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**Human Rights Council**

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

**Second session**

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Item 4 of the provisional agenda

**Plenary discussion in accordance with the agreed timetable  
and programme of work**

**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**

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## I. Introduction

1. In the last decade, many States, international organizations, non-governmental organizations, and transnational corporations have come to increasingly rely on private military and security companies (PMSCs) to perform functions that have historically been performed by States. In addition to the types of activities that they have carried out in the armed conflicts in Iraq and Afghanistan – including detention, interrogation, protection of military facilities and convoys – PMSCs are performing an ever-increasing range of activities outside of armed conflict situations. For example, PMSCs are involved in counter-narcotics activities, maritime and extractive industry security, humanitarian operations, training and security sector reform in post-conflict situations and operations of prisons and other detention facilities.

2. There are differing views on whether or not outsourcing these activities is necessary or wise. There is no disagreement, however, that outsourcing raises new challenges for the application of international human rights and humanitarian law, particularly for ensuring that contractors are held accountable for violations and that victims of human rights abuses have access to remedies.

3. In May 2011, representatives of 70 Member States as well as the European Union and the African Union, participated in the first session of the open-ended intergovernmental working group, established by the Human Rights Council<sup>1</sup> to consider the possibility of elaborating an international regulatory framework. This group was charged with considering, *inter alia*, the option of a legally binding instrument on PMSCs taking into consideration the principles, main elements and draft text 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 (Working Group).<sup>2</sup> In the first session of the open-ended intergovernmental working group, there was agreement that the activities of PMSCs should be properly regulated. The disagreement amongst the participants focused on the form that such regulation should take – *i.e.*, whether an international convention was necessary or whether current international and national obligations combined with self-regulation was sufficient or whether national legislation needed to be strengthened, in particular with regard to the extraterritorial activities of PMSCs. At the first session, many States also emphasized the need to ensure that PMSCs involved in human rights violations are held accountable, and that victims of human rights violations are provided effective remedies.<sup>3</sup>

4. The Working Group is encouraged to see that States recognize these needs and its members are pleased to serve again as resource persons at the second session of the open-ended intergovernmental working group.

5. In the view of the Working Group, an international convention is the most efficient solution to the challenge of regulating PMSCs. This paper will explain the reasons for this conclusion. It will not address the elements of the draft convention, but rather will identify the conceptual and practical problems that led the Working Group to conclude that an international treaty was the best way forward.

<sup>1</sup> A/HRC/RES/15/26

<sup>2</sup> The Working Group has proposed a list of elements that could be included in a convention on PMSCs (A/63/325) and has developed text for such a convention (A/HRC/WG.10/1/2).

<sup>3</sup> A/HRC/WG.10/1/CRP.2

## II. Prohibition or Regulation?

6. The Working Group began its consideration of the issue of PMSCs by recognizing that the activities performed by these companies pose significant risks to human rights. As noted in 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, when private contractors “are armed and mandated to carry out activities that bring them close to actual combat, they pose additional risk to the local population ...”<sup>4</sup> But the risks are not limited to armed conflict situations. For example, operations involving the extractive industry demonstrate that PMSCs performing security functions in areas where there is conflict over resources also pose special dangers to the human rights of local populations.

7. These risks have led some to suggest that the activities of PMSCs should simply be prohibited. The Working Group has not taken this approach. It has instead proposed an international convention through which States could decide whether PMSCs should be prohibited from performing certain activities and which requires States to regulate PMSC activities that are not prohibited. The Working Group has taken this approach because it believes that a blanket ban on PMSC activities is neither practicable nor necessary. Strong and effective international regulation, coupled with national legal and enforcement measures, would allow States and other actors to use PMSCs and at the same time ensure that PMSCs respect human rights and provide for accountability in case of violations.

## III. Gaps in International Law

8. The Working Group’s study of PMSCs indicates that there are two significant gaps in international law that should be covered by a PMSC treaty. First, international law does not contain any provisions which address the outsourcing of State functions to PMSCs -- for example, it does not forbid contractors from direct participation in hostilities. Second, while States have a number of general international law obligations which require them to ensure that PMSCs do not violate humanitarian and human rights law, the content of these obligations is not specified in international law. As a result, state regulation of PMSC activity is spotty and frequently inadequate, a situation which has contributed to a number of well-known cases of human rights violations by PMSCs and an overall lack of effective remedies for such violations.

### A. No international prohibition on outsourcing

9. International law does not clearly prohibit States from outsourcing any functions. At the same time, there are multiple indications of disapproval of some types of outsourcing, particularly with regard to direct participation in hostilities. Such condemnation is reflected in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (Mercenary Convention) and in the Convention of the Organization of the African Unity for the Elimination of Mercenarism in Africa, which prohibit individuals from going to a foreign country to fight for financial gain.<sup>5</sup> The Good Practices section of

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<sup>4</sup> 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 (Montreux Document), p. 38.

<sup>5</sup> Article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (“Mercenary Convention”). Adopted and opened for signature and ratification by General Assembly resolution 44/34 of 4 December, 1989. Entry into force: 20 October 2001 and Article 2 of the Convention of the Organization of the African Unity for the Elimination of

the Montreux Document provides that States hiring PMSCs should “in determining which services may not be contracted out ... take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.”<sup>6</sup> Similar recommendations are included for the home States of PMSCs with respect to deciding on “which services of PMSCs may or may not be exported”<sup>7</sup> and for States on whose territory PMSCs will be operating.<sup>8</sup>

10. In addition, some States have already taken steps in their national laws to prohibit certain activities from being outsourced. For example, under the South African Foreign Military Assistance Act of 1998, no South African person may offer to render any military assistance to any State or organ of State, group of persons or other entity or person, unless he or she has been granted authorization to offer such assistance or a related agreement has been approved.<sup>9</sup> The 2011 draft Swiss law on the provision of private security services abroad prohibits direct participation in hostilities.<sup>10</sup> Finally, in the United States, the Stop Outsourcing Security (SOS) Act,<sup>11</sup> which is currently under consideration by the legislature, would prohibit the US State Department from using any private contractors to perform diplomatic security services in any areas of contingency operations or other significant military operations.<sup>12</sup> The bill would also require a transition away from contractors for functions such as protective services, diplomatic security services, security advice and planning, military and police training, prison administration, interrogation, and intelligence) by January 1, 2013 in all areas of contingency operations and other significant military operations.<sup>13</sup>

11. Despite these indications of disapproval of private actors participating in hostilities, there is no clear international legal norm prohibiting such activities.

12. There are also a number of other PMSC activities that States could potentially agree should not be outsourced. The draft convention proposed by the Working Group contains a list of such activities. In addition to direct participation in hostilities, the following activities could be prohibited to PMSCs: waging war and/or combat operations; taking prisoners; law-making; espionage; intelligence operations; knowledge transfer with military, security and policing application; use of certain arms; and police powers such as arrest, detention and the interrogation of detainees. This list is an expansive one meant to provide States with a starting point for discussions.

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Mercenaries in Africa, CM/817 (XXIX), Annex II Rev.3., adopted on 03 July 1977. Entry into force: 22 April 1985.

<sup>6</sup> Supra note 4, Montreux Document, p. 16.

<sup>7</sup> Id. at 25.

<sup>8</sup> Id. at 21.

<sup>9</sup> Article 3 of the South African Foreign Military Assistance Act.

<sup>10</sup> Article 6 of the Swiss Federal law on the provision of private security services abroad.

<sup>11</sup> The Stop Outsourcing Security (SOS) bill was introduced in both houses of Congress by Representative Jan Schakowsky and Senator Bernie Sanders on July 27, 2011. It was referred to the relevant committees of jurisdiction for consideration, but to date the committees have not yet taken it up. See <http://www.govtrack.us/congress/bills/112/hr2665/text>

<sup>12</sup> Sec. 4 of the bill. According to Sec.3 (3) of the Stop Outsourcing Security (SOS) bill, “other significant military operations” are defined as “activities, other than combat operations, that are carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force”.

<sup>13</sup> Id., Sec. 5 (a) (1).

## B. No clarity on State due diligence obligations

13. The second lacuna in international law is the lack of specific standards applicable to the activities of PMSCs. While people frequently equate PMSCs with mercenaries, the Mercenary Convention does not apply to many of the activities of PMSCs.<sup>14</sup> Of course, international humanitarian and human rights law include various provisions that apply to PMSCs, but the particulars of what these general obligations require of States remain mostly unsettled.

14. The activities of PMSCs and their employees in armed conflicts are subject to international humanitarian law, just like the activities of any other individuals in armed conflicts. States Parties to the Geneva Conventions are required to ensure respect for international humanitarian law, an obligation that extends to all those over whom they have authority.<sup>15</sup> International humanitarian law also requires States to take all necessary measures to suppress acts contrary to the four Geneva Conventions<sup>16</sup> and to put on trial or extradite for trial those who commit grave breaches of the Geneva Conventions.<sup>17</sup>

15. In addition, international human rights law contains several provisions that should be respected by PMSCs, including the rights not be arbitrarily deprived of life<sup>18</sup> or arbitrarily detained<sup>19</sup>, the right not to be subjected torture or cruel, inhuman and degrading treatment or punishment<sup>20</sup> and the right not to be forced or compelled to perform labour.<sup>21</sup>

16. The onus is on States to take appropriate measures and to exercise due diligence to prevent, punish, and investigate violations of these and other human rights and to redress

<sup>14</sup> For example, Article 1 of the Mercenary Convention (see *supra* note 5) only applies to individuals who take part in hostilities or in concerted acts of violence and the majority of PMSC employees do not meet these criteria. The Mercenary Convention also only applies to individuals who are not nationals or residents of one of the State parties to a conflict. In recent armed conflicts, PMSC employees have been nationals of one of the parties to the conflict, which takes them outside the coverage of the Mercenary Convention. Finally, the Mercenary Convention does not apply to individuals who operate within the military chain of command and are considered as members of the armed forces of a party to the conflict. Therefore, where PMSC employees operate within the military chain of command, they are not subject to the Mercenary Convention.

<sup>15</sup> Article 1 Common to the Four Geneva Conventions of 1949.

<sup>16</sup> Article 49 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 (“First Geneva Convention”), Article 50 of Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949 (“Second Geneva Convention”), Article 129 of Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 (“Third Geneva Convention”), Article 146 of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 (“Fourth Geneva Convention”) and Article 87 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (“First Additional Protocol”).

<sup>17</sup> Article 50 of the “First Geneva Convention”, Article 51 of the “Second Geneva Convention”, Article 130 of the “Third Geneva Convention”, Article 147 of the “Fourth Geneva Convention” and Articles 11 (4) and 85 (2-4) of the “First Additional Protocol”. It must be noted, however, that the obligation of States to put on trial or extradite for trial those who have committed grave breaches of the four Geneva Conventions and the First Additional Protocol applies only to armed conflicts between States (international armed conflicts), and not to armed conflicts involving non-State armed groups, whether internal or trans-national (non-international armed conflicts), which comprise the majority of armed conflicts today.

<sup>18</sup> Article 6 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 1966, entry into force 23 March 1976.

<sup>19</sup> *Id.*, Article 9.

<sup>20</sup> *Id.*, Article 7.

<sup>21</sup> *Id.*, Article 8 (3).

the harm caused by violations of these obligations by PMSCs.<sup>22</sup> This obligation was most recently reiterated in the Guiding Principles on Business and Human Rights (Ruggie Principles), which were unanimously endorsed by the Human Rights Council.<sup>23</sup> The very first pillar of the Ruggie Principles is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication.

17. While States' obligations to ensure that PMSCs respect international humanitarian and human rights law are well-established, the minimum standards on what exactly States are required to do to fulfil these obligations are not specified in international law.<sup>24</sup> This has led to a gap in the regulation of PMSCs as evidenced by the experience of the last decade. Reliance on general principles in the context of PMSCs has been insufficient to prevent human rights abuses and, equally importantly, to ensuring that victims are able to exercise their right to obtain remedies for any abuses. Notably, the need for greater access by victims to effective remedies is one of three pillars of the Ruggie Principles.

18. The experience of the United States in Iraq is instructive in this regard. The Coalition Provisional Authority established by the United States, which governed Iraq from 2003, issued Order 17 stripping Iraqi courts of jurisdiction over foreign contractors operating on Iraqi territory. One result of this immunity was that the Blackwater guards who were accused of killing 17 civilians in Nisoor Square in 2007 could not be prosecuted in Iraqi courts. At this time, nothing in international law prohibits States from providing for such legal immunity and similar provisions have been included in other inter-State agreements as well.<sup>25</sup>

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In General Comment No. 31, CCPR/C/21/Rev1/Add13 (2004), para 3) on "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" the Human Rights Committee confirmed that "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." The jurisprudence of the International Court of Justice ("ICJ") further confirmed the extra-territorial applicability of the ICCPR in its Advisory opinion of 9 July, 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (paras. 109 – 111), which has found the ICCPR "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".

<sup>23</sup>

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Docs. A/HRC/17/31 and A/HRC/RES/17/4.

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The law of State responsibility is little help in providing substance to these general obligations. Under the Draft articles on Responsibility of States for Internationally Wrongful Acts, States may only be held directly responsible for those internationally wrongful acts of PMSCs that are attributable to the State. Acts are attributable to the State when a PMSC is acting as an "organ" of a State, exercising "elements of governmental authority," or acting on the "instructions of, or under the direction or control of" the State. (Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001, Chapter II (Attribution of conduct to a State), Articles 4-11, text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session - A/56/10). PMSCs, however, often operate in situations where they do not meet these criteria and in these cases we are left with general humanitarian and human rights law principles. Moreover, the actions of PMSC employees hired by private industry, international organizations or non-governmental organizations cannot normally be attributed to a State.

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Similar immunity provisions are found in the agreements between the US and Colombia and Mexico and are reported to be part of the Merida Initiative, a security cooperation agreement between the US and various countries of Central America with the declared aim of combating the threats of drug trafficking, transnational organized crime and money laundering.

19. The Government of the United States has attempted to bring the alleged perpetrators of Nisoor Square to justice in its own courts. The course of that prosecution demonstrates that uncertainty about how a State should fulfill international humanitarian and human rights standards with respect to PMSCs prejudices even the best-intentioned efforts at accountability. The Nisoor Square case was almost dismissed because the court found that the conditions under which the defendants were interviewed by American authorities impinged on their rights under the US constitution. Such a situation would likely not have arisen if military personnel were accused of such shootings because the US military has in place a sophisticated system of gathering evidence and bringing to justice soldiers who commit such violations.

20. In Latin America too there have been numerous reports of human rights violations by PMSCs participating in drug eradication programs and providing security to extractive industries. These cases have generally not resulted in legal sanctions against the relevant PMSCs or their employees.

21. For example, as part of “Plan Colombia”<sup>26</sup> PMSCs are used in narcotics intervention operations.<sup>27</sup> There have been numerous credible allegations of human rights violations by PMSCs in the course of these operations, but no prosecutions have been brought. For example, in 2007, a US soldier and a US private military contractor were reportedly involved in the rape of a 12-year old girl at the Tolemaida military base in Tolima.<sup>28</sup> The two men were accused of rape by Colombia’s Prosecutor General’s office. They were

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<sup>26</sup> “Plan Colombia” is the name of various cooperation agreements, developed between 1998 and 1999, between the US and Colombia to combat drug related criminal activities.

<sup>27</sup> PRIV-War Report – Colombia, National Report Series 19/09, Colombia: Regulating Private Military and Security Companies in a “Territorial State,” Irene Cabrera and Antoine Perret, University of Externado de Colombia, 15 November 2009., p. 13, *citing* The United States Department of State. (2007). *Report to Congress On Certain Counternarcotics Activities in Colombia*. Washington

<sup>28</sup> Murcia, Diana: Mercenaries, mercenarism and privatization of security in Latin America, In. A. Perret (ed.): Justice in the times of private military and/or security companies, p. 231, Universidad Externado de Colombia, Bogotá, 2010, PRIV-War Report – Colombia (*Supra* note 26.), Brittain, James J: US Strategic Interests in Latin-America: The Militarization of Colombia, Global Research, 8 October, 2009, <http://www.globalresearch.ca/index.php?context=va&aid=15853>

removed from Colombia under diplomatic immunity<sup>29</sup> and, based on the information available, have not been prosecuted in the United States.

22. Beyond individual cases, the aerial fumigation of illegal coca plantation sites has also had repercussions on the life and the health of thousands of farmers, indigenous peoples and Afro-descendants both inside and outside Colombia. Ecuador for example, unsuccessfully attempted to obtain compensation for its citizens who were damaged by counter-narcotics operations on its border with Colombia.<sup>30</sup> A civil case in the United States against the contractor involved, DynCorp, failed because the alleged conduct did not meet the high legal standard that is required for American courts to impose liability on U.S. companies for activities abroad.<sup>31</sup>

23. In sum, while there is no doubt that there are broad international law standards applicable to PMSCs, it is apparent that there is no clarity as to what these standards require States to do in practice and that lacunae has contributed to the lack of accountability for human rights violations by such companies and their employees. The Working Group recognizes that States generally have latitude in deciding on how to fulfil their human rights obligations with respect to corporate actors operating overseas. But it is of the view that this latitude must be constrained when the corporate actors involved pose particular risks to human rights as is the case with PMSCs. In this situation, a convention should explicate the minimum due diligence standards that provide content to existing general international obligations of States.

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"According to Articles 29 to 36 of the Vienna Convention on Diplomatic Relations of 1961, incorporated into national legislation by Act 6 of 1972, the technical and administrative foreign nationals of the diplomatic mission enjoy the privilege of immunity from criminal jurisdiction of the receiving State and are not subject to any form of detention or arrest." - Attorney General of the nation. Press release n° 110. Attorney reports on status of Americans, at: <http://www.fiscalia.gov.co/pag/divulga/Bol2005/mayo/bol110.htm>, Source: Murcia, Diana: Mercenaries, mercenarism and privatization of security in Latin America, in A. Perret (ed.): Justice in the times of private military and/or security companies. p. 231. Universidad Externado de Colombia, Bogotá, 2010.

The legal framework that regulates the presence of contractors in Colombia is composed of a series of bilateral diplomatic instruments: The first is from 1962, General Agreement for Economic, Technical and Related Assistance signed between the government of Colombia and the United States. In accordance with this Convention "special missions and their staff receive the privileges and immunities to which any diplomatic mission entitled, according to the Vienna Convention 1961." In 2004 it added an Annex to this Agreement to "establish and support a bilateral narcotics control program, including a comprehensive program against drug trafficking, terrorist activities and other threats to national security"; Appendix 1 regulates the support to the Counter-narcotics Directorate of the National Police, which includes training by instructors from the U.S. government or private companies. Source: Benavides, Amada: Mercenaries, mercenarism and privatization of security in Latin America, in A. Perret (ed.): Mercenaries, military companies and private security: dynamics and challenges for Latin America, pg. 125. Universidad Externado de Colombia, Bogotá, 2010.

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Empresas transnacionales de seguridad privada en Colombia. Colectivo de abogados J. Alvear Restrepo. 04 february 2008 (<http://colectivodeabogados.org/EMPRESAS-TRANSNACIONALES-DE>), "Acusación en contra la Transnacional DynCorp", Tribunal Permanente de los Pueblos, Audiencia sobre Biodiversidad, Zona Humanitaria de Cacarica, Bajo Atrato, Colombia, 24 a 27 de febrero de 2007.

<sup>31</sup>

United States District Court for the District of Columbia. Civil Action N°01-1908. *Venancio Aguasanta Arias et al. v DynCorp, et al.* "Memorandum opinión and order". May 21, 2007 ([http://www.iradvocates.org/Dyncorp\\_Decision.pdf](http://www.iradvocates.org/Dyncorp_Decision.pdf)), Castillo, Yadira: Castillo, Yadira. An insufficient international legal framework and a limited possibility for the responsibility of "ETN" for violation of human rights. A. Perret (ed.): Mercenaries, military companies and private security: dynamics and challenges for Latin America, p. 284. Universidad Externado de Colombia, Bogotá, 2010.

24. The draft convention proposed by the Working Group would, for example, require States to register and license PMSCs and to make certain that PMSCs adequately vet, train, and monitor their employees. In addition, States would be required to ensure that their national systems provide adequate jurisdiction to prosecute PMSCs and their employees and to provide remedies for victims. The Montreux Document provides an excellent starting point for developing these minimum standards. The list of “Good Practices” included there, in essence, provides the type of specification of general international law obligations that the Working Group believes should be made binding.

25. International legal instruments and the jurisprudence of regional courts and UN treaty and Charter-based monitoring bodies provide further examples of ways to explicate the due diligence standards of preventing, investigating, punishing and providing remedies for acts of violence committed by non-State actors.<sup>32</sup>

#### IV. Limitations of National Legislation

26. The need for a PMSC treaty is underscored by the lack of national legislation governing these companies. The Secretary General’s Special Representative for Business and Human Rights has noted the lack of effective national remedies for victims of human rights abuses by corporations.<sup>33</sup> The lack of legislation is particularly troubling with respect to PMSCs. While the military and police – whose work is often outsourced to PMSCs – are the most strictly regulated amongst government agencies, PMSCs rarely warrant a mention in States’ legislation. The inadequacies of national legislation are frequently in the realm of registering and licensing and in providing effective and transparent mechanisms for accountability and remedies for victims of human rights violations.

27. The limitations of national law are exacerbated by the transnational nature of many PMSC activities. For example, a maritime security company registered in the United Kingdom may recruit personnel from Malta to work on board a vessel flagged in Liberia and operating in international waters off the coast of Somalia. This type of situation – which is not unusual – makes clear that many countries may have a stake in the operations of a PMSC and variations or lack of legislation in any of them may allow a company to

<sup>32</sup> Convention on the Elimination of All Forms of Discrimination against Women (1979), Article 2 e), Declaration on the Elimination of Violence against Women, A/RES/48/104 (1994), Article 4 c), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) (Convention of Belém do Para), Article 7(b), Inter-American Commission on Human Rights (IACHR), *Velásquez Rodríguez v. Honduras*, 29 July 1988, Series C: Decisions and Judgments, No. 04, para 172, IACHR, Report no. 54/01, Case 12.051, *Maria da Penha Maia Fernandes (Brazil)*, 16 April 2001, para. 56., African Commission on Human and People’s Rights (ACHPR) Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria 155/96 (2001). (*SERAC v Nigeria*), paras 44-48, 57-58, ACHPR Zimbabwe Human Rights NGO Forum v Zimbabwe, 245/02 (2006) paras 144-147, 152-154, 156-159, Commission Nationale des droits de l’Homme et des Libertés v. Chad, African Commission on Human and Peoples’ Rights, Comm. No. 74/92 (1995), *Ms. A.T. v. Hungary*, CEDAW Views adopted on 26 January 2005, Human Rights Committee, General Comment No. 31, CCPR/C/74/CRP.4/Rev.6 (2004), para. 8; Committee against Torture, General Comment No. 2, CAT/C/GC/2 (2008), para 18, Committee on the Rights of the Child, General Comment No. 5, CRC/GC/2003/5 (2003), para. 1; Committee on Economic, Social and Cultural Rights, General Comment No. 14, E/C.12/2000/4 (2000), para. 33, Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (1992), para 9, general Recommendation 19 of the Committee on the Elimination of Discrimination against Women (11th session, 1992), para 9, Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2006/61 (2006).

<sup>33</sup> Protect, Respect and Remedy: A Framework for Business and Human Rights – Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/8/5, paras 87, 102.

elude the reach of national regulation. An international convention, on the other hand, could explicate minimum standards for national legislation and thus contribute to the prevention of these types of problems.

28. In addition, States where PMSCs operate are often emerging from years of conflict, lacking stable institutions, functioning justice systems and trained personnel necessary to investigate and prosecute PMSCs employees suspected of involvement in violations. States in which PMSCs are established may lack jurisdiction to prosecute alleged crimes committed by other States' nationals, or even their own nationals working abroad. Even if jurisdiction to prosecute exists, evidence collected in States where violations occur may not meet the requirements for admissibility in the domestic courts of the alleged perpetrator's home State.

29. With regard to criminal prosecutions for human rights violations, available information suggests that national prosecutions are rare. The most comprehensive information about prosecutions is available with respect to the United States. The United States Commission on Wartime Contracting reported that between 2000 and 2008, only 12 of 58 cases against contractors referred by the Department of Defense were prosecuted.<sup>34</sup> In early 2008, the US Department of Justice reported that it had declined to prosecute 22 cases of alleged detainee abuse committed by contractors in Iraq and Afghanistan.<sup>35</sup> While the Working Group cannot judge why these prosecutions were not brought, the small number of cases that have been prosecuted contributes to the sense that PMSC employees operate with impunity.

30. Accountability for human rights violations may take the form of civil liability for corporate actors. Since many major PMSCs are based in the United States, a number of civil actions against contractors have been brought there. But these cases have, by and large, not been allowed to proceed, either because the US government claimed that the risk of revealing "state secrets" meant that the case could not go forward<sup>36</sup> or because the contractor successfully asserted that it should be protected by the type of combat immunity that attaches to government forces<sup>37</sup>.

31. In sum, national legislation provides a patchy and inadequate framework for addressing the challenges posed by PMSCs. A convention that requires States to adopt national legislation meeting certain minimum criteria provides an efficient mechanism for addressing these lacunae.

## V. Self Regulation

32. The Working Group has welcomed the International Code of Conduct for private security providers, in the hope that it will lead to improved standards across the industry. The Code was developed in response to concerns about the impact of PMSC activities on

<sup>34</sup> Congress of the United States - Congressional Budget Office, "Contractors' support of U.S. operations in Iraq", August 2008, p. 24.

<sup>35</sup> Human Rights First: Examples of Violent Crimes and Abuses by U.S. Contractors ([http://www.humanrightsfirst.org/wp-content/uploads/pdf/Examples\\_of\\_Contractor\\_Abuses.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/Examples_of_Contractor_Abuses.pdf)), cited from Letter from Michael Mukasey, Attorney General, Department of Justice, to Richard Durbin, Senator, United States Congress (January 2, 2008).

<sup>36</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), available at: <http://www.ca9.uscourts.gov/datastore/opinions/2010/09/08/08-15693.pdf>

<sup>37</sup> *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C.Cir. 2009); *Al-Quiraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir.2011); *Al-Shimari v. CACI Int'l, Inc.*, 658 F.3d 413 (4th Cir. 2011). In a review of the *Al-Shimari* decision by the full 4th Circuit Court of Appeals, it was determined that the case could go forward, since the defendants' objections to liability were actually defences, not immunities from suit.

human rights and sets forth a commonly-agreed set of principles for PMSCs. It has proved popular with industry and as of 1 June 2012, 404 companies had signed on to it.<sup>38</sup> While this is in itself a significant accomplishment, the Working Group notes that the process of translating the Code's principles into enforceable practical standards (the Charter) has not yet been completed. The draft Charter is presently undergoing a comment and review process. The Working Group has submitted its comments, noting that the draft does not, in its opinion, live up to the aspirations of the Code and does not conform to the Ruggie Principles.

33. Three particular areas of concern identified by the Working Group are:

(a) The failure to include in the Code the requirement that PMSCs operating in complex environments conduct a human rights assessment, which is a fundamental part of the Ruggie Principles;<sup>39</sup>

(b) The draft Code only permits the review of complaints about a company's lack of internal grievance procedures – it does not provide any means of addressing the substance of a third party complaint. In the view of the Working Group, a review of the substance of allegations of violations of human rights is required by the Code. The Working Group notes that in emphasizing the need for greater access by victims to remedies, the Ruggie Principles specifically suggest that collaborative industry or multi-stakeholder initiatives such as codes of conduct should ensure the availability of effective mechanisms which “provide for accountability and help enable the remediation of adverse human rights impacts.”<sup>40</sup> These mechanisms should also be rights-compatible, defined in the Ruggie Principles as “ensuring that its outcomes and remedies accord with internationally recognized human rights.”<sup>41</sup> Neither of these recommendations is met in the current draft Charter.

(c) The draft Charter places insufficient emphasis on field audits in certifying companies and in conducting monitoring and compliance reviews. Since even the most perfect headquarters-level procedures may not be followed in practice, the Working Group believes that greater emphasis should be placed on field audits which take into account the concerns of affected communities and provide a stronger and more credible basis for assessing a company's compliance with human rights norms.

34. These elements need strengthening in order for the Code to be regarded as a legitimate and credible self-regulatory mechanism. The Working Group looks forward to these concerns being addressed in the final Charter.

35. The Working Group considers the Code to constitute one element of an international system to meet the challenges of regulating PMSCs. As a voluntary and self-regulatory tool, the Code by itself is clearly insufficient to ensure comprehensive accountability for violations of human rights and to provide remedies to victims. Only clear legal norms backed by state enforcement can do that.

## VI. Conclusion

36. **The discussion above demonstrates that, although there are some standards in international law applicable to the activities of PMSCs, the regime is far from complete. First, although there are indications of strong disapproval of the**

<sup>38</sup> [http://www.icoc-psp.org/uploads/Signatory\\_Companies\\_-\\_June\\_2012\\_Composite\\_List\\_SHORT\\_VERSION.pdf](http://www.icoc-psp.org/uploads/Signatory_Companies_-_June_2012_Composite_List_SHORT_VERSION.pdf)

<sup>39</sup> *Supra* note 23, UN Doc. A/HRC/RES/17/4.

<sup>40</sup> *Supra* note 23, UN Doc. A/HRC/17/31, Principle 30, Commentary

<sup>41</sup> *Id.*, Principle 31(f)

involvement of private actors in combat activities, there is no clear international prohibition. Second, while it is clear that States have the general international obligation to ensure respect for humanitarian law and human rights vis-à-vis PMSCs, the content of such obligations has not been explicated. The Working Group believes that developing such content is critical for PMSCs because many of their activities pose particular risks for human rights.

37. While the Working Group has consistently encouraged States to adopt national legislation to regulate PMSCs and believes such regulation to be essential, it seems unlikely that ad hoc efforts alone will be successful. Because PMSCs operate transnationally – they are often located in one country, recruit employees outside their home countries and deploy them in yet another country – it is not enough if only a few countries adopt legislation regulating their activities. So, although national legislation is a critical piece of the regulatory puzzle, an international convention serves as vehicle for making sure that such legislation is adopted by all the countries affected by PMSC activity and that it adheres to certain minimum standards.

38. Finally, an international convention serves to highlight the commitment of the international community to address the issue of PMSCs. We often face situations where robust national legislation is vital and we use international mechanisms to get us there. For example, the attacks of September 11th highlighted the danger posed by terrorist attacks carried out by non-State actors. A critical part of preventing such attacks was to ensure that countries adopted and enforced national legislation. The route chosen was, however, an international one: the UN Security Council adopted a resolution to ensure that States passed legislation to control and criminalize their activities.<sup>42</sup>

39. For all of these reasons, the Working Group believes that an international convention is the most efficient solution to the challenge of regulating PMSCS.

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UN Doc. S/RES/1373 (2001)