

## IMPROVING EUROPEAN REGULATION OF PRIVATE MILITARY AND SECURITY COMPANIES

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On September 30, 2008, the Geneva Centre for the Democratic Control of Armed Forces (DCAF) released a report entitled “European Practices of Regulation of PMSCs and Recommendations for Regulation of PMSCs through International Legal Instruments”. The report together with a number of other documents served as a basis for the discussion held in Moscow on October 16 – 18, 2008, by the United Nations Legal and Regional Consultations in the format of the East Europe Group and Central Asia Region “Activities of Private Military and Security Companies: Regulation and Oversight”. The paper considers the current challenges posed by PMSCs, provides an overview of the existing regulation at the European and international levels and presents recommendations to the UN Working Group on the use of mercenaries for effective PMSCs regulation<sup>1</sup>. But it has a much broader value. It provides food for thought about the real aims and consequences of privatizing and outsourcing state defense, military and security functions.

Over the past 30 years, a sophisticated campaign has been waged to privatize all kinds of government services all over the world. The theory is that the modern state has too many obligations and lacks adequate resources to fulfill them. But what is most important, it does not need to provide to society all state services itself. Corporations can deliver government services better and at lower costs than the government. Over the last ten to fifteen years the theory was put into practice, including in the field of defense, military and security services. Some states had to do it because they reduced drastically their armed forces after the end of the “cold war”. Others were forced to go along the same lines because of a severe economic crisis associated with the challenges of the transition period. And others discovered that they might better achieve and promote their national interests under the cover of private providers of different military services.

The result is that in recent years privatization has exploded. A paradigm shift of the provision of security from public to private actors amounts to between 100 and 120 billion dollars spent annually on their services<sup>2</sup>. More than 180 PMSCs of different types operate in Iraq and more than 60 in Afghanistan. They employ thousands and thousands of persons. The exact number of their personnel is likely to be unknown to anybody<sup>3</sup>. The Amnesty International even insists that “there are more private contractors in Iraq than there are U.S. military or government

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<sup>1</sup> European Practices of Regulation of PMSCs and Recommendations for Regulation of PMSCs through International Legal Instruments // Anne-Marie Buzatu. The Geneva Centre for the Democratic Control of Armed Forces (DCAF). – Geneva, 30 September 2008. – p. 59

<sup>2</sup> UN General Assembly Doc. A/63/325 Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. – 25 August 2008. – p. 7.

<sup>3</sup> See, e.g.: Schmeidl Susanne. Case Study Afghanistan – Who Guards the Guardians? / Private Security Companies and Local Population: An Exploratory Study of Afghanistan and Angola. Swisspeace report, November 2007. – p. 14 – 45; Brooking Stephen, Schmeidl Susanne. When Nobody Guards the Guards: The Quest to Regulate Private Security Companies in Afghanistan // Sicherheit und Frieden, Vol. 4, fall 2008.

personnel”<sup>4</sup>. Transnational PMSCs, mainly from the United States and Great Britain, but also from Australia, Canada, Israel and other countries, export their services to over 50 countries, in particular to the countries where low intensity armed conflicts are ongoing, including not only Afghanistan and Iraq, but also the Democratic Republic of Congo, Somalia and Sudan<sup>5</sup>.

Inside many governments and even international structures it has become an article of faith that outsourcing is best. The expert community has largely embraced the same vision. But such a vision has nowhere been supported by facts or deeds. On the contrary, the international community discovered that private providers of defense, military and security services generate numerous violations of basic international law and national legislation, are not cheap at all and not only fail to promote solutions to numerous problems which they were invited to tackle but create a wide range of new ones.

The present article seeks to understand where we are with the PMSCs, and what kind of legal framework is needed to properly regulate and oversight their activities using the Geneva Report as a starting point.

### **Key challenges**

The shift in performing defense, military and security duties and services from state to non-state actors poses several important challenges. In accordance with the DCAF paper, they are: the erosion of the state monopoly on the use of force, lack of coherent PMSCs standards, accountability deficit, weakening of national security, practical problems of applying regulatory framework and oversight, higher risks of human rights violations and different types of other abuses. The list of challenges is not exhaustive, of course. Let us examine them one by one.

For many centuries, it has been assumed that the use of force, as well as the protection of the individual, society and world community, is the responsibility of the state. The assumption is enshrined in public institutions, procedures and mechanisms, national legislation and international covenants, day-to-day life, people’s habits, customs and expectations. It is the basic notion of the relationship between an individual or groups of individuals and the state power, as well as between states on the international scene. The existing regulatory framework is adapted to a world where there is a monopoly of the state for the use of force. The US Federal Activities Reform (FAIR) Act of 1998, for example, defines the “inherently governmental functions” as military, diplomatic and other activities which “significantly affect the life, liberty or property of private persons”<sup>6</sup>. The proliferation of PMSCs has eroded this monopoly. But it is neglected by the existing state and world order. It was not prepared for a new situation. A huge gap between the existing regulatory framework and the new practices creates friction, malfunctioning of institutions, vacuum of authority and lack of legitimacy. It must be filled in or reduced.

Outsourcing of state functions is likely to weaken the ability of the state to guarantee internal and external security to its citizens. Business competes with the state and international collective security organizations for professionals, managerial performance and scarce resources. And it is better placed to win the competition. Jobs for former, or even current, policemen, soldiers and officers are created in the private, instead of public, sector. Young people and well trained professionals consider them much more attractive, or, perhaps, they don’t have any choice. The state is left without so much needed workforce. The mass exodus strains the

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<sup>4</sup> Accountability for Private Military and Security Companies // Amnesty International Human Rights Elections Brief 2008, No. 9, 2008. – p. 1.

<sup>5</sup> UN General Assembly Doc. A/63/325. – p. 7.

<sup>6</sup> 31 USC 501.

remaining police and military forces. Efforts to build an effective state are hampered<sup>7</sup>. The will of the state to improve its abilities to provide defense, military and security services of high quality to its population is watered down. It has to rely on PMSCs more and more.

In contrast to the state security providers, PMSCs are not directly accountable to public oversight<sup>8</sup>. The responsibility of the state for these actors is often lacking or unclear<sup>9</sup>. The wrongdoings committed by them are not suppressed appropriately. All these three deficits undermine the democratic foundations of society. They are detrimental to weak states, and they damage the cause of democracy in general creating an atmosphere of impunity and selective application of law, as well as legal uncertainty.

When PMSCs are in operation instead of the state forces, the risks of wrongdoings, abuses and human rights violations are higher. The official position of the US and Canada, for example, is that the governments are not automatically obliged to provide protection against the violations committed by PMSCs and their personnel abroad.

None of the current laws or standards seems to be applied to PMSCs activities when a contractor of one nationality is hired by an entity of another nationality to work on the territory of a third nationality, etc. There are difficulties in conducting investigations of alleged violations abroad. The same goes for criminal trials. Criminal investigators may have neither resources nor ability to properly collect evidence within the sensitive time-limits and the chain of custody requirements for criminal trials.

The terms “private security companies”, “private military companies”, and “PMSCs” are largely used but nobody knows exactly what they actually mean. Especially now, when PMSCs happen to be often involved in guarding and servicing legitimate military targets or even directly participate in hostilities and armed conflicts. Thus, some authors define “private military companies” as businesses offering specialized services related to war and conflict, including combat operations, strategic planning, intelligence collection, operational and logistical support, training, procurement and maintenance<sup>10</sup>; and the “private security companies” as offering guarding services, electronic security, sensor and surveillance, and intelligence and risk management services<sup>11</sup>. But in real life this distinction is not so obvious. Many PMSCs, especially large ones, do not comply with it. That is why the Report has embraced another approach to their classification. It suggests considering PMSCs in terms of the legal framework that may be applied to them and the likelihood of the use of force or involvement in hostilities by the private contractors. The following three broad distinctions are proposed: 1. Those contractors who are contracted to perform duties requiring the use of the threat of a deadly force are distinct from those who are not. 2. Those contractors who operate within the context of an armed conflict

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<sup>7</sup> Afghanistan, for example, as is mentioned in the report, responded to this situation by imposing an age limit of 25 for Afghan nationals to join private security firms, and is considering raising the limit to 30.

<sup>8</sup> Richards Anna, Smith Henry. Addressing the Role of Private Security Companies within Security Sector Reform Programmes // Journal of Security Sector Management, Vol. 5, No. 1, May 2007.

<sup>9</sup> Some experts think that it is the main reason for PMSCs proliferation.

<sup>10</sup> Private Military Companies // Geneva Centre for the Democratic Control of Armed Forces, DCAF Backgrounder, No. 4, 2006.

<sup>11</sup> Born H., Caparini M., Cole E. Regulating Private Security in Europe: Status and Prospects // DCAF Policy Paper, No. 20, 2007. – p. 10. – Available at [www.dcaf.ch](http://www.dcaf.ch). It is a reprint of the Council of Europe Council of Police Matters of the European Committee on Crime Problem draft report, Report No. PC-PM, 2006, 01, Strasbourg, 11 September 2006.

within the meaning of international law and those who operate within the conditions not reaching this threshold. 3. Those contractors who operate in an area of instability, such as designated by “the UN security phase of 3 or higher”<sup>12</sup>.

To the key challenges enumerated in the Report a few others could be added. To my mind, the crucial one is that the shift of defense, military and security services from the state to private business does not solve either the problem of security personnel shortage or the problem of state and international security.

At the national level, it creates a situation when better protection of a minority of the population is achieved at the expense of a majority. Though even the minority does not seem to be protected well enough considering a large number of rich persons and officials killed under suspicious circumstances. The state efforts to combat criminality and organized crime lack consistency and do not provide an adequate level of protection and security to society. This is detrimental to the quality of life and undermines prospects for economic development. Insecurity creates a growing demand for alternative schemes of protection. More and more people start working for PMSCs. It drastically diminishes the productive potential of a nation and adds nothing to its security. Even worse, PMSCs are likely to be involved in unlawful activities, and they are interested in a growing market for their services. We are in a classical situation of a vicious circle. And it is tremendously difficult to get out of it.

The same happens at the international level. Instead of seeking a lasting peace, stability and solutions which could benefit all parties concerned, the international community merely freezes conflicts. Instead of improving its capabilities to cope with future emergencies, it increases its dependency on PMSCs. Instead of installing law and order in weak states and remote areas of the globe, it brings suffering, humiliation and impunity. Though, of course, there are some indications to the contrary.

### **Unsustainable European regulation of domestic private security and exported PMSCs**

As is stated in the report, no single model for regulating domestic PMSCs exists in Europe<sup>13</sup>. On the contrary, European states have adopted different approaches. It is partially due to historical, cultural, political and legal factors and, partially, to specific security situations prevailing in them.

The previous research conducted for the Council of Europe<sup>14</sup> identified four distinct domestic regulatory approaches in the region. In Cyprus and Serbia, private security forms an unregulated industry with unclear relationship with the public police. In Austria and Germany, a general commercial regulatory framework, which does not grasp their peculiarities, is applied to PMSCs. In Bosnia-Herzegovina, Italy, United States and Switzerland, regulation of PMSCs is decentralized. Only some European states have adopted a special legislation. They are Ireland, Great Britain and the Netherlands.

Though the specific form and content of the regulation varies from state to state, domestic regulations tend to deal with the following aspects of PMSCs: links between private and public security providers; control of PMSCs, their entry into market conditions; selection, recruitment and training of private security personnel; their identification; use of firearms and search and seizure of PMSCs. In some European states, e.g. Cyprus, Czech Republic, Finland, Germany, GB and the Netherlands, PMSC employees have no more powers than any other citizens. In other states, like Latvia, the situation is a little bit different. In Denmark, France, GB, Ireland and the Netherlands,

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<sup>12</sup> European Practices... - p. 11.

<sup>13</sup> European Practices... - p. 17.

<sup>14</sup> Born Hans, Caparini Marina, Cole Eden. – Ibid.

PMSC employees are prohibited from carrying and using firearms. In other states, they are allowed to do both under special circumstances.

Various states have supervising institutions which monitor PMSCs activities<sup>15</sup>. In some states, e.g. in Denmark, Greece, Hungary and Slovakia, PMSCs come under control of the local police. In Germany, Italy and Sweden, local civil authorities are responsible for controlling the sector. The Ministry of the Interior controls PMSCs activities in the Netherlands, Poland and Slovenia. The Ministry of Justice monitors them in Luxemburg. And only GB and Ireland have established specialized security authorities for the purpose of supervision.

Oversight is exercised in different manners. Each country decides whether yearly reports are enough, or inspection visits on the spot are needed, whether the supervisory bodies act on request or on a permanent basis, what triggers investigations, and what sanctions for punishing wrongdoings could be applied.

Several states have adopted laws which apply to their own nationals extraterritorially, introduced provisions of international humanitarian and criminal law in their internal legal order and entered bilateral agreements with third countries seeking military help, thus creating an additional legal framework which is of relevance for regulating PMSCs in cross-borders operations. But with some important exception, most of these laws were never intended to apply to private providers of defense, military and security services.

In principle nothing is intrinsically bad with a situation when a visiting state has its armed forces and its PMSCs present in the territory of a third country on a request of its legitimate authorities and foresees an extraterritorial application of its legislation. This legislation may be well elaborated, fair and modern and create conditions for lawful conduct<sup>16</sup>. It could be even beneficial for everybody in case of a civil war in the region or internal law and order swept away by an ongoing conflict. Under such conditions, it is not the current lack of legislation applicable to PMSCs on the ground that is a problem, but the lack of enforcement of extraterritorial legislation of a visiting state potentially applicable to PMSCs.

First of all, the civil and military authorities of a visiting state do not know and do not understand how domestic legislation can be practically applied to PMSCs. The legislation was not drafted with PMSCs in mind. It has neither PMSCs owners, nor their personnel as its main target. It was drafted based on the assumption described above, i.e. that defense, military and security services must be provided by public bodies, such as the state armed forces. In addition, there are no effective supervision procedures and mechanisms for proper investigation and trial/prosecution of alleged violations committed abroad. Investigations conducted abroad are too expensive. Domestic tribunals do not have capacity to perform them. But the main reason for the impunity of PMSCs abroad is, as is stressed in the Report, the gulf between the “law on the books” and “law in action”<sup>17</sup> or, perhaps more bluntly, an absence of “political will to investigate and prosecute cases of criminal misconduct by contractors”<sup>18</sup>.

In addition, there are even greater difficulties in applying to them international humanitarian and criminal law provisions, contained in the Geneva Conventions of 1949, the International Criminal Court Statute, Additional Protocol I to the Geneva Conventions of 1949,

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<sup>15</sup> This information is based on “Panoramic Overview of Private Security Industry in 25 MS of the EU”, CoESS and Uni-Europa, 2004.

<sup>16</sup> Recent US John Warner National Defense Authorization Act for FY 2007 extends military codes to PMSCs and brings them potentially under the jurisdiction of locally-based military courts.

<sup>17</sup> Lanigan Kevin. Legal Regulation of PMSCs in the United States: The Gap between Law and Practice // Sicherheit und Frieden, fall 2008. – p. 4.

<sup>18</sup> Razook Erica. Online-debate on Private Security Contractors // Council on Foreign Relations, 13 December 2007. – <http://www.cfr.org>

and the International Convention against Recruitment, Use, Financing and Training of Mercenaries of 1989 (UN Mercenary Convention), as well as pertinent rules of customary international law. Here are a few examples. The Geneva Conventions of 1949 are applicable to PMSCs if they directly participate in hostilities or are incorporated into the state forces and what is going on in the region is qualified as an armed conflict. But there are no contracts inviting PMSCs to participate in hostilities. A common understanding of the kinds of activities constituting direct participation in hostilities is much debated. As of today, the ICRC has held four inconclusive Expert Meetings on the Notion of Direct Participation in Hostilities<sup>19</sup>. The incorporation of PMSCs in their military or other forces runs counter the intentions of the states. It means that one of the two conditions is very difficult to prove or testify. Theoretically, the qualification of an armed conflict is less controversial. In practice, it is not the case. Common Article 2 defines an international armed conflict as any declared war or armed conflict between two or more states, even if the state of war is not recognized by one of them. The threshold to determine the existence of an international armed conflict is quite low, requiring neither a high intensity nor a long duration<sup>20</sup>. Common Article 2 also applies in “all cases of partial or total occupation of the territory” of a state. Non-international armed conflicts are distinguished from riots and other less serious internal disturbances by a higher threshold of intensity and duration. On paper, everything is clear and obvious. The US invaded Iraq. American troops are stationed there. They exercise authority over the territory. Military operations continue. So, it means that we are in the presence of an international armed conflict, aren't we? The answer is no, we are not. On June 30, 2004, the US-led Coalition Provisional Authority transferred power to the Iraqi interim government. It changed nothing in the situation on the ground. Nevertheless, the US and the Multinational Forces are considered now to be present in Iraq at the invitation of the lawful Iraqi government, and do not constitute invading foreign forces.

The notion of mercenaries is even more difficult to apply, though some experts argue that PMSCs are just a more organized and modern form for recruiting, using, financing and training private fighters<sup>21</sup>. Article 47<sup>22</sup> of the Additional Protocol I of 1977 to the Geneva Conventions of 1949 deprives them of the status of combatant or prisoner of war, should they be captured by enemy forces. The UN Mercenary Convention gives some teeth to this provision by criminalizing the very act of being a mercenary<sup>23</sup>. But it helps in no way to overcome shortcomings of the definition

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<sup>19</sup> Available at the ICRC website at <http://icrc.org>

<sup>20</sup> How is the Term “Armed conflict” Defined in International Humanitarian Law? // ICRC Opinion Paper, March 2008.

<sup>21</sup> Jose L. Gomez Del Prado writes: “These new modalities have absorbed the use of traditional individual mercenaries... Recruited in their respective countries from all over the world as “private security guards” to provide protection, most of them have in fact taken part in internal low-intensity armed conflicts. Most of them are not members of the armed forces of a party to the conflict and they have not been officially sent by their respective States. All of them have been essentially motivated by private gain. Although these are characteristics of the mercenary-related activities and modalities of the conflicts of the twenty-first century, they are in fact, extremely difficult to prove. These situations together with the loopholes in international law permit PMSC to operate in a grey zone”. – Del Prado J.L.G. Impact on Human Rights of Private Military and Security Companies’ Activities // Global Research, October 11, 2008. – p. 2. – <http://www.globalresearch.ca/index.php?context=va&aid=10523>

<sup>23</sup> It was adopted by the resolution of the UN General Assembly. As in case of Article 47 its mission was to nip in the bud the growing phenomenon of Western governments

contained in Article 47. The term “mercenary” is defined in it by six cumulative criteria. According to Article 47, a mercenary is 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 the 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. This definition is considered nearly by everybody as “unworkable”<sup>24</sup>. Never has it been successfully enforced or invoked against an armed non-state actor<sup>25</sup>. At the same time, Article 47 and the UN Mercenary Convention keeps PMSCs nervous, urging them to lobby elaboration and adoption of effective, enforceable regulation and accountability of the industry they represent.

As is stated in the Report, at present time PMSCs constitute one of the most influential force supporting ongoing efforts to promote dialogue on how to ensure respect for humanitarian and human rights law and improve international regulation on private providers of defense, military and security services, including the Swiss government and ICRC PMSC initiative, the co called “Swiss Initiative”<sup>26</sup>. This initiative resulted in the “Montreux Document”, which reaffirms international legal obligations as they would apply to PMSCs and offers good practices for states to aid them in fulfilling these obligations<sup>27</sup>. The Document was endorsed by the High Level Meeting of Legal Advisers of participating governments in mid-September 2008. It was applauded by the PMSC industry. The conclusion drawn in the Report is that the international community should seize the opportunity. “Alienating representatives of PMSC industry could dampen the momentum for international regulation to the point that it does not materialise”<sup>28</sup>.

#### **Recommendations on future actions to improve regulation of PMSCs**

As was shown in the Report, the existing national legislation and international humanitarian and criminal law regulating private providers of defense, military and security services activities, and especially the practice of their implementation, are entirely insufficient. They must be improved having in mind peculiarities of PMSCs and a real need of the civil society

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hiring mercenaries to suppress national liberation movements. Here lies the explanation why it is largely boycotted by them and inter alia by those states which are interested in PMSCs proliferation.

<sup>24</sup> Cameron Lindsey. Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation // International Review of the Red Cross, No. 863, 2006. – p. 573 – 598. There is even a well known saying belonging to G. Best. In his historical book “Humanity in Warfare: The Modern History of the International Law of Armed Conflicts”, published in 1980, he wrote: “any mercenary who cannot exclude himself from this definition deserves to be shot – and his lawyer with him!” (p. 383).

<sup>25</sup> European Practices... - p. 24.

<sup>26</sup> Its overview is available at <http://www.eda.admin.ch/psc>. See as well: Brooks Doug. The Swiss Show Some Initiative // Journal of International Peace Operations, Vol. 3, No. 6, May-June 2008.

<sup>27</sup> For its summary see, e.g.: Perret Antoine. Latin-America Experience and Lessons for Regulation. Draft Report for the UN Working Group on the use of mercenaries. – Bogotá, 1 October 2008. – p. 31 – 38.

<sup>28</sup> European Practices... - p. 25.

and international community to have the services of the PMSCs at their disposal. But it is a very difficult and delicate task. It should be carried out with the support of the PMSC industry, step by step, and taking on board the existing good practices and a large variety of ideas previously advanced by scholars, research centers, governmental and nongovernmental organizations. It is a kind of a message enshrined in the Report.

The key proposal substantiated in it is to convene a tripartite international conference under the auspices of the United Nations composed of representatives of states, PMSC industry and civil society to build a consensus on common PMSCs standards and appropriate duties, to be embodied at a later stage in an effective internationally supervised regulatory framework<sup>29</sup>.

Essential elements of such a framework may be described like that<sup>30</sup>. 1. A clear-cut distinction is made between PMSCs performing only “police-like” security functions within domestic peacetime contexts, PMSCs giving non-force support to armed forces, PMSCs providing services requiring the threat of use of force and PMSCs acting in areas of insecurity or armed conflict.

2. A sophisticated international vetting system is approved. It is composed of national vetting systems and exchange of relevant information among interested states through an international criminal record network. The Europol and Interpol are likely to be instrumental. But other solutions could be found as well.

3. Compatible national licensing systems are introduced everywhere applying similar requirements as far as the definition of PMSCs, their duties, training of personal, and etc. are concerned, with due account for the environmental context in which PMSCs operate.

4. An international PMSC “Information Clearing House” is established to provide a centralized location for registration of PMSCs and to increase transparency regarding them, their personnel, missions and practices.

5. A “PMSCs export regime” is created. It is aligned with the existing arms export regimes and broadens them. One of its aims is to prevent using PMSCs for provoking, escalating and prolonging armed conflicts, tensions or unrest.

6. An office of the international PMSC Ombudsman is instituted to process complaints from the stakeholders regarding PMSCs services and general public concerning their wrongdoings, to pass them, if needed, to competent bodies for further investigation and settlement, and to monitor their fate.

7. An international PMSC Court of Arbitration is founded as a special dispute resolution mechanism. Its decisions are backed by national courts and judgments implementation systems.

8. A “Code of PMSC Conduct and Business Practices”, directly applicable to PMSCs internal functioning and external activities, is elaborated.

9. Oversight and investigatory, as well as enforcement, procedures and mechanisms are set up to hold accountable those persons and entities who violate human rights and international humanitarian law obligations.

10. A new international convention on PMSCs or an additional protocol to the International Criminal Court Statute for PMSC crimes is signed. This new instrument breaks away from the negative associations with the UN Mercenary Convention. It sets forth common international standards for PMSCs duties and determines crimes for which PMSCs, their owners and personnel should bear criminal responsibility. It constitutes a new body, similar to the ICC, or gives the ICC jurisdiction to process suits against PMSCs.

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<sup>29</sup> Ibid. – p. 49.

<sup>30</sup> Ibid. – p. 3, 41 – 47.



### **Additional food for thought**

All measures to improve the regulation of PMSCs activities suggested in the Report are well defined and explained. They are interlinked and compatible with one another. The list of recommendations is very impressive. Recommendations are designed to serve as a basis for a draft action plan. And the implementation of such a plan will surely create a civilized and well regulated market for private defense, military and security services.

Another merit of the list of recommendations contained in the Report is that it encompasses a set of proposals made earlier on different occasions and makes a step forward in their conceptualization. Let us compare it with 14 recommendations the Council of Europe Council for Police Matters of the European Committee on Crime Problems started to discuss at the end of 2006<sup>31</sup>. These recommendations touch upon such matters as promotion of professionalism of the industry, vetting of PMSCs personnel, entrance requirements for companies' employees, licensing of private security investigators, "moonlighting", training of private security personnel, limitations to what they are entitled to do, relations with the police and other state structures, developing effective emergency responses against terrorist attacks and disasters, privacy guarantees, self-regulation, accountability of transnational companies, corporate accountability, setting up of statutory national regulators and regulatory framework. There is no doubt that the Report is a step forward.

Though the list of ideas developed in it is very detailed, it is not exhaustive. A number of promising new ideas could be found in recent national and international legal acts and think-tanks' research papers. Some countries, e.g. Belgium, France, Italy, New Zealand, South Africa and Zimbabwe, have already passed laws on mercenaries. These laws do not stick to Article 47, described above in all the details. To make the definition of "mercenaries" more operational, France decided, e.g., to get rid of a cumulative criterion concerning a material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in its armed forces. In accordance with it, a larger portion of the PMSCs employees could be qualified as mercenaries.

In 2005, a model law on banning activities related to the use of mercenaries was adopted by 12 MS of the Commonwealth of Independent States. It embraces a more modern multidimensional definition of mercenary activities and makes the states obligations to counter them, inter alia, in the form of PMSCs, more explicit. The model law postulates that mercenary activities could be based on motivations of non-material gains, including ideological and religious motivations. It insists that the states have the right, if not an obligation, to prevent, if required, the operations of foreign mercenaries and recruiting organizations (companies) on their territories, and to punish the parties for spreading propaganda about mercenary-related activities or financing such activities. This law partially bridges the gap between the regulation of mercenaries and that of PMSCs.

A very promising insight into the restraints which could be put on PMSCs activities and new approaches to ensuring their responsibility are provided for by recent US legal acts, as was mentioned above. One of the most promising developments is the creation of the new Commission on Wartime Contracting in Iraq and Afghanistan established in the 2008 Defense Authorization Act<sup>32</sup>.

A new impetus for international efforts to construe a comprehensive regulation of the PMSC industry could be given by the Draft International Convention on Private Military and Security Companies presented to the public for the first time in the course of the discussion held in

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<sup>31</sup> See: Report No. PC-PM, 2006, 01, Strasbourg, 11 September 2006.

<sup>32</sup> National Defense Authorization Act for Fiscal Year 2008, H.R. 4986, passed in the U.S. Congress House of Representatives, January 16, 2008, passed in the Senate, January 22, 2008, signed by the President, January 28, 2008.

Moscow on October 16 – 18, 2008, by the United Nations Legal and Regional Consultations in the format of the East Europe Group and Central Asia Region “Activities of Private Military and Security Companies: Regulation and Oversight” (Draft Moscow convention)<sup>33</sup>. The consultations were convened pursuant to the Human Rights Council resolution 7/21 by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination<sup>34</sup>. After other regional consultations, the Working Group is to convene a high-level round table under the United Nations auspices. The whole process could be crowned with an intergovernmental conference dedicated to reaching a common understanding as to what additional regulations and controls are needed at the international level to make all actors, including states and PMSCs, accountable when performing defense, military and security functions<sup>35</sup>. The draft Moscow convention could be very instrumental for making discussions more substantial and conclusive.

The draft consists of 32 articles, at this stage, and comprises a preamble and five major parts: General Provisions, Principles, Legislative Regulation and Oversight, Responsibility, and Final Provisions. Article 1 stipulates that “the purpose of the present Convention is the promotion of cooperation between the States, so that they can more effectively solve different problems related to the activities of private military companies and private security companies (PMSCs) which are of international character”. Article 2 explains the most important terms used in the text, including the difference between “private military companies” and “private security companies”, as well as the difference between services they provide. Article 3 sets the sphere of application of the Convention. It establishes that the Convention does not apply to mercenaries and natural and legal persons which recruit, train, employ or finance them. Part II specifies in what manner universally accepted principles and provisions of international law should be implemented by the states regarding the PMSCs lawful and unlawful actions and activities. Article 5, e.g., defines more exactly that as far as PMSCs are concerned, the rule of law means that they are bound by the laws of the states on whose territory they are established and registered, as well as operate, and of whose nationality their employees are, and are not allowed to transgress them. Articles 6 to 9 clarify how the state integrity, respect of human rights, prohibition of mercenary activities and the use of force are to be observed. Articles 10 to 11 urge the states to take necessary measures to prevent excessive use of firearms, as well as illicit trafficking in firearms, their parts and components and ammunition. Article 12 confirms the responsibility of the states for establishing a comprehensive domestic regime of regulation and oversight for the PMSCs activities and exchange of information with their counterparts. Part III describes what such a regime should look like. It pays special attention to registration, accountability and licensing of PMSCs, licensing of import and export of military and security services, and provisions to be applied to the PMSCs personnel. Article 19, e.g., enumerates the conditions under which the PMSCs personnel may carry and use firearms. Part IV draws up the main features of criminal proceedings which could be initiated and carried out against PMSCs and their personnel. Articles 24 to 28 deal with the establishment of jurisdiction, extradition, mutual legal assistance, transfer of criminal proceedings and liability.

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<sup>33</sup> Draft International Convention on Private Military and Security Companies. – Moscow, 10 October 2008. – 12 p.

<sup>34</sup> The Working Group was established in July 2005 pursuant to the former Commission on Human Rights resolution 2005/2. It is mandated, inter alia, to monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world and to study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights.

<sup>35</sup> UN General Assembly Doc. A/63/325. – p. 16.

The Draft Moscow Convention is one of the first attempts to present in a legal form general ideas aiming at improving the regulation of the PMSC industry advanced by scholars, think tanks, governmental and non-governmental organizations and PMSCs themselves. Of course, it will be improved and polished up. It is likely to be followed by many others. But even in its present form the Draft contains precise wordings of some core provisions to be used in the future national and international legislation and a number of framework clauses which should be thoroughly studied and developed in the future.

### **To change the paradigm**

The fact that there are new developments, and some additional elements could be added to the list of recommendations advanced in the Report, does not change anything in its high value. The Report is well done. It is in the mainstream. A lot of people nowadays tend to think the same way as its author does.

But we should not be under the impression that the approach embraced in the report may satisfy us, may be sufficient to the civil society and international community. Let us consider the situation we are confronted with again.

The industry is expanding rapidly. Its growth reflects a real need for the services PMSCs provide. PMSCs absorb precious workforce the states have to care for. People in power cannot allow themselves to see unemployment grow among the former officers, soldiers and policemen. The expansion of PMSCs is considered to be an appropriate response to this challenge too. It lightens the burden which modern states are unable now to withstand. But do these reasons outweigh the ills and misery which PMSCs bring to the modern world and all wrongdoings they commit? The answer is “no”. There is no doubt about it.

First of all, we must not forget that a few years ago PMSCs were nearly non-existent. There were a limited number of such companies. Only few people knew about their activities. PMSCs sought not to attract public attention and not to arouse suspicion about their involvement in all sorts of covert operations. Otherwise, it could be detrimental to their future. At that time the services they provided were considered, as a rule, unwelcome and illegal.

Large scale outsourcing of defense, military and security activities was closely linked to the war in Afghanistan and especially to the US led invasion of Iraq, as well as to all imaginable forms of unrest, instability and guerilla warfare triggered by them. A failure of the USA, their allies, international coalition and NATO forces to bring peace, order and post-conflict reconstruction to the region created an enormous market for defense, military and security services and gave a boost to the PMSCs and their activities. In the beginning, outsourcing of state defense, military and security functions was tested in the Balkans and Latin America, where officials and authorities of some major powers preferred to hide behind private military business or, to put it bluntly, created private entities to carry out such missions which the state military and police forces had no right or will to be directly involved in<sup>36</sup>. But it was done carefully and in a pointwise manner. The mess in Afghanistan and Iraq has changed everything.

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<sup>36</sup> See: Perret Antoine. Op. cit. – 38 p.; Саунина Е.В. Международные военные конфликты [Saunina E.V. International Military Conflicts. – Original Russian]; Валецкий Олег Витальевич. Частные военные компании, их создание и развитие. Опыт работы в Ираке и других регионах мира. Влияние боевых действий в Ираке на их деятельность. Положение в Сербии и России [Valetzkyi O.V. Private Military Companies, their Creation and Development. Experience Gained in Iraq and other Regions of the World. Influence of Military Operations in Iraq on their Activities. Situation in Serbia and Russia. – Original Russian]; Приватизация войны (Частные военные компании, их создание, развитие и опыт работы в Ираке и других регионах мира). Статья Олега Валецкого с предисловием и примечаниями

The example of Blackwater is particularly enlightening. Blackwater USA, based in Moyock, North Carolina, was established in 1997. The contracts from the American administration for working in Iraq propelled the company to the rank of one of the world's largest providers of private military services. Prior to the war in Iraq, Blackwater primarily offered training services for law enforcement and military personnel. Now it offers a wide range of services, including personal security details, military training services, private military contracting, aviation support, K-9 services and its own line of armored vehicles. The government contracts during the time of the Bush Administration helped it grow by leaps and bounds. Blackwater passed from the government contracts worth just a few hundred thousand dollars in 2001 to the contracts worth hundreds of millions of dollars, an increase of more than 80,000%<sup>37</sup>. In total, it has received over a billion dollars from the federal government during the fiscal years 2001 to 2006. "There may be no federal contractor in America, - noted Mr. Waxman, the Chairman of the U.S. House of Representative Committee on oversight and government reform, opening the Congressional hearings on PMSCs activities in Iraq on October 02, 2007, - that has grown more rapidly than Blackwater over the last seven years"<sup>38</sup>.

Two other details are important as well. The first is that more than a half of this amount was awarded without full and open competition<sup>39</sup>. Blackwater's work in Iraq began in August 2003, when Coalitional Provisional Authority Administrator Paul Bremer awarded the company a no-bid contract to provide security to top U.S. civilian officials. In June 2004, Blackwater received a second, much larger no-bid contract from the State Department known as Worldwide Personal Protective Services (WPPS). Under this indefinite delivery, indefinite quantity contract, Blackwater was paid to provide "protection of U.S. and/or certain foreign government high-level officials whenever the need arises". On May 8, 2006, the State department awarded WPPS II, the second incarnation of its diplomatic security contract. Under this contract, the State Department awarded Blackwater and the other companies, Triple Canopy and DynCorp, contracts to provide diplomatic security in Iraq, each in a separate geographical location. The maximum value was 1.2 billion per contract, or 3.6 billion total<sup>40</sup>.

The other important detail is the personal relationship of Blackwater, high-level management and US military and state officials. Blackwater is owned by Erik Prince, a former Navy SEAL. In the late 1980s, Mr. Prince served as a White House intern under President George H. W. Bush. Mr. Prince's father was a prominent Michigan businessman and contributor to conservative causes. Mr. Prince's sister, Betsy DeVos, is a former chairwoman of the Michigan Republican Party who earned the title of a Bush-Cheney "Pioneer" by arranging at least \$100,000 in donations for the 2004 George W. Bush presidential campaign. Her husband, Richard DeVos

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Веремева Ю.Г. [Privatization of War (Private Military Companies, their Creation, Development and Working Experience in Iraq and other Regions of the World). Article by Oleg Valetzkyi with introduction and comments by Veremeev U.G.].

<sup>37</sup> In fiscal year 2001 Blackwater had \$736,906 in federal contracts, in 2002 - \$3,415,884, in 2003 - \$25,395,556, in 2004 - 48,496,903, in 2005 - \$352,871,817, in 2006 - \$596,601,952. See: Memorandum, October 1, 2007, to Members of the Committee on Oversight and Government Reform of the Congress of the United States House of Representatives from Majority Staff on Additional Information about Blackwater USA. - p. 3 - 4.

<sup>38</sup> Chairman Waxman's Opening Statement // U.S. House of Representative Hearing on Private Security Contracting in Iraq and Afghanistan, Tuesday, October 02, 2007. - p. 1. - <http://oversight.house.gov/story.asp?ID=1511>

<sup>39</sup> Ibid. - p. 4.

<sup>40</sup> Ibid. - p. 4 - 5.

Jr., is a former Amway CEO and was the 2006 Republican nominee for the Governor of Michigan. Mr. Prince himself is a frequent political contributor, having given over \$225,000 in political contributions, including more than \$160,000 to the Republican National Committee and the National Republican Congressional Committee. Blackwater hired several former senior Bush Administration officials to work for the company. J. Cofer Black, who served as director of the CIA Counterterrorist Center from 1999 to 2002 and as a top counterterrorism official at the State Department until 2004, is now Blackwater's Vice-Chairman. Joseph E. Schmitz, the Inspector General for the Defense Department from 2002 to 2005, is now general counsel and chief operating officer of the Prince Group, Blackwater's parent company<sup>41</sup>.

Summing up, the current widespread use of providers of defense, military and security services and insane PMSCs proliferation are wrongly associated with the objective necessities of the modern world, conflict settlement and international relations. These social phenomena have their origin in the USA-led military operations in Afghanistan and Iraq, awkward policy of export of democracy and war against terror implementation and the failure of occupation forces to bring peace, stability and sustainability to the region. They are deliberately encouraged by some interested countries and their governmental and/or shady structures which are eager to achieve their own aims having nothing to do with those officially proclaimed, even at the expense of the elementary rights and needs of the native population. Their delivery is likely to be closely related to the corruption and coalescence of public and private organizations.

The practices of relying on PMSCs and deliberately using them, as developed in Iraq and Afghanistan, have rapidly spread from the Middle East and Central Asia to all other regions of the world, e.g. to Africa and Latin America. Since 2003, the ex-servicemen from Chile, Columbia, Peru, Honduras and other countries have been contracted and subcontracted by PMSCs to serve in Iraq, Afghanistan, Haiti and other conflict zones<sup>42</sup>. These practices in Africa and Latin America reveal dangers to society, security, sovereignty and peaceful development even better than in Afghanistan and Iraq.

The use of PMSCs by other companies for the protection and security of their sites and personnel are becoming more and more common. The "collateral effect" is that they are utilized as well to support the ongoing wars against terrorist and drug trafficking networks, guerrillas of different kinds<sup>43</sup>, liberation and resistance movements or directly for repression of the local population. Chilean PMSCs, hired by forestry companies, e.g., were directly implicated in the incidents against indigenous communities<sup>44</sup>. British Petroleum paid the former pros of the British Special Forces through the private military and security company "DSL" to train the local police in Columbia to fight guerillas<sup>45</sup>. Ecopetrol contracted the "Airscan" PMSC to inform the Columbian Army when and where to launch strategic attacks against them. Northrop Grumman, a subsidiary of

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<sup>41</sup> Ibid. – p. 5 – 6.

<sup>42</sup> See: Perret A. – Op. cit. – p. 16. The author cites examples of the company "Triple Canopy" subcontracting for the benefit of the US State Department services of "3D Global Solutions" which in its turn subcontracted "Gesegur SAC", "Gun Supply SA", "G4S Wackenhut Peru SA", "Defion International SA" or "Red Tactica Inc." recruiting former Chilean military and police personnel to work for Blackwater.

<sup>43</sup> Or on the contrary on contras side like in Nicaragua. – See: Gomez I., Paez A., Reyes L., Rodrigues F., Peterson L. y otros. Colombia: Outsourcing War. – Washington: International Consortium of Investigative Journalists, 2001.

<sup>44</sup> Perret A. - Op. cit. – p. 18.

<sup>45</sup> Ibidem.

the California Microwave Systems Inc., Airscan, DynCorp and later CIAO and subcontractors hired by them offered military operations services and directly participated in combat<sup>46</sup>.

The Columbian case as a whole is revealing. A large number of PMSCs working there for the American administration are in charge of training the Columbian Armed Forces and National Police and providing them with sophisticated equipment, logistical support, Internet, radars and air surveillance, maintenance of intelligence database and so on<sup>47</sup>. It means that PMSCs play a vital role in managing internal conflicts, ensuring a US-covered implication in decision making and informing the American administration of what is going on even better than local authorities. The reliance on PMSCs entails, as in other cases, dependence on their services and strict obedience to the forces or powers exercising control over PMSCs activities. Such a situation of a state's total dependence is described by some experts as "ex-post holdup" or, in other words, as putting the wholeness of strategic plans and security into private or foreign actor's hands<sup>48</sup>.

The results of PMSCs activities are perplexing. PMSCs may be very efficient and their services can be really needed. In some areas, their record appears to be good but, in general, instead of improving security and bringing solutions, the reliance on PMSCs and their proliferation are likely to cause damage to society in many ways. First, often PMSCs are used to the prejudice of the state sovereignty, independence and integrity. Second, they become operational in creating relationship of dependence between a big state and its clients or in bringing them to power. Third, their presence on the ground leads to the escalation of conflicts and unrest or to the freezing of conflicts because the parties hope to win the war instead of trying to win peace and to seek workable solutions and compromise. Fourth, PMSCs rapid growth is detrimental to the ability of the state to ensure basic needs of society in internal and external security. Fifth, PMSCs are in a position to provide security to the very few and only at the expense of the others, thus widening the gap between those who can afford private services and those who cannot, increasing inequalities between people and states and creating new dividing lines on our globe.

All these elements must be taken into consideration when we make a judgment on the PMSCs usefulness. In some cases, PMSCs seem to be a good way out when states or international organizations are unwilling or unable to act. A lot of experts share this view. But if we ask ourselves whether this or that contract is for the common good, we will see that long-term disadvantages for society greatly outweigh the immediate benefits.

The use of PMSCs may turn out to be neither safe, nor appropriate for achieving a legitimate purpose; neither cheap, nor efficient even in securing somebody's questionable objectives. The right word could be "backfiring", as was suggested by Chairman Waxman in one of his speeches at the U.S. House of Representatives<sup>49</sup>.

PMSCs services might appear once again relatively cheap. PMSCs are trying to prove it to the national parliaments, governmental officials and headquarters of international organizations. To this end, they present figures showing that their salaries and prices are lower as compared to the burden which the state would have had to withstand if it dared to provide the same services itself. But it is simply not true. The defenders of PMSCs argue that using them saves the government money needed to train, equip and support the troops. However, there are grounds to believe that the process may be reverse as the growing role of private military

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<sup>46</sup> See: Veillette C. *Andean Counterdrug Initiative (ACI) and Related Funding Programs: FY2005 Assistance*. – Washington: Congressional Research Service & the Library of Congress, 2005; Perret A. – Op. cit. – p. 23 – 26.

<sup>47</sup> Ibid. – p. 19 – 23.

<sup>48</sup> See: Singer P.W. *Corporate Warriors, the Rise of the Privatized Military Industry*. – Ithaca, London: Cornell University Press, 2003. – p. 148; Perret A. – Op. cit. – p. 28.

<sup>49</sup> Chairman Waxman's Opening Statement. – Op. cit. – p. 2.

contractors causes the trained troops to leave the military for private employment<sup>50</sup>. By the way, the method of providing convincing proofs used by PMSCs and their defenders is biased. The taxpayers' expenses on PMSCs are much higher. Ordinary people are obliged to pay for the state deficiencies, for growing insecurity and for diverting their money to the competitors of their national armed forces and police<sup>51</sup>. Having realized that, the Afghan government tried to forbid PMSCs hiring young men under 25 and even 30 years old and passed an adequate legislation but it did not work. It was too late. Moreover, taxpayers have to cover fictitious expenses cumulated by PMSCs overcharging and double-billing.

But the money wasted is a secondary thing as compared to other headaches PMSCs generate. Not caring a damn about human rights and lives of indigenous population, they incite hatred against the very essence of the cause they are supposed to serve. Neglecting and bypassing elementary moral and legal standards and evading justice with the deliberate help of their "superiors" from governmental structures, they erode the very foundations of democracy and the rule of law.

Incidents reports compiled by Blackwater reveal it as an irrefutable fact. According to the information collected for the Congressional hearing of October 2, 2007, this private military contractor had been a party to at least 195 "escalation of force" incidents in Iraq since 2005 involving firing of shots by its forces<sup>52</sup>. This amounts to an average of 1.4 shooting incidents per week. Blackwater's, DynCorp International's and Triple Canopy's contracts to provide protective services to the State Department prescribed that they could engage in defensive use of force only. In over 80% of the shooting incidents, however, Blackwater reported that its forces fired the first shots. All three companies fired first in more than half of all escalation incidents. In most shooting instances, Blackwater was firing from a moving vehicle and did not remain at the scene to determine if the shots resulted in casualties. Even so, Blackwater's own incident reports documented 16 Iraqi casualties and 162 incidents with property damage, primarily to vehicles owned by Iraqis. In over 80% of the escalation of force incidents, Blackwater's own reports documented either casualties or property damage. In one of these incidents, Blackwater forces shot a civilian bystander in the head. In another, the State Department officials reported that Blackwater sought to cover up a shooting that killed an apparently innocent bystander and so on.

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<sup>50</sup> "Using Blackwater instead of U.S. troops to protect embassy officials, - says one of the U.S. Congress documents, - is expensive. Blackwater charges the government \$ 1, 222 per day for the services of a private military contractor. This is equivalent to \$445,000 per year, over six times more than the cost of an equivalent U.S. soldier". - See: Memorandum, October 1, 2007, to Members of the Committee on Oversight and Government Reform of the Congress of the United States House of Representatives from Majority Staff on Additional Information about Blackwater USA. - p. 3

<sup>51</sup> U.S. Secretary of Defense Robert M. Gates relatively recently testified: "[M]y personal concern about some of these security contracts is that I worry that sometimes the salaries that they are able to pay in fact lure some of our soldiers out of the service to go to work for them". That is why he had asked Pentagon officials to work towards including "non-compete clauses" in military contracts in order to "put some limits on the ability of these contractors to lure highly trained soldiers out of our forces and to work for them". - Testimony of Secretary of Defense Robert M. Gates. Hearing of the Senate Committee on Appropriations: the President's FY 2008 Supplemental Request for the Wars in Iraq and Afghanistan, September 26, 2007.

<sup>52</sup> See: Memorandum, October 1, 2007, to Members of the Committee on Oversight and Government Reform of the Congress of the United States House of Representatives from Majority Staff on Additional Information about Blackwater USA. - p. 1. For more detailed description of Blackwater's escalation of force incidents see: Ibid. - p. 6 - 8.

Blackwater also reported engaging in tactical military operations with the U.S. forces<sup>53</sup>. But the most damaging to the American reputation incident of this series happened on September 16, 2007, when the company contractors killed at least 11 Iraqis. In 2004 Blackwater committed hard mistakes in Fallujah where four contractors were killed and their bodies burned. That triggered a major battle in the Iraq war<sup>54</sup>. It resulted in the death of at least 36 U.S. servicemen, approximately 200 “insurgents”, and estimated 600 Iraqi civilians. Military observers credited the intensity of the U.S. offensive with aggravating the negative Iraqi sentiment towards the coalition occupation and fueling an escalation of the insurgency. The incident was a turning point in American public opinion about the war<sup>55</sup>.

Never have the State Department officials responded to the reports of Blackwater killings of Iraqis by seeking to restrain the company’s actions. In a high-profile incident in December 2006, a drunken Blackwater contractor killed the guard of Iraqi Vice President Adil Abd-al-Mahdi. Within 36 hours after the shooting, the State Department allowed Blackwater to transport the Blackwater contractor out of Iraq. The State Department Charge d’Affaires recommended that Blackwater make a “sizeable payment” and an “apology” to “avoid this whole thing becoming even worse”. The Charge d’Affaires suggested a \$250,000 payment to the guard’s family but the Department’s Diplomatic Security Service said that this was too much and could cause Iraqis to “try to get killed”. In the end, the State Department and Blackwater agreed on a \$15,000 payment. A State Department official wrote: “We would like to help them resolve this so we can continue with our protective mission”. The State Department took a similar approach upon receiving reports that Blackwater shooters killed an innocent Iraqi, except that in this case, the State Department requested only a \$5,000 payment to “put this unfortunate matter behind us quickly”<sup>56</sup>. A year later, there was no indication that the State Department conducted an investigation into the circumstances of the shootings or any potential criminal liability. The only sanction that has been applied to Blackwater contractors for misconduct and wrongdoing is the termination of their individual contracts with the company<sup>57</sup>. A preliminary qualification of all these cases by Chairman Waxman was: “The State Department is acting as Blackwater enabler”<sup>58</sup>. It is hard to disagree with the American Congressman on this point.

It goes without saying that incidents when PMSCs personnel, in particular foreign contractors, commit abuses of different kind, kill innocent persons or assist in having them killed by furnishing false information and escape the country unpunished, increase tension. These incidents happen routinely. They proliferate in an atmosphere of impunity. As the Amnesty International puts it, “PMSCs are operating in capacities that enable them to use force against combatants or civilians in a manner that violates international human rights and humanitarian law... They have been implicated in abuses ranging from torture to indiscriminate shootings and killings. Crimes by contractors have gone largely unpunished. The combination of a patchwork of applicable laws and regulations, a contracting system with few built-in accountability mechanisms and seemingly no political will to bring human rights abusers to justice has created

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<sup>53</sup> Ibid. – p. 2.

<sup>54</sup> Chairman Waxman’s Opening Statement. – Op. cit. – p. 2.

<sup>55</sup> Private Military Contractors in Iraq: An Examination of Blackwater’s Actions in Fallujah. Prepared by Majority Staff for U.S. House of Representatives Committee on Oversight and Government Reform Chairman Henry A. Waxman, September 2007. – p. 4.

<sup>56</sup> Chairman Waxman’s Opening Statement. – Op. cit. – p. 2. For more detailed description of the State Department response to the “Christmas Eve shooting” and other cases see: Ibid. – p. 9 – 12.

<sup>57</sup> Ibid. – p. 13.

<sup>58</sup> Chairman Waxman’s Opening Statement. – Op. cit. – p. 2.



an atmosphere of impunity for human rights violations”<sup>59</sup>. All this poses basic questions of whether reliance on PMSCs and their proliferation help to improve security, facilitate conflict settlement, appease unrest and promote democracy and the rule of law. The answer is no, not at all.

It is very important that American experts happen to come to nearly the same conclusion, using, though, somewhat different reasoning. Testifying recently before a U.S. Congressional committee, Laura A. Dickinson, professor from the University of Connecticut School of law, e.g., started pretending that abuses and other wrongdoings committed by American PMSCs are a relatively rare phenomenon and that there is almost nothing to complain about in their activities. She said: “While most contractors have performed admirably and filled vital roles – and more than 1,100 contractors have died in Iraq while doing so – some have committed serious abuses without being held accountable”<sup>60</sup>. But after enumerating all kinds of abuses and describing their backfiring effect, the American lawyer unambiguously supported the above conclusion. Here is her judgment: “We are left with unmistakable conclusion that the use of private security contractors and interrogators potentially threatens core values embodied in our legal system, including (1) respect for human dignity and limits on the use of force and (2) a commitment to transparency and accountability”<sup>61</sup>.

But if the conclusion is correct, we must reconsider drastically a handful of recommendations cited above. It is of vital importance not to forget that the UN General Assembly Definition of Aggression qualifies as an act of aggression “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State... or its substantial involvement therein”<sup>62</sup>.

#### **A new list of recommendations**

Political recommendations given by the Amnesty International<sup>63</sup> to investigate fully and in a timely manner all cases of shootings and killings and other brutal violations and bring perpetrators to justice without delay, to explicitly include human rights protections and standards in PMSCs contracts, to ensure that adequate laws are in place to address abuses, to create vetting systems are very useful. The ideas advanced in various forums to develop a code of PMSCs good behavior, to introduce modern harmonized legislation on PMSCs, to adopt a model law on PMSCs, to agree on a common international regulatory framework and to create national supervisory bodies are very important as well. But these proposals have the same shortcomings. They are too “modest”. Their aim is to improve the situation condemned by everybody a little bit here and a little bit there. They

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<sup>59</sup> Accountability for Private Military and Security Companies // Amnesty International Human Rights Elections Brief 2008, No. 9, 2008. – p. 1.

<sup>60</sup> Dickinson L.A. “Status of Forces Agreements and UN Mandates: What Authorities and Protections Do They Provide to U. S. Personnel”. Testimony before the U.S. House of Representatives Subcommittee on International Organizations, Human Rights, and Oversight of the Committee on Foreign Relations // U.S. House of Representatives Hearings. – Washington, Thursday, February 28, 2008. – p. 2.

<sup>61</sup> Ibidem.

<sup>62</sup> It’s an extract from Paragraph (g) of Article 3 of the Definition of Aggression, annexed to the United Nation General Assembly Resolution 3314 (XXIX) – 14 December 1974. This provision may be read in conjunction with Article 2, establishing that “the First use of armed forces by a State in contravention of the [UN] Charter shall constitute prima facie evidence of an act of aggression”.

<sup>63</sup> Accountability for Private Military and Security Companies // Amnesty International Human Rights Elections Brief 2008, No. 9, 2008. – p. 2.

do not question the outsourcing of state functions in such a delicate and vital sphere as external and internal security. The heaven they intend to create is a civilized global market of defense, military and security services. It endangers in no way the role, position and growing power of PMSCs in modern world. It does not challenge the myth of their utmost usefulness for society. It is just what PMSCs want. It is just what they pay money for to the same forums where the problems generated by them are discussed.

There is a profound gap between the conclusion that PMSCs activities are backfiring and could be detrimental to society and its core values and the feeble proposals for keeping PMSCs in check. Many in the expert community believe that it is too late to do anything radical. PMSCs have become mighty. Their business is too lucrative. Major countries are interested in their services. That is why only palliative measures may win support and have a chance to be implemented. This way of reasoning is well illustrated, e.g. by Wisconsin International Law Society (WILS) Model Law Project. A preliminary report, drawn by the Project team, was presented for the discussion held in Moscow on October 16 – 18, 2008, by the United Nations Legal and Regional Consultations in the format of the East Europe Group and Central Asia Region “Activities of Private military and Security Companies: Regulation and Oversight”. In the descriptive part of the report explaining the approach and methodology chosen by the Project team it is rightly stated: “PMSCs are capable, by virtue of size, might, resources, lack of oversight, corruption, recklessness, and negligence, of posing a much greater danger to human rights and State sovereignty than could any individual mercenary”. It is reaffirmed: “These “Armies of Fortune” have replaced the traditional “Soldier of Fortune”...”<sup>64</sup> But immediately after that it is noted that, from a practical point of view, it would be impossible to treat PMSCs like individual mercenaries and to apply to them the same kind of legal regime either at the national, or at the international levels. Then, a suggestion is made not even to try to forbid the unlawful and dangerous activities the same way as the International Convention against the Recruitment, Use, Financing and Training of Mercenaries does and to proceed further trying to civilize PMSCs. The Project team contends “that the majority of the current data suggests that a mechanism for regulating Private Military and Security Companies would be more effective in covering a number of services provided by PMSC and banning functions which should not be performed by such companies because they are inherently governmental”.

Partially, the same way of reasoning is embraced by the authors of the Draft Moscow convention described above. In the preamble of the Convention they suggest that PMSCs should be considered merely like a new form of waging mercenaries activities. They propose the following wording: “Worried and concerned over the threat which mercenary activities pose for peace and security; expressing concern at the new forms of mercenarism and affirming the seemingly continued recruitment of the former military and police officers by private military and security companies to work as “guards” in the areas of armed conflict; convinced that notwithstanding the ways of using mercenaries or carrying out any other activities related to mercenaries or the forms such activities take to seem legitimate, they pose a threat to peace, security and self-determination of peoples and hamper the exercise of all human rights by the people; determined to take all the necessary measures to stop the impunity of criminals; have agreed as follows...”<sup>65</sup>. But the scope of the proposed international treaty is limited. It may be concluded from the wording of Article 13 of the Draft, confining the states obligations to adopt “special legislative regulation” to secondary issues. It says: “All States Parties shall take such measures within their domestic legislative systems as may be necessary to legally acknowledge

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<sup>64</sup> Del Prado Jose L. Gomez, Maffai Margaret and others. Wisconsin International Law Society (WILS) Model Law Project // WILS paper, 10 October 2008. – p. 2.

<sup>65</sup> Draft International Convention on Private Military and Security Companies. – Moscow, 10 October 2008. – p. 2.

the provision of military services, security services, export/import of military and security service as special activities which do not fall only under the scope of common law and which demand special (separate) legal regulation”<sup>66</sup>. The wording of Article 21 on the criminalization of offences in the sphere of military and security services corroborates this impression. It stipulates in paragraph 2: “Each State party... shall take such legislative and other measures as may be necessary to acknowledge as a penal action the export and import of military and security services without appropriate licenses (authorizations)”<sup>67</sup>.

The logic of condemning concrete types of activities and then acknowledging their usefulness, legitimizing them, seems rather strange and too “diplomatic” and advantageous for PMSCs. What we really need in order to solve the problems, created by reliance on PMSCs and their proliferation is to be consistent.

In the first place, we need to agree that there is no other way out of this dangerous development than to launch a campaign of reprivatization of basic defense, military and security services. The campaign must consist of six interconnected elements. Firstly, a ban should be imposed on providing most perilous private defense, military, protection and security services, including those related to the massive use of force and direct involvement in military and pacification operations. Recently, a study of the issue was carried out. It could turn out to be very appropriate<sup>68</sup>. Secondly, the activities performed by PMSCs at the request of state institutions should be treated as state activities and should entail state responsibility. Thirdly, any kind of abuses committed by PMSCs and their personnel acting under a contract with state authorities must be prosecuted as if committed by state officials. PMSCs contractors and PMSCs themselves providing defense, military and security services, if involved in different types of abuses and wrongdoings, should be tried and sentenced the same way as the state officials and their superiors are. Fourthly, it is necessary to adapt the Convention on Mercenaries to the radically changing international context. The definition of the person involved in mercenary activities is to be changed to make it simpler and workable. The definition must be expressly made applicable to PMSCs. The activities and acts considered as a violation of international law requirements and attributed to mercenaries should be forbidden for PMSCs as well. Fifthly, the international arms control regime may be enlarged to comprise a special chapter on the export/import of defense, military and security services. Sixthly, all states should introduce legislation criminalizing the banned activities and providing for the reprivatization of former state defense, military and security services.

In the second place, we need to make it quite clear to all players in the defense, military and security services market that from now on the states will not support the proliferation of PMSCs and their activities and that in the future the states will curtail the market, giving up practices of relying on outsourcing of basic governmental functions. It is fair and in compliance with the certainty of law traditions. It will help all players concerned to proceed forward with strategic planning.

In the third place, a multilevel international mechanism for controlling, supervising and regulating PMSCs activities should be agreed upon and established. Its main features must reflect the ideology of reprivatization of vital state functions in the sphere of external and internal

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<sup>66</sup> Ibid. – P. 5.

<sup>67</sup> Ibid. – P. 8.

<sup>68</sup> In accordance with the WILS Model Law Project preliminary report, suggested prohibited activities fundamentally inappropriate for outsourcing to PMSCs are, but not limited to: conduct of and involvement in military operations, dangerous military support activities, use of weapons and explosives except in training and defensive purposes, military counseling, advising, training, and providing and processing intelligence, interrogation of suspects and prisoners. - Del Prado Jose L. Gomez, Maffai Margaret and others. Op. cit. – p. 9 – 11.

security. On the one hand, it should provide for efficient monitoring of the compliance of the states and PMSCs with the bans and obligations described above. On the other hand, it should establish a regulatory framework for legitimate activities of providing private defense, military and security services and for the state cooperation to make it viable and efficient. The best way to achieve that could be a comprehensive international convention, comprising substantive rules, procedures and mechanisms encompassing all or most of the ideas, proposals and recommendations contained in the present article.

But let us be realistic. It will take too much time to agree on such a convention. It is high time to take rapid actions. That is why it would be better to start with establishing a powerful UN Universal Agency on PMSCs with all-embracing, large and loose competencies. The Agency could be instructed to elaborate its rules of procedure and adopt as quickly as possible a necessary regulatory framework. To launch such a UN Universal Agency, it will do to agree on the guiding principles to be later developed by the Agency itself.

The members of the Agency will be under the obligation to stick to the guiding principles, to sign and implement future binding legal instruments produced by the Agency, to adopt national regulatory harmonized framework and to create their national agencies on PMSCs, empowering them to efficiently put into practice national and international legislation.

The UN Working Group on mercenaries has made a crucial step this year when it decided that we need to budge from perceiving PMSCs “as part of the regular “business as usual” exports under commercial regulations towards perceiving them as highly specific field of exports and services requiring supervision and constant oversight on behalf of the national Governments, civil society and international community, led by the United Nations” (Doc. A/63/325, paragraph 85). But this is just a first step in the right direction.

There is a lot of work ahead of us. Let us move from words to deeds.

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