CALL FOR INPUTS: REPORT ON THE ROLE OF PMSCS IN HUMANITARIAN ACTION

1. **Introduction**

Private military and security companies (PMSCs) encounter humanitarian agencies and nongovernmental organizations (NGOs) in two ways: as providers of security services, and as fellow actors “on the ground”, functioning in conflict zones across the world. The use of PMSCs by humanitarian actors has increased, particularly in the past few years. Today, PMSCS have become part of all major conflicts of the world. In fact, many international organizations such as the United Nations increasingly rely upon PMSCs in conflict zones. However, this increased role of PMSCs in conflict zones needs to be evaluated closely.

While private contractors are not being used in combat roles, the reliance of international organizations on these firms is growing as its personnel have become increasingly targeted in conflict zones. In countries with complex environments like Afghanistan and Somalia, the UN is weary of relying on local police forces, and therefore resorts to private contractors to protect its personnel and facilities. Legitimate concerns have been raised that the use of PMSCs to provide protection for UN staff may create conditions where personnel are more vulnerable to attack. Nevertheless, this trend has grown over recent years and is a cause for concern. This trend could eventually pose a threat to the perceived neutrality of the operations conducted by international organizations such as UN around the globe.

Throughout this submission, we have focused on a few specific questions as given in the call for inputs. With regards to question no. 6, we have highlighted the inadequacy of domestic legislations and policies surrounding PMSCs. We have also made a reference to India’s domestic legislation on PMSCS- Private Securities Agency (Regulation) Act, 2005.

Under question no. 7, we have discussed the critical role that is played by performance-based contracts in legitimizing the employment of PMSCs as well as their enhanced accountability.

We have answered question no. 10 by discussing human rights abuses in humanitarian setting with reference to the case of Blackwater. Finally, towards the end we have put forward our own recommendations that strongly emphasize upon the need of framing national or domestic legislations on PMSCs.

1. **Objective**

The Working Group on the use of mercenaries has called for inputs to inform its thematic studies to be presented at the Human Rights Council in its September session and at the General Assembly in October. We present our opinions on question numbers 6, 7, 8 and 10posed by them.

1. **Submissions**

**Regulatory frameworks and their application**

**Question 6**: **Please provide information on existing legislative, policy or other frameworks that regulate the use of PMSCs in humanitarian action. This can include for instance rules and procedures, contractual requirements, monitoring and oversight of contractual clauses and standards, and accountability mechanisms put into place to protect and safeguard against human rights violations by security service providers.**

Analyzing from an international perspective, PMSCs highlight the gray area in international law. They have outnumbered traditional armies and soldiers but the questions on their status, role, and accountability remain unanswered. Thus, it is pertinent to ponder upon questions such as who PMSCs are and what duties do they perform. Can the terms PMSCs and mercenaries be used interchangeably? It is also important to study the existing international legal framework governing PMSCs to make it more transparent and accountable in International Human Rights and Humanitarian Law. Private Military Security Company (PMSC) may be defined as a corporate entity that provides on a compensatory basis military and/or security services by physical persons and/or legal entities.[[1]](#footnote-1)They are private companies that trade in security and/or military services, mostly outside their home states. Among the services offered are armed and unarmed guarding of personnel and assets, intelligence, military support and logistics services, and security training.[[2]](#footnote-2)

* **Can the terms ‘Private Military Security Company’ and ‘Mercenary’ be used interchangeably?**

The legal vacuum on regulations on PMSCs has often diverted the academic discourse to mercenaries. However, it is important to note that the terms ‘PMSCs’ and mercenaries cannot be used interchangeably. A mercenary as per the International Convention against the Recruitment, Use, Financing and Training of Mercenaries 2001[[3]](#footnote-3) has been defined as:

*“For the purposes of the present Convention,*

*1. A mercenary is any person who:*

*(a) Is specially recruited locally or abroad in order to fight in an armed conflict;*

*(b) 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 rank and functions in the armed forces of that party;*

*(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;*

*(d) Is not a member of the armed forces of a party to the conflict; and*

*(e) 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.*

*2. A mercenary is also any person who, in any other situation:*

*(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at :*

*(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or*

*(ii) Undermining the territorial integrity of a State;*

*(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;*

*(c) Is neither a national nor a resident of the State against which such an act is directed;*

*(d) Has not been sent by a State on official duty; and*

*(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.”*

PMSCs are private soldiers employed by a company and work as intermediaries between soldiers and governments. Mercenaries are not attached to any state or company and individuals work purely on monetary incentives. PMSCs carry out various tasks such as peacekeeping operations, security services, logistics, et cetera. In contrast, mercenaries are confined to frontline combat operations. Some of the functions of both PMSCs and mercenaries overlap. Sarah Percy, in her work titled ‘Mercenaries: Strong norms weak law” argues the difference between PMSCs and mercenaries. She points out that PMSCs, unlike mercenaries, associate themselves with a larger group cause and are under "tight" state control. Moreover, PMSCs can point to a more significant cause because they fight for the goals of their home state, contract "primarily" or "exclusively" with their home state, or work on projects approved by their home state.[[4]](#footnote-4)However, there is a difference in the nature of employment and activities carried out, creating possibilities of PMSCs effacing liability under the Mercenary Convention.

* **Inadequacy of domestic legislations**

Any international legal framework to govern the private military industry should be based on the ideas of state sovereignty, respect for human rights and humanitarian law. The ambit of Universal Declaration of Human Rights 1948[[5]](#footnote-5), International Covenant of Civil and Political Rights 1966[[6]](#footnote-6), The Geneva Conventions of 1949[[7]](#footnote-7) and the two Additional Protocols of 1977[[8]](#footnote-8) should be widened to hold non-state actors accountable. The Montreux Document on Private Military and Security Companies[[9]](#footnote-9) enlists international law standards applicable to states using contractors in armed conflict. It contains a valuable list of ‘‘good practices’’ for states to follow concerning contractors.[[10]](#footnote-10) However, these ‘good practices’ are merely advisory and lack any binding value.

International efforts were made in the year 2011 to draft a uniform set of rules for PMSCs across the globe. Draft of a possible Convention on Private Military and Security Companies (PMSCs)[[11]](#footnote-11) (hereinafter referred to as ‘The draft’) was prepared by the Working Group on the use of mercenaries to violate human rights and impeding the exercise of the right of peoples to self-determination. However, the Convention is yet to see the light of the day.

The draft Convention sets out the minimum standards for legislation: the registration and licensing of private military and security companies, the articulation of training and vetting standards, and regular monitoring of activities.[[12]](#footnote-12) However, one significant lacuna in the Draft is the emphasis laid on holding PMSCs accountable under domestic laws instead of a uniform International law. Article 12 of The Draft states:

“*Article 12: Specific legislative regulation: Each State party shall develop and adopt national legislation to adequately and effectively regulate the activities of PMSCs*.”[[13]](#footnote-13)

Domestic accountability shall prove to be an ineffective regulatory mechanism since these private contractors are frequently employed in countries where the rule of law is weak and the government cannot control the use of force on its territory.”[[14]](#footnote-14) Thus, where there is no legitimate sovereign power in a country or has been overthrown by private military employees, non-state actors cannot be held accountable. Moreover, these countries do not have any regulatory structure to hold private military employees responsible under domestic laws.“Investigating a company’s operation requires human resources and financial resources that home countries’ courts may lack. It is accentuated by the difficulties in collecting evidence and witness statements in foreign, war-torn environments.”[[15]](#footnote-15)Further, states confront challenges in monitoring, oversight, and accountability for the industry’s offshore activities. Thus, the transnational nature of activities performed can help them escape domestic regulation or move their headquarters into states with less stringent legislation.[[16]](#footnote-16)

Thus, an international instrument along with domestic regulations shall help in better and effective control. Apart from legislation, an international body is also required to monitor and penalize the illegal activities of PMSCs. However, the establishment of an altogether new global watchdog for PMSCs is a far-fetched vision. Hence, a plausible solution could be extending International Criminal Court’s jurisdiction to matters on PMSCs.

In the Indian context, a good practice with regards to the regulation of PMSCs has been adopted. India prohibits extraterritorial activities of private security companies that have not obtained prior permission from the Controlling Authority, which must first consult the Central Government. In addition, India’s legislation on Private Security Agencies provides that no person shall “carry on or commence the business of private security agency, unless he holds a license issued under this Act.”[[17]](#footnote-17)

**Question 7**: **Please provide information or examples of performance-based contracts and performance assessments of private security providers involved in humanitarian action, incorporating human rights/IHL provisions and/or humanitarian principles.**

Any individual or organization that has been given authority, unless legitimized, is subject to public skepticism. Private Military and Securities Companies, contracted to render military services in international conflicts, have so far seemed to be lacking legitimacy and accountability. Some past incidents like, reports on human rights abuses, implication of fraud and other financial wrongs against contractors contracted out in the US-led military intervention in Iraq[[18]](#footnote-18), do not create a pleasant picture for private military contractors. However, PMSCs are considered to be a significant player in conflict areas by States, International Organizations, and NGOs that hire their services[[19]](#footnote-19) and the last two decades have seen a proliferation in the number of their clientele. The increased use of PMSCs at the global platform raises the need to work on the legitimization strategies so that public acceptance may be ascribed to them. Governments and international organizations have taken recourse to several such strategies to legitimize the outsourcing of securities services; one being performance-based contracting and performance assessment.[[20]](#footnote-20)

Performance-based contracting is a form of contracting wherein the clients pay the consideration only when the desired results or outcomes are delivered by the providers as opposed to the traditional approach of paying money for the activities and tasks done.[[21]](#footnote-21) Further, performance assessment is a process through which the clients assess or measure the results-based performance and to facilitate the same, provide a list of objectives and activities that ought to be done to achieve the desired outcomes. Performance- based contracting includes- a) a clear definition of a series of objectives and indicators by which to measure contractor performance, and b) performance then leading to either granting of rewards or imposition of sanctions on the contractor.[[22]](#footnote-22) Insofar as the PMSCs are concerned, performance or result here has been associated with publicly beneficial outcomes,[[23]](#footnote-23) for example making the region of conflict or wherever the contractors are deputed, secure. Performance measurement helps in ensuring that the contractors funded or hired by the States or International Organizations are only doing what they are mandated to do.[[24]](#footnote-24) Therefore, it is argued that performance-based contracting and performance assessment help generate legitimacy, effectiveness, and public accountability;[[25]](#footnote-25) and governments have justified their contracting out PMSCs in international military interventions on the basis of the aforementioned.

Among the States that resort to performance assessment to justify outsourcing of military services to private contractors, the United States of America stands at the forefront. The security contracts of the US Department of Defense, with the private contractors for military and service aid in Iraq and Afghanistan, are built on performance- based contracting and performance assessment.[[26]](#footnote-26) The US Army handbook, “*Developing a Performance Work Statement in a Deployed Environment”* mentions the importance of performance measurements by contending that they are useful as they ascertain that ‘government pays for results, not activity’.[[27]](#footnote-27)

Performance-based contracting and performance assessment may prima facie seem to be favorable strategies that might help generate legitimacy and ensure public accountability for the growing practice of outsourcing military services to PMSCs, however, there are some inherent problems with the mechanism that need to be taken into consideration.

*Firstly*, performance-based security contracting, as mentioned earlier, requires enlistment of certain objectives and tasks that contractors need to perform to achieve the desired outcome and to help facilitate assessment or measurement of their result- based performance. A flaw with this procedure is that of determining a suitable, definite and objective technique of measuring a PMSC’s performance.

*Secondly,* while ascertainment of a definite and efficient manner of measurement remains the primary difficulty, a more onerous task at hand would be that of defining the term ‘security’ *per se*, which is the desired outcome sought to be achieved in performance- based security contracting with the PMSCs. Some ways of defining security could be- a) the general public’s perception of safety,[[28]](#footnote-28) b) security could be defined in terms of activities and capabilities, such as prevention, deterrence, protection, resilience, etcetera.[[29]](#footnote-29) There are distinct complications with both. If reliance is made on the former definition, it cannot be ignored that perception is highly subjective- what would be security for one would not be perceived to be of a high degree by another. Further, these perceptions may also be in contradiction with the security provisions enlisted in the contract. For example, a performance- based contract requiring greater military presence in an area of conflict may be perceived as a threat instead of security by the local population there.[[30]](#footnote-30) Coming to the second definition- while the conceptualization of security in terms of activities and capabilities may make performance assessment or measurement a convenient task, as they can be easily measured; the very act of defining security in terms of activities like prevention, protection, and resilience seems imprecise.[[31]](#footnote-31) These activities have a causal relationship with security, meaning carrying out the former will lead to the latter or would have some impact on it; both could however not be equated as doing so would mean that these activities have already been conceptualized into the result they seek to achieve, i.e. security. Therefore, performance- based contracts that have their basis in the second definition, might lead to convenient performance measurement, but measurement would not be of the result- based performance, instead it would only be of the activities done by the contractors regardless of the fact whether outcome could be achieved or not. This flawed equation of equating activities that may lead to security to security as the outcome itself is made by many client States in their security contracts, including the USA.[[32]](#footnote-32)

*Thirdly,* the act of specification of activities and tasks for the contractors in the contracts restrains them from performing an act that is not mentioned in the contract but performing which might be the need of the hour owing to some unprecedented situation or context. Further, in the same line, non-performance of a specified act owing to some external, unprecedented situation would lead to an unfavorable performance assessment and cause imposition of sanctions on the contractors. It needs to be observed that the understanding of the term security cannot be bound in a watertight compartment. Further, the needs of the local population of a conflict- affected region cannot be sought to be fulfilled or understood by some other State whose population’s needs may be very different, security is contextual and specification of objectives and tasks regarding what a contractor is mandated to follow or restrain from, would not necessarily lead to security given its contextual nature and it being a social construct.

**Human rights and IHL impact of the use of PMSCs in humanitarian action**

**Question 8**: **How do IHL standards and humanitarian principles apply to PMSCs operating in humanitarian action, and what are the consequences for the protection of civilians?**

Humanitarian action supports people affected by conflict and natural disasters.[[33]](#footnote-33) The core principles of humanitarian action were laid down in the UN General Assembly resolution 46/182[[34]](#footnote-34) which “designed the blueprint for today’s international humanitarian system”[[35]](#footnote-35). Its core principles are a) to provide humanitarian assistance whenever needed b) to not discriminate while providing assistance c) to provide assistance without being hostile and d) to remain independent of any political, religious or ideological colours during the rendering of assistance.[[36]](#footnote-36) IHL includes both protection of civilians as part of humanitarian action as well as any kind of relief and assistance to them.

Several international initiatives have been undertaken with a view to clarifying, reaffirming or developing international legal standards regulating the activities of PMSCs and, in particular, ensuring their compliance with standards of conduct reflected in IHL and human rights law.[[37]](#footnote-37) Fifty four states and three international organisations (the European Union, the Organization for Security and Co-operation in Europe and the North Atlantic Treaty Organisation) have endorsed the Montreux document[[38]](#footnote-38) which intends to promote respect for IHL and human rights law whenever PMSCs are present in armed conflicts. There is also the International Code of Conduct for Private Security Service Providers ICoC (2010), an instrument of PMSCs self-regulation. Nonetheless, these instruments are not binding. Nor are the Codes of Conduct that apply to humanitarian agencies and that could regulate their interaction with PMSCs. Therefore, there is no guarantee that private contractors respect the Fundamental Principles of Humanitarian Action when hired by humanitarian agencies, and this endangers the legitimacy of humanitarian projects where PMSCs are involved.[[39]](#footnote-39)

With increasing hiring of PMSCs to carry out tasks on behalf of troop-contributing countries or international organisations involved in peace operations[[40]](#footnote-40), there is a possibility that PMSCs might be or have been used for combat purposes during peace operations. It is uncontested today that the majority of PMSC personnel operating in armed conflicts are not members of the armed forces and do not directly participate in hostilities and, therefore, enjoy civilian status and protection against attack.[[41]](#footnote-41) Where PMSC-personnel have been incorporated into the armed forces of a belligerent party, they can no longer be regarded as civilians and private actors but become members of that party’s armed forces.

Humanitarian action for PMSCs means a wide range of activities, ranging from peacekeeping to development. In the early 1990s, PMSCs started providing services to governments and UN agencies, for example, UNHCR hired foreign military advisors to secure camps in Zaire after the genocide in Rwanda.[[42]](#footnote-42) Also, during the civil war in Sierra Leone, PMSCs had airlifted humanitarian staff out of conflict zones.

Regarding the nature of the involvement of PMSCs in the humanitarian sphere, its services are not limited to security tasks. These companies provide armed or unarmed guards, support services (logistics, training, intelligence, etc.) and post-conflict reconstruction services, such as demining. The most used service is currently the provision of unarmed guards.[[43]](#footnote-43)

The principles which provide the foundation for humanitarian action are humanity, neutrality, impartiality and independence. They are central to establishing and maintaining access to affected people, whether in a natural disaster or a complex emergency, such as armed conflict. Promoting and ensuring compliance with the principles are essential elements of effective humanitarian coordination. The principle of “humanity” deals with the idea that human suffering must be addressed whenever it is come across. The purpose of humanitarian action is to protect life and health and ensure respect for human beings. “Neutrality” enforces the idea that humanitarian actors must not take sides in hostilities or engage in controversies of a political, racial, religious or ideological nature. When incorporating the principle of “impartiality”, it is to be remembered that humanitarian action must be carried out only on the basis of need. No distinction must be made on the basis of nationality, race, gender, religion, class or political opinion. “Independence” encompasses humanitarian action which is autonomous from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented. The humanitarian principles have practical operational relevance. It almost always takes place in complex political and militarized environments. Given that PMSCs are used nowadays for humanitarian actions, humanitarian principles and IHL standards needlessly apply to them as well. However, existing literature has not explored the applicability of these principles in great detail which has resulted in a general sense of ambiguity in this field.

As per ICRC, the status of the personnel of PMSCs in an armed conflict is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved. As a result, they cannot be targeted and they are protected against attack unless and for such time as they take a direct part in hostilities. If they are operating in situations of armed conflict the staff of PMSCs must respect international humanitarian law and may be held criminally responsible for any violations they may commit. This is irrespective of whether they are hired by States, international organizations or by private companies.

Unless they are incorporated in the armed forces of a State or have combat functions for an organized armed group belonging to a party to the conflict, the staff of PMSCs are civilians.As already stated above, both the Montreaux document and the ICoC are non-binding. Thus, member States should formulate an international legislation which makes PMSCs accountable for their actions in humanitarian aid. Alternatively, the existing legal frameworks such as UDHR, ICCPR and the Geneva Conventions can be widened to be PMSC-inclusive given that the role of PMSCs in private sectors has been becoming profound.

**Question 10**: **Please provide information on allegations of human rights abuses by PMSCs in humanitarian contexts. This may include, for instance, acts in which PMSCs are reportedly directly responsible for, or acts that support the commission of violations and abuses by other actors.**

PMSCs have supported the actions of their clients in times of combat by providing arms and armaments wherever required. This extreme reliance on private corporations to meet the desirable ends in times of conflict had seen a significant upsurge after the cold war.[[44]](#footnote-44) The States have been benefited by these companies while the general public was left to suffer directly and indirectly. Taxpayers’ money is used to deploy the contractors in conflict regions without their (taxpayers) consent. While the one living around the area of such conflict are directly exposed to the recklessness that these PMSCs follow in order to initiate the means to their tasks. The presence of these PMSCs was evident in 70 countries across the globe in 2011.[[45]](#footnote-45) The number of the contractors exceeded the local police in many regions and yet, there remain no or vague rules to hold the contractors liable for the actions that tend to hurt human property.

1. The case of Blackwater

The Middle East has witnessed such support when the Blackwater company that was founded by Erik Prince and Al Clark sent its contractors to Afghanistan, Iraq and parts of Bosnia to help the US military troops during the armed conflicts. The idea revolved around employing the unemployed in America to perform tasks that were as simple as driving a truck or complex like firing a M-60 machine gun. The contractors were assigned a variety of tasks that included training the Iraqi soldiers, guarding VIPs, providing services of a rapid action force, transportation, etc. In the year 2009, it was observed that the proportion of contractors to the US troops had reached 3:1 from 1:1 in a very short span of time.[[46]](#footnote-46) When the number of private military surpasses the State run force, it is obvious that the interests of third parties may take over the primary idea of human rights and liberties.

Blackwater is blamed for the death of 17 people at the Nissour Square of Iraq in 2007. The firing by the contractors was indiscriminate since civilians were attacked with machine guns, grenade launchers and a sniper.[[47]](#footnote-47) The company took the defense that they were obligated to protect the US embassy convoy. The massacre is one of the reasons that America and Iraq have a sour relationship between them. A PMSC in this case had not only paved the way to deaths of innocents and injuries of 20 people but also strained political and fiduciary ties between two States. The backlash was tremendous which forced Blackwater to change its name to Academia. Despite the lack of legislations that governed the conduct of PMSCs, America held four contracts liable for the damage done to the lives of the civilians. Three of them were convicted under multiple charges of voluntary and attempted manslaughter and slapped with an imprisonment of 30 years. While one of them was convicted under first degree murder with a life imprisonment.

In the year 2018, the President of the United States had granted pardon to all the four convicts involved in the massacre. The pardon came in light with all other reliefs that were provided to the American service personnels who were convicted for crimes committed against the non- combatants and civilians in the armed conflicts.

The complications relating to the PMSCs hired by the United States were far more complex and serious than what was expected out of these companies. Since the contractors were governed by the terms of their contracts, they were not expected to use their own rationale or assist the US military troops out of courtesy.[[48]](#footnote-48) The burden of war and expected goal was not shared equally. The contractors had disparate commands and their missions were often uncoordinated.[[49]](#footnote-49) The troops had a constant sense of confusion as to who was leading the contractors and who were the commanders attached to them. Thus, it became extremely difficult for the US troops to report the acts of violence and violation of rules to someone who could be in-charge of the contractors.[[50]](#footnote-50)

1. Torture in Abu Ghraib

USA did not only bring Blackwater into play during its arm conflicts in the Middle East, it also brought PMSCs like Engility Corporation (formerly L-3 Services and Titan Corporation) and CACI International to aid US military troops to act efficiently. Inc. Engility was hired to bridge the gap of language for the convenience of US soldiers imprisoned in the jails of Iraq. while the primary work of CACI was to investigate and interrogate. CACI built detention centres in Abu Ghraib and are accused of major human rights violations that occurred in 2003-04.[[51]](#footnote-51) This included directing beatings, starvation, sexual violations, sleep deprivation and other abuse of prisoners.[[52]](#footnote-52) Three former detainees filed a suit against these companies and claimed that they were left in the cold and often attacked by ferocious dogs in the detention centre.

Centre for Constitutional Rights argued on the behalf of these detainees in the civil suit and said that they (detainees) deserve compensation at the least to live a dignified life again. Following cases highlighted the inhumanity that the detainees were put through by the contractors:

I. Al Shimari*v.* CACI

This case was brought in the East Virginia District by four victims. Co-conspirators of the act named two employees of CACI that actively participated in the inhumane treatment at the detention centre. The victims were subjected to “electric shocks, sexual assaults, being stripped and kept naked, forced to witness the rape of a female prisoner, sensory deprivation, mock executions, stress positions, broken bones, and deprivation of oxygen, food and water as well as other dehumanizing acts of torture”.[[53]](#footnote-53) The military police officers testified in the court of law that they were “commanded” to torture and humiliate the prisoners.[[54]](#footnote-54) The plaintiffs said that they were released without any charges and suffered from post traumatic stress. The case is still pending in the Supreme Court of the United States.

II. Al Qureshi *v.*Nakhla and L-3 Services Inc.

The suit was filed in the District of Maryland and claimed that the 72 plaintiffs were subject to war crimes as state tort law violations across the Iraqi prisons by the PMSCs contractors. The acts of torture the plaintiffs were sexual assault, sleep deprivation, beatings, painful stress positions, sensory deprivation, electric shocks, threats (including with unleashed dogs), denial of medical treatment and other brutal acts.[[55]](#footnote-55)The case specifically named a L-3 employee as an active violator of basic human rights of the detainees. He was accused of holding down a 14 year old boy while a co-conspirator raped him. In addition to this, he was also accused of holding down one of the plaintiffs while he commanded a co-conspirator to pour his feces on him (the plaintiff).[[56]](#footnote-56) In 2012, a settlement was reached that marked the first positive resolution to a US civil case challenging detainee treatment outside the country in the larger “war on terror” context.[[57]](#footnote-57)

III. Saleh *v.* Titan

The case was filed in 2004 by almost 250 people who were subjected to violence and thrown in detention after military raids.The suit charged that Titan/L-3 and CACI violated international, federal and state law by participating in a torture conspiracy, along with U.S. government personnel, that led to the rape and other acts of torture, assault and killing of Iraqi detainees.[[58]](#footnote-58) The case was dismissed after 5 years of litigation by the Court of Appeals in the District of Columbia. In 2011, the Supreme Court of United States dismissed the case and ended the plea of certiorari claimed by the plaintiffs.

1. Open firing by the employees of Triple Canopy

On July 18, 2006, Triple Canopy (an American security firm) commanded four of its employees to escort an employee that worked for a military service provision firm called KBR Inc. They embarked on the convoy route called the “Route Irish” that was situated in the downtown of Baghdad.[[59]](#footnote-59) Three of the contractors claimed that the fourth contractor reportedly said that “he wanted to kill someone today”. The same contractor opened fire on a civilian truck that approached their vehicle at a very unthreatening speed. None of the contractors made any effort to make sure if the civilians were hurt or needed medical help. Instead, they continued to move towards the airport in order to receive the KBR employee.

On their way back to the crime scene, the contractors saw an ambulance and the three contractors claimed that the same fourth contractor asked them to not tell anyone about the incident.[[60]](#footnote-60) Furthermore, they did not stop to either help or know about the well being of the people injured. Later along the same route, a convoy overtook a civilian taxi that was approaching them and meant no harm. Witnesses claim that the contractor who shot at the taxi, said “I've never shot anyone with my pistol before," and went on shooting the taxi that had a driver aged in his 60s in it.

In the next several days, the three contractors who were not responsible for shooting came forward and reported the incident to their employer. Triple Canopy fired the man involved in shooting and the contractor who did not report about the incident in time. The firm reported about the incident to the government of the United States and yet no action has been taken till date.[[61]](#footnote-61)

1. **Recommendations**
2. The private security sector and groups such as the US based International Stability Operations Association (ISOA) and the British Association of Private Security Companies corroborate the idea of ‘self-regulation’ of PMSCs by drafting and implementing a model Code of Conduct (CoC) for such companies.[[62]](#footnote-62) The objective of the CoC would be to get the PMSCs to comply with the principles of international humanitarian law and internationally accepted standards of human rights with the help of self-imposed obligations and restrictions. In furtherance of this, the first objective would be to determine the extent of the applicability of international human rights standards and norms of IHL to the functioning of PMSCs. Based on this, the liability for violation of these norms can be attributed to these companies in accordance with the principles of State Responsibility if such services are formed, sanctioned or commissioned by a State. [[63]](#footnote-63)
3. Forming a robust national legislation for PMSCs that unequivocally and specifically mentions that the respect for human rights and IHL standards is its central objective would be desirable. A cue can be taken from the preamble of Guatemala’s legislation on private security agencies which dictates the private military contractors to respect the Constitution and international Human rights conventions, and states that the legislation should “benefit human rights, personal and collective rights to security.”
4. While drafting a national law on PMSCs, the extraterritorial application of the legislation must be clearly defined so as to keep the PMSCs acting beyond the national boundaries under the ambit of the legislation. clarify that domestic legislation is applicable abroad. Alternatively, a different legislation can be adopted that would apply specifically to the PMSCs involved in foreign campaigns or operating in foreign countries. This would help avoid an accountability vacuum with respect to PMSCs acting abroad and enable the Home states to hold the PMSCs accountable for their activities on foreign soil .[[64]](#footnote-64)
5. All the four Geneva Conventions must be mandatorily applicable to PMSCs too when they participate in humanitarian action.
6. Parties to a given humanitarian treaty have to comply with obligations arising out of that treaty, whereas all States have to respect provisions that are part of customary law. This is of course the case for all international law rules. Member states should include PMSCs in such treaties to make them binding.
7. The objective of international humanitarian law is to limit the suffering caused by warfare and to alleviate its effects. PMSCs have emerged as a significant component of IHL and as such it is right and just that they be brought under its rules and regulations as well instead of making them function under non-binding instruments.
8. **Conclusion**

Throughout history, civilians have been targeted by belligerents, who often have made no distinction between combatants and civilians when fighting their enemies. Massacres, rape, torture, starvation, enslavement, forced conscription and displacement have all been common features of war at different times and in different places. Sometimes civilian suffering has been an unintended result of the fighting, and at other times it has been inflicted as a deliberate military strategy.[[65]](#footnote-65) IHL has proven to be an adaptable legal framework with additional rules being adopted in response to new developments. A case in point is the adoption of the first two Additional Protocols in 1977, partly in response to the humanitarian concerns arising from internal armed conflicts and wars of national liberation. The treaties prohibiting anti-personnel mines and cluster munitions are more recent examples. Under humanitarian law, the civilian population in general is protected from dangers arising from military operations. However, some groups among the population, such as children, women, the elderly, persons with disabilities and displaced people, have specific needs and are entitled to special attention. Civilians can also expect, under humanitarian law, adequate care and respect. But one of the most acute challenges facing humanitarian organisations at present is access to all the victims of an armed conflict.[[66]](#footnote-66)

1. Draft of a possible Convention on Private Military and Security Companies (PMSCs), 2011. [↑](#footnote-ref-1)
2. [Birthe Anders](https://www.oxfordbibliographies.com/ViewContributor/document/obo-9780199743292/obo-9780199743292-0209.xml?id=con7534), "Private Military and Security Companies (PMSCs)". In *obo* in International Relations.<<https://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0209.xml#:~:text=Over%20the%20course%20of%20the,mostly%20outside%20their%20home%20states>.>accessed Mar 06 2021 [↑](#footnote-ref-2)
3. International Convention against the Recruitment, Use, Financing and Training of Mercenaries 2001 [↑](#footnote-ref-3)
4. Ulrich Petersohn, ‘Reframing the anti-mercenary norm: Private military and security companies and mercenarism’, (2014), 69(4), International Journal, <https://www.jstor.org/stable/24709418>accessed March 6 2021. [↑](#footnote-ref-4)
5. <<https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf>>accessed March 6 2021 [↑](#footnote-ref-5)
6. <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>accessed March 6 2021 [↑](#footnote-ref-6)
7. <<https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>>accessed March 6 2021 [↑](#footnote-ref-7)
8. <<https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>>accessed March 6 2021 [↑](#footnote-ref-8)
9. <<https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20192511-montreux-document_EN.pdf>>accessed March 6 2021 [↑](#footnote-ref-9)
10. Don Mayer “Peaceful Warriors: Private Military Security Companies and the Quest for Stable Societies” Journal of Business Ethics, 2009, 89, 2009 <www.jstor.org/stable/40605377>accessed March 6 2021 [↑](#footnote-ref-10)
11. 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, <<https://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>>accessed March 6 2021 [↑](#footnote-ref-11)
12. Faiza Patel. “Regulating Private Military and Security Companies: A Comprehensive Solution”, *American Society of International Law* (2013) 107<www.jstor.org/stable/10.5305/procannmeetasil>accessed March 6 2021 [↑](#footnote-ref-12)
13. Supra note 11. [↑](#footnote-ref-13)
14. Supra note 12. [↑](#footnote-ref-14)
15. Eugenio Cusumano, “Regulating Private Military And Security Companies: A Multifaceted And Multilayered Approach” (2009) <[10.13140/2.1.2481.8248](https://www.researchgate.net/deref/http%3A//dx.doi.org/10.13140/2.1.2481.8248?_sg%5B0%5D=r7_s10-vBjbF5kxd2Us2M2IN_etIo2HFDRTQSsbUWA9--N0PiPugEwC6QuvVw3PXuG2Mv8JT0hvVaJJ6Qs3o-Ox5ig.MevJyqq--e1qen0donT-jIdKkew_ub-gEc_iogsYV2P36LRPoB8dTpwzckOrOOyYUFAE-BFpuRpcWGqvkBuw4Q)>accessed Mar 06 2021 [↑](#footnote-ref-15)
16. James Cockayne and Emily Speers Mears, Private Military and Security Companies: A Framework for Regulation, International Peace Institution Publication (2009)<https://www.ipinst.org/wp-content/uploads/publications/pmsc\_epub.pdf>accessed Mar 06 2021 [↑](#footnote-ref-16)
17. India, Private Security Agencies (Regulation) Act, 2005, No. 29, 23 June 2005, Section 4, available at: http://www. mha.nic.in/hindi/sites/upload\_files/mhahindi/files/pdf/ PS\_Agencies\_Regulation\_Act2005.pdf. [↑](#footnote-ref-17)
18. “Commission on Wartime Contracting, Transforming Wartime Contracting: Controlling Costs, Reducing Risks” (Commission on Wartime Contracting, Arlington VA, 2011) <https://cybercemetery.unt.edu /archive/cwc/20110929213815/http://www.wartimecontracting.gov/> accessed 4 March 2021 [↑](#footnote-ref-18)
19. Christopher Spearin, "Private, Armed and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism." (Security Dialogue 39, no. 4, 2008) <<http://www.jstor.org/stable/26299798>> accessed March 6 2021 [↑](#footnote-ref-19)
20. Irine Ng , Roger Maull and Nik Yip,“Outcome-based contracts as a driver for systems thinking and service-dominant logic in service science: Evidence from the defence industry” (2009) 27(6) European Management Journal, 377–387 [↑](#footnote-ref-20)
21. Ibid. [↑](#footnote-ref-21)
22. World Health Organisation, “What is Performance- Based Contracting?”(*who.int,* 2008) <https://www.who.int/management/resources/finances/Section2-3.pdf> accessed 5 March 2021 [↑](#footnote-ref-22)
23. ElkeKrahmann. "From Performance to Performativity: The Legitimization of US Security Contracting and Its Consequences." (Security Dialogue 48, no. 6, 2017)< doi:10.2307/26294210> accessed March 5 2021 [↑](#footnote-ref-23)
24. J Lewis, “The politics and consequences of performance measurement” (2015) 34(1) Policy and Society, 1-12. [↑](#footnote-ref-24)
25. R Eichler and R Levine, “Performance Incentives for Global Health: Potential and Pitfalls” (Brookings Institution Press, Washington, DC), 139–164 [↑](#footnote-ref-25)
26. ElkeKrahmann. "From Performance to Performativity: The Legitimization of US Security Contracting and Its Consequences." (Security Dialogue 48, no. 6, 2017) < doi:10.2307/26294210> accessed March 5 2021 [↑](#footnote-ref-26)
27. US Army, “Developing a Performance Work Statement in a Deployed Environment” (Handbook 09–48, September 2009) <http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/SOWs/09–48.pdf> accessed 4 March 2021 [↑](#footnote-ref-27)
28. E Rothschild, “What is security?” (1995) 124(3) Daedalus, 53–98 [↑](#footnote-ref-28)
29. E Krahmann, “Security: Collective good or commodity?” (2008) 14(3) European Journal of International Relations, 379–404. [↑](#footnote-ref-29)
30. ElkeKrahmann. "From Performance to Performativity: The Legitimization of US Security Contracting and Its Consequences." (Security Dialogue 48, no. 6, 2017) < doi:10.2307/26294210> accessed March 5 2021 [↑](#footnote-ref-30)
31. Ibid. [↑](#footnote-ref-31)
32. ibid. [↑](#footnote-ref-32)
33. “Humanitarian Action - GSDRC” (GSDRC 26 October 2015) <https://gsdrc.org/professional-dev/humanitarian-action/> accessed 6 March 2021‌ [↑](#footnote-ref-33)
34. “A/RES/46/182 - E - A/RES/46/182 -Desktop” (Undocs.org 2021) <https://undocs.org/A/RES/46/182> accessed 6 March 2021‌ [↑](#footnote-ref-34)
35. “Resolution 46/182, Which Created the Humanitarian System, Turns Twenty-Five” (OCHA 13 January 2017) <https://www.unocha.org/story/resolution-46182-which-created-humanitarian-system-turns-twenty-five#:~:text=On%2019%20December%201991%2C%20the,when%20they%20need%20it%20most.> accessed 6 March 2021. [↑](#footnote-ref-35)
36. “Humanitarian Action - GSDRC” (GSDRC 26 October 2015) <https://gsdrc.org/professional-dev/humanitarian-action/> accessed 4 March 2021‌ [↑](#footnote-ref-36)
37. “International Humanitarian Law and Private Military/Security Companies - FAQ” (International Committee of the Red Cross, 10 December 2013) <https://www.icrc.org/en/document/ihl-and-private-military-security-companies-faq> accessed 4 March 2021‌ [↑](#footnote-ref-37)
38. “The Montreux Document on Private Military and Security Companies” (International Committee of the Red Cross, December 2015) <https://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies> accessed 4 March 2021‌ [↑](#footnote-ref-38)
39. “The Privatization of Humanitarian Action: Implications and Challenges of the Involvement of PMSCs in the Humanitarian Field – Shock Monitor” (*Shock Monitor,* 31 July 2018) <http://shockmonitor.org/privatization-humanitarian-action-implications-challenges-involvement-pmscs-humanitarian-field/> accessed 4 March 2021 [↑](#footnote-ref-39)
40. T Ferraro, ‘The Applicability and Application of International Humanitarian Law to Multinational Forces’ (2013) 95 International Review of the Red Cross, 561‌ [↑](#footnote-ref-40)
41. Franco Angeli ‘Private Military and Security Companies’ (2013) <http://iihl.org/wp-content/uploads/2018/12/35th-Round-Table.pdf> last accessed 4 March 2021 [↑](#footnote-ref-41)
42. “A Publication of : PRIVATE MILITARY and SECURITY COMPANIES and HUMANITARIAN ACTION SMI Professional Development Brief 1” <https://www.files.ethz.ch/isn/137824/SMI\_PD\_Brief\_1\_PMSC.pdf> last accessed 5 March 2021 [↑](#footnote-ref-42)
43. “The Privatization of Humanitarian Action: Implications and Challenges of the Involvement of PMSCs in the Humanitarian Field – Shock Monitor” (Shock Monitor, 31 July 2018) <http://shockmonitor.org/privatization-humanitarian-action-implications-challenges-involvement-pmscs-humanitarian-field/> accessed 4 March 2021 [↑](#footnote-ref-43)
44. “Private Security Companies: The Case for Regulation | SIPRI” (Sipri.org2020) <https://www.sipri.org/publications/2005/sipri-policy-papers/private-security-companies-case-regulation> accessed 8 March 2021 [↑](#footnote-ref-44)
45. Florquin N, “Chapter 4-A Booming Business: Private Security and Small Arms” <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2011/en/Small-Arms-Survey-2011-Chapter-04-Annexe-4.1-EN.pdf> [↑](#footnote-ref-45)
46. Thomas Gibbons Neff, ‘How Obama's Afghanistan plan is forcing the army to replace soldiers with contractors’ *The Washington Pos*t (2 June, 2016) [↑](#footnote-ref-46)
47. Michael Safi, ‘Trump pardons blackwater contractors jailed for the massacre of Iraqi civilians’, *The Guardian* (23 December, 2020) [↑](#footnote-ref-47)
48. Amy Eckert, *Outsourcing War: The just war tradition in the age of Military Privatization* (first published 2015, Cornell University Press) [↑](#footnote-ref-48)
49. https://www.ohchr.org/Documents/Issues/Mercenaries/WG/AllardKLowensteinIHRClinic.pdf [↑](#footnote-ref-49)
50. Molly Dunigan, *Victory for Hire: Private Security for Hire: Private security companies’ impact on military effectiveness* (first published 2011, Stanford University Press) [↑](#footnote-ref-50)
51. Robert Beckhusen, ‘A Decade Later, Contractor Pays Out Millions for Iraq Prisoner Abuse’ Wired (9 January 2013) <<https://www.wired.com/2013/01/torture-settlement/>> accessed 2 March 2021 [↑](#footnote-ref-51)
52. Rachel Weiner, ‘Abu Ghraib contractor treatmenetdeploarble but no torture’ *The Washington Post* (22 September 2011) [↑](#footnote-ref-52)
53. ‘Accpuntability for Abu Ghraib torture by Private Military contractors’ (Centre for Constitutional Rights) <<https://ccrjustice.org/files/PMC%20factsheet%20january%202015.pdf>> accessed 5 March 2021 [↑](#footnote-ref-53)
54. Rachel Weiner ‘A suit over Abu Ghraib getting to what actually helped’ *The Washington Post* (22 September, 2017) [↑](#footnote-ref-54)
55. Supra 52 [↑](#footnote-ref-55)
56. Id. [↑](#footnote-ref-56)
57. ‘Al Quraishi et al v. Nakhla and l 3 Services’ (Centre for Constitutional Rights) <<https://ccrjustice.org/home/what-we-do/our-cases/al-quraishi-et-al-v-nakhla-and-l-3-services>> accessed on 5 March 2021 [↑](#footnote-ref-57)
58. Supra 52 [↑](#footnote-ref-58)
59. Steve Fainaru, ‘Hired Guns are Wildcards in Iraq War’ *Chicago Tribune* (16 Apr 2007) [↑](#footnote-ref-59)
60. *ibid.* [↑](#footnote-ref-60)
61. Richard Morgan, ‘Professional Military firms under International law’ (2008) Chicago Journal of International Law <<https://core.ac.uk/download/pdf/234118458.pdf>> accessed 3 March 2021 [↑](#footnote-ref-61)
62. Administrator, “Regulation and Oversight of PMSCs” (*Globalpolicy.org,* 2013) <https://archive.globalpolicy.org/pmscs/50211-regulation-and-oversight-of-pmscs.html#self> accessed 8 March 2021

‌ [↑](#footnote-ref-62)
63. Rosemann N, “Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies Geneva Centre for the Democratic Control of Armed Forces (DCAF)” <https://www.dcaf.ch/sites/default/files/publications/documents/OP15\_Rosemann.pdf> accessed 8 March 2021 [↑](#footnote-ref-63)
64. “Legislative Guidance Tool for States to Regulate Private Military and Security Companies DCAF DCAF a Centre for Security, Development and the Rule of Law” <https://www.montreuxdocument.org/pdf/Legislative-Guidance-Toolkit.pdf> accessed 8 March 2021

‌ [↑](#footnote-ref-64)
65. Aguirre M and others, ‘Executive Summary’ <https://reliefweb.int/sites/reliefweb.int/files/resources/reclaiming\_background.pdf> [↑](#footnote-ref-65)
66. “Protection of Victims of Armed Conflict through Respect of International Humanitarian Law - ICRC” (*icrc.org*, 16 September 1999) <https://www.icrc.org/en/doc/resources/documents/misc/57jpzn.htm> accessed 5 March 2021 [↑](#footnote-ref-66)