

Remarks of Faiza Patel
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Ladies and Gentlemen:

It is a real pleasure to be here today to speak to such a distinguished audience about the work of United Nations Human Rights Council's Working Group on Mercenaries. My name is Faiza Patel and I currently serve as the Group's Chairperson.

The topic is important and timely. The extent and ways in which private military and security companies (PMSCs) have been used by governments in armed conflicts is one of most significant new developments in warfare. In the first Gulf War, for example, roughly 9,200 contractors accompanied U.S. troops and the ratio of contractors to troops was one to fifty-five.¹ The recent Iraqi conflict involved over 190,000 contractors – far more than the number of American troops.²

Let me start by telling you a little bit about the mandate of the Working Group. The Working Group was established in 2005 by the Human Rights Council.³ It consists of five experts – one from each of the regional groups recognized in the UN system – who serve for one or two 3-year terms. The first set of experts has now rotated out and a new group has been appointed. I am from Pakistan and my colleagues on the Working Group hail from Chile, Poland, South Africa and the United States.

In 2008, the mandate of the Working Group was explicitly expanded to cover PMSCs. The Working Group was requested to study the effects of PMSC activities on the

¹ Laura A. Dickinson, *OUTSOURCING WAR & PEACE* 4 (Yale 2011).

² *Id.*

³ U.N. Commission on Human Rights Res. 2005/2, *The Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, U.N. Doc. E/CN.4/RES/2005/2 (7 Apr., 2005), available at: <http://www.unhcr.org/refworld/docid/45377c39c.html> (accessed Oct. 1, 2012).

enjoyment of human rights and to draft basic international principles that encourage respect for human rights by those companies in their activities.⁴

The expansion of the Working Group's mandate reflected concern amongst the member of the Human Rights Council about the explosion in the use of private military and security companies. This development has generated enormous debate, both about whether the use of these companies is appropriate and about how they should be regulated. We have heard today about two important initiatives in this regard: 1) the Montreux Document; and 2) the Code of Conduct.

My task is to talk about the third regulatory initiative: the UN Draft Convention⁵ and how it fits with these other initiatives. The Draft Convention seeks to do something quite different from either Montreux or the Code of Conduct: to create new, binding international rules on private military and security companies. But its approach is complementary to the other initiatives. As commentators have pointed out, the successful regulation of non-state actors such as PMSCs requires a multi-layered approach involving international standard-setting, robust national legislation and industry self-regulation.

I will talk about the UN Draft Convention from a schematic perspective – focusing on its basic purposes.

⁴ Human Rights Council Res. 7/21, Mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 2(e), 7th Sess., U.N. Doc. A/HRC/RES/7/21 (Mar. 28, 2008), available at: http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_21.pdf (accessed Oct. 1, 2012).

⁵ Human Rights Council, Submission by the Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination, UN Doc. A/HRC/WG.10/2/CRP.1 (Aug. 6, 2012), available at: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session2/A-HRC-WG-10-2-CRP-1.doc> (accessed Oct. 1, 2012).

Who is covered?

The Draft Convention covers the activities of PMSCs, which are defined as corporate entities providing military and/or security services. Unlike the Montreux Document, its rules would apply regardless of whether these companies were operating in an armed conflict.

Reflecting the wide range of activities performed by PMSCs, the definition of covered services is equally broad. Military services means: specialized services related to military actions including: strategic planning, intelligence activities, flight operations and satellite surveillance, knowledge transfer with military applications and material and technical support to armed forces and related activities. Security services are defined as including: armed guarding or protection of people or buildings, any kind of knowledge transfer with security and policing applications, the development and implementation of informational security measures and related activities.

While one might quibble with particulars of this definition, a broad definition is appropriate because while most people think of PMSCs in the context of Iraq and Afghanistan, in fact they operate in many spheres. They are used to provide security for extractive industries, as part of drug eradication efforts in Latin America, and surveillance operations in Africa. The UN uses them to provide armed and unarmed security and logistics support to its missions around the world. Humanitarian groups and NGOs also rely on them. When thinking about PMSCs it is important to recall that we are not just talking about war zones, but also areas where there are other kinds of instability.

Government Functions

The Draft Convention takes the view that there are certain inherently governmental functions that simply should not be outsourced. The list of functions in the Draft

Convention goes well beyond the international humanitarian law requirement that states must themselves perform certain duties – e.g. exercising the power of the responsible officer over prisoners of war and internment camps. The functions listed in the Draft Convention as non-outsourcable are:

- Direct participation in hostilities
- Waging war and/or combat operations
- Taking prisoners
- Law-making
- Espionage
- Intelligence
- Knowledge transfer with military, security and policing application
- Use of and other activities related to weapons of mass destruction
- Police powers, especially the powers of arrest or detention including the interrogation of detainees.

It is well accepted among States that several of these functions should not be outsourced. For example, if one canvasses national laws and statements of policy it seems that States by and large agree that direct participation in hostilities and/or combat operations should not be outsourced. Similarly, most States' legal systems would prevent them from delegating law-making to private companies. Other categories could gain acceptance if narrowed. For example, while "police powers" may be too broad a category to ban in a world where prison privatization is the flavor du jour, some States have taken positions suggesting that at least certain types of interrogation should only be performed by government employees.

But there is no doubt that there are functions currently listed in the Draft Convention that several States would not agree should be banned to private companies – intelligence operations and knowledge transfer for example. These would be a point of negotiation.

Governance

The Draft Convention also includes a number of provisions that oblige States to proactively regulate PMSCs. These obligations would extend not just to the territorial state (which is likely to suffer from instability or a diminished rule of law requiring the use of PMSCs in the first place), but also to the home States of PMSCs. The imposition of specific obligations on home States stems from international humanitarian law and from States' international human rights obligations to ensure the protection of human rights and prevent rights violations. One of the big problems in this field is that there is no international standard requiring States to control PMSCs. Given that PMSCs perform functions that were traditionally performed by highly regulated State entities such as militaries and police forces, the development of such a standard is essential. The international community needs to agree on the due diligence obligations of States vis-à-vis this sector.

In this regard, the Draft Convention requires States to establish a comprehensive domestic regime of regulation and oversight, including:

- establishing a register of PMSCs;
- developing a national licensing regime which would cover the import and export of military and security services;
- ensuring that personnel of PMSCs are properly vetted;
- ensuring that PMSC personnel are trained to respect relevant international human rights and international humanitarian law and are trained to use equipment and firearms; and
- establishing national rules on the use of force and firearms.

The need for licensing and registration is axiomatic – many PMSC home States require domestic security companies that operate in stable environments with strong rule of law to be licensed and strictly regulate their activities and use of firearms. To allow PMSCs to operate in volatile environments and with

sophisticated firepower – with all the risks to human rights and humanitarian law that such operations entail – seems like an abdication of basic due diligence.

Another important way in which the Draft Convention seeks to define the content of States' international human rights obligations is to require States to take legislative, administrative and other measures to ensure that PMSCs and their personnel are held accountable for violations. In particular, each State would be required to enact legislation prohibiting certain activities to PMSCs (the non-outsourcable functions discussed above) and prohibiting PMSCs and their employees from violating international human rights, humanitarian and criminal law and restrictions on the use of firearms. Each state must establish jurisdiction over these offences when committed on its territory, by one of its nationals or when the victim is a national.

In addition, each State must take measures to investigate, prosecute and punish violations and to ensure effective remedies to victims and ignore immunity agreements when they purport to cover violations of human rights or humanitarian law. This is an important provision directed at increasing accountability for violations by PMSCs. The reality is that despite the many well-known cases of PMSC employees committing gross violations of human rights – from running a prostitution ring in Bosnia to killing civilians in Iraq – prosecutions in PMSC home states are extremely rare, leading to the perception that these companies operate with impunity. This perception is only strengthened by the fact that many of the companies allegedly involved in abusive and criminal behavior have subsequently been given large government contracts.

Notably, the civil liability aspect of accountability has not been particularly useful either. In the last several years, we have seen a number of civil suits brought in the United States against contractors, but these suits face jurisdictional hurdles and are often dismissed due to government assertions of secrecy. For example, lawsuits against the PMSCs CACI and Titan for torture, abuse and sexual violence at the Abu Ghraib prison were dismissed on the grounds that the contractors were essentially

operating like soldiers and thus were entitled to immunity from suit.⁶ Another major civil suit against contractors – this time for complicity in extraordinary renditions to torture – was dismissed because the U.S. government asserted that adjudication would necessarily result in the exposure of sensitive national security information.⁷

International Supervision

Although the Draft Convention recognizes the centrality of national regulation in controlling PMSC activities, it also provides for a modest level of international supervision modeled on UN human rights treaties. It establishes an Oversight Committee of international experts to receive reports from States on the legislative, administrative and other measures they have adopted to give effect to the Convention and allows the Committee to comment on them. It includes confidential inquiry procedures for cases where there is reliable information containing well-founded indications of grave or systematic violations of the Convention. Individual and group petitions are allowed if States opt into that procedure.

Having laid out the basic provisions of the Draft Convention, let me now turn to the process for moving it forward.

It is obvious that there are a number of important interests at stake in discussions about regulating PMSCs – both national and commercial. In 2010, the Human Rights Council established an open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework for PMSCs, including the option of elaborating a legally binding instrument based on the

⁶ Saleh v. Titan. Corp., 580 F.3d 1 (D.C. Cir. 2009), cert. denied, 131 S. Ct. 3055 (2011).

⁷ Mohamed v. Jeppesen, 614 F.3d 1070, 1075–76 (9th Cir. 2010), cert. denied, 131 S. Ct. 2442 (2011).

elements and draft text proposed by the Working Group.⁸ Several States – including major host and contracting states – were staunchly opposed to the establishment of this group. Nonetheless, they participated constructively in the two meetings that were held by the intergovernmental group. Much of the conversation at these meetings was focused on whether we need an international convention at all or whether current international law was sufficient.

My Working Group, which served as a resource person for the consultations, took the view that the Draft Convention filled two key gaps: 1) defining what activities were non-outsourcable (beyond the limited categories of the Geneva Conventions); and 2) providing specific content to international obligations vis-à-vis PMSCs.⁹ The second meeting of the intergovernmental group, which was held in Geneva in August 2012, concluded with a consensus that the conversation about the regulation of PMSCs, including the need for a PMSC treaty, should go on for another two years.

The fact that this conclusion was reached by consensus is a significant step forward and I hope it reflects a greater willingness among States to consider the benefits of a PMSC treaty rather than reflexively rejecting regulation. I anticipate that the Human Rights Council will mandate the continuation of consultations at its session in March 2013.

These consultations will provide an important forum to move forward the consideration of a PMSC treaty and explore the difficult – although not insoluble – issues that it raises.

⁸ Human Rights Council, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, p. 19, 15th Sess., UN Doc. A/HRC/15/25 (Jul. 5, 2010), available at:

http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.25_en.pdf (accessed Oct. 1, 2012).

⁹ *Supra* note 5.