



INTERNATIONAL  
COMMISSION  
OF JURISTS

UNITED NATIONS HUMAN RIGHTS COUNCIL

**Second Session of the Open-ended Intergovernmental Working Group (IGWG) to consider the possibility of an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies (PMSCs)**

13-17 August 2012

**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)**

August 2012

*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

## ICJ submission to the Second Session of the IGWG on PMSCs

The International Commission of Jurists, (the ICJ) welcomes the opportunity to contribute to address the question of the international regulation of private military and security companies in the context of the Human Rights Council resolution 15/26 of 1 October 2010. The Human Rights Council in that resolution decided “to establish an open-ended intergovernmental working group [OEIWG] 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 [PMSCs], 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.”

The operations and other activities of private security companies and the corresponding obligations of States to ensure respect for human rights and humanitarian law and to protect human rights in that context have long been a matter of concern for the international community, notably given the many serious human rights abuses documented in recent years. Important attention has been paid to clarifying and/or developing the international legal framework with a view to providing the normative means to improve the protection of human rights in practice. The present submission will identify the nature and scope of the human rights issues that emerge from PMSCs activities and assess the extent to which the existing international regulatory framework provides sufficient answers to those challenges. It will also outline a position about the form and content that a new international instrument should take to address those problems.

### 1. PMSCs and human rights, exploring the links

The scope and rapid growth and expansion of PMSCs activities have already been highlighted in a range of intergovernmental and non-governmental reports and debates.<sup>1</sup> A wide scope and expansion of activities *per se* do not create gaps in protection that would call for more international regulation unless such activities are developed in a context and manner that constitute a risk or actual violation of human rights, and the protective role of States is limited.

The nature and scope of PMSCs activities is broad and complex, including in many cases activities in conflict situations that risk involving civilians (PMSCs personnel) in hostilities. PMSCs provide a wide range of services to States and to non-State actors (including international organisations, private companies, NGOs). In certain cases, the supply of security services abroad is permitted by national legislation. In a number of cases those services have not been confined to static protection of sites, logistics, communication and catering but have involved actual participation in hostilities. In addition, technological advances make it now possible to participate remotely in combat operations by civilians, for instance by managing military surveillance systems and unmanned aerial vehicles (drones).<sup>2</sup> This complex range of activities does not take place in a legal vacuum. Rather, they may be governed by overlapping layers of national and international legal frameworks.

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<sup>1</sup> See for instance, *Recommendation 1858 (2009) by the Parliamentary Assembly of the Council of Europe “Private military and security firms and erosion of the State monopoly on the use of force”*; *Report on Private Military and Security Firms and Erosion of the State Monopoly On the Use of Force*, Adopted by the European Commission for Democracy Through Law (Venice Commission), at its 79<sup>th</sup> Plenary Session (Venice, 12-13 June 2009) (Venice Commission Report 2009) and the multiple reports by the UN Working Group on Mercenaries, accessed at <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>.

<sup>2</sup> See for instance Major Ricou Heaton “Civilians at War: Reexamining the status of civilians accompanying the armed forces” *Air Force Law Review* 57, 2005 p. 155

The fact that these companies and their personnel carry out activities that entail the potential or actual use of (lethal) force, or may be involved in arrest and detention operations, means their activities inevitably constitute a source of additional risk for human rights, even beyond those of other private companies, which need to be mitigated by the State in its protective role. Most examples of human rights abuse have occurred in contexts where those risks were not addressed properly and where State protection was limited or absent entirely.

Instances of serious abuses involving PMSCs reached public prominence as a result of abuses committed in Iraq and Afghanistan. Well-known cases include the Nisoor square killings in Bagdad where private security guards of Blackwater, (now named Academi) allegedly opened fire at civilians, killing or wounding a number of them, or Abu Ghraib where private contractors helped and abetted in the use of interrogation techniques that amount to torture or ill-treatment of detainees.<sup>3</sup> In both cases, criminal and civil law suits were filed in the United States, where the law has been interpreted as providing immunity for “battlefield combatants”, those who work under contract with the Defence Department.<sup>4</sup> In Iraq, the Coalition Provisional Authority Order No. 17, dated June 2003, gave contractors immunity under local laws for actions in the scope of their employment with the multinational force and other entities.

The activities and operations of PMSCs are not limited to situations of armed conflict. PMSCs provide security services to mining and oil companies’ operations in complex environments and for governmental bodies such as ministries, administrative departments, embassies and other delegations. Allegations of human rights abuses have also arisen in these contexts. For instance, the Peruvian security company Forza has been accused of co-authorship and complicity with illegal detention and cruel and inhuman treatment of eight community members who were demonstrating against the operations of the mining company Rio Blanco Cooper (formerly known as Majaz), a subsidiary of Monterrico Metals (now owned by the Chinese consortia Zijin). Because of apparent deficiencies and limitations of the Peruvian legal system and also in an attempt to reach the parent company, a civil law suit was filed in London, which was ultimately settled out of court. The criminal proceedings continue in Peru, where national law does not permit the direct criminal liability of corporations and prosecution authorities have so far been unwilling to investigate and prosecute the security company and the mining company that employed them.<sup>5</sup>

The occurrence of human rights abuses or the risk thereof does not in itself lead to the conclusion that a new international instrument is needed without showing that the existing regulatory system is insufficient. In the cases outlined above, international consensus on, for instance, the need to provide for direct corporate criminal liability, contemplated in the Montreux document as good practice, or the inadmissibility of amnesties and immunities for cases of serious crimes occurred abroad would have had an impact in the outcome of those cases or even in the prevention of their occurrence.

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<sup>3</sup> A useful summary of incidents can be found in the appendices to “Private security contractors at war: Ending the culture of impunity” *Human Rights First*, 2008, See <http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf>

<sup>4</sup> See cases *Ibrahim v Titan No 04-1248*, *Saleh v Titan No 04CV1143R*

<sup>5</sup> See information in <http://www.todosobrerioblanco.com/>, and <http://business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/MonterricoMetalsawsuitrePeru>

## 2. National and international regulation

### 2.1 National law<sup>6</sup>

The activities of PMSCs are generally of two types: providing logistical support for military activities and providing security services at home and abroad. The regulation of PMSCs varies between States. A distinction must be drawn between home State and host State activities and regulation. The activity of PMSCs of greatest concern is their potential participation in hostilities. Some jurisdictions such as the USA have banned such activity where it involves an “inherent governmental function” but the distinction is not clear and lines can be blurred in practice. Providing logistical support for military operations not involving direct combat is notionally less problematic, but the regulation and potential accountability for PMSCs when playing such a role is weak and, at times, when granted immunity, non-existent.

Where PMSCs provide security services in their home States they are usually subject to strict licensing requirements. Common rules across different countries include the following: PMSCs and their employees should be able to demonstrate that they satisfy the necessary professional qualifications, do not pose a threat to State security and have no criminal convictions on the basis of which licenses or professional certificates should be granted. The areas of greatest concern, however, arise where PMSCs provide security services abroad. They are often not subject to the same oversight mechanisms as they would be in their home state. They are not subject to a set of universal standards and where they commit human rights abuses or violations of IHL. Critically, there is often a vacuum in jurisdiction to carry out criminal prosecutions or to gain access to civil remedies.

#### *National Security Services*

Many countries have a system of licensing and /or registration of security companies, but the criteria and requirements they use are not uniform. In fact, there is a wide variance across jurisdictions. Crucially, a requirement of a record of, respect for or knowledge about human rights and international humanitarian law is generally absent. In some countries, special licensing systems exist for services abroad, but this is not consistent.<sup>7</sup> Monitoring and oversight is even less consistent. Specific regulations for PMSCs exist in a small number of countries, but generally not in the form of legislation and sometimes limited to voluntary regulation. In general, the laws that are in place tend to apply to PMSCs only in their home jurisdictions and the regulation of PMSCs operating in the territory of foreign States with weak regulatory power or affected by armed conflict shows important gaps.

#### *Licensing at national level*

Australia has a strict licensing regime for PMSCs and personnel operating domestically.<sup>8</sup> In South Africa, the Security Industry Regulatory Authority issues licences for the practice of security services and accreditation certificates for personnel aim to provide an elevated standard of training.<sup>9</sup> In France PMSCs must register with the Register of the Companies and the Prefect indicating the professional qualifications of the company and provide

<sup>6</sup> The main source of reference is the research conducted by the project PRIV-WAR available on the internet, which covers a number of European jurisdictions and also a few countries across continents, plus the analysis developed by the Working Group on Mercenaries in their country reports, see [http://priv-war.eu/?page\\_id=](http://priv-war.eu/?page_id=) and <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>. In addition, the research herein takes into account information relating to Mexico and Haiti.

<sup>7</sup> See for example, the *South African Mercenary Act 2006*. Under s. 3 of this Act, no person may *inter alia* provide assistance or render services to a party to an armed conflict or a regulated country (a country designated as having an armed conflict or an imminent armed conflict under s.6 of the Act), without first applying for authorization from the National Conventional Arms Control Committee (NCACC). See <http://www.info.gov.za/view/DownloadFileAction?id=75729>

<sup>8</sup> *National Regulatory Models for PMSCs and Implications for Future International Regulation*, Ottavio Quirico, EUI Working Paper, MWP 2009/25, available at [http://priv-war.eu/?page\\_id=](http://priv-war.eu/?page_id=) and , (Priv War Report on NRM), p.3.

<sup>9</sup> *Ibid*

evidence that the company has no criminal convictions. Oversight is provided by a Clerk of the local Trade Court who is responsible for checking the legality of the activity practiced by the PMSC.<sup>10</sup> In Italy the exercise of security activities is also subject to the authorisation of the Prefect. PMSCs pay a sum established by the Prefect as way of guarantee for obligations assumed. Their licence can be revoked where they do not fulfil the requirements or for reasons of public security and policy.<sup>11</sup> In Germany, PSMCs must demonstrate that they possess the necessary skills by passing a test organized by the Chamber of Commerce and Industry and must hold a “certificate of good conduct” awarded by the government.<sup>12</sup> The 2006 EU Directive on Services in the Internal Market<sup>13</sup> requires the adoption of specific proposals for harmonizing private security services. However, the adoption of this directive was driven largely by economic considerations rather than to ensure compliance with international human rights law and IHL.<sup>14</sup>

In the UK, the Private Security Industry Act 2001 created the Security Industry Authority, which is responsible for administering, monitoring and enforcing private security regulation. Compulsory licensing of staff includes a full criminal records check and staff must demonstrate a minimum competency requirement. Significantly, like most other countries surveyed, it does not cover the regulation of PMSCs with operations abroad and their employees. There is also an industry code of conduct called the British Association of Private Security Companies (BAPSC.org.uk) with a BAPSC Charter, which has sanctions to ensure compliance.<sup>15</sup>

In South Africa, employees of PMSCs are subject to relatively strict regulation. In particular, they do not have the power of arrest, search and seizure. The carrying and use of firearms is also subject to different levels of regulation.<sup>16</sup>

In Brazil there is a robust set of laws and regulations concerning security services but not military services.<sup>17</sup> Requirements to get a license do not include training and knowledge of human rights and humanitarian law, yet “private security guards” can be authorised to use fire arms and enjoy special treatment if found criminally guilty in the discharge of their functions. The Ministry of Justice issues authorisations and monitors the industry, but there is no independent oversight. In Colombia there is legislation that requires PMSCs to obtain a license to operate and register, but its implementation is weak and it is reported that many companies operate without registration or license. The law authorises foreign companies and their personnel to provide services in the country, but oversight and accountability in their regard has long been relinquished. An organ of the Government issues licences and the requirements include the need to have an insurance policy to cover cases of civil liability for the company, and it can issue authorisations for companies to use fire arms usually restricted. Moreover, fire arms are generally easy to obtain through the black market and illegal groups. Requirements do not include human rights training or exclude people with criminal records,

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<sup>10</sup> *Ibid*

<sup>11</sup> *Ibid*

<sup>12</sup> *Ibid*

<sup>13</sup> *EU Directive 2006/123/EC, Services in the Internal Market*, 12 December 2006, Article 38, <http://eur-lex.europa.eu>

<sup>14</sup> The objective of the directive is described as “to release the untapped growth potential of services markets in Europe by removing legal and administrative barriers to trade in the services sector”. At [http://ec.europa.eu/internal\\_market/services/services-dir/index\\_en.htm](http://ec.europa.eu/internal_market/services/services-dir/index_en.htm)

<sup>15</sup> *Priv War Report on the UK*, p.17. Interestingly, the BAPSC itself has reportedly lobbied the UK government to introduce an effective complaint system such as an independent ombudsman to collect complaints, investigate and process them. In fact, some sources suggest that the industry believes that regulation is indispensable to raising standards and thereby enhancing the respectability and legitimacy of the industry by putting industry operations on a firm legal basis. See Bearpark and Schulz, ‘The Future of the Market’, S Chesterman and C. Lenhardt, (eds), *From mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007), 248) See also the UK Defence Select Committee’s sixth Report of 2005 which criticized the Government for failing to enact legislation three years after the publication of the Green Paper. See [www.publications.parliament.uk/pa/cm200405/cmdfence/65/6508.htm](http://www.publications.parliament.uk/pa/cm200405/cmdfence/65/6508.htm)

<sup>16</sup> *Priv War report South Africa*, p. 6

<sup>17</sup> *Priv War report on Brazil*, p. 1



and new legislation to update and reform the system has been discussed for year without clear outcomes.<sup>18</sup>

#### *Export of Military and Security Services*

In respect of the United Kingdom, where UK PMSCs operate abroad, few clearly applicable laws apply due to the fact that most laws apply on the basis of territorial jurisdiction. Only the most serious international crimes committed abroad can be tried in the English Courts under the International Criminal Court Act 2001. The UK Foreign Enlistment Act 1870 makes it an offence for a British subject without licence to enlist in the armed forces of a foreign State at war with another foreign State which is at peace with the UK.<sup>19</sup> PMSCs are subject to the provisions of arms export control legislation, including the observance of arms embargoes.<sup>20</sup>

Despite the fact that many States recognize the need for the licensing of PMSCs, as reflected in their national rules, extra-territorial activities by PMSCs, in general, are not regulated by their home States. In Italy, for example, Article 288 of the Italian Criminal Code, forbids providing arms or recruiting citizens, within the Italian State, to fight on behalf of or at the service of foreigners, and is thus applicable only “within the territory of the State”. Similarly in France, the regulation of the activities of PMSCs within the State is strict but it is permissive for activities abroad.<sup>21</sup> Canada, the Netherlands, Spain, Portugal, Latvia, Estonia, Russia and other States do not regulate the activities of PMSCs abroad. Specific regulation of the extraterritorial activities of PMSCs can be found in the United States and South Africa but both systems have been criticized as inadequate.<sup>22</sup> With respect to the United States, criticism has been directed at the procurement process and the lack of supervision of the fulfilment of contract terms that set minimum standards for behaviour.<sup>23</sup> Accountability problems are exacerbated by immunity from Iraqi judicial jurisdiction in particular, which PMSCs have had and in some situations continue to enjoy.<sup>24</sup>

Brazil does not allow foreign nationals and companies to provide security services on its territory. Owners and employees must be Brazilians. Although the provision of Brazilian security companies’ services abroad is not regulated, there have been numerous reports of Brazilian nationals being recruited by foreign companies to serve abroad. In Mexico, foreign companies and their foreign employees are not permitted to use firearms and their tasks are limited to such activities as training, advice, strategy, and surveillance.<sup>25</sup> Colombia allows foreign companies and foreign personnel to provide security services and in tasks that often risk involving them in direct participation in hostilities in the context of a non-international armed conflict.<sup>26</sup> Colombia signed an international agreement with the United States in 1999 under which many US PMSCs are said to be operative in the country and their personnel enjoying immunity from prosecution in the country. Further, Colombia has concluded another agreement whereby it accords immunity to US citizens for conduct in its territory that would otherwise fall within the jurisdiction of the International Criminal Court.

<sup>18</sup> *Priv War report on Colombia*, p. 3 and ff

<sup>19</sup> However, the Diplock Committee 1976 concluded that the Act was ineffective and should be repealed or replaced with legislation containing extra-territorial application.

<sup>20</sup> See the *UK Export Control Order 2008* at <http://www.legislation.gov.uk/ukxi/2008/3231/contents/made>.

<sup>21</sup> *Priv War Report on NRM*, p. 8

<sup>22</sup> See Venice Commission Report 2009, *supra* note 1. For criticism of the South African statute see Malan M. and Cilliers J., *Mercenaries and Mischief: The Regulation of Foreign Military Assistance Bill* (Institute for Security Studies, South Africa, Occasional Paper, 1997) and Caparini, M. *Domestic regulation: Licensing regimes for the export of military goods and services*. For critical analysis of the US system of regulation see Dickinson, L., *Public Values in a Privatized World*, 31 *Yale J. Int'l L.* 383, 2006, (Dickinson 2006).

<sup>23</sup> See Dickinson 2006 *Ibid*.

<sup>24</sup> See *Coalition Provisional Authority Order No. 17*, dated June 2003

<sup>25</sup> [http://www.washingtonpost.com/world/americas/security-contractors-see-new-opportunities-in-mexico/2012/01/03/gIQAUj3wSQ\\_story\\_1.html](http://www.washingtonpost.com/world/americas/security-contractors-see-new-opportunities-in-mexico/2012/01/03/gIQAUj3wSQ_story_1.html)

<sup>26</sup> *Priv War Report on Colombia* p. 10 and ff

### *National practice regarding outsourcing military tasks*

A distinction is often made between direct engagement in hostilities and providing military services. In the United States, Spain, Finland and the Netherlands, and in most other EU States, direct engagement in fighting by PMSCs is considered illegal or undesirable conduct and is considered to be within the exclusive competence of the State.<sup>27</sup> In the United States, the criterion to allocate State functions to PMSCs includes all activities except those that are “inherently governmental”. This is, however, a vague and unclear distinction and PMSC personnel may encounter combat situations in conflict zones. For example, where security guards are charged with protecting facilities and personnel that are military targets they may have to engage in direct combat. In fact, the casualty rate among PMSC personnel hired by the US Department of Defence in Afghanistan in 2009 and 2010 was 2.75 times higher than the casualty rate for US troops in the same period.<sup>28</sup> Thus, clearer definitions may be necessary.

According to the German constitution, only governmental responsibilities related to internal security can be outsourced to PMSCs, not tasks concerning external security. In practice, however, the government outsources non-core military external activities such as backup support. Australia tends to exclude the outsourcing of services that entail lethal force.<sup>29</sup>

Under Dutch law, interrogation of prisoners may not be outsourced.<sup>30</sup> This contrasts to previous policy in the US where interrogation was outsourced. The difficulty with outsourcing such activities without effective regulation is that a State has less control and oversight, in particular regarding training and screening. For example, reportedly 35 percent of interrogators in Abu Ghraib did not have formal interrogation training.<sup>31</sup>

In the UK about 80 percent of military training is provided by private contractors.<sup>32</sup> However, the regulation of PMSC activities abroad is limited to adherence to self regulation by an industry association and adherence to voluntary codes.<sup>33</sup> This approach has been criticised as lacking effective oversight and accountability mechanisms.<sup>34</sup>

Some jurisdictions have outlawed the use of mercenaries. For example, the Russian penal code prohibits the participation in conflict of mercenaries as well as the recruitment, financing, training and support of mercenaries. South Africa deals with the involvement of South Africans in mercenary activities abroad with due authorization released by the National Conventional Arms Control Committee. In Brazil there is no criminal liability provided under legislation for mercenary activities *per se*.

### *Oversight*

Monitoring and controlling companies is also a challenge. In the United States, an Army Procurement Contracting Officer is primarily responsible for directing the activity of PMSC

<sup>27</sup> *Priv War Report on NRM*, p.5. See eg Answers by the German Government to the Parliament, 26 April 2006, *Bundestag Printed Paper 16/1296*, Answer n. 6). Belgium has banned PMSCs since 1934 (Law Prohibiting Private Militias, 29 July 1934.

<sup>28</sup> <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/071011ralby&tonkin.pdf>

<sup>29</sup> *Priv War Report on NRM*, p. 5.

<sup>30</sup> *Ibid.*

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<http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/071011ralby&tonkin.pdf>

<sup>32</sup> *Priv War Report on NRM* p.5.

<sup>33</sup> See Foreign and Commonwealth Office press release at <http://www.fco.gov.uk/en/news/latest-news/?id=619162882&view=PressS> and <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/071011ralby&tonkin.pdf>.

<sup>34</sup> See for example, a War on Want statement at <http://www.waronwant.org/news/latest-news/17468-companies-profiting-from-conflict-take-action-to-end-impunity>, dated 28<sup>th</sup> February 2012.

personnel in conflict situations and they must follow orders given by military commanders. However, this oversight is limited to situations where PMSCs are operating under the direction and control of the State.<sup>35</sup> Further, control is divided across different departments and this can make it difficult to track PMSCs. A UK Green Paper, published in response to a request by the Foreign Affairs Committee, suggested that PMSCs should register their contracts with the government so as to prevent a company from undertaking an agreement contrary to UK interest or policy.<sup>36</sup> In Germany there is no obligation for a PMSC to notify the government of a contract.<sup>37</sup> It is difficult to keep track and control of their existence and activities when PMSCs are hired by non-state actors, especially abroad.

In Italy, Private Security Companies are supervised by State agents of public security and monitored by the *Questore* who can modify the rules of service for reasons of public interest. Significantly, PMSCs must keep a register carefully describing their daily activities and the persons with whom they interact.<sup>38</sup> Further, they are obliged to perform activities in favour of the State, when so requested.<sup>39</sup>

A further difficulty in regulating PMSCs is the fact that labour laws generally do not have extra-territorial reach and this can be problematic for employees of PMSCs. An example of good practice in this regard can be found in France where recent case law has confirmed that arrangements for working conditions for preventing threats or incidents has extraterritorial validity.<sup>40</sup> In Brazil, provisions of labour law apply to the hiring of Brazilian citizens by foreign companies for work abroad, and there is a system of licenses in place.<sup>41</sup>

#### *Accountability and remedies*

A key concern in regards to PMSCs is the lack of accountability mechanisms available where human rights abuses occur, in particular, where PMSCs are operating abroad. At the national level mechanisms of accountability may take various forms and usually involve the Parliament, national human rights institutions, autonomous oversight agencies within the government and the judicial branch. The review of law and practice in this area undertaken by the ICJ and other organisations shows glaring deficits in terms of accountability and access to justice by victims of human rights abuses by private actors.<sup>42</sup>

In terms of criminal law, it may be that employees of PMSCs are subject to the jurisdiction of their home state based on active/passive nationality and State interests. However, PMSCs themselves will only be subject to criminal prosecution where a particular State provides for the criminal liability of legal persons. Despite the ongoing expansion of criminal liability for corporations in the world, at present only a limited number of jurisdictions provide for direct corporate criminal liability. This group includes the United States, Finland, Estonia, Lithuania, Australia, Canada, France, Poland and the Netherlands.<sup>43</sup> In the United States, military commanders may notify the Department of Justice of crimes perpetrated by PMSC personnel for prosecution before Federal Courts. In 2006, the jurisdiction of military courts over civilian personnel accompanying military personnel was extended from the parameter

<sup>35</sup> *Priv War Report on NRM*, p. 6

<sup>36</sup> Published 23 July, 2002. See <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcaff/922/92202.htm>

<sup>37</sup> *Priv War Report on NRM*,

<sup>38</sup> *The Law on Public Security*, RD 773/1931 in *Priv War on NRM*, p.11

<sup>39</sup> *Ibid*

<sup>40</sup> *Priv War report on France*, See the various decisions made by the Cassation Court on 22 February 2002, 26 November 2002; 16 September 2003 and 1 July 2003.

<sup>41</sup> *Law 7064, 1982*, See *Priv War Report on Brazil*, p.8

<sup>42</sup> See ICJ reports series on Access to Justice: human rights abuse involving corporations for Brazil, Colombia, Democratic Republic of the Congo, People's Republic of China, India, Netherlands, Nigeria, Philippines, Poland and South Africa, available at [www.icj.org](http://www.icj.org) See also Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries. Executive Summary, 2006; Obstacles to justice and redress for victims of corporate human rights abuse*, Oxford Pro Bono Publico, submission to SRSF Prof John Ruggie, 2008

<sup>43</sup> See eg Article 121-2 of the French Criminal Code.



of “declared war” to include also “contingency operations”.<sup>44</sup> It may be that employees of PMSCs can be held accountable in military courts as well under the National Defence Authorization Act of 2009,<sup>45</sup> in which case a question of competing jurisdiction may arise.

Civil liability exists as an avenue of accountability for PMSCs in most countries.<sup>46</sup> However, its application is problematic as a result of a number of factors relating to procedural rules and costs. Legal representation, burden of proof and the rule that the loser pays the costs of the winner, work as strong deterrents in most countries. The question of extraterritorial jurisdiction can also act as a barrier. Further, some States provide strong defences for PMSCs that are interpreted as precluding judicial redress. For example in the United States, PMSCs can cite immunity or non-justiciability. Immunity may be invoked by considering the acts of PMSCs as those performed under government directives or military authority. Non justiciability may arise where PMSCs claim that activities in a conflict zone are political issues. Claims in the United States may be brought on the basis of the US Foreign Claims Act,<sup>47</sup> (though this act excludes claims for abuses in a combat zone)<sup>48</sup> and also under the Alien Tort Statute<sup>49</sup>, (ATS), for alleged breaches of ‘the law of nations’. An example of a case brought under the ATS against PMSCs is the case taken by victims of alleged abuses at Abu Ghraib against CACI International and L3, which is currently making its way through the US Courts.<sup>50</sup>

Civil liability may also arise from non-compliance by PMSC and their personnel with contractual obligations but this does not necessarily provide an effective avenue for victims. Basic principles of administrative law require a determination that a licence or contract has been breached before there can be a resulting penalty or remedy. This requires an investigation and a body capable of making such a determination.

In general, private law remedies such as civil remedies for tort are not the best choice of redress for the kind of infringements of life and physical integrity likely to occur in the context of PMSCs activity. In most legal orders, serious crimes such as these should be publicly prosecuted *ex officio*. The decision to prosecute should not be left to an individual victim where the public interest and the interests of justice are at stake.

## 2.2 International regulatory frameworks

### *International law*

PMSCs do not operate in a legal vacuum at the international level. International law already provides a number of standards that are relevant in this context. Under general international law governing State responsibility, acts of PMSCs may be attributed to the State in certain cases.<sup>51</sup> Such conduct can be attributed to the State if the PMSC has been empowered by the law to exercise elements of Governmental authority, provided that it acts in that capacity (eg private companies running prisons), and “*even if it exceeds its authority or contravenes instructions*”.<sup>52</sup> If not empowered by the law, a PMSC act may still be attributed to the State if it “*is in fact acting on the instructions of, or under the direction or control of, that State in*

<sup>44</sup> See *Priv War Report on USA*, p.25,26

<sup>45</sup> *Public Law 109-364*

<sup>46</sup> See generally *Corporate Complicity and Legal Accountability, Report of the Panel of Legal Experts of the International Commission of Jurists*, vol. 3 Civil Remedies, 2008

<sup>47</sup> 10 USC 2734

<sup>48</sup> For a discussion of the ‘combat exclusion’ clause see <http://cojcr.org/vol11no1/319-352.pdf>

<sup>49</sup> 28 USC 1350

<sup>50</sup> In May 2012, the Fourth Circuit Court dismissed an appeal by the defendants in this case claiming immunity against damages lawsuits. See <http://www.ca4.uscourts.gov/Opinions/Published/091335A.P.pdf> and for a summary: <http://www.scotusblog.com/2012/05/setback-for-abu-ghraib-contractors/>.

<sup>51</sup> Articles on State Responsibility for Internationally Wrongful Acts, Report of the International Law Commission, 2001, fifty-third session, Supplement 10 A/56/10. *Yearbook of the International Law Commission, 2001, vol. II (Part Two)*, as corrected, UN 2008.

<sup>52</sup> *Ibid*, Articles 5 and 7 in conjunction and comment 7. See also the Velasquez Rodriguez v Honduras case, Series C, No.4 para. 170 (1988).

carrying out the conduct” (emphasis added).<sup>53</sup> Whether they act on the instructions or under direction or control of the State, there must be a real link between the person or group performing the act and the State machinery.<sup>54</sup> If the State incorporates the PMSC or their personnel into its regular armed forces the PMSC will act as an organ of the State.<sup>55</sup> Treaties may also establish their own rules of attribution. For instance, State responsibility for torture will arise under the UN Convention Against Torture (Article 1.1), where the conduct amounting to torture occurs “with the consent or acquiescence of a public official or other person acting in an official capacity”.

When the conduct cannot be attributed to the State, the State may still be internationally responsible for its failure to prevent infringements of human rights by private third parties. The Human Rights Committee provides in its General Comment 31 considering the general obligation under the International Covenant on Civil and Political Rights,

“the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”<sup>56</sup>

The Inter-American Court has held that “It is enough to prove that there has been support or tolerance by public authorities in the infringement of the rights embodied in the Convention or omissions that enabled these violations to take place.”<sup>57</sup> The Court has also stated that “The State may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the position of guarantors, the State does not fulfil these *erga omnes* obligations embodied in Articles 1(1) and 2 of the Convention”.<sup>58</sup>

The European Court of Human Rights has also recognised the existence of positive obligations of States Party to secure convention rights “even in the sphere of relations between individuals”.<sup>59</sup> States may be held responsible for their failure to regulate and control acts of private parties that violate Convention rights.<sup>60</sup> The African Commission on

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<sup>53</sup> *Ibid* Article 8

<sup>54</sup> *Ibid*, Article 8, Comment (1). See also Comment (2) which states: The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence. See eg the Zafiro case”.

<sup>55</sup> This rule from international humanitarian law has also been restated in the Montreux Document, See *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, <http://www.eda.admin.ch/psc> and [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/63/467](http://www.un.org/ga/search/view_doc.asp?symbol=A/63/467)

<sup>56</sup> General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 8

<sup>57</sup> See *Case of the 19 Tradersmen*, Judgment of July 5, 2004. Series C No. 109, para 141; *The Case of the Mapiripan Massacre vrs Colombia*, Judgment of September 15, 2005 (Merits Reparations, and Costs) para 110 189; referenced by *the Rochela Massacre Case*, Judgment of May 11, 2007, Series C, no. 175 at para 68

<sup>58</sup> *Case Mapiripan massacre*, *Ibid*. para 111. See also *Velazquez Rodriguez v Honduras*, Judgment of 29 July 1988, Series C, Number 4: “if the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention”

<sup>59</sup> See for instance *Ouranio Toxo and Others v Greece* Judgement of 20 October 2005 at para 37 ; also *X and Y v The Netherlands* Judgement 27 February 1985, para 23; *Khurshid Mustafa & Tarzibachi v Sweden*, Judgement 16 December 2008, para 32

<sup>60</sup> See for instance *Cyprus v Turkey* Judgement 10 May 2001, para 81; *Illescu and Others v Moldova and Russia*, Grand Chamber judgement 08 July 2004. The Court reiterated “the acquiescence or connivance of the authorities of a

People's and Human Rights has also recognised the principle that States have an obligation to protect the rights recognised in the African Charter against private abuse.<sup>61</sup>

Significantly, the European Court and, to some extent, the Inter-American Court have developed some parameters to guide States in their regulatory tasks. Under the European Convention, States should aim at regulating to strike a fair balance between the individual's rights affected and the interest of the community.<sup>62</sup> In *Oneryildiz*, a case concerning the right to life and industrial activities, the Court held that the obligation to safeguard the right to life requires the setting of legislative and administrative frameworks designed "to provide deterrence against threats to the right to life". It added:

"This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks".<sup>63</sup>

Recently, the Inter-American Court has also held that for the positive obligation to protect to arise, it should be established that when the facts occurred the authorities knew or should have known of the existence of a situation of actual or imminent risk for the life of the individual or group and it did not take the necessary measures that could reasonably be expected to prevent or avoid the risk.<sup>64</sup> The fundamental legal reasoning of the regional courts in relation to the duty to protect, evaluation of risks, regulatory deterrents and similar measures can also apply in relation to State action on PMSCs.

Human rights organs and jurisprudence are also clear in relation to the obligations to investigate and, if appropriate prosecute and punish violations of human rights.<sup>65</sup>

Since the lending of private security services abroad (in particular to foreign States and in complex environments) is an important aspect that should deserve attention for the purposes of international regulation, regard should be had to the important body of jurisprudence and guidance that flows from the work of international human rights courts and mechanisms on the extra-territorial dimensions of States' human rights obligations.<sup>66</sup>

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Contracting State in acts of private individuals which violate Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention", para. 318

<sup>61</sup> *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001)

<sup>62</sup> *Lopez Ostra v Spain* Judgement 09 December 1994, para 53

<sup>63</sup> *Oneryildiz v Turkey* Judgement 30 November 2004, paras 89-90. In *Tatar v Romania*, judgment 27 January 2009, the Court clarified that the obligations also apply in relation to private corporations.

<sup>64</sup> Case *Kichwa People of Sarayaku and its members v Ecuador*, Judgment 27 June 2012, para 245

<sup>65</sup> See *Velazquez Rodriguez v Honduras*, Judgment of 29 July 1988, Series C, Number 4: General Comment No 31, Human Rights Committee

<sup>66</sup> The present state of play is reflected in the recently adopted *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*. The ETO principles were elaborated over a two-year period by a group of some leading experts in international law and human rights, including present and former UN special rapporteurs, treaty body members, academics, convened by the International Commission of Jurists and the University of Maastricht. The principles clarify the State's obligation to respect, protect and fulfil economic and social rights where a State is operating extraterritorially. Principle 25 provides:

"States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances:

- a) the harm or threat of harm originates or occurs on its territory;
- b) where the non-State actor has the nationality of the State concerned;
- c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;"

*Non binding regulatory frameworks*

Despite the level of progress through law and jurisprudence, international law does not provide for detailed rules to govern/regulate and guide State's actions to regulate PMSCs so as to prevent violations, investigate alleged violations and provide remedy avenues when rights are violated. In particular, rules regarding licensing /registration, oversight and accountability of PMSCs operating in different contexts including, to the extent applicable, in foreign countries are limited. Some of these rules have been developed in documents/instruments of a non binding nature such as the Montreux document.<sup>67</sup>

The Montreux document recalls a series of existing international obligations of States in their relations with PMSCs and their operations during armed conflict. It provides States with good practices that can be used as appropriate to promote compliance with international humanitarian law and human rights law. Although it rightly addresses contracting, territorial and home States to PMSCs, it is mainly confined to situations of armed conflict where the most flagrant abuses occur. Human rights law obligations for States are restated in a general and summary fashion while a good number of articles describing positive conduct, relevant for practical protection purposes, are only listed as good practices. Some 40 States have subscribed to the document but there is no publicly available record of country-level implementation.

As a follow up to the Montreux document and to further its implementation, since 2009 Switzerland has sponsored a process gathering the private security industry, in association with some Governments and civil society groups, that has created an International Code of Conduct for Private Security Providers (Code or ICoC).<sup>68</sup> The Code provides for a detailed set of rules and human rights standards that subscribing companies should follow. This detail adds value and arguably facilitates compliance by companies. An oversight and accountability mechanism for the ICoC is being developed, which includes a process of certification. Without its oversight and accountability mechanism the model of the Code is incomplete, and thus it is still too early to assess its effectiveness. Early criticism includes the fact that the Code is not legally binding and thus is likely to be ineffective in governing company behaviour. The Code has been subscribed to date by some 200 companies, including the largest and those mostly based in the US and in the UK. If success and effectiveness are to be measured by the number of subscribers, it may be concluded that the ICoC is successful. A counter argument would point to the relative ineffectiveness of other initiatives that boast huge number of subscribers.

The potential effectiveness of initiatives such as the ICoC fundamentally relies on the operation of market (supply- demand) incentives: lack of compliance will have negative repercussions on a company's image and reputation. This together with the potential loss of its certification –for those having subscribed to the ICoC Oversight Charter- may materially damage the company's opportunities to secure lucrative contracts from Government and other entities. This theory rests on the assumption that “consumers” of company security services will actually consider the company's compliance with the Code or its certification as a key criterion in their decisions to grant contracts- which remains clearly optional at the moment. Another suggested way of enhancing compliance with the Code and making it

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d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory;

e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.

See <http://www.maastrichtuniversity.nl/web/show/id=596286/langid=42>;  
<http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf>

A commentary to the Principles will appear in the November 2012 edition of *Human Rights Quarterly* (Vol. 34, No. 4 (Nov. 2012))

<sup>67</sup> Montreux Document

<sup>68</sup> *International Code of Conduct for Private Security Providers* at [www.icoc-psp.org](http://www.icoc-psp.org)

effectively “binding” on the company is to embed the Code as part of the contract with the company, the breach of which can eventually trigger legal liability for the company. Again, since “consumers” have no legal obligation to do so, this option currently remains hypothetical.

Another important component of the international regulatory framework, though not directed exclusively to PMSCs, is the framework developed by the former Special Representative of the Secretary General John Ruggie (‘Ruggie Framework’) of “Protect, Respect and Remedy” and its Guiding Principles, adopted in 2008 and 2011 respectively by the Human Rights Council.<sup>69</sup> As a set of standards addressed to States regarding PMSCs these documents do not appear to offer more than existing instruments in the field of PMSCs. However, the standard of human rights due diligence that companies should put into practice in order to show that they respect human rights and avoid committing or contributing to abuses offers potential if companies have the right market incentives to put it into practice. This cannot be taken for granted. Significantly, at the first session of the OEWG Prof Ruggie’s representative stated that the “GPs were a risk-management tool for business enterprises”.<sup>70</sup> Beyond market incentives, government regulation is the other most important element to govern company behaviour. Making due diligence processes a requirement in certain cases such as the lending of security services abroad and in complex environments would make an important difference.

The Voluntary Principles on Security and Human Rights addresses companies in the extractive sector to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.<sup>71</sup> It provides a series of recommendations to manage human rights risks when using security services in company operations. This is a promotional and dialogue-based mechanism that lacks an accountability and remedy mechanism.

Due to their non-binding nature (unless compliance with them is embedded in a contract or in national law) these instruments and initiatives rely fundamentally on a market approach, whereby lack of respect or breaches by companies are presumed to potentially damage the company’s reputation and its business prospects. Because PMSCs are economic profit-seeking entities, these mechanisms have an important role in shaping company behaviour. However, due also to the nature of the services provided by PMSCs to very particular clients, these companies are not subject to the same ‘court of public opinion’ as companies with a wider consumer base such as retailers. This limits the efficacy of the market based approach in this field.

There are also concerns about the potential of such non-binding instruments to provide or ensure accountability and remedies to victims. If these non-binding documents are embedded into contracts, the performance and/or claims for breach of contract will be governed by a branch of private law (contract law), with its inherent procedural and financial limitations. These include exorbitant costs, the need to conduct investigations and gather evidence abroad and a lack of access to courts by victims. Crucially, many examples of abuses by PMSCs relate to serious criminal offences, which public interest and the interests of justice demand should be pursued by the authorities under criminal law as opposed to contract law.

The right to an effective remedy and reparation is closely linked to the State duty to investigate, prosecute and punish human rights violations, which should be undertaken, as the Inter American Court of Human Rights has stated: “not as a mere formality condemned to be fruitless, or a simple catering to private interests that depends on the procedural

<sup>69</sup> Report of the Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises, UN Doc A/HRC/17/31. See <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

<sup>70</sup> Report of 1<sup>st</sup> Session of the OEIWG on PMSCs p. 8

<sup>71</sup> See [www.voluntaryprinciples.org](http://www.voluntaryprinciples.org)



initiative by the victims or their relatives or their providing relevant proof.”<sup>72</sup> The State duty to investigate and provide access to effective remedies is all the more important when the right to life and to physical integrity are at stake. These tasks cannot be left solely to private mechanisms.

### 3. The importance of a legally binding instrument

The national and international regulatory frameworks outlined above show substantial normative and supervisory gaps and insufficiencies in the legal framework in order to create minimal conditions for improved respect of human rights and humanitarian law in the context of PMSCs’ activities. The ICJ considers that an international convention is an effective option. The viability of such an option was recognised by speakers during the First session of the OEIWG.<sup>73</sup> Objections to the idea of a convention in this field seem to relate more to its suggested content and scope rather than its very feasibility.

As the Venice Commission pointed out, the mere existence of non binding frameworks is not *per se* an argument against a binding instrument.<sup>74</sup> The assertion that other non binding regulatory instruments could serve as an alternative to a binding instrument can be seen as misleading because the two types of instruments belong to very different legal orders and fulfil different functions. One cannot be a substitute for the other, and both are needed. International practice in other areas shows a combination of both can be used effectively without significant problems. Each has a role to play. It can be said that different types of instruments can address different issues more effectively.

A carefully elaborated convention that builds on existing achievements will add value and make a key and necessary difference in completing the international regulatory framework. In particular, a treaty is important to set obligatory parameters and standards for licensing, oversight, accountability and remedies. Such an instrument could set forth the key elements that would form the basis of regulatory legislation at the domestic level.

Of course, the elaboration of an international convention in itself is not sufficient. Ratification by both home States and territorial States is essential, as is good faith implementation. An international body with advisory, promotional and monitoring functions should therefore also be considered

Further, a possible convention should differentiate between the regulation of private security services at home and abroad, and clarify the different roles of contracting, territorial and home States.

There is substantial divergence among States and other actors about the scope of a Convention and its potential approach to the outsourcing of military and security services. In principle, using the services of PMSCs does not necessarily threaten the State monopoly on the use of force if States retain control and effective oversight of these companies. Although private security services are used in most States, divergences again arise as to whether those services should be allowed to be exported and the extent to which they may be, or risk becoming, of a military nature involving personnel in hostilities. Using PMSCs (civilians) for tasks that may expose them to military hostilities runs against the humanitarian law principle of distinction. There is a growing consensus about the need to avoid the engagement of PMSCs in direct hostilities. The ICJ considers that there are compelling human rights arguments in favour of not outsourcing to PMSCs the tasks of detention and/or interrogation. A protective approach is needed and States should be required to ensure that civilians are not engaged in hostilities. This can be done through rigorous

<sup>72</sup> *Kichwa People of Sarayaku and its members v Ecuador*, Judgment, 27 June 2012, para 265; see also *Velásquez Rodríguez v. Honduras*, , para. 177, *Caso Torres Millacura y otros v. Argentina*, para. 112.

<sup>73</sup> See report of OEIWG, for instance remarks by Mr Pachoud, p. 8

<sup>74</sup> Venice Commission Report 2009, *supra* note 1

licensing, registration and oversight procedures for security services that examine and prevent risks, including those that are performed abroad and especially in volatile contexts. Heightened oversight of contracting practices is essential.

A stricter process for licensing, registration, monitoring and a democratic oversight requirement should be applied to security services in countries that allow export of these services, while respecting the choices of other States that do not allow such practice. Jurisdiction for investigation, accountability and provision of remedies are at present dissimilar and should be clarified. This lack of coherence creates an incentive for companies to seek a base and to operate in countries with lower standards. The criticism of licensing as disproportionately costly for small business and unlikely to meet policy objectives does not bear out when viewed alongside the use of such systems at a national level.

At the level of oversight and accountability, human rights protection institutions such as National Human Rights Institutions, the judiciary or even parliaments seldom have a meaningful role in controlling PMSCs operations or ensuring investigation and remedy. The establishment of clear obligations in that direction is, in the long run, indispensable.

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