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Holding Private Military and Security Companies and Mercenaries Accountable for Human Rights Violations

**Human Rights Council
7th Session**

**Agenda Item 3:
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**

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Human Rights Advocates presents this report to address the need for greater accountability for human right violations committed by private military and security companies. Part I of this report provides a short background of the problem. Part II discusses the various international human rights threatened by mercenary activity. Part III is a critical evaluation of the existing accountability mechanisms, such as international law, domestic law, and self-regulation. Part IV offers recommendations for the Human Rights Council and Member States.

I. Introduction

Mercenary activity is not a new phenomenon. In ancient Egypt, for-profit soldiers made a living off the conflict between Pharaoh Ramses II and the Hittites.¹ In the Middle Ages, princes often employed “free companies,” or privately organized companies of soldiers, to fight in specific campaigns.² Once the campaign was accomplished, the army disbanded. The emergence of the nation-state in the 16th Century led to the creation of full-time national armies that were maintained and controlled by the State.³ It was not until this period in history that the use of force became the exclusive province of State-run police and military.⁴

Today, many States are outsourcing functions typically performed by the military establishment—intelligence, security training, armed security, and defensive as well as offensive military activities—to private military and security companies or “PMSCs.”⁵ This trend is truly international. Common scenarios involve one State contracting a PMSC, who then recruits employees from a second State, who then perform the services under the contract in a third State.⁶ Triple Canopy, a PMSC based in the United States, “now has about 1,000 men in Iraq, about 200 of them American and almost all the rest

¹ Peter W. Singer, Corporate Warriors 20 (2003).

² *Id.* at 24.

³ *Id.* at 29.

⁴ *Id.*

⁵ Peter W. Singer, “Outsourcing War,” *Foreign Affairs*, March/April 2005. Also available at http://www.brookings.edu/articles/2005/0301usdepartmentofdefense_singer.aspx

⁶ Daniel Bergner, The Other Army, *N.Y. Times Magazine*, Aug 14, 2005 at 6. *Also available at* 2005 WLNR 12785746.

from Chile and Fiji. Its rivals include British firms that draw from the elite units of the U.K. military and outfits that draw from South African veterans of the wars to save apartheid.”⁷

Compared with State-run military and police forces, which are subject to fairly strict regulation by their governments and international laws, PMSCs act with relative impunity in the current international and domestic legal landscape. The result is an increased incidence of human rights abuses and decreased accountability for the actors committing those abuses.

For its part, the United Nations has increased its efforts over the last 20 years to address the effects of mercenary activity. In December 1989, the United Nations General Assembly passed resolution 44/34 adopting the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (“Mercenary Convention”).⁸ July 2005, the Economic and Social Council established the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (“the Working Group”) to monitor the impact of PMSC activity on human rights and prepare draft international basic principles that encourage PMSCs to respect for human rights in the course of their activities.⁹ On 19 December 2006, the General Assembly adopted Resolution 61/151 which, inter alia, called on all States to exercise the utmost vigilance against any kind of recruitment, training, hiring, or financing of mercenaries by private companies offering international military consultancy and security services, as well as to impose a specific ban on such companies intervening in armed conflicts or actions to destabilize constitutional regimes.¹⁰

International law firmly establishes that States have a duty to protect against non-State human rights abuses within their jurisdiction, and that this duty extends to protection against abuses by business

⁷ *Id.*

⁸ International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, 11 Dec 1989, UN Document No. A/RES/44/34. [hereinafter “Mercenary Convention” or “the Convention”].

⁹ “Use of mercenaries as means of violating human rights and impeding the exercise of the right of peoples to self-determination,” Commission on Human Rights resolution 2005/2, 7 Apr 2005, UN Doc E/CN.4/2005/L.10/Add.5.

¹⁰ “Use of mercenaries as means of violating human rights and impeding the exercise of the right of peoples to self-determination,” General Assembly resolution 61/151, 14 Feb. 2007, UN Doc. No. A/Res/61/151.

entities.¹¹ Thus, even if the State no longer is the principal actor in using force, it must still assume responsibility for the use of force by or against its citizens, both human and corporate.

II. Human Rights Implicated by PMSC Activity

The broad sphere of activities in which PMSCs engage creates the potential for an equally broad range of human rights abuses, including violations of the right to self-determination, the right to security of persons, the rights of workers, and human trafficking. The victims of the abuses include not only the citizens and residents of the conflict areas, but also the employees and contractors hired by PMSCs.

The *right to self-determination* is a broad human rights principle articulated in both the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights.¹² In 1970, the General Assembly and the Commission on Human Rights declared that with respect to mercenary activities, the right to self-determination means that

“all people have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and that by the context of mercenary activities, the right to self-determination was and that every State has the duty to respect this right in accordance with the [UN] Charter.”¹³

That declaration was a response to the surge in mercenary activity stemming from the decolonization that occurred throughout the world during the 1960s. Colonial governments hired mercenaries to fight against national liberation movements mounted by indigenous citizens. Mercenaries were also used in the periods following independence by opposition parties hoping to destabilize the nascent governments. The threat to self-determination posed by mercenaries and PMSCs is as salient today as it was in 1960s and 1970s. The resurgence in extreme nationalism and ethnic and religious intolerance has renewed the market for mercenary services. Powerful industrialized States such as the

¹¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Par. 10., 19 Feb 2007, UN Doc A/HRC/4/35. (Hereinafter “Report of the Special Representative John Ruggie”)

¹² International Covenant on Civil and Political Rights, Art. 1. International Covenant on Economic, Social, and Cultural Rights, Art. 1.

¹³ General Assembly Resolution 2625, annex. 24, October 1970.

U.S., Great Britain, and China are more willing to exert their influence in regions with strategic or economic importance to their own interests. The use of force by PMSCs threatens territorial integrity and national sovereignty in violation of the right to self-determination.

The *right to security* includes the right to life, and protects persons from being the victims of war crimes, genocide, torture, forced disappearance, forced labor, and other deplorable acts. Perhaps the most high-profile example of a PMSC violating the right to security is the 16 September 2007 shooting in the Nisoor Square neighborhood of Baghdad involving employees of U.S.-based PMSC Blackwater Worldwide. Seventeen civilians were killed and another 24 were wounded.¹⁴ Following that incident, UN Mission spokesperson Said Arikat remarked that "[w]hen you kill 17 people like that, it's a crime against humanity if it is proven that it was done in cold blood."¹⁵ Shortly after the incident, the Working Group on the use of mercenaries issued a press release expressing concern over the immunity enjoyed by PMSCs involved in armed conflict such as the Nisoor Square shootings.¹⁶ It also reiterated the need for domestic regulation and oversight as well as broader accession to the Mercenary Convention¹⁷

The *rights of workers* include the right to just and favorable conditions of work and remuneration, as well as reasonable limitation on working hours.¹⁸ The Working Group on Mercenaries has received reports from Chilean, Fijian, Honduran, and Peruvian workers who have experienced of poor working conditions, including excessive working hours, ill-treatment and the neglect of basic needs such as access

¹⁴ Scott Horton, Kevin Lanigan, and Michael McClintock, *Human Rights First, Private Security Contractors at War—Ending the Culture of Impunity*, 2,30 (2008) (hereinafter “Human Rights First Report”). Available at <http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf>.

¹⁵ Katarina Kratovac, “U.N.: Shootings by guards might well be war crimes,” 10/12/07 *Star-Ledger* (Newark N.J.) 5, 12 Oct 2007. Also available at 2007 WLNR 20096642.

¹⁶ Working Group on the Use of Mercenaries Expresses Concern over the Killing of Iraqi Civilians Involving Employees of Private Security Company, 25 Sep 2007. Available at <http://www2.ohchr.org/english/issues/mercenaries/index.htm> (follow “News” hyperlink; then follow “Press Releases” hyperlink; then follow “WORKING GROUP ON THE USE OF MERCENARIES EXPRESSES CONCERN OVER THE KILLING OF IRAQI CIVILIANS INVOLVING EMPLOYEES OF PRIVATE SECURITY COMPANY” hyperlink).

¹⁷ *Id.*

¹⁸ Universal Declaration of Human Rights, Art. 23-24.

to medical services.¹⁹ There are also reports of partial or complete non-payment of salaries. These allegations suggest widespread violations of internationally accepted labor standards by PMSCs, namely dangerous or unhealthy working environments in conflict areas and forced or compulsory labor. The recruitment practices of PMSCs raise the additional concern of human trafficking. Trafficking is defined as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.²⁰

In order to meet the growing demand for security services, PMSCs are increasingly recruiting “third-party nationals” from countries with particularly high poverty and unemployment to work in conflicted areas. In its 2007 Report, the Working Group on the use of mercenaries specifically mentions the recruitment of nationals from Chile, Honduras, Peru, Spain, Portugal, Russia, South Africa, and the Philippines to provide security services in Iraq and Afghanistan.²¹ “Over the past few years, in Namibia and Uganda, Mozambique, and Burundi, and scores of other impoverished, war-torn countries, American private security companies have increased efforts to hire former fighters for work in Iraq, Afghanistan, and other global hot spots, according to researchers, human rights activists, and those in the private security industry.”²² The South African Foreign Affairs Ministry estimates that 10,000 South African nationals, mostly former police officers and soldiers from South Africa have been recruited to work in Iraq.²³

¹⁹ 2008 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 people to self-determination (Advanced Edited Version), Par. 40, 9 Jan 2008, UN document A/HRC/7/7. (hereinafter “2008 Report of the Working Group on the use of mercenaries”)

²⁰ U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Art. 3.

²¹ *Id.*

²² Stephanie Hanes, Private Security Contractors look to Africa for Recruits, Christian Sci. Monitor, Jan 8 2008 at 6. Also available at 2008 WLNR 358499.

²³ Paul Salopek, Casualties of S. Africa's silent war in Iraq—Desperation drives kin of four abducted mercenaries to speak out. An exodus of highly paid guns alarms, embarrasses Pretoria, L.A. Times 10/14/07 at A10. Also available at 2007 WLNR 20186213.

Many of these third-party nationals were recruited under fraudulent conditions. They were led to believe they would be “security guards” but would not take part in hostilities and their employment contracts did not specify that they would receive military training or that they would operate military arms. This alarming trend, combined with the alleged violations of international labor standards, raises the concern that the widespread recruitment of third-party nationals by PMSCs may comprise human trafficking.

III. Holding PMSCs Accountable for Human Rights Violations

Given the multi- and transnational nature of mercenary activity, international humanitarian and human rights law such as the Geneva Conventions and the Mercenary Convention does provide some basis for holding PMSCs accountable for human rights abuses. However, these instruments address violations committed by States and individuals rather than corporations. Commentators have observed the doctrines of command responsibility and/or agency liability would allow corporate directors to be held liable for human rights violations.

The American case of *Doe v. Unocal*²⁴ is illustrative. Villagers from the Tenasserim region of Burma sued Unocal corporation for its complicity in human rights atrocities committed by the Burmese government and military during the construction of oil pipeline in state (California) and federal courts. In the federal claim, the Ninth Circuit Court of Appeals found that Unocal could be held liable under the aiding and abetting standards applied by the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda.²⁵ The case was on the verge of trial when the parties reached last-minute settlements on both claims, preventing the establishment of precedent. Thus, the viability of these principles in American courts is still unsettled. This ambiguity is not insignificant, as business and corporate entities are arguably the most powerful non-state actors in the international arena.

²⁴ *Doe v. Unocal*, 110 F. Supp. 2d. 1294 (C.D. Cal. 2000); *Doe I v. Unocal Corp.*, 395 F.3d 932.

²⁵ *Doe I v. Unocal Corp.*, 395 F.3d at 947-948. See also Armin Rosencranz and David Louk, “Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch,” 8 Chapman Law Review 135, Spring 2005.

As the principal actors responsible for committing the abuses, the PMSCs themselves must also shoulder responsibility for respecting international human rights laws and standards. However, the inherent conflict of interest between profitability and regulation limit the effectiveness of industry self-enforcement. Thus, States have the primary responsibility of controlling PMSCs at the domestic level through regulatory and judicial enforcement.

At present, international laws provide an uneven patchwork for addressing human rights abuses by PMSCs. Some forms of mercenary activity are prohibited by treaty law and individual persons may be prosecuted for rights violations. However, States are not prohibited from contracting with PMSCs and no mechanism exists for holding the PMSCs directly accountable.

The primary international law on mercenary activity is the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (“Mercenary Convention”). The Mercenary Convention has three basic components. First, it adopts the widely accepted definition of *mercenary* contained in Article 47 of Additional Protocol I to the Geneva Conventions²⁶ and expands it to include acts of violence aimed at overthrowing a government or otherwise undermining the order or territorial integrity of a State.²⁷ Second, the Mercenary Convention prohibits not only mercenary activity, but also the act of promoting, organizing or tolerating mercenaries.²⁸ Third, the Convention requires party States to facilitate prosecution of violations at the national level.²⁹

²⁶ According to Article 47.2, a mercenary is defined as any person who:

- (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.

All of the above requirements must be met in order for an individual to be considered a mercenary.

²⁷ Mercenary Convention, Art. 1, Sec. 2, see note 8 *supra*.

²⁸ Mercenary Convention, Art. 2, see note 8 *supra*.

²⁹ Mercenary Convention Art. 6; Arts. 9-12, see note 8 *supra*.

While the Mercenary Convention provides a valuable foundation for addressing the problem, it suffers from two major shortcomings with respect to its definition of mercenaries and mercenary activity. Under the Convention, a mercenary is a *person* who participates or attempts to participate in armed conflict or an act of violence aimed at overthrowing a Government, or is motivated to participate in such an act by the desire for private gain or compensation.³⁰ The use of the term “person” would seem to indicate a focus on the individual, rather than organizational or corporate level. This focus is problematic because prosecution will likely be limited to lower-level tactical employees, rather than executives or officers responsible for overall corporate policies and practices.

Additionally, the definition of “mercenary activity” does not adequately encompass the current scope of PMSC activity.³¹ The requirement that mercenaries participate in armed conflict, overthrow the Government or undermine the integrity of the State fails to account for the sophisticated scheme of foreign engagements, which are often compartmentalized into functional groups. Thus, PMSCs operating in conflict areas, but whose functional designation is consulting, logistical, intelligence, or transport services would not be considered mercenaries under the Mercenary Convention. PMSCs hired to provide security for reconstruction projects or extractive industry operations are likewise outside the definition of mercenary activity proscribed by the Convention.

However, perhaps the most significant shortcoming of the Mercenary Convention is practical, rather than substantive. To date, only thirty States are party to the convention.³² Human Rights Advocates echoes the concerns about the low level of accession to the Mercenary Concern expressed by the Working Group on the use of mercenaries in its past three reports. Of particular concern is non-accession by the States engaged in the areas most affected by mercenary activity: the U.S., Great Britain, Iraq, and Afghanistan.

³⁰ Protocol Additional Art. 47(2)(a)-(b), Mercenary Convention Art. 1, see note 8 *supra*.

³¹ Heather Carney, “Prosecuting the Lawless: Human Rights Abuses and Private Military Firms,” 74 *Geo. Wash. L. Rev.* 317, 334, February 2006.

³² 2008 Report of the Working Group on the use of mercenaries, Par. 58, see note 19 *supra*.

The Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (“the Norms”) provide a good starting point for a strong, human rights-based framework for ensuring accountability at the corporate level.³³ According to one scholar, the Norms “constitute a succinct, but comprehensive, restatement of the international legal principles applicable to businesses with regard to humans rights law....”³⁴ The legal authority of the Norms derives principally from fact that they are a restatement of existing international legal principals found in treaties and customary international law, including dozens of UN declarations and resolutions.³⁵

The Mercenary Convention states that mercenary activity violates principles of international law such as sovereign equality, political independence, territorial integrity of states, and self-determination of peoples.³⁶ While the Convention is not among treaties or conventions expressly mentioned in the Norms’ Preamble, several of the Norms’ General Obligations correspond with those underlying principles. Particularly relevant is the recognition of the right to security of persons, prohibiting corporations from engaging in or benefiting from war crimes, crimes against humanity, torture, forced or compulsory labor and the like.³⁷ Also relevant is the obligation to respect national sovereignty, which requires corporations to respect the rule of law of the countries in which they operate, refrain from bribery and corruption, and respect and contribute to the realization of economic, social, cultural, civil, and political rights.³⁸ The profit-motivated activity of PMSCs, especially in failed states and developing nations, directly violates the General Obligations to respect the right to security of persons and national sovereignty.

Moreover, the Norms contain specific implementation provisions contained, indicating the drafters’ intent that the Norms constitute binding principles that go beyond the voluntary codes of

³³ Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. UN Document No. E/CN.4/Sub.2/2003/12/Rev.2 [hereinafter “Norms”].

³⁴ David Weissbrodt and Muria Kruger, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,” 97 Am. J. Int’l L 901, 901, October 2003.

³⁵ *Id.* at 913.

³⁶ Mercenary Convention, Preamble, see note 8 *supra*.

³⁷ Norms, Par. 3-4, see note 34 *supra*.

³⁸ Norms, Par. 10-12, see note 34 *supra*.

business conduct previously proffered by the UN.³⁹ As the initial step in the implementation process, the Norms call for each transnational corporation to “adopt, disseminate, and implement internal rules of operation in compliance with the Norms.”⁴⁰ Second, the UN shall conduct periodic monitoring and verification of the corporations’ efforts and investigate complaints of violations.⁴¹ Third, States are responsible for adopting and enforcing a regulatory scheme consistent with the Norms.⁴² Finally, the corporations are required to provide “prompt, effective, and adequate reparation to those persons, entities, and communities” harmed by their conduct, as determined by national courts and/or international tribunals.⁴³ By including corporations and business entities in this multi-tiered approach to accountability, the Norms help fill the void in current international human rights law that currently only addresses governments, individuals, and armed opposition groups. And while the Norms place in the initial onus of compliance on the corporations, they clearly state that the primary responsibility for the promotion and protection of human rights lies with each State and nothing in the Norms shall be construed to diminish that obligation.⁴⁴

As the principal actors in the human rights violations, the PMSC themselves can a great immediate impact in curbing the violation. The manufacturing and extractive industries provide a relevant example of recent efforts by the private sector to acknowledge international norms with regard to labor, health, and safety standards,⁴⁵ but self-regulation by the private sector likewise contains inherent weaknesses in achieving corporate accountability. Industry organizations such as the U.S.-based International Peace Operations Association (IPOA) and the British Association of Private Security Companies (BAPSC) have actively engaged in dialogue with the Working Group and promoted self-

³⁹ In 1976, the Organisation for Economic Co-operation and Development (OECD) undertook a similar effort when it established its first Guidelines for Multinational Enterprises. In 1977, the International Labour Organization (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises. In 1999, UN Secretary-General Kofi Annan proposed a “Global Compact” asking business to support and adopt core principles of human rights obligations, standards of labor, and standards of environmental protection.

⁴⁰ Norms, Par. 15, see note 34 *supra*.

⁴¹ Norms, Par. 16, see note 34 *supra*.

⁴² Norms, Par. 17, see note 34 *supra*.

⁴³ Norms, Par. 18, see note 34 *supra*.

⁴⁴ Norms, Preamble, see note 34 *supra*.

⁴⁵ Report of the Special Representative John Ruggie, Par. 52-54; 68, see note 11 *supra*.

regulated compliance with international humanitarian and human rights standard to their members.

Several dozen PMSCs are members of these industry organizations, including several PMSCs operating in Iraq and Afghanistan.⁴⁶

The IPOA encourages its members “to follow all rules of international humanitarian law and human rights law that are applicable as well as all relevant international protocols and conventions, including but not limited to the Universal Declaration of Human Rights (1948), the Geneva Conventions (1949), the Convention Against Torture (1975), the Protocols Additional to the Geneva Conventions (1977), the Chemical Weapons Convention (1993), and the Voluntary Principles on Security and Human Rights (2000).”⁴⁷ Again, the Mercenary Convention is noticeably absent from this list. The BAPSC Charter requires its member corporations to comply with “all rules of international, humanitarians, and human rights laws... protocols and conventions...”⁴⁸ While Humans Rights Advocates applauds the efforts of these organizations such to promulgate international human rights standards, the self-regulation model has obvious limitations with regard to enforcement and accountability.

For example, the IPOA’s Enforcement Mechanism—its internal grievance process—lacks transparency. All participants in the procedure are required to sign non-disclosure agreements and the procedures for the Enforcement Mechanism do not specify and guidelines for evaluating complaints, resulting in a “black box” decision process. Any person or organization may initiate the process by lodging a complaint regarding noncompliance with the Code of Conduct with the Standards Committee of the IPOA.⁴⁹ The Standards Committee appoints an “Ad Hoc Taskforce,” which screens complaints and forwarding meritorious complaints the entire Standards Committee for a hearing and a decision on whether corrective measures will be imposed. However, corrective measures are extremely limited. The

⁴⁶Neither Blackwater USA nor Triple Canopy are listed among the current members of IPOA. <http://ipoaonline.org/php> (follow “Membership” hyperlink; then follow “Current Members of IPOA” hyperlink); http://www.bapsc.org.uk/key_documents-charter.asp (follow “Membership” hyperlink; then follow “List of Members” hyperlink).

⁴⁷ <http://ipoaonline.org/php> (follow “Standards of Laws” hyperlink; then follow “Code of Conduct” hyperlink).

⁴⁸ http://www.bapsc.org.uk/key_documents-charter.asp (follow “Key Documents” hyperlink; then follow “Charter” hyperlink).

⁴⁹ <http://ipoaonline.org/php> (follow “Standards of Laws” hyperlink; then follow “Enforcement Mechanism” hyperlink).

Enforcement Mechanism may not compel a member to take any action and does allow any complaints of violations to be escalated outside the IPOA. Corrective measures may not be punitive in nature,⁵⁰ and the most serious sanction a PMSC would face is expulsion from the IPOA and forfeiture of its dues.⁵¹ In comparison to the magnitude and gravity of the human rights violations, expulsion and forfeiture of association dues is a relatively benign consequence that is unlikely to achieve any deterrent or rehabilitative effect, nor do they provide for reparation to victims..

Given the difficulty of enforcing of international law and the inherent limitations of industry self-regulation, domestic legislation is the most effective method of holding PMSCs accountable for international human rights abuses. Of the thirty nations that are parties the Mercenary Convention, Croatia, Georgia and New Zealand have developed laws that comply with the obligations contained in the Convention.⁵² Additionally, several other countries have domestic laws that deal with mercenary activity. Namibia and South Africa have legislation directly on point.⁵³ Azerbaijan, the Russian Federation, and Uruguay have statutes within their respective criminal codes. The penal codes of Cuba and France also deal with mercenaries. Australia, the United Kingdom, and the United States also have legislation relating to security activities abroad.

Thus, Human Rights Advocates recognizes that many States currently have domestic laws that provide for criminal prosecution of mercenary-related activities but emphasizes that individual criminal prosecution is an ineffective method of addressing widespread abuses committed by corporations. Effective domestic legislation must also include regulatory and administrative laws, including licensing requirements for PMSCs performing government contracts, human rights monitoring and reporting, heavy punitive sanctions for human rights violations, and reparations for victims.

In the example of the U.S., the Military Extraterritorial Jurisdiction Act (“MEJA”) allows charges to be levied against U.S. contractors for criminal conduct while working for the Department of Defense or

⁵⁰ *Id.* § 5.5

⁵¹ *Id.* §§ 6.11-6.15.

⁵² Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. Note by the Secretary-General, UN Document A/60/263, 17 August 2005.

⁵³ *Id.*

in support of a Department of Defense mission.⁵⁴ Specifically, the U.S. federal courts have jurisdiction to prosecute any employees, contractors, or subcontractors working for the Department of Defense who commit criminal acts that would be punishable by imprisonment for one year, had those acts taken place in the U.S.⁵⁵ However, the language of MEJA is under-inclusive; by limiting the scope of the statute to members of the military or Department of Defense contractors, PMSCs under contract with other government agencies such as the Central Intelligence Agency, Department of State, or Department of the Interior are exempt from prosecution. As a result of this under-inclusiveness, many of the individuals implicated in the highly publicized abuses of prisoners at Abu Ghraib are immune from prosecution, as they were working under contract with the Department of the Interior.⁵⁶

The US Congress is currently considering expanding the statute to covers contractors working under any federal agency in, or in close proximity to, an area where the Armed Forces are conducting a contingency operation.⁵⁷ While Human Rights Advocates is encouraged by this legislative development, it remains concerned about the US government's systematic failure to investigate or prosecute the numerous reported cases of violations by PMSCs under contract with Department of Defense, despite its clear authority to do so.⁵⁸ Since the statute was enacted in 2000, the U.S. has initiated only one prosecution against a private security contractor for a violent crime.⁵⁹

In South Africa, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Areas of Armed Conflict⁶⁰ provides a more positive and comprehensive approach to the mercenary problem. The Prohibition proscribes a broad range of mercenary activities within its definition of "security services" including consultative, financial, logistical, and personnel support, as well as the

⁵⁴ Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. §§ 3261, 3267(1) (2000).

⁵⁵ *Id.*

⁵⁶ Human Rights First Report, 2;30, see note 14 *supra*.

⁵⁷ MEJA Expansion and Enforcement Act of 2007, H.R. 2740: 2007-2008 (110th Congress). This bill was passed in the House of Representatives on 4 Oct 2007. The bill now goes on to be voted on in the Senate.

⁵⁸ Human Rights First Report, 30, see note 14 *supra*.

⁵⁹ *Id.* at 30.

⁶⁰ The Prohibition of Mercenary Activities and Regulation of Certain Activities in Areas of Armed Conflict, 2005, Bill 42-05 (NA). Available at <http://www.info.gov.za/gazette/bills/2005/b42-05.pdf>.

management, control and supervision of such activities.⁶¹ The law creates a presumption of unlawfulness for all mercenary activity which is defined more broadly to include the support functions involved in a security contract. Equally important, the law creating an unequivocal basis for corporate liability by prohibits the *management, control, and supervision* of such activities.

The law also contains a licensing component, recognizing the need for exceptions where the broad prohibition on security services might limit participation in international humanitarian efforts. Any person or company providing assistance, service, or security services in armed conflict or other regulated countries must seek government authorization⁶² and assumes an obligation to follow international law and human rights standards.⁶³ The law also confers jurisdiction over extra-territorial violations committed by South African citizens and provides for criminal penalties.

South Africa's law therefore serves as an excellent example of domestic regulation of mercenary activity. The law establishes a licensing regime based on international humanitarian and human rights standards, provides for criminal liability at the both individual and corporate level, and establishes extra-territorial jurisdiction over both individuals and corporations. Human Rights Advocates commends the South Africa on its efforts to implement and enforce international human rights standards on human and juridical entities engaging in mercenary activity.

Nonetheless, an international procedure should be available should domestic enforcement be ineffective. The framework for such mechanisms already exists. The Mercenary Convention provides a useful framework for the prosecution of offenders and the establishment of channels of cooperation between States.⁶⁴ In particular, it makes participation in mercenary activities an offense of mandatory universal jurisdiction, which means that an offender must, unless extradited, be tried by any State in which he or she is found.⁶⁵ The Norms on the responsibilities of transnational corporations provide a

⁶¹ *Id.* at § 1(1) "security services" (a)-(i).

⁶² *Id.* at § 4(1).

⁶³ *Id.* at §9(b).

⁶⁴ Office of the United Nations High Commissioner for Human Rights, "The Impact of Mercenaries on the Right of Peoples to Self-Determination," 24, Fact Sheet No. 28, *available at* <http://www.unhchr.ch/html/menu6/2/sheets.htm>.

⁶⁵ *Id.*

potential avenue for corporate accountability in the international community. Under the norms, corporations and business enterprises are subject to UN monitoring and verification, as well as remedial action by international tribunals. The International Criminal Court provides another mechanism for prosecuting individuals for war crimes and crimes against humanity. While the Rome Statute does not specifically mention mercenary activity as a crime, the responsible individuals should be subject to prosecution for the underlying crime in the same way as any other offenders.

IV. Recommendations

Human Rights Advocates urges the Human Rights Council to:

- Continue the mandate for the Working Group on Mercenaries, expanding the Working Group's mandate to allow for three sessions per year, as requested by the Working Group.
- Recognize the foundation established by the Norms and create an expert body to continue the efforts toward implementation of a body of international standards for transnational corporations and other business enterprises with regard to human rights.

Human Rights Advocates calls upon all Member States:

- To ratify or accede to the 1989 International Convention against the recruitment, use, financing, and training of mercenaries.
- To enact domestic regulatory legislation requiring oversight and accountability of PMSCs under contract with any government agency, including provisions for effective monitoring and reporting of human rights violations and remedies for victims.
- To convene and discuss the role of the State as the primary user of force in light of the alarming expansion of mercenary activity.