

WHY PRIVATE MILITARY AND SECURITY COMPANIES SHOULD BE REGULATED



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*Laissez faire et laissez passer,
le monde va de lui même!*

When the defaulted toys made in China for the company Fisher Prize reached European countries a few years ago, the regulations set up by the European Union prevented, for precautionary reasons, to enter the market since they did not comply with the safety measures established by the governments of Europe. No such regulations exist for the exported activities of private military and security companies which due to their nature may become lethal at any time.

Mandated by the Human Rights Council and the General Assembly of the United Nations to study the impact of these private contractors entrusted to fulfill military and security functions, the independent experts of the UN Working Group on mercenaries have arrived to the logic conclusion that a new binding international legal instrument is necessary to regulate and monitor the activities of private military and security companies (PMSC) The reasons are developed in the present article.

In 2005, the United Nations Commission on Human Rights, the predecessor of the UN Human Rights Council, created an independent working group of five experts *to study, identify and monitor emerging issues, manifestations and trends regarding mercenaries and activities of private military and security companies and their impact on human rights, particularly on the right of peoples to self-determination.* The Working Group was also requested *to elaborate and present concrete proposals on possible new standards, general*

*guidelines or basic principles encouraging the further protection of human rights*¹. Since then, the UN Human Rights Council and the General Assembly have reiterated and expanded the mandate given to the independent experts of the Working Group.

In the past five years, the experts have conducted, nine field missions: in countries exporting PMSC's activities (United Kingdom and United States of America); countries importing those services (Afghanistan)² or countries from which third nationals are contracted to be sent to conflict, post-conflict or low intensity armed situations (Chili, Ecuador, Fiji, Honduras Peru)³, and countries where the former employees of private military and security companies have carried out mercenary activities (Equatorial Guinea)

The Working Group has considered a large number of allegations of human rights violations committed by employees of these companies. In the cluster of human rights violations allegedly perpetrated by employees of PMSC which the Working Group has examined one can find summary executions; acts of torture; cases of arbitrary detention; of trafficking of persons; serious health damages caused by their activities; as well as attempts against the right of self-determination. It also appears that PMSCs, in their search for profit, neglect security and do not provide their employees with their basic rights, and often put their staff in situations of danger and vulnerability.

The argument that to employ PMSC is more cost effective may be true in the short term and if a number of socio-economic variables are not taken into consideration such as the training in the use of weapons and counterinsurgency operations of former militaries and policemen, paid by the taxpayers and not by the PMSC themselves. In this connection it is worth noting the increasing number of militaries who attracted by the higher salaries are leaving the army in developed and developing countries to join PMSC. A way to decrease costs for PMSC has been to contract more and more former militaries and policemen from developing countries at much lower salaries. Issues of reintegration and post-traumatic stress disorder in individuals returning to their communities from military/security work abroad have not been assessed either. Because of the nature of their contracts thousands and thousands of these "guns for hire" are disposable and available in the market and ready to be employed in any conflict situation.

In the course of its research the UN Working Group has found out that there is a regulatory legal vacuum covering the activities of PMSC and lack of common standards for the registration, licensing of these companies as well as for the vetting and training of their staff and the safekeeping of weapons. Although there are norms of international humanitarian and human rights law that could apply in some situations in practice they have not been implemented.

The existence of a corpse of legal norms at the international level is one of the main arguments of the Swiss Initiative, launched in 2006 by the Swiss Government and the

¹ UN Commission on Human Rights resolution 2005/2

² A request was made by the Working Group to the government of Iraq which has not agreed the visit of the Group for security reasons

³ The Working Group has, since 2006, addressed numerous requests to the government of Colombia to visit the country. As of the date of this article the invitation to conduct a mission in Colombia has not been granted by the authorities.

International Committee of the Red Cross. The Initiative has been working with a number of governments towards what is known as the Montreux Document, adopted in 2008. A not binding document based on self-regulation and basically reiterating existing international norms, the Montreux Document contains a number of “good practices” as examples to be followed by private military and security companies. The main movers behind the Swiss Initiative are the governments of the United States, of the United Kingdom and of Switzerland with the active support of the two main lobbies of the industry: the International Peace Operations Association (IPOA), grouping major American PMSC, and the British Association of Private Security Companies which does the same for the British companies.

It should be noted that the aphorism that the “invisible hand of the market” is enough to regulate the activities of PMSC without needing any outside intervention whatsoever seems to have been abandoned after a number of events have proved to the contrary. Self-regulation under the Swiss Initiative aims now towards a common Global Code of Conduct of PMSC which would self-regulate their behavior.

Within this context it is interesting to note the concern of academics and public opinion in general in Switzerland regarding the existing legal vacuum in respect of PMSC. The issue has been recently subject of debate in Switzerland following the relocation to Basel of the headquarters of the British firm Aegis Defense Services. There are currently no Swiss laws governing the activities of such firms⁴

Contrary to the “dogs of war” mercenaries of the past, private military and security companies are legally registered and the definition used in international instruments, such as the one contained in Additional Protocol I to the Geneva Conventions and the one in the UN Convention on mercenaries, cannot normally apply to personnel of PMSCs.

However, because the military and security services provided by PMSCs are highly specific and dangerous: they should not be considered as ordinary commercial commodities left to the self regulation of the market and the companies themselves.

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

The Working Group has also found that PMSC have succeeded in creating a situation of diffused responsibility and lack of accountability through a labyrinth of contractual and insurance layers and shells.

In 2009, the UN Human Rights Council in paragraph 13 of its resolution /10/11 specifically requested the Working Group to:

- (a) *Consult with intergovernmental and non-governmental organizations, academic institutions and experts on the content and scope of a possible draft convention on private companies offering military assistance, consultancy and other military security-related services on the international market (...)*

⁴ See «Un vide juridique profite aux armées privées », TSR 10 August 2010.

(b) Share with Member States, (...), elements for a possible draft convention on private military and security companies, requesting their input on the content and scope of such a convention (...);

(c) Report to the fifteenth session of the Human Rights Council on the progress achieved in the elaboration of the draft legal instrument for proper consideration and action;

In order to fulfill with this mandate, the Working Group has conducted a series of consultations with governments of the five geopolitical regions of the world on issues relating to the impact of the activities of PMSCs on the enjoyment of human rights, as well as regulating and monitoring the activities of private military and security companies⁵.

It has also organized a series of consultation with a wide range of stakeholders on the content and scope of a possible draft convention. In this context, an initial draft text of the convention was circulated on 15 July 2009 to some 250 experts, academics and NGOs to provide their input on the contents and scope of the Convention. The Working Group received some 45 written submissions comprising a total of over 400 comments.

On the basis of the comments received from all the above-mentioned stakeholders and the feedback on the ideas contained in the draft elements during the regional consultations held in the five regions of the world the Working Group drafted a new text which was shared with Member States⁶.

The draft text of an international instrument as well as the recommendation of the UN Working Group to the World Organization to create an open-ended working group entrusted with the elaboration of a convention are contained in two separate reports, the first being submitted to the UN Human Rights Council⁷ at Geneva, in September, and the other to the General Assembly's Third Committee⁸ in November 2010.

It should be noted, however, that the Working Group is not the only body calling for a legally binding instrument to regulate and monitor the activities of private military and security companies. This is also the position of the Parliamentary Assembly of the Council of Europe which has adopted two reports⁹ recommending “*that the Committee of Ministers draw up a Council of Europe instrument aimed at regulating the relations of its member states with PMSCs and laying down minimum standards for the activity of these private companies*”. The UN Working Group's proposals go also along the same lines as the “Stop Outsourcing

⁵ The first consultation for Latin America and the Caribbean was held in Panama in 2007, the second in Moscow for Eastern Europe and Central Asia in 2008, the Working Group held, thereafter, regional consultations in Bangkok in 2009 for Asia and the Pacific, in Addis Ababa for Africa in 2010, and in Geneva for the Western European and Others Group also in 2010.

⁶ The Working Group received written submissions from Australia, Azerbaijan, Belarus, Canada, Cuba, Ecuador, Egypt, Guatemala, Lebanon, Qatar, Russian Federation, Serbia, Slovenia, South Africa, Spain (on behalf of the European Union), Switzerland, Trinidad and Tobago, the United Kingdom of Great Britain and Northern Ireland and the United States of America as well as written submissions from the institutions of the Commonwealth of Independent States (CIS).

⁷ United Nations document A/HRC/15/25.

⁸ United Nations document A/65/...

⁹ Council of Europe (Doc. 11787 and Doc. 11801)

Security Act” proposed by US Congress Representative Jan Schakowsky (D-IL), a member of the US House Permanent Select Committee on Intelligence.

The main aims of the proposed convention are to reaffirm and strengthen the State responsibility for the use of force and reiterate the importance of the State monopoly of the legitimate use of force and identify those inherently State functions which cannot be outsourced to PMSCs under any circumstances as well as to limit PMSCs use of force and firearms according to international human rights standards.

The Global Code of Conduct promoted under the Swiss Initiative could be complementary to the proposed binding convention on PMSC. Voluntary codes of conducts for PMSCs may be a useful mechanism. However, the position of the UN Working Group is that they remain insufficient and should be combined with the elaboration and adoption of legally binding instruments at the national, regional and international level.

The international instrument would stipulate the development of a national regime of licensing, regulation and oversight of the activities of PMSCs and their sub-contractors as well as increased responsibility of ‘home States’ (where PMSCs are registered) for the export of military and security services of PMSCs registered and licensed in their country and that States on which territory PMSC operate ensure effective control over the activities of these companies.

The new international instrument would also provide for the establishment of an international Register of PMSCs based on information provided by States. State Parties would be compelled to provide data annually for the Register on imports and exports of military and security services of PMSCs and standardized information on PMSCs registered in and licensed by the State Party. This obligation to share information on companies in an open and transparent way would provide greater public and parliamentary scrutiny. An international committee would monitor the measures taken by State parties to implement the convention.

Taking into account the recent developments at the international level, the proposed convention would apply not only to States but also to intergovernmental organizations, within the limits of their competence, with respect to PMSCs, their activities and personnel. It would apply to all situations where PMSCs deploy their activities, regardless of whether the situation is considered to constitute an armed conflict or not.

The proposed new legally binding instrument by the UN Working Group is aimed at ensuring that, in order to protect human rights, States take the necessary measures to promote transparency, responsibility and accountability in their use of PMSCs and their personnel, and that they establish mechanisms for the rehabilitation of victims.

The international public opinion should be attracted to the debate that will take place in the coming months in the United Nations regarding this issue for it will confront two philosophies among Member States of the World Organization in such important matters as the sovereignty of states and the impact of outsourcing the legitimate use of force to private contractors without regulatory and monitoring mechanisms.

Indeed, an important change in the democracies of Western countries has operated with regard to the paradigm on which Western democracies have based the monopoly of the

legitimate use of force in the past two centuries. Such change has occurred in the context of the anarchical globalization of the world economy that followed the collapse of the USSR. In the course of the last two hundred years the trend in Western democracies towards the strengthening of the legitimate use of force as a public service seems to have been inverted. Today we are witnessing, more and more, the outsourcing of the use of force to the private sector as one, among others, commercial commodities. This new trend to privatize security is generalizing and has already reached the United Nations Secretariat itself which has envisaged outsourcing security functions in some given situations.