COMPANIES IN CONFLICT SITUATIONS

Building a Research Network on Business, Conflicts and Human Rights

ICIP Research
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Gran Via de les Corts Catalanes, 658, baixos . 08010 Barcelona
T. +34 93 554 42 70 | F. +34 93 554 42 80
icip@gencat.cat | www.icip.cat

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SUMMARY

PREFACE

Antoni Pigrau
Director of ICIP program "Armed Conflicts, Law and Justice"

Building a Research Network on "Companies, conflicts and human rights"

On the 28th of November, 2007, the Catalan Parliament passed the 14/2007 Law of the Creation of the International Catalan Institute for Peace (ICIP).

ICIP is an independent, public institution whose principal aims are to promote a culture of peace in Catalonia an across the world, to facilitate the peaceful resolution of conflicts and to ensure that Catalonia plays an active role as a peace agent. Consequently, ICIP promotes human security, disarmament, peaceful solutions and the transformation of conflicts, the construction of peace and respect for human rights.

Additionally, the law responsible for the creation of the ICIP states that the institution must provide services to the public, the peace movement, the academic world and for public administration by organising and collaborating in research activities, training, knowledge transfer, raising awareness as well as active intervention in its field.

With research being one of its focal points, ICIP has a special interest in the promotion of new research, generating new results not exclusively in the theoretical field but also in the practical application of solutions.

It is in this context, and in the light of its programme on *Armed Conflicts, the law and justice*, that ICIP organised an International Research Conference titled "Companies in Conflict Situations: Building a research network on 'Companies, conflict and human rights'" in Barcelona between the 17th and the 18th of January 2013.

This was the second meeting centred on the topic organised by the International Catalan Institute for Peace and marks a continuation of the conference that took place in Barcelona between the 20th and the 21st of October 2011 on

"The Role and Responsibilities of Companies in Conflict Situations: Advancing the Research Agenda."

The theme of the debate centred on international conventional arms markets, on private security and military companies, and on the access, the exploitation and the trade of natural resources. The conference included a session on the potential role of companies in the consolidation of peace.

The aim of the conference was dual: firstly, to discuss the agenda of on-going and future research projects, and secondly, to consider the possibility of establishing an international research network from an interdisciplinary perspective.

On this point, the participants generally demonstrated a significant interest in creating such a network, which would have a three-way focus based on companies, conflicts and human rights. Its principal contribution would be to create links of knowledge provided from different perspectives of interest, fundamentally by academia and non-governmental organisations. Consequently, a series of work agreements were adopted through an open process to make the creation of the network possible. These will come into effect in a meeting scheduled to be held in spring 2014. I hope that this important decision comes to fruition with the participation of a significant worldwide representation of those who dedicate their research to such topics.

This book presents most of the contributions presented to the International Research Conference in 2013. From ICIP, I would like to put on record our acknowledgement of the work of all those who participated in the conference and also in compilation of this book, especially for making time available in their busy schedules and for their valuable contributions.

I would also like to acknowledge the fundamental role of Maria Prandi and Bruce Broomhall, who have accomplished and continue to accomplish the task of organising these meetings. My thanks also go to the technical team of ICIP, particularly to Pablo Aguiar and Marta López, and to Jordi Vives, who produced the minutes of the proceedings.

Antoni Pigrau
Director of the Armed conflicts, law and justice programme of ICIP

INTRODUCTION

Maria Prandi
Co-organiser of the conference and external collaborator at ICIP

This publication contains some of the principal contributions and topics of debate that came up during the conference 'Companies in Conflict Situations: Building a Research Network on Companies, Conflict and Human Rights', held in Barcelona, on 17 and 18 January 2013. The publication is divided into three parts that deal with some of the central questions that were discussed: the existence of an emerging regulatory approach to economies of armed conflict and the paths to corporate liability for human rights violations (Part One); the use of private military and security companies in armed conflicts (Part Two) and business involvement in conflict transformation (Part Three).

In the first part of the publication, the first article by Mark Taylor, Senior Researcher from the Fafo Institute for Applied International Studies, describes an emerging regulatory approach to economies of armed conflict. The paper examines recent developments at the United Nations and OECD and argues that there is an emerging coherence of norms and regulatory options in response to war economies. This coherence provides the basis for excluding goods from global flows that are produced through human rights abuse or which are used for conflict financing, while at the same time limiting the harm to livelihoods and avoiding the wholesale criminalization of informal economies. Mark Taylor concludes with a series of questions for consideration by international law researchers interested in the field.

In the second article, Peter Weiss, Vice President of the Center for Constitutional Rights in New York and lead counsel in the Filartiga case, guides us in great detail through the various channels used in several countries, especially in the United States, to make legal claims against corporations regarding human rights abuses. Here, Peter Weiss gives an exhaustive consideration of the challenges and opportunities that litigation provides against corporations in international law, basing his analysis on the Filartiga case, which took place in the 1970s, up to the latest developments regarding the Kiobel case and the decision of the Supreme Court of the United States in April 2013 that, according to the author,

leaves unresolved the question of whether the Alien Tort Statute can be used to sue a corporation for human rights violations under international law.

Antoni Pigrau, Director of the Armed Conflicts, Law and Justice Program of the ICIP, presents some of the main results of the European project EJOLT (Environmental Justice Organisations, Liabilities and Trade), based on an exhaustive analysis of case studies related to international environmental conflicts. After discussing the general legal framework in which multinational corporations operate, the article presents the various legal channels available to enforce liability for environmental damage and the success factors in appeals to national courts in the affected countries and the channels available in international law. The author concludes that many of the studied cases show that, in practice, the victims of serious environmental damage and the organisations that support them combine all kinds of political and legal channels, both national and international, territorial and extraterritorial in what has been named cluster litigation. He also argues that litigating in a foreign court means following an extremely costly strategy, both in economic and personal terms. Finally, another significant aspect regarding this question discussed by Antoni Pigrau in his article is the fact that international courts and other international bodies for the protection of human rights have the legal capacity to award compensation to alleged victims when it has been possible to establish a connection to other violations of human rights.

In her article, Marta Requejo, Senior Research Fellow at the Max Planck Institute in Luxembourg, analyses the decision of the Provincial Court of Sucumbíos condemning the Chevron Corp. to civil liability. According to the author, the decision of 14 February 2011 by the Provincial Court of Sucumbíos is the culmination of an unusual experience in the history of civil litigation for human rights violations by globally operating corporations. Marta Requejo then raises the question that since the losing party has no assets in Ecuador all the plaintiffs' hopes of collecting the money lay with "exporting" the decision to other forums. The author then turns to the question of whether the Sucumbíos decision would be recognized in Spain in light of the Spanish Private International Law system, as an example of what could be a European response to a similar request.

In the second part of the book, devoted to the question of private military and security companies (PMSCs), Helena Torroja carries out a meticulous review of the regulatory initiatives for PMSCs, such as the Montreux Document, the convention project promoted by the United Nations and the International Code of Conduct for Private Security Service Providers. After a discussion of the possible

international legal grounds on how to break the monopoly of the power of coercion, the author analyzes whether there are fields that would be exempt, based on international law, from any privatisation or delegation and what principles would govern the privatisation or delegation of the other fields. The author ends by arguing that it is necessary to define a "minimum standard of behavior" for states, by establishing international standards on the privatisation of coercion and on the existence of non-delegable activities. In this regard, Helena Torroja supports the need for an international convention for the purposes of establishing these limits and regulating other new limits arising from the practical reality of this phenomenon.

In addition to this analysis, Marco Sassòli argues in his article that PMSCs and their staff do not act, as some have claimed, in a legal black hole. With some exceptions, among them arguably direct participation in hostilities, international law does not outlaw any outsourcing of functions related to armed conflicts to private companies. However, a PMSC is subject to international humanitarian law (IHL) because its staff has to respect it, because a state is responsible for its conduct, and, in some cases and according to some theories, the PMSC is even itself an addressee of IHL. According to the author, IHL provides answers to many crucial legal issues, including some that the industry and states did not wish to clarify in recent soft law instruments and codes of conduct, in particular the relationship between self-defense and direct participation in hostilities. In the opinion of the author, this distinction is crucial and the right to self-defense of civilians, such as PMSC staff, must be interpreted very restrictively. Recent research has brought a lot of clarity to this picture, without claiming that clear solutions exist where states disagree or where sound legal arguments may support different approaches. The author states that the most important problem, however, remains implementation. States related to PMSCs, PMSCs themselves and their staff may be held accountable through many traditional ways and recent codes of conduct accepted by PMSC, but such accountability faces many legal or factual obstacles – or simply a lack of political will.

In his article, José Luis Gómez del Prado, states that the globalisation of the economy and the acceptance of "security" as a commodity subject to the commercial laws of the market have facilitated the advent, in the 21st century, of an Orwellian world of Big Brother. Private military and security companies, closely linked to the military-industrial-political complex are the operational arm of the new security industry. They increasingly replace military and police forces, considered until recently the guardians of sovereign states. According to the author,

today we are increasingly witnessing the outsourcing of the use of force to the private sector as one commercial commodity, among others. This new trend of privatising security is generalised and has already reached the United Nations. But security is not the only fundamental right which is abused: many other fundamental human rights are violated with impunity by PMSCs. José Luis Gómez del Prado argues that this has allowed transnational extractive corporations to operate in low intensity armed conflicts under the protection of PMSCs without the need, in general, for "big powers" to intervene. He concludes that it has also allowed transnational companies such as Monsanto to use subsidiaries of PMSCs such as Blackwater Total Intelligence to provide operatives to infiltrate activist groups organising against multinational biotech firm.

Andrea Iff, Senior Researcher and Project Coordinator of Business & Peace at Swisspeace, opens the third part of the publication with an approach that seeks to critically assess the guidance and policy recommendations that guide businesses in (post-) conflict contexts. Andrea Iff's paper is placed within a peace and conflict research perspective, conceptualising businesses and business leaders as significant actors in transformations from war to peace. The aim of her article is thus to critically assess the guidance and policy recommendations that guide businesses in (post-) conflict contexts taking into account the guidance of multilateral agencies (compliance), conflict-sensitivity guidance (do-no-harm) and literature on the peacebuilding potential of businesses. Andrea Iff shows that while most of the existing guidelines are addressing conflict, they refer to a very narrow definition of conflict as 'armed conflict'. While some guidance takes up the concept of do-no-harm or conflict sensitivity, it rarely takes up the idea of peacebuilding activities. Finally, the author concludes that the existing concepts which describe how businesses could be involved in peacebuilding are flawed, as they are based on the assumption of a division between a business and a political class, which is rarely the case in (post-) conflict situations. New and innovative ideas on business involvement are needed, especially at a time when businesses are portrayed and put forward by development ministries as significant players in the fields of peacebuilding and development.

In the following article, Angelika Rettberg documents how business involvement in negotiations and peacebuilding is not a recent phenomenon in Colombia. Her article both describes and analyses the participation of Colombian business in the ongoing peace negotiations that are taking place in Havana, Cuba. It reviews the private sector´s experience with negotiations in the country, examines some of the factors that have had an impact on shaping business preferences faced

with conflict, describes the current participation of business, and political positions in the ongoing talks, and identifies several challenges for the Colombian business community in terms of building peace in the country. The author states that, overall, Colombian business tends to favor a negotiated solution to the Colombian armed conflict. However, the paper also shows that divisions persist regarding a) the need to conduct peace talks as opposed to keeping up efforts to produce military defeat of the remaining guerrilla forces, b) specific topics on the negotiation agenda, specifically the fate of the agrarian sector, land restitution, and victims' reparations, and c) the question as to how the burden associated with peacebuilding will be distributed within society, in general, and the business community. Angelika Rettberg argues that the existence of a critical mass favoring negotiated peace within business augurs well for keeping up the private sector´s commitment to negotiated peace and the burden of its costs. However, the factors currently causing divisions need to be considered carefully by negotiators on both sides so as to avoid spill-over from recalcitrant business factions to supporters of negotiations, as they could hamper the needed business support that sustainable peace in Colombia will require.

Finally, Cora Weiss, President of the Hague Appeal for Peace, at the beginning of her article raises the need for more detailed research into whether the presence of women in corporate management positions would lead to a substantial reduction in abuses by them or not. According to the author, the facts show that when women are involved in significant numbers in decision making, sexual violence is reduced and indeed, violent conflict is reduced. After reviewing various experiences in countries such as South Sudan, the Philippines, Sierra Leone and Colombia, Cora Weiss stresses that women are overwhelmingly among those who would make a sustainable difference if they were present at decision-making tables to prevent violence. However, the author questions whether this positive impact will be generated immediately in the case of women that run corporations, as only women who have shared experiences of violent conflict, repression, poverty, illiteracy, domestic violence, humiliation, and discrimination are more likely to bring values of peace and justice to decision-making tables. For the author it is not just the fact of being a woman that can determine a more responsible attitude, but the sensitivity of women to certain values.

1 PART ONE

FROM REGULATION TO CORPORATE LIABILITY

REGULATING ILLICIT FLOWS TO AND FROM WAR

Mark B. Taylor[1]
Senior Researcher, Fafo Institute for Applied International Studies

In April 2013, Member States of the United Nations agreed overwhelmingly to regulate the arms trade. The Arms Trade Treaty (ATT) was passed by the UN General Assembly and was expected to enter into force as early as 2014, after fifty ratifications. Passage of the ATT marks the first comprehensive step towards the regulation of the global trade in legal conventional weapons. Yet the ATT is not a disarmament treaty: it will not prohibit, reduce or destroy any weapons. Neither is the ATT a trade treaty, as it does not deal with tariffs nor prohibit discrimination against goods. In fact, the ATT does the opposite: it describes on what basis states should actively discriminate against conventional weapons in their export licensing regimes.[2]

The ATT is not alone in its introduction of discrimination into the global trade of goods and services connected to armed conflict. Recent initiatives in the areas of conflict minerals at the Organization for Economic Cooperation and Development (OECD) and with respect to companies in conflict zones, at the UN Human Rights Council, have also introduced the idea that discrimination by states is a necessary part of managing the global trade connected to armed conflict.

But on what grounds should states discriminate? Are there common approaches to the economic dimensions of armed conflict, or are there signs of fragmentation in international law and policy? By way of an answer, this paper examines the substantive normative content and the regulatory strategies deployed by anti-money laundering law, conflict minerals supply chain guidance, companies in

1 The author would like to gratefully acknowledge the financial support from the Norwegian Peacebuilding Resource Centre (Noref).

2 In this sense the ATT attempts the global harmonization of national export licensing regimes, rather than the harmonization of tariffs or other aspects of trade and investment law. I am indebted to Dr. Gro Nystuen, International Law and Policy Institute, for this insight into the nature of the ATT. Dr. Nystuen was external adviser and legal expert member of the Norwegian delegation to the negotiations on the ATT from 2010 to April 2013.

conflict zones and the ATT. The paper concludes with a discussion of possible directions for future international law research implied by recent innovations in these areas.

Defining the Problem

Violent contention involving one or more non-state armed groups, or irregular warfare, has been a part of both international and non-international armed conflicts throughout recorded history (Boot 2013). In fact, the wars of the post-Cold War era have been predominantly civil wars or combinations of civil wars and regionalised inter-state armed conflicts in which irregular armed violence is common (Themnér and Wallensteen 2012).[3]

All of these armed conflicts, or situations of widespread violence, have economic dimensions. In conflicts in Afghanistan, Cambodia, Iraq, Myanmar/Burma and Sri Lanka, or insurgencies in India and Nepal, state and non-state armed groups have financed their operations through control or exploitation of various sources of wealth, such as forests, opium, extortion, kidnapping, and trade in narcotics. In Africa, such as in the eastern DRC, Rwanda, Somalia, and Sudan, minerals and local informal markets have been central, while in Europe and the Middle East, trafficking in everything from human beings to cigarettes have helped finance warring parties. In the Americas, Colombia, Mexico, Haiti and Guatemala has long struggled with several insurgencies, combined with high levels of violence associated with narco-economies and social conflicts over land.

Scholars have developed approaches concerned with the political economy of contemporary conflicts, including a number of related phenomena, such as the political-economy of warlordism, the regional dynamics involved in conflict economies, the problems which arise out of privatization during conflict or political transitions and the challenges faced by fragile states (Reno 1999; Klador 2001; Ballentine and Sherman 2003; Pugh, Neil, and Goodhand 2004; Duffield 2001; Arnson and Zartman 2005). Much of the scholarly and policy literature on the question of economies of civil war or other conflicts has focused on natural resource wars and the role of access to natural resources in the onset, duration and intensity of armed conflict (Le Billon 2012).

3 In 2011, in 36 out of 37 ongoing conflicts, the warring parties included both government and rebels forces. Op. cit (Themnér and Wallensteen, 2012).

Both approaches – a broad concern with the political-economy of armed conflict and a narrow focus on natural resources – assume some form of integration of these war economies to global economic activity. Often these economies takes advantage of what have been termed "illicit flows" (van Schendel and Abraham 2005; Dev Kar and Freitas 2012). Although by definition difficult to estimate, illicit financial flows account for anywhere between one and 1.7 trillion dollars (US) per year, and consist of proceeds of crime and drug trafficking, looted or embezzled state funds, bribery and other forms of corruption, and tax avoidance (Reed and Fontana 2009). Illicit flows may also consist of goods or commodities, such as humans and human organs, wildlife, fish, minerals, timber, weapons, cigarettes, counterfeit electronics and art.

At the centre of the illicit flows concept is the ability to move goods and services from informal or illicit markets into legal and formal markets. The mechanisms to 'launder' money, goods or services between licit and illicit markets differs according to sector: stolen diamonds or gold usually enter the licit supply chain through trading houses and processing points; weapons may be exported legally to one country only to be smuggled on to another; migrant workers may be trafficked illegally into a country and may remain irregular, working on the black market, or they may find a way to establish themselves and enter the formal labour market. Or the reverse.

Although the mechanisms for laundering differ according to the nature of the economic activity, in every illicit flow there are legal definitions which attempt to dictate where the boundary between licit and illicit should be drawn. Usually, those boundaries are drawn by domestic laws which license and regulate economic activity. But in the past decade, there have been repeated efforts at trans-national legal coordination to combat money-laundering, bribery and terrorist financing. These have resulted in the development of new legal definitions and their harmonization across jurisdictions through treaties, such as the UN or OECD Conventions on Bribery, or through multilateral policy coordination, such as through the Financial Action Task Force efforts to combat money laundering.

Similar attempts to regulate transactions connected to armed conflict have been rare. The global economy is largely unfettered in its circulation of a variety of commodities to and from war zones or parties to a conflict. This is in part because there is no legal definition that prohibits such commerce. The UN Security Council has sought to constrain commerce connected to threats to international peace and security through such measures as sanctions, investigations and peacekeep-

ing, although with limited success (Le Billon 2012; Taylor and Davis 2013). But Security Council measures are inevitably political in their logic, with measures designed to manage threats posed by specific countries, entities or individuals. Beyond those targets, the unregulated space of the legal arms trade enables a range of dodgy commercial practices to take place in connection with zones of conflict. In fact, while many flows to and from war zones may participate in illicit flows of some kind or another, there is nothing inherently illegal about trade or other commercial activities associated with armed conflict. After all, there is no law against profiting in or from war. Indeed, if there was such a law, what would be legal about defense industries? The same is true for the variety of largely unregulated and often complex global supply chains of various goods and services. Thus, the traffic in small arms flows relatively easily into war zones and conflict minerals flow untouched in the opposite direction.

Past attempts to grapple with illicit flows to and from war economies have failed to adequately grapple with the problem of a defining what is illegal or illicit about those flows or the war economies with which they are associated. Both the Kimberly Process on conflict diamonds and the protocol of the International Commission on the Great Lakes Region (ICGLR) on "illegal exploitation" (ICGLR, 2006) defined the problem as economic activities which helped sustain challenges to state sovereignty. The UN General Assembly resolution on conflict diamonds was concerned about "breaking the link" between diamonds and armed conflict, and defined conflict diamonds as "Rough diamonds which are used by rebel movements to finance their military activities" (A/RES/55/56 (2001)). Similarly, the ICGLR defined the problem as "exploitation…contrary to the law, custom practice or principle of permanent sovereignty over national resources" (Article 1, Definition, ICGLR, 2006). In both approaches, it is left up to the state to define the normative standards to be enforced in domestic law. In neither case, is there an attempt to establish a universal norm relevant for conflict economies.

A New Approach?

More recent attempts to respond to the problem have taken a different approach. In May 2011, ministers of Member States the Organisation for Economic Cooperation and Development (OECD) signed off on the "Due Diligence Guidance for Responsible Supply Chain Management of Minerals for Conflict Affected and High Risk Areas." (OECD, 2013) This Guidance was developed with specific

reference to the mineral sectors relevant for the Democratic Republic of Congo (DRC). It was developed in partnership with business, civil society, and those countries most directly involved in the trade. The ICGLR endorsed the Guidance in late 2010, at about the same time as the UN Security Council had called upon states to "raise awareness" about the Guidance and authorized an expert group to assess its implementation. (S/Res/1952 (2010)

The OECD Guidance is centred on the concept of due diligence by business as the basis for ensuring respect for human rights. The Guidance sets up a risk-based framework in which business is expected to examine its mineral supply chain for signs that minerals might be originating in conflict-affected or high risk countries. Once a risk is detected, and a so-called "red flag" is raised with respect to a sourcing country or region, the Guidance suggests procedures for the business to implement due diligence on its supply chain to ensure it is adhering to its own policy on responsible supply chain management.

The Guidance provides a "Model Supply Chain Policy" (Annex II, OECD, 2013) which defines the conflict-financing and human rights risks which due diligence should respond to. It is that policy which contains the key elements defining the conflict financing and human rights standards to which the company should be adhering. These include a commitment in Article 1 of the Model Policy to not "tolerate or by any means profit from, contribute to, assist with or facilitate the commission by any party of:

i) any forms of torture, cruel, inhuman and degrading treatment;

ii) any forms of forced or compulsory labour…

iii) the worst forms of child labour

iv) other gross human rights violations and abuses such as widespread sexual violence;

v) war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide."

Articles 3 and 5 of the Model Policy also set out a definition of conflict financing in the context of mineral extraction as "direct or indirect support" to non-state armed groups, public or private security forces "through the extraction, transport, trade handling or export of minerals". The Model Supply Chain Policy explains that this includes direct or indirect support, such as "procuring minerals from,

making payments to or otherwise providing logistical assistance or equipment to" such groups or forces. This includes support provided via "affiliates" such as business "intermediaries" in the supply chain who work directly with such groups or forces "to facilitate the extraction, trade of handling of minerals". The role of armed groups or security forces become problematic when they,

> *"...illegally control mine sites, transportation routes and upstream actors in the supply chain; illegally tax or extort money or minerals at point of access to mine sites, along transportation routes or at point where minerals are traded; or illegally tax or extort intermediaries, export companies or international traders"* (Annex II, 3 and 5)

The language and approach of the Model Policy is carefully crafted to accommodate legitimate state interests with respect securing their own natural resource wealth. The Model Policy sets out a universal standard of conflict financing and human rights protections that companies should apply to all armed actors, including non-state armed groups, state armed forces and private security forces. At the same time it distinguishes between state and non-state actors by providing for different company responses depending on whether the problems detected are caused by armed groups or public security providers. In the case of violations by armed groups, the Model Policy recommends that companies immediately disengagement from "upstream suppliers where (due diligence activities) identify a reasonable risk" that those suppliers are sourcing from such groups, or their affiliates, which illegally tax or extort economic actors (Annel II, 4.). Where the risks of such abuses are identified for public or private security providers or their affiliates, the Model Policy describes a process of constructive engagement and the possible disengagement in the event of a lack of progress (Annex II, 10). Similarly, the Model Policy, explicitly distinguishes "direct and indirect support" from "legally required forms of support" such as taxes, licensing fees, royalties which companies would normally be required by law to pay to agencies in the countries in which they operate (Annex II, footnote 7).

The approach of the Model Supply Chain Policy represents a significant innovation in the norms underpinning international responses to the pathologies associated with war economies. It sets out a definition of a universal minimum standard against which a business can assess whether it is contributing to financing the conflict or to human rights abuses associated with the conflict. This definition is both more detailed and more comprehensive than previous attempts

to identify what businesses should not be doing in relation to conflict: both the UN's Kimberly resolutions and the ICGLR Protocol refer to human rights and the problem of conflict financing, but they do not define these, nor do they deploy the concepts in their operative elements. In other words, unlike the OECD Guidance, previous efforts to grapple with the problem of conflict commodities or illicit exploitation have not defined specific conflict financing activities to be avoided, nor have they integrated human rights to the definition of the problematic behavior. Instead, previous attempts to grapple with the problem have defined the source of the problem as rebel or non-state control over exploitation of a resource. Rather than this actor-based approach, the OECD Guidance defines the problem on the basis of a defined set of activities – conflict financing and human rights abuse – and applies that same standard universally to both state security agencies and non-state armed groups.

Another innovation of the OECD Guidance is to locate primary responsibility for implementation of due diligence with industry, not with states. The Guidance recognizes that states are the primary duty bearers under international law. Indeed, as a document endorsed by the OECD, Security Council and ICGLR, the Guidance should be read as a message from states about what is expected of businesses in such situations. However, the regulatory strategy is different from Kimberly or from Sanctions regimes. Rather than seeking to impose regulatory control by states directly on a commodity, for example through state certification regimes or customs enforcement, the OECD Guidance places the responsibility on business entities to ensure the ethical value of their supply chains, through supply chain due diligence. The Guidance assumes that state control is both fundamentally legitimate and necessary. Equally, it assumes that in situations of conflict effective state control may be difficult, if not impossible, to implement. Such situations imply the need for clear responsibilities for business actors.

By integrating this approach to the their efforts to deal with the economic forces helping to sustain the conflict in the DRC, the OECD, ICGLR and the UN Security Council have given significant normative authority to the due diligence approach. To be effective, such an approach will require states to both legislate rules creating legal obligations for business to be transparent about their due diligence activities as well as to enforce sanctions on businesses who cannot show respect for the standards set down in law. The result of the emergence of this new international norm is that business entities sourcing minerals from a conflict-affected country face a concrete expectation that they will be conduct-

ing due diligence to ensure they are neither contributing to the financing of the conflict nor contributing to human rights abuse in such conflicts. Member States now face the question of how to translate that expectation into domestic laws, a question to which I will return below.[4]

In this focus on due diligence, the OECD Guidance, the ICGLR endorsement and the UN Security Council resolutions on sanctions applied to the conflict in the DRC, were giving effect to the framework developed by Special Representative of the UN Secretary-General (SRSG) on Business and Human Rights, Professor John Ruggie, and promulgated as Guiding Principles on Business and Human Rights in June 2011. Ruggie had formulated the "Protect, Respect and Remedy" Framework in 2008, wherein he proposed that a business's responsibility for human rights arises out of its activities and relationships (its impacts) and that respect for human rights can be practiced by a business through due diligence. The Human Rights Council welcomed the Framework in 2008, asked Ruggie to develop it further, and in June 2011, Ruggie proposed Guiding Principles to implement the Framework, which won unanimous endorsement from the HRC (A/HRC/17/31).

In taking the unprecedented step of endorsing the Guiding Principles, the HRC gave significant soft-law authority to an instrument clarifying what it means for a business to respect human rights. This was a first for any UN organization. In general, the Guiding Principles describe a balance of duties in which States' duties to protect human rights – the first "pillar" of the Framework – make them ultimately responsible for human rights, including providing most forms of remedy (the latter separated out as a the third "pillar" of the Framework). Business responsibilities were nestled within this overarching state duty as the second "pillar." The Guiding Principles state that states should take "appropriate steps to prevent, investigate, punish and redress" human rights abuse "through

4 In 2010, the United States adopted the conflict minerals provision (Section 1502) of the Dodd-Frank Wall Street Reform Act. Section 1502 requiring companies whose products rely on certain minerals – tantalum, tin, tungsten (the three Ts) and gold – to file disclosures of the country of origin of such minerals in their annual reporting to the Securities and Exchange Commission (Commission). Where the origin of those minerals is not known, or where those minerals originate from the DRC or certain neighbouring countries, the company would then be required to file an additional report – a "Conflict Minerals Report" – explaining what due diligence it has exercised on its supply chain to ensure the minerals it is using are "conflict free". The SEC has referred to the OECD Guidance as a standard to be followed and the DRC itself has implemented legislation coherent with the OECD Guidance. In 2013, the European Commission began public hearings about the possibility of similar legislation.

effective policies, legislation, regulations and adjudication" (Guiding Principle 1, A/HRC/17/31), establishing clearly that States' duties include the need to create legally binding rules with respect to human rights and business, where States see fit to do so within their jurisdiction. (Taylor, 2011)

The Guiding Principles are not specific to conflict, but they do address the problems of business activity in conflict situations. Guiding Principle number seven, under the State Duty to Protect pillar, is entitled "Supporting business respect for human rights in conflict-affected areas":

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

   a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

   b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

   c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

   d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Guiding Principle seven is designed as a sliding scale of government engagement with business, from an early engagement to assist businesses that want to do the right thing, through to the hard law sanctions where businesses refuse to do so. Ruggie's approach on the question of conflict was guided by extensive consultation with states. Attached to the Guiding Principles was a report on "Business and human rights in conflict-affected regions: challenges and options towards State responses"(A/HRC/A/32, 2011). The report is a reflection of what the SRSG heard from a group of member state practitioners about the present state of policy and practice within government officialdom. The report attempts to provide some guidance as to state responses outlined in Guiding Principle seven in the body of the Guiding Principles proper. It distinguishes between

"cooperative enterprises" and "uncooperative enterprises" and sets out options for state responses accordingly.

The Guiding Principles recognize that few governments, if any, have policies in place today specifically designed to deal with their domiciled businesses operating in war zones abroad and clearly assert that this has to change. The Guiding Principles assert that a state's policy of providing support (e.g. trade support, export credit) to business must be weighed in the balance against its duties to ensure respect for and protect human rights. The case for regulation is made easier if government is seen to have implemented its policies and law as part of its overall engagement with business on the issues of business involvement in conflict, including by clarifying standards and procedures for due diligence. The logic of this phased approach recognizes that companies involved in such situations have any number of motives, from the very innocent to the very cynical.

Meeting its duty to protect human rights will require a government to engage, support, encourage and require due diligence, and where necessary legally sanction those who violate the law. This is an approach found in attempts to regulate other illicit flows, for example under anti-money laundering (AML) laws. When financial or other forms of property are suspected of association with criminal activities, it can be a crime to receive, hold, manage, hide or otherwise engage in a financial transactions where the funds involved are the proceeds of criminal activities. The predicate offences which criminalize such property are usually crimes associated with organized crime, trafficking, narcotics, weapons proliferation and other serious crimes as well as evasion of tax. The mechanism through which financial institutions exclude these from financial dealings is through the exercise of due diligence.

Anti-money laundering laws usually govern four main categories of questionable asset: proceeds of crime, terrorist financing, financing of proliferation of weapons of mass destruction, financing of persons or organizations subject to UN targeted sanctions. Failure to comply with asset freezes targeted at a named person by the Security Council can result in liability for the financial institution, in those jurisdictions which have the proper legal framework in place.

Integration of AML rules to domestic legislation and penal codes has been facilitated by a number of international conventions requiring domestic regulatory authorities to criminalize a range of offenses relating to misap-

propriation and hiding of assets. The Transnational Organized Crime Convention, Art. 6., requires States Parties to criminalize the laundering of the proceeds of crime. The United Nations Convention Against Corruption likewise requires States Parties to criminalize money-laundering (Art. 23), and additionally permits states parties to prevent and detect money-laundering (Art. 14), as well as criminalize embezzlement or misappropriation of public funds (Art. 17), influence trading (Art. 18), abuse of functions (Art. 19) and illicit enrichment (Art. 18).

The elements of the crime of money-laundering are defined by the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) and the United Nations Convention Against Transnational Organized Crime (2000). The latter defines the elements as follows:

a) i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

   ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

b) Subject to the basic concepts of the particular legal system:

   i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

   ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

In most jurisdictions, AML laws have been structured to require companies which provide financial services - such as banks, money transfer bureaus and other financial institutions – to comply with these laws through the implementation of due diligence. Most national regulators apply customer identification as the basis of due diligence, whereby financial service providers must adhere to “know your customer” (KYC) rules. In some regulatory contexts the KYC rule is sometimes referred to as “customer due diligence” (CDD) and often includes requirements to monitor transactions and submit suspicious transactions re-

ports. In many jurisdictions, failure to submit a suspicious transactions report in cases of non-compliance with CDD standards can give rise to liability.

This reliance by AML laws on business due diligence as the basis for compliance with the legal standards is echoed by the approach of the UN Guiding Principles to business in conflict zones, and the OECD Guidance to conflict minerals. All three deal with aspects of economic activity associated with armed conflict, albeit within distinct policy arenas and in from different perspectives. However, taken together, they appear to constitute evidence of a shift away from regulatory responses that emphasize state-based attempts to control trade flows directly at border crossings, towards a regime based at least in part on regulating the behaviour of companies towards excluding specified activities – conflict financing and human rights abuse - from their value chains globally.

An Emerging Strategy?

In its reliance on business responsibility, and due diligence as the operational fulfillment of that responsibility, the OECD approach to conflict minerals, and the UN Guiding Principles approach to business in conflict zones, is consistent with criminal law provisions found in such areas as anti-money laundering law. By contrast, the ATT requires state parties to set up monitoring and listing regimes to govern the import and export of weapons. In other words, under the ATT, the obligation to conduct due diligence lies with states, not with businesses.

The ATT is an international treaty and as such it is natural that the due diligence obligation under the treaty lie with states, and not with business. In its approach, the ATT is reflecting existing state practice in the issuing of licenses for weapons exports and deploying a trans-national regulatory approach. That approach builds on the existence (in most countries) of state regulation of weapons exports and uses an international treaty to harmonize standards across all states parties and in this way regulate the global weapons trade.

Nothing of comparable authority to export licensing regimes or the ATT exists at the national or international level to deal with other commercial aspects of war. The OECD Guidance and the UN Guiding Principles do not have the international legal authority of a treaty comparable to the ATT, nor so they explicitly require implementation in the laws of Member States, as is required fro parties to the ATT. Arms embargoes, asset freezes or travel bans are not generalized

treaty instruments but specific measures imposed on specific targeted individuals or entities by governments, often under the authorization of the UN Security Council. While it is true that the due diligence approach of the OECD Guidance has been integrated to the mandate of UN sanctions monitoring in the case of the DRC, the Council has not chosen to generalize this approach to other situations on its agenda.

Still, certain normative and conceptual underpinnings of the ATT bear a striking resemblance to these other recent initiatives at the OECD and UN. All three approaches set a standard against which due diligence should be conducted that is based on, at a minimum, human rights and international humanitarian law. These standards are central to the Guiding Principles, which also apply in conflict, and are found in both the OECD Model Company Policy (Annex II) and the ATT (Article 7). The ATT uses some of the same fundamental concepts as the OECD Guidance and the UN Guiding Principles, such as the connection between business transactions and human rights harms: the ATT includes reference to weapons that might be used to "commit or facilitate a serious violation" of either international humanitarian law, international human rights law, or violations relating to terrorism or transnational organized crime (Article 7.1(b) i-iv). Like the OECD Guidance and the Guiding Principles, the ATT refers specifically to "risk" in several places (e.g. 7.2, 7.3, 7.4, and 11.2), including to the need to "mitigate" the risks of violations (7.2). The ATT requires states to "assess the potential" (Article 7.1) that a weapons shipment will be used to commit a violation and includes the obligation under the treaty to stop exports where the state determines that there is an "overriding risk" (7.3) of such violations.

Similarly, the ATT is concerned with the movement of arms between legitimate markets and "illicit trade" (Article 1). Its focus on "Brokering" (Article 10) and "Diversion" (Article 11) finds echoes in the OECD Guidance approach to "fraudulent misrepresentation of the origins of minerals" (Annex II, 11), as well as in AML laws. In addition, the ATT requirements of licensing authorities are entirely consistent with the duty of states under the UN Guiding Principles to engage with companies to protect human rights, including in conflict zones.

A significant difference is that under the ATT primary responsibility for the due diligence with respect to weapons exports rests with states, through their export licensing regimes. However, it would be logical that a subsidiary obligation is passed on to weapons exporters by licensing authorities: as part of the

licensing application, national authorities could require a business to show its due diligence with respect to the risk of human rights abuse by end-users. This would be consistent with both the duties of states under human rights law and their obligations for risk assessment under the ATT.

If the evidence presented here is any indication, the evolution of international policy and law on the question of war economies may be maturing. The reality of war economies has long presented policymakers with a "malign problem structure" (Lunde and Taylor 2005) consisting of a range of challenges: these include difficulties in designing targeted regulations that do not also harm civilian livelihoods; difficulties in assessing contested legitimacy in conflict economies, not least with respect to rebellions against repressive regimes; a heterogeneous set of actors with strong incentives to resist regulation; and challenges in finding common ground among international organisations. Yet, the evolution of separate regimes covering discreet aspects of the problem of war economies appears to have been mitigated by recent measures. The ATT, the UN Guiding Principles and the OECD Guidance are consistent with each other in seeking to protect fundamental human rights from abuses caused or contributed to through economic activity. They all do so on the basis of an approach to regulation that relies on risk, due diligence, and regulation of the separation between licit and illicit flows, all of which they share with criminal laws designed to combat money-laundering. Indeed, all three define a standard that is intended to be the basis for discrimination between licit and illicit goods on the basis of respect for human rights in the production or use of those. This normative agreement, and the consistency in approaches to regulation, suggests there is the potential for a regulatory strategy at the international level to respond to the problems of globally integrated war economies. Such a strategy would discriminate against goods and services produced by means of, or used in the furtherance or, human rights abuse.

These developments imply a two-pronged approach to regulating war economies. The first involves the exclusion of illicit activity from global value chains, primarily through the creation of due diligence obligations that are specifically designed to require business to act as the gate-keepers for the entry points of conflict commodities, such as weapons and conflict minerals, to their own global value chains. This builds on the recognition that trade is conducted by businesses and only secondarily by states. An implication of this is that business is far better placed than government to both know about and deal with the risks arising from a business' own activities or risks associated with a particular industrial sector.

It also builds on the recognition that states already use due diligence to regulate business, both across corporate groups and national boundaries(De Schutter et al. 2012). Effective regulation would include a mix of rules to require business to take responsibility for its own involvement in these illicit flows to and from conflict. Due diligence is the practical means to enable business to fulfill that responsibility, while simultaneously creating the basis upon which regulators and the courts can assess business compliance with those standards set down in law.

The second track in a global approach to regulating war economies is through domestic law enforcement, complimented by access to civil remedies for victims. States should empower law enforcement to target the illicit economic activities associated with international crimes, including in situations of armed conflict. The prosecutions of World War II-era industrialists who participated in the crimes of Nazi German and Imperial Japanese officialdom have left a legacy: there are, for example, "war crimes of an economic nature"(Cassese et al. 2011), such as pillage, slavery and forced labour, which were all prosecuted in the aftermath of World War II. More recently, prosecutors at the Special Court for Sierra Leone and the International Criminal Court have spoken of their interest in getting at the economic actors and activities they have come across in their investigations of war crimes and atrocities, in particular the trade and financial aspects of arms provision.[5] Yet, since the World War II-era cases, no international tribunal has specifically targeted economic actors, such as business people. Domestic criminal prosecutions targeting economic actors for international crimes have been few and far between.[6]

A strategy which relies on criminal prosecutions alone is not likely to address the problem of war economies effectively. Adding civil litigation to the menu of

5 "Early in his mandate, the Prosecutor pointed towards the economic actors as being those who might 'bear greatest responsibility' and therefore merit his attention", William A. Schabas, An Introduction to the International Criminal Court, Third Edition, Cambridge, 2007, p. 53, citing a "Paper on some Policy Issues before the Office of the Posecutor" pp.2-3, which specifically refers to "financial transactions, for example for the purchase of arms used in murder"; See also;.David M. Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Intitial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts', *Case W. Res. J. Int'l L Vol 37:1*, 2005, in which Crane, the then Prosecutor at the Special Court for Sierra Leone states that "(w)e have also exposed and are assisting in breaking up a multi-million dollar diamonds for-guns joint criminal enterprise".

6 The exceptions which prove this characterisation consist almost exclusively of two cases in the Netherlands; see, e.g., Wim Huisman and Elies van Sliedregt, "Rogue Traders," *Journal of International Criminal Justice* 8, no. 3, July 1, 2010: 803–828.

options would help significantly, but both judicial options face many practical and jurisdictional obstacles. Business entities, both large and small, often operate across borders making investigation more difficult, costly and dependent on law enforcement cooperation. The opaque nature of networked, but separate, business entities can make evidence hard to come by. Often victims are poor and have few resources to pursue civil claims. The government-business nexus can create disincentives for courts to hear cases or prosecutors to pursue investigations. Problems of exercising extra-territorial jurisdiction can result in cases being dismissed or result in lengthy delays while courts decide on jurisdiction (Taylor, Thompson, and Ramasastry, 2010).

For both a judicial approach and a more administrative law approach, the problem still remains to define the standard with which businesses will be required comply. It has been suggested that, in dealing with the apparently illegal commercial activities associated with war and atrocity, the particular challenge for international criminal law is a problem of definition (van den Herik and Dam-De Jong 2011). There is, in fact, no set of legal prohibitions in any jurisdiction that is specifically designed to deal with commerce that takes place in connection with armed conflict or widespread or systematic violence, or in association with war crimes, crimes against humanity or genocide. By pointing to human rights and international humanitarian law the UN Guiding Principles, the OECD Guidance, and the ATT all provide clear direction for the formulation of that standard. But states have yet to clarify those existing international norms and implement them in national rules.

The UN Guiding Principles does not provide a normative definition of what legal prohibition might be brought to bear against businesses in situations of conflict. Although mentioned in Guiding Principle 7 (d), the category of "gross human rights abuses" is not defined. Indeed, in the final months of his mandate, Professor John Ruggie stated that all stakeholder groups had reported a need for greater consistency as to the legal protections afforded victims of business-related human rights abuse in situations of "armed conflict or other situations of heightened risk". Ruggie found that "national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes." [7]

7 See "Recommendations on Follow-Up to the Mandate" (February 2011) *http://www.globalgovernancewatch.org/docLib/20110218_GGW_-_Ruggie.pdf.*

In order to ensure human rights are protected in those situations where national criminal laws may fail to function, the applicability of international humanitarian and criminal law to commercial activities and actors requires some clarification. Ruggie suggested that clarity was required with respect to the following:

- standards for appropriate investigation, punishment, and redress
- effective appropriate and dissuasive sanctions
- the appropriate extension of jurisdiction by states and the basis for such jurisdiction
- resolution of jurisdictional disputes
- international cooperation, technical assistance

In practice, clarity on these issues identified by Ruggie implies a set of questions relevant for legal scholars. These include:

- What are the principle substantive prohibitions (crime definitions) associated with commercial activity in situations of armed conflict, severe state repression or widespread violence?
- What liabilities arise from these prohibitions? In what legal regimes? For whom? Through what remedies?
- What forms of jurisdiction are appropriate to such violations?
- What modes of liability for business entities are most commonly used by states?
- What kinds of punishments/redress should be expected for findings of guilt in such cases?
- What options are there for harmonization with respect to the above (definition of crimes, nature of liability, territorial/national jurisdiction, modes of liability, redress)?
- How do the legal solutions envisaged interact with the other obstacles to justice for business related human rights abuse (state-corporate nexus, lack of resources, etc)?[8]

8 For a summary of these and other obstacles to remedy see Taylor, Mark B., Robert C. Thompson and Anita Ramasastry (2010), Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses. Fafo-report 2010:21

- In light of the overlap of gross human rights abuse (which has no technical definition) and international crimes (which do), what is the appropriate international space for policy coordination, i.e. an intergovernmental approach (Human Rights Council? Security Council? Other?)

These questions form the basis for an international law research agenda that can help clarify the next stage in the evolution of measures which attempt to grapple with war economies. In many cases, partial answers already exist and the challenge is to lower the obstacles to justice for victims as well as provide clarity for business and the courts. But in pursuing a research agenda to clarify the foundations for this two-pronged strategy to control war economies, it must be remembered that attempts to control illicit economies will reduce the resilience of households who rely on informal economies. Those who seek to clarify and promote a law enforcement approach should understand their efforts in light of a larger regulatory strategy. Criminal law standards are minimum standards and as such should be used with caution, but they do need to be used.

A law enforcement and/or judicial strategy that targets obviously criminal acts should be the minimum basis for a broader regulatory approach to the global dimensions of war economies and the peacebuilding strategies used to transform war economies. "Regulation" is the key word here and must be distinguished from criminalisation. Informal economies should not be targeted with criminal law remedies simply because they are unregulated by administrative or commercial law. Similarly, armed groups should be targeted by law enforcement on the basis of their failure to respect the relevant human rights standards, not on the basis of their political views. The financing of conflict per se may not be illegal, just as households' reliance on informal markets is not a crime. But war economies may include violent and predatory acts that are. The task of legal research is to provide policy makers with the ability to effectively distinguish between the two and to suggest a regulatory strategy that serves to end impunity without increasing the vulnerability of those made most vulnerable by conflict.

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SHOULD CORPORATIONS HAVE MORE LEEWAY TO KILL THAN PEOPLE?

Peter Weiss
Vice President of the Center for Constitutional Rights in New York
and lead counsel in the Filartiga case

The purpose of this note is to trace, in summary fashion, the evolution of international law from a state-centric to a person-centric[2] system and to situate corporate accountability for human rights violations within the latter. Part I describes the role played by the *Filartiga* case in this progression. Part II deals with the standard for ATS litigation prescribed by the Supreme Court in the *Sosa* case and the extension of the *Filartiga* principle to corporate malfeasance. Part III cautions that *Kiobel* may represent an unwelcome retrogression from this path, by focusing on the issues of corporate liability which emerged in the two Supreme Court hearings last year. Part IV seeks to provide answers to three of these issues and Part V ends with some thoughts about the future of corporate human rights litigation. Given the fact that, in recent decades, the question of corporate accountability for human rights violations has been driven to a considerable extent by litigation in US courts, it may be useful to focus on such litigation, without attempting a major comparative law study.

I.

On April 4 1979 the Center for Constitutional Rights (CCR) in New York received a phone call from a researcher for Amnesty International. "There is a high Paraguayan police official sitting in the facility of the Immigration and Naturalization Service in Brooklyn. He has overstayed his tourist visa and is about to be deported. He is believed to have tortured to death Joelito Filartiga, the son of Dr. Joel Filartiga, one of the leading opponents of General Alfredo Stroessner, the brutal dictator of Paraguay. You have to keep him here and bring him to trial."

1 This title was given by the editors to an opinion article by the author of this note published in the *Digital New York Times* on February 26, 2012.

2 The terms "state-centric" and "person-centric" are borrowed from Ruti G. Teitel, (2011), *Humanity's Law* by, Oxford University Press.

An emergency meeting of CCR was convened. The staff was informed that Dolly Filartiga, Joelito's sister, was in the United States and anxious to serve as a plaintiff. But first a decision had to be made on an unprecedented legal question: Could a Paraguayan torturer be sued in a US federal court by a Paraguayan citizen for an act in violation of international law committed in Paraguay? Skeptics doubted that a US court would entertain a suit with so few contact points with the United States. But others prevailed with the following argument: The first Judiciary Act of the United States contains a one-sentence law, the Alien Tort Claims Act, which, although very rarely used since its enactment in 1789, sounds made to order for the Filartiga case. In its current version it reads "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[3] And so the case, *Filartiga v Peña Irala.* was filed in the Eastern District of New York on April 6, 1979.[4] It came before Judge Eugene Nickerson who, while conceding that torture violated the law of nations, felt obliged to dismiss the complaint on the precedent of a case in the Court of Appeals for the Second Circuit[5] holding, in essence, that the law of nations confers no justiciable rights on individuals and particularly not with respect to a state's obligations toward its own citizens[6]. In support of its holding that "there is little definition of the law of nations", other than that it serves to regulate relations between nations, the Circuit, in 1975, cited Chancellor Kent who, in the first edition of his Commentaries, in 1826, defined international law as "that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other."

On appeal, the Second Circuit reversed and remanded the case to the District Court[7], accepting the plaintiffs' argument that, since 1826, international law had evolved from a code of conduct for states to an instrument defining the rights of persons as well. In its final paragraph the opinion stated:

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and

3 28 USC 1350.

4 ICRC, *Filartiga v Peña Irala* case, *http://www.icrc.org/ihl-nat.nsf/67408a74a589868841256497002b02e4/27721c1b47e7ca90c1256d18002a2565!OpenDocument*. [accessed 27 April 2013].

5 The Eastern District, in which the Filartiga case was filed, is in the Second Circuit.

6 *Dreyfus v Von Finck,* 534 F.2nd 24. (1975).

7 630 V.2nd 876 (1980).

> then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

As it turned out, the *Filartiga* decision was not such a small step. Over the last thirty years it gave birth to hundreds of articles and cases and continues to be cited as a landmark human rights case, not only in the United States, but throughout the world. Two public interest law firms are doing almost exclusively ATS[8] litigation: Earth Rights International[9] against corporations and the Center for Justice and Accountability[10] against individuals.

II.

In due course it occurred to human rights lawyers that a corporation, like an individual, was "an alien" and ATS cases began to be brought on behalf of victims of either direct corporate tortfeasance, or, more frequently, of aiding and abetting such crimes as torture, rape, slave labor, summary execution or causing disappearances, committed for their benefit by third parties, usually governments.

Many of these cases were dismissed, but some resulted in positive outcomes for the plaintiffs, either by court rulings or by settlements. Gradually the corporate

8 Over time, the Alien Tort Claims Act has come to be known as the Alien Tort Statute, or ATS.

9 *http://www.earthrights.org*.[accessed 27 April 2013].

10 *www.cja.org*. On November 20, 2012, in *Ahmed v. Magan,* CJA obtained a 12 million dollar judgment against the former intelligence chief of Siad Barré's regime in Somalia on behalf of one of his torture victims. [accessed 27 April 2013].

bar began to mobilize against the Alien Tort Statute; in 2004 they saw their opportunity in the first ATS case to reach the Supreme Court, *Sosa v Alvarez-Machain*. Although not a corporate case – it was brought by a Mexican citizen kidnapped and briefly detained in Mexico – it could have ended the run of ATS. However, by a surprising majority of 6 to 3, the Supreme Court decided to keep it alive[11]. Justice Souter, who wrote the opinion of the court, also took the opportunity to define the standards which a successful ATS case had to meet. He began with an examination of the nature of international law at the time of the enactment of the statute, citing Blackstone as authority for the proposition that it then consisted of a very limited number of offenses recognized by all "civilized" nations, primarily, violation of safe conducts, infringement of the rights of ambassadors, and piracy. The three dissenters, belonging to the originalist school of jurisprudence, would have limited the scope of ATS to this triad. But the majority, recognizing the evolutionary character of the law of nations, chose a different path, holding that "no development in the two centuries from the enactment of 1350 to the birth of the modern line of cases beginning with Filartiga [...]has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law [...]. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th- century paradigms we have recognized."

Armed with this imprimatur from the Supreme Court a number of ATS corporate cases proceeded to trial or settlement. Some examples:

> In *Licea v Curacao Drydock Co.* 584 F.Supp. 2d 1355 (2010) the three plaintiffs were awarded a total of 80 million dollars for slave labor in a default judgment.
>
> In *Chowdury v Worldtel Bangladesh Holding Ltd* (2009) the plaintiff was awarded 1.5 million dollars at a jury trial, which found that the defendant arranged for the plaintiff to be tortured by police.[12]
>
> *Doe v Unocal* was a nearly decade long litigation brought by Burmese villagers alleging forced relocation, forced labor, torture, rape and murder committed by government forces with the complicity of the defendant corporation. It

11 542 US 692 (2004).

12 Unreported decision by E.D.N.Y.

was settled in 2005 for an undisclosed amount when it became clear that it would proceed to trial.[13]

Wiwa v Royal Dutch Petroleum was one of three related cases brought by survivors of activists in the Ogoni region of Nigeria alleging summary execution, torture and other crimes against humanity. It was settled in 2009 on the eve of trial for 15.5million dollars.

III.

Based on the same facts as *Wiwa*. but with a different set of plaintiffs, *Kiobel v Royal Dutch Petroleum (*hereafter Shell*)* promised the corporate bar a second bite at the apple. Esther Kiobel, the widow of Dr. Barinem Kiobel, who, she alleged, had been executed by the Nigerian military after a sham trial in which Shell was complicit, brought this case, together with a number of other victims, in 2002 in the Southern District of New York. The plaintiffs had all been active in protesting Shell's oil-extracting activities in the Ogoni region of Nigeria without regard, they claimed, for the environmental, economic and social consequences thereof, while rendering assistance to the Nigerian military in their brutal repression of the protest movement. In 2006 the court dismissed the aiding and abetting claims with respect to certain alleged crimes but left them standing with respect to others,[14] leading to appeals and cross-appeals to the Court of Appeals for the Second Circuit.

In 2010 the Second Circuit, the very court which in 1980 had upheld the validity of the Alien Tort Statute in the *Filartiga* case, launched a legal bombshell. Two of the three judges sitting on the *Kiobel* panel, ordered the dismissal of the entire case, on the ground that they could find no authority in international law for holding corporations liable for human rights violations. The third judge filed a powerful dissent, arguing that he could find no authority in international law for distinguishing between individuals and corporations as human rights tortfeasors, but expressing some doubt as to whether the aiding and abetting claim had been pleaded with sufficient evidence.

13 See press release, available at *http://www.earthrights.org/legal/doe-v-unocal-case-history*. [accessed 27 April 2013].

14 456 F.Supp. 2d 457.

An appeal was filed with the Supreme Court, which had little choice but to take the case, given the fact that several other circuits had had no problem taking ATS cases against corporations and that one of the principal functions of the Supreme Court is to resolve conflicts between circuits. In addition to the briefs for the petitioners and the respondents, an unusually high number of amicus briefs were filed: nineteen for the petitioners and fourteen for the respondents. The former included briefs from the United States Government, the United Nations High Commissioner for Human Rights, United States and International Human Rights Organizations and several groups of legal scholars. Among the *amici* supporting the defendants were the governments of the United Kingdom, the Netherlands and Germany, five large multinational corporations, the US and German Chambers of Commerce and two groups of legal scholars.[15]

Oral argument was heard on February 28, 2012 before an overflow audience.[16] Before Paul Hoffman, widely regarded as the leading ATS lawyer in the country, could complete his first sentence arguing for the petitioners, Justice Kennedy interrupted him to ask what effects that are closely related to the US were present in this case. Hoffman replied that there was personal jurisdiction over the plaintiffs through their presence in the United States and over the defendants through their doing business in the United States. This became the principal thread running through the argument, with the three conservative justices (Chief Justice Roberts, Alito and Scalia[17]) essentially asking "what is this case doing in a US court?" and the four liberals (Ginsburg, Breyer, Sotomayor and Kagan) saying "we already upheld the validity of ATS in *Sosa* with respect to individuals and see no reason to distinguish between individuals and corporations now." Justice Kennedy, as usual, gave no clear indication of his position and may eventually cast the deciding vote on one side or the other, as is frequently the case.

The aforementioned summary, of course, fails to do justice to the lively and intellectually complex verbal exchanges which took place that day. Justice Kennedy, for instance, wanted to know whether, if a US corporation commits a violation of international law in the US it can be sued anywhere. Justice Scalia asked if

15 For a catalogue of and links to these and other pertinent documents see CJA Kiobel Briefs and Resource Center, available at *http://cja.org/article.php?list=type&type=509*.[accessed 27 April 2013].

16 For links to transcript and audio recording see fn 14.

17 Justice Thomas has made it a habit not to ask questions at Supreme Court hearings, but it is safe to assume that he will side with the conservatives in this case.

there was a "superbody" somewhere which decides what norms of international law would trigger an ATS action. Justice Alito speculated about the effect on an ATS case of a suggestion by the US government that it might create foreign policy complications. Kennedy said *Filartiga* was a binding and important precedent, but it did not dispose of the question why an ATS case had to be brought here rather than elsewhere.

There followed a brief intervention by Edwin Kneedler, Deputy Solicitor General of the United States, as amicus curiae in support of the plaintiff-petitioners. Under the heading "The Role of Politics in Law" it is worth noting that both in *Kiobel I* and in *Filartiga*, when the United States Government also supported the plaintiffs, the administration was in the hands of the Democratic Party. It is unlikely that such support would have been offered by the Republicans; indeed, Republican administrations repeatedly urged courts to refrain from taking ATS cases, which the courts, in a commendable demonstration of judicial independence, refused to do.

Kneedler basically took a "what's good for the goose is good for the gander" approach, insisting that, with ATS having been upheld by the Supreme Court in *Sosa*, a case involving an individual, there was no reason to deny the application of ATS to corporations. Justice Sotomayor asked Needler to distinguish between respondeat superior and direct corporate liability, but he refused to take the bait by collapsing the two concepts, i.e. the action of the agent made the corporation liable under respondeat. Scalia, known for his conservatism, but not normally for questions which could be blown away with a feather, asked why, if respondeat made corporations liable for the acts of their agents, this did not also apply to governments. The answer, of course, was sovereign immunity. Human rights lawyers, who have been trying to bring President Bush and Vice President Cheney to justice for opening the door to torture, will be glad to know that this prompted Scalia to point out that the Foreign Sovereign Immunities Act does not relieve the sovereign of every kind of liability.

Justice Kagan had her own conceptual dichotomy, between an ATS based on substantial violations and one based on enforcement, which was her preference. Chief Justice Roberts chimed in to say that government torture violates international law, while private torture does not, a point easily lost on followers of *Kiobel*, which involves private actors aiding and abetting government torture.

The next speaker was Kathleen Sullivan, a former dean of Stanford Law School occasionally mentioned as a candidate for the Supreme Court. Appearing for the

respondents, she delivered what, in retrospect, seems like a one-note lecture, repeating over and over that, while there are some conventions which make corporations liable for certain violations, e.g. in the area of finance, there is no convention nor any source grounded in customary law which makes corporations liable for human rights violations. Justice Kagan suggested that, once a norm of international law was established, one could not grant an exemption from compliance with such norms for Norwegians, any more than for corporations. Justice Breyer reminded Ms Sullivan of the 1657 case in which Thomas Skinner prevailed against the East India Company in the House of Lords for having seized his ship and his house, actions which the Lords called "odious and punishable by all laws of God and man." Ms Sullivan remained unmoved, repeating that where there was no convention holding corporations liable for the violation alleged in the case at bar there could be no justiciable ATS case.

In his rebuttal, Paul Hoffman sought to direct the attention of the court to the fact that ATS is a tort statute, not a criminal one, and that, under international law the enforcement of a tort is left to the discretion of domestic courts, applying federal common law.

One week after what has come to be called Phase I of *Kiobel,* the Supreme Court launched another bombshell. Responding to the issue of extraterritoriality which kept popping up in the oral argument, it called for reargument and briefing on the following question:

> Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

This formulation went way beyond the question which had brought the *Kiobel* case to the Supreme Court in the first place. Now it was no longer a question of whether corporations could be held liable for human rights violations under ATS, but whether such liability could attach to anyone, including individuals, where the violation occurred outside of the United States. In other words, despite the hundreds of ATS cases entertained by US courts since *Filartiga,* the ATS bar would now have to fight for its very life.

The hearing on the new question took place on October 1, 2012, again before a packed audience and again preceded by a large number of amicus briefs on both sides of the question. The first part of the hearing was, in essence, a rehash of the first part of the previous hearing, i.e. why is this case being brought here

when it has nothing to do with the United States? Because, says Paul Hoffman, the plaintiffs are here and so is the principle of universal jurisdiction. But then Justice Sotomayor complicates the issue by asking Hoffman what is wrong with the position of the European Union when, in its amicus brief, it says there may be other countries more suited to hear this case, on both substantive and procedural grounds, and doesn't this raise a question of exhaustion of remedies? To which Hoffman replies there is an exhaustion of remedies requirement under the Torture Victims Protection Act but not under the Alien Tort Statute.

Ms Sullivan then found herself defending a difficult position in the face of questions from several justices, namely, that *Kiobel* could be dismissed on grounds of extraterritoriality without overruling *Filartiga* or *Sosa*.

The position of the United States was presented by Donald Verilli, the Solicitor General. It turned out to be quite different from that of his deputy at the hearing on Phase I. General Verilli[18] first said the US did not approve of US courts taking cases involving corporations aiding and abetting human rights violations by foreign governments. Then, when pressed by several justices, he seemed to be saying courts should not take cases lacking any nexus with the United States, but finally he retreated somewhat from that position and admitted there might be valid ATS cases involving direct human rights violations by corporations. Not the greatest performance by a Solicitor General in the history of the Supreme Court.

In his rebuttal, Hoffman mentioned that ATS, as currently applied, is part of a worldwide trend toward universal jurisdiction. The Chief Justice said the UK and the Netherlands didn't seem to think so, prompting Hoffman to point out that, since the hearing in Phase I a Dutch court had awarded damages to a Palestinian for torture suffered in Libya and that the European Union, in its amicus brief had not taken issue with the principle of universal jurisdiction.[19]

As well as those surfaced in the two *Kiobel* hearings, a number of other issues were raised in the multitude of merits briefs as well as amicus briefs. The balance of this note will discuss some of them.

18 By virtue of a quaint long standing custom, the Solicitor General is referred to and addressed as General.

19 As this note was being written, a Nepalese colonel was arrested in the UK, with the approval of the Attorney General, on charges of having committed torture in Nepal in 2005. *UK Defends Decision to Prosecute Nepalese Colonel Accused of Torture,* The Guardian, January 6, 2013.

IV.

Are corporations liable for human rights violations? This, of course, is the nub of the debate. It is sometimes, confusingly, waged in terms of the personhood of corporations. Thus, people of liberal bent in the United States, particularly non-lawyers, are outraged by the decision of the US Supreme Court in *Citizens United v Federal Election Commission*[20] , which held that, corporations being persons, they are entitled to the protection of the First Amendment to the Constitution, which guarantees freedom of expression. This decision has led to a veritable tsunami of mostly conservative corporate financial contributions to the political process and liberals can be heard to engage in rhetorical questions like "Do corporations breathe, do they talk, do they walk?" But of course when these same citizens are asked whether corporations should be held to account for torture or summary execution, they reply enthusiastically in the affirmative.

It would certainly have helped the plaintiffs if they could have called the attention of the court to a long list of cases in which corporations were sued for human rights violations. But if, as the defendants insist, international law norms can be created only by conventions or treaties, then international law is arbitrarily deprived of three of its basic four pillars, which leaves it in a highly wobbly state. Article 38 of the Statute of the International Court of Justice, which is an integral part of the United Nations Charter, a document binding on all members of the UN, is clear enough on this point. It states that, in deciding cases submitted to it, the ICJ shall apply

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b) international custom, as evidence of a general practice accepted as law;

c) the general principles of law recognized by civilized nations;

d) subject to the provisions of Article 59[21], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

20 558 US 310 (2010).

21 Article 59 states: The decision of the Court has no binding force except between the parties and in respect of that particular case.

Putting aside the question of what, after Nuremberg and Abu Ghraib, constitutes a civilized nation, Article 38 is quoted in most if not all textbooks of international law as the premier definition of the sources of international law. Several *amici* submitted briefs detailing how the liability of corporations for human rights violations follows, if not from 38(a) – although from that also according to some – most certainly from the other three subparagraphs. It is the answer to Justice Scalia's question whether there is a "superbody" that decides what the justiciable norms are: It is not one single superbody, but the confluence of several streams of practice, analysis, legislation, litigation and scholarship, leading to rules universally recognized with the specificity required by the *Sosa* decision.

The Alien Tort Statute defines only the plaintiffs; it is not open to citizens of the state in which the suit is brought. But, once the norms have been established, any person, whether legal or natural, can be a defendant, subject only to exemptions prescribed by law, such as sovereign immunity. The lack of precedents cannot be an obstacle to compliance with the law; if it were, there would never be any progress in the law, except through the enactment of new legislation.

Aiding and abetting a crime is itself a crime and aiding and abetting a tort is itself a tort.

It may be true that no legal system in the world makes as much use of the concept of conspiracy as that of the United States. While conspiracy played a role at the Nuremberg Tribunal, it is not generally considered to be part of the civil law tradition prevalent in much of Europe and Latin America. It is, therefore, not a good candidate for use in an ATS suit.[22] Aiding and abetting, however, is another story. There are differences among various legal systems in what constitutes aiding and abetting and in the sentences imposed for aiding and abetting versus the actual commission of the crime or tort, but it is unlikely that a court anywhere would acquit someone for procuring a murder by supplying to another a weapon to be used for killing a third person.

22 On January 9, 2013, the Court of Appeals for the District of Columbia Circuit reversed the conviction of a Guantanamo detainee for material support, conspiracy and solicitation on the basis of a precedent in the same court holding these offenses not to be part of international law. The decision is *Bahlul v United States,* USCA Case # 11-1324; the precedent is *Hamdan v United States* (Hamdan II), 636 F.3d 1238 (2012).

There has been some confusion about the position of the US government in Kiobel II. A careful reading of its brief and of the Solicitor General's speech at the oral argument show that the basis of the government's reversal from Kiobel I was not that it now considered aiding and abetting per se to be an inadequate violation of international law, but that it now thought it was imprudent for the United States to, albeit indirectly, challenge the conduct of a foreign sovereign government toward its own citizens. In other words, this was not a legal argument about substance, but a diplomatic argument about foreign policy. Had Shell hired a corporation called "Torture Inc." – to use Justice Breyer's hypothetical – instead of collaborating with the Nigerian military the US might well have supported the plaintiffs rather than the defendants.

Extraterritoriality is a Factor of Universality

The defendants and several of the *amici* in Kiobel II argued vehemently for the proposition that, in a world of nation states, each state should refrain from unduly interfering in the affairs of all others. The plaintiffs and several pro-plaintiff *amici* countered by pointing to the emergence not only of universal norms, but also of universal jurisdiction in the last century. Both sides have some justification for their positions, but there is more to be said for the latter than the former.

About 350 B.C. Aristotle wrote

> Universal law is the law of Nature. For there really is, as everyone to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other.[23]

Thus, Lord Mansfield in *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774) said:

> If A becomes indebted to B, or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found [...] As to transitory actions, there is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas.

23 Rhetoric, Bk I, Ch. 13.

The proposition advanced by Justice Alito, that cases based on extraterritorial occurrences have no place in US courts ignores both legal history and the momentous advances which international has made towards true internationalism in the last century.

With respect to history, two ancient legal principles, both to some extent precursors of ATS, contradict this narrow view of extraterritorial jurisdiction. One is *aut dedere aut judicare,* extradite or prosecute, which, as its Latin name implies, dates back to Roman times. The other is the transitory tort principle mentioned by Lord Mansfield in *Mostyn*, a case decided fifteen years before the enactment of ATS. The amicus brief of the Yale Law School Center for Global Legal Challenges[24] in *Kiobel II* lists a variety of laws from 25 countries providing for some form of extraterritoriality[25]. Other amicus briefs argue for a case-by-case determination of the appropriateness of exraterritorial jurisdiction, while denying that there is in international law any categorical prohibition of such jurisdiction. Thus the question heard repeatedly in the two Kiobel arguments, "what is this case doing in our courts?" sounds more like a plea for American exceptionalism than the statement of a legal principle.

As to the effect of the galactic shift in international law from state-centric to person-centric and from national to universal, this takes many forms. One is the development of and interest in human rights following the Nuremberg Tribunal and the adoption of the Universal Declaration of Human Rights. The defense in *Kiobel* is based essentially on the implications of one country meddling in the internal affairs of another. But is it "meddling" only when Corporation A issued in country B for acts committed in country C, or also when country B issues an annual report on how well countries A and C are complying with human rights standards? Is it not also meddling when the US Congress attaches a human rights condition to a US-Russian trade bill and Russia retaliates by suspending adoption of Russian orphans by US citizens?

What about globalization? Can the world exist economically like a tightly wound ball of twine while remaining compartmentalized legally?

24 Available at *http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/10-1491-tsacsb-Yale-Law-School-Center-for-Global-Legal-Challenges.pdf.*[accessed 27 April 2013].

25 REDRESS, 2010, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union.*

V.

At this writing, the decision of the Supreme Court in *Kiobel* is still awaited. But it is not too early to offer some recommendations on how corporations can be made more accountable for human rights violations committed by them, or, as is usually the case, by others for their benefit and with their knowledge and assistance. The International Law Association has already undertaken this task, in the form of the wide-ranging Final Report on International Civil Litigation for Human Rights Violations, presented in August 2012 to the Sofia Conference of the ILA[26] and by adopting the resolution on guidelines based thereon. Herewith some comments on the guidelines.

1) *Scope*

1.1 It should be noted at the outset that, while Resolution No. 2 is headed *International Civil Litigation and the Interests of the Public,* the mandate of the drafting committee was to render a report on international civil litigation for human rights violations. The clear implication of this apparent dichotomy is that the public has an interest in human rights litigation, although it may be private in nature. Par. 1.1 of the Guidelines states that they "apply to civil claims against corporations. Individuals and other non-State actors arising out of [...] human rights violations." This seems to be inconsistent with a statement in the report that it does not take a position on the liability of corporations for human rights violations under international law, unless it is meant to say that, as far as corporations are concerned par. 1.1 deals only with the international law implications of corporate violations under domestic law.

2) *International Jurisdiction*

2.1 Defendant's domicile

2.1. (1) "The courts of the State where the defendant is domiciled shall have jurisdiction." This seems like a gratuitous attack on ATS and ATS-type jurisdiction. Parts. 2.3 (Forum of Necessity), 2.4 (Other grounds of jurisdiction under national law) and 2.5 (Forum non conveniens) may be available to provide jurisdiction

26 Available at *http://webcache.googleusercontent.com/search?q=cache:MlSqKefx-_sJ:www.ila-hq.org/download.cfm/docid/D7AFA4C8-E599-40FE-B6918B239B949698+&cd=1&hl=es&ct=clnk&gl=es*. [accessed 27 April 2013].

in another forum than that of the defendant's domicile under universal jurisdiction principles, but only after protracted litigation for which the claimants may lack the required resources

The remaining paragraphs of the Sofia Guidelines may raise additional questions which, however, exceed the scope of this note. The preambular paragraphs of Res. No. 2, calling for wide distribution of the guidelines, and par. 4, containing detailed recommendations on transnational judicial cooperation, deserve to be applauded.

Civil litigation, which leaves the victims of human rights abuses in charge of prosecuting their claims, will always be their main path to justice, given the power of multinational corporations to influence governments. It would no doubt be helpful if more and more countries adopted laws implementing the principle of universal jurisdiction for the gravest violations of human rights law. It would also be helpful if countries which have the freedom to launch criminal investigations of human rights violators also developed the fortitude to punish these violations in proportion to their gravity. The custom of penalizing corporate human rights violations by monetary fines amounting to slaps on the wrist should be replaced by criminal convictions resulting in prison sentences for the corporate officers responsible. The monetary fines now assessed to corporations in criminal cases or awarded to plaintiffs in civil cases frequently amount to only very small shares of their profits and are treated by them as expenses in the ordinary course of doing business. They do not serve a punitive or deterrent purpose.

The Lords had it right when, in 1657, they called the crimes of the East India Company "odious and punishable by all laws of God and man. "

However, some recent developments provide reason to hope that, even if *Kiobel* is badly decided by the US Supreme Court, the search for corporate accountability will make progress in other ways. On November 15, 2012 BP pleaded guilty in an American court to criminal charges connected with the explosion of the Deepwater rig in the Gulf of Mexico and agreed to pay 4.5 billion dollars in fines. Concurrently, three BP executives were criminally indicted, two for manslaughter and one for lying to a Congressional committee, leading the New York Times to comment

> Legal scholars said that by charging individuals, the government was signaling a return to the practice of prosecuting officers and managers, and not

> just their companies, in industrial accidents, which was more common in the 1980s and 1990s.[27]

The recent prison sentences imposed on two Wall Street giants for insider trading, eleven years for Raj Rajaratnam and two years for Rajat Gupta, bear out the validity of this comment.

If criminal charges for manslaughter, perjury and insider trading can be brought successfully against corporate executives, should aiding and abetting crimes against humanity be far behind?

On January 30. 2013 a Dutch court rendered a mixed verdict in an environmental case brought by Nigerian farmers against Royal Dutch Shell, charging the very pollution of their lands which led to the protest movement underlying the Kiobel case. Quoting the NYTimes again:

> Evert Hassink, a spokesman for the Dutch chapter of Friends of the Earth, described the court ruling as "mixed." The court's refusal to assign any responsibility to the parent company was disappointing, he said. But "we've succeeded in establishing the principle of going to court in the Netherlands or Europe because of what happened in another country," he said.[28]

Thus, if *Kiobel* eventually makes it more difficult to sue foreign corporations for human rights violations in the United States, the Dutch case may make it easier to do so in other countries.

It will be a challenge for human rights lawyers to build on these positive precedents and to overcome whatever negative precedent may come out of *Kiobel*. In pursuing this effort they will do well to remember that the Lords had it right when, in 1657, they called the crimes of the East India Company "odious and punishable by all laws of God and man."

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27 In BP Indictments, U.S. Shifts to Hold Individuals Accountable, available at: *http://www.nytimes.com/2012/11/16/business/energy-environment/in-bp-indictments-us-shifts-to-hold-individuals-accountable.html*. [accessed 27 April 2013].

28 Available at *http://www.nytimes.com/2013/01/31/business/global/dutch-court-rules-shell-partly-responsible-for-nigerian-spills.html?pagewanted=all&_r=0*, January, 30th 2013. [accessed 27 April 2013].

Addendum

On April 17, 2013 the Supreme Court issued its decision in the *Kiobel* case. In an opinion written by Chief Justice Roberts and joined by the other four conservative justices (Alito, Kemmedy, Scalia and Thomas)it affirmed the decision below, dismissing the case Justice Breyer, writing for himself and the other three members of the liberal minority (Ginsburg, Kagan and Sotomayor) concurred in the dismissal, but on different grounds.

The court left undecided the sole question presented to it by the parties, i.e. whether the Alien Tort Statute can be used to sue a corporation for human rights violations under international law. Instead the majority opinion stated that "the question presented" was the one the court itself had raised, i.e. "whether and under what circumstances" courts could recognize Alien Tort Statute cases alleging violations of international law occurring outside the United States. One might think that conservative politicians, who grow apoplectic at what they conceive to be "judicial activism" by liberal judges would have objected to this development, but apparently judicial activism is objectionable only when it leads to policies of which conservatives disapprove.

As is often the case with complex decisions, this one is not a model of clarity and leaves a good deal to be decided in future litigation. Chief Justice Roberts relies largely on what he calls the presumption against extraterritoriality and cites with approval a 2010Syprene Court precedent*, Morrison v National Australia Bank Ltd,* which held that "United States law governs domestically but does not rule the world." But he also cites *Morrison* to support his thesis that "even where the claims touch and concern the territory of the United States they must do so with sufficient force to displace the presumption."

In a brief but forceful concurrence, Justice Kennedy further develops Roberts' point that the presumption against extraterritoriality is not absolute. "The opinion of the court", says Kennnedy, "is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute" and he went out of his way to point out that "Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991".

Further evidence that, after *Kiobel,* ATS, although battered and bloody, is still alive, is found in the fact that Justices Alito and Thomas delivered a concurring

opinion holding that the Chief Justice, in his opinion, did not go far enough. They found it necessary to revive this somewhat bombastic quote from *Morrison*: [...] "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."

The Breyer opinion is a bit of a puzzle. It begins, strongly enough, by stating that he and his three fellow liberal justices agree with the court's conclusion, but not with it reasoning. It rejects the presumption against extraterritoriality as the basis for the dismissal of the suit and opts instead - but only in part – for "the principles and practices of foreign relations law {." It states that ATS can still be invoked in at least three situations: "when (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest". The majority would not necessarily disagree with (1) and (2) and would certainly agree, in principle, with (3), which sounds much like Roberts' "touch and concern with sufficient force" standard. But then Breyer expands his definition of (3) to include "a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."

Here, then, is the long and short of it: For ATS to apply there must be some kind of nexus with the United States. Neither the majority nor the minority give us much to go on as to the nature of that nexus, except to agree that it is inadequate in the present case. And, importantly, except that providing a safe haven for *hostis humani generis,* an enemy of all mankind – a phrase which, Breyer reminds us, comes from *Filartiga* and was adopted by the Supreme Court in *Sosa* - does create such a nexus in the opinion of the minority.

For the time being, we are left with the intriguing possibility that the minority's "safe haven" approach, combined with Kennedy's recognition of the demonstrated concern of the United States with human rights in foreign countries, may provide a majority of five for a human rights-based nexus in future ATS litigation. But this is not to suggest that this is the only way the ATS can survive *Kiobel.*

Finally, what about the missing issue, corporate liability for human rights abuses under international law? Time will tell. Stay tuned.

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A STUDY IN THE FRAMEWORK OF THE EJOLT PROJECT: LEGAL AVENUES AVAILABLE TO VICTIMS DEMANDING LIABILITY FOR ENVIRONMENTAL DAMAGE

Antoni Pigrau
Professor of Public International Law, Universitat Rovira i Virgili

The Tarragona Centre for Environmental Law Studies (CEDAT) is a research and higher education centre devoted to environmental law at the Universitat Rovira i Virgili (URV). In the field of research we work on different projects, some of which are centred on issues related to environmental justice. One of these is the EJOLT Project (Environmental Justice Organisations, Liabilities and Trade). EJOLT is part of the European Union's 7th Framework Programme, which is being developed between 2011 and 2015. The primary aim of the project is to give visibility to environmental conflicts and, secondly, support work in favour of environmental justice, connecting the knowledge, experience and work of organisations of activists and academics in the fields of environmental law, environmental health, political ecology and ecological economics. It centres on the use of concepts such as ecological debt, environmental responsibility and ecologically unequal exchange by science and environmental activism, in the interest of formulating public policies. For this reason, EJOLT carries out different activities, including the creation of a large database, which will have an atlas of subject-based and regional maps that cover ecological conflicts throughout the world. In the framework of EJOLT, relevant studies have already been conducted on issues such as the impact of the Clean Development Mechanism in Africa, contemporary mining conflicts in the context of the sustainable development and environmental justice movement, the problem of industrial tree plantations in the global South, the use of economic instruments to halt biodiversity loss and ecosystem degradation, conflicts caused by waste flows towards developing countries or poorer areas of developed countries (available on the EJOLT Project website).

I will briefly describe one of our centre's contributions to the EJOLT Project, which is a study on the legal avenues available to victims demanding liability for environmental damage (Pigrau et al. 2012).

This project was based on the comparative study of a series of prominent national, transnational and international litigation cases filed by victims of serious environmental damages caused by large multinational companies. In phase one, 11 case studies were analysed, which were selected according to four criteria: the severity of the environmental and social impacts; the representativeness of the companies' behaviour patterns; geographic diversity; and the existence of lawsuits with well-documented information advanced by the affected groups or communities. Accordingly, the following cases were chosen: the impact of Shell in Nigeria; the impact of Texaco / Chevron in Ecuador; the Trafigura's waste dumping case in Ivory Coast; the impact of Rio Tinto in Bougainville (Papua New Guinea); the impact of Yanacocha in Peru; the impact of the aerial fumigations carried out by Dyncorp's fumigation in Colombia and Ecuador; the impact of climate change on the Inuit; the impact of the Rössing uranium mine in Namibia, via the Connelly Case; the impact of Vedanta in India; and the issue of land tenure and forced displacement in the Department of Chocó, in northeastern Colombia. Furthermore, a cross-sectional assessment of the problem of persecution of environmental defenders is also included.

Phase two of the study is currently being developed, during which new cases will be added, including the cases of the Islands of Nauru and Diego García; Bhopal's accident in India; the Metalclad issue in Mexico; the action against Anvil Mining for its undertakings in the Republic of Congo; the impact of the dam in Belo Monte, Brazil; lawsuits against the mining company Cape Ltd. for its activities in South Africa; the case of the Matanza-Riachuelo River basin, in Argentina; the forced displacements of the population in the Namwasa Forest Reserve, Uganda, for the implementation of forestry projects in the framework of the Clean Development Mechanism; and the ThyssenKrupp Atlantic Steel Company's (TKCSA) impact in Santa Cruz, next to Rio de Janeiro.

Further detail on these cases shall not be given in this paper. They are included to provide a general idea on the study's structure and contents, as well as several of the main conclusions reached, until now, as it is an ongoing research project.

The study has four parts, where the first is an introduction describing the objectives and methodology followed.

The second part handles the general legal framework in which multinational companies move. It is divided into five sections, which centre on the invisibility of multinational companies in international law (McCorquodale, Simons,

2007); the debate between mandatory and voluntary regulatory instruments for companies (McInerney, 2007; Clapp, Utting 2008); on how environmental damages are handled in international treaties, in which the tendency has been to impose reparations for damages on private operators; the privileged situation that multinational companies tend to have in host states; and, lastly, the connection between environmental damages and human rights violations, which is explained by the fact that in searching for redress, different legal instruments are indiscriminately turned to that are typical to both sectors.

The third part represents the core of the study and refers to the legal channels to try to execute assigning liability for environmental damages. In turn, it contains five main sections.

The first is on the legal recourses in the country where the damages took place. First, two issues are dealt with that are common to all cases and extremely important, which are the problems of land ownership and access to natural resources, and the persecution to which environmental defenders are increasingly subjected. With respect to the first, it has been verified that access to land and natural resources generally takes place or is the direct consequence of colonial domination or different operating concession models, normally granted under extremely favourable conditions for foreign companies, and often in cooperation with local public and private companies. Moreover, environmental disputes, particularly those involving extraction activities, are frequently related to occupying territories that are traditionally populated by indigenous populations or communities that suffer a direct impact to their lifestyles and sustenance, lose control of the lands and are frequently displaced from them (Anaya, 2011). With respect to the second issue, as demonstrated in reports on this topic in the framework of the special procedures of the UN Human Rights Committee and Board, the persecution of environmental advocates is a tendency that has been growing all over the planet and is increasingly manifest. The human rights' violations committed against these environmental advocates and activists are directly related to their work of claiming, defending and protecting territories and natural resources, or their defence of the right to autonomy and the right to cultural identity (Sekaggya, 2011).

Then recourse to national courts in the countries affected by the selected cases is analysed (Colombia, Ecuador, India, Ivory Coast, Nigeria, Peru, United States), revealing disparate results. This is the legal arena, which is clearly where we must begin. The possibilities of success depend on a wide range of factors, which include: the existence and quality of environmental legislation; the existence

of control instruments for industrial activities by the state and their efficiency; the existence of other non-legal bodies for protecting human rights (attorney generals, ombudsman, etc.); the existence of independent and effective judicial power; the possibilities for citizens to gain access to environmental information; the possibilities citizens have to participate in decision-making processes concerning the environment; and the access avenues to environmental justice for common citizens, victims and NGOs. In the plan of legal processes, all routes must be taken into account: administrative, civil, criminal and, in those countries in which they exist, specifically environmental. Within the analysis of governing legislation, it is essential to look at the international obligations that the state has assumed through international treaties, particularly in the area of international environmental law and international human rights law, both in the framework of the UN, and in other specialist areas such as the ILO, but also in other fields such as fighting corruption and organised transnational delinquency, or related to international trade and the protection of investments.

The second section examines the legal channels available in the national legislation of the state in which the parent company is located. The cases selected in phase one have basically situated us in three countries (Netherlands, United Kingdom and United States). More detail will be given to this issue later.

Section three handles the routes available in international law. We have to start with the fact that there are no international legal or quasi-legal mechanisms with specific competences to handle environmental disputes. What do exist are bodies with other types of competences, before which lawsuits can be filed with an environmental component under specific conditions. The study will deal with them, to the degree in which they have been involved in the case studies: the International Court of Justice, whose competence only extends to litigation between states; special procedures for the protection of human rights at the United Nations, which does not have a legal nature or executive powers; regional systems for human rights protection, which may handle lawsuits only against the states and under certain conditions. Finally, there are other legal devices contained in international instruments for protecting investment systems (arbitration courts), or in the context of international financial organisations (international administrative control bodies)

Complementarily, reference is made to the legal instruments within regulatory frameworks that are voluntary –as they were employed in the case studies- in section four, and other tools to apply social pressure, such as public opinion tribunals and the role of shareholders, in section five.

Part four of the study contains the conclusions that –as mentioned– are still provisional. We will only focus on three main aspects in this area: the dynamics of *intertwined actions* (1), the potentialities and limits of extraterritorial routes (2) and the use of international mechanisms for human rights' protection (3).

Intertwined actions

The first point refers to our most general conclusion. Many of the case studies, and paradigmatically those of the impacts of Shell in Nigeria and Chevron-Texaco in Ecuador, make it clear that, in practice, the direct victims of severe environmental damages and the organisations that support them, combine all types of political and legal channels, both national and international, territorial and extraterritorial, to find the way to make the perpetrators of serious environmental damages actually take responsibility. This is what is known as a *cluster-litigation*, which is defined as 'a parallel or serial litigation of overlapping or closely related claims before multiple courts' (Nollkaemper 2008). However, the phenomenon is not limited to recourse to courts, so that it may be more pertinent to call them *intertwined actions* (Pigrau, A., Cardesa-Salzmann, A. 2013). Although the incidents denounced or those concretely injured or affected do not necessarily respond to a pre-determined global strategy, all actions, including those that are not litigious before a legal body, make reference to the same source problem, contribute to increasing their visibility and end up being mutually strengthened on the legal plane.

And, effectively, this seems to be the best way to act. The existing channels are very diverse, each of with its own advantages and disadvantages, although all of them share a high level of difficulty and considerably long periods of time and exorbitant costs. However, they do end up mutually influencing each other, in the sense of politically and judicially reinforcing those who drive them forward.

Potentialities and limits of extraterritorial channels

The second issue to point out refers to recourse to the courts of the state where the TNC originated (host state).

Obviously, litigations in courts in a foreign country involve a series of burdens, such as frequent travel, having to communicate in a foreign language, dealing with a less known legal system, etc. All of this makes this strategy extremely

costly, both in financial and personal terms. The primary pertinent factors for the purpose of evaluating the possibilities of legal action in the host state are its national legislation, with respect to the different action channels and the scope of jurisdiction of its different courts (Ebbeson, 2009), and the content of the international commitments it has taken on, including their adaptation to national law. This route first requires that the country's laws allow foreign citizens access to its courts. And these, in turn, must be invested with extraterritorial jurisdiction, which means they must have power to judge acts committed outside national borders. Our research has dealt with the practice of the US federal courts, on the one hand, and the national courts of EU member states (United Kingdom and the Netherlands) on the other, with respect to these types of extraterritorial liability lawsuits.

In the United States, the channel of the Alien Tort Claims Act (ATCA) was analysed. Among the confirmations stemming from the analysis, these merit mention:

The ATCA was also employed to present civil claims for the infringement of environmental standards (Pigrau 2009). Nonetheless, there are barriers that are now irresolvable with regard to accepting these types of standards as material grounds for lawsuits, so that they are always presented jointly with other serious human rights violations. The prohibition of causing environmental damage could end up being considered by US courts as a rule protectable through the ATCA by two routes: due to its hypothetical inclusion in the category of *ius cogens*, as pointed out by the International Law Commission, in its comment in article 40 of the draft articles on the state's responsibility for internationally illegal actions, adopted by the ILC and GA in 2001 or because it ends up being accepted that, even though the infringement of *ius cogens* regulations has not occurred, environmental damages do not necessarily require a state perpetrator, in line with the clear trend in conventional international environmental law of attributing the liability for paying costs for damages to the specific operators, public or private, that cause them, in accordance with the polluter pays principle (*Institut de Droit International* 1997, International Law Commission 2006), in areas such as nuclear energy, hydrocarbon pollution, the transport of hazardous goods, damages from the cross-border transport of hazardous wastes or damages caused by the cross-border effects of industrial accidents in cross-border waters.

Furthermore, given that private players do not easily admit that they may be directly responsible for the infringement of international law; lawsuits tend to outline the complicity of companies with violations of human rights perpetrated

by the armed forces or by the police of the host state. The doctrine of *forum non conveniens* is also a significant obstacle for these types of demands in the United States.

The main limitations of the ATCA channel have rested, until now, with the difficulties of obtaining a favourable ruling, due to the problem of the action's grounds, and also due to the multiple procedural requirements and exceptions that can be admitted to block the court's jurisdiction. Even when plaintiffs do receive a favourable sentence, there are great difficulties to executing the established reparations, except for companies with assets in the United States.

However, the entire debate was radically affected by the recent US Supreme Court decision of 17 April 2013, in the Kiobel case[1]. The court did not expressly confirm the view of the US Court of Appeals for the Second Circuit, in its decision of September 2010, according to which United States courts generally lack jurisdiction over companies under the ATCA. An enormous restriction was nonetheless introduced in the arena of potential protection of human rights and companies' liability for the consequences of their activities, due to determining that the ATCA was assumed to not have extraterritorial scope and that violations of international law committed abroad by companies or individuals could no longer be subject to US federal courts pursuant to this law, unless the connections to the United States are strong enough to take precedence over the aforesaid assumption, although further details about what connections these could be were not given[2]. In reality, under the argument of not creating problems with other states in US international relations, the first consequence of this ruling is presumed immunity –and therefore impunity– of multinational companies before US federal courts for the acts they commit abroad, in the framework of the ATCA. Even when the perpetrator's nationality as one of these connections capable of belying the assumption is accepted, its application to subsidiaries of a US parent company will not be easy. Thus, the historic pattern of exempting

1 The importance of the issue is reflected in the large number of *amicus curiae* reports received by the Supreme Court. They are posted at: *http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm*; [consulted 17 April 2013].

2 The Court's majority decision concluded: A group of four judges, although expressing agreement with the solution to the specific case, disagree with the reasoning and the existence of an assumption that opposes extraterritoriality; and defend the applicability of the ATCA whenever it was created. In this regard, they also end up basing their stance on the existence of connections with US interests, which were specified in three possibilities and, thus, forsaking a doctrine of absolute universal civil jurisdiction.

companies from legal liability for their acts abroad is revived and strengthened at the hands of this United States Supreme Court decision.

With respect to Europe, in recent decades it has been clarified that litigation in national courts in European countries can end up being an effective channel for persecuting the liability of transnational companies that violate human rights or cause environmental damage in third countries.

In the European Union arena, Regulation 44/2001 (known as the Brussels I Regulation) establishes extraterritorial jurisdiction of the EU member state courts for civil and trade matters. These include claims for direct foreign liability against companies with residency in an EU member state, which some member states already permitted in their civil laws. However, on the one hand, the requirements of legal residency make it difficult to establish jurisdiction for direct claims against subsidiaries in third countries that are not residents of the European Union and, on the other, do not change the fact that establishing direct liability of the parent company for events that took place abroad via subsidiaries entails resolving the obstacle of piercing the corporate veil (Augenstein 2010).

We must also recall that, in accordance with the jurisprudence of the European Court of Justice, established in 2005, in its response to the prejudicial matter outlined in the context of the Owusu versus Jackson case, it was determined that the application of the *forum non conveniens* principle, when the plaintiff is an EU resident, is not compatible with EU rules on jurisdiction, and the courts of the member states are not empowered to reject extraterritorial claim on this basis. This represents a different meaning for having access to justice between the EU and the USA.

Finally, some EU member states recognise the courts' powers based on what is termed *forum necessitatis*, for cases in which no national court of any member state is going to guarantee access to justice. However, the European Commission's proposal to incorporate this option to the new Regulation 1215/2012 (Brussels II) was rejected by both the European Parliament and the Council of the European Union.

Use of international mechanisms to protect human rights

The third issue I would like to emphasise is that the case studies reinforce the idea that international courts and other international human right protection

organisations can provide reparations to alleged victims of environmental damages when they are connected to other human rights violations.

The connection between the environment and human rights is broadly accepted and has been articulated from different perspectives; fundamentally from an environmental right as a specific human right, or from a healthy environment as a factual presupposition of the enjoyment of human rights such as the right to life, health, private life and property (Ksentini 1994; Bosselmann 2001; Boyle.2007).

In all cases, this connection between the environment and human rights enables both sectors of the law, in the national arena, to be used in scenarios of severe environmental damages, both from the viewpoint of policies, and the institutions to which they must turn.

However, in the field of national laws, there will normally be both administrative policies that govern different environmental sectors and activities with environmental impacts, as well as civil and criminal policies that let liability be articulated for damages associated or not with committing environmental offences, in those countries in which this figure is set forth. The use of rights to access information, participation and access to justice on environmental issues will also be important, in those countries in which they are recognised. Moreover, from an institutional viewpoint and depending on each national legislation, there can be channels for exercising actions before the competent administrative bodies or with the respective administrative, civil, criminal or, specifically, environmental courts, in those countries in which they exist. It may also be possible to claim for these environmental damages in a different state from the one in which the damages occurred, for example, in the state where the parent company resides of the company that caused the damage (Chesterman 2004). In this case, we will have to pay particular attention to whether or not there is an extraterritorial scope to national policies and whether or not there is extraterritorial jurisdiction for the courts in the country in question (Zerk 2010).

Conversely, in the international arena, the channels for environmental defence are extraordinarily limited.

There are no specific international courts for the environment, although some international courts may handle environmental issues, in virtue of their general competence, which is the case of the International Court of Justice, or its specific competence, as is the case for the International Tribunal for Law of the

Sea. With respect to international criminal courts –the International Criminal Court and other ad hoc tribunals– their material competence has been limited for now to the most serious crimes of international law (genocide, crimes of war and crimes against humanity) and do not have competence to indict legal persons, although they can however try individuals for crimes committed from, or with the support of, or in the interest of corporate structures. Only specific types of crimes of war associated with the environment are admitted in the material competence of the court.

With respect to the existence of other non-legal mechanisms, the outlook is not optimistic either. In conventional systems related to the environment, there is a secretariat to which communications can be addressed denouncing possible breaches by the state or data that cast doubts on the reports that states are generally obligated to write for their own compliance. Furthermore, there are bodies planned for specifically established treaties to supervise compliance with obligations conventionally taken on by state parties. However, only the states or the secretariats to the conventions can activate these compliance proceedings, with the notable exception of the 1998 CEPE Convention, on access to information, public participation in taking decisions and access to justice on environmental issues (Aarhus Convention).

For this reason, faced with the scant regulatory and institutional opportunities that offer international environmental law, we must take notice of those stemming from international human rights laws.

From a regulatory viewpoint, we must start with control and surveillance obligations that are applicable to state parties, the conventional regulation in different areas sensitive to the environment -such as fishing-, the use of nuclear energy, hazardous wastes, toxic products, pollution of waters and the atmosphere and restrictions in trading endangered species, However, international accords on human rights protection are also pertinent, both in the international arena (International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966), and in the regional arena –European Covenant for the Protection of Human Rights and Fundamental Freedoms, CEDH (Rome, 1950), the American Convention on Human Rights (San José, 1969) and the African Charter on Human and People's Rights (Banjul, 1981) and their respective protocols— without forgetting other sector regulations, such as ILO conventions, particularly Convention No. 169 on indigenous and tribal peoples.

Unlike the environmental field, there are indeed international courts in the area of human rights connected to the three main regional protection systems: The European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR) and the African Court on Human and People's Rights (ACHPR). States have the obligation of protecting human rights and controlling the activities that are carried out in their territory or under their jurisdiction, which includes companies (Ruggie, J. 2011). Regional human rights systems are created as supervisory mechanisms for states' compliance with the obligations they took on internationally of ensuring specific rights. Thus, the ECHR, the IACHR and the ACHPR are not civil or criminal courts that can directly punish those that cause environmental damage. They are competent for determining the violations committed by states that participate in the respective legal framework and for establishing the pertinent reparations in favour of victims, when they exist. They can also decree provisional measures to protect people threatened due to defending human rights.

Therefore, these systems, particularly in Europe and the Americas, have demonstrated through their jurisprudence that they can be powerful instruments in favour of organisations that defend environmental justice, provided that environmental damages can be linked to the violation of rights recognised in the respective legal frames of action of the regional institutions that protect human rights (courts and commissions, for cases in Africa and the Americas. In this regard, the African framework is particularly interesting, due to directly recognising the right to a healthy environment as a right that can be invoked before system bodies –unlike in the Americas- and for recognising collectives' rights.

Nonetheless, each of the regional systems has their particular features, their scope of competence and their access requirements, besides the fact that both the American and African systems include a filtering entity: the Inter-American Commission on Human Rights and the African Commission on Human and People's Rights.

Likewise, in the scope of international human rights treaties, which are universal, there are a group of control bodies to ensure fulfilment by the states, which is non-judicial, that can receive, under certain conditions, complaints from individuals and those that can turn to this body under certain conditions. Meriting mention are the Committee of Experts on the Application of Conventions and Recommendations (ILO); the Commission on Human Rights, which supervises the International Covenant on Civil and Political Rights; and the Committee

on Economic, Cultural and Social Rights, which is in charge of controlling the International Covenant on Economic, Social and Cultural Rights. Although all these procedures have limited powers with respect to resolving concrete cases, their function of interpreting treaties is proving to be extremely relevant to other cases that may arise in the future.

Besides specific agreements, the UN Human Rights Council (formerly the Commission on Human Rights) has written a series of special procedures to support human rights centred in a country or by topical areas –special rapporteurs, special representatives, workgroups and other figures– among which some of them have tasks connected to the environment. Although their term is limited and they do not have binding powers, the holders of these proceedings have some freedom to visit countries, interpellate governments, express interest in concrete cases of human rights violations, gather data and conduct studies, draw up recommendations related to their specific scope of responsibility and publicise their conclusions and denouncements via the regular reports they draft. They also uphold some coordination with each other, which enables them to draft simultaneous actions before several of them around the same problem. For this reason, they play a meritorious role of making visible and acting as spokespeople for the claims that these special procedures and conventional control bodies may play.

In short, the study conducted makes the nonexistence very clear of mechanisms for accessing justice so transnationalised and functional as the mechanisms are that cause injustice in the environmental arena, just like the difficulties that the victims of these injustices and the organisations that support them run up against, in a scenario that is fundamentally hostile to their claims. But we should also point out the elements that could define both the political agenda and practical strategies that must be adopted to better defend environmental justice at an international level.

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THE LAST STRUGGLE FOR REDRESS: RECOGNITION AND ENFORCEMENT OF FOREIGN RESOLUTIONS ON CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS*

Marta Requejo Isidro
Senior Research Fellow, Max Planck Institute Luxembourg

Introduction

Jurisdictional fragmentation is a byproduct of the division of the world into sovereign states. Because of the territorial limits of sovereignty, each state can only offer effective legal protection in all its complex extension (i.e., access to justice, right of defense in line with the principle of equality of arms, right to the effectiveness of the judgment) provided all the elements of the situation which the claim is based upon are exclusively linked to that State. Otherwise –i.e., when the underlying factual situation is linked to more than one legal order-, the provision of legal protection splits into two operating phases: ascertainment in one forum ("tutela por declaración"), recognition and enforcement in another ("tutela por reconocimiento"). The first stage involves a process of cognition in the forum: a local court declares a preexisting status or legal situation, creates ex novo or modifies a legal relationship, awards damages or orders the defendant to do something or to stop doing something. The second stage involves receiving in one forum a decision of another State (declaring a preexisting status or legal situation, creating ex novo or modifies a legal relationship, awarding damages or ordering the defendant to do something or to stopping doing something).

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The above mentioned distinction has had so far little (if any[1]) impact in the area of civil litigation for human rights violations perpetrated by transnational corporations. Academic interest has mainly focused on the difficulties experienced by the victims to access the courts, at the expense of examining the possibilities of recognition of the judicial resolutions of one forum in another; a lack of attention perfectly justified by the very scarce number of final decisions pronounced to date. Ecuador's decision of February 2011 in the *Aguinda v. Texaco* case (also known as *Lago Agrio* case) forces us to reconsider this perspective: the defendant corporation has no estate in Ecuador, thus *de facto* the judgment is not enforceable in that country. In 2012 the claimants sought the recognition and enforcement of the judgment in several locations: the Superior Court of Justice of Ontario (Canada); the Superior Court of Justice in Brasilia (Brazil); and also Argentina, last November. They have also obtained an Ecuadorian order for the seizure of assets of the company in Colombia[2].

To the extent that the offending company, Chevron Corp., conducts business all around the world, similar requests in other countries, including some in Europe, should not be ruled out. It is time to analyse their prospects of success.

Geography of the Case: from the U.S. to Ecuador, from Ecuador to Canada

From the U.S. to Ecuador

The decision of 14 February 2011 by the Provincial Court of Sucumbios culminates an unusual experience in the history of civil litigation for human rights violations. The claim, first lodged with the U.S. courts under the Alien Tort Claims Act, was dismissed on grounds of *forum non conveniens*; the claimants resumed the process in Ecuador. That is an unprecedented step; so is the fact that the process carried on and that a verdict was reached.

1 See the limited results in this regard of the Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations, adopted by the International Law Association at its 75th Conference Held in Sofia, Bulgaria, August 2012.

2 *Providencia de la Corte Provincial de Justicia de Sucumbíos*, 15 October 2012. The decisions so far adopted by the different national courts are accessible through *http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador*, accessed 28 May 2013.

The history of the *Aguinda v. Texaco Inc.* saga is the history of a long, complex court case, which began its journey in the U.S. in 1993, to end there only in 2001. The initial lawsuit against Texaco was filed in November 1993 before a federal court in New York as the place of central administration of the company's international operations – thus decisions concerning oil exploitation in Ecuador would have been adopted there. In December 1993, Texaco sought dismissal of the lawsuit on the basis of three arguments: *forum non conveniens*, international comity, and lack of standing. In November 1996, the district court declared that Ecuador would be a more convenient forum and ruled in favor of Texaco; the plaintiffs appealed. Back to the district court the claim was rejected for a second time on 30 May 2001, again on grounds of *forum non conveniens*, and taking into account Texaco's agreement to submit to the jurisdiction of Ecuador, and to the lifting of the statute of limitations in that forum. The decision was appealed by the applicants before the Court of Appeals for the Second Circuit, but this time the court upheld the dismissal, rejecting the claimants' arguments about corruption and partiality of the Ecuadorian judiciary.

The lawsuit was taken up in Ecuador in 2003 before the Provincial Court of Sucumbios. In February 2011, this court issued a judgment of almost 200 pages, in which it claimed to have found undeniable evidence of deliberate dumping of tons of toxic waste in the geographically specified area between 1964 and 1993, with severe consequences in terms of environmental damage and damage to health, with such an impact on the ecosystem that the very survival of the affected community is at stake.

The decision has actually fallen upon Chevron Corp: Texaco ceased operating in Ecuador in 1992; in 2001 it was acquired by Chevron, the second energy company in the world. On the basis of considerations relating to the lifting of the veil, the Sucumbios decision also dismissed Chevron Corp.'s allegations about the nature of its relationship with Texaco. The Court awarded 18 billion dollars, half of which correspond to punitive damages.

Chevron Corp.'s appeal was dismissed in January 2012; the Court of Appeal upheld the entire lower court's decision. The corporation has filed a cassation appeal, and the ruling is expected by the end of 2013. Meanwhile, on 15 October 2012, the Provincial Court of Justice of Sucumbios issued an order ordering the enforcement of the award against the assets of Chevron Corp., located both inside and outside the country.

From Ecuador to Canada

As previously mentioned, in 2012 the Lago Agrio plaintiffs filed an action in Ontario for the recognition and enforcement of the Ecuadorian ruling. The application was addressed against Chevron Corp. and two Canadian subsidiaries (Chevron Canada Limited and Chevron Finance Canada Limited[3]), which according to the plaintiffs are wholly owned by Chevron Corp., and over which it exerts absolute control.

Chevron Corp. argued the lack of any contact with Ontario (lack of residence, business activity or assets), as well as the absence of direct links with the other corporations. In turn, these based their defence on the fact that the process and the Ecuadorian decision were limited to the American company; consequently, they could not be considered debtors of the plaintiffs.

The Ontario court's analysis focused in two points: its jurisdiction to rule on the application for recognition and enforcement - in other words, whether or not "some real or substantial connection to Ontario" is required in order to assume jurisdiction over the case; and what practical effect a ruling in favour of the applicants for recognition/exequatur would have in Ontario. With regard to the former, after a review of different viewpoints in both Canada and the USA which points to the lack of unanimity in both countries, the court found itself not to be "prepared to adopt (...) a blanket principle that an Ontario Court lacks jurisdiction to entertain a common law action to recognize and enforce a foreign judgment against an out-of-jurisdiction judgment debtor in the absence of showing that the defendant has some real or substantial connection to Ontario or currently possesses assets in Ontario" (recital n. 85). As for the latter, the Canadian court examined in detail the relationship between the defendants, and concluded that there was no direct relationship between them in the light of the doctrine of piercing the veil: it therefore concluded that "Chevron does not possess any assets in this jurisdiction at this time". Finally, "the evidence also disclosed that no realistic prospect exists that Chevron will bring any assets into this jurisdiction in the foreseeable future" (recital n. 110), so "Accordingly, any recognition of the Ecuadorian Judgment by this Court would have no practical effect whatsoever" (recital n. 111); quite the contrary, it would lead to an unjustifiable waste of time, money, and judicial resources.

3 The plaintiffs discontinued the action as against Chevron Finance Canada Limited on August, 2012.

Recognition and Enforcement: What if in Spain?

Current Regime for the Recognition and Enforcement of Ecuadorian Rulings

We will now turn to the question whether the Sucumbios decision would be recognized in Spain had the petition been lodge here, as an example of what could be a European response to a similar request. However, it is important to note from the outset that any conclusion we reach in this respect will have a limited scope: while there is a uniform, simplified EU system of recognition and enforceability of judgments in civil and commercial matters, it only includes EU Member States decisions[4], i.e. third-country - as is the case in Ecuador- rulings do not benefit from it. Therefore, each European country will apply its residual national Private International Law rules to the request for recognition /exequatur.

There is no recognition agreement between Spain and Ecuador; the rules applicable to the decision of February 2011 would therefore be those of the Ley de Enjuiciamiento Civil (LEC) 1881[5], as interpreted in today's practice. This means (i) brushing aside both art 952 and 953 LEC (regimes of positive and negative reciprocity), (ii) an updated understanding of the conditions stated in art. 954 (which literally would require that the foreign judgment: is final; has been issued following the exercise of an *in personam actio*; and has not been given in default; also, the lawfulness of the obligation for which enforcement is sought in Spain; and the authenticity of the decision[6]), and (iii) adding three additional conditions, created by our Supreme Court through its rulings in the course of more than 100 years (jurisdiction of the court of origin, limited control of the law applied by the foreign judge[7], and lack of inconsistency with an already existing decision of the forum, or with a process pending therein).

4 Regulation (EC) n. 44/01, of 22 December 2000, *OJ,* L series, n. 12, 16 January 2001.

5 Real Decreto de 3 de febrero de 1881, de promulgación de la Ley de Enjuiciamiento civil. A new LEC was passed in 2000, but the provisions for exequatur of the old one are still in force.

6 The judgment is final and enforceable in the territory of origin; recognition or enforcement of the judgment is not contrary to the public policy of the forum; the judgment debtor, being the defendant in the original proceedings, was duly served with the process of the original court, in sufficient time to enable him to organize his defense.

7 The law applied by the judge of origin would have also been applied in Spain had the claim been lodged with Spanish Courts – or, had the Spanish courts preferred a different law, the final result would still have been the same.

In the face of these conditions the recognition of the Ecuadorian award should not be taken for granted. The first difficulty lies in the provisional nature of the decision itself: under art. 951 LEC, the foreign judgment must be final; as an appeal is still pending, the Ecuadorian decision does not meet this requirement.

Among the remaining conditions, those relating to public policy, both procedural and substantive, are the trickiest; any other obstacle looks unlikely. The defendant has challenged neither the service of process in Ecuador[8] nor the authenticity of the Ecuadorian decision. As for the control of the international jurisdiction of the original court, it raises no difficulties from the Spanish perspective: the lack of indirect fora in our autonomous system is supplied with the bilateralization of the criteria set up in art. 22 Ley Orgánica del Poder Judicial[9]. Tacit prorogation of jurisdiction, which may be argued at least as regards Texaco, is accepted as grounds of jurisdiction under art. 22.2; but even in the absence of such a submission the international jurisdiction of Ecuador would be justified as the place of the harmful event (art. 22.3).

Similarly, it is not likely that the condition concerning the law applied by the original court may raise difficulties: to start with, in our system this requisite is almost exclusively examined in cases dealing with questions of civil status. Moreover, in practice this control is combined with the assessment of an intention of fraud on the part of the claimants (or both the claimants and the respondents), who would have deviously sought a forum of convenience in order to benefit from the application of a legal order more favorable to their interests. Obviously this did not occur in the present case.

Since there is as yet no decision or proceeding pending in Spain which could prevent recognition of the decision of Ecuador, due to their actual or potential incompatibility between them, this proviso would also be satisfied.

The Public Policy Clause

Overcoming the obstacles relating to public policy looks much more problematic. Indeed, the Ecuadorian Constitution proclaims the independence of the judi-

8 To the best of our knowledge, there have been so far 46 applications for recognition of Ecuadorian decisions in Spain, all in the context of family law. Some of them have been denied recognition on the grounds of non-respect of the right to due process, linked to service of process by edicts. No other arguments have ever been claimed.

9 *Ley 6/1985, de 1 de julio, Orgánica del Poder Judicial.*

ciary. However, throughout the entire procedural development of *Aguinda v. Texaco* allegations of corruption, and bias or sensitivity on the part of judges to external pressures have been present. In fact, two weeks before the Ecuadorian decision of 2011, Chevron Corp. began a process in the U.S. under the Racketeering and Corrupt Organizations Act (RICO), in which it requested and obtained an "anti-enforcement injunction" (injunction which would result in preventing the recognition and enforcement of a decision rendered abroad)[10]. In order to grant it the district court analyzed the likelihood of a future recognition of the Ecuadorian ruling in the U.S., concluding it would not: in this regard, the court emphasized the corruption of Ecuador's judicial system and its permeability to political interference, especially under the leadership of President Correa; it also highlighted irregularities in the expert's report for the calculation of damages in the Sucumbios claim. If these allegations proved to be right, they would also prevent the recognition in Spain of the Ecuadorian decision, for they put into question one of the pillars of our democratic culture, as stated in art. 117.1 of the Spanish Constitution of 1978.

Other procedural, but also substantive, irregularities by the Ecuadorian court abound in the idea of incompatibility with the Spanish public order. Some findings both in the operative part of the decision and in the reasoning give rise to suspicion: namely, the assessment of the facts that led the judge to affirm the links between the companies involved – Chevron Corp. and Texaco. In the stage of recognition review of the evidence or of its assessment by the foreign judge is forbidden; still, the above mentioned argument would have weight in Spain if Chevron succeeds to connect its lack of relation with Texaco and its activities with the impossibility to carry out a proper defense; if the Ecuadorian judge's decision was arbitrary in this sense it would collide with our procedural public policy.

The retroactive application by the Court of Sucumbios of legal standards not existing at the time of the incident must also be considered as potentially inconsistent with Spanish public policy. The Ecuadorian lawsuit was based in the *Ley de Gestión Ambiental*, in force as of 1999. Up to then the Ecuadorian legal system only provided for reparation of individual harms; the law of 1999 establishes instead means for collective redress. They applicability of the new act in

10 The anti-enforcement-injunction was issued, but vacated later. See corresponding decisions in *http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador*, accessed 28 May 2013.

the *Aguinda* claim may be contested for it entered into force *after* the events causing the environmental disaster – though before the filing of the suit. It is submitted that to the extent that the new legislation comports not only procedural changes, but also substantive ones, retroactive application is difficult to accept: it creates legal uncertainty and may contradict the legitimate expectations of the parties as to the consequences of their behavior. The idea of an irregular or arbitrary application of the legal system by the court of origin, unacceptable in light of art. 9.3 of the Spanish Constitution, becomes evident.

Finally, the amount of compensatory damages awarded is so high that it suggests punitive considerations, unknown to our conception of civil liability; also, the Sucumbios decision expressly included a statement of punitive damages. In this context some further explanation of the Spanish system is needed: American awards of punitive damages have already been granted recognition in Spain (our country being in this regard less restrictive than many other in Europe). Also, should the punitive damages statement of the decision be considered utterly inacceptable, it would always be possible to exclude it through partial recognition: i.e., only the compensatory part of the award would benefit from it. However, if at the stage of recognition this latter amount is also seen, due to its enormity, to purport some purpose of deterrence or sanction, it may be characterized as being of criminal or semi-criminal nature. Such a result would strengthen the argument against recognition of the Ecuadorian ruling, as the retroactive application of any rule imposing restrictions of individual rights is banned in Spain– according, again, to art. 9.3 of the Spanish Constitution.

We don't think that the remoteness of the facts underlying the Ecuadorian decision, when looked from Spain as the forum where recognition is sought, supports a milder application of the public policy exception[11]. On the one hand, "graduating" the effect of the public policy clause according to the intensity of the links between the case and the requested forum should not be allowed when the principles at stake are fundamental in a democratic society. In addition, cases such as *Lago Agrio* are of considerable relevance in a global economy: what happened to Chevron Corp. must serve as an example to other multinational corporations operating in developing countries; but that's precisely why the proceedings and the ruling against the corporation must be absolutely spotless.

11 What is called "orden público de proximidad": the application of the public policy clause – rather, its severity- is made conditional upon the degree of closeness between the case at stake and the forum where recognition is sought.

The Exequatur Procedure: Some other Obstacles

A "Real and Substantial Connection"

The analysis of the conditions for recognition /exequatur has shown that there might obstacles "on the merits" to the reception of the decision of Ecuador in Spain. The Canadian decision of 2013 points to other hindrances which relate to the recognition/exequatur procedure in itself.

The requirement of a "real and substantial businesses connection" between the defendant and the jurisdiction of Canada, as expressed by the Ontario Court, evokes concerns that we Europeans usually address under the heading of "international jurisdiction". This, and the criteria on which it takes shape, are usually studied in the context of the "tutela por declaración" - that is, when a Spanish court is requested to pronounce a decision on the merits. In the field of the "tutela por reconocimiento"- when the claim before the Spanish courts is for recognition of a foreign resolution - the need for any connection between the jurisdiction and the defendant or the facts underlying the original lawsuit appears as a requirement for recognition (the grounds of jurisdiction of the court of origin are therefore examined); not as a pre-condition of the proceedings that will lead to the granting or the refusal of the recognition request.

However, it makes sense to argue that some kind of linkage is also required at this stage. Indeed, in the process of recognition/declaration of enforceability, as in that of enforcement, certain procedural principles are typically nuanced to the detriment of the defendant (the judgment debtor), because he has already been sentenced to pay: in particular, those relating to the contradiction and equality of arms. Still, attenuation must occur within the frame of the right to due process.

The ruling of the Spanish Constitutional Court 61/2000, of 13 March 2000,[12] perfectly fits this idea: "no one can be required to apply unreasonable or excessive diligence in order to be able to exercise his right of defense at trial; the defendant in a civil procedure can only be subjected to a jurisdiction if in light of the circumstances of the case it can be concluded that the exercise of the right of defense will not imply disproportionate costs". Although the rea-

12 *Boletín Oficial del Estado*, nº 90, 14 April 2000.

soning refers to the grounds of international jurisdiction at the declaratory stage ("tutela por declaración"), there is no doubt that it is also true when it comes to the recognition or declaration of enforceability of a foreign judgment. However, there is no legal provision stating the circumstances in which there is international jurisdiction to decide on an application for recognition / enforcement order: neither in EU law (the Brussels I Regulation), nor in the residual national regime (art. 22 LOPJ)[13].

Actually, the theoretical starting point is that the creditor is free to seek a declaration of enforceability based on a foreign resolution in any country. It is assumed, however, that in practice this risk does not exist, because no rational creditor will invest his time and money in an application for enforcement in a place where the judgment debtor has no assets. Thus, although the so called "Enforcement shopping" may take place (also, nothing prevents the plurality of either simultaneous or consecutive applications: Mankowski, 2011, par. 5) the issue is mostly a self-regulating one[14].

At the same time, the truth is that the need for some kind of connection is embedded in the Spanish rules on recognition/exequatur. Art. 955 LEC states that "Without prejudice to the provisions of treaties and other international conventions, the jurisdiction to hear applications for recognition and enforcement of judgments and other foreign decisions and foreign mediation agreements, corresponds to the Courts of first Instance of the domicile or place of residence of the party against whom recognition or execution is sought (...); alternatively, jurisdiction shall be determined by the place of enforcement, or by the place where those decisions should produce their effects. "

The reasons underlying venue (territorial jurisdiction) are different from those that explain the grounds of international jurisdiction. However, the above mentioned criteria of territorial competence presume a link between the applica-

13 Art. 22.5 of both Regulation Brussels I and the Spanish LOPJ set up a ground of exclusive jurisdiction over proceedings concerned with the enforcement of a resolution, in favor of the jurisdiction of the State where the judgments has been or is to be enforced. The declaration of enforceability, of a merely territorial value, independent and prior to the enforcement stage, predetermines what this court of exclusive jurisdiction will be.

14 As the Ontario Court put it, "the whole issue of the recognition and enforcement of foreign judgments is self-regulating": it is likely that applicants make reasonable choices, thus the request for recognition/ declaration of enforceability is made only in places where assets of debtor may be found.

tion for a declaration of enforceability and the national jurisdiction where it is lodged. A connection which finds its rationale in facilitating the enforcement of the foreign decision in the requested forum, at a later stage.

It is here submitted that international jurisdiction to recognize and to declare the enforceability of a foreign resolution should not be excluded even if the defendant has no domicile or no assets in Spain, provided that the applicant for recognition/exequatur demonstrates that he has a legitimate interest, different from (or beyond) the enforcement of the judgment. We therefore prefer the formula of the Draft law on international legal cooperation in civil matters (Virgós, Heredia, Garcimartín and Díaz, 2012). Art. 89 thereof admits implicitly to the absence of the typically required connections (domicile, residence, assets of the debtor), thus emphasizing the independence between internal territorial jurisdiction and international jurisdiction[15].

De lege lata, the materialization of the "real and substantial connection" will depend on the interpretation of the territorial jurisdiction criteria. In this sense it seems reasonable to defend a broad understanding, at least with regard to the "place of enforcement", admitting as such, for the purposes of the declaration of enforceability, every place where the debtor has *potentially* enforceable assets (including for instance portions of a estate, or claims against third parties). The place where the creditor anticipates as "place of enforcement" may also be an acceptable venue, even if at the time of the application for a declaration of enforceability this may not be obvious. There are several grounds to support this proposal. First, purely operational reasons, among which the limited nature of the procedure for recognition/exequatur. Indeed, the applicant may be required to indicate already in the application the property upon which he intends to carry out the execution; however, other activities related to the identification of this property (such as an injunction to force the debtor to declare or exhibit his property; or to compel third parties to do so) do not fit within the narrow context of the procedure for recognition/exequatur.

Besides, it should not be ruled out that the plaintiff, even if able to claim that the debtor possesses local property, finds it difficult to identify specific

15 "Venue shall be determined by the place of domicile of the party against whom recognition or enforcement is sought; subsidiarily, by the place of performance or the place where the foreign judgment should produce its effects. *In the absence of these criteria, the court of first instance to which the application is submitted will be competent*." (emphasis added).

assets when filing the application for recognition (being at the same time compelled to do so in order to avoid losing the opportunity, for instance because the action for recognition/exequatur is subject to a prescription of "x" years after the date of the judgment); in such a situation the only limit to the application should be abuse of process. Finally, it is submitted that the absence of property or of the domicile/residence of the judgment debtor should not automatically remove the legitimacy of a request for recognition/exequatur: as pointed out by the Ontario court, "often, in enforcement proceedings, timing is everything "; to require the creditor to "wait for the arrival of any assets of the debtor before applying for the recognition and declaration of enforceability may well affect his ability to collect ", given the ease with which assets currently move (recital n. 81). Again, as in the previous case, the only limit should be the abuse of process.

The Parties to the Exequatur Proceedings

Let's assume the international jurisdiction for the granting of a recognition/declaration of enforceability sought in Spain. In a case such as *Lago Agrio*, the game is not yet won. In Ontario the decision to stay the action is linked to the lack of debtor's assets, both currently and in the near future. The court reached this result after analyzing the relationship between Chevron Corp. and her Canadian subsidiaries, and concluding the independence between them. Whether the request for a declaration of enforceability in Spain against subsidiaries of Chevron Corp. would prove successful is also disputable. The problem of the structural independence between corporations, and the legal and material difficulties to penetrate it, run against claimants both at the declarative and the enforcement stages of a process. Logically, the same occurs at the time of the declaration of recognition/enforceability.

Who may be parties to the proceedings for recognition / exequatur is not a frequent subject matter of study; nor does it seem to have attracted much attention in practice. The Brussels I Regulation refers to "any interested party" (Art. 33.2) as applicant, and to "the party against whom enforcement is sought" (art. 42.2) as defendant. No details are provided about whom these may be; the doctrine is unanimous in submitting that the circle should not be restricted to the original parties (i.e., claimant and defendant to the initial claim: Virgós and Garcimartín, 2007, 673; Wautelet, 2012, par. 22-25); legitimacy should also be recognised to their successors, and also to other stakeholders with a legitimate interest – but there is no agreement on who exactly these are. The Spanish LEC does not even

mention the applicant; the formula to refer to the defendant in art. LEC 955 is similar to the one in Brussels I Regulation.

The Order of the Provincial Court of Justice of Sucumbios, of 15 October 2012, listed what the tribunal considered to be the debtor's assets both inside and outside the U.S. A statement in the following terms precedes the list:

"Chevron Corp. se auto describe ante las autoridades de control de los Estados Unidos como *una sociedad comercial que cotiza sus acciones en bolsa, maneja sus inversiones en subsidiarias y compañías afiliadas…*, de tal modo que no cabe discusión respecto de la existencia de inversiones (patrimonio) y de su manejo mediante subsidiarias y compañías afiliadas. Además la Compañía Chevron declara en el formulario 10K que el término *Chevron* puede referirse a *Chevron Corporation, una o más de sus subsidiarias consolidadas, o a todas ellas tomadas como un todo (…)*. Y así, aunque es la misma Chevron quien anuncia en el formulario que *estos términos se usan solo por conveniencia* y aclara que *no tienen como fin ser descripción precisa de alguna de las compañías separadas, (ya que) cada una maneja sus propios asuntos*, la traducción del documento Anexo 21.1 de Chevron Corporation Forma 10-K, para el ejercicio fiscal concluido el 31 de diciembre de 2011, y presentado ante la Comisión Bolsa y Valores de los Estados Unidos, que en su primera línea está titulado Subsidiarias de Chevron Corporation al 31 de diciembre de 2011, deja en claro quién ejerce el dominio sobre estas al declarar que *Todas las subsidiarias en la lista precedente son de propiedad total, directa o indirectamente, de Chevron Corporation*".

On this basis, the applicants extended their petition to the Canadian subsidiaries of Chevron Corp.

The Ontario Court denied any relevance to the statement quoted above. It argued in the first place that to the extent that Chevron's subsidiaries had not taken part in the Ecuadorian proceedings, the decision could not be extended to them. Furthermore, it held that only Canadian law, and not Ecuadorian law, can decide what the attributes of a CBCA (the corporate structure of the Canadian subsidiaries of Chevron) are, including the enforceability of their assets in order to satisfy a court judgment.

We believe that in all probability the result would have been the same in Spain - though maybe following a different path. In this regard, decisions such as those by the *Audiencia Provincial de Málaga,* of 22 June 2000, 20 September 2000,

and 18 October 2000[16], recommend that the request for recognition/declaration of enforceability be addressed only against those who were already defendants at the declaratory stage, since the absence of formal identity between them and the respondents in the exequatur application, coupled with the limited scope of the exequatur proceedings, may lead –as shown by the cases referred to- to an unfavorable outcome.

It may indeed be argued that this is not the more subtle approach to the question of legitimacy as regards the exequatur. At the same time, the already mentioned limited scope of the procedure to recognize or to declare the enforceability of a foreign judgment leaves a very small margin to argue otherwise. The Ontario court reached its conclusion after a detailed analysis of the relationship between the co-defendants on the basis of the doctrine of piercing the veil. Whether the same could be done in Spain in the context of the process of execution is disputed; the lifting of the veil at the stage of recognition/declaration of enforceability is even more doubtful. At any rate, it would require a huge legal engineering work. To our knowledge, it has been done just once: in the *Auto del Tribunal Supremo,* of 24 November 1998[17], the judge indulged himself into investigating the matter with the excuse of assessing whether the right to due process of the (presumably identical to the defendant corporation) suspected corporation has been respected in the original jurisdiction. A complex and, above all, artificial construction, not likely to be repeated.

We may, finally, wonder whether the difficulty described, linked to the procedural standing in the process of recognition / exequatur, could be circumvented in Spain by an argument similar to the one the parties used in Ontario: that is, by way of simply invoking the Ecuadorian decision of 15 October 2012. In our view the answer is no. Technically, the plaintiffs did not seek the recognition of the decision. However, assertions as the ones made by the Ecuadorian Court as to the identity of the defendants are not admissible without it; they are not mere factual contentions; quite the opposite, they comport an exercise of sovereign jurisdiction and therefore their admission to a forum other than the home State requires recognition, in the strict sense of the word. Regarding the question

16 *Autos de la Audiencia Provincial de Málaga,* 22 June 2000, JUR\2000\283925; 20 September 2000, JUR\2001\75705; 18 October 2000, n. 260/2000, JUR\2001\44012, 18 October 2000, n. 270/2000, JUR\2001\108636. Source: Westlaw Aranzadi.

17 *Auto del Tribunal Supremo*, 24 November 1998, RJ\1998\9228 (source: Westlaw Aranzadi).

whether this would be granted, again our opinion tends to favor a negative answer. Ecuador's decision is very sparse with regard to the reasons which drove to conclude the identity among the corporations involved. This laconism is not objectionable itself; still, is it is striking when compared to the careful application of the doctrine of piercing the veil in Spain. The Spanish judicial practice frequently recalls the exceptional character of the doctrine and stresses that it should only be applied under very strict conditions. This does not preclude its using, of course, when its requirements are met; also, the progressive systematization of these situations has not led to establishing an exhaustive list of circumstances[18]; and there are Spanish examples of piercing the veil in relation to groups of transnational companies[19]. However, the successful invocation of the doctrine of piercing the veil requires providing sufficient evidentiary material: on the one hand, to convince the judge; on the other hand, to provide the defendant with enough elements to build his defense. In this sense the lack of motivation of the court of Ecuador and its (apparent, at least) superficiality seem to us too weak to justify an outcome that calls into question fundamental principles, such as the independent personality of legal entities, and ultimately, the right to entrepreneurial freedom.

Finally, accepting the Ecuadorian ruling would also raise difficulties even if understood as a mere individualization of executable assets. As a resolution aimed at organizing the enforcement *senso stricto,* it is arguable that Ecuador lacks the international jurisdiction to adopt it. One thing is the lifting of the veil, which is to be determined within a contradictory process leading to a declaratory judgment; another thing is the discussion on the assets to satisfy the winning party[20]. Enforcement of judgments corresponds only to the courts of the place of execution; they enjoy exclusive jurisdiction in any proceedings about it (art. 22.5 Brussels I Regulation and LEC).

18 *Sentencia del Tribunal Supremo,* 13 December 1996, RJ/1996/9016; *Sentencia del Tribunal Supremo,* 29 October 2007, RJ/2007/8642; *Sentencia de la Audiencia Provincial de Salamanca,* 22 June 2009, AC/2009/1717, (source: Westlaw Aranzadi).

19 *Sentencia de la Audiencia Provincial de Barcelona,* 4 May 2006, AC/2006/1741 (source: Westlaw Aranzadi).

20 Although the issue is very much in the limit, since the lifting of the veil is what enables the identification of executable assets: *Auto de la Audiencia Provincial de Madrid,* 23 April 2004, JUR/2004/237498 (source: Westlaw Aranzadi).

Conclusion

In April 17, 2013, the U.S. Supreme Court adopted a landmark decision. *Kiobel v. Royal Dutch Petroleum* interprets the famous American Alien Tort Statute imposing significant limits on ATS litigation in the federal courts. American academy argues that there will certainly be a new wave of human rights litigation in U.S. State courts, in the form of transnational tort claims. From the European perspective, what really matters is the repercussions for our own courts of the *Kiobel* restraint imposed on US federal courts. Several countries of the old continent have already seen disputes relating to human rights against corporations lodged with their courts, belying the mythical exclusivity of the U.S. jurisdiction for these matters. We still lack, however, experience in the realm of recognition/exequatur. The decision of the Provincial Court of Sucumbios condemning Chevron Corp. to civil liability could be a pioneer in the way. However, from what we have seen, with not a very promising future.

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2 PART TWO

PRIVATE MILITARY AND SECURITY COMPANIES IN CONFLICTS

PMSC AND HUMAN RIGHTS: THE INTERNATIONAL BOUNDARIES OF THE SOVEREIGN POWER OF COERCION[1]

Helena Torroja Mateu,
Associate Professor of Public International Law, Universitat de Barcelona

The crisis of states monopoly regarding the power of military coercion: issues and recent regulatory initiatives

Among the various factors of crisis in the early twenty-first century, there is one whose harmful effects are still not seen in Western societies: the failure of the public power monopoly in the field of security and defense. This means that there is a state tendency to break the exclusivity exercise of this power, which happens to be shared with private companies. This breakup of the monopoly of armed coercion sovereign competition is one more element of what Habermas defines as the "breakdown of state authority" (Habermas 2008, 28.)

The international consequences of this crisis can be systematized around two questions. First, are there international regulations that put limits to the internal organization of the competence of armed coercion of the State (either the host state, the territorial state or the contracting state)? And second, are there international limits to operations (transnationals or not) of private military and security companies and their control by the affected States?

Before answering, let's see the recent international initiatives with normative vocation or without it, focusing on the universals, for being the most developed, although there are also other regional initiatives. (Gómez del Prado y Torroja Mateu 2011, 37 y ss.).

1 The study is part of the research project of the Ministry of Science and Innovation (DER 2009-10847) entitled The enforceability of international law of human rights in crisis situations ", led by Dr. Jordi Bonet Perez.

The *first initiative*, by motion of Switzerland and the ICRC, is the "Montreux Document on international legal obligations and good practices relevant to States related to operations of private military and security companies during armed conflicts", September 17, 2008.[2] Montreux Document is not binding. This is an "understanding" in the words of Swiss Permanent Representative.[3] Montreux Document itself makes it clear in his preface: This document is not a legally obligatory instrument.[4] Today a total of 45 states have announced their support to the document to the Department of Foreign Affairs of Switzerland[5]. The European Union has also announced its support today, on July 2012. In the content of the document two parts are clearly distinguished, in order to show two levels of legal scope in the document's contents. Thus, the first part, seeks to remember the "rules" for states and PMSCs and their personnel. It lists a series of 27 obligations for States and PMSCs, "well-established international law" (preface, point 2). According to the same document, it is about valid international regulations, "several international agreements of international humanitarian law and human rights and international common law" (Introduction, Part One). In this vein, this part would be declaring the existence of certain international regulations. For the States that support the document, that part would be enforceable, in my opinion, as an instrument that is acknowledging the existence of international obligations tor that State. The second part of the Montreux Document collects 73 recommendations about the best practices of the States, about PMSCs, related to the above mentioned promotion of international regulations. This is clearly a guide of conduct for States, from a *soft law* nature. This content, it wouldn't have more value than the pure policy that the States would subscribe to without any legal scope. Finally, we should clarify that the rules in both parts (whether are preexisting regulations, whether are recommendations), are meant to be applied in situations of armed conflicts. Even though it foresees that they could be useful in other post-conflict cases or comparable situations, it is clear that the international humanitarian law is applicable only in those contexts. (Preface, item 5).

2 On this agreement by consensus at the fourth wmeeting and the various meetings see the information provided by the website of the Swiss Foreign Ministry: *http://www.eda.admin.ch/eda/en/home/topics/intla/ humlaw / pse / parsta.html,* December 7, 2012.

3 Letter of October 2, 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary General, of October 6, 2008, Doc A/63/467-S/2008/636.

4 A/63/467-S/2008/636 Doc, *doc. cit.,* preface, point 3.

5 Vid. *http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html*, consulted May 22, 2013

A *second initiative* is the "Draft of a possible convention on private military and security companies (PMSCs)," presented by the Working group on the use of Mercenaries to the Human Rights Council of the United Nations[6]. The project was a response to the request of the same Council to discuss a possible draft convention on PMSCs [7]. The fruits of such consultations, and with the support of certain States, the working group tried hard in order to deliver a text in the term of time agreed by the Council, and before the end of the mandate of various representatives of the Group (between 2011 and 2012, all its members were renewed). The text was received by the Council, who immediately decided to create an open intergovernmental group with the mandate to examine the viability or not of this text [8]. Leaving aside political arguments of some states about the lack of the Council's competence to regulate on the subject matter of the project,[9] from an academic doctrinal perspective, it makes sense to argue that should be jurists experts and within the framework of an agency with the function to codify and develop the international law - such as the International law Commission - , those who are the most appropriate to undertake a task of this magnitude.

Because the contents of the agreement is not only an exclusively topic of human rights and international humanitarian law, although it has a close relationship with them. Rather, the object and purpose of the possible agreement is to establish international limits to the competence of the military coercion within the State. There is no area of the state competence that most affects the core of its sovereignty than this one. The debate is currently transferred to the Intergovernmental Working Group, who has met twice, having shown the political tensions that the States are facing. The Group of western countries opposes the possible agreement Project, supporting their arguments largely on the adequacy and effectiveness of the International Code of conduct for suppliers of private

6 Text in: Human Rights Council, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of peoples right to self-determination, of July 5, 2010, Doc A / HRC/15/25.

7 Human Rights Council, Resolution 10/11 of March 26, 2009.

8 Human Rights Council, Resolution 15/26 of 1 October 2010, 32 votes in favor, 12 against and 3 abstentions (point 4 of the regulatory part).

9 The Western delegations (European Union, Norway, among others) have pointed out that the issue should be addressed in the Sixth Committee of the General Assembly, not the Human Rights Council (see Gómez del Prado, JL and Torroja Mateu, H. , *op. cit.,* p. 62-63)

security services (ICOC)[10]. There is no doubt that behind are the interests of the States that turn mostly to this industry, especially when they realize military operations abroad. Opposed to this, the Asian countries, led by China, the Russian Federation, Cuba and others like Nigeria, are tireless advocates of the Agreement Project [11]. The confrontation seems to return to the classic scene of the Cold War... The underlying theme had been bolstered in the following way; it is about the liberalization of a public power, the power of coercion. In March 2013, the Human Rights Council, has decided to extend the Groups mandate for two more years.

The *third recent initiative* is the self-regulation of this business sector. The Swiss Government, once adopted the Montreux Document, they launched another initiative for the members of companies; this is led to the development of a code of conduct for their services: the International Code of Conduct for suppliers of private security services (ICOC), approved in 2010 [12]. Behind its development it is also a powerful lobby formed by the most relevant British and American companies in the sector. From then until now the number of signatory companies has been growing rapidly and today are about 630 [13]. United States and Britain strongly support the signing of this Code by companies, and in the international debates on the Human Rights Council and on the Intergovernmental Group who was created by the Council in order to chart the possible draft convention, are embodying this issue. It is an instrument of companies self-regulation and it is based, therefore, on a favourable conception to this business phenomenon. There is no purpose to legally bind the companies, nor it is directed to States or international organizations. At the moment, it is discussing the adoption of a Charter of the ICOC, which aims to regulate the mechanism of verification

10 For example, among the states that voted against the creation of the intergovernmental Working Group that should follow up on the Draft Convention were Belgium, Slovakia, Spain, United States of America, France, Hungary, Japan, Poland, United Kingdom of Great Britain and Northern Ireland, Republic of Korea, Republic of Moldova, Ukraine (see HRC Resolution 15/26 of October 1, 2010).

11 For example, among the states that voted in favor of creating the intergovernmental Working Group that should follow up on the Draft Convention were Brazil, Burkina Faso, Cameroon, Chile, China, Cuba, Djibouti, Ecuador, Russia, Gabon , Ghana, Guatemala, Libyan Arab Jamahiriya, Jordan, Kyrgyzstan, Malaysia, Mauritania, Mauritius, Mexico, Nigeria, Pakistan, Qatar, Senegal, Thailand, Uganda, Uruguay, Zambia *(Ibid)*.

12 Swiss Confederation, International Code of Conduct for suppliers of private security services, November 9, 2010, Vid. *http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse.html, and http://www.dcaf.ch/Programmes/Private-Security-Governance*.

13 All details are in *www.icoc-psp.org* consulted on May 22, 2013.

standards and certification as well as monitoring the implementation of the Code by companies. Among the purposes of the ICOC is to establish in minute detail the obligations to respect human rights and international humanitarian law that business and its staff must know and apply. As it is stated, though this model can "be useful to promote respect for international humanitarian law as a supplement to other legal instruments, (... / ...) cannot make up for the absence or inadequacy of a national or international legislation" (Jorge Urbina 2012 , 720).

Let see now how these instruments respond to the two questions posed.

The international public law and the competence of armed coercion of the State

The problem that now arises is to what extent the international public law establishes limits on state policies and behaviours in relation to the internal organization of its armed coercion competence. In any way the problem is focused on the content of the fundamental principle which prohibits the threat or use of force by states. It might seem that it is like this is at first glance, but this fundamental rule of the international legal system, as it is well known, regulate the licit and illicit use of armed force by States in their international relations. It does not prohibit, permit or compel specific behaviours in relation to the internal organization of armed coercion. It is about to identify the extent to which the international law limits or could eventually limit the bankruptcy of the state monopoly of armed coercion.

In this context, the key question is whether there are areas that would be exempt, on the basis of international law, of any privatization or delegation, as well as, what principles govern the privatization or delegation of other areas (legal regulation, subjection to a regime of authorizations, central registry, state control, etc..). Before moving on to discuss how international texts are dealing with the problem, should be consider possible international foundations about the existence of international boundaries objectives of the bankruptcy of the monopoly of coercive power.

The bankruptcy of the state monopoly of coercive power and the notions of "sovereignty" and "State governed by the rule of law"

In the *first place*, we are wondering whether the monopoly of coercive power is an inherent element in state sovereignty, so that the decision to privatize or

delegate, alters the concept of State and this of *sovereignty* that legitimizes the State (Aparicio, 2009, 50). Indeed, as it is stated by the Swiss Federal Council, "the state monopoly of the use of force undoubtedly constitutes the core of the state security system," in this sense, the "privatisation of such tasks would call in question the existence of the state per se and certainly its legitimation as the entity responsible for public order. The privatisation of such tasks can therefore only be considered in limited specific instances and in a complementary context" (Swiss Federal Council 2005, 9-10).

We recall that the modern state, as a form of political organization, consolidated definitively around the first half of the seventeenth century, with the Peace of Westphalia, is built around the centralized power and also around two basic pillars: the emergence of bureaucracy -the professional management- and the professional army of permanent nature (Aparicio 2009, 50).

This element, inherent to the birth of the State, was on the basis of the new way of the powers organizing that replaced the medieval system. With it, came the disappearance of mercenaries and privateers. Thus, "when the soldiers (i.e. mercenaries or salary earners) ceased to be paid by the monarchs and the National Army was created (for defence, which is one of the main rights that the Nation is exercising), the military stopped be considered an aristocratic company that hired workers and became "the armed wing of the Nation" (organic conception of the state) or simply "the nation in arms" (democratic conception) "(González Casanova 1984, 35).

It would be therefore an essential element of the State to safeguard the monopoly of power of armed coercion. From a functional conception of sovereignty, this not only means "the right to exercise state functions on a level of independence and equality with other States", but also "imposes a duty to respect the rights and duties of States, the direct submission of these to the international law " in this sense sovereignty includes the" duty to develop (... / ...) the state activity, the functions of the State "(Carrillo Salcedo 1969, 68). It is at this point of the speech in which the question arises *whether it is not a state function safeguard the monopoly of coercive power.*

In the political debate on the privatization of state functions, different ideological positions can be held, ranging from liberal to the Social Democrats. One can hold one position or another and argue it according to his view of the relationship between state and society. But when it is about an essential

function of the state, which affects the notion of state sovereignty, it should be possible to find constitutional and international legal limits. In practice, even the most liberal doctrinal positions like Hayek, include coercive power as an essential function of the state (Hayek 1960, 133 et seq.), which is very significant, because those who advocate a liberal conception of the state, a minimum and no auditor State, have traditionally included the power of coercion, along with other powers or functions such as law, justice, money, taxes or international relations. For their part, social democrat authors such as Kelsen (Kelsen 1989, 102) and Heller (Heller 1947) are also including among the essential elements of the organization of sovereign power, the monopoly of military power.

That said, if it is an essential function of the state, we are not only before a State's right but before its duty, from the generally accepted functional conception of sovereignty [14]. Thus, the State would have the duty to protect its monopoly, as a right of other states.

Secondly, we are wondering whether the monopoly of coercive power is an inseparable element of the obligation to respect and guarantee the human rights, one of the pillars of a state governed by the rule of law.

The link between the coercive monopoly of power and the respect and guarantee of human rights is already reflected in the Declaration of Rights of Man and of the Citizen of 1789:

> "*Guaranteeing the rights of man and of the citizen requires a public force: This force is therefore established for the benefit of all, and not for the particular use of those to whom it is entrusted."(Art. 12 of the Declaration of rights of Man and citizen of 1789).*

The Spanish law of privatization of security of 1992 (police coercion), is very clear: "in the exercise of basic rights and freedoms, there is no possible regulation by private companies and the monopoly of the state, not only the ownership, but the exercise, is total "[15]. Thus, private security forces can never intervene in the

14 Functional concept already defined by Judge Huber in the Subject of Palmas or Miangas Islands on 1928(UN Treaty Arbitral Sentences, vol II, p. 828 ff.)

15 Statement of Intent and art. 3 of Law 23/1992, on July 30, on private security (BOE-A-1992-18489), as amended by Royal Decree Law 8/2007, on 14 September (BOE-A-2007-18477).

development of labour or political disputes, meetings and demonstrations, nor exercise control over ideology or opinions of all kinds.

Therefore, from the perspective of the state governed by the rule of law *stricto sensu*, sovereignty is not absolute and unlimited, but must meet specific requirements. As it was stated, "(...) the fundamental requirements of the state governed by the rule of law: rule of law, law as an expression of the general will; division of powers and legality of the Administration with antitotalitarian legal mechanisms, and finally, respect , warranty and material realization of the rights and fundamental freedoms "(Diaz 1983, 154). It is true that today we are in a process of internationalization of the concept of rule of law that carries with it a relaxation and attenuation of its content. But it is far from a constitutional notion of the rule of law. In this, the executive power (and therefore the power of coercion) is subject to legislative and judicial power, and is always limited by the obligation to respect and guarantee the human rights.

So that the legitimacy of the sovereign power, is now recognized always when the human rights are respected. To that is referring Ferrajoli when is proposing the "constitutionalism as a new paradigm of law" (Ferrajoli 1999, 65), considering that it is based on identifying the fundamental human rights as an essential element of democratic constitutional order and on the submission to international law relating to human rights.

The answers to the problem in the recent international texts

Let's see how the indicated texts respond to the issues raised: there are areas of competition of military coercion that cannot be privatized or delegate, and in case of privatizing or delegate, how should do it (by law, regulation ...), and what control system must be set (whether to submit to requirements, authorizations, etc..).

As for the existence of international limits regarding the competition of military coercion in its dimension of the ban delegation of functions that should form part of the essential core of this sovereign jurisdiction, only the possible draft convention provides a concrete answer. Precisely among the main purposes of the Convention is to prohibit the delegation of inherently State functions in the framework of the legitimate use of armed force. Article 1, paragraphs 1.a) and b), maintains that:

"*1. Bearing in mind the fundamental principles of international law on the prohibition of the threat and use of force and on the equal sovereignty of States, the purposes of the present convention are: (a) To reaffirm and strengthen State responsibility for the use of force and reiterate the importance of its monopoly of the legitimate use of force within the comprehensive framework of State obligations to respect, protect and fulfil human rights, and to provide remedies for violations of human rights; (b) To identify those functions which are inherently State functions and which cannot be outsourced under any circumstances*".

These goals are directly related to two subsequent articles of Part II entitled "General Principles". On the one hand in Article 4, entitled "Responsibility of States vis-à-vis private military and security companies", whose content is to synthesize the main obligations of the Draft Convention. On the other, in Article 9 entitled "Prohibition of the delegation and / or outsourcing of inherently State functions". So, there are functions that can never be delegated which are the inherently state functions and which are defined in Article 9 as follows: "including direct participation in hostilities, waging war and / or combat operations, taking prisoners, law-making, espionage , intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction, police powers, Especially the powers of arrest or detention Including the interrogation of detainees, and other functions that a State Party considers to be inherently State functions.". This article may be criticized for its content for the terminology that is used and especially by the difficulty that would entail finding a consensus among the States in this regard.

As for the Montreux Document, it does not give a direct answer to this question. Although, some references can be found *in the first part regarding the relation on the existing international standards related to private military and security companies that are recalled at the States*. Specifically, the rules relating to the contracting States, in section 2, establish that those States *are obliged not to contract PMSCs to carry out activities that the international humanitarian law assigned explicitly to an agent or a state authority, like for example exercise the power of the official responsible of the war prisoners camps or civilians internment places* in accordance to the Geneva Conventions. So, this would be the only clear conventional limitation to the *privatization / delegation* in the international humanitarian law. In the second part regarding the recommended good practices, there are some recommendations that seek to modulate or limit the bankruptcy of the state monopoly on the use of force. For example, establish-

ing a good practice (similar to the contracting States, territorial and host State) related to the determination of the delegated services: "*States determine what services may or may not be hired to PMSCs; among other criteria will be taken into account if a service entail direct participation in the personnel company's hostilities* (rules 1, 24 and 53)".

Finally, it is clear that we won't find direct references to this problem in the Code of Conduct for suppliers of private security services. Now, indirectly it is taken for granted that could perform some activities considered in other international texts as inherently state. This is the case of the detention activities, activity that the possible convention Project considers as inherently state, and this fact is not delegated. It specifies that *detainees, will only be escorting, transporting or question, in the event that: (a) the company is specifically hired to do so by a State, and (b) the company's staff has received the personnel raining required in matters of applicable national and international law* (Rule 33). The Code is more cautious when it is about arresting people that is prohibited except in case of self-defence or threats of violence or attacks or crimes against staff or clients or assets, must be handed to the competent authority as soon as possible (Rule 34). This is a very significant detail: while the Code addresses these functions, being assumed that could be performed by these companies, the possible draft convention may consider them as functions that are not delegated since they are inherently State functions

Now let's see the second part of the questions. In relation to the areas of coercion's competence, in case that this would be delegated by the state, what principles should such delegation govern and how this must be controlled. So, for once again, the possible draft convention aims to provide an answer to the problem. Its second major purpose is to force the States to regulate, supervise and control PMSCs and, also, to punish and demand liability for unfulfillment obligations by PMSCs and their personnel, and in addition, to promote international cooperation for that purpose. Thus, the delegation or privatization should respect certain principles: by law, verifying an authorizations / licenses and registration system, checking, through procedures, determined criteria (training in humanitarian law, human rights, and use of force ...).

As for Montreux Document, it is focusing on the *second part on recommended good practices* seeking to modulate or limit the form of delegation of the States: Contracting State is encouraged to adopt a procedure for the selection and recruitment of PMSC (rules 2, 3, 4) and some selection criteria (rules 5-13). The

territorial state is encouraged to establish a licensing procedure to act in its territory (Rule 25), and establish also a process in relation to the authorizations which means designating a central authority, among others (26-29). Best practices are recommend to the host State relating to the export of PMSC services that are established under the law (rules 53-66), among others.

In this sense, the content of the possible draft convention and the Montreux Document is similar. The main difference is whether they have a legal vocation or not. The International Code of Conduct does not address directly this issue.

The International standards that limit the behaviour of PMSCs and their international control

Now it is time to answer the second question on whether there are international standards that limit the actions (transnational or not) of private military and security companies, and if so, whether there are international control mechanisms that could apply of such rules. In turn, we will try to analyse what is the position of the recent initiatives.

The current public international law

To explore this question is important to note that there are different underlying assumptions, both from the perspective of rights violations and the context (conflictual or not) in which the company acts. Indeed, there is a wide range of possible human rights violations, both within the company (social and labour rights), and externally providing concrete services (civil rights and rights protected under the international humanitarian law). But the company can act in different contexts, expanding or reducing the international legal regime. While in the recent past, there have been many cases where they have acted in contexts of armed conflict (and thus calling for the implementation of international humanitarian law), there is a proven tendency to act in other contexts, which is the case of the armed protection against piracy. For this reason, instead of seeking an answer of general application, [we ¿?] must seek international standard applicable to each specific fact.

And this, without stopping to observe the underlying reality: the company will always be operating under a specific internal legal system, whether it is the territorial or operations state, or the host State or the contracting State. In practice, it will depend a lot of the international legal relationships that this particular state has.

The first assumption made is that of the armed conflict situations that open the door to these companies to the application of the international humanitarian law. The ICRC's position is clear: there is no legal loophole and the international humanitarian law is applicable regardless of whether the personnel of these companies is considered civil or fighter (which depends on each individual case). The International humanitarian law must be respected and applicable in times of armed conflict by all participants (military, civilian irregular forces ... private companies) irrespective of the status they have. In addition, the States that had firmed the Geneva Conventions of 1949, have a general monitoring obligation, established in Article 1 common to the Geneva Conventions ("to respect and to ensure respect for the present conventions..."). Obligation which has come to be interpreted in an applicable way: "*In fact they [the States] have to ensure even more that the private security companies which they deploy in conflict situations, which are based in their state or which are operational on their territory, respect international humanitarian law.*" "*In addition, the contracting states are obliged to prosecute especially in cases of serious breaches of the Geneva Conventions regardless of where the act took place or the nationality of the perpetrator*" [16].

Now, although the International humanitarian law is applicable to PMSCs personnel, the question remains: is it sufficiently effective in these cases? It seems that is not always like this; in many cases it will be necessary to adjust the companies structure and operation so that they can apply the humanitarian law, in particular that "they have an authority or leadership with the ability to exercise some control over its members and that ensure the compliance of his instructions "(Jorge Urbina, 2012, 725-726). This involves the adoption of monitoring mechanisms of these PMSCs, especially, from the part of the host States; it would be necessary to clarify this issue legally. And also requires the obligation by these states to supervise the training in International humanitarian law of these companies. We should clarify what is the meaning and scope of the obligation in the common Article 1 of the Geneva Conventions, especially in regards to the "ensure respect" perspective regarding PMSCs. In this sense, I wonder if many of the rules included in the second part of the Montreux Document (like recommendations) could not have been included in the first part, like obligations. It would have been more courageous.

16 Report by the Swiss Federal Council ..., *doc. cit.*, p. 46.

A second assumption could actually be delimited by the situations that are outside the scope of the application of armed conflict, in times of peace. It is evident that in these cases does not seem that PMSCs and their personnel operate in a legal vacuum. They always remain under the application of the territorial's state legal order (penal code, labour rights, fundamental human rights ...)..; a State which is governed by the rule of law, respecting Ferrajoli's constitutional paradigm, or not, depending on the case. This is one of the problems that appears in reality. Followed by the major problem when the host State has negotiated with the operations State to include jurisdictional immunity clauses (civil, criminal and administrative) for this staff. This situation would justify an international minimum standards that PMSCs and their employees must respect in their behaviour both internal (company-staff relations) and externally (business-to-population relations). This is what precisely is seeking to identify the possible draft convention Working Group on the Use of Mercenaries.

A third assumption that every day is becoming more important, is the use of armed force by private companies in order to get protection against maritime piracy. In this area, the use of force is being justified in the context of self-defence of the state, and thus, of the individuals on the basis of criminal law. Professor Sánchez Patrón has shown that in this area there is an international legal vacuum that would justify a necessary international regulation treaty (Sanchez Patrón 2012). The International Maritime Organization itself is considering this option. The Intersessional Maritime Security and Piracy Working Group, which belongs to the Maritime Safety Committee of the IMO, at its meeting from 13 to 15 September 2011, adopted in this area are a number of notices addressed to the States, where it is stated that the current international regulation is insufficient. It is interesting to point out that they consider that neither the Montreux Document nor the ICOC are sufficient. The first, because the "international humanitarian law is applicable only during armed conflict", the second because "is written in the context of self-regulation and only for land-based security companies, and is therefore not directly applicable to the Peculiarities of deploying armed guards on board merchant ships to protect against acts of piracy and armed robbery at sea"[17]. The notices, which are not binding, are setting a series of recommendations and standards in matters of private security at sea.

17 Interim Guidance to Private Maritime Security Companies Providing Arm Privately Contracted Security Personnel on Board Ships in the High Risk Area, 25 May 2012, doc. MSC.1/Circ.1443, section 2.1, p. April.

In short, although it can be argued that there is no gap in the framework of international humanitarian law in relation to the activities of PMSCs, it seems that there is a need to establish international limits applicable to the conduct of PMSCs in other areas. The underlying issue is the difficulty of regulating directly the companies, given the recurring opposition of states to do so. Let's see how the various initiatives resolve this situation.

The answers to the problem in recent international texts

The possible draft convention is the only document that clearly seeks to answer to this legal loophole, attempting to identify the minimum standards applicable in any act. It aims to regulate the activities of PMSCs and of the subcontractors, but always in an indirect way: States shall adopt the necessary measures to enforce PMSCs and the subcontractors to carry out concrete obligations. These companies' indirect obligations are contemplated along the articles which may highlight the following:

The respect for international human rights standards and international humanitarian law[18],- the prohibition of certain purposes and uses of force by PMSCs and their personnel (direct participation in hostilities, acts of terrorism and military actions pursuing any of four principles relating to attacks on the internal political order of the State, on its territorial borders, on an armed intervention and attacks on civilians or on disproportionate damages)[19] - the prohibition of exercise of inherently State functions[20] -the prohibition of the use of certain weapons, according to the principles of international humanitarian law, and in any case, the use of weapons of mass destruction (nuclear, chemical, biological and toxic[21] - the prohibition of the acquisition, possession and illicit trafficking of firearms, their components and ammunition[22] - the respect for the basic international standards on labour issues, mentioning expressly the territorial State

18 Article 7 also introduces the responsibility of line managers of PMSC personnel, taking the idea of Montreux Document (section 7.3). Also in other indirect items (art. 5, art. 14.3, Art. 17.2 and 4 of the possible draft convention, *doc. cit.*).

19 Art 8 and Art.17.5 of the possible draft convention, *doc. cit.*

20 Article 9 of the possible draft convention, *doc. cit.*

21 Article 10 of the possible draft convention, *doc. cit.*

22 Article 11 of the possible draft convention, *doc. cit.*

and the operations State[23] - the respect for the international standards regarding the use of force and firearms during military or security activities[24] - the question of determining jurisdiction, in order to avoid abusive immunity clauses in contracts or interstate agreements.[25]

Having said that, even though there is a positive intent, the finished result can be much more improvable. Some of these obligations could have been worded more simply, omitting aspects that are reiterative. Or even some of them could be simply deleted for being difficult to justify them; such in the case of the prohibition of certain purposes and uses of force, especially as it has seen in the writing of Article 8 of the possible draft convention, which writing is directly inspired by the use of state force, and so, it is losing sense; besides these assumptions would be covered by other international standards.

Nevertheless, a very necessary aspect is regarding the guidelines of the use of armed force in peacetime by individuals, which Article 18 of the possible draft convention is intended to summarize inspired by the important international recommendations. This is a central issue in the relevant international legal vacuum. Now, it is also important to think that if it has been difficult to adopt a conventional international regulation on the use of force and firearms by public officials, it will be harder in the case of private companies.

For its part, the *Montreux* Document approach in this area, is partly similar to the possible draft convention. *In the first part*, the document identifies as international legal obligations, regarding to PMSCs, the follows[26]: PMSCs and their personnel have the obligation to respect the international humanitarian law and human rights standards imposed on them by *applicable national law*, as well as comply with other applicable provisions of national law, such as criminal law, tax law, the law on immigration, labour law and specific rules on military or private security. Additionally, the Montreux Document has been created for being applied in times of armed conflict and, thus, it is focusing on the staff's statute, and following the lines advocated by the ICRC, is deter-

23 Article 17. 1 of the possible draft convention, *doc. cit.*

24 Articles 17.3. and 18 of the possible draft convention, *doc. cit.*

25 Article 21 of the possible draft convention, *doc. cit.*

26 Paragraphs 22-27 of the Montreux Document, *doc. cit.*

mined by international humanitarian law[27], establishing a liability rule for the higher authority[28].

In its second part, the Montreux Document contains a number of "rules relative to the provision of services by PMSCs and their personnel"[29]. Among these, some are similar to the possible draft convention but with a more simplified writing. Specifically in the case of the rules on use of force and firearms by PMSCs and their staff members, such as: "a) Make use of force and firearms only when it is necessary for self-defence or defence of others; b) In case of use of force and firearms inform immediately the competent authorities and cooperate with them". Moreover, it also recommended to States to establish relevant rules on possession of weapons by PMSCs and their staff members[30]. In this case, there is greater specificity and detail on this issue than in the regulation of the possible convention Project, in Article 11.

As for the International Code of Conduct, it answers this question directly, by setting a long list of obligations for PMSCs and their personnel. At first place, it sets out a number of general commitments relating to: implement and en-

27 So: a) if they are civilians, they cannot be attacked, except if they participate directly in the hostilities and only during their participation. b) Members of PMSCs personnel must respect the applicable international humanitarian law, c) are entitled to the status of prisoners of war in international armed conflict in case that they are accompanying the armed forces according to the conditions established in paragraph 4) of section 4A of the Third Geneva Convention, d) they must comply, as far as they exercising prerogatives of public authority, the State's obligations under the international human rights standards, e) they can be prosecuted if they commit type acts such as crimes of theapplicable national law or international law (*Ibid*).

28 Superiors of PMSC personnel (directors and managers of PMSCs) may be considered culprit for crimes against international law committed by members of PMSC personnel under their effective authority and control in case they did not exercised on them the necessary control in accordance with international law standards. Superiors responsibility does not arise exclusively from a contract (*Ibid*).

29 Rules 43-45 of the Montreux Document, *doc. cit*.

30 "A) Limit the types and amount of weapons and ammunition that PMSC may import, possess or acquire; b) require registration of weapons, including its serial number and caliber, and ammunition before the competent authority; c) require that members of PMSCs personnel obtain a permit to carry weapons which may present when it is requested; d) limit the number of employees who are allowed to carry arms in an area or a specific context e) require that guns and ammunition are stored in a safe and secure place when staff members are out of service, f) require members of PMSCs personnel carry authorized weapons only when are on duty; g) control the possession and use of arms and ammunition after an operation is completed by returning them to their place of origin or disposal in accordance with the relevant standards". And all cases required "that members of PMSCs personnel can be identified during the performance of activities defined under their contractual responsibilities" (*Ibid*).

force the applicable law, human rights, humanitarian law; not to participate in operations opposite to the Security Council's sanctions; not to engage in acts of war crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, sexual or gender violence, human trafficking, arms or drugs trafficking, child labour or extrajudicial, summary or arbitrary executions.

Later, more specifically, between the rules relating to the conduct of companies staff in their dealings with other persons during the course of their service, it has established a general treatment of all people "with humanity and with respect for their dignity and private life" and to denounce the violation of the Code[31]. The rules are laid down by the Basic Principles on the Use of Force and Firearms of the United Nations to the Officials Responsible for the Law Enforcement (1990). As well as rules related to the detention; persons arrest; the prohibition of torture, sexual exploitation and abuse or gender violence; human trafficking; prohibition of slavery and forced labour; prohibition of the worst forms of child labour; discrimination; identification requirements and registration of personnel and assets (vehicles, weapons).

In turn, specific commitments for management and government regarding PMSCs are laid down, such as the incorporation of the Code in the policies of the company; the selection and verification of personnel records; the selection and testing of subcontracted personnel records; the staff training, arms control and training, the management of war material, incident reporting, the safe and healthy work environment, the prohibition of harassment, and the adoption of a complaint procedure.

Final considerations

It is necessary to establish international limits for state actions relating to the delegation or privatization of power, especially coercive military power. Today these limits have been developed through initiatives of a different legal vocation.

Given this diversity, the debate is about why we need an international convention, which could include both codification and progressive development in

31 Rule 28 of the ICOC, *doc. cit.*

the field. Underlying this debate is a fundamental question: what conception is defended regarding the rule of law, and specifically regarding the competence of coercive power. In front of the liberalization of certain public services of the State, one can have a more or less liberal, or, more or less social democratic conception. But we are not talking here about a public service such as health, education, transport ... We're talking about an essential part of the hard core of sovereignty on which the modern state in Westphalia was built: the monopoly of the legitimate use of force, which is now a cornerstone of the State governed by the rule of law. It is undeniable that the limits of the coercive power of the legislature (submission to the legislative and judicial power) are a guarantee for the effective enjoyment of human rights and fundamental freedoms. By arming those companies it is surpassing the notion of rule of law with its defining elements (democracy, human rights, rule of law, and separation of powers). And doing this is irresponsible, even in the most complete legal anarchy. In these times when international market regulation is talked about, it is safe to introduce the necessary international armed market regulation. A different question is what United Nations authority is the most competent and qualified to propose this general regulation. So far, the work under the Human Rights Council does not seem to be fruitful.

In sum, it is not about deciding between the International Code of Conduct and a future international Convention, or between this and the Montreux Document. But to be convinced that the identification of international legal obligations and limits of States in relation to the hard core of its sovereignty, is a way for the state to protect itself "from itself", in the person of Governments. Ultimately, these obligations, in my opinion, already exist; they are intrinsic to the essential element of international subjectivity of the state: sovereignty and its corollary monopoly of the legitimate use of force. It is necessary to define a *minimum standard of behaviour* of States in relation to the bankruptcy of the state monopoly of coercive power, that is, establish international minimums on the privatization of coercion and on the existence of delegated activities. In this sense, an international convention is needed, at least, to set existing limits, as well as, to regulate other new derivatives of the practical reality of this phenomenon (codification and progressive development), which will limit the behaviour of governments. Therefore, a convention is essential. And that does not undermine the complementarity character that could have the International Code of Conduct, which is useful but insufficient.

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INTERNATIONAL LAW AND THE USE AND CONDUCT OF PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICTS[1]

Marco Sassòli
Professor and director of the Department of public international law and international organization at the University of Geneva

Introduction

A growing number of states (and sometimes international organizations, NGOs or businesses) use private military and security companies (PMSCs) in armed conflicts for a large variety of tasks, which were traditionally fulfilled by soldiers, in the field of logistics, security, intelligence gathering, and protection of persons, objects and transports. A definition of PMSCs may be found in the Montreux Document, which, though not binding, constitutes the only inter-state instrument guiding states in their use and tolerance:

> '"PMSCs" are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel (Montreux Document 2008, Preface, point 9(a)).'

The privatisation of activities formerly exclusively performed by states is a general tendency in recent years. It even concerns the use of force, within and between states, a domain previously considered as a core attribute of the Westphalian state. Historically, this constitutes a simple return to previous realities. However, modern codified international humanitarian law (IHL) was born during the phase of nearly complete state monopoly .

1 This article is largely based upon - and reproduces in part the foreword and the conclusion I wrote of - a book written by Lindsey Cameron and Vincent Chetail (Cameron and Chetail, 2013), which presents the results of a research project funded by the Swiss Science Foundation on the subject. This research project was supervised by the author. The aforementioned book also provides for references for statements and opinions contained in this article.

This development fits into – and is perhaps situated at the cutting edge of - a larger challenge for international law in the contemporary world: the growing importance of non-state actors in international relations and the difficulty of dealing with them under the traditional categories of international law, to attribute them to a state and to determine which state has what obligations in their respect.

Multinational enterprises, armed groups, terrorists, and non-governmental organizations are becoming increasingly important, while public international law is still mainly addressed to states and developed by states, and its implementation mechanisms are best geared towards states. Even when it comes to the use of force within a state against armed groups and between states, a domain previously considered as core attributes of the Westphalian state, private actors, that is, PMSCs, play an increasing role. In some recent conflicts, some belligerent states have employed more PMSC contractors than members of their regular armed forces (Schwartz and Joyprada 2011, Summary). PMSCs are perceived as committing violations of IHL or even as not being bound by the rules of IHL adopted by states to govern the conduct of their armed forces which ensure that they respect civilians and other war victims.

The international law applicable to PMSCs is therefore not only a practical humanitarian challenge, but also an ideal testing ground for conceptual *de lege lata* questions and *de lege ferenda* dilemmas. Here, as elsewhere, the question arises whether international law should combat (or already outlaws) the phenomenon, or cover and regulate it. Here, as elsewhere, the possibilities are either to address those actors directly by international law or to deal with those categories via well-established subjects of international law such as states and international organizations, and to a certain extent (in particular for international criminal law) individuals.

The issue is conceptually particularly challenging for the law prohibiting the use of force in international relations because that law is traditionally exclusively addressed to states. In practice, the issue also raises difficult problems for IHL. Certainly, since 1949, this branch has been, at least in part, equally addressed to armed groups involved in armed conflicts against governmental forces and between one another. With the – at least theoretically – breathtaking development of international criminal law and international criminal justice in recent years, the individual has also become the addressee of some rules of IHL. Private companies hired by parties to armed conflicts or others to conduct armed

conflicts, however, are not yet explicit addressees of IHL. As for International Human Rights Law, PMSCs raise the traditional debate about when and to what extent non-state actors are bound by human rights, combined with the controversy about the relationship between IHL and Human Rights, which may not necessarily be the same for a non-state actor as for a state.

The historical, international relations, political science, psychological or public finance aspects of PMSCs, who uses them, for what purposes, in which situations, how they behave: all these questions have been analyzed by others (See, for example, Avant (2005); Kinsey (2010); Ortiz (2010); Dunigan (2011); Mandel (2002); Carmola (2010); Leander (2006); Alexandra, Baker and Caparini (2008); Jäger and Kümmel (2007)). I do not deal with how international law should be developed to cover PMSCs more appropriately. For me PMSCs are, as war is for IHL, a reality. I try to apply international law as it stands to this reality.

International law applicable to armed conflicts which is relevant to PMSCs

Armed conflicts are regulated by two distinct and completely separate branches of international law: the *ius ad bellum* prohibiting and exceptionally authorising the use of force, and the *ius in bello*, regulating, mainly for humanitarian purposes, that use of force independently of whether it is lawful or unlawful under *ius ad bellum* and regardless of the causes espoused by or attributed to the parties to the conflict. No matter the legitimacy of the use of force in the first place, the laws on how force may be used apply equally to all parties to a conflict.

The *ius ad bellum* defines when it is lawful to use force in international relations, i.e., to resort to armed conflict. At least since the prohibition of the use of force was enshrined in Article 2 (4) of the UN Charter, it could be more appropriately referred to as *ius contra bellum*. Indeed, the use of force between states is prohibited. There are exceptions, in particular individual and collective self-defence, enforcement measures decided or approved by the UN Security Council, probably national liberation wars and arguably other cases. However, those exceptions in which a *ius ad bellum* (i.e., a right to wage war) exists may only justify the use of force by one party. The enemy has necessarily violated the *ius contra bellum*. States are never equal before the *ius ad bellum* and if the *ius contra bellum* were respected, international armed conflicts would not exist. In this article, I will use a broad concept of *ius ad bellum*, one which in-

cludes not only the rules of the UN Charter on the use of force, but also all rules of international and domestic law which directly or indirectly justify the use of force. In non-international armed conflicts, no international *ius ad bellum* exists concerning non-international armed conflicts, since such conflicts are neither justified nor prohibited by international law. Nevertheless, *ius ad bellum* for non-international armed conflicts does exist in national legislation. As the monopoly on the use of force for state organs is inherent in the very concept of the Westphalian state, the national legislation of all states prohibits anyone under their jurisdiction to wage an armed conflict against governmental forces or, except state organs acting in said capacity, anyone else.

The *ius in bello* defines what is legal in an armed conflict. IHL is its most important branch. It limits the use of violence in armed conflicts by protecting those who do not or no longer directly participate in hostilities and limiting the violence to the amount necessary to achieve the aim of the conflict, which under *ius in bello* can only be to weaken the military potential of the enemy. Currently, IHL is largely codified in treaties, in particular the four 1949 Geneva Conventions and the two 1977 Additional Protocols. Those instruments apply to armed conflicts. They make a strict distinction between international and non-international armed conflicts, the latter being governed by less detailed and less protective rules. As for customary international law, a recent comprehensive study undertaken under the auspices of the International Committee of the Red Cross (ICRC) has found a large body of customary rules, the majority of which apply to both international and non-international armed conflicts (see Henckaerts and Doswald-Beck 2005). Both treaty and customary IHL regulate the conduct of states and armed groups involved in armed conflicts. In addition, at least its numerous criminalized rules equally govern all conduct in an armed conflict linked to the conflict, even if it is not attributable to a party to a conflict. As will be discussed later, conduct of PMSCs is therefore governed by IHL.

International Human Rights Law (IHRL) does not stop applying in armed conflict, except for derogations admissible from some rights in situations of emergency. In the few cases in which IHL and IHRL contradict each other on a certain issues, the applicable law has to be determined by the *lex specialis* principle. Traditionally, IHRL is however only addressed to states, not to private actors, although states have a due diligence obligation to protect the human rights of persons under their jurisdiction against interferences by private actors such as PMSCs.

Recent specific instruments regulating PMSCs

The international legal obligations of contracting states, territorial states, home states, of all other states in relation to PMSCs and their personnel have been restated (together with recommendations of 'good practices') in the Montreux Document, accepted by most of the particularly interested states (see Montreux Document 2008). It does not constitute a binding treaty. It essentially encapsulates the varying obligations on different states depending on their relationship with PMSCs. Contracting states have the highest level of due diligence obligations with regard to PMSCs. They must 'ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly'. These duties are subject to the limitation of what is 'within their power' to do. In comparison, territorial and home states of PMSCs are under an obligation to 'disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel'. The good practices set out in the Montreux Document reflect some of the most effective ways for states to satisfy their due diligence obligations.

As far as the obligations of PMSCs themselves are concerned, the only instrument specifically enumerating them is an International Code of Conduct for Private Security Providers, resulting from an initiative led by the Switzerland and the PMSC industry (see The International Code of Conduct 2010). This Code is presently signed by 511 companies concerned, including nearly all major PMSCs. It aims at establishing direct obligations incumbent on private security companies. This initiative is not the fruit of interstate negotiations (although Switzerland and the UK were co-sponsors of it), but rather of PMSCs, acting in collaboration with the Swiss Federal Department of Foreign Affairs, an NGO (the Geneva Centre for the Democratic Control of Armed Forces) and an academic institution (the Geneva Academy of International Humanitarian Law and Human Rights). The implementation of the pledges in the Code of Conduct is to be overseen by a 'steering committee' that bears the responsibility of developing 'the initial arrangements for the independent governance and oversight mechanism, including by-laws or a charter which will outline mandate and governing policies for the mechanism'. Recently, a Charter for that mechanism has been adopted (see for general information about the process and a draft charter for the mechanism with comments: International Code of Conduct for Private Security Providers, *http://www.icoc-psp.org/*). It still meets major criticism both from the PMSC industry and from Human Rights NGOs. The effectiveness of this enforcement

mechanism will be pivotal to the effectiveness of the Code. The major flaw of the sophisticated supervisory system foreseen is that findings of violations of the Code by PMSCs are only possible if the industry representatives in the supervisory body agree.

To go beyond soft law, the UN Working Group on Mercenaries prepared a draft convention regulating PMSCs which it presented to the Human Rights Council in September 2010 (see Draft of a possible Convention 2010). The draft included provisions that would require state parties to 'develop and adopt national legislation to adequately and effectively regulate the activities of PMSCs.' A significant part is devoted to outlining detailed requirements of such legislation, including licensing, registration and oversight mechanisms. The draft convention was not adopted by the Council; instead, the Council passed a resolution establishing 'an open-ended intergovernmental working group' tasked 'to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument' (UN Doc. A/HRC/RES/15/26, adopted 1 October 2010). While the failure to adopt the draft convention does not necessarily signal a death knell for a UN Convention on PMSCs, the mandate of the 'open-ended intergovernmental working group' could hardly be more loosely defined. Moreover, support for the draft convention and even for the establishment of the intergovernmental group lacked the support of western states that rely heavily on PMSCs.

May States use PMSCs?

Despite all modern theories and an international reality – of which PMSCs are the acme – which is less and less state-centred, international law is still basically addressed to states, developed by states and its implementation mechanisms are geared towards states. It is therefore appropriate to first enquire whether and to what extent states may outsource the conduct of armed conflicts to private companies. Even searching beyond IHL and including *jus ad bellum*, we find only a few explicit prohibitions on very specific activities. Some treaties and arguably customary international law also prohibit states to use mercenaries, but the definition of mercenaries (in particular the condition that they must not be nationals of a party and be hired to fight) excludes most PMSC staff (International Convention 1989, Art. 3). Some implicit prohibitions of outsourcing are arguable. Good faith prohibits it if the specific intent

is to avoid obligations – and such intent would be futile in most cases – or to implement unlawful action. A state may not outsource the decision to exercise its right to self-defence, but it may outsource the exercise of that right as long as it keeps sufficient control to ensure respect of the principles of necessity and proportionality. As for the UN and regional organisations, nothing fundamental hinders them from a legal point of view to outsource a lawful use of force, or more realistically, to accept PMSC action as contribution by a state or to constitute a permanent force made up of PMSCs. International human rights law arguably also does not prohibit outsourcing of law enforcement functions other than the administration of criminal justice, including the decision to arrest a person. However, the state must make sure that PMSCs to whom it outsources law enforcement action respect human rights to the same extent as if such action was taken by the state. IHL requires that the responsible officer of a POW camp must belong to the regular armed forces of the detaining power, which excludes PMSCs (Geneva Convention III 1949, Art. 39). Similarly, in an occupied territory, requisitions in kind and services may only be demanded on the authority of the military commander of the occupying power (Hague Regulations 1907, Art. 52).

The most crucial admissibility of outsourcing issue is obviously whether a state may outsource the conduct of hostilities under IHL. There are serious reasons for a negative answer. While IHL arguably does not prohibit a civilian from directly participating in hostilities, if a state wants to respect – in good faith – the principle of distinction, it may not entrust civilians with conduct that constitutes direct participation in hostilities (which again shows the crucial importance of the latter concept for our issue). In addition, a PMSC that is not sufficiently integrated into the state organisation could not know or be aware of elements necessary to evaluate criteria such as the military advantage anticipated from an attack. The latter argument also prevents a state from allowing a non-state actor to take some other decisions (such as whether imperative military necessity or security reasons require certain action).

Are States Responsible for PMSCs they Use?

The Montreux Document recalls the obvious: that contracting states retain their IHL obligations even if they contract out certain activities to PMSCs. This raises, however, the question when is a state responsible for (or in relation to) PMSC conduct. A positive answer not only facilitates enforcement through the well-

developed (but still basically non-hierarchical) mechanisms of implementation of international law, but it also implies that the rules of IHL fully apply (at least to the state in relation) to such conduct.

PMSC staffs are only very rarely state organs under domestic law. They may however occasionally be so completely dependent on a state that their conduct is attributable to that state as a de facto organ (See ICJ, Bosnia and Herzegovina v. Serbia and Montenegro 2007, paras 391-4). In my view, such attribution does not yet imply that the PMSC constitutes an armed force for combatant status purposes under IHL. A state is furthermore responsible for conduct of PMSC staff if it delegates to them not just public functions, but elements of governmental authority (ILC Draft Articles 2001, Art.5). Arguably such attribution does not presuppose a delegation by the domestic law of the state concerned. It covers acts of authority through unilateral decision, such as seizure, arrest, detention, interrogation, maintenance of public order and arguably again direct participation in hostilities. A state is furthermore responsible for PMSC conduct that occurs pursuant to its instructions or that is executed under its direction or control (ILC Draft Articles 2001, Art. 8). If the overall control standard developed by International Criminal Tribunal for the Former Yugoslavia (ICTY) is sufficient, contracting states would very often be responsible for conduct incidental to the execution of the contract by PMSCs (ICTY, Tadic 1999, paras 98-145). However, there are good reasons to consider, along with the International Court of Justice (ICJ), that effective control is necessary for such attribution, which rarely exists and even more rarely can be proven (ICJ, Bosnia and Herzegovina v. Serbia and Montenegro 2007, paras 402-6).

Even when PMSC conduct is not attributable to a state, state organs which are attributable to a state may lack due diligence in relation with PMSC conduct. Such very variable due diligence obligations exist in the law of neutrality (if a PMSC is recruiting on a neutral territory staff for a specific conflict) and in international human rights law. If a PMSC acts in a territory under the jurisdiction of a state or the victim of a violation is subject to a high degree of control by a state, that state has an obligation to protect the victim's human rights even against interference by private actors, including a PMSC whose conduct is not attributable to that state. In IHL, occupying powers have such due diligence obligations (see, e.g. Hague Regulations 1907, Art. 43), and they also result from the many rules directing states to 'protect' war victims (see e.g. Geneva Convention IV 1949, Art. 27). In addition, the obligation to ensure respect for

IHL (see Geneva Conventions III and IV 1949, Art. 1) may imply a general due diligence obligation for all states, but more particularly for states contracting PMSCs, host states of PMSCs, and home states (in which the companies are registered or headquartered).

Legal means through which PMSCs are bound by IHL

As the phenomenon of PMSCs goes beyond the traditional axioms of the Westphalian system, it is not sufficient to show that states engaging PMSCs are most often responsible for (or in relation to) IHL violations PMSCs commit. For the effective implementation and enforcement of IHL, to create a sense of ownership among their staff, and last but not least because many PMSCs do not work for states and armed groups, the traditional addressees of IHL, it is equally important to apply IHL directly to PMSCs. This does not only involve the interpretation of the IHL rules of conduct in the light of PMSCs tasks and conduct, but equally the question through which means IHL can become binding on PMSCs, a question which is completely neglected in existing legal writings.

While not in a legal vacuum, PMSCs operate, however, in a very chaotic legal environment, made up of very diverse rules, addressed to various actors, which have not been made for PMSCs (but nevertheless cover them). There are several possible legal justifications for the applicability of IHL, each one situation-dependent and often subject to controversies.

Under explicit rules of IHL, this is the case if the PMSC constitutes an armed group party to a non-international armed conflict (See Geneva Conventions III and IV 1949, Art. 3). It seems obvious that this is also the case whenever the conduct of a PMSC can be attributed to a state, although the legal reasoning leading to such equivalence of attribution and obligation is not obvious. The main argument for this conclusion is an *ad absurdum* argument that otherwise even armed forces of a state would not be bound by IHL. In addition, when IHL obligations are self-executing or when they are implemented through the domestic law of states under the jurisdiction of which a PMSC or its staff acts, both the PMSC and its staff are obviously bound by such domestic laws, including through the doctrine of corporate complicity or arguably whenever the relevant rule corresponds to customary international law. Similarly, under a growing number of domestic legal systems, but not yet under international criminal law, there may exist a corporate criminal responsibility of the PMSC as

a legal person. Whether the PMSC itself is a subject of international law raises the general problem of what is international personality and whether companies possess it. This is very controversial, treated in international law doctrine with many preconceived ideological and philosophical ideas and does not lead to many operational results. Beyond international personality, a PMSC may however become an addressee of IHL rules through self-regulation in codes of conduct and the provisions of its contract. Arguably, the binding character upon individuals may also be implicit in the state obligation to disseminate IHL as widely as possible.

In any case, PMSC staff is bound at least by criminalized rules of IHL. The precise range of persons who are addressees of IHL of non-international armed conflicts has been discussed in the jurisprudence of the two *ad hoc* International Criminal Tribunals (See in particular ICTR, Akayesu 2001, paras 432-45). Not only members of armed forces or groups, but also others mandated to support the war effort of one party to the conflict are bound by IHL. Individuals who cannot be considered as connected to one party, but nevertheless commit acts of violence contributing to the armed conflict for reasons connected with the conflict, are equally bound by the criminalized rules of IHL. What is unclear is whether the many rules of IHL that are not criminalized also cover all individual acts having a nexus with the conflict. This is often claimed, but no one provides a technical legal justification. Therefore, it is only when PMSC staffs are combatants or law enforcement tasks are delegated to them that IHL or IHRL fully and directly applies to them regardless of the applicable domestic legislation. Otherwise, as civilians, they are subject only to criminalized rules of IHL.

Status of PMSC staff under IHL

PMSC staff normally do not fall under the very restrictive definition of mercenaries in IHL (See Protocol I 1977, Art. 47) Most of them are not *de iure* or *de facto* incorporated into the armed forces of a party and are therefore not combatants but civilians. This is controversial in scholarly writings. Theoretically, under the text of IHL treaties, a good argument can be made that they often fulfil the necessary conditions for combatant status (See Protocol I 1977, Art. 43; Geneva Convention III 1949, Art. 4(A)(2); Doswald-Beck 2007, 121). States, PMSCs and NGO critics however do not consider them as combatants. A legal explanation for the absence of combatant status is that PMSC staff

does not belong to the contracting state in a fighting function. If they are not combatants, they have no right to directly participate in hostilities and they lose protection as civilians if and for such time as they do so. This raises the highly controversial issue - which conduct constitutes direct participation in hostilities.

When does PMSC staff directly participate in hostilities?

As civilians, PMSC staff may not directly participate in hostilities. In addition, as mentioned above, one may argue that it is contrary to the philosophy of IHL if states use PMSCs for tasks which constitute direct participation in hostilities. The concept of 'direct participation in hostilities' is a cornerstone of IHL on the conduct of hostilities, which gains an increasing practical importance because of the 'civilianization' of armed conflicts, by powerful states through private contractors and by weaker states and armed groups by using their own civilian population to overcome the enemy. Both in international and non-international armed conflicts, civilians lose their protection against attacks (and their protection against incidental effects of attacks, afforded to the civilian population as a whole) if and for such time as they take a direct part in hostilities (Protocol I 1977, Art. 51(3); Protocol II 1977, Art. 13(3)) Neither treaties nor customary law define this concept. After a large consultation of experts which showed an absence of agreement on some crucial issues, the ICRC has tried to clarify in an 'Interpretive Guidance' several notions: who is covered as a 'civilian' by the rule prohibiting attacks except in case of direct participation; what conduct amounts to direct participation; the duration of the loss of protection; the precautions to be taken and the protections afforded in case of doubt; the rules governing attacks against persons who take a direct part in hostilities; and the consequences of regaining protection (see ICRC 2009 Interpretive Guidance). The first issue is probably the most controversial one.

PMSCs and major contracting states often stress that PMSCs have only defensive functions. The execution of such functions may nevertheless constitute a direct participation in hostilities. This is uncontroversial if they defend combatants or military objectives against the adverse party. On the other extreme, it is uncontroversial that the defence of military targets against common criminals or the defence of civilians and civilian objects against unlawful attacks does not constitute a direct participation in hostilities. Mine-clearing falls under this concept only if it is directed against the other party to the conflict, training

only if it is provided in view of a predetermined hostile act. The most crucial, difficult and frequent situation is when PMSC staff guard objects, transport or persons. If those persons and objects are not protected against attacks in IHL (combatants, civilians directly participating in hostilities) guarding or defending them against attacks constitutes direct participation in hostilities and not criminal law defence of others. In my view, this is always the case when the attacker is a person belonging to a party to the conflict, even if he or she does not benefit from or has lost combatant status. In my view the unlawful status of the attacker does not give rise to a right to self-defence. If the person attacked – and under the domestic legislation of some countries even if the object attacked - is civilian, criminal law self-defence may justify a use of force, even against combatants. The analysis is complicated by the absence of an international law standard of self-defence and defence of others and by doubts about whether the criminal law defence of self-defence which avoids conviction may be used *ex ante* as a legal basis for an entire business activity. It must in addition be stressed that self-defence may be exercised only against attacks, not against arrests or the taking of control over objects. Indeed the criteria determining when a civilian may be arrested or objects may be requisitioned are too complicated in IHL to allow a PMSC staff to determine when they are fulfilled. In my view, self-defence as an exception to the classification of certain conduct as direct participation in hostilities must be construed very narrowly. In addition, PMSC staff providing security for an object will often not be able to know whether that object constitutes a military objective (which excludes self-defence, because the attack would not be unlawful) and whether the attackers do not belong to a party (which would not classify resistance against such attackers as direct participation in hostilities, even when the object attacked is a military objective). At the same time it is difficult for the enemy to distinguish between, on the one hand, combatants, PMSC staff who directly participate in hostilities (whom they may attack and who may attack them), and on the other hand PMSC staff who do not directly participate in hostilities, who may not be attacked and will not attack the enemy. To maintain a clear distinction between civilians and combatants and to avoid that PMSC staff lose their protection as civilians, they should therefore not be put into an ambiguous situation.

When PMSC staff is mandated with law enforcement tasks by a state, the normal IHL and human rights rules are applicable, but such law enforcement constitutes direct participation in hostilities if it is directed against armed groups or their members.

The main problem is enforcement

If implementation is the weakest aspect of international law, and even more so of IHL in current armed conflicts – in which reciprocity is often irrelevant – it is even more difficult to obtain from non-traditional addressees such as PMSCs, to whom the traditional mechanisms are not geared. First, the normal mechanisms of implementation of state responsibility may be used, when PMSC conduct can be attributed to a state, by the state injured by such conduct. States other than the injured state may at least invoke the violation and require cessation and reparation to the victims. States however only rarely use those mechanisms. Human rights protection mechanisms may therefore be more promising, as they may also hold a state responsible when no other state complains. The injured individual may invoke the responsibility of the state on the domestic level through domestic law or to the controversial extent international law gives a right to reparation to the individual. Indeed, while the obligation of a state having violated IHL to make reparation is uncontroversial, the possibility of individuals to implement it, including before courts of third states is more questioned and difficult to implement, *inter alia* because of the immunity of states before courts of third states. In any case, territorial states and home states may and should foresee enforcement mechanisms of their and a PMSC's obligations in their domestic law, *inter alia* through registration and licensing systems. The PMSC itself may be criminally responsible in states knowing criminal corporate responsibility, a concept which is still developing in international criminal law. Individual PMSC employees are however certainly criminally responsible for war crimes, including as superiors who may even fall under the more strict rules for military commanders. In international criminal law mere knowledge of the probability that a crime will be committed is sufficient for criminal responsibility for aiding and abetting and international criminal tribunals have developed a large concept of joint criminal enterprise. IHL violations by PMSC staff may constitute torts under private law (which is more uncontroversial in civil law systems than in common law systems), but court action by the victims may encounter the obstacle of immunities in the contracting state or the territorial state and jurisdictional obstacles in other states. Criminal jurisdiction over them in third countries is not as clearly regulated as for members of armed forces and often not backed up by an efficient law enforcement system. Finally, self-regulatory mechanisms should include credible enforcement possibilities by an independent body and the possibility for individual victims of violations to trigger them.

Conclusion

In conclusion, PMSCs and their staff do not act, as some have claimed, in a legal black hole (This assertion was made in particular by Singer 2004). A PMSC is subject to IHL because its staff has to respect it, because a state is responsible for its conduct, and, in some cases and according to some theories, the PMSC is even itself an addressee of IHL. IHL provides answers to many crucial legal questions, including some, which the industry and states did not want to clarify in recent soft law instruments and codes of conduct, in particular the relationship between self-defence and direct participation in hostilities. I do not think that PMSCs and their staff are more or less prone to commit violations than state organs or members of non-state armed groups. However, they were until now left – deliberately or not - in many respects in a legal fog. Recent research has brought a lot of clarity into this picture, without claiming that clear solutions exist where states disagree or where sound legal arguments may support different approaches (see in particular Cameron and Chetail (2013). However, despite the fascinating and fundamental nature of many of the legal issues discussed in this contribution, the main problems are that the status, rights and obligations of PMSC staff are not always clear to the PMSC and to the staff itself - and representatives of the industry have no interest in clarifying them because this could seriously limit their ability to provide security in conflict areas. The most important problem, however, remains implementation: even where the rules and their applicability are uncontroversial, PMSC staff are often not adequately trained and supervised and if they commit violations, their prosecution often meets legal or factual obstacles – or simply a lack of political will.

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PRIVATE MILITARY AND SECURITY COMPANIES' INVOLVEMENT IN CONFLICTS

José L. Gómez del Prado
Former Member of the UN Working Group on the Use of Mercenaries

"War is peace. Freedom is slavery. Ignorance is strength"

George Orwell

Introduction: The new security industry

Since 1990 the world has witnessed the proliferation of private military and security companies (PMSCs). They provide security services in normal situations but also operate in armed and low-intensity conflicts, international relief, and contingency operations. Such services were until recently the preserve of the state fulfilled by the police and the military. Governments, multinational corporations, non-governmental organizations but also international organizations such as NATO and United Nations utilize their services.

The years that followed the decolonization period in the 1960's were marked by the activities of mercenaries. The last 20 years which ensued the fall of the Berlin Wall, the collapse of the U.S.S.R. and the globalization of the world economy (Kurtz, 2009) with ruthless competition for natural resources, political instability and intra-state armed conflicts, the 9/11 antiterrorist measures, and the end of "apartheid" in Southern Africa have been stamped by the activities of private military and security companies (PMSC).

Military and security functions, considered inherently state functions, have increasingly been outsourced to the private sector (Cook, 2002). The growth of this new industry is a direct consequence of merging the public and the private sectors: government and big business. It falls within the strategy of a Global Society which is increasingly abandoning the social welfare state and becoming more entrenched in a police state controlled by public/private security forces (Robinson & Harris, 2000).

The unstoppable flow of money, in a period of economic recession, has seen the increasing outsourcing of military functions to private contractors, with companies such as Blackwater (renamed Xe and Academi) or DynCorp doing the jobs of the professional soldiers. In the field of intelligence private contractors are hired to do the work of spies (Harris, 2011). Prisons, once a State responsibility, now rely more and more on private contractors. Wackenhut, a subsidiary of G4S, in the prison business provides cheap labor for corporations such as IBM and Microsoft (Pelaez, SourceWatch). Robotic weapons such as unmanned drones are increasingly outsourced to PMSC.

This new industry is transnational in nature and has literally exploded with the privatization of war in the Afghan and Iraqi conflicts, where private contractors outnumbered that of militaries (Horton, 2011). As transnational companies, PMSCs register in tax havens such as the Bahamas or the Caymans Their headquarters are in countries where they do not face regulatory difficulties with the government. For that reason most of them have their headquarters in Washington or London. The security market yields over $ 100 billion per year (Singer, 2004). It functions in a globalized economy which does not care whether the source of profit is licit or illicit or benefit or destructive for people. To avoid taxes $32 trillion are placed in tax havens, excluding real state, jewels yachts etc., of these $23 trillion is held by the super rich of Western States, and banks such as JP Morgan, HSBC, Wachovia and Citibank have been laundering drug money and other illicit funds (Petras, 2012).

Everyone should enjoy security, which should be provided by the State as a human right. A direct consequence of outsourcing security is that it reinforces the inequalities between the rich and the poor. Moreover, in their thirst for making money PMSCs often established links with criminal networks, as has been in Afghanistan (UN, Mercenaries 2010). In addition PMSCs are insufficiently regulated and there is an important vacuum regarding accountability for human rights violations committed by PMSCs.

The new paradigm of the world globalized economy based in the privatization of the public and private sector conduces to inequality: 1% accumulating the wealth versus 99% of the population endangering our future (Stiglitz 2012). A key element of the new paradigm consists in the privatization of the most inherently functions of the State: army, police and justice. The “revolving door phenomenon”, whereby Generals, Admirals, CIA and FBI executive directors go to work for defense and security contractors, is the strategy used to dismantle the State of its prerogatives (Citizens for Ethics).

PMSCs replacing the traditional guards of national sovereignty

The distinction between the activities and functions that are public and those that belong to the private sector has been increasingly blurred. Public and private activities are intermingled and extremely difficult to identify, particularly in an area that has been inherently governmental till not very long ago: security. Security, understood in its two State dimensions. At the domestic level, which is supposedly to be secured by the police, and externally by an army reputedly to be capable of defending the territory and the national sovereignty. Along State governments more and more we find corporate private entities controlling and policing large extensions of public and private spaces.

Peaceful situations

In many countries already private security personnel outnumbers public police officers. For example, the ratio of private security to police is for: Australia (2.19); Guatemala (6.01); Honduras (4.88); India (4.98); Russia (1.33); South Africa (2.57) and USA (2.26) (Small Arms Survey, 2011).

A direct consequence is that it leads to its intrusion into personal or private spaces and possible infringements of accepted civil liberties without any official authorization such as a search warrant or a lawful arrest. By privatizing a number of police functions, security has become a commodity for those who can afford it. This is happening in developed countries such as Canada with a democratic and progressive tradition as well as in developing countries.

A close study (Rigakos, 2002) of the practices of a private security company, *Intelligarde International,* in a Toronto suburb shows that security guards–as agents of the landlords–took the right to arrest anyone trespassing or committing an offense. In Canada, the ratio of private security to police is 2 to 1.

"Parapolice" was the term used by the security employees to describe their job that was not just of prevention (traditionally the field of the private sector), but clearly fell in a reactive approach, an activity to be exclusively within the competence of the public police. *Intelligarde International* conducted investigations, elaborated reports, arrested and issued notices prohibiting entry to public places. According to the author "both conceptually and in practice, *Intelligarde* was acting like a police force".

Another Canadian research warns about the dangerous trend of privatizing security that is increasing largely because of the neoliberal agenda of de-regulation,

and cutbacks in the public sphere. The state must not abdicate democracy, protection for human rights, and equality (Cukier, Quigley, Susla, 2003).

This same trend is also a widespread practice in developing countries coming out from authoritarian regimes such as Honduras, Ecuador and Peru. In Peru, the privatization of security has expanded enormously in the last 20 years. For a population of 28 million, Peru has some 92,000 police officers, which is considered as insufficient (UN, Mercenaries 2007). Peru also seems to experience the "revolving door" syndrome whereby, when they retire members of the military and police are hired by private security companies or start their own. The Ministry of the Interior apparently authorizes these companies to hire off-duty police officers and wear their weapons to protect buildings.

A municipal citizen-protection system, known as the *serenazgo* or local watch, has also developed and is paid for out of residents' taxes. Watchmen are hired to patrol the district or municipality, but off-duty police officers may also be hired to work with them. Because local taxes vary from municipality to municipality, the rich ones have better protection, which is against the universal principle of non-discrimination in the right to security. In addition, the lack of any overall civic security policy means that each of Peru's 1,600 districts has a different strategy. The State is thus abdicating its duty to protect its citizens.

Any action by the watchmen, such as an arrest, must have the approval of a police officer, and should be taken when the police officer is working with the watchman. However, there are cases where such action is taken without a police officer present.

Another problem is the one posed by the *guachimanes*, a form of private security provided by individuals acting as guards who protect a residential area by surrounding the houses or preventing free passage to carry out checks. This is a violation of the right to freedom of movement. At the same time, in marginalized districts residents organize their own protection, frequently taking the law into their own hands.

There would be some 100,000 private individuals offering security services: 50,000 private vigilantes and a further 50,000 casual *guachimanes*, who are badly exploited. They work 12-hours a day, with 6 hours off the following day and a monthly wage between US$ 50 (for the guachimanes) to 150 (for the serenos) with no social security. Their exploitative working conditions would be the cause that explains the aggressive behavior of these guards.

In Louisiana, USA, prisoners are good business (Courrier international, 2012). With nearly 40 000 prisoners in 2010, Louisiana has the world record of persons incarcerated. The prison population in this State has increased fivefold since the authorities took the decision to build private prisons in the 90s. The rate of incarceration is 3 times that of Iran, seven that of China and ten times that of Germany. In Louisiana one adult out of 86 is in prison. The majority of the prisoners are incarcerated in profit making institutions that must receive a constant flow of human beings in order to keep functioning this $ 182 million business. Each prisoner yields $24,39 a day. A recidivist thief can be condemned to 24 years of prison and three drug traffic condemnations suffice to be imprisoned for life.

In the XIXth century prisoners in Louisiana were loaned to work in the cotton plantations. Presently, most of the contractors of the prison sector are rural sheriffs who finance law enforcement partly thanks to the dollars legally levied from penitentiary activities. If the number of detainees falls, the finances of the sheriffs bleed white and their constituents lose their jobs. Each dollar spent for prisons is a dollar not spent for hospitals, schools, social services or infrastructure. In Louisiana profit has the priority to public security.

With some 2 million inmates in federal and private prisons, this industry is one of the fastest-growing ones in the United States: its investors are on Wall Street. The federal prison industry produces 100% of all military helmets, ammunition belts, bullet-proof vests, ID tags, shirts, pants, tents, bags, and canteens. Along with war supplies, prison workers supply 98% of the entire market for equipment assembly services; 93% of paints and paintbrushes 92% of stove assembly; 46% of body armor; 36% of home appliances; 30% of headphones/microphones/speakers; and 21% of office furniture, Airplane parts, medical supplies, and much more (Pelaez).

Armed conflict situations

Israeli Private security guards and the Palestinian population

In 2002 Group 4 Falck, which controlled the Israeli security company Hashmira, was forced to withdraw its employees following the disclosure that Hashmira violated the human rights of the population in the Occupied Palestinian Territories (Languerquist, Steele, 2002).

In the Israeli settlement of Kedumim private guards worked closely with the Israel's military security apparatus. Kedumim was established in 1976, and since

expanded gradually expropriating a fifth of the Palestinian community of Kafr Qaddum of 4,000 inhabitants.

Many of the guards are settlers who systematically prevent Palestinian villagers from cultivating their own fields, travelling to schools, hospitals and shops in nearby towns or receiving emergency medical assistance. Local unemployment is of 80%. Over 100 students who used to attend university in Nablus dropped out. Access to education and medical care has been severely restricted. Palestinian women have been obliged to give birth in the village. Intimidation and harassment are common, causing many villagers to fear for their lives.

In February 2007, the Reihan checkpoint, located just five kilometers from the Green Line, near Jenin, in the northern West Bank, through which hundreds of Palestinians pass every day, was "civilianized" and privatized (Rapoport, 2007). The Israel Defense Ministry had contracted a private security company "Shin-Bet"[1].

Palestinians have to undergo long checks, the indifference of the private company's employees, and inexplicable delays. Private security employees detain 90 percent of the men for questioning, in contrast with soldiers who would only hold back those they thought suspicious. Palestinians are humiliated: eight to fifteen men are put together in one room and forced to strip. They are afraid to complain for fear their entry permits are canceled.

The treatment of the women is even more sensitive. The transit permits of two women were canceled and had to go back to the West Bank after they refused to strip.

According to the non-profit organization, Kav La'Oved (Worker's Hotline) the private security market in Israel is a jungle where thousands of young people earn a meager wage, and only a few of them receive the benefits determined by law. Many companies violate labor rights. The general feeling is that privatization does not really save the government money and that the main purpose is to show the downsizing of the public sector.

By March 2008, private security companies already operated most of the 17 checkpoints surrounding Jerusalem (Estrella Digital, 2008). Private security companies

1 Acronym for "Shmira Uvitahon" (Guarding and Security). It is believed to be at the forefront of undercover operations against Palestinian militants

in the Occupied West Bank including East Jerusalem were operating thirteen checkpoints[2] and two of the main private security companies were also operating at two other checkpoints. In 2006, Israel's exports in security services increased by 15%. Israel's technology sector "makes up 60% of all exports (Klein, 2007)". The Israeli company Elbit responsible for building the "wall" separating the Occupied Palestinian Territories (the most important construction project in Israel with a cost of $2.5 billion (Ibid)) has been involved in the virtual fences separating the USA frontier on the south from Mexico and on the north from Canada.

Iraq and Afghanistan, the perfect example for PMSCs' operations where human rights violations is committed with impunity

PMSCs' personnel has been accused of violating human rights, shooting civilians, using excessive force, being insensitive to local customs or beliefs, or treating the local population disrespectfully. Concerns over the lack of transparency, oversight and accountability have also attracted media and public attention (Schartz, 2010).

In 2004 the killing of four Blackwater's employees by Iraqi insurgents in Fallujah dramatically changed the course of the war. US Army Operation Phantom Fury to recapture Fallujah killed over 1,350 insurgents, some 95 US soldiers and wounded other 560 (Scahill, 2007). A number of sources indicate that, in order to save money, Blackwater failed to provide the appropriate safeguards for protecting a military convoy going through an area controlled by insurgents (Hamsen, 2005).

In 2006, a Blackwater employee, while drunk, shot and killed the security guard of the Iraqi Vice President. US Committee on Oversight and Government Reform, House of Representatives, found in 2007 that Blackwater had avoided paying Social Security, Medicare, and Federal income and employment taxes (US Congress, 2011).

The US Special Inspector General for Iraq Reconstruction 2007 report indicated that the State Department did not know specifically what it had received for most of the $1,2 billion in expenditures under its DynCorp Contract for the Iraqi Police Training Program. In the 1990s during the Balkans operations, several DynCorp

2 These were: Shufat, Qalandia, Gilo, Hizma, Zayem, Tunnel, Ramot, At Tayba, Betunia, Tarqumiya, Al Jalama, Bisan and Meitar.

employees working in the UN Police Task force were involved in a sex-trafficking scandal (including "owning" girls as young as 12 years old) and prostitution rackets. The supervisor of DynCorp in Bosnia videotaped himself raping two young women. None of these employees have been ever prosecuted (Singer, 2004).

Kathryn Bolkovac, a U.N. International Police Force monitor, hired by DynCorp on another U.N.-related contract also filed a lawsuit in Great Britain in 2001 against DynCorp for unfair dismissal due to a protected disclosure (whistleblowing). She had reported that DynCorp police trainers in Bosnia were paying for prostitutes and participating in sex trafficking. On 2 August 2002 the court unanimously sentenced in her favor.

At the time she reported such officers were paying for prostitutes and participating in sex-trafficking, DynCorp had a $15 million contract to hire and train police officers for duty in Bosnia and Herzegovina. None of DynCorp employees were prosecuted, since they enjoyed immunity (CorpWatch, 2012). In 2010 her story was made into the film *The Whistleblower* (Permanent Peoples Tribunal, 2007).

In 2009, photos were published showing employees of ArmorGroup North America, hired by the State Department to provide security at the US Embassy in Kabul, engaging in lewd sexual hazing and harassment. Previous reports indicated a number of other allegations including that the deficiencies of the company endangered the security of the Embassy (ibid).

A 2010 Senate Armed Services Committee investigation found that EOD Technology, the company contracted to protect the US Kabul Embassy was suspected of hiring local warlords with possible Taliban ties. A report of the US Congress Subcommittee on National Security and Foreign Affairs stated that the contract of the Department of Defense had fueled a vast protection racket run by a shadowy network of warlords, strongmen, commanders, corrupt Afghan officials. Not only did the system run afoul of the Department's own rules and regulations mandated by Congress, it also appeared to risk undermining the U.S. strategy in Afghanistan (US Congress, 2010).

In April 2010 five former Blackwater employees were indicted for conspiring to violate Federal firearm laws, possession of unregistered firearms, and obstruction of justice. That same year, XE Services, LLC, (formerly Blackwater), agreed to pay to the State Department a penalty of $42 million for 288 alleged violations of the Arms Export Control Act – AECA - (US Congress, 2011). In

addition there have been challenges to accountability asserted in a number of litigations against PMSCs in cases of torture and abuse of detainees in the Abu Ghraib prison involving employees of CACI and Titan as well as the death of 17 Iraqi civilians in the shooting by Blackwater employees in Nisoor Square in Baghdad in 2007 (UN, Mercenaries 2010).

In 2011 the Bill, "Stop Outsourcing security Act" to phase out the use of private military contractors, was tabled again. For four times, since 2007, at different sessions of the Congress the Bill had been rejected (US Congress, 2011-2012). Also rejected, since 2003, despite having been reintroduced at four different sessions of the Congress is the "Transparency and Accountability in Security Contracting Act (US Congress, 2009) ". According to a bipartisan Congressional panel, the US would have wasted or misspent $34 billion in Iraq and Afghanistan wars (Hodge, 2011).

The US Congress has regularly stated not to have complete access to information about all security contracts, the number of armed private security contractors working in Iraq, Afghanistan, and other combat zones, the number of contractors who have died, and any disciplinary actions taken against contract personnel or companies. The Special Inspector General for Iraq Reconstruction had not obtained information regarding the State Department's deployment in Iraq in 2012 of some 5 500 private security contractors (Ackerman, 2011).

In addition there have been embarrassing reports of the US Congress indicating waste, fraud, and abuse running into the billions of dollars. The reports state: "for many years the government has abdicated its contracting responsibilities—too often using contractors as the default mechanism, driven by considerations other than whether they provide the best solution, and without consideration for the resources needed to manage them. That is how contractors have come to account for fully half the United States presence in contingency operations (US Congress, 2011)".

Use of PMSCs by the United Nations System

Terrorist attacks and the occupation of Afghanistan and Iraq have had important consequences in the activities of UN agencies which has resulted in an increased demand for security, provided by PMSCs, isolating the UN from civil society. The terrorist attack of UN Headquarters in Baghdad, on 19 August

2003, which killed the Representative in Iraq of the Secretary General, Sergio Vieria de Melo, along with 20 other staff members traumatizing the international community played an important role in the fortification and isolation of the Organization.

UN agencies have to deploy in extremely insecure environments such as Iraq, Afghanistan or Somalia with urgency humanitarian relief and development operations. The pressure for increased security in UN agencies has come both from substantive humanitarian relief and development programs inside UN as well as from the security industry itself. PMSCs have and continue to exert pressure to bear in order to expand their role into UN. Counting humanitarian agencies as clients has multiple advantages for PMSCs. They enhance their reputation, providing distance from the mercenary label, and gaining a foothold in a potentially lucrative market (Spearing, 2005).

The increasing size and spread of international humanitarian operations has contributed to greater numbers of major violent incidents against humanitarian personnel (Stoddard, Abby, Harmer, Haver, 2006), which has in turn prompted humanitarian organizations to outsource their security needs. Headquarters in many UN agencies tend to take a hands-off approach in this area, allowing country-level managers to decide what is needed and feasible for their particular context. Local offices, operating in a policy vacuum, thus make these important decisions with little or no guidance from their headquarters and do not generally practice close oversight and monitoring of PMSCs' activities (Cockayne, 2006).

In 2007, the Center on International Cooperation and the Humanitarian Policy Group in collaboration with the UN Office for the Coordination of Humanitarian Affairs carried out a study on the use of private security companies in humanitarian operations (Canadian Government, 2006).

The study identified areas of concern and potential risk, in particular: (1) ad hoc screening of PMSCs; (2) lack or scarce monitoring of the contracted PMSCs activities, which could potentially compromise the agency's principles, ethics, or behavioral standards, or, in the worst case scenarios, violate international legal norms; (3) lack of exclusivity in agreements, meaning that the PMSCs could have additional clients, such as belligerent parties, that may reflect poorly on the humanitarian actor's clients; and (4) little or no reference to international standards.

Hiring security services locally may very well compromise neutrality by feeding into conflict dynamics. It may also create new sources of conflict and insecurity by degenerating into protection rackets or sparking localized arms races. Conversely, use of international PMSCs can compromise acceptance by introducing a foreign element, and distancing the agency from the beneficiaries and host community.

Additionally, as one agency visibly increases deterrent measures there is a possibility that other aid actors will switch to utilizing external security measures—creating a domino effect—to ensure they are not perceived as soft targets in contexts where militant movements view aid operations as opportune objects for violence (Cockayne, 2006).

Lately, UN Security Management System (UNSMS), responsible of the security matters affecting staff, premises and operations all over the world, has been working with the view to coordinating policies and procedures regarding the outsourcing of security to the private sector.

At its January 2011 meeting, UNSMS considered the recommendations elaborated earlier by a working group consisting of the heads of security of ten UN departments, agencies and programs[3]. Thirty UN departments, agencies and programs[4] agreed on the use of PMSCs as a measure of last resort as well as on a set of basic recommendations which were to be submitted to the UN Policy Committee and the Secretary-General in order to issue the appropriate directives for the whole UN system.

UN is increasingly hiring these companies for a wide array of security services, such as armed and unarmed security, risk assessment, security training, logistical support and consultancy**.** The UN's leadership says these services are needed to protect the organization's staff and worldwide operations from growing threats and unprecedented dangers. The UN Under-Secretary-General for Safety and Security since 2009 is Gregory B. Starr. Prior to his appointment with UN, Starr was the Director of the US Diplomatic Security Service (DSS). In September 2007, Blackwater contractors were involved in the killing of 17 civilians in Baghdad. Six months later in April 2008, Starr assessed Blackwater as doing "a very good job" (BBC, 2008).

3 UNDPKO, UNDP, UNOCHA, UNHCR, UNOHCHR, UNICEF, WHO, FAO, WFP and WIPO

4 Two UN agencies did not agree on using PSC in any circumstances.

Reports from UN Working Group on mercenaries, governments, NGOs and the media indicate PMSCs commit grave human rights violations, torturing, killing or injuring innocent civilians and breaching international law.

A critical study on the use of PMSCs by the United Nations indicates that by using PMSCs, UN is allowing these companies to define its security strategy and its reputation. Given the bad record of PMSCs, serious questions arise as to whether PMSCs are appropriate UN partners for the complex task of creating a secure, just and lawful world (Pingeot, 2012). The amount spent on PMSCs by the UN went up from $44m in 2009 to $76m in 2010, an increase of 73% in one year. UN security officials can neither give a total estimate of the security contracted within the UN nor a complete list of companies contracted which suggest a system that is unaccountable and out of control.

The report emphasizes that the UN has repeatedly hired companies well known for their misconduct, violence and financial irregularities, such as "DynCorp International, infamous for its role in a prostitution scandal involving the UN in Bosnia in the 1990s and, more recently, its participation in the US government's "rendition" program; G4S, the industry leader known for its violent methods against detainees and deported asylum seekers; ArmorGroup, a G4S subsidiary singled out in a US Senate report for its ties to Afghan warlords; and Saracen Uganda, an offshoot of notorious mercenary firm Executive Outcomes with links to illegal natural resources exploitation in the Democratic Republic of Congo (Ibid)".

UN use of PMSCs raise important questions about the organization's mission and policy choices, the report states. "Why does the UN increasingly rely on these companies and why does it need more "security?" UN use of PMSCs is a symptom of a broader crisis affecting the UN's mission. It coincides with the establishment of increasingly "robust" peacekeeping missions and of "integrated missions" where the military, political and humanitarian agendas are combined into a single, supposedly complementary policy process. In recent years, the UN has considerably changed its security strategy, relying increasingly on "bunkerization" as it protects its staff and facilities behind blast walls and armed guards, cutting the organization from the public it is supposed to serve. PMSCs are enabling this bunkerization policy. Their security thinking encourages the organization to harden its security posture, and they provide all the services and apparatus of a bunker approach (Ibid)".

This situation has been exposed to the General Assembly on a number of occasions by the UN Working Group on mercenaries as well as in private meetings

with UN officials responsible of safety and security. Indeed it has expressed concern at the fact that a number of PMSCs in the UN Procurement Service-List of Registered Vendors without control and that UN was increasingly using PMSCs without appropriate vetting procedures. Among other things, it has recommended that United Nations departments, offices, organizations, programs and funds establish an effective selection and vetting system and guidelines containing relevant criteria aimed at regulating and monitoring the activities of private security/military companies working under their authority. They should also ensure that the guidelines comply with human rights standards and international humanitarian law (UN, Mercenaries 2009 and 2010).

Social conflicts and the use of PMSCs by transnational companies in the exploitation of natural resources

An emerging trend in Latin America but also in other regions of the world is the social conflicts between private security employees and rural communities. Reports indicate situations of private security companies protecting transnational extractive corporations whose employees are often involved in suppressing the legitimate social protest of communities and human rights and environmental organizations in the areas where these corporations operate (UN, NGO 2000).

A recent report of the Observatorio de conflictos mineros en América Latina indicates that there are some 120 conflicts in this continent. According to the World Bank nearly one third of the world investments in the exploration of new mining deposits are in Latin America. Mining companies continue to behave as colonialist: they take as much as they can, contaminate the environment and thereafter they leave. Many governments in order to obtain the investments of these transnational corporations criminalize the social protest of the communities (Courrier international, 2012).

For example, members of private security companies and police officers engaged in private security work have been intimidating the population of Cajamarca (Peru), notably environmental rights defenders (UN, Mercenaries 2007).

In 2006, following a social protest against the Yanacocha mining company for water pollution of a rural community one farmer was shot dead. Three police officers working as private security guards at Yanacocha were identified as suspects by investigators.

Newmont Gold Corporation, the Buenaventura mining company and the World Bank's International Finance Corporation own Yanacocha. It operates in a region containing 65 communities with 20,000 inhabitants and employs 8,000 people. Complaints have been brought against it for destruction of springs, pollution of rivers, streams and irrigation canals that supply thousands of rural families and the town of Cajamarca; the death of flora and fauna; contamination of the soil and grazing lands with mercury, arsenic and cyanide; and failure to comply with its undertakings in respect of development projects in the region. Yanacocha is also accused of forcibly expropriating farmers' land between 1992 and 1994.

The mining company Yanacocha would have also been involved in an operation of surveillance, tailing, spying by physical and electronic means against members of the ngo GRUFIDES (Sustainable Development Training and Action Group). Three Catholic priests and members of their families, as well as 40 local representatives and environmental leaders complained of undercover approaches, infiltration and threats with the aim of intimidating and breaking them down psychologically, as well as running slander campaigns to damage their reputation.

In Australia, in operating Reception Centers for Asylum seekers PMSCs have been involved in serious human rights abuses.

Woomera Immigration Reception and Processing Center, located in the South Australian desert, was opened in 1999 by the Australian authorities in response to an increase of unauthorized arrivals. It has been the site of a series of riots, hunger strikes and suicide attempts (Green Left Weekly, 2001).

In 2002, a delegation (UN, Arbitrary detention 2003) visited the Woomera operated by Australasian Correctional Management (ACM), a subsidiary of Wackenhut Security Corporation (World Socialist Website, 2003) under a contract with the Department of Immigration and Multicultural and Indigenous Affairs. Its report raised a number of concerns about the mandatory detention of unauthorized arrivals and human rights abuses. It also raised concerns about the ramifications of the privatization of the centers on the legal status of detention.

The UN mission found behavioral anomalies, affective regression and infantilism; aggressiveness against detainees and, above all, acts of self-mutilation going as far as suicide. It indicated contradictions between the delegated exercise of authority that is usually the prerogative of the public powers and the motivation for profit making.

Among the prerogatives of the public powers, cited were: the surveillance of the detention of asylum seekers; the exercise of the power to discipline; maintaining order; the setting of conditions on access to the centers by lawyers and other professionals.

These prerogatives of the public powers were exercised by a commercial company, recruited by tender and therefore according to the laws of the market, whose purpose, notably in response to pressure from its stockholders, was to realize profits through a contractual relationship with the State.

In the Philippines sugar has been at the base of the class struggle between peasants and landlords who lobby the government to maintain a large part of the rural population in a Middle Age situation. As 250 years ago, some 400 000 peasants without land depend on landlords. This oligarchy as well as their banks and commercial neighborhoods is protected by their own private police (France TV 5, 2012).

A more sly form of exploitation is the one committed by multinationals with the collaboration of national contractors who oppress children in third world countries.

There are 215 millions of children in the world between 5 and 17 years of age working, 115 millions of which under the worst unimaginable conditions. They may work India to produce clothes for Calvin Klein, or in gold mines in Burkina Faso, Bolivia, Ecuador, Indonesia, Peru, Tanzania and Zimbabwe (UN, Slavery 2011) or in the United States agriculture where some 500 000 Mexican children are exploited (ARTE TV, 2012).

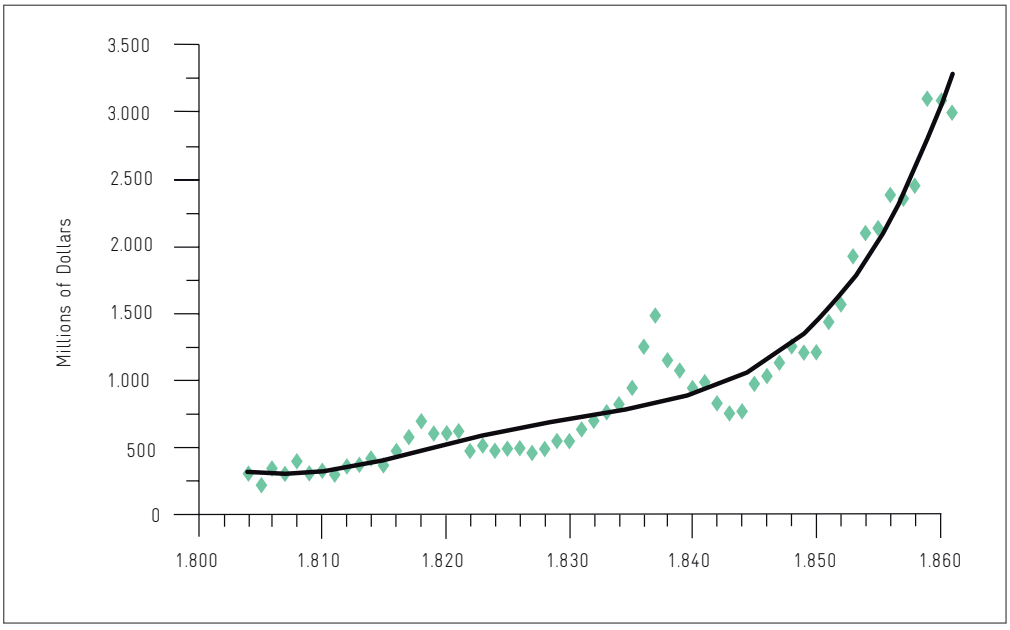
Low-cost clothes are largely manufactured in Bangladesh and India for firms or companies such as IKEA, Calvin Klein, LINDEX, HM, or ZARA. All these multinational companies, like PMSCs (Swiss Government, 2010), have signed a Code of Conduct. They engage themselves to respect the Universal Declaration of Human Rights and work only with contractors who respect national norms. All of this is window dressing for public opinion. An internal audit report leaked to the press showed that all of the 24 contractors in India with whom ZARA worked did not respect any norms. The audit had rated them with the worst possible note according to a set criteria, such as number of hours, health conditions in the premises, whether children under 14 were employed, whether they subcontracted work without authorization-that all of them did to over 2000 subcontractors which, of course, were not audited by ZARA- (French TV 5, 2012). The Rana Plaza collapse in April 2013 in Dacca which killed over 1100 workers

of the factory in Bangladesh unfortunately confirms the safety conditions of the garment industry in third world countries exploited by multinational companies.

In the XXIst century transnational companies, or the 1 per cent oligarchy, continues to approach the 99 per cent of the population as it did in the XIXth century but now worldwide. An article (Ames, 2012) comparing the two situations analyzes how the stock of slaves appreciated while other forms of capital depreciated with time. The growth of the slave population continuously increased the stock of wealth of the oligarchy in the South of the United States. The one percent of the Confederacy fought the Secession War in order to continue profiting from their human slave stock, their most valuable investment property.

The graph of a university research conducted in 1988 on the increasing value of the stock of slaves in the United States in the XIXth century (reproduced below) illustrate his argument.

Figure 1. The Value of the Stock of Slaves in the United States, 1805-1860



Source: Roger Ransom and Richard Sutch (1988: Table 3).

The author contrasts this data with a report carried out for the period 1995-2005 by the consulting group McKinsley entitled "The New Metrics of Corporate

Performance: Profit per Employee" which shows that the best performing firms are those companies which have learned to squeeze ever-larger profits out of each employee. The world's 30 largest companies had more than doubled their profits, from an average of $35,000 per employee to $83,000.

As in the XIXth century in the South of United States today's plutocratic capitalism of the 1 percent continues to exploit the rest of the population.

Implication of PMSCs in the good business of war

> *"War is a racket. It always has been. It is possibly the oldest, easily the most profitable, surely the most vicious. It is the only one international in scope. It is the only one in which the profits are reckoned in dollars and the losses in lives"*

Who says that? Major General Smadley Butler, one of the most decorated and celebrated militaries in the history of the United States Marines Corps.

He spent mostly of his 33 years in active military service operating for "Big Business, for Wall Street and the bankers". In his own words he was a "racketeer, a gangster for capitalism": in Mexico for American oil interests; in Haiti and Cuba for the National City Bank; in Central American republics for the benefit of Wall Street. From 1902 to 1912 he paved the way in Nicaragua for the International Banking House of Brown Brothers. In 1903 he helped the American fruit companies in Honduras and in 1916 the American sugar interests in the Dominican Republic. In China, in 1927, he assisted Standard Oil operations. In his own words whereas the best Al Capone could do was to operate his racket in three districts he operated on three continents (Butler, 1935).

The recourse to war in order to loot natural resources continues to be a constant in history as we can see with the wars in Afghanistan, Iraq and Libya. While US Administration has been spending well beyond its means, others like the oil companies have been among the few winners of these wars. The true cost of the Iraq War would be over $3 trillion (Bilmes, Stiglitz, 2008) (National Priorities, 2011).

Through their lobbies in Washington, US multinational military companies defend their interest. In May 2012, the U.S. House of Representatives passed a bill authorizing 2013 appropriations for the Pentagon. In the US campaign contributions to politicians figure ten defense contractors among the 20 largest military companies in the world: Lockheed Martin, BAE Systems, Boeing,

Northrop Grumman, General Dynamics, Raytheon, United Technologies, SAIC, Honeywell and General Electric (MapLight, 2012). The international trade of conventional arms is valued at $40 to $60 billion a year (NY Times, 2012).

Parallel to the plundering of natural resources, civil wars establish a new system of profits and power. Case studies (SIPRI Yearbook 2011) show the roles played by diamonds in conflicts in Angola, Liberia and Sierra Leone; by narcotics in conflicts in Afghanistan and Colombia; and by minerals in the Democratic Republic of the Congo. With regard to narcotics it is interesting to note that in the 80s and 90s US Administration supported South American governments implicated in the illicit traffic of cocaine. The most known case was the Iran Gate under the Reagan Administration which aim was to obtain funds by the cocaine traffic to finance the Nicaraguan Contra through the illegal sale of arms to Iran (Blum, 2000).

PMSCs have played an important and often a decisive role in these conflicts: Sandline International in favor of the Revolutionary United Front in Sierra Leone and of the government of Papua New Guinea in Bougainville Island; Executive Outcomes in Angola on behalf of both UNITA, the rebel group, and the government; DynCorp in Colombia; MPRI trafficking arms to the Sudanese People's Liberation Army (Francioni, Ronzitti, 2011) or Blackwater and Saracen in Somalia (NY Times, 2011). In 2009 the German security company Asgaard was planning to supply mercenaries to a Somali warlord (Der Spiegel, 2005). Main PMSCs operating in the Afghanistan and Iraq conflicts includ: Aegis, ArmorGroup, Blackwater, DynCorp International, Control Risks, MPRI, Triple Canopy, EOD Technology and Erinys. Primarily the government of the United States and United Kingdom hired these PMSCs. The authorities of Côte d'Ivoire and Libya resorted to mercenaries to impede to exercise the right of the people to self-determination (UN, Mercenaries 2011).

Individuals, often working as mercenaries or under a PMSC, are involved in these conflicts, such as former Israeli Coronel Yair Klein in Colombia (Semana, 2011) or Richard Rouget, a gun for hire over two decades of bloody African conflicts. In 2003, Rouget commanded a group of foreign fighters during Ivory Coast's civil war and was convicted by a South African court for selling his military services. He was also involved in the presidential guard of the Comoros Islands, an archipelago plagued by political tumult and coup attempts. In Somalia, he presently works for Bancroft Global Development, an American PMSC, indirectly financed by the US State Department. He has trained African troops who fought a pitched urban battle in Mogadiscio against the Shabab, the Somali militant

group allied with Al Qaeda (NY Times, 2011). In 2009, two alleged mercenaries from Norway were facing the death penalty in the Democratic Republic of Congo after being accused of murder and spying (The Guardian, 2009).

The new security industry of PMSCs is very much linked to the militarindustrial complex. An osmosis occurs between militaries and police officers and PMSCs. In the United States, MPRI (Military Professional Resources Incorporation) was created by four former US Army Generals, the President of MPRI is General Bantant J. Craddock. The same phenomenon is true for Blackwater and its affiliate companies or subsidiaries that employ former directors of the CIA (Gomez del Prado, 2011).

Punitive economic sanctions are sold as an alternative to war, but as the invasion of Iraq has shown international sanctions are often the prelude to war. In this context, Western economic sanctions on Iran may be compared to the oil sanctions imposed by the United States in 1940 that lead Japan to attack USA.

As in the 1940s, a global crisis of capitalism is paving the way to war. Not only war opens new markets but the destruction it causes needs reconstruction stimulating thus the capitalist economic model based on limitless growth and expansion.

NATO's 2011 humanitarian intervention in Libya indicates that Western oligarchy is contemplating war as a means to resolve the current capitalist crisis. But the spoils from Libya do not seem to be enough to stimulate the economy since the 2008 financial crisis (Schreiner, 2012).

Concluding remarks

Competition between emergent powers, Brazil, Russia, India, China and South Africa (BRICS) and USA, Western countries and their Allies has already started, as access to increasingly scarce resources diminish. The Arctic contains significant hydrocarbon resources. The melting of its ice cap due to global warming will undoubtedly spark conflict in the region. Africa is seen as another key region where resource geopolitics could lead to violence; growing competition for the continent's resources could provoke an increased incidence of conflict between global powers seeking access to them (SIPRI Yearbook, 2011).

The new security industry forms part of this economic and financial system of exploitation of natural resources without limit and the new forms of con-

ducting war by robotic weapons in which only profit matters. A system with a model of development, which does not hesitate to ruin the public services of countries in order to make profit through privatization; to maintain one fifth of the world population in hunger when the food and agriculture resources suffice to feed twice the world population (Ziegler, 2012); to laundering the money of the illicit narcotics traffic through banks such as HSBC (El País, 2012) and Wachovia Bank (AlterNet, 2012) or to the fraud of Libor Rate fixing by banks such as Barclays or UBS; to sell weapons to a country like Greece in deep economic recession; a system in which 1% of the oligarchy that monopolizes profits and privatize services and resources get richer while 99% of the population becomes poorer; to climate change which will destroy the environment and the human species.

It is thus imperative to establish a more just economic world order; to go back to the fundamental principles enshrined in the UN Charter and start implementing the objectives for which it was created namely: "to save succeeding generations from the scourge of war" as well as" to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".

In this context there is urgency to reconsider, adopt and implement the draft Norms on the responsibilities of transnational corporations (UN, 2003) as well as international binding instruments to control the arms trade and the activities of PMSC, which have less regulation than the banana or the toy industry.

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3 PART THREE

BUSINESS INVOLVEMENT IN CONFLICT TRANSFORMATION

WHAT GUIDES BUSINESSES IN TRANSFORMATIONS FROM WAR TO PEACE?[1]

Andrea Iff
Senior Researcher and Project Coordinator of Business & Peace at Swisspeace

Introduction[2]

During recent years, several publications showed the highly relevant impact business might have on (post-)conflict situations. Nelson (2000) and Jamali and Mirshak (2010) use a pyramid to visualize different possible reactions of businesses in these contexts and define them as (1) compliance, (2) do-no-harm and (3) peace*building*[3]. Companies - at a minimum - should comply with local and international laws[4]. In post-conflict situations, a do-no-harm approach is needed additionally. Merely complying with law or voluntary guidelines is not enough, companies need to minimize risks for their personal and financial assets and at the same time *their own negative impact* on the context. Where societies are deeply divided, businesses may (unknowingly) exacerbate underlying tensions. They can be conflict-sensitive through asking questions like: Do our business partners or our security service belong to one of the conflicting par-

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2 The author thanks Anne Flohr for her valuable review of the text and her excellent comments.

3 Ten years ago, Carroll (1991) introduced the Corporate Social Responsibility (CSR) Pyramid. In this pyramid, responsibility of companies is described and illustrated in three levels. The first pillar describes the basic legal responsibility that all companies have to adhere to. The second level describes the requirement of the company to act fairly and ethically within a given legislation. The third level is called philanthropic responsibility describing community involvement.

4 Even though this seems logical, in (post-)conflict situations, two questions have to be asked: Compliant with which regulation and under which enforcement agency? There are no enforced international legal documents that would guide the behavior of multinational companies in these situations (Augenstein and Kinley 2012; Ruggie 2008). After violent conflict, rule of law rarely applies (Rajagopal 2007; Samuels 2006; Tolbert and Solomon 2006) and the local governments don't have the willingness or the capacity to enforce legislation if it exists at all.

ties? Might company materials or infrastructure be used by armed groups? (A. Iff et al. 2012). Finally, businesses might proactively strive to build peace. This reaction does not include philanthropic activities (like building schools or hospitals, or sponsoring a local football team). As (Salil Tripathi 2010, 122) shows convincingly, in situations of conflict, such activities might still exacerbate conflict. Rather, peacebuilding activities are directly linked to the transformation from war to peace and include activities like the reintegration of combatants or the lobbying for peace.

The aim of this chapter is to critically assess the guidance and policy recommendations that guide businesses in (post-)conflict contexts along the three different reactions of compliance, do-no-harm and peacebuilding. This paper is placed within a peace- and conflict research perspective, conceptualizing businesses and business leaders as relevant actors in transformations from war to peace. The assumption stems from the middle-out approach to peacebuilding, which involves leaders in a conflict that do not have military power (highly respected, representing a certain association or network) (Ramadhan 2011; Rogers, Chassy, and Bamat 2010; Hemmer et al. 2006). The rational behind this is that societal relationships of these people can establish a connection both to the masses and to the top leadership.

Why is this focus on conflict but also peace relevant? First, company awareness for the specific needs in (post-)conflict zones is low. Even though their activities might not be linked to conflict, their impact *always* is (Zandvliet 2011; Iff, Alluri, and Hellmüller 2012). Second, companies (but also NGOs and development agencies) tend to operate in similar strategies in different contexts. However, many tools and instruments are meant for situations where conflict is absent, where the rule of law exists, were local judicial remedies are available and stability is expected. In (post-)conflict zones, this is not the case (Salil Tripathi 2005, 125). Third, guidance often is placed in a frame of negative peace; how businesses might *not* exacerbate conflict; there are no empirically grounded ideas of how businesses could support or enhance peacebuilding activities.

The analysis is based on a document analysis of existing guidelines, policy recommendations and secondary data (grey, as well as academic literature). Guidances and recommendations are analyzed with reference to their definitions of and contextualization within conflict and peace: How is conflict defined? How is conflict-sensitivity conceptualized? What kind of peacebuilding activities are

mentioned? [5] In the following, the documents analyzed are shortly presented for every 'reaction' or level of the pyramid:

1) *Compliance (chapter 2)*: Even though there is a tightening web of legal liability (Thompson, Ramasastry, and Taylor 2009), there are on 'direct' legal documents that can held companies accountable for human rights abuses in (post-)conflict situations. This is why in this part of the analysis a focus will lie on voluntary guidelines. The sample of the guidelines is not representative; only three guidelines from the largest multilateral organizations (UN, World Bank, OECD) are included. However, these often serve as reference documents in other code of conducts (Salil Tripathi 2005, 125). Some multistakeholder initiatives will be shortly mentioned to show the range of conflict definitions within these.

2) *Do-no-harm (chapter 3)*: Two guidance documents will be evaluated; the International Petroleum Industry Environmental Conservation Association's "Guide to operating in areas of conflict for the oil and gas industry" (IPIECA 2008) and International Alert's "Conflict-Sensitive Business Practice: Engineering Contractors and their Clients"(International Alert 2006). Most of the publicly available existing guidance on conflict-sensitive business practices have been developed by International Alert and have a similar structure.

3) *Peacebuilding (chapter 4)*: As there are not yet guidelines on this issue, I will analyze academic and policy-oriented literature proposing how business could support peacebuilding. The activities mentioned will be categorized along the peacebuilding palette of Smith (2004) and then assessed critically based on their assumptions on the interplay between business, the state and society in (post-)conflict situations.

The aim of this paper is thus to critically assess the guidances and policy recommendations that guide businesses in (post-)conflict contexts taking into account guidance of multilateral agencies (compliance), conflict-sensitivity guidances (do-no-harm) and literature on the peacebuilding potential of businesses. It will be shown that while most of the existing guidelines are addressing conflict (see also Iff and Graf 2013), they refer to a very narrow definition of conflict as 'armed conflict'. While some guidance take up the concept of do-no-harm or conflict-sensitivity, very few take up the idea of peacebuilding activities. Finally, the existing concepts

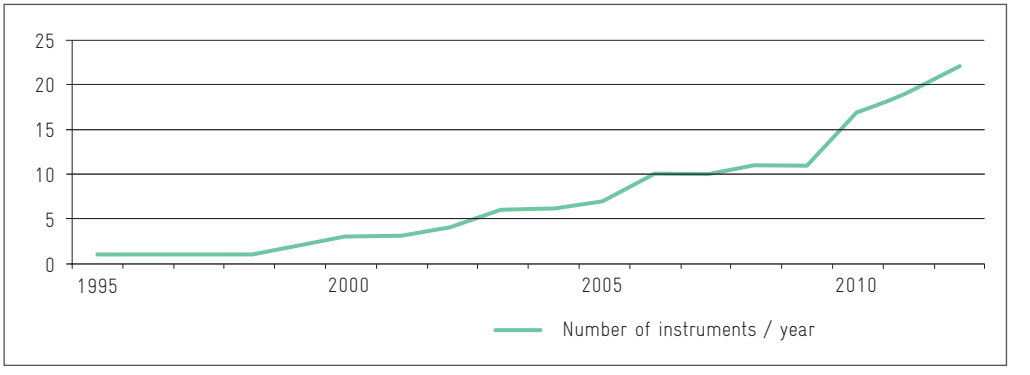
5 If conflict is not separately mentioned, this does not mean that the guidance might not have a conflict-mitigating impact. However, this is not the aim of this paper.

how businesses could be involved in peacebuilding are flawed, as they are based on the assumption of a division between a business and a political class which is rarely the case in (post-)conflict situations. New and innovative ideas on business involvement are needed, especially in a time where businesses are portrayed and put forward by development ministries as relevant players in the fields of peacebuilding and development[6].

Conflict-reference in existing guidelines

The biggest multilateral institutions, the UN, the World Bank and the OECD have developed guidelines for multinational companies: The UN Guiding Principles on Business & Human Rights (UN GP), the OECD Guidelines for Multinational Companies (OECD Guidelines) and Performance Standards of the International Finance Corporation (IFC Standards). The last decade has seen almost an 'inflation' of voluntary initiatives (often taking a multi-stakeholder approach), that try to tackle the legal 'limbo' in which multinational companies operate, for either

Graph 1: Historical development of voluntary initiatives per year



Source: Graf and Iff (2013, 32)

all sectors and industries or specific businesses or regions (Bäckstrand 2006; Fransen and Kolk 2007; Bäckstrand 2006).

6 Apart from Germany, also the European Union and its think tank Friends of Europe, discuss „Policies for Promoting the Private Sector's Role in Development" in different events (*www.friendsofeurope.org*, accessed 1 May 2013). Switzerland, in it's Message for International Developmen Cooperation describes it's commitment to work with the private sector (Swiss Foreign Department 2012). The Austrian Development agency promotes the activities of their businesses in far markets with the slogan „Go for an expedition" on it's homepage (*www.entwicklung.at*, accessed 1 May 2013).

The ***UN Guiding Principles on Business and Human Rights*** (GP) are introduced as applicable to all situations irrespective of the context. At the same time, they make explicit reference to conflict affected areas, especially in the three principles 7, 12 and 23. Under the principles that address *state duties*, the GP address conflict-affected areas in principle 7 called 'Supporting business respect for human rights in conflict-affected areas'. Based on the fact that the risk of gross human rights abuses is heightened in conflict-affected areas, states are asked to *help* businesses in a) identifying, preventing and mitigating their risks and b) assessing and addressing heightened risk of abuses especially related to gender-based and sexual violence. Under c) and d), with an interesting change in language, the GP state that states should *deny access* to public support and services for companies involved in gross human rights violations and they should ensure that *their [own, A.I.] policies, legislations and regulations* are effective for conflict contexts. It is interesting that the heightened problems of conflict contexts are primarily addressed in the state pillar (principle 7). Even though the differentiation is not made in this principle, the guidance might address home states particularly, because host states that are in a situation of conflict or fragility are defined by their lack of capacity or - more importantly - legitimacy to establish and implement rules and regulations (Besley and Persson 2011; Carment, Prest, and Samy 2010; Pritchett and de Weijer 2011). Principle 7 distinguishes supportive *and* sanctioning behavior of states towards businesses and addresses state's own regulations for (post-) conflict contexts. Even though this might seem vague and not very specific, this is already a big step, given that there are rarely states that have such a policy. Some 'home' states are in the process to implement the principles in so called National Action Plans (Miller 2012; Lundan and Muchlinski 2012) however, it is not yet clear how the different countries will interpret and implement especially the supportive elements of this principle in particular[7].

There are two other principles that refer to conflict-contexts, both under the *business pillar:* 12 (body of existing laws) and 23 (context). In principle 12 on the body of existing laws, in the commentary, the GP refer to the adherence of IHL in situations of *armed* conflict. IHL includes war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking, or extrajudicial, summary, or arbitrary executions. The relevance of IHL for businesses is understudied, possibly because there are only a few businesses

7 There is also no specific guidance from the UN Working Group on this issue so far, even though with Alexandra Guáqueta, there is an expert on the topic in the group so that implementation guidance is very likely to be estalibshed soon.

that are active in situations of armed conflict (Chesterman 2010, 21) and there is a need to move away from a focus on private military security companies only (Cameron 2000; Clark 2008; Dutly 2007; Gillard 2006). The ICRC brochure on "Business and International Humanitarian Law: an introduction to the rights and obligations of business enterprises under international humanitarian law" (ICRC 2006) focuses under the subtitle 'obligations of businesses' on the use of military force for the defense of business assets and personnel (private military and security companies, the collaboration with rebel forces or the army), pillage as well as labor conditions, displacement and environmental protection. With regards to 'liability' under IHL, it seems that complicity is the most important one. Martin-Ortega (2008, 282) criticizes that these statements are wide-ranging statements, which are "likely to go down well with purist interpreters of international law; indeed, ultimately they have insufficient grounding in common international practice to support consensus"[8]. Also Tripathi (2010, 131) focusing on genocide stresses that "it is necessary to determine clear rules for what they *[businesses, A.I.]* should not do, what they must do, and what they can do.[9]" Still, even if there were a consensus on these 'whats', there are no enforcement mechanisms.

From a peace and conflict research perspective, a focus on IHL is in so far problematic as it addresses mainly the security aspects of armed conflict and only tackles situations of ongoing conflicts[10], not post-conflict situations where investments are made. Taking the proposition of the ICRC, "Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organisation*." (International Committee of the Red Cross 2008, 5). Thus, conflict only entails (political) international and non-international conflicts and *not* situations of political instability

8 The definitions of genocide, war crimes, and crimes against humanity require so detailed evidence, and the criminal threshold for prosecution and liability is so high, that companies are unlikely to be charged (Salil Tripathi 2010, 137).

9 The Red Flags Initiative of FAFO (Institute for Applied Social Science) and international peace academy led to an enumeration of what businesses should not do (Salil Tripathi 2010, 140): Expelling people from their communities; forcing people to work; handling questionable assets; making illicit payments; violating sanctions; engaging abusive security forces, trading goods in violation of international sanctions; providing the means to kill; allowing the use of company assets for abuses; financing international crimes.

10 A problematic also taken up by human rights advocates in a different context (Amnesty International 2010).

or even company-community conflicts (Nawir and Santoso 2005; Garvey and Newell 2005). The change from a security to a human security approach is not mirrored in these interpretations (Bellamy and McDonald 2002; Paris 2001).

In principle 23 on context, a longer paragraph in the commentary first states the relevance of complicity in activities with *security forces*, second, warns businesses of the *expanding web of legal liability* (both corporate and individual) and third advises businesses to not only rely on internal assessments but to *consult* with a variety of actors in the field or on the ground. The guidelines stress security forces particularly, point to new legal liabilities and advise businesses to take the local context into account. From a peace and conflict research perspective, it is interesting to see that again, the focus lies on security. The reference to consultation with a variety of actors in the field is relevant, however, what does this mean for businesses in practice?

Concluding, it is a big merit that the GP are mentioning conflict situations specifically with an own principle in the state pillar and refer to conflict (less explicitly) in two principles of the business pillar. They thus acknowledge that " (…) some of the most egregious human rights abuses, including those related to corporations, occur in conflict zones" (Ruggie 2008, 210). At the same time, the GP remain vague and within the generally accepted frames. This should be changed in the national action plans (NAP), where a reference to the conflict-sensitivity methodology and especially the notion of impact could be added. Thereby, the states could profit from some guidance that have already been established by other UN agencies: (UN Global Compact and PRI 2010; Global Compact 2010).

The ***OECD Guiding Principles for Multinational Companies*** are general principles for companies and do not specify the particular context of their applicability. The only reference to specific requirements in conflict situations is to be found in paragraph 40 in the chapter on human rights. Analogous to the GPs, the guidelines state that in situations of *armed* conflict, enterprises should respect the standards of IHL, "(…) which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments." At the same time, the OECD developed additional guidances and documents that are conflict-specific, like the "*Risk Awareness Tool for Multinational enterprises in Weak Governance Zones"* (2006) and more recently a "*Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*" (2010). The latter guidance was developed for companies concerned with armed conflict for either sourcing conflict through the buying of these minerals,

thus specifically for (post-)conflict contexts. Its definition (p. 13) of 'conflict-affected and high-risk areas' is an 'armed conflict plus' definition that is quite encompassing. Conflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence or other risks of harm to people. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. In the Risk Awareness Tool, the OECD addresses conflict again from a security and IHL perspective. In part 2 on „Obeying the Law and Observing International Instruments" under the subtitle of 'Human rights and management of security forces (p. 16)', it introduces amongst others questions like: If the country is experiencing an armed conflict, do the parties to the conflict respect international humanitarian law? How does the company intend to protect employees and assets from threats to violent conflict and from extortion and other criminal activities? At the same time, the tool also refers to the OECD DAC (Development Assistance Committee) work on prevention of conflict or International Alert's conflict sensitive business practices.

From a peace- and conflict perspective, it is interesting to see that the OECD addresses conflict different than the GP. On the one hand, in the Due Diligence guidelines it applies rather a fragility lens including a lot of different situations that might be problematic for companies instead of a very narrow definition within IHL. Furthermore, the Risk Assessment tool refers to conflict-sensitivity tools (like the ones from International Alert). It is difficult to speculate about the reasons for this; one could argue that the Due Diligence guidance has been developed in close collaboration with the countries in the Great Lakes region where the definition of 'armed conflict' would not have applied anymore. Additionally, the guidance refers to specific peace and conflict documents within the OECD and thus supports the mutual influence of these instruments.

The ***IFC Performance Standards*** do not set specific standards for conflict-affected areas. At the same time, under Performance Standard 4 (Health, Safety and Security), there is a reference to conflict and post-conflict areas, stating that in these areas, "the level of risks and impacts described (…) may be greater. The risks that a project could exacerbate an already sensitive local situation and stress scarce local resources should not be overlooked as it may lead to further conflict." Another reference to conflict is mentioned under Performance Standard 7, where a clearer definition of the term 'Indigenous People' is introduced, saying that the standard may also apply to communities that have lost territories amongst others because of conflict. At the same time, the IFC states that the standards should be applied irrespective of the context.

These guidances (especially the newer ones) are not designed in a way as to help businesses in their activities. Rather, they are very broad and are based on the least common denominator, and do not include clear, practical guidance. Thus, the IFC does not address conflict particularly in it's guidances. At the same time, there are encompassing social and environmental impact assessments proposed for any project support. These might also have a conflict mitigating effect if implemented with a particular political economy lens.

Aside from these initiatives within international organizations, there are several voluntary initiatives that have been brought forward from specific sectors or industries often organized as multi-stakeholder processes (Peters, Koechlin, and Zinkernagel 2009). Some of these initiatives are interesting in their reference to conflict, because MNCs worked closely with governments and non-government organizations to develop practical solutions to problems for enterprises in conflict zones. The most explicit reference to conflict and also clearest definition of conflict is included in the ***Conflict Free Gold Standard*** (CFGS): it is specifically oriented towards gold originating in conflict-affected or high risk-areas. The standard refers to the Heidelberg Conflict Barometer in order to designate areas considered conflict-affected or high risk. The criteria for an area to be conflict-affected or high-risk and therefore relevant for the GFCS is that the country or area has been ranked by the conflict barometer as 5 (war) or 4 (limited war) in the reporting year or one of the two previous years.[11] At first, this seems to solve the problem of a very broad definition of conflict and leaves companies with a clear applicable and referable definition of conflict. However, from a peace and conflict perspective, if we apply this to the current situation, this includes almost the same cases that would fall under an armed conflict category within IHL (42 cases). The intersection of countries that fall into this categories (intensity 4-5) of the Conflict Barometer and those countries that have most of the gold resources, are Brazil, Russia and Mexico[12]. Another guideline that has been developed for (post-)conflict contexts, does not make explicit reference to conflict at all. The ***Voluntary***

11 If a company considers that the area where its mine is located within a country categorized by the Heidelberg Conflict Barometer 5 or 4 is not conflict-affected or high-risk, the mine can be exempted from the process. However, the company needs to provide evidence supporting this conclusion and make it public. See:

12 Countries with a 4-5 intensity conflict in 2012: Russia (Northern Caucasus), CAR, Chad, DRC, Kenya, Mali, Nigeria, Somalia, South Sudan, Sudan, Brazil, Colombia, Mexico, India, Pakistan, Myanmar, Philippines, Tajikistan, Thailand, Afghanistan, Algeria, Iraq, Israel, Lybia, and Turkey. Countries that have most of the unsourced reserves in gold: Australia, South Africa, Russia, Chile, USA, Indonesia, Brazil, Peru, China, Usbekistan, Ghana, Mexico, Papua-New-Guinea, Canada.

Principles on Business and Human Rights (VP) addresses human rights violations of security providers. Thus, even if the VP are not making explicit reference to conflict-affected areas, they are directly relevant to these situations. Due to a number of reasons, countries with important natural resource extraction sites tend also to have weak governance structures and violent conflict. It is therefore precisely in such areas where the problems the VP try to address are occurring in the most virulent ways. Still, the authors of the principles chose not to include conflict in the wording, nor in the accompanying guidance. Another initiative, the ***Extractive Industries Transparency Initiative*** (EITI), does also not refer specifically to conflict-affected areas. However, the EITI published case studies where their standard was applied in conflict-affected countries and they included conflict issues in event's series. Interestingly, EITI mentions conflict as one of the *consequences* of weak governance and not as an origin.

Table 1: Reference to conflict in guidances for businesses

Guiding Principles	Principle 7	No definition
Guiding Principles	Principle 12	Armed conflict (IHL)
Guiding Principles	Principle 32	No definition
OECD Guidance for MNC	Paragraph 40	Armed conflict (IHL)
OECD Due Diligence	Box (p. 13)	Armed conflict, widespread violence or other risks of harm to people, political instability, repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence.
OECD Risk Awareness	Chapter 2	Armed conflict (IHL); reference to International Alert and OECD
IFC	Performance Standard 4	Greater risks and impacts of same in conflict.
IFC	Performance Standard 7	Conflict in indigenous communities.
CFGS		Heidelberg Conflict Barometer (intensity 4 or 5)
VP		No definition
EITI		No defintion (conflict as consequence of weak governance)

If we take this (not representative) sample of guidances as a starting point, we see that most of them either do not define conflict, or they refer to armed conflict in the framework of IHL. The question is: do we need an applicable definition of conflict in order to guide businesses? As indicated above, a narrow definition of armed conflict does not serve the purpose of sustainable economic development and peacebuilding in (post-)conflict situations[13]. Such a definition allows businesses to not apply enhanced due diligence in situations that are 'only' characterized by political instability, repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence. For most companies, investments in situations of armed conflict are profoundly uninteresting: decreased predictability, limits in the guarantee of contract, increase in transaction and transport costs, disruption of labor and good markets, endangering of a company's physical assets and staff, lack of enforceability of contract and property rights (UN Global Compact and PRI 2010; Mihalache 2008; Channell 2010). To conclude; the analysis of the guidance on conflict and fragile situations shows that existing voluntary initiatives are not yet well placed to specifically address these situations and more work needs to be done to 'operationalize' what the very broad definitions of conflict mean for business behavior. One proposition would be to stop linking conflict situations to IHL, and rather follow the definition of conflict analogous to the Due Diligence guidance of the OECD.

Do-no-harm and conflict-sensitive business practices

The guidances of multilateral agencies mentioned above address different actors (states and businesses and the affected population); the guidelines that take a conflict-sensitivity approach address companies and businesses particularly. Most of these guidelines have been developed by International Alert. The do-no-harm approach or conflict-sensitivity, as it is more often called today, was first systematized by Anderson (1999) and has developed into a more comprehensive and cross-cutting concept in the last decade (Woodrow and Chigas 2009; Rogers, Chassy, and Bamat 2010). Conflict-sensitivity is the ability of a business or any other organization in a (post-)conflict context to (a) understand the context in

13 The referring to IHL also points to the possibility that with the formal regulation of things, there is a 'race to the bottom' (Chesterman 2010, 18).

which it is operating in (what are the connecting and dividing issues); (b) understand the interaction between the organization's intervention and that context and (c) act upon that understanding in order to avoid unintentionally feed in to further division and maximize the potential contribution to strengthen social cohesion and peace (Dittli and Gabriel 2012). In the following, two of the guidelines, the IPIECA Guide for the oil and gas industry and Alert's seminal work for the extractive industry will be analyzed. It is interesting to note that after a lot of publications in the mid 2000s, there are rarely guidances published taking a do-no-harm or conflict-sensitive business approach today. This is particularly interesting, as in comparison, several development actors are mainstreaming their activities based on conflict-sensitivity recently (Operations Evaluation Department 2012; Swiss Foreign Department 2012).

The ***IPIECA Guide***[14] is specifically addressing risks in conflict-affected areas for oil and gas industries, the ***Internatioal Alert Conflict Sensitive Business Practices*** for the Extractive Industries particularly address the extractive industries. The definitions of conflict in these kinds of guidances distinguish themselves strongly from the ones that have been discussed for the 'compliance' level above. They are different in four ways:

1) Conflict is defined very *broadly* in both documents, as a situation, where interests of two parties become seemingly incompatible (International Alert 2005, 3 and IPIECA 2008, 5).

2) *Non-violent* conflict is also defined as conflict, and described as a situation that could worsen with time and that needs to be handled with care and monitored regularly. "Whereas this Guide is focused on conflicts that have the potential for violence or are violent in nature (…), non-violent conflicts should not be disregarded (IPIECA 2008, 7).

3) Conflict is seen as a *gradual* process and both publications apply a flexible definition of the severity of conflict. While within IPIECA the scale from non-violent (0) to violent conflict (5), to war (10) is described[15], International

14 IPIECA 2008, Guide to Operate in Areas of Conflict for the Oil and Gaz Industry, p.5, available at: *http://www.ipieca.org/sites/default/files/publications/conflict_guide_0.pdf*

15 In the IPIECA guidance, they give several examples for the oil sector along this spectrum: corporate-community disagreements in Alaska, corporate-community tensions in Tangguh, West Papua, pipeline vandalism and tapping in Georgia, corporate community conflict in the Niger Delta, oil production in insurgency affected areas in Colombia, oil production in Iraq. It becomes clear that depending on the context, a situation can be more violent than the other, even if the operations are implemented in the same ways.

Alert is mentioning the different phases of conflict. Alert's guidance uses the conflict cycle to show that conflict is not something static.

4) Apart from political or socio-economic conflict, the guidances include *company-community* conflicts. They are defined as those directly related to the industry's presence in a given context (resettlement, environmental degradation, etc.).

The guidances follow the above outlined logic of the do-no-harm approach: first, they recommend an analysis of the conflict context, then the interactions between the conflict context and the activities of the companies, and finally, the mitigating measures. While companies have a lot of different guidance than can help them to understand their impact on different issues (environmental and social impact analyses), there are rarely tools that help them to understand their possible impact on violence and conflict.

There is not yet evidence on the impact of conflict-sensitivity approaches. The Global Compact (2010, 7) has a rather pessimistic view: "Despite efforts to enhance the private sector's capacity to make a positive contribution and to mitigate the negative impact of their operations, individual company and industry initiatives to promote conflict-sensitive practices have not been widely embraced and have not yielded a cumulative positive benefit to conflict-affected communities". The impact of business guidances overall strongly contested (Jerbi 2009; Lozano 2012). While it is accepted that some guidances were helpful with regards to achievements in the abolition of child labor, or regarding the health and safety of workers, the impact of initiatives with more political issues is questioned by several scholars and civil society: "Often, the impact is patchy and does not lead to broad, structural improvements" (Burghardt 2009, 4). While one might share these assessments to a certain point, there is also no empirical data on this issue. There seems to be no overview how many companies tried to apply a conflict-sensitive approach to their business activities and what the impact and outcome of this was. This mirrors a general problem when researching businesses in political governance issues (Iff, Alluri, and Hellmüller 2012).

To conclude, there are at least two documents addressing businesses, that try to introduce a do-no-harm approach to their activities. From a peace and conflict research perspective, such an approach however is most relevant. Still, as we discovered in our research, businesses rather link themselves with human rights, that seem a 'neutral and good' concept, rather than with conflict, which is

always negatively loaded despite the efforts to see conflict as something natural in societies (Iff, Alluri, and Hellmüller 2012). Therefore, I propose to look more closely into the similarities between the human-rights based and the conflict-transformation approach (Parlevliet 2011; Parlevliet 2010)), in order to enhance the current efforts and guidances and also make them more accessible and implementable for businesses.

Businesses that build peace?

Finally, after looking into references to conflict and conflict-sensitivity/do-no-harm in existing guidances, the aim was to explore guidance on how businesses can do good[16]. In contrary to conflict sensitivity that aims at conflict mitigation, building peace aims at conflict transformation (Rogers, Chassy, and Bamat 2010, 18). However, there is no guidance that is specifically looking into this. Still, ten years ago, several publications have come out that were proposing a 'positive' or 'do good' role for businesses in peacebuilding (Gerson 2001; Haufler 2001; Nelson 2000). Also several organizations, not least the UN, pushed into the direction of private sector involvement in peacebuilding (Annan 1999). This is why the following paragraphs will concentrate rather on a literature review instead of a content analysis of guidance.

Peacebuilding following Smith (2004, 122) has four main goals: "to provide security, to establish socio-economic foundations of long-term peace, to establish the political framework of long-term peace, to generate reconciliation, a healing of the wounds of war and justice". Also most of the development and peacebuilding agencies depart from these four goals. For example, the Development Assistance Committee (DAC) of the OECD defines peacebuilding as a "fast developing field that covers four broad areas of intervention: equitable socio-economic development, good governance, the reform of security and justice institutions, and truth and reconciliation processes" (OECD DAC 2008, 2). "In a larger sense, peacebuilding involves a transformation toward more manageable, peaceful relationships and governance structures—the long-term process of addressing root causes and effects, reconciling differences, normalizing relations,

16 In the IPIECA (2008, 3) guide, it is stated that: "In situations of violent conflict, it may be necessary for companies to play a more active role in the external environment." This is what is then later called the 'do something' and the 'do something ++' approach.

and building institutions that can manage conflict without resort to violence" (Snodderly 2011, 40).

In the following table (table 2), the possible business activities mentioned by different authors / organizations are categorized along the peacebuilding palette of Smith[17], in order to find out where *theoretically*, authors would see business' possible role in peacebuilding. Authors that are analyzing the role of businesses in peace*making* are not taken up in the table (S. Tripathi and Gündüz 2008; Iff et al. 2010). Thus, in this analysis I am more interested in possible activities that are not linked to mediation particularly. If authors also have mentioned mediation activities as part of their enumerations, they are categorized as 'other' in the table.

17 While this is an exercise based on literature, we did this already empirically, based on interviews with representatives of MNE's see Iff et al. (2012)

Socio-economic development	Good governance	Reform of security and justice	Truth and reconciliation	Other	(Smith 2004)00
• Physical reconstruction • Economic infrastructure / job creation • Infrastructure of health and education • Repatriation and return of refugees and IDPs • Food security	• Democratization (parties, media, NGO, democratic culture) • Good governance (accountability, rule of law, justice system) • Institution building • Human rights (monitoring law, justice system)	• Humanitarian mine action • Disarmament, demobilization and reintegration of (child) combatants • Security sector reform • Small arms and light weapons	• Dialogue between leaders of antagonist groups • Grass roots dialogue • Other bridge-building activities • Truth and reconciliation commissions • Trauma therapy and healing		
• Supporting humanitarian relief operations • Limiting means to wage war	• Ensuring accountability		• Creating cross-sector dialogue and partnerships • Rebuilding trust	• Engaging in diplomacy and peacemaking	• (Nelson 2000) (Key challenges 7-12, p.9)
• Contribute to "officially sanctioned interventions" such as peacekeeping or humanitarian missions				• Facilitate communication and access to information • Intervene in diplomatically to bring he parties together, and mediate between different interests • Impose negative sanctions by withdrawing from activities know to be contributing to violence	• (Haufler 2001)
• Technical expertise (finance, product design, accounting, and marketing, as well as electronic commerce) • Providing managerial and business expertise		• Development of a rule of law (essential to securing investment, defining property rights, forming contracts, and preventing default on debts)		• Assistance in the formulation of a systemwide strategy • Assistance in overcoming divisions based on divergent institutional cultures • Participation in negotiation/mediation processes	• (Gerson 2001)
• Support in new communications and collaboration technology • Targeted product donations			• Conflict resolution training to own employees.	• Business sponsored peacebuilding (funding efforts of practitioners)	• (Sweetman 2009)
• Donating resources to respond to local humanitarian crises				• Mediating interactions between parties to the conflict, organization negotiations among the conflict parties • Lobbying the government to actively resolve the conflict; speaking out publicly against violence and/or its causes	• (Getz and Oetzel 2009)
• Strategic social investment (helps communities to achieve their development priorities)	• Government relations			• Core business aimed principally at making profit (human rights, workplace policy, stakeholder dialogue) • Local stakeholder (consultation and communication strategies)	• (UN Global Compact and PRI 2010)

In the following, the activities mentioned in the four categories will shortly be commented and interpreted. However, as indicated above, these are just named in the literature and (apart from the survey data of the Global Compact 2008) not empirically verified; rather these are opinions of authors about the should's and could's of business involvement in peacebuilding.

- Socio-economic development: The most relevant discussion here is similar to the in how far businesses contribute to socio-economic development just by doing their core business. If we take into account the literature on Private Sector Development in post-conflict situations (Al-Muthaffar, Nasir, and Kacem 2012; Kramer, Trevinyo-Rodríguez, and Verweij 2012; Venugopal 2011) and the connected discussion on horizontal inequalities (Venugopal 2011; Østby et al. 2011; F. Stewart 2000; Frances Stewart 2010), we might assume that just-doing-business for peacebuilding is not enough. Interestingly, most of the activities mentioned refer to humanitarian relief or to knowledge transfer and technical support, not even to business as usual.

- Good governance: The relevant question here is in how far businesses can contribute indirectly to peacebuilding when they are just interacting with government in a responsible way. Looking at the activities in the table, it is interesting that there are only a few authors/organizations mentioning this. Government relations are 'daily business' for businesses and they might have an important impact on these aspects of peacebuilding. There are not yet studies that tackle for example the impact of corruption on statebuilding and legitimacy, however, this kind of research might give insights into how such activities of companies sustain peace.

- Reform of security and justice: Interestingly, there is only one author that mentiones this indirect contribution of businesses: Through their long-term investment, they help to build structures and rule of law. The important reference field is the literature on private military security companies (Gillard 2006; Clark 2008; Cockayne 2008); however, most of the literature is focused on the question how to hold these companies accountable and not so much in how far they can help to support peacebuilding processes. While the Voluntary Principles help to guide businesses on how to reduce human rights violations, they do not take up the connected issues to security sector reforms.

- Truth and reconciliation: Again, there are only two authors that mention this field of activities and only Nelson (2000) introduced 'building trust'.

Generally, it becomes obvious that all of the activities can only contribute *indirectly* to peacebuilding. While most of the texts claim to tackle the role of businesses in peacebuilding, they often mention activities of peace*making* (taken up in the 'other' column). There seems to be very little knowledge on the possibilities how companies could support peacebuilding while focusing on their core business.

Conclusion – flatten the pyramid?

The aim of this paper was to critically assess the guidances and policy recommendations that guide businesses in (post-)conflict contexts taking into account guidance of multilateral agencies (compliance), conflict-sensitivity guidances (do-no-harm) and literature on the peacebuilding potential of businesses. The analysis was based on a content analysis of the definitions of and contextualization within conflict and peace: How is conflict defined? How is conflict-sensitivity conceptualized? What kind of peacebuilding activities are mentioned?

The definition of conflict in voluntary guidelines of multilateral agencies is focusing on armed conflict in IHL. This is a relatively narrow definition of conflict, comparing to the situations that multinational companies are faced with in their daily business. Apart from the guidance by the OECD that focuses on supply chains, situations of 'fragility' are rarely taken into account. This definition also supports the conceptualization of businesses within a control agenda (Cooper 2002), where businesses are either involved with 'good' or 'bad' partners, licit or illicit trade. However, as the recent interest in relations of businesses with armed groups shows, relationships in a situation of (post-)conflict are often more complex. The question arises if the definition of the context of a behavior is relevant (conflict). Given the recent development in the field of business and human rights and the tightening net of legal liability, a human-rights based approach to compliance issues might be more relevant than the framing within a traditional peace and security approach.

The assessment of the existing guidelines on the do-no-harm level showed that there are a few guidances that support businesses if they want to take such an approach. These guidances take a very broad sociological definition of conflict and distinguish between socio-political conflicts and the conflicts between companies and communities. They can help companies in implementing their activities in (post-)conflict situations, without exacerbating existing tensions.

The human-rights based approach on the compliance-level integrates well with the conflict-sensitivity approach on the do-no-harm level: "In a context of conflict, this analysis [conflict sensitivity analysis, A.I.] necessarily includes human rights violations and abuses, as well as the actions of organizations that seek to mitigate such abuses" (CDA 2103, 1). However, there is a need for conceptual clarity and greater awareness on the part of both policy makers and business entities as to how respect for human rights and conflict-sensitivity relate to and reinforce one another, as the constituent elements of responsible business practice. In this connection, there is also a need to bring the human rights and peacebuilding discourses closer together and stimulate more concerted efforts by private sector actors to adopt an integrated approach to tackling impacts in conflict-affected and fragile environments (Forrer, Fort, and Gilpin 2012; Parlevliet 2011; Parlevliet 2010). From a business perspective, the integration of a human rights based approach is much more attractive than the integration of any concept that includes 'conflict' (Iff, Alluri, and Hellmüller 2012).

The existing literature on businesses and peacebuilding lacks empirical evidence and conceptual clarity. There are no guidelines for businesses in peacebuilding neither in academic nor in practitioner's literature. Authors tackling the topic rarely define what they mean with peacebuilding activities and often cite peace*making* activities of businesses but not their involvement in long-term peacebuilding. As indicated above, there is rarely empirical evidence on this issue (Iff, Alluri, and Hellmüller 2012) and it needs yet to be established if the assumptions that different authors have when they propose businesses as 'peacebuilders' hold true also in (post-)conflict situations. Most authors proposing businesses as peacebuilders do this without problematizing the high interdependence that exists between business and political actors in such environments (as is recently shown comparatively by Pitcher (2012)). As indicated in the beginning of the text, the assumption that businesses are important players in peacebuilding is based in the middle-out approach to peacebuilding, where businesses are seen as a connection both to the masses and to the top leadership. However, in reality, multinational companies rarely see themselves like this and also do not want to play such a role. Thus, literature on this issue could greatly profit from insights from political economy approaches that take a differentiated view on the possibilities and restrictions of businesses in peacebuilding.

In terms of guidances for businesses in (post-)conflict situations, they are well consulted if they do not conceptualize their actions within the pyramid. Rather,

they should flatten the pyramid. The definition of conflict as armed conflict within IHL will not help them to guide their behavior in violent situations; a conflict-sensitivity analysis (including human rights) serves them better. There is almost no guidance how to do better, and companies receive guidance that is oriented along a negative peace. For a sustainable economic development however, we need companies to think not only in a way how they can not be implicated in human rights abuses, but rather in how they could also add to a social and economic peace in a country.

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PEACE IS BETTER BUSINESS, AND BUSINESS BETTER PEACE: EXAMINING THE ROLE OF THE PRIVATE SECTOR IN COLOMBIAN PEACE PROCESSES FROM THE 1980S UNTIL TODAY[1]

Angelika Rettberg
Political Science Department. Universidad de los Andes

Introduction

"We warn you about the consequences of a bad ending, such as the one I expect for this process" (El Espectador 2013).[2] These harsh words, pronounced by the president of the Colombian cattle ranchers association (Federación Nacional de Ganaderos - Fedegán), contrast with the active role that important sectors of the Colombian private sector have played in promoting the current peace process led by the government with the *Fuerzas Armadas Revolucionarias de Colombia* (FARC).

Business involvement in negotiations and peacebuilding is not a recent phenomenon in the country, as will be documented below. More importantly, in light of increasing budget limitations for international cooperation in development and peacebuilding (Rettberg 2012)—resulting both from the global financial crisis as well as from the shift of interest towards Africa—it is likely that the Colombian state and society—mainly wealthy taxpayers and the business community—will carry the brunt of the burden of Colombian peacebuilding costs. The relevance of Colombian business support for peace negotiations and peacebuilding can therefore not be overstated as a source of vital resources—via taxes, employ-

1 A preliminary version of this paper was presented via video at the International Conference on "Building a Research Network on Companies, Conflict and Human Rights", Institut Internacional Català per la Pau, January 17th and 18th 2013, Barcelona, Spain. I am grateful to Carlos Alberto Mejía for helpful research assistance.

2 The original statement was "Advertimos las consecuencias de un mal final, como creo que va a terminar el proceso" (El Espectador 2013).

ment, and other contributions—to support processes ranging from institutional reform to demobilization and victims' reparations. Business opposition, in turn, can hamper progress on crucial issues such as the design and implementation of land reform and a direly needed review of the Colombian fiscal structure.

However, business participation in peacebuilding issues serves more than material purposes. For many sectors in society, the involvement of the owners of capital and their managers holds significant symbolic value, signaling commitment and willingness to accept change. Thus, in an overall business-friendly society such as the Colombian, business participation should also be considered as a source of political legitimacy for tasks related to diverse peacebuilding goals (Rettberg 2007, Rettberg & Rivas 2012).

This chapter will both describe and analyze the participation of Colombian business in the ongoing peace negotiations that are taking place in Havana, Cuba, with the support of the governments of Cuba, Chile, Norway, and Venezuela. It will review the private sector´s experience with negotiations in the country, examine some of the factors that have had an impact on shaping business preferences faced with conflict, describe business' current participation and political positions in the ongoing talks, and identify several challenges for the Colombian business community in terms of building peace in the country.

The paper will illustrate that, overall, Colombian business tends to favor the solution of the Colombian armed conflict via negotiations. However, the paper will also show that divisions persist regarding a) the need to conduct peace talks as opposed to keeping up efforts to produce military defeat of the remaining guerrilla forces, b) specific topics on the negotiation agenda, specifically the fate of the agrarian sector, land restitution, and victims' reparations, and c) the question as to how the burden associated with peacebuilding will be distributed within society, in general, and the business community, in particular (e.g. increasing the tax burden, restructuring the national budget, increasing calls for international cooperation). It will be argued that the existence of a critical mass favoring negotiated peace within business augurs well for keeping up the private sector´s commitment with negotiated peace and its costs. However, the factors currently causing divisions need to be considered carefully by negotiators on both sides so as to avoid spill-over from recalcitrant business factions to supporters of negotiations, as they could hamper the needed business support that sustainable peace in Colombia will require.

The role of business in previous peace negotiations

With over 5,8 million registered victims (Unidad de Víctimas 2013), the Colombian armed conflict is one of the deadliest in the world. It is also one of the longest remaining active conflicts. In addition to the significant human cost, the armed conflict has accumulated huge material costs, amounting to around 3% of GDP (on average 0,6% of GDP/year, according to Ibañez & Jaramillo 2008). The state has also incurred in significant military expenditures, amounting to 3,6% of GDP (SIPRI 2012). As a result of war-related devastation and an ongoing weakness of the Colombian state, an important war economy has developed in the country, associated mainly with the drug trade (Gaviria & Mejía 2012) but also with the extractive industry and other legal resources (Leiteritz, Nasi, and Rettberg 2009, Rettberg, Leiteritz, and Nasi 2011).

Over the past decades, the country has undergone numerous efforts to bring a negotiated end to the confrontation among the guerrillas and the state. As a result, several insurgent groups have demobilized, including the M-19, the Movimiento Quintín Lame (MQL), and the Ejército Popular de Liberación (EPL) in the early 1990s, as well as the Rightist delf-defense groups (AUC) in the mid 2000s. However, the two main Left-wing guerrilla forces, the FARC and the *Ejército de Liberación Nacional* (ELN), both founded in 1964, remain up in arms until today.

The costs of conflict from a business perspective

The armed conflict has exacted numerous burdens for the Colombian society and economy (Camacho, Rodríguez & Zárate 2012). A survey of business owners and executives published in 2008 documents the impact the conflict has had on economic activity in the country (Rettberg 2008).[3] One of the survey´s main conclusions was that the costs of conflict for economic activity are high, as described by all participants in the survey. At the same time, costs are not evenly spread. Factors such as company size, sector of the economy (and the degree to which the sector is labor intensive and/or oriented toward interna-

3 The survey included phone interviews with the legal representatives of 1,113 enterprises of different sizes, located in six Colombian cities, from all sectors of the national economy and with national, regional and local reach (find a summary in English at *http://www.international-alert.org/pdf/Exploring_peace_dividend_Colombia.pdf*).

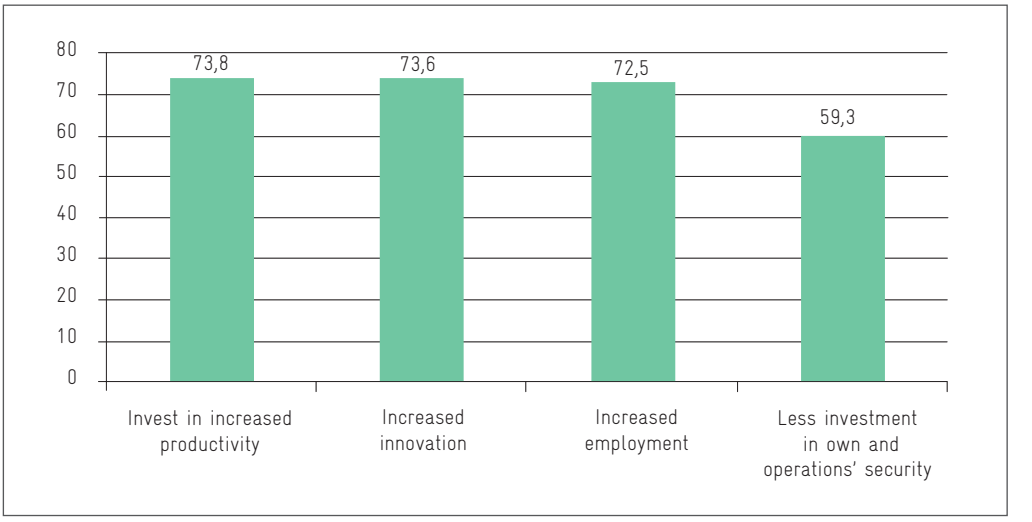
tional markets), company nationality, and region of the country determine how conflict has affected companies in the country.

According to the survey, the majority of Colombian businesses identified *indirect* costs, relating to loss of business opportunities, delays in merchandise distribution, and opportunity costs, investments in security and in insurance, and taxes, rather than a *direct* impact on their operations, such as kidnappings, extortions, and attacks (against staff and operations). Larger companies were more likely to report costs than smaller ones, and they also reported higher growth. Smaller companies more frequently reported extortion payments, as well as suffering more frequently from business closures resulting from conflict-related conditions. Companies with nationwide operations were more likely to pay extortion to illegal armed groups and suffer from disruptions to distribution and transport systems than were companies with regional or local operations. Mining, gas, electricity, agriculture, and transportation companies most frequently reported direct costs related to armed conflict, while financial services and investors reported the least.

The results of the survey provide a better understanding of the kinds of impacts the Colombian armed conflict has had on economic activity, as well as of the types of enterprises and sectors that are most vulnerable (or less exposed and more resilient) to certain costs associated with conflict. The results also point at the possible links between armed conflict´s impact on businesses and political preferences in terms of peace negotiations. As I have argued elsewhere, the higher the perception of conflict costs, the higher the likelihood that business will support peace negotiations as a solution to armed conflict and as a strategy to protect assets and operations (Rettberg 2007).

In addition, the survey also provides insights as to what the Colombian society and economy are missing in terms of greater private sector activity in the absence of conflict. As presented in figure 1, three quarters of the sample of Colombian business covered by Rettberg (2008) reported that they would be more productive, innovate more, and increase employment. A smaller percentage would invest less in their security, reflecting a well learned lesson about post-conflict criminality.

Figure 1. In what way would you run your company differently in the absence of armed conflict in Colombia (in percentages)? Based on Rettberg (2008)



Business and peace negotiations in the 1980s and 1990s

Marked to different extents by the vagaries of political and economic crises, Colombian business is not a newcomer to the history of peace negotiations in Colombia. However, in the course of history, its participation has become both more intense as well as more professional, as it has accumulated lessons and knowledge about the challenges involved in peacebuilding. During some periods, the impact and costs of conflict on business activity has been the main factor mobilizing business support. However, variation in the kinds of sectors and companies involved suggest that other factors, such as an awareness of opportunities and investments foregone, have also come to play an important additional role in rallying business support for negotiations. This section will describe the evolution of these factors in different peace negotiations in Colombia that took place in the past three decades.

President Belisario Betancur (1982 – 1986)

Even before president Belisario Betancur (1982-1986) formally launched the country´s first of a sequence of peace talks with the Colombian guerrillas, ANDI, then the private sector's main association and spokes organization, sustained at its annual meeting that peace should be a national purpose: "Without social justice we will not regain peace and tranquility" said ANDI's president thirty

years ago, echoing president Betancur's emphasis on addressing the so-called "objective" or structural causes of violence (Kalmanovitz, 1991, p.202).

While not combined with willingness to pay—either higher taxes for security or for greater social investment—private sector associations, especially ANDI, as well as individual members of the business community, occupied important positions in the government negotiating team (Betancur 2002). In addition, business associations met regularly in the presidential palace to discuss the government's peace negotiations strategy (Kalmanovitz, 1991).

However, this participation did not reflect a widespread concern with conflict or peace on behalf of the whole Colombian private sector. Conflict levels and costs were still low as compared to twenty years later and Colombian society's attention was more concerned with the growing drug trade and its impact on domestic criminality (Kalmanovitz, 1991). As recalled by the president of ANDI's office in Bogotá, "at that time there was no awareness among business people that we should be a part of this [effort to negotiate peace] (...). The private sector in the 1980s was either skeptical or clearly opposed to peace negotiations. (...) Remember, this was during the Cold War" (Betancur, 2002).

Despite business´s low profile in negotiations, guerrilla leaders were aware of the advantages offered by the presence of capital owners at the table. "They [*the FARC guerrilla*] had a strong preference for discussions with business people. They saw us as their opponent, (...), they got dialectic anxiety. (...) They saw the need to hold discussions with the private sector, but the private sector had no interest to discuss anything with them, they were viewed as someone living in the woods" (Betancur 2002). This was reflected in the associations' reluctance to accept key aspects of Betancur's peace policy, including reforms of the Police code and an amnesty for ex-combatants (Kalmanovitz, 1991).

Talks led by president Betancur were partially successful in producing the demobilization of a fraction of FARC combatants and the creation of a political party (*Unión Patriótica*), which however, was later subjected to severe persecution by rightist extremists, leading to the death of thousands of its militants (Cepeda and Girón 2005). In terms of business participation these talks, as well as following attempts to bring a negotiated end to conflict (e.g. in Caracas and Tlaxcala in the 1990s), laid the seeds of negotiation activism in the private sector. These initial efforts, however, were still limited in terms of private sector coverage in large part due to fact that armed conflict had not yet developed its full destructive potential, as later years would witness.

Presidents Ernesto Samper (1994 – 1998) and Andrés Pastrana (1998 – 2002)

This changed significantly in the mid 1990s, when, during the government of Ernesto Samper (1994 – 1998) economic recession, a severe crisis of governance and an unprecedented escalation of armed conflict increased the costs of conflict for all Colombian society and, specifically, for private sector activity, prompting renewed calls for a negotiated end to the armed conflict. Fears that conflict was scaring away foreign investors and preventing domestic capital from being used more productively figured prominently among business arguments in favor of talks. While Colombia had been able to maintain levels of economic growth similar or higher than the Latin American average despite its internal conflict (Echeverry, 2002), for many business people the long standing Colombian conflict had finally turned into a liability affecting the country's competitiveness in the region and worldwide.

In addition to the costs of conflict, the widespread assumption that—in the absence of conflict—the Colombian GDP would grow at an additional 2 percent a year convinced many in the business community to consider the convenience of investing in peace and supporting a negotiated solution to conflict. In brief, growing conflict intensity—and awareness that ongoing conflict was responsible for lost opportunities—aided the development of a critical mass within the business community in favor a negotiated solution to conflict. This group increasingly linked its own livelihood and chances of economic success to ending conflict and its associated costs.

As a result, business became a crucial promoter and ally of president Andrés Pastrana's (1998 – 2002) efforts to begin negotiations with the Colombian guerrillas at the end of the 1990s. In these peace talks, held in the Southern region of *El Caguán*, business members participated in the negotiating team, served as facilitators from civil society, and developed an important leadership in local and regional peacebuilding initiatives (Rettberg 2004, 2009, 2010). Some of these business people had had their first exposure to talks in the 1980s. This unprecedented activism spawned a growing conscience regarding the role of business in peacebuilding, activated flows of resources to private-sector led peacebuilding activities and attracted attention by international donors and development offices (Rettberg and Rivas 2012). "Peace is better business" was a standard slogan expressed by public and private officials alike.

Numerous congresses, workshops, and other public appearances saw business people refer to the importance of a peaceful solution to conflict. Several prominent business leaders even referred to the private sector's responsibility in peacebuilding. President of *Suramericana de Seguros* and visible head of one of the country's four largest conglomerates, Nicanor Restrepo, gave several public addresses and later published "The Right to Hope" (*Derecho a la Esperanza*), a forty-five page booklet discussing the causes and costs of the Colombian conflict and lining out steps towards overcoming its impacts (Restrepo, 1999). In his book, Restrepo estimated that a ceasefire would generate 800.000 new jobs per year and would allow the Colombian economy to grow an additional 1.5 percent per year. Similarly, during his address to alumni of Universidad del Rosario, real estate tycoon Pedro Gómez Barrero made a point to underscore shared responsibility in analyzing the causes of conflict while also pointing at the costs of conflict for business (Gómez, 2001).

Much of this enthusiasm was combined with actual peacebuilding activity. In contrast with other Latin American countries, more Colombian companies have been involved in peacebuilding and philanthropic activities (Villar 2001). Particularly during the years prior and during Pastrana´s peace negotiations, different business-led peace initiatives at the regional and local levels developed projects motivated by the belief that the development of conflict-ridden areas (so-called "red" zones) would likely bring peace –and stability for operations– sooner than official negotiations (Rettberg 2004).

A reflection of this qualitative change in the private sector's interest in supporting peacebuilding was the founding in 1999 of *Fundación Ideas para la Paz* (FIP – Ideas for Peace Foundation), led by few large companies. The purpose of this big business-backed think tank was to advise government negotiators in the design of a negotiation agenda and promote a negotiated solution to conflict. In addition, ever since its founding, FIP has developed a growingly sophisticated and policy-relevant research agenda to promote reflections on fostering peacebuilding, development, and security.

However, negotiations in Caguán were severely flawed both in procedural and political terms (Departamento de Ciencia Política 2012; Medina 2009; USIP, Georgetown, Uniandes, and CINEP 2012; Villarraga 2008), leading to their collapse in 2002 and to widespread disappointment with a negotiated solution. As a result, by the end of the Pastrana government, the public and business opinion pendulum went in the opposite direction, embracing recently elected president Álvaro Uribe´s (2002 – 2006, 2006 – 2010) strategy to seek military defeat of all Colombian guerrillas.

President Álvaro Uribe (2002 – 2006, 2006 – 2010)

The new president promoted a significant tactical overhaul of available military forces and an increased ability to extend the Colombian state´s presence all over the Colombian territory. This effort was funded both by Colombian taxpayers and by the United States via *Plan Colombia*, a policy package linking the war on drugs to the fight against Colombian guerrillas. The support garnered by president Uribe is notorious, as even a harsh fiscal reform, requiring the private sector to take on a significant part of the financial burden in the war effort against the guerrillas (termed the "democratic security" strategy) was accepted by business representatives.

Due to the rapid and impressive results –in terms both of indicators such as homicides and kidnappings, and of the improved perception of security in the country– of the democratic security strategy, in less than five years Colombian business experienced two peaks of "enchantment": one with a prompt negotiated solution to conflict at the beginning of the Pastrana government and, faced with the failure of these negotiations, with the Uribe government´s promise to draw the final blow to Colombia's insurgent threat. This also led to the atrophy of many business-led peace initiatives, as hopes that a strong hand approach would prevail ran high.

Largely due to the success of this military strategy on security in Colombia, the country´s economy has undergone steady changes in the past ten years, boosting economic growth, diversifying sectoral production, and attracting foreign investment (which has tripled in terms of volume since 2002 and doubled in five years in terms of its contribution to GDP, from 2,2% in the period from 1933 – 2005, to 4,2% in the period 2005 – 2011; Garavito, Iregui & Ramírez, 2012, 25-26). The results earned Álvaro Uribe a successful reelection as well as historically high levels of popular support. And the Colombian is today considered one of the most promising economies among middle-income countries.

While during the 1980s and 1990s Colombia was considered the Andean problem case due to violence related to the drug trade and to the armed conflict, economic recession, political ungovernability, and widespread corruption, in recent years the country has been described as a booming economy (part of the CIVETS—countries expected by *The Economist´s Intelligence Unit* as one of the most promising emergent markets of the coming years[4]—), an outstanding partner of the US war on drugs and a model case for controlling violence: homicides and kidnappings

4 The other countries are Indonesia, Vietnam, Egypt, Turkey and South Africa (Reuters 2010).

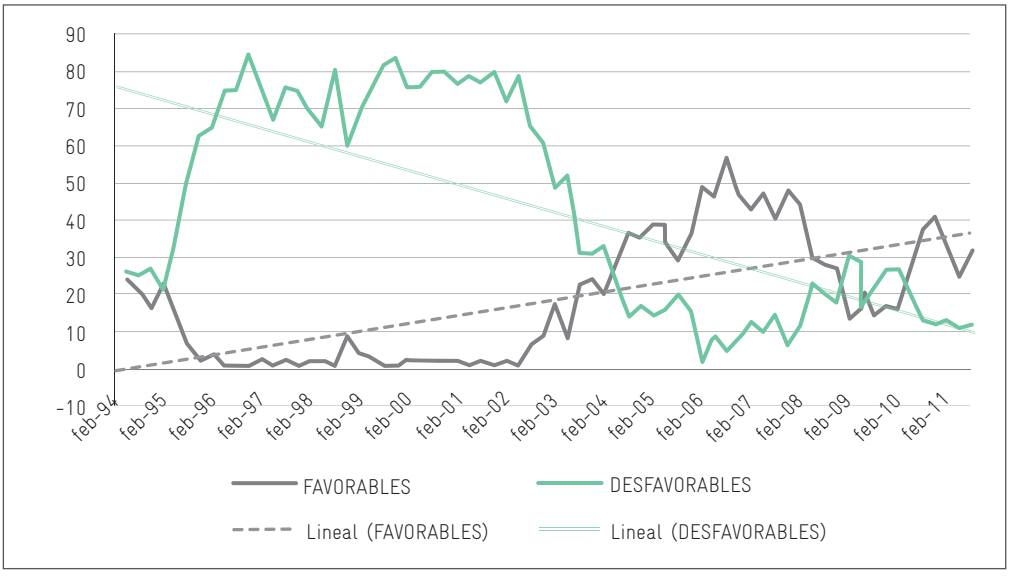
are down and an increasing percentage of the national territory is considered safe, accounting for growing domestic tourism and renewed interest in investing in far-from-center regions.

While the military success of the Uribe government took a toll on business vehemence to deal with peacebuilding issues, some core activities continued, such as participation in government-led combatant demobilization programs. In addition, Colombian business—in contrast both with private sectors in other transitional countries and with previous periods in the history of the Colombian armed conflict—maintained its commitment to pay taxes related to peace and war efforts (Rettberg & Rivas, 2012).

Summing up

Figure 2 captures one way to track the evolution of conflict costs and the reaction of business people described so far. In brief, it illustrates how the perception of sociopolitical conditions for investment first declined and stayed at their lowest from the mid 1990s until 2001 and since then has steadily improved. This provides an important point of reference in our understanding of the political context in which Colombia´s private sector has operated and its implications for business preferences and strategies faced with different options for ending conflict.

Figure 2. Sociopolitical Conditions for Investment in Industry (February 1994 - August 2011)



Source: Fedesarrollo, *Encuesta de Opinión Empresarial*, 1994 – 2011.

In sum, over the past twenty-five years, Colombian business has undergone an important learning process in matters related to peacemaking and peacebuilding (Rettberg and Landínez 2012). Both simplistic expectations –that either negotiations or a strong hand approach will bring peace to the country easily– have given way to an increased understanding of the complexity of the Colombian conflict and of its possible solutions.

In the process, elements for the consolidation of a critical business mass have emerged. Crucial amongst members of this critical mass is the notion that both conflict and peace are costly endeavors but that negotiated peace is the least costly option. This is reflected, for example, in business surveys which have captured opinions over time and which have shown that, while business has steadily supported Uribe´s military strategy and a majority still stands behind him, there have also been growing fears as to the state´s capability to sustain the war effort and the realization of the diminishing returns of this strategy (as reflected in rates of desertion, a resumption of kidnappings, and the simple fact that FARC –while severely hurt in its operative capacity– has not ceased to operate, as was vociferous and frequently promised by Uribe government officials; see El País 2008; Caracol Radio 2008; El Tiempo 2010). These are important insights in regards to the fate of the current peace process, which has been supported and even sponsored by this critical business mass. The following section will explore today´s peace process in light of the background described here.

One (last?) round, the government of Juan Manuel Santos (2010 – 2014)

In August 2012, the Colombian government, led by president Juan Manuel Santos (2010 – 2014) announced the formal launch of new peace talks with FARC. The sides had been in preliminary contacts for months, with the informal support of the governments of Venezuela, Cuba, and Norway. Following severe blows to the organization (several high-level commanders were killed by government forces, historical strongholds were attacked, desertion peaked and the overall number of FARC combatants has declined by half), FARC is today a different actor than it was ten years ago. The Colombian government, too, has learned several lessons, including the diminishing returns associated with a purely military strategy to end conflict and the need to pursue complementary strategies.

Business is today again playing an active role in promoting dialogue. Members of the business community have paid travel-related costs for members of the government and the guerrilla to meet and have served as facilitators and sources of confidence-building. Members of the government negotiating team include Frank Pearl (a former president of *Valorem S.A.*, one of Colombia´s largest business holdings, who gave up his private career to become High Commissioner for Reintegration and, then, High Commissioner for Peace), Alejandro Éder (current High Commissioner for Social and Economic Reintegration, and descendant of a prosperous family linked to the sugar and biofuel industry), Sergio Jaramillo (former director of *Fundación Ideas para la Paz*, a private sector think tank founded in the context of the Caguán peace process); and Luis Carlos Villegas (the president of the National Association of Industry – Andi, whose daughter was kidnapped by the FARC in 2000 and who has himself played an active role in previous peace processes). Their presence in the negotiating team is, overall, a positive sign. Not because they represent the whole private sector. But their sensibility towards and communication with the sector most likely to provide legitimacy and resources to fledgling peace in Colombia augur well for the ongoing talks.

However, in comparison with previous occasions, overall business has had a much lower profile: Only few public statements and hardly any peace-related events have been organized or attended by business people and organizations. The presence of business members at the table itself is downplayed by both sides to the negotiation.

Interestingly, business activism today is taking place in a context in which it is difficult to make the same peace dividend argument as ten year ago (as it worked, for instance, during the Caguán experience, and in other countries, such as El Salvador or Northern Ireland, Rettberg 2007). Overall, the Colombian private sector has benefited from improved economic and security conditions (see Figure 1). In addition, for many in Colombian society and in the private sector, some of the social, political, and economic gains and reforms that provided substance to peace talks elsewhere (e.g. Guatemala and El Salvador) were already achieved by the Colombian Constitution of 1991. Land reform, for long the classical project of Left and revolutionary sectors, as well as the reparation of victims has been discussed and promoted by the governments of Álvaro Uribe and Juan Manuel Santos even before talks officially began. In brief, for many in the private sector there is nothing much to negotiate about in addition to the conditions for effective demobilization of FARC combatants (FIP 2012).

At the same time, several facts and ongoing processes provide reasons for crucial private sector factions to support peace talks: On the one hand, more than 9,000 individuals remain involved in illegal armed activity in Colombia and recruitment continues in many rural and urban areas, posing ongoing risks to security in the country. In addition, indications of growing criminalization and renewed urban violence led by criminal bands that inherited the knowledge of drug routes and tools of territorial control from demobilized paramilitary groups and individual guerrilla fighters underscore the limits of military strategies alone to lastingly address all sources of political and social instability. Third, companies that have been included in state-run reintegration programs during the Uribe government have learned about the organizational and financial challenges involved in meeting the needs of more than 50,000 demobilized combatants, and, specifically, about the risks of recidivism in a context of ongoing conflict, in which many remain linked to illegal networks. Fourth, the Colombian private sector has been pressed hard for resources to support military efforts. Different forms of taxes and bonds have been imposed since the 1990s to support the government´s efforts. Finally, the country´s ongoing economic success is closely tied and contingent on the prospects of further economic internationalization, which will depend on investor safety and the development of further civilian institutional capacity.

Against this background, it should become clear that, while the private sector was not as desperate for peace talks to occur as at the end of the 1990s and was being able to prosper amidst conflict, overall it does also not have strong reasons to oppose talks and realized the convenience to promote negotiations in order to address some of the ongoing as well as some of the emerging security risks, in order to "consolidate", as termed by the Uribe government, the Colombian model of increased security and economic growth.[5]

In addition, the increased presence of international companies in Colombia, and the participation of Colombian companies in international trade networks may have had a spill-over effect—reflected in an increased adoption of Corporate Social Responsibility (CSR) standards and in greater adherence to international

5 Of course, this statement requires regional and sectoral qualifications. Still, companies located in the capital are better shielded from attacks and from extortion, while smaller cities and rural areas are more exposed. As demonstrated by recent attacks against oil operations in the South of Colombia and ongoing road and operation blockages in Cauca Department, guerrillas may be very much weakened, but hold on to the ability to infringe damage on critical parts of the country´s strategic infrastructure and on Colombia´s public image faced with investors.

norms of corporate practice which may be favorable to supporting peace talks. Also, recalcitrant business sectors such as those mentioned in the beginning of this document (which have accused government negotiators of treason) are weak and few in Colombia.

Finally, conditions considered unnegotiable by the private sector according to statements made prior to the initiation of talks have been met, mainly 1) close consultation with private sector representatives in low profile settings in order to avoid the pitfalls of previous processes as well as to keep control over the items on the agenda, 2) a verifiable ceasefire and disarmament process, as well as a commitment to effectively end kidnappings, 3) the non-inclusion of substantial reforms of the social and economic structure of the Colombian state, including protection of property rights, and 4) no mention of possible private sector complicity in Human Rights violations.[6]

In brief, even amidst overall economic and security improvements, the private sector has undergone a process of increasing ripeness, leading to the realization both that ongoing conflict entails important costs and that many of the achievements gained in recent times may be at risk if the additional step of effectively demobilizing remaining armed groups is not properly addressed and fulfilled. In this sense, years of peacebuilding pedagogy seem to have paid off, and private sector participation in talks today may be more effective than in previous occasions in bringing the parts together and shaping the eventual outcome of the process.

At the same time, as was pointed out above, the private sector is not a homogenous category. In addition to historical divisions between industrial and agrarian interests as well as internal divisions, some of them profound, refer to the differing regional experiences with armed conflict (some regions have been harder hit by conflict activity), the resulting acceptance of a negotiation strategy (instead of an ongoing military strategy), and the fear that fundamental tenets of the Colombian state and economy (such as the right to private property) might be sacrificed in a negotiation. These divisions have not become radicalized, but

6 In the context of the "Peace and Justice Law", individual reports to judicial authorities by demobilized paramilitary combatants regarding their actions and responsibilities as well as reports produced by the Historical Memory Commission have unveiled some of the links between paramilitary groups and regional economic elites. In addition, recent judicial action by US courts against companies has disclosed corporate support of paramilitary group actions against labor unionists, leftist politicians, and communities.

point to the need to caution against excessively optimistic expectations regarding the role that the private sector can play in ongoing peace talks and in future peacebuilding.

Conclusions

Whether current peace talks fail or prove successful in Colombia will not depend primarily on the private sector but on the negotiating parties (the government and the FARC). At the same time, as illustrated in this document, the private sector has and will play a crucial role in Colombian peacebuilding, as a source both of material and intangible resources.

It should also have become clear that the majority of the Colombian private sector will be among the winners in the event of a successful peace accord. Although the costs of conflict have been steadily declining over the past years, improved security, less operational costs, more investment partners and greater international opportunities resulting from the demobilization of the largest remaining guerrilla force in the country are still sufficiently attractive to enlist business support. This also suggests that, should peace talks fail, business will be one of the actors carrying the brunt of the cost in terms of foregone investment and growth opportunities and continuing war efforts. As a result of this realization, and on the basis of past experiences, Colombian business today cannot remain indifferent to the risks of failed negotiations.

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WOMEN'S PARTICIPATION IN DECISION MAKING AND REDUCTION OF VIOLENCE

Cora Weiss
President of the Hague Appeal for Peace

As you know, human rights abuses by corporations and by the state are often closely related.

And as you also know, women have been overwhelmingly the victims of violence in factories whose owners are generally from Europe or the United States. The disasters have been so horrible, and the companies associated with the factories so well known, that you are certainly familiar with the following examples:

- Triangle shirtwaist fire in New York City, in March 1911, where young women worked a 13 hr day at .13 cents an hour,(in today's money it would be $3.17) and over 100 mostly young immigrant women were killed, half of whom were teenagers;
- The Bhopal, India chemical disaster in December 1984 where of half a million people exposed to deadly gases, 200,000 were under the age of 15, many were women, and 3000 were pregnant;
- In September 2012 in China, Foxconn, makers of parts for Apple and other well known electronic brands, was guilty of rioting against workers protesting in repressive conditions, and security guards who severely enforced strict rules. Known for its suicides in 2009, the majority of workers are under 24 yrs of age and according to one, "There is no sense of safety here."
- The most recent industrial tragedy in November, 2012, was at the Tazreen garment factory in Bangladesh where 112 workers were burned to death, and the majority were young women.

The common denominator for all of these was low pay, few workers rights, poor working conditions, the majority of workers were young and women.

My question is: Would women, in significant numbers, on the Boards of Directors of the companies associated with these factories, have made a difference?

Would exploitation continue? Would fire extinguishers be installed? Would doors be allowed to be locked, would 13 hr work days be tolerated, would safety manuals be written in English when the majority of workers speak and read a different language? Would trade unions be allowed? Fire escapes, and adequate ventilation? And would workers receive adequate and appropriate pay?

That research has not been done. What research has been done shows that where there are women managers there is more efficiency and more profit. But it doesn't say that where there are more women making decisions on Boards of Directors there are better working conditions. I recommend this for future research. And when you complete your investigation, I predict you will find that when women climb the testosterone ladder to success they do not bring feminist values including caring about working conditions with them.

I raise that question in the context of this work, because women are also overwhelmingly the victims of state and intra- state violence. And we know about the paucity of women at all levels of governance. I refuse to think about or see women only as victims. We know that women are also overwhelmingly among those who *would* make a sustainable difference if they *were* at the decision making tables to prevent such violence and at the peace making tables that resolve it. These are women peace builders at the informal community level and data is being collected to document that claim.

We have finally gotten Security Council resolutions that recognize the need to engage women in participation for the prevention and resolution of violent conflicts and which aim to protect women from sexual abuse. The first resolution on women peace and security, SCR 1325, was unanimously adopted in October 2000. It was initially conceived at International Alert in London and brought to the Hague Appeal for Peace conference in The Hague in May 1999. That conference was held under the banner of Time to Abolish War and Peace is a Human Right. 1325 was drafted and vetted by grassroots women to apply to all levels of governance in peace time, not just in times of violent conflict. We met in June 2000 in collaboration with the UN agency for women, then called UNIFEM and lobbied for its adoption. It calls for the 3 P's, Participation of women at all levels of governance and at peace making tables; Prevention of violent conflict and Protection of women and girls during violent conflict.

In fact, Spain is one of 36 countries to date that has adopted a National Action Plan (NAP) designed to implement SC Res 1325 on Women Peace and Security.

In 2010 Spain occupied 14th place in the Gender related Development Index (GDI) of the UN Report on Human Development.

Under Article 25 of the UN Charter, The Members of the United Nations Agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. According to Hans Correll, the UN's lawyer under Kofi Annan, this makes the resolutions on women peace and security, international law.

Since 1325 was unanimously adopted, four additional WPS resolutions have also been unanimously adopted which represents in what someone has called a "huge shift in how the UN and regional bodies approach peace and security from a gender perspective."

These headquarters, not civil society, driven resolutions include:

- SCRes 1820 (June 2008) addresses sexual violence during armed conflict and recognizes the relationship between use of sexual violence as an instrument of war and the maintenance of peace and security; commits the SC to consider appropriate steps to end atrocities and to punish the perpetrators. It asks for a report from the Secretary General on strategies for ending sexual violence. It recognizes rape as a crime against humanity in the Rome Statute of the ICC and stresses the equal participation of women in maintaining peace and security. It calls for the exclusion from amnesty in an effort to end impunity.
- SC Res 1888 (Sept. 2009) mandates that peacekeeping missions protect women and children from sexual violence and calls for the appointment of a Special Representative of the Secretary General (SRSG) to coordinate a range of mechanisms to fight the crime, to strengthen the rule of law and add women's protection advisers among the human rights protection units and retrain peacekeepers.
- SC Res 1889 (Oct 2009) calls for strengthening the participation of women at all stages of the peace process and in implementing the peace agreement; it calls for the needs of women who were in the conflict to be taken into account in planning the DDR, (demobilization, disarmament and reintegration).
- SCRes 1960 (Dec. 2010) cites the slow progress of states in complying with the need to end sexual violence and says the SC must strengthen its policy of zero tolerance, calls on states to comply with international law and combat impunity.

These resolutions are enormously important. Trying to get 193 countries to agree to anything, much less something to give women more rights and include us in

decision making is very challenging. However, please note that the resolutions which rightly condemn use of sexual violence as a weapon of war attempt to pluck rape out of war and let the war go on. It is only 1325 that calls for the prevention of armed conflict. While we must condemn rape as the most traumatic of crimes that a woman can endure if she survives, we are not interested in making war safe for women. It's time to abolish war.

Civil society is combining efforts to implement 1325 and 1820, and we can now document that when women are in significant numbers in decision making, sexual violence is reduced and indeed, violent conflict is reduced, or as in the case of Liberia, ended. This may be limited to developing countries.

Examples

- In South Sudan, the Non Violent Peace Force, NVP, (*http://www.nonviolent-peaceforce.org/*) was invited to help protect civilians against Sudanese armed forces. The unarmed multi -national civil society organization was approached by a woman who said they needed help in stopping the massive numbers of rapes of women going to fetch wood and water or on their way to the latrines at night when UN peacekeepers were forbidden to leave their barracks. The NVP leader, Tiffany, suggested that the woman come back with some of her friends and they would discuss the problem. The next morning 80 women showed up, made their own plan to divide themselves into teams and patrol at night. Rape rates went down radically. These are now called the Women's Peacekeeping Teams.

- In the Philippines, women from the Global Network of Peacebuilders (GNWP) (*http://www.gnwp.org/*) working in the northern mountain province of Kalinga, held a Localization meeting. Women gathered and invited elected local officials and other strategic decision makers to discuss the indigenous method of resolving problems which was centuries old and always composed of men only. Called the Bodong, which comes from the sound of drumming, this traditional process took care of all problems. Beheading was one of the penalties practiced. Over 100 women demanded that the traditional cultural solution to conflict could no longer be made up of only men. The Bodong group was so impressed with their meeting that they let in 2 women, later another 2 women were invited and now the group of 24 members includes 6 women. This revolutionary change is serving as a role model in the Philippines for other communities still under the domination of all male tribal institutions.

The recent peace agreement signed by the Moro Islamic Liberation Front and the government after many years of armed conflict, was due in large part to the presence of a Muslim woman lawyer retained by the Liberation Front, a woman who chaired the negotiations on the side of the government and the pressure created by the adoption of the National Action Plan and the platform that SC Res 1325 provided which gave more visibility to the requirements to include women in decision making. The women influenced the content of the Peace Agreement, which calls for women's political participation, women's access to economic resources, and a commitment to power sharing, just as women influenced the content of the Good Friday Agreement which ended The Troubles in Northern Ireland in 1998. The human rights institutions in Northern Ireland today are due to the insistence of 2 women at the peace agreement table.

In Sierra Leone women's groups are working to harmonize international laws and human rights standards with traditional practices. Customary law sanctions Female Genital Mutilation, marriage of girls as early as 10 yrs of age to old men and other violent actions. Women have decided to put an end to culturally sanctioned violence against women and girls and practices that prevent them from taking advantage of the new international laws that empower them. So the women sat down with tribal male leaders, said they respected their culture but not those aspects that allow for violence. This example was used by the Secretary General in his report to the Security Council on the implementation of Women Peace and Security resolutions.

- Thousands of Indian women are forcing the courts to speed up and bring to trial over 100,000 cases of rape as a result of the barbaric rape and death of the young student whose brutal experience has become a tipping point in causing change in India's society. That is a legal example of the power of women.

- Peace talks proceed between the Colombian government and the FARC, soon to be joined byt the ELN, National Liberation Army, without women at the principal 1st tier table. Colombian women are demanding full participation in conformity with SC Res 1325, and demand a cease fire during the talks, reparations for victims, full implementation of the 2011 Victims Law # 1448 where the Colombian government acknowledges the impact of armed conflict including human rights abuses committed against its citizens, and continuation of the talks until an agreement is reached. The absence of women from the negotiating table contravenes international law and could be added to your future research. Do Peace Agreements with women as negotiators have better human rights protections and are they more sustainable?

- Corporate Military and Security Contractors have been found guilty of some of the most egregious human rights abuses. One contractor, KBR, a subsidiary of Halliburton, is suing the US government despite its having received more than $31 billion in military contracts. They found toxic chemicals some carcinogenic, in a water treatment plant in southern Iraq. Workers came down with severe health conditions, 2 died. The deadly substance was left behind to affect Iraqis. A court found them guilty and awarded the plaintiffs $85 Million. Contractors who work for the United Nations don't seem to be obligated to abide by UN resolutions, including those that would protect women and children. KBR is appealing the decision.

In conclusion, why do I compare women in decision making in corporations with women deciding peace and security issues in terms of their effectiveness in serving their communities?

Until we know differently, I believe that women who gain power by climbing the testosterone ladder to success in corporations are more likely to be concerned with the efficiency of their companies and their profits and not about conditions on the factory floor.

Of course there are always exceptions, especially with women-led companies and those that espouse social responsibility.

Women who have shared experiences with violent conflict, repression, poverty, illiteracy, domestic violence, humiliation, and discrimination are more likely to bring values of peace and justice to the decision making tables.

I used to say women were everywhere and not enough in power. Not anymore. The evolution of the women's movement, and the gap between developed and developing countries has made it clear that women are not of one voice, or one point of view. In my country we have some women elected to office who are anti-abortion, anti-immigrant, anti-health insurance. We now must distinguish between "women women" and progressive women who support gender equality, peace, justice and sustainable development.

When women dressed all in white in Liberia locked arms around the house where only men were negotiating a peace agreement, they were making a non violent statement that the men could not come out until an agreement was signed.

When women went to appeal to Sen. George Mitchell, the facilitator of the Belfast, or Good Friday Agreement in Northern Ireland, for a seat at the peace table, he said no, only political parties were welcome. So they went home and formed the women's party, took their two independent seats at the table and now the human rights institutions they insisted on survive and the talks ended the 30 years of The Troubles.

For the first time in history we have 20 women out of 100 Senators in the US Congress. We are waiting to see if they will make a difference. One has already voted to exempt car race track companies from taxation. That is not we expect from women in government.

We need feminist women to enter the decision making seats of power, whether in the corporations or at peace tables and in governance in order to secure a safe, peaceful, just and sustainable future for our children and theirs.

Just to end on a lively note. My husband gave me an encouraging news item. Women determined to make peace can be very creative: 950 dancers from 30 countries including Turkey, Egypt and Jordan came to Israel to participate in the world's biggest belly dancing festival. Belly dancers from Arab countries were not afraid to come to Israel and vibrate their hips for peace.

SHORT BIOGRAPHIES OF AUTHORS

José Luis Gómez del Prado is former member of the UN Working Group on the Use of Mercenaries, serving in his personal capacity as a human rights independent expert. Has chaired the Group at several sessions and presented a number of reports to the UN Human Rights Council and the General Assembly. Former Senior Officer of UN OHCHR has coordinated the UN Security Council Expert Group entrusted for investigating and determining the genocide committed in Rwanda in 1994 as well as other UN human rights missions in the Region of the Great Lakes in Central Africa. He has assisted Mary Robinson in coordinating the World Conference against Racism. Last articles and monographs: "*Hacia la Regulación internacional de las empresas militares y de seguridad privadas"*, Editorial Marcial Pons, Barcelona, 2011; *"Privatising security and war",* in *Forced Migration Review*, Refugee Studies Centre, University of Oxford, Issue 37, March 2011; *"A United Nations Instrument to Regulate and Monitor Private Military and Security Companies",* in *Notre Dame Journal of International, Comparative and Human Rights Law,* Vol. I, Number 1, Spring 2011; "*Impact* on Human Rights of a *New Non-State Actor: Private Military and Security Companies*", in *The Brown Journal of World Affairs, Fall/Winter 2011-Vol. XVIII Issue I. A UN Convention to Regulate PMSCs?* in *Criminal Justice Ethics, Vol. 31 Issue 3 December 2012*. Visiting Professor in European and American Universities.

Andrea Iff is Senior Researcher and Project Coordinator of Business & Peace at Swisspeace. She holds a PhD in political science from the Institute for Political Science at the University of Bern (2009), where she also earned her Master's degree in Political Science, Media Science and Public Law. Before joining the University of Bern as a scientific assistant, she worked with PricewaterhouseCoopers, the Swiss Federal Government and at the Institute of Political Science of the University of Zurich. Before entering the field of Business & Peace, she worked mainly on institutions and conflict transformation. She has studied with Prof. Ronald L. Watts at Queen's University, Kingston in Canada and consulted Berghof Foundation on the question of federalism and decentralization in Sri Lanka.

Antoni Pigrau is the Director of the 'Armed Conflicts: Law and Justice' Programme' at the International Catalan Institute for Peace (ICIP) and member of the Board of Governors of the institute. He is Professor of public international law and international relations and currently teaches at the Faculty of Legal Sciences of at the Universitat Rovira i Virgili (URV) in Tarragona, where he has served as both Vice-President and Secretary General. He collaborates with the Permanent Peoples' Tribunal, is the Spanish correspondent for the Yearbook of International Humanitarian Law, is the Director of the Tarragona Centre for Environmental Law Studies (CEDAT) and is Editor-in-Chief of the Revista Catalana de Dret Ambiental (Catalan Environmental Law Review). Antoni Pigrau is also author of a variety of works on the topics of environmental law, international humanitarian law, criminal international law and liability for environmental damages.

Marta Requejo is a senior researcher fellow of the Max Planck Institute Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. She holds a Doctorate (European Doctorate) from the Santiago de Compostela University. Tenured lecturer since 2001, she qualified for access to senior professorship in September 2011. She is visiting professor at the Paris-Panthéon University. She is author of several monographs and numerous articles and papers printed in collective works. Her primary teaching and research interests are conflict of laws, international litigation, and international commercial law. From 2007 on her research has concentrated on business and human rights violation, and access to justice; in this area she has published the following papers: "Regulation 44/01 and human rights violations in warfare", *Yearbook of Private International Law,* 2012, pp. 217-231; "Trasnational Business, Human Rights, and Civil Litigation... in Europe?", Institut Internacional Català per la Pau, septiembre 2012, *http://www.icip-perlapau.cat/revista/numero-14-setembre-2012/per_la_pau_14.pdf*; "Derechos humanos y acciones colectivas", *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid,* 2012, pp. 313-336; "Responsabilidad civil y derechos humanos en EEUU: ¿el fin del ATS?", *Indret,* 2011, núm. 3, pp. 1-38; "Litigación civil internacional por abusos contra derechos humanos. El problema de la competencia judicial internacional", *AEDIPr*, 2010, pp. 259-300; "Violación de derechos humanos y acciones transnacionales de responsabilidad civil (transnational human rights litigation)", *Colección Cuadernos Escuela Diplomática,* 2009, pp. 259-269; "Transnational human rights claims y acceso a la jurisdicción civil en Europa", *Revista de Derecho Comunitario Europeo*, 2007, pp. 511-548.

Angelika Rettberg earned her PhD from Boston University. She is an associate professor at the Political Science Department at Universidad de los Andes (Bogotá – Colombia), where she leads the Research Program on Armed Conflict and Peacebuilding at the same university. Her research has focused on the private sector as a political actor and, specifically, on business behavior in contexts of armed conflict and peacebuilding. She has also been involved in research about other aspects of the political economy of armed conflict and peacebuilding, such as the relationship between legal resources, armed conflict, and criminality in several Colombian regions as well as the dynamics of transitional justice. Her research has been funded by the International Development Research Centre of Canada (IDRC), the Social Science Research Council, the Colombian Institute for Science and Technology, the World Bank, the United Nations Development Program (UNDP), the Gesellschaft für Internationale Zusammenarbeit (GIZ), and the Universidad de los Andes. She has published over ten books, and more than forty journal articles and book chapters. Her most recent edited book is Construcción de paz en Colombia (Peacebuilding in Colombia, Bogotá: Ediciones Uniandes, 2012). Since July 2013 she is a visiting researcher at the German Institute for Global and Area Studies (GIGA) in Hamburg with support from the Alexander von Humboldt Foundation.

Marco Sassòli is professor and director of the Department of public international law and international organization at the University of Geneva (Switzerland) and associate professor at the University of Quebec in Montreal (Canada). This article is largely based upon - and reproduces in part the foreword and the conclusion written by the author of - a book written by Lindsey Cameron and Vincent Chetail (Cameron and Chetail, 2013), which presents the results of a research project funded by the Swiss Science Foundation on the subject. This research project was supervised by the author. The aforementioned book also provides for references for statements and opinions contained in this article.

Mark Taylor is a researcher at the Fafo Institute for Applied International Studies in Oslo. Mark's work focuses on regulatory and policy responses to violence and conflict, in particular the ways in which law is applied to non-state actors (armed groups, warlords, business). Mark is a former Managing Director at the Fafo Institute and represents Fafo as a founding member of the Center for American Progress' Just Jobs Network. Mark has been an advisor and analyst for governments, business, civil society organisations and the United Nations. In addition to his work at Fafo, Mark edits the legal blog

Laws of Rule (*www.lawsofrule.net*), writes for various media outlets including OpenDemocracy, the European documentary magazine DOX, and Le Monde Diplomatique (Norway). He holds a B.A. (honours) in Religious Studies from McGill University, in Montreal and an LL.M (cum laude) in Public International Law from Leiden University, The Netherlands (1996), where he is completing a midcareer PhD in International Criminal Law.

Helena Torroja is professor of public international law at the University of Barcelona, Law School. She holds a PhD in Law (public international law), University of Barcelona, 2001. Since 1993, she primarily teaches international human rights law, international humanitarian law and public international law and international relations at the University of Barcelona. She is visiting professor of International Human Rights Law, University of Puerto Rico (2006, 2008, 2011). She is head of Studies and Director of the Course on Acces to the Spanish Diplomatic Career at the Center of International Studies (Spanish Ministry of Foreign Affairs-University of Barcelona- La Caixa), and Co-Director of the Master's Degree on Diplomacy and Internacional Public Service from UB and UAB. She collaborates with the WG on the use of Mercenaries since 2007. She is author with Gómez del Prado of Hacia la regulación internacional de las EMSP, Marcial Pons, Barcelona, 2011, among others.

Cora Weiss has spent her life in the movements for civil rights, human rights, women's rights and peace. She was President of the International Peace Bureau (Nobel Peace Prize 1910) which she now represents at the United Nations and is President of the Hague Appeal for Peace. She was among the drafters of Security Council Resolution 1325 on Women Peace and Security and continues to work for its full implementation.

Peter Weiss has led a double life as an intellectual property lawyer (now retired) and a constitutional, International and human rights lawyer (now active). He was born in Vienna in 1925 and obtained his J.D. from Yale Law School in 1952. He has been active with the Center for Constitutional Rights (CCR) since 1968 and currently serves as one of its cooperating attorneys and Vice Presidents. He was the lead attorney in the Filartiga case which established, in 1980, the right to sue foreign persons and entities in US courts for gross human rights violations. He has worked with colleagues at CCR in litigation seeking to hold multinational corporations accountable for such violations. He was involved in the creation of the European Center for Constitutional and Human Rights (ECCHR) in Berlin and serves on its Advisory Board. Corporate accountability

is one of ECCHR's main priorities. He is a former president and current co-president of the International Association of Lawyers Against Nuclear Arms and President Emeritus of its US affiliate, the Lawyers Committee on Nuclear Policy. He was counsel to the government of Malaysia in the nuclear weapons case argued before the International Court of Justice in 1995. He has taught and lectured on international law and written numerous articles, including The Future of Universal Jurisdiction in International Prosecution of Human Rights Crimes, Springer 2006, and "Taking the Law Seriously: The Imperative Need for a Nuclear Weapons Convention", in Fordham International Law Journal, April 2011.

L'**Institut Català Internacional per la Pau - ICIP**, creat pel Parlament de Catalunya per a fomentar la recerca, la formació, la transferència de coneixements i l'actuació de prevenció de la violència i promoció de la pau, fomenta, a través d'actuacions diverses (convocatòria de projectes, beques, seminaris...) la recerca de base i aplicada en els estudis de i sobre la pau. La col·lecció *__ICIP Research__* recull resultats d'aquestes activitats sobre temes com conflictes armats, seguretat humana, resolució i transformació de conflictes, relacions internacionals, dret internacional i construcció de pau. Tots ells, però, amb un evident eix vertebrador: la recerca per la pau i la noviolència.
Els objectius de la col·lecció són difondre i oferir textos que poden ajudar a la reflexió i formació. Especialment adreçada tant a l'àmbit acadèmic, com a les persones treballadores de pau, els textos es publiquen en qualsevol de les quatre llengües de la col·lecció: català, anglès, castellà o francès.

The **International Catalan Institute for Peace - ICIP**, created by the Catalan Parliament to foster research, training, the transfer of knowledge and the prevention of violence and the promotion of peace, fosters applied research of peace studies through diverse actions (calls for projects, scholarships, seminars...). The *__ICIP Research__* collection gathers the results of these activities focusing on subjects such as armed conflicts, human security, resolution and pacific transformation of conflicts, international relations, international law and peace building. All maintain a clear leitmotif: the research for peace and nonviolence. The aims of the collection are to present and publicise texts that may help to stimulate reflection and training. Addressed specifically to academia and to peace workers, the texts are published in any of the four languages of the collection: English, Catalan, Spanish or French.

El **Instituto Catalán Internacional para la Paz –ICIP**, creado por el Parlament de Catalunya para fomentar la investigación, la formación, la transferencia de conocimientos y la actuación de prevención de la violencia y promoción de la paz fomenta, a través de actuaciones diversas (convocatoria de proyectos, becas, seminarios...) la investigación de base y aplicada en los estudios de y sobre la paz. La colección *__ICIP Research__* recoge algunos resultados de estas actividades tratando temáticas como los conflictos armados, la seguridad humana, la resolución y transformación de conflictos, las relaciones internacionales, el derecho internacional y la construcción de paz. Todos ellos mantienen un evidente eje vertebrador: la investigación por la paz y la noviolencia.
Los objetivos de la colección son difundir y ofrecer textos que puedan ayudar a la reflexión y la formación. Especialmente dirigida tanto al ámbito académico como a las personas trabajadoras de paz, los textos se publican en cualquiera de las cuatro lenguas de la colección: castellano, inglés, catalán o francés.

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