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SISYPHUS IN THE AGORA? HOW THE UNITED NATIONS WORKING GROUP ON THE USE OF MERCENARIES FUNCTIONS AS A SPECIAL PROCEDURE OF THE HUMAN RIGHTS COUNCIL

Abstract

The proliferation of private military and security companies ('PMSCs') in the wake of the end of the Cold War has prompted a variety of reactions concerning the regulation of PMSCs in the 'market for force'. Some underscore a lack of accountability of the industry and regard PMSCs as having an inimical impact on human rights; others argue that PMSCs are legitimate actors in international society, able to provide efficient and effective support for humanitarian intervention and peacekeeping. While the literature about PMSCs is voluminous, how the United Nations ('UN') Working Group on the Use of Mercenaries ('WGUM') performs its functions as a Special Procedure of the Human Rights Council ('HRC') and thereby seeks to contribute to the promotion and protection of human rights is one of the least studied aspects in the literature on PMSCs. This article argues that how the WGUM performs its functions as a Special Procedure can be ascribed to the Sisyphean dynamics of norm change in the 'agora'. The WGUM seeks to create a space in the agora for the elaboration of norms and legal discourse on the protection of human rights in the market for force. The WGUM's efforts to create that space in the agora would appear, however, to be a Sisyphean task in light of widespread opposition from key Western states to the WGUM's mandate, including the WGUM's efforts to develop a treaty norm that proscribes the outsourcing of inherently state functions to PMSCs.

I Introduction

Pursuant to its mandate as a Special Procedure of the Human Rights Council ('HRC'), the Working Group on the Use of Mercenaries ('WGUM') carries out fact-finding regarding the impact of mercenaries and private military and security companies ('PMSCs') on the enjoyment of human rights. Additionally, the WGUM advocates a draft of international principles that proscribes the

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outsourcing of inherently state functions to PMSCs; these functions include direct participation in armed conflict and the interrogation of prisoners. The WGUM was established in 2005 by the United Nations ('UN') Commission on Human Rights ('CHR') with a thematic mandate to examine, inter alia, how PMSCs impact 'on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities'.[1] The WGUM examines two broad concerns about human rights vis-a-vis PMSCs: human rights violations (allegedly) perpetrated by PMSCs on local civilian populations and on PMSC employees themselves.[2] Examples of the former include allegations of summary executions, arbitrary detention, torture, trafficking of persons and involvement in violations of self-determination.[3] Examples of the latter include allegations of harsh working conditions, partial payment or non-payment of wages and inadequate health care in the field.[4] In a report to the Human Rights Council ('HRC') in 2010, the WGUM presented its *Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council*.[5] In seeking to create a space in the agora for the elaboration of a treaty norm on PMSCs, the WGUM trudges a Sisyphean path: it faces widespread Western opposition to its mandate and to a treaty norm on PMSCs, and faces widespread

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1 *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 2005/2, UN ESCOR, 61st sess, 38th mtg, Supp No 3, UN Doc E/CN.4/RES/2005/2 (7 April 2005) para 12(e) ('*Use of Mercenaries*').

2 José L Gómez del Prado, 'Private Military and Security Companies and the UN Working Group on the Use of Mercenaries' (2008) 13 *Journal of Conflict and Security Law* 429, 433; José L Gómez del Prado, 'A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors' (2011) 1 *Notre Dame Journal of International*, *Comparative*, *and Human Rights Law* 1, 17–23.

3 Gómez del Prado, 'A United Nations Instrument', above n 2, 17–23.

4 Ibid 23, citing Amada Benavides de Pérez, Chairperson, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Mission to Honduras*, UN Doc A/HRC/4/42/Add.1 (20 February 2007) 8 [19]. See generally Molly Dunigan et al, 'Out of the Shadows: The Health and Well-Being of Private Contractors Working in Conflict Environments' (Report, Rand Corporation, 2013) <http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR420/RAND_RR420.pdf>.

5 José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) annex ('*Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council*') ('*Draft PMSC Convention*'); Working Group on the Use of Mercenaries, *Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council*, UN Doc A/HRC/WG.10/1/2 (13 May 2011). All references to the *Draft PMSC Convention* in this article are to UN Doc A/HRC/15/25.

Western support for principle (soft law) and policy norms about PMSC industry self-regulation.[6]

The Ancient Greek gods had condemned Sisyphus to pushing a rock toward the summit of a mountain in the underworld, only to watch the rock roll back down to the foot of the mountain — and ceaselessly repeat the task. Sisyphus, founder and ruler of Corinth, was condemned to his futile and hopeless task due to his attempt to outwit both Hades and Zeus, not simply once but twice. Continuing with a futile and hopeless task could be seen as a paradoxical quest for human perfectibility[7] or as an archetype of the absurdity of life,[8] but even absurdity can take on a broader meaning. In his seminal reading of the myth of Sisyphus, Albert Camus portrayed Sisyphus as triumphing over the absurdity of his ceaseless labour: 'All Sisyphus' silent joy is contained therein. His fate belongs to him. His rock is his thing. … The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy.'[9] Some scholars have taken up Camus' reading of the myth of Sisyphus to argue that, even if the constancy of human rights-oriented organisations and legal practitioners in seeking to effect lasting political transformation is a Sisyphean task, the very constancy of their efforts to reach a pinnacle of meaningful change enhances human dignity.[10]

6 On the agora, see below nn 37–8 and accompanying text. On treaty, principle and policy norms, see below n 26 and accompanying text. In line with the practice of the WGUM and much of the literature on the market for force, this article uses the acronym 'PMSC'. Where appropriate, the article uses the acronyms 'PSC' (private security company), 'PMC' (private military company) and 'PSSP' (private security service provider). For the purpose of this article, PMSC is defined as 'a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities': *Draft PMSC Convention*, UN Doc A/HRC/15/25, annex art 2(a). 'Military services: refers to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities': at art 2(b). 'Security services: refers to armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities': at art 2(c).

7 Elliott M Simon, *The Myth of Sisyphus: Renaissance Theories of Human Perfectibility* (Fairleigh Dickinson University Press, 2007) 27–49.

8 David Sherman, *Camus* (John Wiley & Sons, 2009) 21–54.

9 Albert Camus, *The Myth of Sisyphus* (Justin O'Brien trans, Penguin, 2000) 88–9 [trans of: *Le Mythe de Sisyphe* (first published 1942)].

10 Jerome J Shestack, 'Sisyphus Endures: The International Human Rights NGO' (1978) 24 *New York Law School Law Review* 89, 123; Jochen von Bernstorff, 'Sisyphus was an International Lawyer. On Martti Koskenniemi's "From Apology to Utopia" and the Place of Law in International Politics' (2006) 7 *German Law Journal* 1015, 1024–5.

The efforts of the WGUM to reach such a pinnacle in the market for force have unfolded amidst contestation about how to regulate PSMCs. The PMSC industry grew at an exponential pace after the Cold War; as states reduced standing armies in size, former soldiers sought employment in the private sector and the neoliberal logic of outsourcing extended even further to the provision of military and security support services.[11] State and industry actors who support self-regulation see PMSCs as legitimate actors in international society, able to provide efficient and effective support for humanitarian intervention and peacekeeping;[12] in contrast, the WGUM and others warn that the privatisation of force is emasculating the state monopoly on legitimate violence.[13] In the 1990s, the United States of America ('USA') shied away from helping to coordinate the international regulation of PMSCs.[14] Evidently, and in the broader context of the post-Cold War era, the USA, as a leading player in the market for force, believed that the international regulation of PMSCs belonged in the too-hard basket.[15] Certain events in Iraq, namely, the involvement of PMSC personnel in the Abu Ghraib torture and abuse scandal in 2003 and in the Nisour Square massacre in Baghdad in 2007, prompted the USA and others to turn toward the international regulation of the PMSC industry.[16] That turn has not been towards the creation of a treaty regime on PMSCs: many Western states, particularly the United Kingdom

11 Deborah D Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press, 2005) 1–38; Laura A Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (Yale University Press, 2011) 23–39; Elke Krahmann, *States, Citizens and the Privatization of Security* (Cambridge University Press, 2010) 196–201; P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press, 2003) 49–70.

12 For analysis of how PMSCs present themselves as 'new humanitarians', see Nicholas Maisel, 'Strange Bedfellows: Private Military Companies and Humanitarian Organizations' (2015) 33 *Wisconsin International Law Journal* 639; James Pattison, 'Outsourcing the Responsibility to Protect: Humanitarian Intervention and Private Military and Security Companies' (2010) 2 *International Theory* 1. See also Birthe Anders, 'Tree-Huggers and Baby-Killers: The Relationship between NGOs and PMSCs and its Impact on Coordinating Actors in Complex Operations' (2013) 24 *Small Wars and Insurgencies* 278, 279–89; James Pattison, *The Morality of Private War: The Challenge of Private Military and Security Companies* (Oxford University Press, 2014) 172, 192–6.

13 See generally Krahmann, *States, Citizens and the Privatization of Security*, above n 11, 21–50, 241–85; Hannah Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (Cambridge University Press, 2011) 54–263.

14 Deborah D Avant, 'Pragmatic Networks and Transnational Governance of Private Military and Security Services' (2016) 60 *International Studies Quarterly* 330, 330, 333–4.

15 See generally Avant, *The Market for Force*, above n 11, 33–8, 146–57, 226–8, 259–61; Dickinson, above n 11, 1–24, 30–9; Scott Fitzsimmons, 'The Market for Force in the United States' in Molly Dunigan and Ulrich Petersohn (eds), *The Markets for Force: Privatization of Security Across World Regions* (University of Pennsylvania Press, 2015) 144, 151–4; Singer, above n 11, 6–18, 174–81.

16 Avant, 'Pragmatic Networks', above n 14, 335; Dickinson, above n 11, 1–3, 60–1.

('UK') and the USA, and others behind the growth of the PMSC industry, argue that industry-focused codes of conduct for PMSCs, created through intergovernmental and industry cooperation, suffice to make PMSCs accountable.[17] *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* ('*Montreux Document*') is an initiative of the Swiss Government and the International Committee of the Red Cross, and recalls existing IHL and human rights norms; however, the *Montreux Document* itself is a non-binding instrument.[18] The *International Code of Conduct for Private Security Service Providers*[19] ('*ICoC*') is an industry-focused initiative, developed with support from the Swiss Government and designed to 'complement' the *Montreux Document*;[20] but the *ICoC* but does not refer to PMSCs and frames itself as a self-regulatory initiative for Private Security Service Providers. The *ICoC Articles of Association*[21] is the founding document of the ICoC Association, which oversees the *ICoC*. In short, key players in the market for force support the international regulation of PMSCs, but only to the extent that

17 For critical analysis, see Deborah Avant, 'Netting the Empire: Relationships and US Roles Governing Small Arms and Military and Security Services' in Deborah Avant and Oliver Westerwinter (eds), *The New Power Politics: Networks and Transnational Security Governance* (Oxford University Press, 2016) 103, 103–5, 117–28; Carsten Hoppe and Ottavio Quirico, 'Codes of Conduct for Private Military and Security Companies: The State of Self-Regulation in the Industry' in Francesco Francioni and Natalino Ronzitti (eds), *War By Contract: Human Rights*, *Humanitarian Law and Private Contractors* (Oxford University Press, 2011) 362, 362–80; Nigel D White, 'Regulatory Initiatives at the International Level' in Christine Bakker and Mirko Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay between International*, *European and Domestic Norms* (Hart Publishing, 2012) 11, 11–16.

18 *Montreux Document* (International Committee of the Red Cross, 2008) <https://shop.icrc.org/document-de-montreux-sur-les-entreprises-militaires-et-de-securite-privees-2581.html>. The *Montreux Document* has been brought to the attention of the UN General Assembly and the UN Security Council: see *Letter Dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations Addressed to the Secretary-General*, UN GAOR, 63rd sess, Agenda Item 76; UN SCOR, 63rd sess, UN Docs A/63/467 and S/2008/636 (6 October 2008) annex ('*Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*').

19 *International Code of Conduct for Private Security Service Providers* (9 November 2010) <http://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf >.

20 Nelleke Van Amstel and Tilman Rodenhäuser, 'The Montreux Document and the International Code of Conduct: Understanding the Relationship between International Initiatives to Regulate the Global Private Security Industry' (Public-Private Partnership Series, No 1, Geneva Centre for the Democratic Control of Armed Forces, 2016) i, 10–11, 32 <http://www.dcaf.ch/content/download/316057/4981054/file/DCAF_PPPs_Series_Paper_The_MD_and_ICoC_Understanding_the_Relationship.pdf>. Cf Avant, 'Netting the Empire', above n 17, 124 n 38.

21 *International Code of Conduct for Private Security Service Providers' Association: Articles of Association* (February 2013) <http://www.icoca.ch/en/articles_of_association>.

states couch regulations in the language of soft law, voluntary agreements and self-regulation.[22]

This article argues that examining the efforts of state and non-state actors to regulate the use of PMSCs in national and international communities can shed important light on the formation of norms in international law. In this way, the article contributes to a growing and important theoretical literature and to an empirical and problem-oriented literature about how international law develops.[23] This article neither gives an account of traditional theories of international law,[24] nor examines the relationship between *jus cogens* norms and *erga omnes* obligations,[25] but takes as a starting point the issue of how and why norms (broadly defined) matter in international society. Simply put, norms are shared expectations about ethical values and behaviour, and are created through a complex confluence of material, ideational and institutional factors. Norms can take a variety of forms. Treaty norms, for instance, are binding in treaty form whereas principle norms are evinced in customary or soft law (or both), and policy norms are evinced in policy statements issued by international organisations and industry bodies.[26] Whether the line between legal and

22 See, eg, Kavi Abraham, 'Politics Lost?' on *International Studies Quarterly Online* (31 October 2016) <http://www.isanet.org/Publications/ISQ/Posts/ID/5356/Politics-lost>; Avant, 'Pragmatic Networks', above n 14, 335–40; Hoppe and Quirico, above n 17, 362–80; Fitzsimmons, above n 15, 148–54, 158–9; Elke Krahmann, 'Choice, Voice, and Exit: Consumer Power and the Self-Regulation of the Private Security Industry' (2016) 1 *European Journal of International Security* 27, 27–34.

23 For theoretical literature, see Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013); Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press, 2013); Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012); Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing, 2010). For empirical and problem-oriented literature, see Hin-Yan Liu, *Law's Impunity: Responsibility and the Modern Private Military Company* (Hart Publishing, 2015); Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012).

24 For critical analysis of traditional theories of international law, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, reissue with a new epilogue, 2005).

25 On *jus cogens* norms, see *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 53, 64, 71. On *erga omnes* obligations, see *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32 [33]–[34].

26 Alexander Betts and Phil Orchard, 'Introduction: The Normative Institutionalization-Implementation Gap' in Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press, 2014) 1, 8–18. The above treaty/principle/policy typology is by no means exhaustive: norms can take any number of different forms — social, religious, ethical, moral,

non-legal norms is a 'bright line' or a 'grey zone'[27] is an open question — the closing of which is beyond the scope of this article. Clearly, though, different norms are institutionalised through different forms; yet, it is not so much the *content* of any given norm but instead the *form* of a norm that tends to be a decisive factor in the successful implementation of the norm.[28] The conventional constructivist logic of norm change would say that norms (broadly defined) emerge through the advocacy efforts of norm entrepreneurs, and cascade in the international community once a critical mass of support from key actors has been achieved; finally, norm internalisation occurs when habit and institutionalisation make adherence to norms largely or wholly 'automatic.'[29] Arguably, conventional constructivist logic takes an overly linear, if not teleological, view of norm change,[30] and does not adequately analyse the 'dogs that do not bark', namely, norms that are not successfully implemented by state and non-state actors — or norms that do not emerge in the first place.[31] Taking a critical approach to examining how the WGUM performs its functions as a Special Procedure, and has attempted to create a tipping point for the development of a treaty norm on PMSCs, contributes to the understanding of why some dogs do not bark in international relations or in international law.[32]

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military or legal (domestic or international) — and sub-forms — international legal norms, for instance, can be either prescriptive, prohibitive or permissive. On the prescriptive/prohibitive/permissive typology of international legal norms, see Prosper Weil, 'Toward Relative Normativity of International Law?' (1983) 77 *American Journal of International Law* 413, 413. In addition to the above three international legal norms, Pauwelyn lists 'exempting norms', which 'grant a right to states not to do something': Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003) 159 (emphasis altered), citing Hans Kelsen, *Théorie Générale des Norms* (Presses Universitaires de France, 1996) 1.

27 Joost Pauwelyn, 'Is it International Law or Not, and Does it Even Matter?' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 125, 127–41.

28 Alexander Betts and Phil Orchard, 'Conclusions: Norms and the Politics of Implementation' in Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press, 2014) 269, 271.

29 Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887, 895–905.

30 Betts and Orchard, 'Introduction', above n 26, 2.

31 Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58 *International Organization* 239, 241; Jeffrey T Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50 *World Politics* 324, 339. Cf R Charli Carpenter, 'Setting the Advocacy Agenda: Theorizing Issue Emergence and Nonemergence in Transnational Advocacy Networks' (2007) 51 *International Studies Quarterly* 99, 102.

32 This article is interdisciplinary in orientation but does not dwell on debates about the merits of interdisciplinarity, except to argue, contra Koskenniemi, that when viewed through a critical lens, international relations theories — in this case, constructivism — can convey a sense of the contested character of 'legal *praxis*'. Koskenniemi

A treaty norm on PMSCs, as this article argues, is a dog that does not bark in international relations or in international law. The WGUM presented the *Draft PMSC Convention* to the HRC in 2010. The proposed treaty regime includes the creation of an Oversight Committee to oversee the international supervision of rules applicable to PMSCs and to the states or organisations that employ PMSCs.[33] The *Draft* remains a draft, however, and is likely to remain that way. Crucially, key Western UN Member States favour principle and policy norms in the shape of voluntary agreements and industry self-regulation, as opposed to a treaty norm that proscribes the outsourcing of inherently state functions to PMSCs and sets out a hard law approach in an attendant treaty regime. Given the opposition of key Western states to the WGUM's mandate,[34] and given the Western preference for 'mushrooming' regulatory initiatives in the shape of voluntary agreements, industry-focused codes of conduct and the like,[35] it is not surprising that the *Draft PMSC Convention* has stalled. That stalled status suggests that the import of the WGUM's efforts to discharge its mandate is not so much that WGUM barks as an entrepreneur for a treaty norm on PMSCs, or is effective in maintaining awareness in the agora about human rights issues in the market for force; rather, the WGUM is a Sisyphus-like actor in the agora. But is the WGUM engaged in a quest for perfectibility or is it mired in absurdity?[36] This article argues that Sisyphean dynamics of norm change in the agora underpin how the WGUM functions as a Special Procedure. The agora is a public meeting place for debate about actions for the good of the *polis* (to use the language of classical political philosophy) — or, put differently, the good that is owed towards everyone in the international community.[37] The dynamics of norm change in the agora refers to

seems to take issue not with interdisciplinarity per se (after all, his own œuvre draws heavily on French structuralism) but instead with how interdisciplinary international relations perspectives convey 'no sense of the eclectic and pragmatic character of legal *praxis*': Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26 *International Relations* 3, 19 (emphasis in original).

33 See generally Nigel D White, 'The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention' (2011) 11 *Human Rights Law Review* 133, 141–3. The full name of the proposed Oversight Committee is 'Committee on the Regulation, Oversight and Monitoring of PMSCs': see *Draft PMSC Convention*, UN Doc A/HRC/15/25, annex art 29.

34 See below Part IV(A).

35 Anna Leander, 'Engaging the Contested and Material Politics of Private Military and Security Service Governance from a Pragmatist Perspective' on *International Studies Quarterly Online* (31 October 2016) <http://www.isanet.org/Publications/ISQ/Posts/ID/5355/Engaging-the-Contested-and-Material-Politics-of-Private-Military-and-Security-Service-Governance-from-a-Pragmatist-Perspective>. For analysis of the jurisgenerative nature and scope of codes of conduct, see Anna Leander, 'What Do Codes of Conduct Do? Hybrid Constitutionalization and Militarization in Military Markets' (2012) 1 *Global Constitutionalism* 91.

36 See above nn 7–8 and accompanying text.

37 See, eg, Jan Klabbers, 'Two Concepts of International Organization' (2005) 2 *International Organizations Law Review* 277, 282–4; Venzke, above n 23, 254–5.

how interactions between state and non-state actors, for example, in various fora on the privatisation of force, provides opportunities for building epistemic communities for debate and deliberation about action on norm creation and institutionalisation.[38] The WGUM's attempts to act in the agora as a 'catalyst for rights' and a 'catalyst for change' — to borrow two phrases that Ted Piccone uses to describe Special Procedures in general[39] — can be described as Sisyphean because very few, if any, key state and industry actors appear to take the WGUM seriously. Further, apart from publishing annual reports (including details of its country visits), issuing press releases and taking part in various UN and other fora on the market for force,[40] it is unclear how WGUM is in an agora that can effect consequential impact, or its activities create a groundswell of support for a treaty norm on PMSCs.

This article acknowledges, then, the challenges to norm creation in international law. The objective of this article, however, is not to take on the 'Herculean task' of deciding whether state practice on the use and regulation of PMSCs has developed to the point where one can, and mindful of *opinio juris*, speak of customary international law on the legitimacy of using PMSCs under prescribed conditions.[41] Nor will the article examine the extension of tort liability to the provision of military

38 On the agora function, see generally Hannah Arendt, *Human Condition* (University of Chicago, 2nd ed, 1998) 160; Zygmunt Bauman, *In Search of Politics* (Stanford University Press, 1999) 3–4, 86–100; Gerd Oberleitner, *Global Human Rights Institutions: Between Ritual and Remedy* (Polity Press, 2007) 35. On epistemic communities, see generally Mai'a K Davis Cross, 'Rethinking Epistemic Communities Twenty Years Later' (2013) 39 *Review of International Studies* 137; Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1; Clive Jones, 'Private Military Companies as "Epistemic Communities" ' (2006) 8 *Civil Wars* 355.

39 Ted Piccone, 'Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights' (Report, Brookings Institution, October 2010) <https://www.brookings.edu/wp-content/uploads/2016/06/10_human_rights_piccone.pdf>; Ted Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Brookings Institution, 2012).

40 See below Part IV(F).

41 See Corinna Seiberth, *Private Military and Security Companies in International Law — A Challenge for Non-Binding Norms: The Montreux Document and the International Code of Conduct for Private Security Service Providers* (Intersentia, 2014) 29–30, 230–4, 243–57. On the constitutive elements of customary international law, see *Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Rep 13, 29 [27]; *Statute of the International Court of Justice* art 38(1)(b); Michael Wood, Special Rapporteur, *Second Report on Identification of Customary International Law*, UN Doc A/CN.4/672 (22 May 2014) 7–63 [21]–[80]. On the 'Herculean task' of elucidating customary international law, see Daniel Bodansky, 'Customary (And Not So Customary) International Environmental Law' (1995) 3 *Indiana Journal of Global Legal Studies* 105, 113; Manley O Hudson, Special Rapporteur, 'Article 24 of the Statute of the International Law Commission' [1950] II(2) *Yearbook of the International Law Commission* 24, 28 [38]–[39].

and/or security services by corporate actors,[42] or evaluate the respective merits of the *Montreux Document*, *ICoC* and *Draft PMSC Convention*. Instead, this article focuses on how the WGUM performs its functions as a Special Procedure of the HRC. First, the article begins with an overview of the nature and scope of the Special Procedures. The term 'Special Procedures' refers to the system of independent experts with thematic or country-specific mandates from the HRC (preceded by the CHR) to investigate, report and advise the UN on human rights, whether civil, political, social, economic or cultural (or a combination thereof).[43] Second, the article gives further historico-legal context to the WGUM by discussing its genesis in the mandate of the Special Rapporteur on the Use of Mercenaries ('SRUM'). Third, the article turns to the WGUM itself and how it seeks to perform its functions as a Special Procedure, including how the WGUM carries out fact-finding in relation to its thematic issue. How the WGUM performs its functions as a Special Procedure is one of the least studied aspects in the voluminous literature about PMSCs.[44] This article seeks to fill that gap in the literature because doing so casts light on the limits and possibilities of the mechanisms and methods used to examine the activities of PMSCs and their impacts on the fulfilment of human rights standards.

II The Nature and Scope of the Special Procedures System

Narratives of progress and the rhetoric of justice as desirable and necessary for the good of the international community are a common thread in various laudatory

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42 See Andrea Atteritano, 'Liability in Tort of Private Military and Security Companies: Jurisdictional Issues and Applicable Law' in Francesco Francioni and Natalino Ronzitti (eds), *War By Contract: Human Rights*, *Humanitarian Law and Private Contractors* (Oxford University Press, 2011) 471, 471–89; Kristine Huskey and Scott Sullivan, 'United States: Law and Policy Governing Private Military Contractors After 9/11' in Christine Bakker and Mirko Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay between International*, *European and Domestic Norms* (Hart Publishing, 2012) 331, 362–75; Liu, above n 23, 263–92.

43 Mireille Fanon-Mendes-France, Rapporteur, *Report on the Twenty-First Annual Meeting of Special Rapporteurs/Representatives*, *Independent Experts and Working Groups of the Special Procedures of the Human Rights Council*, *Including Updated Information on the Special Procedures*, UN Doc A/HRC/28/41 (29 January 2015) 3 [1] ('*Twenty-First Annual Meeting of the Special Procedures*'). For a concise history of the Special Procedures, see Elvira Domínguez-Redondo, 'The History of the Special Procedures: A "Learning-by-Doing" Approach to Human Rights Implementation' in Aoife Nolan, Rosa Freedman and Thérèse Murphy (eds), *The United Nations Special Procedures System* (Brill Nijhoff, 2017) 11, 18–35.

44 Notable examples include Christine Bakker and Mirko Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay between International*, *European and Domestic Norms* (Hart Publishing, 2012); Dickinson, above n 11; Francesco Francioni and Natalino Ronzitti (eds), *War By Contract: Human Rights*, *Humanitarian Law and Private Contractors* (Oxford University Press, 2011); Liu, above n 23; Sean McFate, *The Modern Mercenary: Private Armies and What They Mean for World Order* (Oxford University Press, 2014); Pattison, *The Morality of Private War*, above n 12; Seiberth, above n 41; Tonkin, above n 13.

descriptions of the Special Procedures system.[45] The Special Procedures system has been described as 'a success',[46] 'catalysts for rights',[47] 'catalysts for change',[48] 'a cornerstone of human rights protection',[49] 'the crown jewel of the [human rights] system',[50] 'a fundamental pillar of the international human rights machinery',[51] 'the trusted eyes and ears of the international human rights community',[52] 'first-line actors in the discharge of the international community's responsibility to protect'[53] and 'one of the UN's most effective tools for the promotion and protection of human rights'.[54] A further common thread in the above descriptions of the Special Procedures is that mandate-holders are indispensable 'norm entrepreneurs', to use constructivist international relations terminology, in the promotion of human rights norms.[55] By calling attention to pressing issues and making explicit the implicit meaning or significance of new or reconfigured ways of normative thinking about pressing

45 On the 'rhetoric of justice' in international legal discourse, see generally Venzke, above n 23, 198–223.

46 Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Subcommittee, *Roundtable on Reform of United Nations Commission on Human Rights*, Canberra, 12 August 2005, 7 (John von Doussa QC, President, Human Rights and Equal Opportunity Commission).

47 Piccone, 'Catalysts for Rights', above n 39.

48 Piccone, *Catalysts for Change*, above n 39.

49 Tania Baldwin-Pask and Patrizia Scannella, 'The Unfinished Business of a Special Procedures System' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future of the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, 2011) 419, 420.

50 Kofi Annan, 'Secretary-General, in Message to Human Rights Council, Cautions Against Focusing on Middle East at Expense of Darfur, Other Grave Crises' (Press Release, SG/SM/10769-HR/4907, 29 November 2006) <http://www.un.org/press/en/2006/sgsm10769.doc.htm>.

51 Gay McDougall, Rapporteur, *Report of the Thirteenth Meeting of Special Rapporteurs/Representatives*, *Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme* (Geneva, 19–23 June 2006), UN Doc A/HRC/4/43 (26 October 2006) 6.

52 United Nations News Centre, 'Poverty Is the Most Serious and Widespread Human Rights Abuse, UN Official Says' (Press Release, 23 June 2006) <http://www.un.org/apps/news/story.asp?NewsID=18982#.WT4LBnrsTzR>, quoting the then UN High Commissioner for Human Rights, Louise Arbour.

53 Bertrand G Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Martinus Nijhoff Publishers, 2009) 4.

54 Amnesty International, '2003 UN Commission on Human Rights: A Time for Deep Reflection — Background Briefing' (Media Briefing, IOR 41/004/2003, 13 March 2003) <https://www.amnesty.org/download/Documents/108000/ior410042003en.pdf>.

55 See generally Finnemore and Sikkink, above n 29, 893, 895–901, 914–15; Ann Florini, 'The Evolution of International Norms' (1996) 40 *International Studies Quarterly* 363, 375, 381–2, 386–7.

issues, norm entrepreneurs help to generate or create norms.[56] A précis of the history of Special Procedures shows that human rights norm advocacy is fraught with contestation between state and non-state actors over partisan interests and ideational factors. The analysis of the SRUM and WGUM in following sections further locates norm advocacy in the politics of international law: whether as a by-product or as an intended result of contestation, some norms — such as a treaty norm on PMSCs — remain inchoate and their entrepreneurs marginalised by hegemonic actors.[57]

Special Procedures originated in the 1960s when the CHR began to challenge the 'no power to act' consensus. Key Western states maintained that the UN could only 'promote' human rights and had no power 'to take any action in regard to any complaints concerning human rights.'[58] The UN Committee on Decolonization mounted a direct challenge to the consensus in 1965 when it requested that the CHR inquire into the situation of human rights in South Africa.[59] In 1967, the CHR appointed a rapporteur to inquire into the practice of apartheid in South Africa and subsequently created the Ad Hoc Working Group of Experts on the Treatment of Political Prisoners in South Africa;[60] the CHR transformed the latter into a special working group of experts in 1969, to investigate allegations of human rights violations in the Israeli Occupied Territories.[61] In 1980, the CHR created the first thematic mandate: the Working Group on Enforced or Involuntary Disappearances. The primary impetus for creating the Working Group was the human rights situation

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56 Finnemore and Sikkink, above n 29, 893, 897. See also Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 81–3; Venzke, above n 23, 12–13. Here, I use 'norm' in a broad sense, as referring to shared expectations about ethical values and behaviour.

57 On hegemony, see generally Koskenniemi, *From Apology to Utopia*, above n 24, 597–8; Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 221–3.

58 Economic and Social Council, *Report of the Commission on Human Rights to the Economic and Social Council on the First Session of the Commission on Human Rights*, *Held at Lake Success*, *New York from 27th January to 10th February 1947*, UN Doc E/259, quoted in Marc Limon and Hilary Power, 'History of the United Nations Special Procedures Mechanism: Origins, Evolution and Reform' (Report, Universal Rights Group, September 2014) 4 <http://www.universal-rights.org/wp-content/uploads/2015/02/URG_HUNSP_28.01.2015_page_by_page.pdf> (emphasis altered).

59 Limon and Power, above n 58, citing Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia, 2005) 11.

60 Jeroen Gutter, 'Special Procedures and the Human Rights Council: Achievements and Challenges Ahead' (2007) 7 *Human Rights Law Review* 93, 97, citing *Communication Dated 3 February 1967 From the Acting Chairman of the General Assembly's Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa*, CHR Res 2 (XXIII), UN ESCOR, 23rd sess, 914th mtg, Supp No 6, UN Doc E/CN.4/RES/2(XXIII) (6 March 1967). See especially CHR Res 2 (XXIII) para 3.

61 Gutter, above n 60, 97, citing *Question of Human Rights in the Territories Occupied as a Result of Hostilities in the Middle East*, CHR Res 6 (XXV), UN ESCOR, 25th sess, 1014th mtg, UN Doc E/CN.4/RES/6(XXV) (4 March 1969). See especially CHR Res 6 (XXV) para 4.

in a specific country, namely, the disappearances in Argentina's 'dirty war'. 'The issue-oriented or thematic approach', as Jeroen Gutter also points out, 'offered a less polarised method for monitoring major human rights phenomena worldwide and, therefore, became an attractive and politically feasible option for the Commission to pursue.'[62] Other thematic mandates were soon to follow the Working Group: a Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions (1982),[63] a Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment (1985),[64] a Special Rapporteur on Religious Intolerance (1986)[65] and a Special Rapporteur on the Use of Mercenaries (1987).[66]

The Special Procedures system came to be recognised as precisely that, a system, only in the early 1990s. The *Vienna Declaration and Programme of Action* recommended that the Special Procedures be strengthened as a 'system' and 'enabled to harmonize and rationalize their work through periodic meetings.'[67] The Special Procedures mandate-holders held their first annual meeting in 1994.[68] As part of the process of systematising their work, mandate-holders adopted a *Manual of Operation for Special Procedures* in 1999, at their sixth annual meeting. In essence, the *Manual* was adopted as 'a *vade mecum* for all mandate-holders'.[69] Also in 1999, but at the CHR's 55th session, the CHR's Chairperson imposed a time limit

62 Gutter, above n 60, 99–100.

63 *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*, *With Particular Reference to Colonial and Other Dependent Countries and Territories: Summary or Arbitrary Executions*, CHR Res 1982/29, UN ESCOR, 38th sess, 59th mtg, Supp No 2, UN Doc E/CN.4/1982/29 (11 March 1982) para 2.

64 *Torture and Other Cruel*, *Inhuman or Degrading Treatment or Punishment*, CHR Res 1985/33, UN ESCOR, 41st sess, 55th mtg, Supp No 2, UN Doc E/CN.4/RES/1985/33 (13 March 1985) para 1.

65 *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, CHR Res 1986/20, 42nd sess, 50th mtg, Supp No 2, UN Doc E/CN.4/RES/1986/20 (10 March 1986) para 2. In 2000, the CHR changed the mandate title to 'Special Rapporteur on Freedom of Religion or Belief': see *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, CHR Res 2000/33, UN ESCOR, 56th sess, 60th mtg, Supp No 3, UN Doc E/CN.4/RES/2000/33 (20 April 2000) para 11.

66 *The Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 1987/16, UN ESCOR, 43rd sess, 52nd mtg, Supp No 5, UN Doc E/CN.4/1987/16 (9 March 1987) para 1 ('*Use of Mercenaries*'). For analysis of the SRUM, see below Part III.

67 *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993) II [95].

68 Nigel Rodley, Rapporteur, *Report of the Meeting of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme*, *Geneva*, *30 May – 1 June 1994*, UN Doc E/CN.4/1995/5 (15 June 1994).

69 Nigel S Rodley, 'On the Responsibility of Special Rapporteurs' (2011) 15 *International Journal of Human Rights* 319, 321.

of six years for mandate-holders, '[t]o help maintain appropriate detachment and objectivity on the part of individual officeholders, and to ensure a regular infusion of new expertise and perspectives'.[70] The Chairperson stipulated as a 'transitional measure' that 'office-holders who have served more than three years when their current mandates expire will be limited to at most three years of further renewals in these posts.'[71] Concerns about various aspects of the Special Procedures system persisted, however, and in 2002, the UN Secretary-General called for 'clear ground rules' for how Special Procedures report and function.[72] But in the context of broader UN reforms, including the establishment of the HRC in 2006, reforming the Special Procedures system would prove to be an 'elusive goal'.[73]

The impetus for further systematisation continued after the HRC replaced the CHR. In June 2007, the HRC outlined the rights and responsibilities of the Special Procedures in the *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council* (the '*Code*').[74] Philip Alston warns that the *Code* is little more than an effort to 'hobble' the Special Procedures by limiting their working methods.[75] Indeed, the *Code* requires mandate-holders to 'address all their communications to concerned Governments through diplomatic channels'.[76] Elvira Domínguez Redondo shares Alston's concern about the *Code* but muses whether the *Code* shores up the Special Procedures as a system, insofar as the *Code* 'inadvertently provides' a clear legal and normative basis for the Special Procedures in their fact-finding efforts regarding allegations of breaches of human rights.[77] In light of the *Code*, the Special Procedures adopted a revised version of the *Manual of Operations of the Special Procedures* in 2008 at their 15th annual meeting, 'to explain and elaborate

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70 Commission on Human Rights, *Report on the Fifty-Fifth Session (20 March – 30 April 1999)*, UN Doc E/CN.4/1999/167 (1999) 378 [552] ('*Fifty-Fifth Session*').

71 Ibid.

72 *Strengthening of the United Nations: An Agenda for Further Change — Report of the Secretary-General*, 57th sess, Agenda Item 53, UN Doc A/57/387 (9 September 2002) 13 [55].

73 Limon and Power, above n 58, 13.

74 *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, HRC Res 5/2, UN GAOR, 5th sess, 9th mtg, Supp No 53, UN Doc A/HRC/RES/5/2 (18 June 2007) annex ('*Draft Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*').

75 Philip Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors Be Accountable?' (2011) 52 *Harvard International Law Journal* 561, 582–601. See also Baldwin-Pask and Scannella, above n 49, 463–70; Elvira Domínguez Redondo, 'Rethinking the Legal Foundations of Control in International Human Rights Law — The Case of Special Procedures' (2011) 29 *Netherlands Quarterly of Human Rights* 261, 276–8 (but see 278–88); Maximilian Spohr, 'United Nations Human Rights Council: Between Institution-Building Phase and Review of Status' (2010) 14 *Max Planck Yearbook of United Nations Law* 169, 186–7, 214.

76 *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, annex art 14.

77 Redondo, 'The Case of Special Procedures', above n 75, 263 (see also 278–88).

upon these methods of work with a view to assisting the mandate-holders themselves, Governments, civil society and all other interested parties.'[78] A further opportunity for systematisation was the 2011 review of the HRC, which noted the importance of the 'integrity' of the Special Procedures 'system' for enhancing the HRC's ability 'to address human rights situations on the ground'.[79] Arguably, though, the 2011 review has had a negligible impact on strengthening the Special Procedures as a system; 'in practice', as Marc Limon and Hilary Power explain, 'the 2011 review achieved nothing more than a further crystallisation of opposing state visions of what the mechanism is and what it is there to do.'[80]

III The Special Rapporteur on the Use of Mercenaries: The Genesis of the Working Group on the Use of Mercenaries

A *The Mandate of the Special Rapporteur on the Use of Mercenaries*

Special Procedures mandate-holders are indispensable norm entrepreneurs in the promotion of human rights standards; however, as the preceding section also explained, mandate-holders face considerable challenges as a system.[81] This article is not suggesting that all mandate-holders can be likened to the mythological or philosophical figure of Sisyphus, but argues that how the WGUM attempts to discharge its mandate as a thematic Special Procedure is Sisyphean in scope and impact.

Before considering how the WGUM functions as a Special Procedure, it is instructive to consider the WGUM's genesis in the context of the mandate of the SRUM. ESC Resolution 1986/43 asked the CHR to appoint a special rapporteur to investigate the use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination.[82] The CHR established the SRUM in March 1987[83] and appointed Enrique Bernales Ballesteros as the SRUM's first

78 *Manual of Operations of the Special Procedures of the Human Rights Council* (August 2008) 4 [1] <http://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf>.

79 *Review of the Work and Functioning of the Human Rights Council*, HRC Res 16/21, UN GAOR, 16th sess, 47th mtg, Supp No 53, UN Doc A/HRC/RES/16/21 (12 April 2011) annex ('*Outcome of the Review of the Work and Functioning of the United Nations Human Rights Council*') 73 [24].

80 Limon and Power, above n 58, 16.

81 On the challenges facing the Special Procedures, see below Pt IV(H).

82 *Use of Mercenaries as a Means to Violate Human Rights and to Impede the Exercise of the Right of Peoples to Self-Determination*, ESC Res 1986/43, UN ESCOR, 1st regular session of 1986, 19th plen mtg, Agenda Item 9, Supp No 1, UN Doc E/RES/1986/43 (23 May 1986) para 6.

83 *Use of Mercenaries*, UN Doc E/CN.4/1987/16, para 1, endorsed in *Use of Mercenaries as a Means to Violate Human Rights and to Impede the Exercise of the Right of Peoples to Self-Determination*, ESC Res 1987/61, UN ESCOR, 1st regular session of 1987, 18th plen mtg, Agenda Item 17, Supp No 1, UN Doc E/RES/1987/61 (29 May 1987) para 5.

mandate-holder. Nearly a decade later, he began to augment his singular focus on the phenomenon of mercenarism in the postcolonial context by investigating 'new forms' of mercenary activities.[84] For instance, in October 1996, Bernales Ballesteros visited South Africa at the invitation of its government,[85] and carried out in situ investigations into allegations that Executive Outcomes, a security firm based in South Africa, had provided mercenaries to the Governments of Angola and Sierra Leone in exchange for mining concessions.[86]

In the late '90s and beyond, Bernales Ballesteros continued to broaden his original mandate by monitoring what he and others regarded as 'new forms' of mercenary activities.[87] He rejected the corporate mien taken by some new military and security service providers in categorical terms, as 'a threat to the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples who have to endure their presence.'[88] In 2001, the Office of the UN High Commissioner for Human Rights ('OHCHR') convened the first meeting of experts on traditional and new forms of mercenary activities.[89] According to one expert at the meeting, the then current

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84 See, eg, United Nations Information Service, 'Report on Mercenaries Presented to the Human Rights Commission' (Press Release HR/CN/764, 14 March 1997) <http://www.un.org/press/en/1997/19970314.hrcn764.html>.

85 Enrique Bernales Ballesteros, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, *Submitted by Mr Enrique Bernales Ballesteros*, *Special Rapporteur*, *Pursuant to Commission Resolution 1995/5 and Commission Decision 1996/113*, UN Doc E/CN.4/1997/24 (20 February 1997) 11 [25] ('*Use of Mercenaries*').

86 Ibid 4 [9]. Eeben Barlow, the director of Executive Outcomes Pty Ltd ('EO'), told the Special Rapporteur that EO provided the Governments of Angola and Sierra Leone not with mercenaries but instead with 'instructors' to train Angolan government armed forces in mine detection and improve the effectiveness of Sierra Leonean government armed forces in the face of armed opposition: at 17–18 [51]–[53]. Barlow dismissed the accusation regarding the mining concessions as 'absurd': at 18 [52]. EO closed in 1998.

87 See, eg, Enrique Bernales Ballesteros, Special Rapporteur, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/53/338 (4 September 1998) 13 [71]; Enrique Bernales Ballesteros, Special Rapporteur, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/54/326 (7 September 1999) 15 [52]–[53], 19 [75]; *Report of the Meeting of Experts on the Traditional and New Forms of Mercenary Activities as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, *Geneva*, *29 January – 2 February 2001*, UN Doc E/CN.4/2001/18 (14 February 2001) 12–17 [56]–[71] ('*Meeting of Experts on Mercenary Activities*').

88 *Use of Mercenaries*, UN Doc E/CN.4/1997/24, 26 [83].

89 The meeting (in Geneva) was held pursuant to *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 54/151, UN GAOR, 54th sess, 83rd plen mtg, Agenda Item 115, Supp No 49, UN Doc A/RES/54/151 (29 February 2000) para 12.

CHR resolution that set out the SRUM's mandate defined it in a 'narrowly conceived' postcolonial manner by focusing on threats posed by mercenary activities to the constitutional order or territorial integrity of states, particularly in Africa.[90] Thus, as the same expert noted, Bernales Ballesteros was unable to give due consideration to how '[n]ew forms of mercenaries threatened not only the right of peoples to self-determination, but also a host of other human rights.'[91] The expert meeting recommended, inter alia, that the CHR expand the SRUM's mandate when it was next due for a vote on its renewal, at the 57th session of the CHR, and 'include private security and military companies and all other new forms of mercenarism'.[92] The recommendation was reflected to some extent in the renewal of the mandate by CHR Resolution 2001/3, which requested that Bernales Ballesteros 'continue taking into account in the discharge of his mandate the fact that mercenary activities are continuing to occur in many parts of the world *and are taking on new forms*, *manifestations and modalities*'.[93] The resolution did not specifically request, however, that Bernales Ballesteros investigate the impact of PMSCs on human rights.

Inchoate efforts to expand the SRUM's mandate to include fact-finding on PMSCs faced an intractable problem: how to situate the analysis of PMSCs in relation to the legal definition of 'mercenary'. The representative of Canada at a meeting of the CHR in March 2003 suggested the CHR expand the SRUM's mandate to include 'private military companies, private security services and military consultants.'[94] Bernales Ballesteros 'explained' in reply to Canada's representative 'that his terms of reference had been constrained by the very narrow wording of Additional Protocol I to the Geneva Conventions, which referred to one type of mercenary activity only.'[95] Evidently, 'one type of mercenary activity only' denoted the use of mercenaries, viz. those who meet the cumulative definition of mercenary, in situations of international armed conflict.[96] In a draft resolution in April 2003, the CHR requested that

90 *Meeting of Experts on Mercenary Activities*, UN Doc E/CN.4/2001/18, 15 [65]. For the resolution, see *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 1998/6, UN ESCOR, 54th sess, 20th mtg, Supp No 3, UN Doc E/CN.4/RES/1998/6 (27 March 1998) para 3.

91 *Meeting of Experts on Mercenary Activities*, UN Doc E/CN.4/2001/18, 15 [65].

92 Ibid 25 [116].

93 *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 2001/3, UN ESCOR, 57th sess, 43rd mtg, Supp No 3, UN Doc E/CN.4/RES/2001/3 (6 April 2001) para 13 (emphasis added).

94 *Summary Record of the 11th Meeting*, UN ESCOR, CHR, 59th sess, 11th mtg, Agenda Items 3, 5 and 6, UN Doc E/CN.4/2003/SR.11 (27 March 2003) 6 [28] (Mr Westdal, representative of Canada). The meeting was held on 21 March 2003.

95 Ibid 6 [29].

96 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1979 UNTS 3 (entered into force 7 December 1978) art 47(2) ('*Additional Protocol I*').

all states 'exercise the utmost vigilance against any kind of recruitment, training, hiring or financing of mercenaries' by PMSCs.[97] The draft and subsequently adopted resolution[98] did not expand the SRUM's mandate, most likely because the CHR thought it was more fitting for a decision on expanding the mandate to be taken when the mandate came up for renewal.

In 2004, at its 60th session, the CHR renewed the SRUM's mandate for three years.[99] The renewed mandate was also expanded to include 'particular attention to the impact of the activities of private companies offering military assistance, consultancy and security services on the international market on the exercise of the right of peoples to self-determination'.[100] Here, the expanded mandate echoed a recommendation in Bernales Ballesteros's final report, that '[t]here is an urgent need to regulate private military assistance, consultancy and security companies and establish criminal liability for members of such companies.'[101] The time limit for Special Procedures mandate-holders created in 1999, to ensure the influx of new perspectives into the Special Procedures system,[102] prevented Bernales Ballesteros from continuing as the SRUM's mandate-holder after 2004. Where he had equated private companies such as Executive Outcomes with mercenaries and had taken an abolitionist approach to both,[103] his successor, Shaista Shameem, was to take a 'pragmatic approach' to the privatisation of force:[104]

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97 *Summary Record of the 47th Meeting*, UN ESCOR, CHR, 59th sess, 47th mtg, Agenda Items 5, 6, 13, 14, 17 and 19, UN Doc E/CN.4/2003/SR.47 (25 April 2003) 14 [68] (Mr Reyes Rodríguez, representative of Cuba). For the draft resolution, see *Draft Resolution — The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR, 59th sess, Agenda Item 5, UN Doc E/CN.4/2003/L.7 (7 April 2003).

98 *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 2003/2, UN ESCOR, 59th sess, 47th mtg, Supp No 3, UN Doc E/CN.4/RES/2003/2 (14 April 2003).

99 *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, CHR Res 2004/5, UN ESCOR, 60th sess, 44th mtg, Supp No 3, UN Doc E/CN.4/RES/2004/5 (8 April 2004) para 2.

100 Ibid para 18.

101 Enrique Bernales Ballesteros, Special Rapporteur, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination; Report Submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur*, UN Doc E/CN.4/2004/15 (24 December 2003) 21 [70] ('*Use of Mercenaries*').

102 *Fifty-Fifth Session*, UN Doc E/CN.4/1999/167, 378 [552].

103 *Use of Mercenaries*, UN Doc E/CN.4/2004/15, 10–11 [28]–[34], 13–15 [43]–[45]. On Bernales Ballesteros' abolitionist approach, see Sarah Percy, 'Morality and Regulation' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007) 11, 24–6.

104 Victor-Yves Ghebali, 'The United Nations and the Dilemma of Outsourcing Peace-keeping Operations' in Alan Bryden and Marina Caparini (eds), *Private Actors and Security Governance* (LIT Verlag, 2006) 213, 217, quoted in Elke Krahmann, 'From

> As concerns private military companies, in the absence of a universally accepted and satisfactory definition of mercenaries and corresponding legislation, a pragmatic approach should be promoted in the interim. This should include encouraging company self-regulation rather than regulation imposed by external bodies, to promote a sense of ownership and sustainability in the implementation of agreed measures.[105]

Shameem advocated a pragmatic approach but also adopted her predecessor's proposal that the UN revise the legal definition of mercenary. Shameem argued, for instance, that a revised definition include the 'new element … of a "mercenary company"'[106] and 'demonstrate that mercenarism is a human rights issue, with implications for violations of, inter alia, the right to life and the integrity of the person and to national security, as well as for the right to self-determination.'[107] Shameem called for a 'politically feasible' definition,[108] namely, a definition likely to gain support from UN Member States, but evidently her proposed definition was not sufficiently feasible. The cumulative definition of mercenary in the *International Convention Against the Recruitment*, *Use*, *Financing and Training of Mercenaries*[109] remains unchanged, most likely because the *Convention* is widely seen as an outdated, inadequate mechanism for regulating the market for force.[110]

"Mercenaries" to "Private Security Contractors": The (Re)Construction of Armed Security Providers in International Legal Discourse' (2012) 40 *Millennium: Journal of International Studies* 343, 359.

105 Shaista Shameem, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/60/263 (17 August 2005) 17 [62].

106 Ibid 9 [29].

107 Ibid 9 [30].

108 Ibid.

109 *International Convention Against the Recruitment*, *Use*, *Financing and Training of Mercenaries*, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001) art 1 ('*Mercenaries Convention*'):

> A mercenary is any person who:
> (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
> (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
> (d) Is not a member of the armed forces of a party to the conflict; and
> (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

110 See, eg, Liu, above n 23, 176–7, 319, 322–3; Seiberth, above n 41, 62–6.

B *The End of the Mandate of the Special Rapporteur on the Use of Mercenaries*

Shameem served as Special Rapporteur for only one year. On 7 April 2005, Cuba introduced a draft resolution in the CHR, seeking to end the SRUM's mandate and replace it with a working group of five members drawn from the UN's different geographic regions.[111] The CHR adopted the draft 35 votes to 15, with two abstentions.[112] Yet only several months earlier, the third meeting of experts on traditional and new forms of mercenary activities had 'expressed support for the continued mandate of the Special Rapporteur'.[113]

There is scant, if any, documentation for why the CHR ended the SRUM's mandate. Writing in a 2009 journal article, José L Gómez del Prado, then a member of the WGUM, argued: 'There is no documentation explaining the sudden shift in the Commission on Human Rights after barely one year of the mandate.'[114] Be that as it may, the summary record of the meeting on the draft resolution to terminate the SRUM's mandate provides some documentation: according to the summary record, the 'significant increase in mercenary activities in recent years' had necessitated the organisation of 'a series of seminars of experts to discuss issues related to the use of mercenaries and to develop norms for the protection of human rights against the activities of private security companies.'[115] One implication here is that the growth of the PMSC industry had overtaken the fact-finding and other capabilities of a mandate held by one person. The corollary, and a further implication, is that a working group would be better suited than one person to formulating new norms to counter the impact of PMSCs on the enjoyment of human rights.

The resolution that ended the SRUM's mandate expressed the CHR's 'appreciation' to the OHCHR for convening the third meeting of experts on mercenaries,[116] but had the CHR decided it would be more cost effective to replace both the SRUM and further meetings of experts with the WGUM? Travel and subsistence costs of the third meeting of experts were budgeted at US$55 000, and conference servicing

111 *Draft Resolution — The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Expertise of the Right of Peoples to Self-Determination*, CHR, 61st sess, Agenda Item 5, UN Doc E/CN.4/2005/L.6 (4 April 2005). Note: it seems fair to say that *Expertise* should read *Exercise*.

112 *Summary Record of the 38th Meeting*, UN ESCOR, CHR, 61st sess, 38th mtg, Agenda Items 4, 5 and 12, UN Doc E/CN.4/2005/SR.38 (18 April 2005) 4 [16] ('*38th Meeting*').

113 *Report of the Third Meeting of Experts on Traditional and New Forms of Mercenary Activities as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc E/CN.4/2005/23 (18 January 2005) 21 [68]. The meeting was held in Geneva from 6–10 December 2004.

114 Gómez del Prado, 'Private Military and Security Companies', above n 2, 432 n 7.

115 *38th Meeting*, UN Doc E/CN.4/2005/SR.38, 3 [11] (Mr Reyes Rodríguez, representative of Cuba).

116 *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 15.

requirements budgeted at US$507 600;[117] because the OHCHR's budget had not provided for these costs, meeting the costs required additional appropriations by the General Assembly.[118] When the SRUM's mandate was terminated, US$49 100 per year became 'available for other mandates under the category of activities considered to be of a perennial nature.'[119] The WGUM's total travel and subsistence costs were budgeted at US$147 900 for an entire three-year mandate; consultancies were budgeted at US$45 000.[120] Additionally, the WGUM's annual meetings (five days for each meeting) were budgeted at US$321 300 for an entire three-year mandate; travel and subsistence costs for the WGUM's chairperson were budgeted at US$39 900.[121] OHCHR budgets had not provided for the WGUM's various costs and thus meeting the costs would require additional appropriations by the General Assembly.[122] It is unclear whether financial considerations were a factor in the CHR replacing the SRUM and additional meetings of experts on mercenary activities with the WGUM. It is not inconceivable, however, given the constant pressure of limited resources in the Special Procedures system,[123] that the CHR may have given some thought to financial considerations when deciding to end the SRUM's mandate.

The sudden end of the SRUM's mandate has prompted a variety of explanations. Gómez del Prado argued in his 2009 journal article[124] that a letter, 'Communication of Peace and Security Companies at the Conclusion of the Meeting with the Special Rapporteur (London, 27–28 June 2005)', annexed to Shameem's final report to the General Assembly[125] may account for the termination of the SRUM's mandate.

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117 Commission on Human Rights, *Programme Budget Implications of Resolutions and Decisions Contained in the Report of the Commission on Human Rights at Its Sixtieth Session: Statement Submitted by the Secretary-General in Accordance with Rule 31 of the Rules of Procedure of the Economic and Social Council*, UN Doc E/2004/L.34 (20 July 2004) 2 [7]–[8].

118 Ibid 1 [2], 2 [9].

119 Commission on Human Rights, *Programme Budget Implications of Resolutions and Decisions Recommended for Adoption by the Economic and Social Council Contained in the Report of the Commission on Human Rights at Its Sixty-First Session: Statement Submitted by the Secretary-General in Accordance with Rule 31 of the Rules of Procedure of the Economic and Social Council*, UN Doc E/2005/L.34 (20 July 2005) 2 [4].

120 Ibid 2 [5].

121 Ibid 2 [6]–[7].

122 Ibid 2 [8]–[9].

123 For contemporaneous statements, see, eg, Sigma Huda, Rapporteur, *Report of the Twelfth Meeting of Special Rapporteurs/Representatives*, *Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme (Geneva*, *20–24 June 2005)*, UN Doc E/CN.4/2006/4 (3 August 2005) 5–6 [15]–[18], 11 [47].

124 Gómez del Prado, 'Private Military and Security Companies', above n 2, 432 n 7.

125 Shaista Shameem, Special Rapporteur, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/60/263 (17 August 2005) annex II

According to the letter, mercenary is a 'derogatory term', which is 'completely unacceptable and is too often used to describe fully legal and legitimate companies engaged in vital support operations for humanitarian peace and stability operations.'[126] Gómez del Prado contended that the letter 'may not have been strange in having influenced members of the then Commission on Human Rights to terminate the mandate of the special rapporteur and establish a broadened mandate of a working group to deal with the issues of mercenarism.'[127] It is unclear how a letter dated 27–28 June 2005 could have influenced the CHR's decision in April 2005 to terminate the SRUM's mandate. Gómez del Prado would later argue (in a journal article published in 2011) that the CHR and HRC both 'decided to reinforce the mandate on mercenarism and related activities by transforming it into a Working Group composed of five independent experts, taking into consideration the geopolitical dimensions of the UN.'[128] Elke Krahmann suggests that Shameem aligned herself too closely with the stated position of the peace and security companies and that the CHR 'was apparently not happy with this and soon replaced Shameen [sic] with a working group';[129] but precisely how unhappy the CHR was with Shameem is unclear, because she was appointed to the WGUM. Explaining why the SRUM's mandate ended in a sudden manner is, then, a matter of some speculation; nonetheless, it is fair to say that the CHR regarded a working group as better placed than a single individual to investigate the impact of PMSCs on the enjoyment of human rights.

IV How the Working Group on the Use of Mercenaries Performs its Functions as a Special Procedure of the Human Rights Council

A *Introduction*

European Union ('EU') Member States in the CHR had long wanted the SRUM's mandate to be terminated, viewing the Sixth Committee as the most appropriate UN forum for addressing legal issues relating to mercenaries;[130] and for the same reason,

('*Communication of Peace and Security Companies at the Conclusion of the Meeting with the Special Rapporteur (London, 27–28 June 2005)*') ('*Communication of Peace and Security Companies*').

126 Ibid.

127 Gómez del Prado, 'Private Military and Security Companies', above n 2, 432 n 7.

128 Gómez del Prado, 'A United Nations Instrument', above n 2, 43. See also *Summary Record of the 37th Meeting*, UN GAOR, 3rd Comm, 62nd sess, 37th mtg, Agenda Items 68 and 69, UN Doc A/C.3/62/SR.37 (30 November 2007) 6–7 [35] (Mr Gómez del Prado, Chairperson of the WGUM) ('*37th Meeting*').

129 Krahmann, 'From "Mercenaries" to "Private Security Contractors"', above n 104, 359.

130 See, eg, *Summary Record of the 44th Meeting*, UN ESCOR, CHR, 60th sess, 44th mtg, Agenda Items 4, 5 and 14, UN Doc E/CN.4/2004/SR.44 (9 December 2005) 8 [40] (Ms Wheelan, representative of Ireland, speaking on behalf of the EU and Hungary). The meeting was held on 7 April 2004.

EU Member States opposed the creation of the WGUM.[131] Empirical analysis of voting records on CHR and HRC resolutions on promoting Special Procedures mandates has the potential to reveal whether ideological or other patterns can be discerned in how regional groups and political blocs of UN Member States support different categories (or generations) of human rights.[132] This article, however, takes a qualitative (albeit deskbound and open source) approach to examining how the WGUM performs its functions as a Special Procedure.

B *The Working Group on the Use of Mercenaries' Analysis of its Thematic Issue*

1 *What the WGUM's Mandate Encompasses*

The WGUM's mandate includes advocacy for human rights in the face of threats posed by mercenary and mercenary-related activities and by the PMSC industry. When the CHR established the WGUM in 2005, the CHR requested the WGUM 'meet for five working days before the next session of the Commission in fulfilment of the following mandate':[133]

> (a) To elaborate and present concrete proposals on possible new standards, general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, while facing current and emergent threats posed by mercenaries or mercenary-related activities;
>
> (b) To seek opinions and contributions from Governments and intergovernmental and non-governmental organizations on questions relating to its mandate;
>
> (c) To monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world;
>
> (d) To study and identify emerging issues, manifestations and trends regarding mercenaries or mercenary-related activities and their impact on human rights, particularly on the right of peoples to self-determination;
>
> (e) To monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities …[134]

131 *38th Meeting*, UN Doc E/CN.4/2005/SR.38, 4 [14] (Mr De Jong, representative of the Netherlands, speaking on behalf of the EU).

132 See generally Rosa Freedman and Jacob Mchangama, 'Expanding or Diluting Human Rights? The Proliferation of United Nations Special Procedures Mandates' (2016) 38 *Human Rights Quarterly* 164, 165, 169–70, 178–87.

133 *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12.

134 Ibid.

Also included in the mandate are requests that the WGUM continue the SRUM's work on developing a new definition of 'mercenary';[135] that the WGUM communicate its progress on carrying out its mandate to both the CHR and the General Assembly on an annual basis;[136] and that the WGUM consult with governments, civil society and inter-governmental organisations in the course of carrying out its mandate.[137]

How CHR Resolution 2005/2 set down the architectonics of the WGUM's mandate suggests that the Working Group's emphasis on human rights norm advocacy vis-a-vis its mandate emanates in a foundational way from the CHR, with the Working Group acting as the CHR's personal servant or major-domo, rather than from boundary setting from the Working Group itself. Renewing the mandate of a Special Procedure requires a resolution from the HRC,[138] and the WGUM cannot, or so it would seem, add a new dimension to its mandate by its own *fiat*. Expanding the mandate of any Special Procedure is the province of the HRC but negotiated with the mandate-holders in question and set out in a resolution from the HRC which requests (viz. authorises) the mandate-holders to take on new subjects of analysis.[139] However, the *Manual of Operations of the Special Procedures* allows mandate-holders to initiate studies relevant to the mandate: 'In addition to any other reports, mandate-holders may opt to devote a separate report to a particular topic of relevance to the mandate. Such studies may be initiated by the mandate-holder or undertaken pursuant to a specific request by relevant bodies.'[140] Rather than examine the textual minutiae of resolutions that have renewed the WGUM's mandate,[141] this section examines how

135 Ibid para 13.

136 Ibid para 14.

137 Ibid para 20.

138 Claire Breen, 'Revitalising the United Nations Human Rights Special Procedures Mechanisms as a Means of Achieving and Maintaining International Peace and Security' (2008) 12 *Max Planck Yearbook of United Nations Law* 177, 181–2.

139 *Institution-Building of the United Nations Human Rights Council*, HRC Res 5/1, UN GAOR, 5th sess, 9th mtg, Supp No 53, UN Doc A/HRC/RES/5/1 (18 June 2007) annex ('*United Nations Human Rights Council: Institution Building*') [54]–[55].

140 *Manual of Operations of the Special Procedures*, above n 78, 20 [75].

141 *Mandate of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 7/21, UN GAOR, 7th sess, 41st mtg, Supp No 53, UN Doc A/HRC/RES/7/21 (28 March 2008) para 2 ('*Use of Mercenaries*'); *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 15/12, UN GAOR, 15th sess, 31st mtg, Supp No 53A, UN Doc A/HRC/RES/15/12 (6 October 2010) para 11 ('*Use of Mercenaries*'); *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 24/13, UN GAOR, 24th sess, 34th mtg, Supp No 53A, UN Doc A/HRC/RES/24/13 (8 October 2013) para 13 ('*Use of Mercenaries*'); *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 33/4, UN GAOR, 33rd sess, 38th mtg, Supp No 53, UN Doc A/HRC/RES/33/4 (5 October 2016) para 21 ('*Use of Mercenaries*').

the WGUM has analysed its thematic issue, namely, the impact of mercenary and mercenary-related activities and PMSCs on the enjoyment of human rights.

The WGUM's founding mandate was complex, and it would not be long before the Working Group was calling for an expanded mandate to consider the complexity of analysis needed to carry out the mandate. While CHR Resolution 2005/2 was pivotal in creating the architectonics of the WGUM's mandate, later calls for boundary setting and enlargement were to come from the mandate-holders themselves. The WGUM in its early years recommended that it be allowed to hold three sessions per year at five working days for each session.[142] The HRC accepted the recommendation and made it part of the WGUM's mandate when the mandate was renewed in 2008.[143] Some have argued that the HRC expanded the mandate in 2008 to include the study of PMSCs,[144] but the requirement to study PMSCs was set out in the WGUM's original mandate;[145] what was really expanded in 2008 was the number of annual meetings that the WGUM was allowed to hold.

What the Working Group deems its thematic issue to encompass has evolved since 2005. Special Procedures mandate-holders, as mentioned above, can initiate studies as they deem necessary or when requested by 'relevant bodies.'[146] The WGUM's 2014 annual report to the General Assembly focused on the WGUM's 'yearlong study' of the UN's use of PMSCs in UN peacekeeping and other operations.[147] In July 2013 and March 2014, the WGUM had contacted UN officials and organised public panel events about the UN's use of PMSCs.[148] Why the 2014 report's summary described the study as 'yearlong' is puzzling, because the WGUM initiated its research on the matter in early 2010, when the WGUM contacted officials in the UN Department

142 See, eg, Amada Benavides de Pérez, Chairperson, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/4/42 (7 February 2007) 25 [76] ('*Use of Mercenaries*'); Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/61/341 (13 September 2006) 8 [25], 21 [101] ('*Use of Mercenaries*').

143 *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 3.

144 Daniel Matteo, *The Use of Private Military and Security Companies in International Security: Contestation and Legitimation of State Practice* (PhD Thesis, University of Westminster, 2015) 161 <http://westminsterresearch.wmin.ac.uk/15582/1/Matteo_Daniel_thesis2015PhD.pdf>; Gabor Rona, 'Remarks at the Montreux +5 Conference, 11–13 December 2013' (Statement/Message, 11 December 2013) <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14105&LangID=E>.

145 *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12(e) (quoted above; see n 132 and accompanying text).

146 *Manual of Operations of the Special Procedures*, above n 78, 20 [75].

147 Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination*, UN Doc A/69/338 (21 August 2014) 2 ('*Use of Mercenaries*').

148 Ibid 3–4 [5].

of Safety and Security ('DSS') for information about UN regulatory policies and monitoring regarding its use of PMSCs.[149] (Writing in 2011, Åse Gilje Østensen asked whether assessing the UN's use of PMSCs fell within the WGUM's mandate; Østensen then mused that 'this body would inspire more confidence if UN use [of PMSCs] were taken into account.')[150] The WGUM itself appears to have initiated its study of the UN's use of PMSCs, pursuant to requests from the CHR and then the HRC that the WGUM monitor the activities of PMSCs.[151] Gabor Rona, appointed to the WGUM in September 2011,[152] noted in a press conference in July 2015 that the WGUM had been informed by DSS officials that the UN uses PSCs and not PMCs;[153] Rona also noted that the WGUM was unable to directly state whether the DSS had provided the WGUM with information about how the UN determines when its use of PSCs is necessary as a 'last resort',[154] that is, when all other options, including sourcing civilian and military personnel from Member States, have been exhausted and the UN thus needs to hire PSCs.[155] That the WGUM has gathered information about the UN's use of PMSCs has served more than one function: the various fact-finding activities are part of WGUM's analysis of its thematic issue and part of its efforts to alert national and international communities to the impact of PMSCs on human rights.

149 José Luis Gómez del Prado, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/18/32 (4 July 2011) 15 [68] ('*Use of Mercenaries*'); Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/65/325 (25 August 2010) 10–12 [30]–[37].

150 Åse Gilje Østensen, 'UN Use of Private Military and Security Companies: Practices and Policies' (SSR Paper 3, Geneva Centre for the Democratic Control of Armed Forces, 2011) 61 <http://www.dcaf.ch/content/download/45662/678940/file/SSR_PAPER3.pdf>.

151 *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12(e); *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 2(e).

152 Office of the High Commissioner for Human Rights, *Current and Former Mandate-Holders for Existing Mandates* <http://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx>.

153 *Elzbieta Karska (Chair of the Working Group) and Gabor Rona (Member of the Working Group) — Press Conference* (UN Web TV, 23 July 2015) 00:13:29–00:14:11 <http://webtv.un.org/search/elzbieta-karska-chair-of-the-working-group-and-gabor-rona-member-of-the-working-group-press-conference/4370727480001?term=Working%20Gro%20up%20on%20the%20Use%20of%20Mercenaries>.

154 Ibid 00:16:10–00:16:43.

155 *Use of Private Security — Report of the Secretary-General*, 67th sess, Agenda Item 130, UN Doc A/67/539 (22 October 2012) 2 [3].

It is unclear from the WGUM's 2015 annual report to the General Assembly on foreign fighters[156] whether the WGUM initiated the report or was asked to do so, but like its 2014 annual report to the General Assembly, the WGUM situated the 2015 report in the context of its efforts to monitor the impact of the market for force on the enjoyment of human rights.[157] A point of difference between the two reports is how the WGUM framed the reports. The WGUM declined to use the term 'mercenarism' in the 2014 report to describe the UN's use of PMSCs, for instance, 'in complex emergency situations and post-conflict or conflict areas where the host Government was not in a position to provide for the security of United Nations personnel and assets.'[158] The WGUM framed the 2015 report as analysing the 'evolving phenomena' of 'mercenarism'[159] and set the report in the context of the Syrian civil war and the insurgency in Iraq.[160] One month after the 2015 report was distributed, the HRC, on 15 September 2015, held an interactive dialogue on the rights of older persons and on the uses of mercenaries. The UK's representative at the dialogue remarked that the WGUM risks causing 'confusion' about its mandate by inquiring into foreign fighters and asked how the WGUM would focus on mercenarism; in reply, the WGUM's then Chairperson, Elzbieta Karksa, argued that the phenomenon of foreign fighters is closely linked to the issue of mercenary and mercenary-related activities.[161] The OHCHR's press release about the interactive dialogue did not elaborate the linkage, but as the WGUM's 2015 annual report to the General Assembly had explained:

> Foreign fighters and mercenaries are both multifaceted phenomena that have many things in common, ranging from links to acts of terrorism and participation in armed conflicts that may negatively impact human rights, as well as to other criminal activities, including organized crime and smuggling networks.[162]

Since the 2015 annual report was distributed in August 2015, the WGUM has carried out further research, including meetings, country visits and reports, on how foreign

156 Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/70/330 (19 August 2015) ('*Use of Mercenaries*').

157 See, respectively, *Use of Mercenaries*, UN Doc A/69/338, 3 [1]; *Use of Mercenaries*, UN Doc A/70/330, 3 [1].

158 *Use of Mercenaries*, UN Doc A/69/338, 3 [2].

159 *Use of Mercenaries*, UN Doc A/70/330, 2, 3 [1]–[4], 23 [88].

160 Working Group on the Use of Mercenaries, 'Concept Note' (Panel Event on Foreign Fighters, UN Headquarters, New York, 23 July 2015) 1 <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/ConceptNoteForeignfighters.pdf>.

161 Office of the High Commissioner for Human Rights, 'Human Rights Council Holds Interactive Dialogue on the Rights of Older Persons, and on the Uses of Mercenaries' (Press Release, 16 September 2015) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16436&LangID=E>.

162 *Use of Mercenaries*, UN Doc A/70/330, 6 [15].

fighters impact on human rights.[163] The HRC renewed the WGUM's mandate in September 2015 in HRC Resolution 33/4,[164] but the resolution did not explicitly ask the WGUM analyse the foreign fighter phenomena; nor did the resolution even mention the phenomena in passing. Nonetheless, the WGUM continues to examine the foreign fighter phenomena, as part as the Working Group's analysis of the 'evolution of the phenomena of mercenarism' and the impact of mercenarism on the right of peoples to self-determination.[165]

2 *The Methods Used by the WGUM to Investigate the Subject of Its Mandate*

The WGUM's investigation of the subject of its mandate has been contested from its outset, if not even before the CHR created the Working Group. Western Member States of the UN have long argued that it is the Sixth Committee — and not other UN organs — that should consider legal issues regarding mercenaries.[166] A further locus of contestation is the very name 'Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination'. The Working Group's name reflects, as Nigel White

163 See, eg, *Summary Record of the 37th Meeting*, UN GAOR, 3rd Comm, 70th sess, 37th mtg, Agenda Items 70 and 71, UN Doc A/C.3/70/SR.37 (6 January 2016) 6–8 [31]–[47]; Working Group on the Use of Mercenaries, *Panel Event: Thursday 14 April 2016*, *Room XXIII*, *Palais des Nations*, *Geneva — Foreign Fighters and New Forms of Mercenarism*, Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/EventApril2016.aspx> ('*Foreign Fighters and New Forms of Mercenarism*'); Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on Its Mission to Belgium*, UN Doc A/HRC/33/43/Add.2 (8 July 2016) 3 [4]–[6], 4 [14]. Note: the mission to Belgium took place from 12–16 October 2015.

164 *Use of Mercenaries*, UN Doc A/HRC/RES/33/4, para 21. Note: HRC Resolution 33/4 was adopted on 29 September 2015.

165 See, eg, Human Rights Council, *Facts and Figures with Regard to the Special Procedures in 2016*, UN Doc A/HRC/34/34/Add.1 (31 January 2017) 22; Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/71/318 (9 August 2016) 4 [2]–[4], 11–16 [27]–[49]. For discussion, see Elżbieta Karska and Karol Karski, 'Introduction: The Phenomenon of Foreign Fighters and Foreign Terrorist Fighters — An International Law and Human Rights Perspective' (2016) 18 *International Community Law Review* 377, 283–5.

166 See, eg, *Summary Record of the 27th Meeting*, UN GAOR, 3rd Comm, 42nd sess, 27th mtg, Agenda Items 12, 91, 92, 95, 96 and 97, UN Doc A/C.3/42/SR.27 (2 November 1987) 12–13 [59] (Mr Hoppe, representative of Denmark, speaking on behalf of the European Economic Community); *Summary Record of the 43rd Meeting*, UN ESCOR, 57th sess, 43rd mtg, Agenda Items 5, 9 and 11, UN Doc E/CN.4/2001/SR.43 (17 April 2001) 7 [31] (Mr Noirfalisse, representative of Belgium, speaking on behalf of the EU and associated states); *Summary Record of the 50th Meeting*, UN GAOR, 3rd Comm, 56th sess, 50th mtg, Agenda Items, 114, 118 and 119, UN Doc A/C.3/56/SR.50 (18 December 2002) 3 [9] (Mr Maertens, representative of Belgium, speaking on behalf of the EU).

points out, the WGUM's 'traditional concern … with extending and entrenching the prohibition on mercenaries and mercenary activities.'[167] Former members of the WGUM, especially José L Gómez del Prado, describe PMSCs as 'new forms of mercenarism, in which "traditional" mercenaries were being absorbed by private security companies'.[168] Representatives of the PMSC industry perceive the WGUM as having conflated and continuing to conflate the legal activities of PMSCs with mercenary activities;[169] key Western states in the growth of the industry share that perception.[170] As James Cockayne and others point out, the WGUM's effectiveness is 'hamstrung' by the strong opposition of the PMSC industry and many Western states to the WGUM's monitoring of mercenary activities *and* the activities of PMSCs.[171]

On-site missions, especially country visits, are a vital part of how the WGUM investigates its thematic issue. At the WGUM's first session, 'members decided that the Working Group would undertake [country] visits largely on the invitation of Governments, but could also take the initiative to approach Governments when appropriate.'[172] The WGUM usually carries out its country visits with two of its members over a period of five days. In some cases, the visits last over one week or more; for example, its mission to the USA took place from 20 July – 3 August 2009.[173] During their country visits, the members, in line with terms of reference for fact-finding missions by Special Procedures, meet with a variety of state actors

167 White, 'Comments on the UN Working Group's Draft Convention', above n 33, 136.

168 *37th Meeting*, UN Doc A/C.3/62/SR.37 (30 November 2007) 7 [37] (Mr Gómez del Prado, Chairperson of the Working Group on the Use of Mercenaries), quoted in Matteo, above n 142, 167.

169 *Communication of Peace and Security Companies*, UN Doc A/60/263 (17 August 2005) annex II 21. See also Sarah Percy, 'Regulating the Private Security Industry: A Story of Regulation the Last War' (2012) 97 *International Review of the Red Cross* 941, 953–4.

170 See, eg, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on its Mission to the European Union Institutions — Addendum — Comments of the European Union Institutions to the Report of the Working Group*, UN Doc A/HRC/33/43/Add.7 (14 September 2016) 2 [3(b)]; *Summary Record of the 34th Meeting*, UN GAOR, 63rd sess, 34th mtg, Agenda Items 62 and 63, UN Doc A/C.3/63/SR.34 (29 January 2009) 3 [10] (Mr McMahan, representative of the USA) ('*34th Meeting*').

171 James Cockayne et al, *Beyond Market Forces: Regulating the Global Security Industry* (International Peace Institute, 2009) 9 <http://www.ipinst.org/wp-content/uploads/publications/beyond_market_forces_final.pdf>.

172 Amada Benavides de Pérez, Chairperson, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, UN Doc E/CN.4/2006/11 (23 December 2005) 9 [30] ('*Use of Mercenaries*').

173 Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to the United States of America* (20 July to 3 August 2009), UN Doc A/HRC/15/25/Add.3 (15 June 2010) 4 [1].

(such as politicians, bureaucrats and representatives of armed forces), civil society actors (such as non-governmental organisations and national human rights institutions), representatives of the PMSC industry, and alleged victims of human rights violations.[174] Reports on country visits are a form of follow-up on country-visits, published online and as addenda to annual reports;[175] however, the fact that only one country has received more than one visit from the WGUM — the WGUM visited Honduras in 2006 and again in 2013[176] — raises questions about the extensiveness of the WGUM's follow-up to its country-visits.

A key focus of the WGUM's analysis of its thematic issue is examining the root causes of the growth of the PMSC industry. Through its on-site missions 'and information received', as the WGUM's 2007 annual report to the HRC explained:

> the Working Group has observed at least three national conditions which allow the recruitment of personnel for these private companies: (a) unemployment, and/or underemployment, and the availability of low-wage labour trained in security and military functions; (b) a migratory population ready to work abroad; and (c) scarce or weak national legislation that allows largely unmonitored activities of PMSCs.[177]

A critical approach to how human rights bodies study root causes[178] would suggest that the WGUM has conflated the root causes of PMSCs with the effects of the growth of PMSCs as an industry, or has identified certain causes only to put them aside. A more nuanced view would suggest that the WGUM since its establishment has shifted its focus on the root causes of the growth of the PMSC industry, to a focus on how to delimit the privatisation of force. Indeed, in 2005, the WGUM decided to undertake a comparative analysis of national legislation and regional perspectives

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174 See, eg, Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Honduras (18–22 February 2013)*, UN Doc A/HRC/24/45/Add.1 (5 August 2013) 11–3 [36]–[45] ('*Mission to Honduras*'). For the terms of reference, see Fatma-Zhora Ksentini, Rapporteur, *Report of the Meeting of Special Rapporteurs/Representatives, Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme, Geneva, 20–23 May 1997*, UN Doc E/CN.4/1998/45 (20 November 1997) annex ('*Terms of Reference for Fact-Finding Missions by Special Rapporteurs/Representatives of the Commission on Human Rights*').

175 For the reports published online, see Working Group on the Use of Mercenaries, *Country Visits*, Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/CountryVisits.aspx>.

176 See ibid.

177 *Use of Mercenaries*, UN Doc A/HRC/4/42, 20 [59].

178 See generally Susan Marks, 'Human Rights and Root Causes' (2011) 74 *Modern Law Review* 57, 60–3, 70–8.

on PMSCs,[179] and at regional 'round tables' over 2007–10, the WGUM discussed principles for a possible draft convention on PMSCs.[180]

Pursuant to the resolution that established its mandate,[181] the WGUM began holding regional conferences on PMSCs in 2007.[182] General Assembly Resolution 62/145,[183] HRC Resolution 7/21[184] and HRC Resolution 10/11[185] requested, inter alia, the WGUM hold regional conferences. The first conference, which the OHCHR organised in 'close collaboration' with the WGUM,[186] was for the Latin American and Caribbean region and took place in December 2007 in Panama. The conference involved both state and non-state actors and addressed, inter alia, proposals for new international principles for ensuring that PMSCs respect human rights.[187] A conference in Moscow in October 2008 for the Eastern European Group and

179 *Use of Mercenaries*, UN Doc E/CN.4/2006/11, 9 [34].

180 *Use of Mercenaries*, UN Doc A/HRC/15/25, 7–8 [24]–[28]. For further discussion of the regional conferences, see below Part IV(C).

181 *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12(b) (asking the WGUM '[t]o seek opinions and contributions from Governments and intergovernmental and non-governmental organizations on questions relating to its mandate').

182 See José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Latin American and Caribbean Regional Consultation on the Effects of the Activities of Private Military and Security Companies on the Enjoyment of Human Rights: Regulation and Monitoring (17–18 December 2007)*, UN Doc A/HRC/7/7/Add.5 (5 March 2008) 6 [6] ('*Latin American and Caribbean Regional Consultation*'), explaining that the Panama meeting, 17–18 December 2007, was held pursuant to *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 62/145, UN GAOR, 62nd sess, 76th plen mtg, Agenda Item 69, Supp No 49, UN Doc A/RES/62/145 (4 March 2008) ('*Use of Mercenaries*'). However, GA Res 62/145 was adopted on 18 December 2007, which is contemporaneous with the Panama meeting. The likely basis for the Panama meeting is *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 12, and the draft of GA Res 62/145: see *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self Determination*, 3rd Comm, 62nd sess, Agenda Item 69, UN Doc A/C.3/62/L.62 (8 November 2007) para 15 (where the General Assembly thanked the OHCHR for convening the regional meeting in Panama, and asked the OHCHR 'to convene other regional governmental consultations on this matter').

183 *Use of Mercenaries*, UN Doc A/RES/62/145, para 15.

184 *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 7.

185 *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 10/11, UN GAOR, 10th sess, 42nd mtg, Supp No 53, UN Doc A/HRC/RES/10/11 (26 March 2009) para 16 ('*Use of Mercenaries*').

186 *Latin American and Caribbean Regional Consultation*, UN Doc A/HRC/7/7/Add.5, 2.

187 Ibid 6 [9], 8–9 [20]–[28].

Central Asia Region[188] and a conference in Bangkok in October 2009 for Asia and the Pacific[189] discussed elements for a possible draft convention on PMSCs; both conferences involved state and non-state actors. The WGUM held discussions with state and non-state actors on progress on achieving the *Draft PMSC Convention* at conferences for the Africa Region in March 2010 in Addis Ababa[190] and for the Western European and Others Group in April 2010 in Geneva.[191] A common thread of argument at the five regional conferences was that states should not outsource inherently state functions to PMSCs.

C *Advising Governments and Other Relevant Actors*

Stemming from its analysis of its thematic issue, the WGUM's advice about, inter alia, responses to the growth of PMSCs, includes recommendations that 'regulatory gaps' at national, regional and global levels be closed;[192] that all states should 'exercise the utmost vigilance in banning the use of private companies offering international military consultancy and security services when intervening in armed conflicts

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188 Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Eastern European Group and Central Asia Region; Regional Consultation on the Activities of Private Military and Security Companies: Regulation and Oversight (17–18 October 2008)*, UN Doc A/HRC/10/14/Add.3 (26 February 2009) 6–7 [16], 9 [22]–[24] ('*Eastern European Group and Central Asia Region*').

189 Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Asia and the Pacific on the Activities of Private Military and Security Companies: Regulation and Monitoring* (26–27 October 2009), UN Doc A/HRC/15/25/Add.4 (1 April 2010) 6–7 [19]–[26] ('*Regional Consultation for Asia and the Pacific*').

190 Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Africa on the Activities of Mercenaries and Private Military and Security Companies: Regulation and Monitoring*, *3–4 March 2010*, UN Doc A/HRC/15/25/Add.5 (2 June 2010) 10 [33]–[37] ('*Regional Consultation for Africa*').

191 José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Western European and Others Group on the Activities of Mercenaries and Private Military and Security Companies: Regulation and Monitoring (14 April 2010)*, UN Doc A/HRC/15/25/Add.6 (5 July 2010) 6–8 [14]–[26] ('*Regional Consultation for Western European and Others Group*').

192 See, eg, Working Group on the Use of Mercenaries, *Annual Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/30/34 (8 July 2015) 21–2 [124], 22 [127] ('*Annual Report*'); Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/33/43 (13 July 2016) 21 [90] ('*Report*').

or actions to destabilize constitutional regimes';[193] and that victims of human rights violations involving mercenaries or PMSCs should have access to effective remedies.[194] As regards accountability and redress measures, the WGUM sees an international convention on PMSCs as the keystone of the regulation of PMSCs.[195] The WGUM does not completely reject self-regulation but sees self-regulation by itself as insufficient; the WGUM recommends that self-regulation be combined with national laws and that the *ICoC* 'be combined with an independent and authoritative "watchdog"' in order to provide 'a trustworthy and effective complaint and redress mechanism for victims'.[196]

Some have argued that the WGUM of late has focused less on elucidating the impact of mercenary and mercenary-related activities on human rights, and more on developing principles that proscribe PMSCs from performing inherently state functions.[197] According to the WGUM, inherently state functions are 'consistent with the principle of State monopoly on the legitimate use of force' and include 'direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, [and] knowledge transfer with military, security and policing application'.[198] Clearly, elaborating principles to deal with the impact of PMSCs on human rights is a core aspect of the WGUM's mandate.[199] Western

193 *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 27/10, UN GAOR, 27th sess, 39th mtg, Supp No 53A, UN Doc A/HRC/RES/27/10 (3 October 2014) para 5 ('*Use of Mercenaries*').

194 Working Group on the Use of Mercenaries, *Submission by the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/WG.10/2/CRP.1 (6 August 2012) 3 [2]–[3], 7 [17], 9 [24], 10 [26], 12 [35]–[36] ('*Submission by the Working Group on the Use of Mercenaries*').

195 See, eg, *Annual Report*, UN Doc A/HRC/30/34, 22 [128]; *Report*, UN Doc A/HRC/33/43, 22 [96].

196 Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/64/311 (20 August 2009) 10 [22] ('*Use of Mercenaries*').

197 Krahmann, 'From "Mercenaries" to "Private Security Contractors"', above n 104, 360–2; Matteo, above n 144, 172–5, 178–9. See also Laurence Juma and James Tsabora, 'The South African Defence Review (2012) and Private Military/Security Companies (PMSCs): Heralding a Shift from Prohibition to Regulation?' (2013) 16 *Potchefstroomse Elektroniese Regsblad* 232, 250–3.

198 José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 12 [51].

199 See especially *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 2(a); *Use of Mercenaries*, UN Doc A/HRC/RES/33/4, para 21 ('[the HRC renews] for a period of three years, the mandate of the Working Group, for it to continue to undertake the tasks described by the Human Rights Council in its resolution 7/21 of 28 March 2008 and in all other relevant resolutions on the subject').

states argue, though, that providing recommendations on developing international law lies outside the competence of the WGUM. The USA, for instance, has said that the *Draft PMSC Convention* 'prejudged the ongoing work of the Group' and 'strayed from the original mandate of considering the *possibility* of elaborating an international regulatory framework.'[200]

Leaving in abeyance debates about what is within the mandate and thus the competence of the WGUM, it is clear that the concept of 'human security' is inextricably linked with the WGUM's advice to state actors and other relevant actors, including intergovernmental organisations ('IGOs') and the PMSC industry. As the WGUM emphasised in its report on its 2013 visit to Honduras (a follow-up to its 2006 visit):

> [T]he right to security is an inherent human right of all and underpins the enjoyment of other human rights. Outsourcing the use of force to PMSCs seriously undermines the rule of law and the effective functioning of a democratic State institution responsible for ensuring public safety in accordance with international human rights standards and national laws.[201]

The language of human security informs not only the WGUM's advice, particularly regarding the *Draft PMSC Convention*, but also the WGUM's advocacy on behalf of victims of violations alleged to have been committed by mercenaries or PMSCs.[202]

Advising the UN and state actors on how to strengthen laws regarding mercenaries is an originary part of the WGUM's mandate. CHR Resolution 2005/2 requested the WGUM continue the SRUM's work on 'strengthening … the international legal framework' on mercenaries.[203] General Assembly resolutions about 'the use of mercenaries' made on an annual basis have reiterated that request,[204] as have the HRC resolutions that have extended the WGUM's mandate.[205] How much emphasis of

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200 *Summary Record of the 45th Meeting*, UN GAOR, 3rd Comm, 66th sess, 45th mtg, Agenda Items 27, 64, 67, 68, 69 and 107, UN Doc A/C.3/66/SR.45 (7 February 2012) 6 [40] (Mr Sammis, representative of the USA) (emphasis added) ('*45th Meeting*').

201 *Mission to Honduras*, UN Doc A/HRC/24/45/Add.1, 15 [53].

202 See below Part IV(E).

203 *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 13.

204 See, eg, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 69/163, UN GAOR, 69th sess, 73rd plen mtg, Agenda Item 67, Supp No 49, UN Doc A/RES/69/163 (10 February 2015) para 15 ('*Use of Mercenaries*'); *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 70/142, UN GAOR, 70th sess, 80th plen mtg, Agenda Item 71, UN Doc A/RES/70/142 (9 February 2016) para 17 ('*Use of Mercenaries*').

205 *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 4; *Use of Mercenaries*, UN Doc A/HRC/RES/15/12, para 12; *Use of Mercenaries*, UN Doc A/HRC/RES/24/13, para 16; *Use of Mercenaries*, UN Doc A/HRC/RES/33/4, para 17.

late the WGUM has placed on providing advice pursuant to those requests compared with providing advice on dealing with PMSCs, however, is open to question. In 2007, the WGUM, by its own admission, 'agreed, as a short-term objective, to promote the ratification/accession of Member States' to the *Mercenaries Convention*, the Working Group's 'long-term objective' being to develop a protocol to the *Convention* 'to address newer forms of mercenarism and the activities of private military and private security companies.'[206]

On the one hand, the WGUM's mandate still contains the request that the Working Group continue with efforts to change the definition of mercenary in line with Bernales Ballesteros' 2004 proposal.[207] The proposal had argued, for example, that a new definition 'should avoid a systematic accumulation of competing requirements, which would always prevent the identification of a mercenary' and 'should be proposed as an amendment to the *International Convention against the Recruitment*, *Use*, *Financing and Training of Mercenaries*.'[208] The *Mercenaries Convention* had retained the cumulative definition of 'mercenary' set out in *Additional Protocol I*,[209] apparently because delegates to the Ad Hoc Committee on drafting the *Mercenaries Convention* felt that departing from the definition risked creating confusion if international law contained two different definitions.[210] On the other hand, as regards its 'long-term objective', the WGUM in the past several years has focused less on framing its recommendations in line with the 2004 proposal and more on developing principles for a new convention on the use, monitoring and oversight of PMSCs as 'corporate actors whose operations pose potential threats to human rights.'[211] The WGUM's shift of focus may be due to changes in the composition of the Working Group, when its original mandate-holders reached their six-year time limit and the HRC replaced the mandate-holders.[212]

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206 Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/62/301 (24 August 2007) 5 [10]. See also José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, UN Doc A/HRC/7/7 (9 January 2008) 5 [9] ('*Use of Mercenaries*'), re-iterating the above 'longer-term objective'.

207 *Use of Mercenaries*, UN Doc A/HRC/RES/24/13, para 17.

208 *Use of Mercenaries*, UN Doc E/CN.4/2004/15, 15 [45] (emphasis added).

209 Art 47(2).

210 Ad Hoc Committee on Drafting a Convention Against Mercenaries, *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment*, *Use*, *Financing and Training of Mercenaries*, UN GAOR, 36th sess, UN Doc A/36/43 (17 March 1981) 17 [53].

211 Rona, 'Remarks at the Montreux +5 Conference', above n 144.

212 Matteo, above n 144, 178–9. The six-year time limit for Special Procedures mandate-holders was imposed in 1999: see, *Fifty-Fifth Session*, UN Doc E/CN.4/1999/167, 378 [552].

In undertaking various fact-finding activities pursuant to its mandate, the WGUM has highlighted the existence of gaps — 'grey zones'[213] or 'lacunae'[214] — in domestic and international laws with respect to the use and regulation of PMSCs. The gaps in international law include how PMSCs fall outside — or 'evade'[215] — the scope of the cumulative definition of mercenary.[216] Recent reports by the WGUM note the persistence of gaps in national laws, including 'the lack of a clear and publicly accountable body dedicated to licensing, a mechanism for monitoring the post-licensing activities of private security companies and a national registration system for such companies.'[217] The critical import of the WGUM's concern and advice about regulatory gaps is that the existence of interstitial spaces in domestic and international laws is inimical to the rule of law and undermines the protection of human rights;[218] thus, the WGUM argues, an international convention on the use of PMSCs is 'the most efficient solution to the challenge of regulating PMSCs.'[219]

The WGUM took the lead role in developing the *Draft PMSC Convention* and presented it to the HRC in 2010. One commentator, writing in 2015, suggests that present members of the WGUM have distanced themselves from their predecessors' focus on the *Draft* as *the* means for regulating PMSCs,[220] but one member of the WGUM writing in late 2015 said that the WGUM continues to regard itself as

213 *Latin American and Caribbean Regional Consultation*, UN Doc A/HRC/7/7/Add.5, 7 [16].

214 Ibid 8 [23].

215 E L Gaston, 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement' (2008) 49 *Harvard International Law Journal* 221, 221, 242.

216 *Mercenaries Convention* art 1; *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*, opened for signature 3 July 1977, 1490 UNTS 95 (entered into force 22 April 1985) art 1(1); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1979 UNTS 3 (entered into force 7 December 1978) art 47.

217 *Report*, UN Doc A/HRC/33/43, 6 [23]. At 5 [15]:

> The present report focuses on the laws and regulations of six countries of the Commonwealth of Independent States (Azerbaijan, Kazakhstan, Kyrgyzstan, the Republic of Moldova, Tajikistan and Uzbekistan), four countries in the Asia and Pacific region (Australia, New Zealand, Nauru and Papua New Guinea) and the United States of America in North America.

NB: the report was distributed on 13 July 2016.

218 See, eg, *Annual Report*, UN Doc A/HRC/30/34, 21–2 [124], 22 [127]; *Report*, UN Doc A/HRC/33/43, 21 [90].

219 *Submission by the Working Group on the Use of Mercenaries*, UN Doc A/HRC/WG.10/2/CRP.1, 3 [5].

220 Matteo, above n 144, 178, citing a video call by the author with Felipe Daza, Coordinator of the Control PMSC coalition, 1 October 2014.

'responsible' for the *Draft*.[221] Although responsibility for developing the *Draft* has 'shifted' to the UN Open-Ended Intergovernmental Working Group on PMSCs ('IGWG')[222] and to 'representatives of Governments',[223] the WGUM continues to support the *Draft* in IGWG meetings, where the WGUM acts as a 'resource person' for advocacy on the *Draft*,[224] and in annual meetings of Special Procedures mandate-holders.[225]

D *Alerting UN Organs and the International Community to the Need to Address Specific Situations and Issues*

Just as analysing thematic issues or country situations is a key function of Special Procedures, so, too, is their 'alerting' function. Special Procedures, as the *Manual of Operations of the Special Procedures* explains, 'alert United Nations organs and agencies and the international community in general to the need to address specific situations and issues.'[226] Hence, Special Procedures 'have a role in providing "early warning" and encouraging preventive measures'[227] in a 'proactive' manner.[228] The WGUM's annual reports to the HRC and the General Assembly[229] serve an alerting function insofar as the reports are a useful tool for canvassing preventive measures on human rights violations. By definition, though, the alerting function is time-sensitive. Arguably, the thoroughness of research and preparation needed for the

221 Gabor Rona, 'Foreign Fighters, Mercenaries, and Private Military Companies under International Law' on *Just Security* (18 November 2015) <https://www.justsecurity.org/27732/foreign-fighters-mercenaries-pmscs-ihl/>.

222 Østensen, above n 150, 62.

223 *Summary Record of the 36th Meeting*, UN GAOR, 3rd Comm, 65th sess, 36th mtg, Agenda Items 66 and 67, UN Doc A/C.3/65/SR.36 (7 January 2011) 13 [92] (Mr Nikitin, Chairperson-Rapporteur of the WGUM).

224 See, eg, Abdul S Minty, Chairperson-Rapporteur, *Summary of the Third Session of the Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies*, UN Doc A/HRC/WG.10/3/2 (2 September 2014) 4 [9].

225 *Twenty-First Annual Meeting of the Special Procedures*, UN Doc A/HRC/28/41, 5 [15]; Human Rights Council, *Report on the Twenty-Third Annual Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Human Rights Council (Geneva, 6 to 10 June 2016), Including Updated Information on Special Procedures*, UN Doc A/HRC/34/34 (31 January 2017), 6 [24].

226 *Manual of Operations of the Special Procedures*, above n 78, 5 [5].

227 Ibid.

228 Ibid 21.

229 Working Group on the Use of Mercenaries, *Annual Reports*, Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>.

reports[230] militates against the capacity of reports to provide 'early warning' in the requisite timely manner.[231]

Public statements are useful tools for publicising information on human rights violations in a time-sensitive and proactive manner. Although the *Code* requires Special Procedures to address urgent appeals to governments through 'diplomatic channels',[232] mandate-holders can also issue urgent appeals, including appeals issued with other mandate-holders, through public statements when 'a Government has repeatedly failed to provide a substantive response to communications' about 'grave' situations'.[233] If the WGUM's press releases and statements page on the OHCHR website[234] are any guide to the matter, the practice of the WGUM with regard to issuing public statements is twofold. First, the WGUM issues press releases and statements/messages individually (not in conjunction with other Special Procedures) about its on-site missions (completed or forthcoming),[235] its concerns about gaps in the provision by countries of accountability measures for PMSCs[236] and meetings about the regulation of PMSCs held by the WGUM or by other various actors in which the WGUM has participated.[237] Second, the WGUM issues press releases

230 *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, annex arts 6(a), 8; *Manual of Operations of the Special Procedures*, above n 78, 11 [23]–[26], 20 [76].

231 See generally Ingrid Nifosi-Sutton, 'The System of the UN Special Procedures: Some Proposals for Change' in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future of the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, 2011) 389, 416.

232 *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, annex art 14; *Manual of Operations of the Special Procedures*, above n 78, 14 [44]. In carrying out its advocacy function as a Special Procedure, the WGUM can issue letters of urgent appeal and letters of allegation to governments: see below Part IV(E).

233 *Manual of Operations of the Special Procedures*, above n 78, 15 [49]. See also *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, annex art 10.

234 Office of the High Commissioner for Human Rights, *OHCHR News 2014–Present* <http://www.ohchr.org/en/NewsEvents/Pages/NewsSearch.aspx?SID=Mercenaries>.

235 See, eg, Office of the High Commissioner for Human Rights, 'UN Expert Group on Mercenaries on First Visit to the Central African Republic' (Press Release, 6 October 2016) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20646&LangID=E>.

236 See, eg, Office of the High Commissioner for Human Rights, 'Blackwater Sentencing — UN Experts on Mercenaries Call for International Regulation of Private Security' (Press Release, 14 April 2015) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15840&LangID=E>.

237 See, eg, Office of the High Commissioner for Human Rights, 'Expert Group on Mercenaries Debates the Issue of Foreign Fighters and Human Rights' (Press Release, 20 July 2015) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.

(or statements) jointly with other mandate-holders on commemorative occasions[238] and on a variety of country situations.[239]

E *Advocacy on Behalf of Victims of Human Rights Violations*

Advocacy on behalf of victims of human rights violations alleged to have been committed by mercenaries and PMSCs is a critically important function of the WGUM's mandate and inextricably linked with its other functions. Central to the WGUM's advocacy for victims is the effort to remind states of their responsibility to provide redress. As the WGUM reported to the seventh session of the HRC, the execution of contracts with PMSCs does not absolve states of the responsibility to provide redress for victims of violations committed by the PMSCs acting under or beyond the scope of their contracts:

> As pointed out by the Human Rights Committee, States have the responsibility to take appropriate measures or exercise due diligence to prevent, punish, investigate and redress the harm caused by acts of PMSCs or their staff that impair human rights. States which contract PMSCs to export their activities abroad have to respect their international legal obligations, which cannot be eluded by outsourcing some of its functions …[240]

The WGUM cited the Committee's *General Comment No 31* on the nature of the general legal obligations imposed on State parties to the *International Covenant on*

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aspx?NewsID=16249&LangID=E> (the press release was about a panel discussion held by the WGUM at the UN Headquarters in New York on 23 July 2015); Rona, 'Remarks at the Montreux +5 Conference', above n 144.

238 See, eg, Office of the High Commissioner for Human Rights, '"As the Covenants Turn 50, it is Time to Turn Norms into Action" — UN Experts' (Press Release, 9 December 2015) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16861&LangID=E>; Working Group of Experts on People of African Descent, 'Human Rights Protection Must Gain New Momentum at World Humanitarian Summit — UN Experts: Statement by Special Procedures Mandate Holders of the Human Rights Council in Advance of the World Humanitarian Summit' (Press Release/Statement, 20 May 2016) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19997&LangID=E>.

239 See, eg, Mads Andenas, Chair-Rapporteur of the Working Group on Arbitrary Detention, 'Open Letter by Special Procedures Mandate-Holders of the United Nations Human Rights Council to the Government and the Congress of the Republic of Columbia' (Press Release, 29 September 2014) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15116&LangID=E>; Karima Bennoune, Special Rapporteur in the Field of Cultural Rights, 'UN Experts Urge Turkey to Adhere to Its Human Rights Obligations Even in Time of Declared Emergency' (Press Release, 19 August 2016) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394&LangID=E>.

240 *Use of Mercenaries*, UN Doc A/HRC/7/7, 22–3 [51] (citations omitted).

Civil and Political Rights.[241] The *General Comment* did not mention PMSCs but instead spoke of 'private persons or entities' and underscored the importance of art 2 of the *ICCPR*:

> There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[242]

To reiterate, then, in undertaking its advocacy function as a Special Procedure, the WGUM underscores the challenges facing the implementation of human rights standards in the market for force.

Advocacy on behalf of victims of violations, by calling for states to provide redress, underpins the *Draft PMSC Convention*. In addition to reaffirming the state monopoly on the legitimate use of force as well as promoting cooperation between states in the licensing and regulation of PMSCs, the stated purposes of the *Draft* include establishing mechanisms 'to prosecute the perpetrators [of violations of human rights and IHL] and to provide effective remedies to the victims.'[243] Titled 'State Responsibility to Impose Criminal, Civil and/or Administrative Sanctions on Offenders and Provide Remedies to Victims', Part IV of the *Draft* elaborates the theme, if not a norm, of redress in the market for force. The *Draft* does not provide for redress against PMSCs themselves, but Part VI, titled 'International Oversight and Monitoring', provides alternative pathways for redress. Part IV establishes a Committee on Regulation, Oversight and Monitoring of PMSCs to review the application of the Convention,[244] and asks State Parties to implement provisions in their national laws to recognise the competence of the Committee to receive individual and group petitions when complainants have exhausted local remedies.[245] The *Draft PMSC Convention* builds, then, on the norm of redress as embodied in art 2 of the *ICCPR* and elaborated in General Assembly Resolution 60/147.[246] Importantly, the norm of redress can be

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241 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

242 Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 3 [8] ('*General Comment No 31 [80]*').

243 *Draft PMSC Convention*, UN Doc A/HRC/15/25, annex art 1(1)(e).

244 Ibid art 29.

245 Ibid art 37.

246 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/147, UN GAOR, 60th sess, 64th plen mtg, Agenda Item 71(a), Supp No 49, UN Doc A/RES/60/147 (21 March 2006) annex ('*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*').

found in sources of international law, particularly in treaty form and in customary international law,[247] and other contributions to standard setting, such as General Assembly resolutions,[248] HRC Resolutions,[249] Economic and Social Council resolutions[250] and general comments issued by human rights treaty bodies.[251] Arguably, the norm has not simply emerged in international society; rather, the norm has, or so constructivist international relations theory would suggest, cascaded in international legal discourse and reached a tipping point whereupon the norm can be internalised by key actors in international society.[252]

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247 See generally Diane F Orentlicher, 'Addressing Gross Human Rights Abuses: Punishment and Victim Compensation' in Louis Henkin and John Lawrence Hargrove (eds), *Human Rights: An Agenda for the Next Century* (Washington DC: American Society of International Law, 1994) 425, 426–7, 430–1; Theo van Boven, 'Victim-Oriented Perspectives: Rights and Realities' in Thorsten Bonacker and Christoph Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (Asser Press, 2013) 17, 20–6.

248 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc A/RES/60/147; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, Agenda Item 98, Supp No 53, UN Doc A/RES/40/34 (29 November 1985) annex ('*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*').

249 *Business and Human Rights: Improving Accountability and Access to Remedy*, HRC Res 32/10, UN GAOR, 32nd sess, 42nd mtg, Agenda Item 3, Supp No 53, UN Doc A/HRC/RES/32/10 (15 July 2016); *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN GAOR, 17th sess, 33rd mtg, Agenda Item 3, Supp No 53, UN Doc A/HRC/RES/17/4 (6 July 2011).

250 *Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, ESC Res 1989/57, UN ESCOR, 1st regular session of 1989, 15th plen mtg, Agenda Item 11, Supp No 1, UN Doc E/RES/1989/57 (24 May 1989); *United Nations Standards and Norms in Crime Prevention and Criminal Justice*, ESC Res 1998/21, UN ESCOR, Substantive session of 1998, 44th plen mtg, Agenda Item 14(c), Supp No 1, UN Doc E/RES/1998/21 (28 July 1998).

251 Committee Against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) 4–5 [15]; Committee on Economic, Social and Cultural Rights, *General Comment No 9: The Domestic Application of the Covenant*, UN Doc E/C.12/1998/24 (3 December 1998) 2 [2]; Committee on Economic, Social and Cultural Rights, *Report on the Sixteenth and Seventeenth Sessions (28 April – 16 May 1997, 17 November – 5 December 1997)*, UN Doc E/1998/22 (1998) annex IV ('*General Comment No 7 (1997): The Right to Adequate Housing (Article 11, Paragraph 1 of the Covenant): Forced Evictions*') 116–17 [16]; Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, UN Doc HRI/GEN/1/Rev.9 (Vol 1) (30 September 1992) 3 [14]; Human Rights Committee, *General Comment No 31 [80]*, UN Doc CCPR/C/21/Rev.1/Add.13, 3 [8].

252 On the concept of norm cascade and internalisation, see Finnemore and Sikkink, above n 29, 887.

The absence of a legally binding convention on PMSCs that sets out, inter alia, avenues for redress for victims of human rights violations underscores the need for other avenues of advocacy for such victims. Those avenues include the WGUM's complaints procedure and use of communications (letters of urgent appeal and letters of allegation). The WGUM's 2006 annual report to the General Assembly sets out the WGUM's methods of work,[253] including a complaint mechanism for addressing complaints about mercenary and mercenary-related activities or the activities of PMSCs. The report did not use the very term 'complaint mechanism' but instead stipulated that individual letters of communication 'may be addressed to the Working Group by a State, State organ, intergovernmental and non-governmental organization (NGO), or the individuals concerned, their families or their representatives, or any other relevant source.'[254]

In carrying out their advocacy function, Special Procedures issue communications by means of letters, which includes sending letters of urgent appeal and letters of allegation to states. The former are 'addressed to concerned Governments through diplomatic channels',[255] calling upon them to 'intervene to end or prevent a human rights violation.'[256] The latter 'are used to communicate information about violations that are alleged to have already occurred and in situations where urgent appeals do not apply.'[257] Some Special Procedures have by necessity been especially prolific in their use of communications. From 1 June 2006 to 30 November 2016, the Special Rapporteur on the Situation of Human Rights Defenders sent 2991 communications. Over the same period, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions sent 1277 communications and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment sent 2145 communications.[258] The WGUM has not been as prolific by comparison: it sent 73 communications in the same period.[259] Nonetheless, discernible patterns of practice — gleaned from the WGUM's reports to the HRC on its communications[260] and from reports on communications issued by the Special Procedures from 2010

253 *Use of Mercenaries*, UN Doc A/61/341, 5–7 [7]–[24].

254 Ibid 7 [17].

255 *Manual of Operations of the Special Procedures*, above n 78, 14 [44].

256 Ibid 14 [43].

257 Ibid 15 [46].

258 Human Rights Commission, *Communications Report of Special Procedures: Communications Sent*, *1 June to 30 November 2016; Replies Received*, *1 August to 31 January 2017*, UN Doc A/HRC/34/75 (17 February 2017) 9 ('*Communications Report of Special Procedures*').

259 Ibid.

260 Prior to 2010, the WGUM issued its communications reports as appendices in its annual reports to the HRC. From 2010 onwards, summaries of the WGUM's communications have been contained in joint communications reports of the Special Procedures.

onwards[261] — can be seen in the WGUM's use of communications. The WGUM issues joint communications with other Special Procedures containing specific allegations or general concerns about human rights. The WGUM also issues its own communications to countries regarding specific allegations that nationals of a country, PMSCs headquartered in a country or PMSCs operating in a country contacted by the WGUM, may be involved in human rights violations. For instance, on 27 March 2014, the WGUM wrote to the USA Ambassador to the UN to request information about why three complainants (Mr Taha Yaseen Arraq Rashid, Mr Asa'ad Hamza Hanfoosh Al-Zuba'e and Mr Suhail Najim Abdullah Al Shimari) in a lawsuit against CACI Premier Technology, a PMC at Abu Ghraib in Iraq, 'were allegedly refused entry into the United States … to participate in their lawsuit' against CACI.[262]

A notable example of a joint communication letter is from multiple Special Procedures, including the WGUM, to the Board of Directors of the European Bank for Reconstruction and Development ('EBRD'), dated 5 May 2014, regarding the EBRD's ongoing process to review its good governance policies.[263] The example is notable because the Special Procedures' letter is not to a government but to an international financial institution. Given the scope of the WGUM's mandate, it is worth noting here that the letter's paragraph regarding security personnel 'welcome[d]' the reference to the 'Voluntary Principles and Security and Human Rights' in the ERBD's 'performance requirement 2 on health and security'.[264] The same paragraph suggested that the Voluntary Principles were by themselves not enough to ensure accountability of security personnel. The mandate-holders recommended, inter alia, that the performance requirement cite the *Montreux Document* and the *ICoC* and that '[t]raining of employees of private security companies should include the regulation

261 Available online at Office of the High Commissioner for Human Rights, *Communications Reports of Special Procedures* <http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx>. All communications and replies are available online at Office of the High Commissioner for Human Rights, *Communication Report and Search* <https://spcommreports.ohchr.org>.

262 Letter from the Working Group on the Use of Mercenaries to the Ambassador of the United States of America to the UN, 27 March 2014, 1 <https://spdb.ohchr.org/hrdb/27th/public_-_AL_USA_27.03.14_%286.2014%29.pdf>.

263 Letter from the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context to Sir Suma Charkarbati and Members of the Board of Directors of the European Bank for Reconstruction and Development, 5 May 2014 <https://spdb.ohchr.org/hrdb/27th/public_-_OL_EBRD_05.05.14_%284.2014%29.pdf>.

264 Ibid 5. The Voluntary Principles were established in 2000, as 'a multi-stakeholder initiative (MSI) involving governments, companies, and non-governmental organizations that promotes implementation of a set of principles that guide oil, gas, and mining companies on providing security for their operations in a manner that respects human rights.' US Department of State, *Voluntary Principles on Security and Human Rights* (20 December 2012) <https://www.state.gov/documents/organization/196344.pdf>. For the Principles, see The Voluntary Principles on Security and Human Rights, *The Voluntary Principles on Security and Human Rights* <http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf>.

of the use of force, but also training in human rights and humanitarian law.'[265] The EBRD claimed in its reply, however, that performance requirement 2 'adequately covered' the mandate-holders' concerns.[266]

F *Activating and Mobilising the International and National Communities and the Human Rights Council, and Encouraging Cooperation between Governments and Other Actors*

In carrying out its mandated functions, the WGUM seeks to have a catalyst effect with regard to making the international community active or more active in addressing human rights issues in the market for force and encouraging cooperation among governments, civil society and IGOs. The WGUM's efforts at encouraging cooperation underscore the oft-made request in General Assembly resolutions[267] and HRC resolutions[268] on 'the use of mercenaries' that states cooperate fully with the WGUM in the fulfilment of its mandate. On-site missions have the potential to produce a catalyst effect inasmuch as the missions afford the Special Procedures with opportunities to garner the attention of a wide variety of actors in national and international communities. As Ted Piccone says with regard to Special Procedures in general,

> civil society actors … devote considerable time and attention to informing the experts about the human rights problems in their country, preparing substantive reports, helping them make contact with victims, and suggesting ways to improve state compliance with international standards.[269]

The issuing of country reports helps mandate-holders to activate national and international communities after visits. The inclusion of recommendations of Special Procedures arising from country visits in the Universal Periodic Review ('UPR') process[270] and in the OHCHR's Universal Human Rights Index database[271] offers further opportunities to activate and mobilise various actors to cooperate with each

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265 Letter from the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context to Sir Suma Charkarbati and Members of the Board of Directors of the European Bank for Reconstruction and Development, 5 May 2014, 5 <https://spdb.ohchr.org/hrdb/27th/public_-_OL_EBRD_05.05.14_%284.2014%29.pdf>.

266 Ibid 2.

267 See, eg, *Use of Mercenaries*, UN Doc A/RES/62/145, para 17; *Use of Mercenaries*, UN Doc A/RES/69/163, para 18; *Use of Mercenaries*, UN Doc A/RES/70/142, para 21.

268 See, eg, *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 8; *Use of Mercenaries*, UN Doc A/HRC/RES/10/11, para 17; *Use of Mercenaries*, UN Doc A/HRC/RES/15/12, para 17; *Use of Mercenaries*, UN Doc A/HRC/RES/24/13, para 20; *Use of Mercenaries*, UN Doc A/HRC/RES/27/10, para 20.

269 Piccone, *Catalysts for Change*, above n 39, 23.

270 Ibid 33.

271 Office of the High Commissioner for Human Rights, *Universal Human Rights Index* <http://uhri.ohchr.org>.

other and with Special Procedures mandate-holders. But do those various opportunities also give state and non-actors cause to push back against, and call into question the competence of, the WGUM?

Presenting annual reports to the General Assembly and the HRC and contributing to joint communications reports of Special Procedures are key strands in the WGUM's efforts to activate and mobilise actors in national and international communities to address aspects of the human rights debate that relate to the WGUM's mandate. The decision to issue joint communications reports was taken at the sixteenth annual meeting of the Special Procedures, in 2009.[272] The WGUM's annual reports are statements of the Working Group's progress, but can, in whole or in part, also address thematic issues: the WGUM's 2014 annual report to the General Assembly focused on the UN's use of PMSCs;[273] the WGUM's 2015 annual report to the General Assembly focused on the issue of foreign fighters;[274] and thematic parts in the WGUM's 2013, 2014, 2015 and 2016 annual reports to the HRC elaborated the Working Group's ongoing global study of national laws and regulations relating to PMSCs.[275]

The WGUM initiated the global study in May 2012, when it sent letters to UN Member States requesting information on national legislation relating to PMSCs.[276] The stated purpose of the global study is to gather research to 'assist in identifying best practices, provide a basis for research by stakeholders and will inform the report of the Working Group to the Human Rights Council at its 24th session, in 2013.'[277] Pursuant to the global study, the WGUM not only releases summaries of findings in annual reports to the HRC and General Assembly, but also makes summaries of

272 Najat M'jid Maalla, Rapporteur, *Report of the Sixteenth Meeting of Special Rapporteurs/Representatives*, *Independent Experts and Chairpersons of Working Groups of the Special Procedures of the Human Rights Council (Geneva*, *29 June – 3 July 2009)*, UN Doc A/HRC/12/47 (22 July 2009) 8 [24]–[26].

273 *Use of Mercenaries*, UN Doc A/69/338.

274 *Use of Mercenaries*, UN Doc A/70/330.

275 2013 report: Anton Katz, Chairperson-Rapporteur, *Annual Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/24/45 (1 July 2013) 6–12 [19]–[52] ('*Annual Report*'); 2014 report: Patricia Arias, Chairperson-Rapporteur, *Annual Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/27/50 (30 June 2014) 5–19 [13]–[66] ('*Annual Report*'); 2015 report: *Annual Report*, UN Doc A/HRC/30/34, 5–21 [15]–[123]; 2016 report: *Report*, UN Doc A/HRC/33/43, 4–20 [18]–[88]; 2017 report: Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/36/47 (20 July 2017) 7–19 [19]–[73].

276 Working Group on the Use of Mercenaries, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/67/340 (30 August 2012) 7 [15] ('*Use of Mercenaries*').

277 Ibid 7 [14].

regional studies available online[278] and makes received examples of national legislation available online.[279] Thus, the global study has the clear potential for activating and mobilising the international community to deal with regulatory gaps on PMSCs in national laws.

Participating in various fora about the regulation of PMSCs is another key strand of the WGUM's efforts to activate and mobilise the international community. That the WGUM participates in these fora is a reflection of the WGUM's mandate 'to consult States, intergovernmental organizations, non-governmental organizations and other relevant actors of civil society' when carrying out its functions as a Special Procedure.[280] Although the WGUM is sceptical of the efficacy of self-regulation, it has participated in meetings on the *Montreux Document* organised by the Swiss Government, International Committee of the Red Cross ('ICRC') and the Geneva Centre for the Democratic Control of Armed Forces ('DCAF'), including a regional meeting in Ulaanbaatar, Mongolia, 12–13 October 2011[281] and the Montreux +5 Conference in Montreux, Switzerland, 12–13 December 2013.[282] When addressing the Montreux +5 Conference, Gabor Rona, a member of the WGUM, welcomed the adoption of the *Montreux Document* (in 2008) and the adoption of the *ICoC* (in 2010) as 'important complementary initiatives towards the improvement of standards' for the PMSC industry.[283] Rona emphasised, however, that self-regulation is a 'necessary' but 'insufficient' basis for accountability.[284]

In addition to participating in various fora about the regulation of PMSCs, the WGUM, as part of its analysis of its thematic issue, has organised consultations and panel events on PMSCs and related matters. In 2007–11, the WGUM held five regional consultations on PMSCs with a variety of actors from national and international communities, on the WGUM's efforts to develop a legally binding international instrument on PMSCs.[285] The WGUM convened an expert panel on

278 Working Group on the Use of Mercenaries, *National Legislation Studies on PMSCs*, Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx>.

279 Working Group on the Use of Mercenaries, *National Regulatory Frameworks on PMSCs*, Office of the High Commissioner for Human Rights<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalRegulatoryFrameworks.aspx>.

280 *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 10.

281 *Use of Mercenaries*, UN Doc A/67/340, 8 [20(c)].

282 *Annual Report*, UN Doc A/HRC/27/50, 5 [12].

283 Rona, 'Remarks at the Montreux +5 Conference', above n 144.

284 Ibid.

285 *Eastern European Group and Central Asian Region*, UN Doc A/HRC/10/14/Add.3, 4–9 [4]–[29]; *Latin American and Caribbean Regional Consultation*, UN Doc A/HRC/7/7/Add.5, 6–9 [7]–[28]; *Regional Consultation for Africa*, UN Doc A/HRC/15/25/Add.5, 4–10 [7]–[37]; *Regional Consultation for Asia and the Pacific*, UN Doc A/HRC/15/25/Add.4, 4–7 [7]–[26]; *Regional Consultation for Western Europe and Others Group*, UN Doc A/HRC/15/25/Add.6, 4–8 [6]–[26].

31 July 2013 on the UN's use of PMSCs, and in a follow-up action, convened an expert panel on the same matter on 5 March 2014.[286] On 1 December 2015, the WGUM held a panel event on its ongoing global study of national laws and regulations relating to PMSCs.[287] Constructivist international relations logic would suggest that the importance of panel events and the five regional consultations is their collective effort to raise awareness of human rights issues in the market for force. However, given the opposition of Western states to the WGUM's mandate, it seems unlikely that the above and other panel events[288] of only one day will have a significant effect in motivating state and non-state actors in the market for force to address human rights issues regarding PMSCs.

G *The Working Group on the Use of Mercenaries' Follow-Up to Its Recommendations*

Gauging the effectiveness of the WGUM's follow-up activities is a complex matter, particularly when set in the context of broader issues with follow-up in the HRC. One such issue concerns the terminology of 'follow-up'. Although HRC Resolution 5/1 set out the institution-building mechanisms of the Special Procedures,[289] the resolution did not use the term 'follow-up'. The term was used only once in HRC Resolution 5/2, when a preambular paragraph stated that the HRC's methods of work 'shall be transparent, fair and impartial and shall enable genuine dialogue, be results-oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms'.[290]

Follow-up on progress made in fulfilment of its mandate is a raison d'être of the WGUM's mandate. The very term 'follow-up' is conspicuous by its absence from the

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286 Working Group on the Use of Mercenaries, *Study on the Use of Private Military and Security Companies (PMSCs) by the United Nations*, Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/StudyOnPMSC.aspx>.

287 Working Group on the Use of Mercenaries, *Panel Event: Tuesday 1 December 2015*, *Room IX*, *Palais des Nations*, *Geneva — Regulation of Private Military and Security Companies*, Office of the High Commissioner for Human Rights<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/EventDec2015.aspx>.

288 Working Group on the Use of Mercenaries, *Foreign Fighters and New Forms of Mercenarism*, above n 163; Working Group on the Use of Mercenaries, *Panel Event: Thursday 21 July 2016*, *Conference Room 3*, *United Nations Headquarters*, *New York — Privatization of War: Impact on Human Rights*, Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/EventJuly2016.aspx>.

289 *United Nations Human Rights Council: Institution Building*, UN Doc A/HRC/RES/5/1, annex [39]–[64].

290 *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, Preambular para g, quoting *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120, Supp No 49, UN Doc A/RES/60/251 (3 April 2006) para 12.

resolution that established the WGUM and from resolutions that have renewed and extended its mandate; however, the need for follow-up is implicit in the request made in the resolutions that the WGUM submit annual reports to the General Assembly and the HRC.[291] When the WGUM does use the term 'follow-up' in its reports,[292] it tends to use the term in its natural and ordinary meaning. The WGUM's practice regarding follow-up goes beyond the WGUM itself carrying out follow-up activities (especially in the form of country visits and associated reports) and extends to system-wide efforts in the Special Procedures system to gauge whether, and if so, how governments and other actors have followed-up the recommendations from mandate-holders. Examples of follow-up include how recommendations of Special Procedures arising from country visits are included in the UPR process and in the OHCHR's Universal Human Rights Index database,[293] and that the joint-communications reports of Special Procedures 'feed into' the UPR process.[294] Compilation reports authored by the Working Group on the UPR discuss, inter alia, how the country under review has cooperated with human rights mechanisms, including Special Procedures, for instance, identifying whether a country has responded to questionnaires from mandate-holders requesting information on thematic issues.[295]

Determining whether the WGUM's follow-up to its recommendations are effective is a quantitative and qualitative matter that defies easy resolution; some observations, though, can be made about the effectiveness of the WGUM's follow-up activities. Clearly, on-site missions serve an indispensable fact-finding role and thus are central to the WGUM's mandate; in turn, country reports are an indispensable form of follow-up. However, the length of time — in some instances, more than a year — between the end of a country visit and the general distribution of the attendant

291 *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, para 14; *Use of Mercenaries*, UN Doc A/HRC/RES/7/21, para 10; *Use of Mercenaries*, UN Doc A/HRC/RES/15/12, para 19; *Use of Mercenaries*, UN Doc A/HRC/RES/24/13, para 22.

292 See, eg, Alexander Ivanovitch Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 4 [9]–[11], 11 [32]–[33]; *Mission to Honduras*, UN Doc A/HRC/24/45/Add.1, 5–6 [8]–[11]; Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/15/25/Add.1 (2 September 2010) 3 [6], 12 [67], 12–3 [72]; *Use of Mercenaries*, UN Doc A/64/311, 7 [13]–[14], 14–5 [39]–[43].

293 See above n 271 and accompanying text.

294 *Communications Report of Special Procedures*, UN Doc A/HRC/34/75, 6 [2].

295 See, eg, Shamsul Bari, Rapporteur, *Report of the Seventeenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairs of Working Groups of the Special Procedures of the Human Rights Council (Geneva, 28 June – 2 July 2010)*, UN Doc A/HRC/15/44 (19 July 2010) 9 [26]–[27].

report[296] may militate against, or otherwise call into question, the effectiveness of country reports as a form of follow-up to country visits.[297] An originary aspect of the WGUM's mandate is to follow-up on whether states have ratified the *Mercenaries Convention*.[298] The need for this follow-up stems from the lack of a treaty body for the *Convention*. José L Gómez del Prado is reported as having said in a meeting of the Third Committee in 2007:

> In contrast with main human rights instruments, the *Convention* had not established a treaty body, and the Working Group, as the only mechanism within the United Nations that dealt with mercenarism, attempted to address that gap by monitoring and follow-up activities in order to bring about universal adherence to the *Convention*.[299]

These activities include issuing recommendations in annual reports that countries ratify the *Convention*,[300] and analysing national laws regarding PMSCs vis-a-vis, inter alia, whether the laws have ratified the *Convention*.[301] The continuing dearth of support from Western states for the *Convention* suggests, however, that the WGUM's follow-up activities to promote ratification are Sisyphean tasks.

That some aspects of the WGUM's follow-up efforts are Sisyphean, or lack a requisite degree of 'smartness', is also illustrated by the Working Group's follow-up to its annexure of the *Draft PMSC Convention* to its 2010 annual report to the HRC. The follow-up activities consist in the main of the WGUM participating in UN fora on the *Draft*, such as sessions of the IGWG,[302] and recommending that all states should

296 For example, the WGUM's report for its mission to Tunisia from 1–8 July 2015 was distributed on 2 August 2016. See Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on Its Mission to Tunisia*, UN Doc A/HRC/33/43/Add.1 (2 August 2016).

297 See generally Piccone, *Catalysts for Change*, above n 39, 24.

298 *Use of Mercenaries*, UN Doc E/CN.4/RES/2005/2, paras 13–14.

299 *37th Meeting*, UN Doc A/C.3/62/SR.37, 5 [33] (Mr Gómez del Prado, Chairperson of the WGUM) (emphasis added).

300 See, eg, *Use of Mercenaries*, UN Doc A/HRC/18/32, 6 [15], 10 [38], 14 [62], 18–9 [83]; *Annual Report*, UN Doc A/HRC/30/34, 23 [133]; Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Côte d'Ivoire (7–10 October 2014)*, UN Doc A/HRC/30/34/Add.1 (17 August 2015) 5 [11], 17 [83].

301 See, eg, *Annual Report*, UN Doc A/HRC/27/50, 5 [14], 7 [22], 14 [49]; *Annual Report*, UN Doc A/HRC/24/45, 6 [23], 12 [51]; *Annual Report*, UN Doc A/HRC/30/34, 5 [16], 9 [38], 14 [73], 15 [80], 21 [123]; *Report*, UN Doc A/HRC/33/43, 5 [17], 11 [44]–[45], 22 [20].

302 See, eg, Elzbieta Karska, Chairperson-Rapporteur, 'Statement of the Chair of the Working Group on the Use of Mercenaries as a Means of Violating the Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination' (Statement

support the *Draft*.[303] The *Draft* remains, however, a draft. According to the *Manual of Operations of the Special Procedures*:

> Recommendations [arising from, and related to, country visits], whether addressed to governments, inter-governmental organizations or non-governmental organizations, should be SMART: specific, measurable, attainable, realistic, and time-bound. Not all issues that arise in the context of a visit may be best addressed through a specific recommendation, and mandate-holders should generally give priority to those proposals which meet the SMART criteria.[304]

While the *Manual* makes the 'smart' requirement with reference to recommendations on country visits and not advice per se provided by mandate-holders, the requirement offers an interesting prism through which to view the effectiveness of the WGUM's follow-up efforts. On the one hand, the WGUM's follow-up activities on the *Mercenaries Convention* and the *Draft PMSC Convention* appear to be specific but not attainable and realistic. On the other hand, the activities at least serve to underscore the WGUM's recommendations in the HRC, General Assembly and elsewhere. A lack of 'smart' follow-up may be due less to the activities themselves and more to the long-standing opposition from Western states to the examination of legal issues about mercenary and mercenary-related activities by UN bodies other than the Sixth Committee.

H *The Challenges Facing the Working Group on the Use of Mercenaries*

Alerting UN bodies and the international community about the need to address specific situations and issues is not without its challenges. Some challenges facing the WGUM pertain to the Special Procedures as a system. The HRC tasks the Special Procedures to take a 'proactive role' in disseminating information on 'specific situations and issues';[305] yet, some have argued that the process of circulating public statements to the OHCHR for dissemination is 'cumbersome'.[306] A perennial challenge to the effectiveness of Special Procedures is obtaining adequate funding.[307] In 2016, the OHCHR allotted US$14.441 million of regular budget funding (or 13.74 per cent

presented to the fourth session of the IGWG, Geneva, 27 April – 1 May 2015) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session4/Statement_of_Chair_of_WG_mercenaries.pdf>.

303 See, eg, *Annual Report*, UN Doc A/HRC/27/50, 20 [75]; Rona, 'Remarks at the Montreux +5 Conference', above n 144.

304 *Manual of Operations of the Special Procedures*, above n 78, 25 [98].

305 Ibid 21, 21 [78].

306 Piccone, *Catalysts for Change*, above n 39, 116.

307 See, eg, *Twenty-First Annual Meeting of the Special Procedures*, UN Doc A/HRC/28/41, 10 [43], 11–2 [50]–[55], 15 [73]–[75]; Seong-Phil Hong, Rapporteur, *Report of the 22nd Annual Meeting of Special Rapporteurs/Representatives, Independent Experts and Working Groups of the Special Procedures of the Human Rights Council (Geneva, 8–12 June 2015), Including Updated Information on the Special Procedures*, UN Doc A/HRC/31/39 (23 May 2016) 11 [44], 14 [61].

of the total of the OHCHR's regular budget) and $7.883 million of extra-budgetary funding (or 3.69 per cent of the total of the OHCHR's extra-budgetary funds) to the Special Procedures Branch.[308] Ted Piccone points out that funding pressures leave the Special Procedures 'with no choice but to seek additional support from outside the UN system, a step that raises some concerns regarding transparency and equity.'[309]

A further perennial challenge to the effectiveness of Special Procedures relates to follow-up efforts. The need to devote more time and resources to follow-up on recommendations made by Special Procedures was noted by 'many states' in the 2011 5-year review of the HRC;[310] however, the extent to which follow-up activities have been built into the HRC's program of work can be questioned. Limon and Power also acknowledge the importance of systematic follow-up processes, but argue that 'systematic follow-up by Special Procedures remains "at present, negligible."'[311] Similarly, Ted Piccone notes that ensuring systematic follow-up is the 'Achilles' heel' of the Special Procedures system.[312] Christophe Golay, Claire Mahon and Ioana Cismas acknowledge the problem of the scarcity of resources for follow-up efforts,[313] but point out that processes for follow-up, such as 'follow-up missions undertaken by the expert him/herself', are 'vital to increasing the impact of a country visit and assuring that recommendations are being implemented.'[314]

The above challenges are a microcosm of problems that face the Special Procedures as a system, and belie the capacity of mandate-holders to fulfil their mandates in a timely manner. Other challenges to the capacity of the WGUM to fulfil its functions are specific to the WGUM. The USA, the UK and the EU Member States dispute the competence of the WGUM to develop new legal principles for the regulation of PMSCs,[315] and see existing IHL and human rights norms and instruments such as

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308 Office of the High Commissioner for Human Rights, *OHCHR Report 2016* (2016) 92 (total funds available), 111 (Special Procedures funding) <http://www2.ohchr.org/english/OHCHRreport2016/allegati/Downloads/1_The_whole_Report_2016.pdf>.

309 Piccone, *Catalysts for Change*, above n 39, 124. See also Baldwin-Pask and Scannella, above n 49, 470–6.

310 Limon and Power, above n 58, 19. See also Sihasak Phuangketkeow, Chair-Rapporteur, *Report of the Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council*, UN Doc A/HRC/WG.8/2/1 (4 May 2011) 74–80.

311 Ted Piccone, 'The Future of the United Nations Special Procedures' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge, 2013) 725, 727, quoted in Limon and Power, above n 58, 19.

312 Piccone, *Catalysts for Change*, above n 39, 99.

313 Christophe Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15 *International Journal of Human Rights* 299, 309.

314 Ibid 311 (citations omitted).

315 See, eg, *45th Meeting*, UN Doc A/C.3/66/SR.45, 6 [40] (Mr Sammis, representative of the USA).

the *Montreux Document* as able to provide a framework to regulate PMSCs.[316] Past and present members of the WGUM would likely argue that persistent questioning by Western states of the WGUM's mandate raises questions about the receptiveness of certain state actors in the international community to heed the full import of the WGUM's public statements — and the full import includes the necessity, as the WGUM sees it, for a binding international convention on the use of PMSCs.[317]

V Conclusion

The proliferation of PMSCs in the wake of the end of the Cold War has tested the capacity of states and the international community to regulate private companies that offer a range of military and/or security services in conflict, post-conflict and other situations. Arguably, dealing in a comprehensive manner with the impact of PMSCs on human rights requires more than PMSC industry-focused self-regulation regimes and national efforts to recall existing principles of international law as they apply to the privatisation of force.

CHR Resolution 2005/2 created the WGUM only one year after the CHR had renewed the SRUM's mandate for three years. This volte-face has been attributed to dissatisfaction in certain quarters in the CHR to the SRUM's new mandate-holder taking a pragmatic approach to the regulation of PMSCs. The volte-face has also been attributed to recognition that creating a Working Group comprised of five independent experts would reinforce the long-standing individual thematic mandate on mercenary and mercenary-related activities. That the CHR initially authorised members of the new WGUM to hold only one session over a five-day period each year belies arguments that the WGUM was created to reinforce the individual mandate. In 2008, though, the HRC broadened the WGUM's mandate to three five-day sessions per year. Coupled with five regional consultations over 2007–10 with state and non-state actors regarding, inter alia, principles for a possible draft convention on PMSCs, the broadened mandate gave greater scope for the WGUM to carry out the analytical, advisory, alerting and other functions of a Special Procedure. Nonetheless, the WGUM has faced and continues to face considerable challenges. Although the WGUM's country reports are an indispensable form of follow-up to the Working Group's analysis of its thematic issue, the continuing dearth of support from Western states for the *Mercenaries Convention* and the *Draft PMSC Convention* suggests that the WGUM's follow-up activities to promote ratification of the former and adoption of the latter have not been particularly effective.

316 *34th Meeting*, UN Doc A/C.3/63/SR.34, 4 [13] (Mr McMahan, representative of the USA); *Summary Record of the 51st Meeting*, UN GAOR, 3rd Comm, 68th sess, 51st mtg, Agenda Items 27, 28, 65, 66, 68 and 69, UN Doc A/C.3/68/SR.51 (16 January 2014) 9 [58] (Ms Kazragienė, representative of Lithuania, speaking on behalf of the EU) ('*51st Meeting*').

317 See, eg, Gómez del Prado, 'A United Nations Instrument', above n 2, 43, 52–6; Rona, 'Remarks at the Montreux +5 Conference', above n 144.

Two conclusions can be drawn from both the widespread Western opposition to the WGUM's mandate and the preference of key Western states for self-regulation, codes of conduct and voluntary agreement regimes on PMSCs. One conclusion is that creating the kinds of practices necessary to generate and sustain a treaty norm to reassert a state monopoly on the use of force is beyond the capacity of the WGUM. Another conclusion is that the WGUM's efforts to raise and maintain awareness in the agora about human rights in the market for force are Sisyphean. Indeed, the cumulative weight of the manifold challenges facing the WGUM is not unlike the rock that Sisyphus was condemned to rolling up a mountain in the underworld. Both conclusions seem to sit uneasily with a description of the crucial role of Special Procedures as catalysts for human rights. Clearly, though, the prospect for success of any given norm entrepreneur is the product of contestation between different actors with different interests and varying levels of power. Norm entrepreneurship does not always result in the institutionalisation and implementation of a norm, or even the unambiguous emergence of a norm. When a norm entrepreneur persists in its efforts over an extended period of time despite, or perhaps even because of, intractable opposition to its efforts, then it seems fair to say that that norm entrepreneur has taken on the role of a Sisyphus in the agora. But even Sisyphus was successful, in his own way. It seems counter-intuitive to depict Sisyphus as enjoying or achieving any measure of success, but it is instructive to recall here the message of Albert Camus' reading of the myth of Sisyphus: absurdity does not seem quite so pointless if a person enduring the absurdity believes the struggle for meaning was not for nothing — put differently, it is in accepting the struggle against an indifferent world that a principle of human existence can be found and shared with others who recognise the significance of doing what needs to be done.