

**UNITED NATIONS WORKING GROUP ON THE USE OF
MERCENARIES AS A MEANS OF VIOLATING HUMAN
RIGHTS AND IMPEDING THE EXERCISE OF THE
RIGHTS OF PEOPLE TO SELF DETERMINATION & THE
WISCONSIN INTERNATIONAL LAW SOCIETY:**

**MODEL LAW FOR THE REGULATION OF PRIVATE
MILITARY AND SECURITY COMPANIES**

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Following a February 2008 Conference on Private Military Contractors in Latin America at the University of Wisconsin-Madison,¹ the Wisconsin International Law Society (WILS)² undertook to draft a model law for the regulation of private military and security companies (PMSCs) for the United Nations Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of People to Self Determination (“Working Group on the Use of Mercenaries” or “Working Group”).³ The Working Group requested a broad and flexible model law that could be incorporated into domestic legislation by any country that desired to regulate PMSCs. After review-

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¹ “The Privatization of Security and Human Rights in The Americas: Perspectives from the Global South,” University of Wisconsin-Madison, Jan. 31–Feb. 2, 2008, <http://www.havenscenter.org/privatemilitaryconference2008>.

² The Wisconsin International Law Society (WILS) is a student organization at the University of Wisconsin Law School. Wisconsin International Law Society, <http://hosted.law.wisc.edu/wils/>. WILS called its effort to formulate a model law for the UN Working Group on Mercenaries the “WILS Model Law Project.”

³ The Working Group on the Use of Mercenaries is formally called the “United Nations 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.” <http://www2.ohchr.org/english/issues/mercenaries/index.htm>.

ing existing international and national legislation,⁴ the WILS Model Law Project determined that creating a mechanism for regulating PMSCs, rather than merely broadening the definition of “mercenary,” would more effectively address the threat posed by PMSCs to human rights and state sovereignty.

Because PMSC are taking functions which are inherently governmental and affect the sovereignty of States, there is a strong position in the international community that many of the activities carried out by PMSC should be prohibited and legislation to fulfill this aim should be elaborated.⁵ The WILS Model Law Project considers this aim to be unrealistic and perhaps even undesirable taking into account the extent to which many governments, intergovernmental and non-governmental organizations currently rely on contractors for basic services such as: policing, military support, and logistics. The enormous task of eliminating PMSCs would be complicated further by the fact that existing laws focus on identifying and punishing individual mercenaries but do not address PMSCs as international actors with specific legal rights and obligations.⁶ PMSCs, by virtue of their size, might, resources, lack of oversight, and potential for corruption, recklessness, and negligence pose a much greater danger to human rights and state sovereignty than could any individual mercenary. Laws aimed at regulating and punishing individuals, thus, prove unwieldy and ultimately ineffective tools in the struggle to reassert control over PMSCs.

Thus, in drafting this document, the WILS Model Law Project opted for regulation over prohibition or banning, and directed its efforts at PMSCs, rather than individuals. WILS endeavored to construct a mechanism to prevent PMSCs from performing tasks that are inherently governmental, and to encourage companies to comply with international standards for the protection of human rights and state sovereignty. Rather than drawing from traditional, individual-targeted frameworks for understanding mercenaries, the Model Law Project determined to treat

⁴ The laws evaluated included the 1907 Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, the Charter of the United Nations (Art. 2, par. 4), the 1949 Geneva Conventions Common Article Three, Protocol I (relating to the Protection of Victims of International Armed Conflicts), Protocol II (relating to the Protection of Victims of Non-International Armed Conflicts), the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and the OAU Convention for the Elimination of Mercenarism in Africa of July 1977.

⁵ Organisation of African Unity, OAU Convention for the Elimination of Mercenarism in Africa, http://www.africa-union.org/root/AU/Documents/Treaties/Text/Convention_on_Mercenaries.pdf

⁶ *Supra* note 4

PMSCs as a legal and non-state actor unique and separate from the individual mercenary. These “Armies of Fortune” replaced the traditional “Soldier of Fortune” as the target of the Model Law.

To ease application of these regulatory suggestions, the Model Law Project opted for plain language that could be easily and quickly adapted to the needs of different States. The approach required WILS to recast questions of a mercenary’s citizenship, his motivations, his desire for financial compensation, and the status, location, affiliation, and interests of the employers as questions about the nature of specific tasks, activities, and contracts. If a task is traditionally performed by the military and a contract requires it to be performed by employees of a private company, the Model Law treats that task as a private military activity. Similarly, if a private company is awarded a contract to perform a collection of activities traditionally performed by the military (i.e., the training of prison guards, the interrogation of detainees, the armed escort of supply vehicles), the Model Law treats this as a private military contract. Companies that bid on and perform these contracts are, for the purposes of this document, private military companies.

The Model Law defined private security companies as private entities that perform tasks traditionally performed by police and other domestic security forces within the home state. Many companies that work overseas in support of military operations refer to themselves as “Private Security Companies.”⁷ However, if a company acts overseas in the performance of contracts which require employees to be armed, to use force against civilian populations, to provide armed escorts to government vehicles, or any other tasks traditionally performed by the military and outsourced to the private sector, such a company is considered a private military company for the purposes of this document.

Due to the fact that many of the suggested provisions are applicable to both Private Military and Private Security Companies, the document employs the general term PMSCs except when distinguishing between the two is necessary.

In October 2008, the Working Group first introduced this model law at its Regional Consultation for Eastern European and Central Asian countries in Moscow, Russian Federation. The Working Group considers this document a part of the legislative arsenal it is

⁷ Thirty five companies currently supporting military activities in Iraq are members of the Private Security Association of Iraq, a “non-profit organization formed and maintained to discuss and address matters of mutual interest and concern to the industry conducting operations in Iraq.” Private Security Association of Iraq, <http://www.psc.ai.org/>.

studying and considering in the elaboration of an international instrument on PMSCs. It is our wish that academics, activists, and leaders—political, military, and business—can look to this document as one way in which governments can affect necessary regulation and mitigate the risks posed by PMSCs to human rights and state sovereignty. Such regulation is possible and grows increasingly vital to state and human security as PMSCs take on an ever-widening role in military and security activities on the international stage.

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I. PURPOSE AND FINDINGS

A. The purpose of this document is to suggest guidelines for the realistic and effective regulation of PMSCs with the aim of protecting human rights and preserving State sovereignty.

B. Findings:

1. Sufficient data does not yet exist to determine conclusively whether or not PMSCs reduce or increase the cost to the State of fulfilling essential functions and accomplishing traditionally State-performed tasks.
2. Due to the lack of accountability for acts committed by private military and security employees, PMSCs inherently pose a greater threat to civilians than do the military and police counterparts these private employees replace.
3. Comprehensive regulation will not only provide the civilian population with improved human rights protection but will also protect States from PMSCs' infringement on the State monopoly on the use of force.
4. As the use of PMSCs is currently widespread, with private companies fulfilling essential State functions in some areas to the extent that banning them does not seem realistic, regulation appears to be a more practicable "next step" approach to the problem of PMSCs, human rights, State sovereignty, and the State monopoly on the legitimate use of force.
5. A lack of political will to eliminate or regulate PMSCs is widely acknowledged in every recent conference and report. The monitoring and control of PMSCs has been left to the companies themselves which have adopted different and unevenly applied self regulatory procedures. Grave and consistent human rights violations and abuses as well as tragic events such as the Nisour Square massacre of 16

September 2007 have shown that self-regulation alone is not sufficient.

6. Economic sanctions and incentives for companies that meet or fail to meet international standards for recruitment, training, and self-regulation should form a portion of any legislation adopted relating to PMSCs. This document proposes a strategy tying eligibility for lucrative government contracts to responsible behavior with regard to protecting human rights and respecting State sovereignty.
7. Despite this document's focus on regulation, it is hereby acknowledged that, drawing on international definitions of a State and Customary International Law regarding the State monopoly on the legitimate use of force, there exist a number of activities which are inherently governmental and fundamentally inappropriate for outsourcing to private companies. Performance of these activities should be restricted to State actors only.

II. DEFINITIONS

- A. Private Military and Security Companies (PMSCs): refers generally to private entities providing military, police, security, or related services which are employed by or under contract with national or State governments, national agencies, international governmental and non-governmental organizations (NGOs), as well as transnational and private companies. This term should be interpreted broadly, but at minimum includes all companies, the employees of which are armed or trained with the ability to cause bodily harm, that act domestically or overseas.
- B. Private Military Companies: refers to companies assisting, accompanying, or supporting the mission of the national military. Includes companies that perform traditionally military tasks abroad and companies acting under contract or command of a government body in performance of traditionally military or constabulary tasks within domestic borders.

- C. Private Security Companies: refers to companies performing State security functions, such as police, law enforcement, investigative, tasks. This term includes companies under contract or command of a government body to provide for the administration and/or operation of any detention facilities, related to the penal system, immigration and border patrol services, etc. This term includes any private company with arrest, detention, strike-breaking, or interrogation powers and includes any private company with a government mandate to maintain state order or to protect assets, public or private, at the request of the State.
- D. Home State: refers to the State in which a PMSC is headquartered when the PMSC also conducts the operation in question in that State. This is to distinguish between a sending-State—a State that sends PMSCs to operate in foreign countries, or host-States—those States in which PMSCs sent by the sending-State conduct their operations. The term home State will be employed primarily when discussing Private Security Companies.
- E. Host State: refers to the State to which a PMSC is sent to conduct its operations.
- F. Sending-State: refers to the State in which a PMSC is headquartered and/or where its highest level business decisions are conducted. The sending-State sends PMSCs to a foreign host-State. In some instances the PMSC of a sending State may be registered in another State.
- G. Adopting State: refers to a State in the process of or planning stage for adopting legislation to control PMSCs on a national level.

III. INTERAGENCY TASK FORCE ON THE USE AND REGULATION OF PMSCs

- A. States intending to establish judicial, administrative, and investigative oversight on PMSCs activities should create an Interagency Task Force responsible for adopting legislation and set up regulatory mechanisms to control and monitor their activities,

including a system of registering and licensing that would authorize these companies to operate and allow them to be sanctioned when the norms are not respected. When establishing such regulatory systems of Registration and licensing of private military and private security companies and the individuals working for them, mechanisms should be put in place to determine minimum requirements for the obligatory transparency and accountability of firms, provide for the background screening and vetting of private military and private security company personnel, ensure adequate training of such personnel on international human rights and international humanitarian law, as well as rules of engagement consistent with applicable law and international standards, and establish effective complaint and monitoring systems, including parliamentary oversight.

- B. This Task Force should be created by the Executive with the authority to regulate PMSCs within the home-State and when acting under government contract abroad.
- C. This Task Force should include representatives of all government bodies that issue contracts to private companies at a level of authority to be decided by the adopting State. Defense, Foreign Ministry/Department of State, Labor, Finance, and Accountability institutions, at minimum, should be represented.
- D. This Task Force could draw upon the recommendations of this model law and international human rights norms to draft a list of activities fundamentally inappropriate for outsourcing, consequences for private companies that engage in such fundamentally public activities, and a dual ranking system for the classification of government contracts and for PMSCs that bid for said contracts.
- E. Recommendations generated by this Task Force could be a source for legislation and administrative regulation. Authority to draft, introduce, and enact legislation will differ depending on adopting States' legislative processes. As such, wherever this document makes reference to the Task Force's duty to enact, draft, publish, etc., legislation or regulation, it should be assumed

that this duty extends as far as the authority of the Task Force to participate in legislation extends.

IV. ACTIVITIES FUNDAMENTALLY INAPPROPRIATE FOR OUTSOURCING TO PMSCs

- A. The Task Force would establish, clearly articulate, and make known to the public and to all government contractors in the form of a widely, and freely accessible written document that there are some functions that the State alone may perform. The Task Force would compile an exhaustive list of activities prohibited to private companies and their employees. Suggested prohibited activities are, but are not limited to:
1. Military operations: Whether acting as soldiers or in support positions, it is not appropriate to utilize private contractors in military activities, such as tactical combat roles, static and mobile security, defending facilities, escorting convoys, and people in situations of low intensity armed conflict.
 2. Independent military and contingency operations using PMSCs to act in a military capacity separate from the sending-State when States want to minimize political attention or circumvent arms embargoes: It is not appropriate for PMSCs to act in a military capacity separate from the sending-State.
 - a. Sending-State must have a military or political presence in host-State to send PMSC personnel in a military capacity.
 - b. Parties to internal State conflicts cannot import PMSC employees from a foreign sending-State independent of a military or political presence from the sending-State. PMSC employees that enter into combat on behalf of a party to internal political conflict within a foreign State will be considered mercenaries and in violation of international law.
 - c. Contracts to serve as personal security for government officials, NGO's, aid organizations, or government or

international regulatory bodies should not be considered independent military operations.

3. Weapons and explosives: firing without having been *actually* fired upon or any use of explosives, search and recovery, or construction-related demolition are military activities. It is not appropriate for contractors to fire weapons except in training and defensive circumstances. It is not appropriate for contractors to use explosives to advance military or offensive objectives.
 - a. Regarding defensive actions, firing when fired upon, there are certain types of ammunition which are inappropriate for use by PMSCs. PMSCs engaged in military or police action should be prohibited from employing any type of ammunition not permitted to their military or police counterparts engaged in similar activities.
4. Military Counseling-Arming/Advising/Training: It is absolutely not appropriate for a contractor to supply arms to foreign nationals under any circumstances. In a number of circumstances training and/or advising in police, prison, or military employees is an inappropriate activity for private companies. When describing prohibited activities, the Task Force should consider the kind of training offered (strategic, weapons/demolition related, educational, administrative) and the groups that may be trained by PMSC advisors (e.g., foreign governments, anti-government groups, paramilitary groups, drug cartels, etc.).
5. Military Counseling-Intelligence: the Task Force should consider that private employees are not legally accountable for breaches of loyalty or confidentiality in the same way as military and government-run intelligence employees. The Task Force should consider prohibiting the hiring of private employees for intelligence work or should consider limiting such hiring to certain lower levels of secret clearance.
6. Interrogation: although many governments do not have

enough highly trained interrogators or translators to meet current demands, the Task Force should consider this task as in appropriate to employ contract interrogators and translation. Interrogation and translation expose an extremely vulnerable population (detainees) to great potential for abuse of power in a situation that does not lend itself to transparency or regulation. At minimum the Task Force should determine that:

- a. Interrogators and translators are used only strictly within onsite military or state-run police chain of command.
 - b. A military or police officer of comparable or superior rank/experience should be assigned to each contract interrogator or translator at all times to observe and report to the chain of command.
7. Dangerous military support activities such as penetration into “black” or “red” areas (military designations for geographical areas—roads, etc.,—under imminent threat of violent attack by insurgents): although many contracts require, and many companies undertake, this activity, it is not appropriate for this type and level of risk to be undertaken by private employees. These activities should be carried out by military personnel. The Task Force should account for conflict between practical reality and labor and human rights concerns in its ranking system by providing:
- a. Security guards or special guarded convoys would be an exception to the “inappropriate activities” designation, but to receive this exception, PMSCs would have to demonstrate for each employee or each convoy that it is specifically trained, armed, and armored for these activities.
- B. The Task Force would establish, publish, and arrange for the enforcement of strict criminal and financial consequences for private companies and private employees that engage in the activities designated as inappropriate for outsourcing. At minimum, any private employee engaging in these activities should be considered a mercenary and subject to relevant penalties under international laws and the laws of the home, host, and sending-states. The Task Force

should draft, publish, and incorporate into national law, a Definition of mercenary consistent with customary international law.

V. REGULATING ACTIVITIES APPROPRIATE FOR OUTSOURCING TO PMSCs

- A. The Task Force would establish, publish, and make widely and freely accessible to the public and to PMSCs a list of activities that can be appropriately and legally conducted by PMSCs under, national, federal, state, and international laws.
- B. The Task Force would create a dual ranking system coordinating two factors:
 - 1. The risk that the activity will result in human rights abuses or inappropriate encroachment upon the authority of the host-state (or home-state in the case of Private Security Companies).
 - 2. The degree to which a company bidding for a government contract complies with the Task Force's minimum standards for PMSCs for the protection of human rights and state sovereignty.
- C. The Task Force would issue rankings, to be reviewed annually, to PMSCs that wish to be eligible to bid on government contracts. PMSCs would be ranked from Tier 1 (highest possible) to Tier 5 (lowest possible) according to each company's compliance with the Task Force's minimum standards for the protection of human rights and State sovereignty. Companies that do not submit requested information to the Task Force for the purpose of determining a ranking would not be eligible to bid on government contracts.
 - 1. Minimum standards to be considered when ranking companies would include:
 - a. Hiring/recruitment practices:
 - i. No criminal record.
 - ii. Adults only (not under eighteen).
 - iii. Officially hired employees (must have a contract).

- iv. Contracts drafted and executed in good faith.
 - v. Procedures in place to eliminate former war criminals from applicant pool.
- b. Training and education of personnel:
- i. No drug use (regular screenings).
 - ii. Trained with the weapons required to use.
 - iii. Emergency medical training if working in conflict areas.
 - iv. Employee education and training programs regarding human rights, religion, and culture of the host-State, etc.
- c. Company regulations - disciplinary procedures:
- i. Incorporation of Task Force requirements into internal policy.
 - ii. PMSC policy for regulating and punishing human rights abuses is clear and enforced among employees. In case of inappropriate employee activity and/or violation of human rights, international or host-state law, PMSCs should cooperate fully with government investigations and prosecutions.
 - iii. Effective internal disciplinary company response, separate from sending-State and host-State criminal systems, in case of inappropriate employee activity, violation of human rights, international or host-State law.
 - iv. Regular record-keeping, employee review, and retraining to ensure problem employees do not continue to work with vulnerable populations and to ensure that non-problem employees receive the necessary training and education to continue to comply with Task Force standards.
 - v. Transparency: policies and compliance data should be published when possible and made available to Task Force when requested. All possible efforts should be made to minimize and expose corruption.

- d. Efforts on the part of PMSC to coordinate with sending- and host-State governments, militaries, and aid organizations to ensure humane treatment and expeditious rescue of PMSC employees detained against their will in conflict situations.
 - e. Compliance with information requests
 - i. By government officials during investigations of human rights violations, corruption, and other abuses of power.
 - ii. By the Task Force when reviewing rankings.
 - f. Any other criteria set by the Task Force
- D. The Task Force would issue rankings, to be reviewed annually, to ALL GOVERNMENT CONTRACTS available for bidding to PMSCs. Rankings for contracts will mirror rankings for companies by utilizing a Tier 1 to Tier 5 scale, based upon the risk that, in the performance of a particular contract, a contractor could violate human rights or state sovereignty.
- 1. Minimum standards to be considered when ranking contracts will include:
 - a. Amount and degree of potential contact with host-state civilian population.
 - b. Amount and degree of potential contact with host-state military and/or police.
 - c. Degree to which contractor will be required to be armed:
 - i. Type of arms required.
 - ii. Quantity of armed employees.
 - iii. Degree of training required for armed employees to pose minimal risk to vulnerable populations.
 - d. Frequency of attacks within area in which contract is to be performed (risk to safety of PMSC employees).

- e. Adequacy of military or police support in conflict areas or other dangerous zones.
 - f. Opportunities for corruption and/or abuse of government trust, privileges under the contract, government authority, etc.
 - g. Opportunities for oversight and regulation.
 - h. Transparency: To what extent will government regulators and/or the public be aware of the nature of the tasks to be performed?
 - i. Any other criteria set by the Task Force.
- E. A contractor can ONLY bid for and be awarded contracts of its own rank and/or below. Tier 1 companies can bid for and be awarded any of the 5 levels of contracts. These companies have demonstrated a commitment to incorporating human rights and state sovereignty concerns into business practices and have provided employees with the training, education, and equipment necessary to conduct themselves appropriately in situations required of a Tier 1 contractor. Tier 5 companies will be legally prohibited from bidding on any contract ranked above Tier 5. These companies have demonstrated the least willingness to comply with minimum standards and therefore should be engaged in activities determined to have the least risk of abuse.

VI. PMSC HUMAN RIGHTS AND STATE SOVEREIGNTY STANDARDS COMPLIANCE REPORT

- A. In addition to the above regulatory responsibilities, the Interagency Task Force would publish the results of company and contract rankings in an annual report evaluating and making known to the public efforts of adopting State PMSC efforts to comply with national and international human rights and civil rights laws.

APPENDIX

It is difficult to accurately demonstrate how the dual ranking system would work, as adopting States will develop different criteria. However, as this proposed system is unique, and a clear understanding is critical, we have included this appendix as a basic example for the benefit of the reader.

Contract A requires that a company provide the food, food preparation, and serving staff for a population of approximately 5,000 diplomatic and security personnel in a heavily fortified “international zone” within a volatile conflict area. Security for supply vehicles is a separate contract, as is construction of mess halls, and purchasing and maintenance of food preparation and serving equipment. The contract requires only the contractor arrange for the purchasing, preparation and distribution of food alone. Due to isolation within the international zone, there will be no regular contact between food service employees and the local population. Depending upon how the model law criteria are implemented in the adopting state, and depending upon the history of attacks penetrating the “international zone” and civilian casualties, the Task Force could rank this contract anywhere from Tier 3 to Tier 5.

Company A is a supply and logistics company that specializes in acquiring large amounts of food, transporting it long distances, and distributing that food to large populations. The company retains its own corps of food preparation and serving staff. These employees are trained to respond to kitchen-related emergencies, such as choking and fire, and undergo a training course on religious dietary restrictions relevant to the parts of the world where the employees are to be assigned. Company A hires employees through stringent vetting procedures and requires each employee to undergo a brief human rights orientation and sign a document agreeing to abide by company policy, which is in minimum compliance with Task Force standards. Depending on how the model law criteria are implemented in the adopting state, the Task Force could rank this company from Tier 3 to Tier 5.

Contract B requires that a company provide armed guards to protect diplomatic personnel in their travels outside of the international zone within a volatile conflict area. Attempted terror attacks on diplomatic vehicles are common outside the international zone, particularly when traffic is at a standstill, such as during traffic jams and at security checkpoints. The contract would require guards to travel regularly through the streets of the conflict area, exposing them and their charges to a high risk

of injury or death and to the possibility of abduction and detention by enemy combatants. The contract would therefore require guards to possess a high degree of training in tactical combat roles and to be heavily armed and skilled with a variety of weapons. As the contract would be entirely performed outside the security of the international zone, the contract would entail a high degree of interaction with local residents of the conflict area. This would undoubtedly be a Tier 1 contract.

Company B operates training facilities around its home state. It recruits highly trained former-military officers and provides the latest weapons and technology. Employees undergo a mandatory orientation as to the cultural and social norms they can expect when posted abroad and how to interact respectfully with the local population of the conflict area. In execution of past contracts, when questions regarding employee behavior have arisen, Company B has claimed "trade secrets," and refused to reveal employees' identities or to cooperate with any governmental investigation. The employees in question were reassigned to performance of other contracts held by Company B with no disciplinary action, reduction in pay, mandatory re-training, or other consequences. The company provides weapons and ammunition as requested by employees without a clear policy or regulation of such. Therefore, it is common for employees to carry exploding-tip ammunition, also known as "hollow-point" or "cop-killer" bullets, ammunition which is prohibited to the home-state military. Though its employees are highly-trained and are well prepared to carry out the requirements of Contract B, Company B's lack of compliance with Task Force minimum standards for disclosure, cooperation with investigations, regulation of ammunition, and adequate internal disciplinary response to inappropriate employee behavior would earn the Company a Tier 3 or possibly Tier 4 ranking. Company B would therefore be ineligible to bid for Contract B.

Company B would very likely be eligible to bid for Contract A. It would then be up to the contracting government agency to determine if Company B possessed the expertise and infrastructure to adequately perform the tasks of Contract A for the lowest quoted cost.