

The Role of Private Military and Security Companies in Modern Warfare

Impacts on Human Rights

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Private military and security companies (PMSC) have been involved in grave human rights violations that have attracted international attention and debate over the legitimacy of PMSCs, the norms under which they should operate, and how to monitor their activities. These companies pose a real problem to human rights, to the foundations of the democratic modern state, and to the rule of law[1].

The widespread outsourcing of military and security functions has been a major phenomenon in recent years[2]. The new industry that has developed is transnational in nature and has grown very rapidly with the conflicts in Afghanistan and Iraq.

Following the fall of the Berlin Wall in 1989 and the collapse of the U.S.S.R., military and security functions, previously considered inherently state functions, have been increasingly contracted out to the private sector. This important change with regard to the monopoly on the legitimate use of force[3] has been primarily implemented in western countries in the context of the anarchical globalization of the world economy. The private military and security industry has taken advantage of the reduction of national armies and the globalization of the economy to find a profitable niche and grow it into a powerful global phenomenon estimated at over \$100 billion yearly[4]. It has benefitted from the insecurity and fear that followed the terrorist attacks of the early 2000s and within the context of countering terrorism reinvigorated by "the global war on terror".

The availability of experienced security and military personnel for hire has enabled governments, intergovernmental and nongovernmental organizations to circumvent political constraints on the use of force[5]. PMSCs operate in zones of low-intensity armed conflict such as Afghanistan- and post conflict environments-such as Iraq and Colombia. These companies also provide services for extractive industries and multinational corporations operating in unstable environments[6].

The new export security industry expanded primarily, though not exclusively, in Western Europe and North America. The growth has been particularly pronounced in the United States and United Kingdom, where 70 percent of the companies of this new security industry are registered[7]. Parallel to this privatization of warfare, there has also been increased demand for private security at the international level and for protection of property at the domestic level in states all over the world. In many countries, the number of private security personnel is greater than the number of active state police[8].

A. INVOLVEMENT OF PMSCs IN HUMAN RIGHTS VIOLATIONS

The use of PMSC as a new instrument of foreign policy, particularly of the USA, may be due to a number of factors such as: (a) the lack of human resources in the armed forces; (b) that they are considered to be more cost efficient; (c) nepotism and/or good contacts with the Administration; (d) to avoid responsibility for the acts committed by PMSC; (e) to avoid the control of democratic institutions; (f) to intervene in the internal affairs of a country. The use of PMSC as a foreign policy tool, however, not only raises a number of dangers but indicates that the State is abdicating to the private sector an essential responsibility.

Heavily armed and operating in situations of conflict, private security companies have been functioning in the absence of national regulatory frameworks to vet the recruitment of their employees, to control their weapons and to monitor their activities. There has also been opacity in their behavior and a lack of transparency which companies have managed to establish through the creation of numerous layers of subsidiaries or subcontracts in diverse countries[9].

The lack of accountability for human right violations that they have committed has been partly due to the difficulties in the application of domestic laws to PMSC acting in foreign countries as well as to the difficulties in carrying out investigations in failed states. It has also been partly due to the difficulties in establishing responsibilities. Indeed, if the direct responsibility of the State for human rights violations can easily be proved when one of its agents commits a human right abuse, it is much more difficult to establish the link when it is a contracted PMSC or one of its employees. Moreover under international law for human right abuses only the responsibility of natural persons, not legal person, are recognized. To these circumstances also has contributed the immunity granted by governments to PMSC operating in a number of situations[10].

Despite the argument of home or contracting states from which PMSCs operate that they cannot be responsible for human rights violations committed by PMSC employees outside their territories and national jurisdictions, home states[11] should be able to regulate PMSCs at the source because they have the effective territorial control over different activities of PMSCs. Their territorial competence and control should make it possible for the state where PMSCs have their business headquarters or operational seat to discharge its due diligence principle duty. Under International Human Rights Law, states have the responsibility "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused" by acts of private military companies or their staff that impair human rights[12]."

All these factors have provided a propitious terrain where the human rights of the civilian population have been violated. An additional fact important to bear in mind is that PMSC, in their search for profit, often neglect security putting their employees in dangerous or vulnerable situations which may have disastrous consequences, such as the 2004 Fallujah incident in which four Blackwater private contractors were killed allegedly due to a lack of safety precautions that Blackwater was supposed to provide. That particular incident changed the whole course of the war in Iraq. That incident may be considered as the turning point in the occupation of Iraq. It led to an abortive US operation to recapture control of the city and a successful recapture operation of Fallujah in November 2004, called Operation Phantom Fury, which resulted in the death of over 1,350 insurgent fighters. Approximately 95 American troops were killed, and 560 wounded.

PMSCs, particularly in Afghanistan and Iraq, have been operating in gray areas without any control or lines of command threatening the lives and security of the civilian population. The following examples, which are not exhaustive, may serve to illustrate the impact of PMSC in the enjoyment of human rights.

Afghanistan

29 June 2009, a number of civilian casualties occurred as a result of a shooting incident between an Afghan private entity operating as a security company (Afghan Special Guards) and the Afghan National Police inside the Attorney General's Office in Kandahar[13].

5 May 2009, two Xe (formerly Blackwater) private security contractors working for the U.S. Army were involved in an incident in Kabul, in which one Afghan civilian was killed and three others injured according to a US military inquest in Kabul.[14] "While stopped for a car accident, the contractors were approached by a vehicle in a manner they felt threatening. The contractors were trainers hired by Paravant LLC, a subsidiary of Xe[15]. There were allegations that they were issued AK-47s despite guidelines from the U.S. Department of Defense specifically indicating that the Xe personnel would not be armed[16]. A US Senate inquiry found that the Blackwater subsidiary Paravant illegally signed out 500 machine guns from a US military store[17].

Iraq 9 October 2007 In central Baghdad, two Armenian women were shot dead when their car came too close to a convoy protected by Unity Resources Group (URG) contractors.[18] URG employees opened fire as they felt threatened that the women's car approached the convoy at high speed and was not going to stop.[19].

The same company (URG) was also involved in the March 2006 shooting of a 72-year-old Australian professor[20]. This 25-year resident of Baghdad, who drove through the city every day, allegedly accelerated his vehicle as he approached the guards and did not pay attention to warnings to stop[21]

According to a U.S. Congressional memorandum, between 2005 and 2007 Blackwater guards were involved in nearly 200 shootings in Iraq. [22] The document raises serious questions about how State Department officials responded to reports of Blackwater killings of Iraqi civilians. For example, in the case of a shooting of a guard of Iraqi Vice President Adil Abd-al-Mahdi in December 2006 by a Blackwater contractor, the State Department allowed Blackwater to transport the contractor out of Iraq within 36 hours of the shooting and suggested a \$15,000 fine.[23] A similar approach was taken in other cases involving the shooting of innocent Iraqi civilians. Iraq continues to grapple with the legal immunity granted to private security contractors under Order 17 issued by the Coalition Provisional Authority (CPA). Such immunity has prevented prosecutions in Iraqi courts. Nor have prosecutions in the home countries of such companies been successful.

The lack of accountability for violations committed between 2003 and 2009 persists and the victims of such violations and their families are still waiting for justice.[24]The lack of vetting procedures by PMSCs is best illustrated by the case of Danny Fitzsimons, a former British Army paratrooper who fatally shot two colleagues at the U.K. security company ArmorGroup (now part of G4S) and injured an Iraqi security guard in Baghdad. Fitzsimons had been discharged from the British Army in Iraq. Despite having been diagnosed by several psychiatrists as suffering from post-traumatic stress disorder, Fitzsimons was contracted

without any vetting procedure. In 2009, 36 hours after arriving in Baghdad, he shot dead two of his colleagues- a British and an Australian- and injured an Iraqi guard. In February 2011, he was tried in Iraq and condemned to 20 years in prison[25].

The most egregious known human rights violation by a PMSC is the shooting massacre perpetrated on 16 September 2007 by Blackwater personnel in Nisour Square, Baghdad. Seventeen people were killed and twenty others were severely injured[26]. Blackwater [27] has also been accused of fabricating documents to acquire unauthorized weapons, defrauding the USA government, and tolerating the widespread use of steroids and cocaine by its personnel.[28] Only after the implementation of a new Status of Forces Agreement in January 2009 and the cancellation of Coalition Provisional Authority Order 17—which had granted immunity to contractors—was the government of Iraq able to deny Blackwater’s application for an operating license. However, the company still had a contract with the U.S. State Department, and some Blackwater personnel were working in Iraq at least until September 2009[29].

Two United-States-based corporations, CACI International and L-3 Services (formerly Titan Corporation), have allegedly been involved in torturing Iraqi detainees at the Abu Ghraib prison in Baghdad.[30] The two companies, contracted by the U.S. Government, were responsible for interrogation and translation services in several facilities in Iraq. The Center for Constitutional Rights and a team of lawyers brought claims against the two companies under the Alien Tort Claims Act in 2004 on behalf of over 250 plaintiffs. The plaintiffs claimed they were “subjected to rape and threats of rape and other forms of sexual assault; electric shocks; repeated beatings, including beatings with chains, boots and other objects; prolonged hanging from limbs; forced nudity; hooding; isolated detention; being urinated on and otherwise humiliated; and being prevented from praying and otherwise abiding by their religious practices.”

Rendition flights

A number of reports have indicated that private security guards have played a central role in some of the most sensitive activities of the CIA. These activities include arbitrary detention and clandestine raids against alleged insurgents in Iraq and Afghanistan, involvement in CIA rendition flights, and joint covert operations[31]. Employees of PMSCs have been involved in the transport of detainees from pick-up points (such as Tuzla, Islamabad, and Skopje); in rendition flights to drop-off points (such as Cairo, Rabat, Bucharest, Amman, and Guantanamo); and in building, equipping, and staffing the CIA’s “black sites.[32]” In 2007, the American Civil Liberties Union (ACLU) filed a lawsuit against Jeppesen DataPlan, Inc., a subsidiary company of Boeing, on behalf of five persons who had been kidnapped by the CIA and held in overseas secret prisons maintained by the United States[33]. Allegedly, Jeppesen would have participated in the rendition by providing flight planning and logistical support. The US government had petitioned to dismiss the case under the state secrets privilege. The plaintiffs petitioned the US Supreme Court on 7 December 2010 asking it to hear an appeal of the dismissal. In May 2011 the Supreme Court declined to hear the plaintiffs appeal[34].

Ecuador

Three Ecuadorian provinces and 3,266 plaintiffs have initiated lawsuits against DynCorp—a private company contracted by the U.S. State Department—concerning grave health problems [35] as a consequence of the spraying of narcotic plants along the Colombian and Ecuadorian border under Plan Colombia[36].

Equatorial Guinea

The 2004 attempted coup d'état perpetrated in Equatorial Guinea is a clear example of the link between mercenaries and PMSCs and violation of the sovereignty of States.[37] 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.[38] The team of mercenaries also included two employees of a PMSC, Meteoric Tactical Systems, who at the time were providing security to diplomats of western embassies in Baghdad, including the Ambassador of Switzerland.[39] It also included a security guard who previously worked for the PMSC Steele Foundation, which also provided protection to President Aristide of Haiti[40]. A number of people involved in the attempted coup in Equatorial Guinea were arrested in Zimbabwe, others in Equatorial Guinea itself. The coup was intended to overthrow the government and hijack rich oil resources.

B. ARE PMSCs THE NEW PRIVATE PROVIDERS OF THE USE OF FORCE, THE MERCENARIES OF THE TWENTY-FIRST CENTURY?

PMSCs are the modern reincarnation of a long lineage of private providers of physical force, such as corsairs, privateers, and mercenaries. PMSCs are non-state entities operating in extremely blurred situations, where the lines between what is allowed and what is not are difficult to identify.[41] The new security industry moves large quantities of weapons and military equipment. It provides services for military operations, recruiting former military as civilians to carry out what has been labeled as “passive or defensive security”.

During the French Revolution, Swiss “private soldiers were also exercising passive security to protect Louis XVI and his family in Versailles. They were mercenaries. Today in Iraq, legally registered employees of private military and security companies protect President Kharzai of Afghanistan, U.S. generals, and many other political or diplomatic figures.

Mercenaries have existed throughout history. They have been a constant in all wars, but almost disappeared for nearly one hundred years after privateers were outlawed in the nineteenth century[42], only to reappear in the 1960s during the decolonization period, which took place under the United Nations in Africa and Asia. To a certain extent PMSCs constitute the new corsairs.

The definition of “mercenary” is contained in two universal instruments and one regional convention.[43]. The universal instruments are Additional Protocol I (Article 47) to the Geneva Conventions of 1949, within the context of *ius in bello*, and the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the United Nations within the context of *ius ad bellum*. Under International Humanitarian Law, mercenaries are not given the protection of combatants but are not outlawed. Under the UN convention, mercenaries are criminalized[44].

According to the UN Definition of Aggression[45], one of the obligations of Member States is to prohibit the use of its territory to recruit, train and send “armed bands, groups, irregulars, or mercenaries” abroad to be used in combat operations directed against the “sovereignty, territorial integrity, and political independence of another State.” PMSC personnel are one of the categories covered by the definition.[46] The term “political independence of another State” is a direct reference to the right of self-determination stipulated in Article 1 common

to the International Human Rights Covenants.

According to the definition under Article 47 (2) of Additional Protocol I, to be considered a mercenary the person has to fulfill the six conditions set out in that instrument. A mercenary (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) 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[47].

The definition of a mercenary under the UN Convention covers all the criteria of Additional Protocol I with the exception of “does in fact take a direct part in the hostilities.” In addition, the UN Convention includes “any other situation” in which a non-national is recruited to take part “in a concerted act of violence aimed at (i) overthrowing a Government or otherwise undermining the constitutional order of a State, or (ii) undermining the territorial integrity of a State.” Whereas Additional Protocol I only applies to international armed conflicts, the UN Convention covers both international and non-international armed conflicts. Furthermore, the UN Convention makes the recruitment, use, financing or training of mercenaries an offense under international law and implies that any foreigner taking part in any violent activity aimed at provoking a change of regime through a coup d’état during peacetime may be considered a mercenary.

A number of the activities fulfilled by PMSC[48] may meet the requirements contained in the international instruments regarding mercenaries. Also, the recruitment of former militaries and law enforcement personnel as “security guards who would be ‘exposed to great risks [...] including but not limited to the threats inherent in a war situation,’ included as a clause in a number of contracts that the private security contractors signed, is extremely close to the element of the definition that specifies that the mercenary must be specifically recruited “in order to fight in an armed conflict.” [49] Even if they do not conduct offensive operations but have been recruited to protect military objectives, “security guards” may be targeted by the enemy who consider them as being recruited in an armed conflict. A number of activities conducted by PMSC employees may be considered direct participation in hostilities, such as the involvement of Blackwater employees in Najaf, Iraq, on 4 April 2004.

According to the interpretation of some legal experts of the International Committee of the Red Cross, the majority of PMSC employees operating in international armed conflict could be considered civilians. Only a small number are seen as combatants and mercenaries, who would lose protection under International Humanitarian Law when taking “direct part in hostilities.” The UN Convention against the Recruitment, Use, Financing and Training of Mercenaries does not require the direct participation of “security guards” in hostilities.[50].

Even though the main motivation of many of the private contractors engaged by PMSCs may be private gain, it is extremely difficult to prove this in court. Moreover, for many private guards, the motivation is a mixture of monetary gain, the “excitement and adrenaline” of adventure, and the possibility to put in practice all of their training, as PMSCs usually hire

personnel who have been highly trained in dangerous and counterinsurgency operations such as members of US SEALs, or SWCC, the British SAS or the French Legion[51].

The criteria of nationality and residence could not be applied to contractors from the United States, the United Kingdom, Canada, Australia, and other countries which have been involved in the conflicts in Afghanistan and Iraq. It could be applied to nationals of countries such as Peru, Honduras, and Chile that are not parties to the conflict. In the case of Chile, it is interesting to point out that while the government of Chile voted against the UN Security Council resolution to intervene in Iraq Chilean citizens were contracted by PMSCs to provide “passive protection” in Iraq. The requirement that a mercenary must not be a member of the armed forces of a party to the conflict could easily be circumvented by a given state that utilizes PMSCs by incorporating these employees into its own armed forces.

Each of the elements taken individually poses problems to classify PMSCs as mercenaries. For PMSCs and their employees to be considered mercenaries, all the requirements in the definition of the international instruments must be cumulatively met. PMSCs are commercial firms legally registered in their home countries, a large number of which have obtained contracts from governments (the Pentagon and the State Department in the United States).

In addition, only 32 states have ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and most of the governments which contract PMSC are not parties to the Convention.

All these difficulties to apply the 1989 International Convention against mercenaries indicate that this international instrument has become obsolete to deal with the new phenomenon of PMSCs.

C. THE NEED FOR INTERNATIONAL REGULATION

Self-Regulation: 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 International Humanitarian and International Human Rights Law with regard to PMSCs, the government of Switzerland and the International Committee of the Red Cross launched what has been known as the Swiss Initiative, an international consultation process with main stakeholders: governments, the new industry of PMSCs, and civil society.[52] The Swiss Initiative has been supported domestically and by the governments of the United States and the United Kingdom, where most of the industry (70 percent) and the lobbyists for the new security industry are located: the International Peace Operations Association (IPOA) and the British Association of Private Security Companies (BAPSC).[53]

On 17 September 2008, the process led to a common understanding by 17 states 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 Conflict.[54] This set out what the signatories view as the relevant IHL and IHRL applicable to PMSCs as well as a set of good practices for them. The second phase of the Swiss Initiative is the International Code of Conduct for PMSCs, aimed at setting high standards for the industry worldwide and supporting the establishment of a voluntary enforcement mechanism to ensure compliance with such standards. This is, however, still in the process

of elaboration.

The United Nations and the proposed draft convention to regulate and monitor PMSCs

In 2005, the United Nations established the Working Group on the use of mercenaries “To monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities”. [55]

In the course of five years, the UN Working Group on Mercenaries has found that there is a regulatory legal vacuum covering the activities of PMSCs. It has also discovered 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 are challenges to the application of domestic laws, in particular for international PMSCs operating in a foreign state, and difficulties in conducting investigations in conflict zones. The effect of this situation is that PMSCs are rarely held accountable for violations of human rights.

The military and security services provided by PMSCs are highly specific and dangerous. They should not be considered ordinary commercial commodities left to the self-regulation of the market and internal controls. PMSCs have succeeded in creating diffuse responsibility and a lack of accountability through a labyrinth of contractual and insurance layers and shells.

Moreover, one should not forget that legal responsibilities of states to take appropriate measures to prevent, investigate, punish, and provide effective remedies for relevant misconduct of PMSCs and their personnel fully remain even if states have chosen to contract out certain security functions.

The Working Group has conducted a series of consultations with governments of the five geopolitical regions of the world on the impact of PMSC activities on the enjoyment of human rights, as well as on regulating and monitoring the activities of private military and security companies.

It has also organized a series of consultations with a wide range of stakeholders on the content and scope of a possible draft convention. An initial draft text of the convention was circulated to some 250 experts, academics, and NGOs to collect 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.

In 2010 the Working Group recommended to the UN Human Rights Council and the General Assembly principles, main elements, and text for a possible International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies.[56] Both documents take into consideration the comments received from these stakeholders and feedback from member states.

The proposed binding international instrument aims to reaffirm and strengthen state

responsibility for the monopoly on the legitimate use of force, identify inherent state functions that cannot be outsourced to PMSCs under any circumstances, and regulate the use of force and firearms by PMSCs under international human rights standards. It also envisages the development of a national regime of licensing, regulation, and oversight of the activities of PMSCs and their subcontractors. The proposed convention identifies inherent state functions that cannot be outsourced, making a bright line between functions that are permitted, but should be regulated, and functions that belong to the state and cannot be privatized.

The new instrument would establish an international register of PMSCs based on information provided by states. State parties would be compelled to provide data annually for the register on imports and exports of military and security services of PMSCs and standardized information on PMSCs registered in and licensed by the state party. This obligation to share information about 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 operate, regardless of whether the situation is considered to constitute an armed conflict or not.

The fact that PMSC personnel are not usually “mercenaries” is also a strong argument for the adoption of a new instrument to deal with a new type of actor. Contrary to the “dogs of war” mercenaries of the past, private military and security companies are legally registered, and the definition used in international instruments—such as the one contained in Additional Protocol I to the Geneva Conventions and the one in the UN Convention on Mercenaries—typically does not apply to the personnel of PMSCs.

The argument that employing PMSCs is cost-effective may be true in the short term and if a number of socioeconomic variables are not taken into consideration, such as training in the use of weapons and counterinsurgency operations of former militaries and policemen, which is paid by taxpayers. In this regard, it is worth noting the increasing number of military personnel who, attracted by higher salaries, are leaving the army in developed and developing countries to join PMSCs. One way to decrease costs for PMSCs has been to contract more former military members 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 or security work abroad have not been assessed either. Because of the nature of their contracts, thousands of these disposable “guns for hire” are available in the market and ready to be employed in any conflict situation.

The aphorism that the invisible hand of the market is enough to regulate the activities of PMSCs without outside intervention seems to have been abandoned after a number of events have proved to the contrary.

The Working Group is not the only body calling for a legally binding instrument to regulate and monitor the activities of private military and security companies. This is also the position of the Parliamentary Assembly of the Council of Europe, which has adopted two reports recommending “that the Committee of Ministers draw up a Council of Europe

instrument aimed at regulating the relations of its member states with PMSCs and laying down minimum standards for the activity of these private companies.”[57] The UN Working Group’s proposals follow the same logic as the “Stop Outsourcing Security Act” proposed by U.S. Congress Representative Jan Schakowsky (D-IL), a member of the U.S. House Permanent Select Committee on Intelligence.

Most UN Member States, upon considering the impact of PMSCs on the enjoyment of human rights, assert the opinion that outsourcing functions related to the legitimate use of force to private contractors requires binding regulatory and monitoring mechanisms at the international level due to the transnational character of the industry. The position of western states, however, is that a binding instrument with regulatory and oversight mechanisms is too premature. The recommendation made by the Working Group to the United Nations to create an open-ended intergovernmental working group to consider an international regulatory framework to monitor PMSCs has been accepted despite the opposition of western states.[58] A process has been set up in the United Nations for political negotiations on this important issue by Member States, Intergovernmental Organizations, and civil society represented by human rights institutions and non-governmental organizations.[59]

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Notes

[1] The rule of law is a pre-condition for achieving the principles of the United Nations: peace and security, development and human rights.

[2] A number of tasks may be performed by PMSCs in relation to the maintenance of international peace and peaceful coexistence of nations as laid down in the UN Charter. See “Private military and security firms and the erosion of the state monopoly of the use of force,” Council of Europe, Parliamentary Assembly, Document 11787 of 22 December 2008.

[3] The monopoly by the state on the legitimate use of force is a cornerstone of sovereignty. The current international political system, constructed in the twentieth century under the UN Charter, is based on a community of sovereign states Article 2.1 “The Organization is based on the principle of the sovereign equality of all its Members, United Nations Charter”.

[4] See Barry Yeoman, “Soldiers of good fortune,” Mother Jones, May/June 2003, <http://motherjones.com/politics/2003/05/soldiers-good-fortune>

[5] . See Yves Engler, “La privatisation de l’occupation: Les mercenaires et les ONG (Counterpunch)”, HAITI RECTO VERSO (blog), 9 March 2010, <http://haitirectoverso.blogspot.com/2010/09/la-privatisation-de-loccupation-les.html>.

[6] Human rights abuses are committed by private security guards protecting multinational companies. See Guatemalan women Mayan Q’eqchi’ community living in El Estor against HudBay Minerals and its subsidiary HMI Nickel Inc. The women alleged that the companies were complicit in the gang rapes they suffered at the hands of security personnel. Also lawsuit filed by the widow of a Q’eqchi community leader, who was severely beaten and shot dead during a protest against the Fenix mine by security guards from the Fenix project. <http://businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsS electedcases/HudBayMineralslawsuitsreGuatemala#news> .

[7] United Nations doc. A/HRC/7/7.

[8] See Chapter 4 of Small Arms Survey 2011, Cambridge University Press.

[9] PMSC are mostly virtual companies with a small staff. They use databases of qualified military/law enforcement and sub-contractors. See P. W. Singer, "Corporate Warriors", Cornell University Press 2004, Chapter V

[10] Plan Colombia between the United States and Colombia allows private military and security companies, such as DynCorp, to carry out operations in Colombian territory with diplomatic immunity. In Iraq, from 2004 and 2007, all private U.S. contractors including PMSC were given immunity status under the Coalition Provisional Authority Order 17. In 2007 the immunity was withdrawn. However, the legal situation of PMSCs operating in the country and in particular if some PMSCs still benefit from the immunity clause contained in CPA Order 17 remains unclear. It is not certain as to whether this removal of immunity covers all contractors employed by the United States Government and as to whether it is fully applied in Iraqi courts. See United Nations Doc. A/HRC/18/32/Add.4. In the United Kingdom, in response to an inquiry from the Foreign Affairs Committee of the Parliament the U.K. Foreign Secretary stated, "Some individuals contracted to the Foreign and Commonwealth Office (FCO) in Iraq and Afghanistan to undertake private security contracts for the protection of our diplomatic missions do have certain immunities, including in particular immunity from criminal jurisdiction, under the Vienna Convention on Diplomatic Relations".

See, <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmffaff/557/55708.htm>, consulted on 03/05/2011 The diplomatic status has been one of the main arguments of the defense of the five private guards of Blackwater charged with manslaughter and weapons violations and allegedly responsible for the massacre which took place in Baghdad's Nissour Square, in 2007. In December 2009, Judge Ricardo Urbina of the U.S. District Court for the District of Columbia dismissed the Justice Department's prosecution of the five guards on the basis that the prosecution's evidence was tainted by the improper use of compelled statements. The Justice Department appealed the ruling and a federal appeals court reinstated the prosecution of the Blackwater guards in April 2011.

[11] The fact remains that if a PMSC decides to place its headquarters in a particular country is because it has already calculated that it is not going to have regulatory difficulties with that government. Many PMSC that have their headquarters in Washington or London are registered in tax havens such as the Bahamas or the Caymans, See P. W. Singer, "Corporate Warriors", Cornell University Press 2004, Chapter V.

[12] United Nations Human Rights Committee, General Comment 31, paragraph 8, United Nations doc. CCPR/C/21/Rev.1/Add.13 (2004).

[13] Communications sent by UN Working Group on mercenaries and Special Rapporteur on extrajudicial executions to the governments of Afghanistan and United States, United Nations doc. A/HRC 15/25/Add.1.

[14] Jon Boone, "Afghanistan lets Blackwater stay despite shakeup of security contractors", The Guardian 7 March 2011; CNN, "Security contractors charged in Afghanistan killings to be arraigned", 17 August 2010 .

[15] August Cole, "US Contractors Fired at Kabul Car", The Wall Street Journal, 18 May 2009.

[16] Jeremy Scahill, "Blackwater Operating in Afghanistan on Subcontract with Raytheon", RebelReports, 19 May 2009.

[17] Ibid, Jon Boone, The Guardian.

[18] See José L. Gómez del Prado, The Privatization of War: Mercenaries, Private Military and Security

Companies (PMSC), CENTRE FOR RESEARCH ON GLOBALIZATION, 8 November 2010,

<http://www.globalresearch.ca/index.php?context=va&aid=21826> .

[19] U.N. Doc. A/HRC/7/7/Add.1 (Feb. 13, 2008)

- [20]. Ibid.
- [21] Ibid
- [22]. "Additional information about Blackwater USA", memorandum dated 1 October 2007 from Majority Staff to the Members of the Committee on Oversight and Government Reform, p. 2, <http://i.a.cnn.net/cnn/2007/images/10/01/blackwater.memo.pdf>.
- [23]. Ibid.
- [24] United Nations Doc. A/HRC/18/32/Add.4.
- [25] BBC News, <http://www.bbc.co.uk/news/uk-england-manchester-12594245>.
- [26] United Nations document A/HRC/10/14/Add.1.
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- [29] Jeremy Scahill, "Blackwater still armed in Iraq", The Nation, 14 August 2009
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- [33] Mohamed v. Jeppesen DataPlan, Inc., 614 F.3d 1070, 1073 (9th Cir. 2010)
- [34]Business-Human Rights org.
<http://businesshumanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/Jeppesenlawsuitreextraordinaryrenditionflights#news>
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their Mission to Equatorial Guinea, 27 August 2010, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10293&LangID=E>.

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

[41]. The U.S. Commission on War Contracting criticized the Government for not having “clear standards and policy on inherently governmental functions”. It called for a single definition ensuring that only officers or employees of the federal Government or members of the armed forces perform inherently governmental functions and other critical functions. See, Commission on Wartime Contracting in Iraq and Afghanistan, At what cost? Contingency Contracting in Iraq and Afghanistan, Interim Report (June 2009).

[42] 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>

[43]. 1977 Organization of Africa Unity (OUA) Convention for the Elimination of Mercenarism in Africa.

[44] Under Article 2 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries stipulates that: “Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention”. Under Additional Protocol I to the Geneva Conventions “Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status”.

[45]. United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974.

[46]. Francesco Francioni, “The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors,” War by Contract, eds. Francesco Francioni and Natalino Ronzitti, Oxford University Press, 2011.

[47] International Humanitarian Law, International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[48]. M. Mancini, F. Z. Ntoubandi and Th. Marauhn, “Old Concepts and New Challenges,” in War by Contract, eds. Francesco Francioni and Natalino Ronzitti, Oxford University Press, 2011. PMSCs have also been contracted for the protection of individuals (security escorts), convoys (convoy security), and high-ranking officials (personal security) as well as to provide military and law enforcement training, intelligence, and interrogation of prisoners.

[49]. UN Doc. A/HRC/7/7, UN Doc. A/HRC/4/42/Add.1

[50] “A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict” (...)

[51] SEALs means Sea, Air, Land; SWCC stands for Special Warfare Combatant Craft Crewmen and SAS for Special Air Services. Information collected by members of the UN Working Group on the use of mercenaries in their country missions through their interviews with private security guards former employed by PMSC working in Iraq and Afghanistan.

[52]. 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>.

[53]. 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; 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. Andy Bearpark CBE Director General, BRITISH ASSOCIATION OF PRIVATE SECURITIES COMPANIES, 15 March 2011, http://www.bapsc.org.uk/about_us-andy_bearpark.asp.

[54]. Permanent Representative of Switzerland to the UN, Letter dated 2 October 2008 addressed to the Secretary-General of the Security Council, UN Soc. A/63/467- S/2008/636 (6 October 2008) (by Peter Maurer) (Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom Ukraine, and the United States).

[55]. United Nations, Commission of Human Rights Resolution 2005/2 and Human Rights Council Resolution 7/21.

[56]. United Nations documents, A/HRC/15/25 and A/65/325.

[57]Parliamentary Assembly of the Council of Europe, 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) and 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). On 11 May, the European Parliament has adopted Resolution 2010/2299 (INI) on the development of the common security and defence policy following the entry into force of the Lisbon Treaty, which calls on the Council and the Commission to initiate regulatory measures in the field of PMSCs (paras 53-55).

[58]. United Nations document, A/HRC/RES/15/26.

[59]. The first session of the open-ended intergovernmental working group was held from 23 to 27 May 2011 at the United Nations in Geneva; see United Nations document A/HRC/WG.107CPR.2.

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