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### **PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT**

**Written statement<sup>\*</sup> submitted by Human Rights Advocates, Inc. (HRA),  
a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[13 February 2009]

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<sup>\*</sup> This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

## **Bridging Accountability Gaps – The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations**

1. Human Rights Advocates submits this written statement, calling on Member States to ratify or accede to the 1989 International Convention against the recruitment, use, financing and training of mercenaries; to enact domestic legislation requiring oversight and accountability of PMSCs in their contracts with government agencies, including regulatory and administrative laws, licensing requirements for contracts, training of PMSC personnel, human rights monitoring and reporting, sanctions for violations and reparations for victims; and to consider the Norms on the responsibilities of transnational corporations and other business enterprises (“the Norms”) with regard to human rights as a foundation for developing a set of legally binding standards addressing the obligations of PMSCs.

### The Expanding Use of PMSCs

2. Globalization has increasingly expanded opportunities for growth of transnational business sectors like the private security industry. Further, trends towards outsourcing government functions to the private sector borne from neo-liberal ideologies have lead to the blossoming of military and security functions being performed by private firms. And, while mercenaries and armed forces-for-hire are by no means new, the corporatization of military service is a relatively recent phenomenon.

3. The increased rise in PMSCs has also been met with growing controversy over reports of unpunished criminal misconduct and human rights abuses. In the 1990s, DynCorp employees hired to represent the U.S. contingent in the U.N. Police Task Force in Bosnia were involved in sex-trafficking scandal.<sup>1</sup> In Africa, the private military firm Executive Outcomes was criticized for using cluster bombs and other military methods that were questionable under international humanitarian law.<sup>2</sup> In Iraq, security contractors employed as interrogators by CACI International and Titan were involved in the Abu Ghraib prison abuses.<sup>3</sup> Recently, Blackwater contractors came under scrutiny for the apparently unjustified killing of 17 Iraqi civilians while they were providing mobile convoy protection for USAID employees.<sup>4</sup>

### Existing Laws: Riddled with Loopholes

4. Although international humanitarian law as embodied in the Geneva Conventions, Protocol I, Article 47, denies mercenaries the privileges of lawful combatants, the first legal precedent condemning mercenary activity stemmed from a regional African convention. Thereafter, the

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<sup>1</sup> Robert Capps, *Crime Without Punishment*, Salon.com, June 27, 2002.

<sup>2</sup> Peter Singer, *Corporate Warriors*, 49-54 (2003)

<sup>3</sup> Joel Brikley & James Glanz, *Contract Workers Implicated in February Army Report on Prison Abuse Remain on the Job*, N.Y. Times, May 4, 2004 at A6.

<sup>4</sup> James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. Times, Oct. 3, 2007 at A1.

1989 U.N. Convention Against Recruitment, Use, Financing, and Training of Mercenaries (“Convention Against Mercenaries”) went into effect in 2001.

5. In July 2005, the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination was created. The Working Group was tasked to monitor and study the effects on the enjoyment of human rights, particularly the right of peoples to self-determination, of the activities of private companies offering military assistance, consultancy, and security services on the international market, and to prepare a draft of international basic principles that encourage respect for human rights by those companies in their activities.

6. On December 19, 2006, the General Assembly adopted Resolution 61/151, calling on States to exercise vigilance against recruitment, training, hiring or financing of mercenaries by private companies offering international military consultancy and security services, as well as to impose a specific ban on such companies intervening in armed conflicts or actions to destabilize constitutional regimes.

7. The problems with the patchwork of precedents prohibiting mercenary activity are numerous. For instance, although the Convention Against Mercenaries does make it a crime to be a mercenary, the enforcement of this crime depends on implementing legislation by the relevant state party. Additionally, to date, only thirty-two States are party to the Convention. What’s more, the right mentioned in the Convention Against Mercenaries is that of self-determination. However, business activity impacts multiple internationally recognized rights, including the right to life, liberty and security of the person. This right protects persons from being victims of war crimes, genocide, torture, forced disappearance, forced labor, and other such acts.

8. Another concern is that neither Protocol I nor the Convention Against Mercenaries has explicit provisions making state use of mercenaries an offense. More problematic, the requirements for qualifying as a mercenary under the Convention are difficult to apply to the majority of PMSC actors, as they may not be recruited to and actually take “direct part” in the conflict. In the context of Iraq and Afghanistan, contractors who are citizens of either the US or coalition partners would be disqualified under the provision concerning nationals of a party to the conflict. So too would Iraqi or Afghan nationals hired by these countries be disqualified under the provision excepting a resident to a territory controlled by a party to the conflict.

9. Perhaps most importantly, none of the aforementioned treaties or resolutions are directed at the corporate entity itself, but rather at the contractors employed to carry out the work.

#### Ensuring PMSC Accountability – Signing the Convention Against Mercenaries, Building and Enforcing Strong Domestic Regulation and Adopting the TNC Norms

10. A starting point towards building together a system of accountability is to encourage all States to sign onto the Mercenary Convention. Doing so would bring into regulation and prohibition the actions of contractors themselves. The next step would be to create and enforce domestic regulation through legislation geared at holding PMSCs accountable for international human rights abuses. Of the nations party to the Mercenary Convention, only Croatia, Georgia and New Zealand have developed laws in compliance with obligations under the Convention.

Cuba, Uruguay, and Azerbaijan, other State parties to the Convention, have statutes in either their criminal or penal codes relating to mercenaries. Outside of the Convention, Namibia and South Africa have legislation specifically on mercenaries, while the Russian Federation and France have statutes within their respective criminal or penal codes pertaining to mercenaries.<sup>5</sup>

11. Although Human Rights Advocates recognizes the importance of domestic laws providing criminal prosecution for mercenary-related activities, individual criminal prosecution is ineffective for addressing widespread abuses committed by corporations. Thus, domestic regulation must include regulatory and administrative laws, licensing requirements for contracts, human rights monitoring and reporting, sanctions for violations and reparations for victims.

12. Given the prominence of non-state actors in sectors of the economy previously relegated to States, the fact is that international law still overwhelmingly speaks expressly to States and imposes legal obligations upon them. Thus, as the Working Group recently noted, accountability gaps exist where the State does not have effective domestic regulation, or lacks regulation over PMSCs entirely.<sup>6</sup> These gaps can only be addressed by placing such non-state actors under direct international legal obligations.

13. The Norms, promulgated by the UN Sub-Commission on the Promotion and Protection of Human Rights, provide the strongest framework for ensuring accountability at the corporate level. The Norms start by recalling that the Universal Declaration of Human Rights was addressed to individuals and organs of society, as well as governments who retain primary responsibility for the protection of human rights.

14. The value of the Norms as compared to voluntary compliance regimes is that they contain an implementation process, calling on each transnational corporation to adopt, disseminate, and implement internal rules of operation in compliance with the Norms. Secondly, the UN shall conduct periodic monitoring and verification of the corporations' efforts and investigate complaints of violations. Thirdly, States are responsible for adopting and enforcing a regulatory scheme consistent with the Norms. Lastly, the corporations are required to provide prompt, effective and adequate reparation to those persons, entities and communities harmed by their conduct, as determined by national courts and/or international tribunals.

15. It is by including corporations under such an accountability framework that the obligation to respect human rights is shared across the different entities capable of affecting them. Domestic regulation alone, no matter how strict or well designed, will not be able to reach all PMSC activity or personnel.

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<sup>5</sup> UN General Assembly, Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination Note by the Secretary-General, 17 August 2005. A/60/263.

<sup>6</sup> UN General Assembly, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Chairperson-Rapporteur: Mr. Alexander Nikitin, 21 January 2009. A/HRC/10/14.

Recommendations

16. Human Rights Advocates commends the progress of the Working Group, and calls upon it to:
- Continue monitoring the phenomenon of PMSC activity and work towards developing a system of supervision and oversight by national Governments, civil society and the international community led by the United Nations.
17. Human Rights Advocates also urges Member States to:
- Ratify or accede to the 1989 International Convention against the recruitment, use, financing and training of mercenaries.
  - Enact domestic legislation requiring oversight and accountability of PMSCs in their contracts with government agencies, including regulatory and administrative laws, licensing requirements for contracts, training of PMSC personnel, human rights monitoring and reporting, sanctions for violations and reparations for victims.
  - Consider the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights as a foundation for developing a set of legally binding standards addressing the obligations of PMSCs.

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