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## **International Legal Accountability over Non-State Actors: An Analysis of the Report of the Special Representative of the Secretary General**

### **1. Need for Accountability – Examples<sup>2</sup>**

#### **1.1 EXAMPLE ONE: PRIVATE MILITARY AND SECURITY COMPANIES**

Globalization has increasingly expanded opportunities for growth of transnational business sectors. In the context of the use of force, trends towards outsourcing government functions to the private sector borne from neo-liberal ideologies have led to the blossoming of military and security functions being performed by private firms (Singer 2003: 49-54; Spear 2006). And, while mercenaries and armed forces-for-hire are by no means new, the corporatization of military service is a relatively recent phenomenon (Spear 2006: 19-39).

The use of private military and security companies (“PMSCs”) in Iraq is illustrative of the complexity stemming from the proliferation of this group of actors. Recent news reports suggest that at least 310 private security companies from around the world have received contracts from the United States agencies to protect American and Iraqi officials, installations, convoys and other entities in Iraq since 2003 (Glanz 2008). Further, with more than six years into the conflict, there is no centralized database to account for all the security companies in Iraq financed by American money (Glanz 2008). In addition to the heavy reliance upon PMSCs in Iraq, many other powerful democratic States are dependant on PMSCs in order to deploy and operate their armed forces. The United Kingdom, for example, has contracted out training in operation and maintenance of its nuclear submarines; aircraft support units, tank transporter units and air-to-tanker refueling fleet (See, e.g. Gray 2007).

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 scandals (Capps 2002). 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 (Singer 2003: 116). In Iraq, security contractors employed as interrogators

by CACI International and Titan were involved in the Abu Ghraib prison abuses (Brikley/Glanz 2004). 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 (Glanz/Rubin 2007).

The aforementioned examples are just some of the ongoing reports that have surfaced about PMSCs. It is precisely this misconduct that has led to the association of PMSC actors with the term mercenaries (UN-Document2004).<sup>3</sup> Beyond the dangers of the mercenaries themselves, the corporatization of mercenary forces has the additional problem of reducing the control that States have over their own warfare and the overall level of state-based control over the use of force (Gaston 2008: 235). Given their continued involvement in conflict situations, the potential for abuse is only increased.

The tremendous loopholes in coverage over PMSC actors under the applicable Conventions, including the Convention Against Mercenaries, the Geneva Convention and other such international treaties, showcases the urgent need for an international consensus on accountability for the corporate entity itself.

## 1.2 EXAMPLE TWO: PRIVATE DETENTION INDUSTRY AND IMMIGRANTS

Current U.S. immigration policy has resulted in a shortage of detention facilities with the capacity to adequately detain migrants. In a sinking economy, immigration detention is a rare growth industry. Congress has doubled annual spending on it in the last four years, to \$2.4 billion approved in October 2008 as part of \$5.9 billion allotted for immigration enforcement through September 2009. In order to deal with rising rates of detention, the government has increasingly contracted with private companies to create and manage detention centers as well as providing funding for local prisons and jails to expand their immigrant detention capacities.

Housing immigrants has become an extremely lucrative industry for cash strapped local jails as well. As Congress allocates more money for immigrant detention, businesses and local jails profit through public-private partnerships. A Plymouth County jail in Massachusetts houses 324 immigrants, up from 44 a decade ago, bringing in \$15.6 million last year. The Sheriff at the Plymouth jail stated that the “money is a tremendous boost for us, we aggressively try to market ourselves to get as many of those inmates into our doors as we can.” (Sacchetti 2009)

Outside of its effect on immigrant populations, corporatization of detention centers themselves also present some quandaries. In Virginia, for example, a corporation recently contracted with the United States Immigration and Customs Enforcement

to build a massive detention facility, charging a rate of almost \$63 per detainee per day. If the corporation “houses” the estimated 322,000 detainees each year, they could gross \$20 million in federal tax dollars annually. After salaries and expenses, the group would make significant profits (White/Miroff 2008). Turning over the operation of detention centers to a corporation with the purpose of generating profits inevitably produces pressure for increases in detention. Profit depends on bodies to fill the detention center, encouraging the commodification of individuals and the inevitable incentive to cut costs at the expense of the rights of detainees.

As the Special Representative has recently stated, “More than respect may be required when companies perform certain public functions. For example, the rights of prisoners do not diminish when prisons become privatized. Here, additional corporate responsibilities may arise as a result of the specific functions the company is performing. But it remains unclear what the full range of those responsibilities might be and how they relate to the State’s ongoing obligation to ensure that the rights in question are not diminished.” (UN-Document 2009)

However, the detention of human beings should never be a profit generating enterprise. The impact is particularly severe on immigrants where the purported goal of detention is to prevent them from absconding during the pre-removal process. With States increasingly turning to private corporations to administer detention centers, the potential for abuse and the inherent danger of a per body payment plan cannot be ignored.

### 1.3 EXAMPLE THREE: TOXIC WASTE

The illicit transfer of toxics has also involved significant abuses at the hands of corporations. Africa has been particularly affected by the dumping of toxic waste. Over the past years, the coast of Somalia has been used as an illegal dumping ground for several European companies who have dumped their most toxic substances including nuclear and chemical wastes into the waters (Caruso 2005). The Asian Tsunami has further exacerbated the problem as tidal waves smashed open containers of toxic waste and spread the contaminants as far away as 10 or more kilometers inland. Some of the groundwater has also been contaminated. The dumping is illegal; but the low cost (\$2.50 per ton to dump the wastes on Somalia’s beaches as opposed to the \$250 to dispose of it in Europe), the ease of the dumping due to the absence of a functioning government, and the lack of accountability have prompted many corporations to continue this dangerous practice in Somalia and in other parts of Africa (Caruso 2005). Interestingly, it is precisely this dumping that has been used by Somali pirates as a justification for their seizure of ships off the coast of Somalia in recent years.<sup>4</sup>

Another example of corporate involvement in the dumping of toxics concerned the dumping of toxic waste in the Ivory Coast by Trafigura, a Dutch company. Health concerns counsel for waste to be incinerated; however in this example, the waste was not. As a consequence, the emissions from the waste resulted in the death of 10 people and the hospitalization of 69 others.<sup>5</sup> A British law firm instituted a lawsuit against the corporation and both the Ivorian and Dutch authorities started criminal proceedings against the corporation and its officers (Murphy 2007). A settlement was reached between Trafigura and the Ivorian government wherein Trafigura agreed to pay the Ivorian government \$198 million dollars for a clean up.<sup>6</sup> However, Trafigura admits no liability for the incident and, as a condition of the agreement, the Ivory Coast has dropped any prosecutions or claims against the firm. Trafigura's employees, who had been jailed by the Ivory Coast authorities after the incident, would also be released.<sup>7</sup>

Speaking of the deal in an issued statement, Jasper Teulings, the Senior Legal Counsel of Greenpeace commented, "one cannot do justice without knowing the facts in their entirety. At this stage, it would have been more appropriate to secure a provisional settlement with an advance payment, rather than one that closes the books definitively, especially when the full extent of liabilities have not yet been determined."<sup>8</sup>

Although this settlement has no bearing on the legal rights of the victims, the general impression is that the victims will now receive little support from their government in pursuing justice. Helen Perivier, the Toxics Campaigner for Greenpeace notes, "the ease with which international environmental laws are broken and questionable deals exchanged for real justice, painfully highlights yet again, that the international community creates laws but simply lacks the political will to implement and enforce them."<sup>9</sup>

With expanding voices calling on governments to do more to protect their populations from harm, regulatory models need to be adopted to hold accountable those with the greatest power in today's world: the corporations. We have reached a tipping point where lacking regulation and resulting human rights abuses impel a different approach, one away from voluntary codes of conduct and towards a system that ensures the promotion and protection of human rights by all actors involved in the global economy.

## 2. Special Representative's Framework

On April 20, 2005, the U.N. Commission on Human Rights adopted resolution 2005/69, requesting the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises