²²⁷ The Council also adopted, by 32 votes in favor, 12 against with 3 abstentions, a resolution extending the mandate of the Working Group for three additional years. The resolution was introduced by the representative of Cuba. *See infra* Annex II.

²²⁸ *Id.*

²²⁹ *See infra* Annex II (emphasis added).

Finally, operative paragraph 6, reads now: “Further decides that the open-ended intergovernmental working group shall present its recommendations at its twenty-first session.”²³⁰

CONCLUDING REMARKS

The main aims of the proposed international convention elaborated by the Working Group are to address a number of concerns shared by the international community, such as the lack of transparency, accountability and, in some cases immunity and impunity PMSCs and their employees enjoy. These issues are undermining the mere foundations of democratic institutions all over the world.

In this context, it should be recalled that for the sake of security for all members of society, citizens, at least in Western democracies, have implicitly agreed not to use force individually but to give the legitimate monopoly of the use of force to the State. We are now witnessing that what we, as citizens, have granted to the State as an inherently function to guarantee security for all as a public good is being privatized and contracted out by the State: only those able to afford it will be enjoying security. The proposed convention underlines the need to share information on companies in an open and transparent way, in order to provide greater public and parliamentary scrutiny.

The text also emphasizes the responsibility of PMSCs, not merely through self-regulatory processes but as responsible entities of society linked to the principle that States are always responsible for protecting, respecting and remedying human rights violations even if they have chosen to contract out certain activities with PMSCs. In addition, it opens the avenue to the responsibility of intergovernmental organizations such as the U.N. or NATO, which in the spur of the anarchical globalization of the economy are increasingly outsourcing security functions to the private sector.

For the last two decades Cuba has been at the forefront of the HRC on the issue of mercenaries and the activities of private companies offering military assistance, consultancy, and other military security-related services on the international market. And it has been the main sponsor of the resolutions adopted on mercenaries in the U.N.

The position of the Western Group has been a rejection of the Cuban motions by voting against the establishment, mandate, and recommendations of the Working Group.²³¹ Member States of the Western Group, and principally the U.K. and U.S., where approximately 70% of the PMSCs are located, have discredited the resolutions presented by Cuba on the basis that these private contractors are not mercenaries but employees of commercial

²³⁰ *Id.*

²³¹ For a brief account of some of the same conclusions I draw in this section see also Amol Mehra, *A Pyrric Victory at the United Nations over the 21st Century's "Privateer Industry?"* RIGHTRESPECT, Oct. 14, 210, <http://www.rightrespect.com/2010/10/14/a-pyrric-victory-at-the-united-nations-over-the-21st-century-%C2%A8privateer-industry%E2%80%9D/>.

entities legally registered fulfilling contracts outsourced by governments, mainly of the U.S., multinational companies, intergovernmental, and non-governmental organizations providing such activities as training, intelligence and passive security. In addition, they claim that the HRC is not the appropriate forum since the matter of PMSCs is not primarily a human rights issue.

However, since 2001 the use of these private contractors to support operations in Iraq and Afghanistan, and the human rights violations in which they have been involved has been the focus of international attention. It has generated debate about the type of functions PMSCs should fulfill, the norms under which they should operate and how to monitor their activities.

To respond partly to these concerns, the U.K. and the U.S., with the government of Switzerland, the IPOA—for the U.S.—BAPSC—for the U.K.—launched the Swiss Initiative which led in 2008 to the adoption of the Montreux Document. It reiterates the norms of IHL and IHRL and sets out a series of good practices to be followed on a voluntary basis by PMSCs. However, these excellent examples cannot be left to self-regulation if they are meant for something else than window dressing: an enforcing mechanism is necessary. Left to self-regulation by the security industry, the good practices contained in the Montreux Document appear more as a public relations operation because PMSCs continue to fail to apply them.²³²

Because of their impact in the enjoyment of human rights, the Working Group was convinced that a legally binding instrument regulating and monitoring their activities at the national and international level was necessary. Its 2010 reports to the HRC and the General Assembly recommend the U.N. take action on this issue.

For the first time, a different resolution dissociating the activities of PMSCs from the traditional resolution on mercenaries was tabled this year at the HRC in Geneva. The main mover of this resolution has been South Africa, a country that has been compelled to repatriate the corpses of 40 South African private guards contracted by PMSCs operating in Iraq. The original text of the resolution requesting the establishment of an intergovernmental open-ended working group with the mandate to elaborate a legally binding instrument on the regulation, monitoring and oversight of the impact of the activities of PMSCs on the enjoyment of human rights, changed substantially and was

²³² For example, PMSCs committed human rights violations in the Iraqi prison of Abou Ghraib, summary executions at Nissour Square in Baghdad, and continue to lack vetting procedures in cases such as that of former soldier Danny Fitzsimons, who had been diagnosed as suffering from Post-Traumatic Stress Disorder (PTSD) in January 2004, May 2008 and June 2009. Fitzsimons was hired by ArmorGroup, sent out to Iraq without undergoing a full medical assessment and 36 hours after his arrival killed two colleagues and injured an Iraqi may suffice to demonstrate that the activities of these guns for hire must be regulated and monitored. See Paul Gerrard, *Betrayed-Post-Traumatic Stress Disorder Casualties of War*, THE SOCIALIST (Feb. 3, 2010), <http://www.socialistparty.org.uk/issue/610/8775>.

weakened by the introduction of amendments in order to accommodate concerns of Western countries.

Although adopted by a large number of favourable votes (32-12-3),²³³ the negative vote of the delegations of the Western Group is a clear indication that the interests of the new expanding security industry—its annual market revenue is estimated to be over \$100 Billion—have been quite well-defended, as has been the case in a number of other occasions. Relatedly, it is worth mentioning that the regional consultation for Western States scheduled to be hosted by the government of Spain in Madrid, in October 2010, had to be cancelled due to the lack of interest showed by Western governments in participating.

However, the resolution adopted by the HRC opens a process for all stakeholders to elaborate an international framework to regulate and monitor the activities of PMSCs. The elements and the draft text of a possible Convention presented by the Working Group will be one among many other initiatives for the elaboration of such international regulatory framework. The “good practices” and the norms of IHL and IHRL reiterated and contained in the Montreux Document should also be considered as well as the initiatives of the Parliamentary Assembly of the Council of Europe. Indeed, the Council of Europe has been seized by two expert reports indicating the need to adopt a legally binding instrument regarding PMSCs.²³⁴ That proposed instrument contains recommendations which have not been addressed by the Working Group such as the prioritization of conflict prevention to rapid reaction and handling conflicts by civilian approaches instead of using force to solve conflicts.

Since the U.N. Working Group was established in 2005 in general and more particularly since the HRC decided in October 2010 to establish an open ended intergovernmental working group to consider a regulatory framework for PMSCs, one important development has occurred in the Council’s Advisory Committee. Indeed, the progress report²³⁵ on the right of peoples to peace, prepared by the drafting group of the Advisory Committee on this issue,

²³³ It is important to mention that four members of BRICS (Brazil, Russia, China and South Africa with the exception of India) are behind this resolution. BRICS is the group of emerging economies accounting for more than a quarter of the world’s land and more than 40% of world population. They form a strong geopolitical alliance in the United Nations. See Konstantin Rozhnov, *Bric Countries Try to Shift Global Balance of Power*, BBC NEWS (April 15, 2010), <http://news.bbc.co.uk/2/hi/8620178.stm>. This in addition to the vote of Pakistan on behalf of Organization of the Islamic Conference, Syria on behalf of the Arab Group and Nigeria on behalf of the African Group.

²³⁴ Political Affairs Comm., *Private Military and Security Firms and the Erosion of the State Monopoly on the Use of Force*, Doc. No. 11787 (2008), <http://assembly.coe.int/images/IcoDocExistPDF.gif>; Comm. on Legal Affairs and Human Rights, *Private Military and Security Firms and the Erosion of the State Monopoly on the Use of Force: Opinion*, Doc. No. 11801 (2009),

²³⁵ Progress Rep. on the Right of Peoples to Peace, Human Rights Council, 6th Sess., Jan. 17-21, 2011, U.N. Doc. A/HRC/AC/6/CRP.3 (Dec. 22, 2010). This document was discussed and adopted at the Advisory Committee’s session held in January 2011.

devotes a whole section to PMSCs and proposes the following standards for a future declaration on the right to peace:

(a) States should refrain from outsourcing inherently state military and security functions to private contractors. They should establish an international regime with clear rules regarding the oversight and monitoring of existing private military and security agencies; and (b) States shall ensure that PMSCs, their personnel and any structures related to their activities perform their respective functions under officially enacted laws consistent with international human rights and humanitarian law. They shall take such legislative, administrative and other measures as may be necessary to ensure that PMSCs and their personnel are held accountable for violations of applicable national or international law.²³⁶

The rapidity with which the Swiss Initiative has moved since the establishment of the Working Group by the U.N. in 2005, first to elaborate the Montreux Document which reiterates the norms in IHL and proposes good practices that PMSCs should follow, and secondly in elaborating an International Code of Conduct with oversight mechanisms must be considered a very positive development indeed. The Working Group hopes that the oversight mechanism will be finalized and enter into force as soon as possible. Such self-regulatory mechanism is necessary but will never replace the State obligations which should be regulated by a binding international instrument.

Another major development has been the discussions which have taken place in the U.N. system regarding the outsourcing of security to the private sector. In several of its reports to the HRC and the General Assembly, the Working Group, having observed the lack of coordination and the absence of a policy and procedures regarding the use of PMSCS by the U.N., has recommended that U.N. departments, offices, organizations, programs and funds establish an effective selection and vetting system and guidelines containing relevant criteria aimed at regulating and monitoring the activities of PMSCs working under their respective authorities. In doing so they should ensure that the guidelines comply with human rights standards and IHL.²³⁷

²³⁶ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 5, U.N. Doc. A/HRC/15/25 (July 5, 2010) (by José Luis Gómez del Prado).

²³⁷ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 60, U.N. Doc. A/HRC/7/7 (Jan. 9, 2008) (by José Luis Gómez del Prado) [hereinafter Jan. 9 Working Group Report]; Working Group on the Use of Mercenaries, *Report of the Working Group on the use of mercenaries as a means of violating human rights and*

The Working Group welcomes the activities that have been carried out in the U.N. system aiming at agreeing upon a common policy and procedures regarding the use of PMSCs.

The launching by the European Commission of the three year project PRIV-WAR in 2008, of which the primary objective has been to propose to the countries of the E.U. a common regulatory framework for PMSCs, is regarded as a very positive initiative. This has been one of the major recommendations of the Working Group to intergovernmental organizations such as the E.U.²³⁸ The Working Group hopes that the European Commission will take action on the recommendations emanating from the PRIV-WAR Project.

The unwillingness of Western States to join this process of elaborating an international regulatory framework for such important problems as the privatization of war indicates that Western governments are not willing to have a binding instrument which would monitor the activities of PMSC. Without a large consensus and, in particular, the participation of the U.K. and U.S., the main exporters of these activities, as well as other Western countries where the new industry is growing fast the resolution passed in the HRC appears more like a pyrrhic victory since the process which opens with the creation of the open ended working group appears extremely difficult if not impossible. However, if we do not want to return to the times of imperialistic companies such as the Bay Hudson or the East India Company which dominated immense territories in Canada and India and which obliged the King of England to fight unnecessary wars ; or, even worse, to go back to the Middle Ages and see multinationals take the place of feudal lords; public opinion and civil society in Western countries must react and exert enough pressure to bear on their respective governments for this process to succeed.

impeding the exercise of the right of peoples to self-determination, ¶ 60, (2010) transmitted by Note of the Secretary-General, U.N. Doc. A/65/325 (Aug. 25, 2010).

²³⁸ Rep. of the Working Group on the use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, transmitted by the Secretary-General to the General Assembly pursuant to the Commission on Human Rights resolution 2005/2 on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, U.N. Doc. A/63/325 (Aug. 25, 2010); Jan. 9 Working Group Report, *supra* note 231; Working Group on the Use of Mercenaries, *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, (2007) transmitted by Note of the Secretary-General, U.N. Doc. A/62/301 (Aug. 24, 2007); Chairperson of the Working Group on the Use of Mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, U.N. Doc. A/HRC/4/42/Add.2 (Feb. 7, 2007) (by Amada Benavides de Pérez).

ANNEX I: ELEMENTS OF THE PROPOSED DRAFT CONVENTION

The main elements of the draft convention proposed to the international community are analyzed in the following paragraphs.²³⁹

Preamble

The preamble makes reference *inter alia* to:

- The General Principles enshrined in the Charter of the United Nations: the *erga omnes* obligations related to the protection of human rights, the principles of sovereign equality of all States, the territorial integrity and political independence of every State, the right of peoples to self-determination, and the prohibition of the threat and use of force in international relations;
- The principles and rules of international human rights and humanitarian law and their complementarity;
- The principles contained in the Rome Statute of the International Criminal Court and the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes;
- The duty of all States to prevent abuses of international human rights and humanitarian law or other abuses committed by or involving transnational corporations and other business enterprises;
- The duty of all States to prevent human rights violations through legislative and other measures, the duty to investigate reports of violations and, where appropriate, prosecute and punish offenders as well as to provide adequate remedies to the victims;
- The United Nations Code of Conduct for Law Enforcement Officials; the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the United Nations Non-Binding Guidelines on the Use of Military or Armed Escorts for Humanitarian Convoys; the Montreux Document of 17 September 2008 on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict; the U.N. Global Compact initiative for businesses;
- The increasing outsourcing of inherently State functions which undermine any State's capacity to retain its monopoly on the legitimate use of force;
- The increasing and alarming cases of abuses of international human rights law and international humanitarian law committed by PMSCs and their personnel, and aware of the pressing need to establish

²³⁹ Rep. of the Working Group on the use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, Annex, Gen. Assembly on its 65th Sess., Sept. 15, 2010-Oct. 2011, Annex, U.N. Doc., A/65/325 (Aug. 25, 2010).

effective measures to ensure that PMSCs activities are carried out in accordance with international law;

- The fact that self-regulation of private military and security companies is insufficient to ensure the observance of international human rights law and international humanitarian law by the personnel of these companies;
- The urgency for State Parties to agree on international minimum legal standards to regulate and monitor the activities of PMSCs.

Purposes of the Convention:

The purposes of the Convention are to:

- Reaffirm and strengthen the State responsibility for the use of force within the comprehensive framework of State obligation to respect, protect and fulfill human rights, and to provide remedies for victims of human rights violations;
- Identify those functions which are inherently State functions and which cannot be outsourced under any circumstances;
- Regulate the activities of PMSCs and sub-contractors;
- Promote international cooperation between States regarding licensing and regulation of the activities of PMSCs in order to more effectively address any challenges to the full implementation of their human rights obligations including the right of peoples to self-determination;
- Establish and implement mechanisms to monitor the activities of PMSCs and violations of international human rights and humanitarian law, in particular any illegal or arbitrary use of force committed by PMSCs, prosecute the violators and provide remedies to the victims.
(Art. 1)

Definitions:

The convention proposes a number of definitions, including the following:

- **Private Military and/or Security Company (PMSC):** a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities.
- **Military services:** specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities.
- **Security services:** armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with

security and policing applications, elaboration and implementation of informational security measures and other related activities.

- **Export of military and/or security services:** an export of military and/or security services from the home State in which a PMSC is registered or export of military and/or security services which a PMSC provides outside the State in which it is registered or where it has its principle place of management or headquarters.
- **Import of military and/or security services:** an import of military and/or security services which a PMSC registered in a foreign State provides.
- **Inherently State functions:** functions, which are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs under any circumstances. Among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State Party considers as inherently State functions.
- **Contracting States:** States that directly contract with PMSCs for their services, including, as appropriate, where such a company subcontracts with another PMSC or where a PMSC operates through its subsidiary companies.
- **States of operations:** States on whose territory PMSCs operate.
- **Home States:** States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, the State where the company has its principal place of management or headquarters is the home State.
- **Third States:** States other than the contracting, home States or States of Operations whose nationals are employed to work for a PMSC. (Art.2)

Scope of application:

- The Convention applies to States and inter-governmental organizations within the limits of their competence with respect to PMSCs, their activities and personnel.
- References to "States Parties" in the Convention shall apply to inter-governmental organizations within the limits of their competence.
- The Convention applies to all situations whether or not the situation is qualified as an armed conflict. (Art.3)

General Principles:

The Convention is based on the following principles:

- **State responsibility *vis-à-vis* private military and security companies**
 - Each State party bears responsibility for the military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the State.
 - Each State party must ensure that the PMSCs it has contracted are trained in and respect international human rights and international humanitarian law.
 - No State Party can delegate or outsource inherently State functions to PMSCs.
 - Each State Party shall take such legislative and other measures as may be necessary to establish procedures for contracting PMSCs, licensing procedures for the export and import of military and security personnel and services; and the effective customs and other forms of control over export/import and re-export/re-import of firearms used by PMSCs.
 - Each State Party, in accordance with its domestic law, shall take legislative and other measures required to introduce full or partial prohibition on the delegation or outsourcing of military and/or security services. (Art.4)

- **Rule of law**
 - Each State Party shall ensure that PMSCs, their personnel and any structures related to their activities perform their respective functions under officially enacted laws consistent with international human rights and humanitarian law.
 - Each State Party shall take such legislative, administrative and other measures as may be necessary to ensure that PMSCs and their personnel are held accountable for violations of applicable national or international law.
 - Each State Party shall ensure that any contract or agreement between the State party and a PMSC on provision of military and/or security services entered into by a PMSC as well as its employees is in accordance with international law and is consistent with the legislation of the home State, the contracting State, the state of operations and third States whose nationals are employed to work for a PMSC under this contract. (Art.5)

- **State sovereignty**
 - States parties shall ensure that PMSCs under no circumstances carry out activities that undermine the sovereignty of another State, its territorial integrity and/or that contravene to the principle of sovereign equality and obligation of non-intervention in the domestic affairs of other States and the principle of self-determination of peoples.
 - Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of inherently State functions under international as well as domestic laws. (Art.6)

- **Respect and protection of international human rights and humanitarian law**
 - Each State Party shall take legislative, judicial, administrative and other measures as may be necessary to ensure that PMSCs and their personnel are held accountable in accordance with this Convention and to ensure respect for, and protection of international human rights and humanitarian law.
 - Each State party shall ensure that PMSCs and their personnel apply due diligence to ensure that their activities do not contribute directly or indirectly to violations of human rights and international humanitarian law.
 - Superiors of PMSC personnel, such as:
 - a. governmental officials, whether they are military commanders or civilian superiors, or
 - b. directors or managers of PMSCs,may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. No clause in a contract shall be interpreted as evading superiors' responsibility under international law. (Art.7)

- **Prohibition of the use of force**
 - Each State party shall take such legislative, administrative and other measures as may be necessary to make it illegal for and prohibit PMSCs and their personnel to directly participate in hostilities, terrorist acts and military actions aimed at, or which States have grounds for suspecting would result in the overthrow of a government; the coercive change of internationally acknowledged borders of the State; the violation of sovereignty; explicitly targeting civilians or causing disproportionate harm;

- Each State party shall ensure that the activities of PMSCs and their personnel do not cause or exacerbate inter or intra-state warfare or conflict;
- Each State party shall ensure that PMSCs and their personnel do not provide training that could facilitate its client's direct participation in hostilities, terrorist acts and military actions. (Art.8)

- **Prohibition of delegation and/or outsourcing inherently State functions**
 - Each State Party shall define and limit the scope of activities of PMSCs and specifically prohibit the outsourcing to PMSCs of functions which are defined as inherently State functions. (Art.9)

- **Prohibition of outsourcing the use of certain arms**
 - Each State Party, without prejudice to its respective conventional obligations, has the duty to respect the principles of international humanitarian law such as the "basic rules" on the prohibition of certain methods and means of warfare as set out in art. 35 of Additional Protocol I of 1977 to the Geneva Conventions of 1949, that refers to the prohibition of weapons which cause superfluous injury or unnecessary suffering, or which are to cause widespread, long-term and severe damage to the natural environment.
 - Each State party shall take such legislative, administrative and other measures as may be necessary to prevent PMSCs and their personnel from using weapons likely to adversely and/or irreversibly damage the environment on a massive scale.
 - Each State Party shall take such legislative, judicial, administrative and other measures as may be necessary to ensure that PMSCs and their personnel under no circumstances use, threaten to use and/or engage in any activities related to nuclear weapons, chemical weapons, biological and toxin weapons, their components and carriers. (Art.10)

- **Prohibition of illegal acquisition, illegal possession or trafficking of firearms, their parts and components and ammunition.**
 - Each State Party shall establish and maintain an effective system of licensing or other authorization, which prohibits PMSCs, their personnel and any sub-contracted personnel from trafficking in firearms, their parts, components or ammunition.
 - Each State Party shall take such measures as may be necessary to ensure that its licensing or authorization

procedures are robust and secure and that the authenticity of licensing or authorization documents can be independently verified or validated.

- Each State party shall regulate the possession and use of firearms by personnel of PMSCs inside the premises of the client they have been contracted to protect, and to restrict them from possession and use of firearms outside the limits of the premises in which they have been contracted to provide security. (Art.11)

National legislative regulation, oversight and monitoring:

- **Specific legislative regulation**
 - Each State Party shall develop and adopt national legislation to adequately and effectively regulate the activities of PMSCs. (Art.12)
- **National regime of regulation and oversight**
 - Each State Party shall establish a comprehensive domestic regime of regulation and oversight over the activities in its territory of PMSCs and their personnel including all foreign personnel, in order to prohibit and investigate illegal activities as defined by this Convention as well as by relevant national laws;
 - States Parties shall apply practical measures for sharing information on companies providing military and security services outside their territories and for establishing control over the provision of such services, as consistent with the safeguards aimed at ensuring the proper use of information without impeding their legal implementation in any way.
 - States Parties shall endeavor to develop and encourage global, regional, sub-regional and bilateral cooperation among judicial bodies and law enforcement agencies as well as financial regulation bodies in order to monitor and control any use of force by PMSCs.
 - States Parties shall investigate reports of violations of international humanitarian law and human rights norms by private military companies and private security companies and ensure civil and criminal prosecution and punishment of offenders.
 - States Parties shall take appropriate action against companies that commit human rights violations or engage in any criminal activity, *inter alia* by revoking their licenses and reporting to

the Committee on the record of activities of these companies.
(Art.13)

▪ **Licensing**

- Each State Party shall take such legislative, judicial, administrative and other measures as may be necessary to ensure that PMSCs and their personnel carry out their activities exclusively under the respective licences and authorizations.
- Each State party shall ensure that all licenses and authorizations issued to PMSCs and their personnel shall be registered in the general Registry of the State and shall be granted following a transparent and open procedure.
- Each State Party shall establish criteria to grant licenses and authorizations to PMSCs, taking into account in particular any records or reports of human rights violations committed by the companies, providing and/or ensuring training in international human rights and humanitarian law and the existence of robust due diligence measures. (Art.14)

▪ **Licensing import and export of military and/or security services**

- Each State Party shall take such legislative, judicial, administrative and other measures as may be required to ensure that PMSCs and their personnel import and export their services only under the respective licences and authorizations.
- Each State Party which imports or exports private military and security services shall publicize their scope and activities and keep the Committee informed about its licensing regime as well as provide regular and up-dated information on any changes and supplements to the import or export of these services, including details of any subsidiaries or holding companies of the PMSC in question. (Art.15)

▪ **Registration and accountability**

- Each State Party shall take such legislative, judicial, administrative and other measures as may be necessary to establish:
 - a. Specific and obligatory procedures on governmental registration of PMSCs;
 - b. Specific legal requirements for persons employed by PMSCs concerning *inter alia* their training and experience;
 - c. A ban on the registration of PMSCs in offshore zones.
- Each State Party shall establish and maintain a general State Registry of PMSCs operating in their jurisdiction, including

- information on any subsidiaries or holding companies of each registered PMSC.
- Each State Party shall identify or establish a governmental body responsible for the registration of PMSCs and exercise oversight over their activities. (Art.16)
- **State obligations vis-à-vis PMSCs and their personnel**
- Each State Party shall ensure that all PMSCs registered or operating on its territory comply with fundamental international labour standards.
 - Each State party shall ensure that personnel of PMSCs are professionally trained to respect relevant international human rights law and international humanitarian law.
 - Each State Party shall ensure that PMSCs personnel must be professionally trained and vetted according to the applicable international standards, in particular regarding the use of specific equipment and firearms.
 - Each State Party shall ensure that personnel of PMSCs strictly adhere to relevant norms of international human rights law and international humanitarian law, including through prompt investigation, prosecution and punishment of violations of human rights and humanitarian law.
 - Each State Party shall ensure that the personnel of PMSCs providing military and security services in the territory of a foreign country undertake to respect the sovereignty and laws of the country of operations. (Art.17)
- **Regulation of the use of force and firearms**
- Each State Party shall establish rules on the use of force and firearms by the personnel of PMSCs.
 - State parties shall ensure that in providing military and security services, employees of PMSCs shall, as far as possible, apply non-violent means before resorting to the use of force and firearms.
 - In providing military and security services, employees may use force or firearms only (a) to defend him/herself or other employees of the company against what he/she believes to be an imminent unlawful threat of death or serious body injury, in respect of the exercise of the essential right of self-defense; (b) to defend persons whom he/she is under a contract to protect against what he/she believes to be an imminent unlawful threat of death or serious body injury; (c) to resist what he/she reasonably believes to be an attempt to unlawfully abduct him/her, other employees of the company or a person whom he/she is under contract to protect; (d) to prevent or put a stop to

- the commission of a serious crime that would involve or involves a grave threat to life or of serious bodily injury.
- Each State party shall ensure that all incidents involving the use of force and firearms by PMSCs are promptly reported to the competent State bodies and ensure appropriate investigation of the incident by competent authorities. (Art.18)

State responsibility to impose criminal, civil and/or administrative sanctions on offenders and provide remedies to victims

- **Criminal, civil and/or administrative offenses in the sphere of private military and security services**
 - Each State Party shall ensure that the acts of carrying out inherently State functions are offenses under its national law.
 - Each State Party shall ensure that the unlawful use of force and firearms, unlawful use of certain arms and illicit trafficking in arms by PMSCs and their personnel are punished as criminal offenses under its national law.
 - Each State party shall ensure that all activities of PMSCs occurring without the required license and authorization, including the export and import of military and security services are offenses under its national law.
 - Each State party shall take such legislative, judicial, administrative and other measures to ensure, in accordance with their obligations under international human rights law, international criminal law and international humanitarian law, that individual criminal responsibility is established and that PMSCs and their personnel are held accountable for any violations of the law, that no recourse is taken to immunity agreements, and that effective remedies are provided to victims.
 - In relation to imposing penalties for offenses listed in this article, due consideration should be paid to offenses committed against vulnerable groups. (Art.19)

- **Liability of legal persons and entities**
 - Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons and entities for the offenses established in accordance with this Convention.
 - Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative, or a combination of these
 - Such liability shall be without prejudice to the criminal liability of the natural persons who have actually committed the offenses.

- Each State Party shall, in particular, ensure that legal persons held liable in accordance with this convention are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions.(Art.20)
- **Establishment of jurisdiction**
 - Each State party shall take such measures as may be necessary to establish its jurisdiction through its domestic law over the offenses set out in this convention, when (a) the offense is committed in the territory of that State; (b) the offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed; or (c) the offense is committed by a national of that State.
 - A State party may also establish its jurisdiction over any of the offenses set out in the convention when (a) the offense is committed against a national of that State; or (b) the offense is committed by a stateless person who has his or her habitual residence in the territory of that State;
 - This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.(Art.21)
- **Obligations related to prosecution**
 - Each State party shall take such measures as are necessary to investigate, prosecute and punish violations of the present Convention, and to ensure effective remedies to victims.
 - Each State party, in the interests of justice, shall take such measures as necessary to ensure that no immunity agreement from prosecution for PMSCs and their personnel for violations of international human rights law and international humanitarian law are enforced.
 - The State Party in the territory under whose jurisdiction a person alleged to have committed any offense referred to this convention is found, shall in the cases contemplated in article 21, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. (Art.23)
- **Extradition**
 - To the extent that the crimes set out in the convention are not mentioned specifically in any extradition treaty existing between States parties, they shall be deemed to be included as extraditable offenses in the treaty. States parties undertake to include such offenses as extraditable offenses in every extradition treaty to be subsequently concluded by them. (Art.24)

- **Mutual legal assistance**
 - The States Parties shall afford one another mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offenses covered by this Convention. (Art.25)
- **Transfer of criminal proceedings**
 - States parties may transfer to one another proceedings for the prosecution of offenses under this convention in cases where such transfer is considered to be in the interests of the proper administration of justice.(Art.26)
- **International Fund for the rehabilitation of victims**
 - States parties shall consider establishing an international Fund to be administered by the Secretary-General to provide reparation to victims of offenses under this Convention and /or assist in their rehabilitation;
 - The establishment of such a Fund shall be without prejudice to the obligation of PMSCs and/or the individuals criminally liable to directly compensate victims of violations. (Art.28)

International Oversight and Monitoring

- **Committee on the Regulation, Oversight and Monitoring of PMSCs**
 - For the purpose of reviewing the application of the Convention, there shall be established a Committee on the Regulation, Oversight and Monitoring of PMSCs. (Art.29)

International Register of PMSCs

States Parties request the Committee to establish and maintain an International Register of PMSCs operating on the international market, based on information provided by States parties.

Each State Party shall provide annually for the Register data on imports and exports of military and security services of PMSCs and standardized information on PMSCs registered in and licensed by the State Party. (Art.30)

Reports by State parties

Each State Party undertakes to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other

measures which they have adopted and which give effect to the provisions of this Convention. (Art. 31)

Inquiry Procedure

If the Committee receives reliable information indicating grave or systematic violations of the provisions set forth in this Convention, the Committee shall invite the State where the offenses have been reported to have occurred and/or the State of registration of the PMSC reportedly involved in such offenses to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

Taking into account any observations which may have been submitted by the State(s) concerned as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently. (Art.33)

Complaints against Parties

- A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. (Art.34)

Conciliation Commission

- If a matter referred to the Committee is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention. (Art.35)

Individual and Group Petitions

- A State Party may at the time of ratification of this Convention or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State

Party of provisions of this Convention. The Committee shall not admit any communication concerning a State Party which has not made such a declaration. (Art.37)

Final provisions

- Standard provisions regarding signature, entry into force, amendment, denunciation, reservations, conference of States parties, depository and languages. (Art. 40 to 49)
- **Intergovernmental organizations**
 - Intergovernmental organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention.
 - References to "States Parties" in the present Convention shall apply to such organizations within the limits of their competence
 - Inter-governmental organizations, in matters within their competence, may exercise their right to vote in the Meeting of States Parties. (Art.42)

ANNEX II: HRC RESOLUTION 15/22

Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies

The Human Rights Council,

Guided by the Charter of the United Nations,

Recalling all previous resolutions adopted by the General Assembly, the Council and the Commission on Human Rights on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, including General Assembly resolution 62/145 of 18 December 2007,

1. *Takes note with appreciation* the broad consultations held by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, including the various regional governmental consultations for States on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, in particular regarding the effects of the activities of private military and security companies on the enjoyment of human rights;

2. *Also takes note with appreciation* the broad consultation process undertaken by the Working Group regarding the content and scope of a possible draft convention on private companies offering military assistance, consultancy and other military and security-related services on the international market, including a series of regional governmental consultations and consultations with intergovernmental and non-governmental organizations, academic institutions and experts;

3. *Further takes note* of the principles and main elements of the proposed draft convention on private

military and security companies presented by the Working Group, as contained in its report;²⁴⁰

4. *Decides*, for purposes of transparency and inclusivity, to establish an open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination;

5. *Also decides* that the open-ended intergovernmental working group shall hold a session of five working days a year for a period of two years, and that its first session shall take place no later than May 2011;

6. *Further decides* that the open-ended intergovernmental working group shall present its recommendations at its twenty first session;

7. *Affirms* the importance of providing the intergovernmental open-ended working group with the necessary expertise and expert advice to fulfill its mandate, and decides that the members of the Working Group on the use of mercenaries who were involved in the elaboration of the principles, main elements and draft text for a possible convention shall participate in the intergovernmental open-ended working group as resource persons;

8. *Requests* the Secretary-General and the United Nations High Commissioner for Human Rights to provide the intergovernmental open-ended working group with all the financial and human resources necessary for the fulfilment of its mandate.

²⁴⁰ Chairperson-Rapporteur of the Working Group on the Use of Mercenaries, U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. Doc. A/HRC/15/25 (July 5, 2010) (by José Luis Gómez del Prado).