

Challenges for Creating and Implementing Appropriate and Effective Legal Accountability for Publics

Focus: This submission will focus upon the challenge of holding individuals and companies involved in mercenarism and mercenary related activities (as defined by the UN Working Group) to publics, rather than clients, through legislation, regulation and their accountability processes. Principles and core dimensions that accountability processes will need to have in order to achieve accountability to publics will be explored, rather than focusing upon a specific country's accountability regime. This submission is concerned with mercenary and mercenary related activities that have an international character, where contracted and contracting parties may be across borders or individuals from a number of countries may be impacted, as these situations have particular accountability complexities. However, the concerns and principles that this submission outlines may be relevant to other circumstances.

This submission is based upon ongoing PhD research; further information was shared with the UN Working Group on the Use of Mercenaries in confidence.

Key Points:

- The forms of legal or regulatory accountability available to victims of misconduct by private military and security company personnel are often dependent upon the corporate nature of the private military and security sector. For example, civil laws such as tort law may be used instead of criminal law or human rights law. This can create a disconnect between the identification of acts of misconduct, how that misconduct is legally identified and labelled, and the remedies that then become available. For example, attempts to prosecute alleged acts of torture committed by CACI and Titan personnel are being channelled through the US's Alien Tort Statute. This 11 year case will have no criminal element and will facilitate financial compensation as the remedy. Given the length of legal proceedings and available outcomes, some claimants may opt to settle out of court in a way that they find unsatisfactory and removes legal scrutiny. As a result, the accountability processes available to victims may be perceived as inappropriate and ineffective, and publics may view companies as unaccountable.
- Accountability processes for wrongdoing frequently centre upon the conduct of individuals, minimising the ability to scrutinise the role that companies play in enacting government policy, their participation in the process of securitisation, and their impact upon situations of insecurity and conflict. This process of 'individuation of accountability' facilitates the ability of both private military and security companies and those contracting them to distance themselves from acts of wrongdoing and minimises the functional ability to hold companies to account as it reduces transparency, focus on policy and systems of implementation.
- As the structure, content and state practice of international law makes it extremely challenging to hold the private military and security sector accountable through international law, there has been a turn to the national implementation of laws and regulations. These regulatory networks can create a process by which accountability is displaced or passed around a range of mechanisms, resulting in a lack of

accountability. This also supports the practice of ‘accountability shopping’ which can reduce the efficacy of existing—even if flawed—accountability processes as they are unevenly applied. In turn, this can lead to a lack of interpretative clarity over the content and application of the laws and regulations that can apply to mercenaries and mercenary related activities that facilitates the normative expansion of legal boundaries.

- The issue of accountability concerns multiple publics: the public where a company involved in mercenary related activity carry out their activities and can come into contact with that company and, in cases where a government contracts such a company, the public of the contracting government. These different publics may require different accountability processes and available remedies in order for accountability to be appropriate and effective. Accountability standards for the private military and security sector do refer to acts of wrongdoing that can be committed against members of the public, such as human rights violations. This is seen through ‘soft’ international law or regulation such as the Montreux Document and the voluntary International Code of Conduct, and through national standards such as the PSC.1 and PSC.2, and South Africa’s 2006 Prohibition on Mercenarism Act. However, many, but not all, of these standards characterise possible wrongdoing that can be carried out against members of a public to be a matter of concern for the contracting relationship, rather than a problem for the public or the immediate victim. This characterisation can happen when the way accountability processes for wrongdoing are operationalised means that those responsible for wrongdoing becomes answerable to their employer or the contracting party. This process of effectively internalising accountability processes either within companies that carry out mercenary related activities or within the company-client relationship omits accountability to victims and publics.

Questions that Legal and Non-Legal Regulatory Regimes need to Better Address:

- How can accountability mechanisms be developed or adjusted to meet the accountability needs of victims and publics pre- and post-conduct?
- Do existing accountability mechanism contribute to providing justice to harmed or at risk communities?
- How do pre-conduct and post-conduct accountability processes interact?
- How can transnational cooperation be used to overcome barriers to national prosecutions for wrongdoing?
- How could it be made easier for members of the public to identify personnel working in mercenary related activities separately from members of the armed or security forces?
- How can transparency of the types of activities that those involved in mercenary related activity undertake as well as the types of accountability mechanisms available, be improved to ensure the identification, reporting and redress of wrongdoing?