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CHILDREN'S RIGHTS: THE POTENTIAL IMPACT OF
PRIVATE MILITARY AND SECURITY COMPANIES

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Abstract

This paper examines the potential risks that the use of PMSCs in a conflict or post-conflict situation poses for children, considering the existing norms for the protection of children's rights at the international and EU levels. It first analyses which children's rights protected by international and regional human rights instruments and IHL are at risk through the intervention of PMSCs, also providing examples of violations that have occurred in practice. It specifically considers whether PMSCs may be held accountable for recruiting children or for using them to actively participate in hostilities; and examines which measures PMSCs are required to take if they find themselves confronted with children participating in armed hostilities.

In the second part, the paper examines the specific instruments for children's rights adopted by the EU, and discusses their strengths and limits in terms of protecting the child, especially in view of an increasing PMSC activity. In the prospective of a more active role of the EU in establishing common standards for Member States with regard to PMSCs, it suggests that a specific clause be adopted for the rights and protection of the child, which covers PMSC activity when there is a link between such activity and an EU Member State. The authors conclude that states should ensure full compliance with the existing international rules protecting the rights of children, including by PMSCs. The provision of adequate training for PMSC personnel on these rules and the accountability for violations of children's rights are essential in this regard.

Children's Rights: The Potential Impact of Private Military and Security Companies

CHRISTINE BAKKER AND SUSANNA GREIJER*

This thematic paper forms part of the research undertaken in the context of the PRIV-WAR Project on Private Military and Security Companies (PMSCs) and the Protection of Human Rights (Work Package 4). It aims to examine what the normative framework is for the protection of children's rights at the international and the European Union (EU) levels; how the rights of children¹ may be affected by PMSCs in a conflict or post-conflict situation; and what remedies exist for violations of these rights. It will make some proposals on how such violations may be prevented through specific regulatory measures regarding PMSCs and their services.

It is justified to consider children's rights within the framework of the PRIV-WAR Project due to the risk that these rights could be undermined or affected by the deployment of PMSCs in an armed conflict or in post-conflict situations.

The paper is divided in two parts. It first examines the normative framework aiming to protect children's rights and which are most relevant to the intervention of PMSCs at the international level (Part I).² Considering the focus of the PRIV-WAR project on the role of the European Union in ensuring compliance by PMSCs with human rights and International Humanitarian Law (IHL), the paper then analyses the existing European legal framework for the protection of children, both within the EU and with regard to its external relations (Part II).³

PART I: Protecting Children's Rights: Evolving Norms at the International Level

1. General Protection of Children's Rights

Since the PRIV-WAR Project focuses on the regulation of PMSCs and their services in armed conflict or post-conflict situations, this report will also concentrate on those rights of children which are most relevant to this type of situations. A substantial body of human rights norms protecting children has developed over the last decades. Moreover, specific norms for the protection of children in armed conflict exist in the context of International Humanitarian Law, in particular in the two Additional Protocols to the Geneva Conventions. In the following examination, first an overview will be given of the various instruments protecting the rights of children, distinguishing between human rights law, IHL and International Criminal Law (A). After that, a specific analysis will be devoted to the instruments that prohibit the recruitment of children into armed forces or groups and the act of using them to actively participate in the hostilities of an armed conflict (B). Each time, the relevance of these

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¹ In this paper, the term 'children' is used for persons below the age of eighteen years, in accordance with the definition in Article 1 of the Convention on the Rights of the Child.

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provisions for PMSCs will be examined, also considering whether PMSC employees can be held accountable for violation of the rights included therein.

A. Human Rights Instruments

The 1989 Convention on the Rights of the Child (CRC) is the most comprehensive human rights instrument specifically geared towards the protection of children. It sets out the rights of children, who are defined as ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’ (Article 1). Article 3 of the CRC states that, ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. The general obligation to ensure the rights of the child is laid down in Article 4: ‘States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention’. Taken together, the provisions contained in Articles 3 and 4 imply that in all circumstances where a child is involved, the measures normally required to ensure respect for human rights may not be sufficient, and specific measures must be taken to protect the rights enshrined in the CRC.

The CRC contains many rights which are also included in general human rights instruments, covering both civil and political rights and social and economic rights, as well as provisions originating from IHL, adapting them to the specific situation and needs of children. It also lays down several specific rights of the child that are additional to these general instruments.

The children’s rights laid down in the CRC which are most likely to be violated by PMSCs in an armed conflict or in its aftermath when the security situation is still fragile, are the right to life⁴; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment;⁵ the right not to be deprived of his or her liberty unlawfully or arbitrarily⁶; the right to be protected from all forms of trafficking⁷ as well as from all forms of sexual exploitation and sexual abuse;⁸ and the right of persons who have not reached the age of fifteen years not to be recruited by armed forces and not to take a direct part in hostilities.⁹

Also the ICCPR contains a general provision on children’s rights. Article 24 states:

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. [...]

This provision was included because the vulnerabilities related to childhood were considered to require specific measures in order to ensure that children fully enjoy the rights recognised by the Covenant. This has been confirmed by the Human Rights Committee in its General Comment No. 17.¹⁰

The general obligation contained in these human rights instruments that states parties must respect and ensure the rights enshrined therein, entails a number of positive obligations, in particular the obligation to prevent violations of these rights, as well as the obligation to investigate violations, prosecute those

⁴ CRC, Article 6

⁵ CRC, Article 37 (1)

⁶ CRC, Article 37 (2)

⁷ CRC, Article 35.

⁸ CRC, Article 34.

⁹ CRC, Article 38(2)). For more details on this particular right, see *infra*.

¹⁰ General Comment No. 17, “Rights of the Child” (Article 24), 1989

responsible and to provide reparations to the victims. A detailed analysis of these obligations for the home state, contracting state and the host state of PMSCs is presented in three specific Working Papers produced in the context of the PRIV-WAR project.¹¹

B. IHL Instruments

Special care must be taken that children do not become victims of armed operations and that schools or places where children gather are not targeted for such operations. Under IHL, specific provisions protecting children are included in the Fourth Geneva Convention,¹² in particular Article 14(1), regarding hospital and safety zones to protect from the effects of war, *inter alia*, children under fifteen; Article 17, requiring the removal of children from besieged or encircled areas; Article 23(1), concerning the free passage of all consignments of essential foodstuffs, clothing and tonics intended for, amongst others, children under fifteen. The most comprehensive provision concerning the general protection of children who are orphaned or are separated from their families as a result of war is Article 24 (1):

The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. (...).

Apart from these child-specific provisions, IHL obviously contains a vast body of rules designed to protect civilians, which also apply to children. Therefore, grave breaches of the Geneva conventions, including rape, sexual violence and torture, may also occur when children are victims of such war crimes.

States are required to respect and to ensure respect of the Geneva Conventions in all circumstances (common Article 1 of these conventions). Therefore, in principle all the states involved in the deployment of a PMSC in a situation of armed conflict (the contracting state, the home state and the host state) are bound to ensure the protection of children as outlined in the above-mentioned provisions. Although the scope of some of these provisions (e.g. the above-mentioned Article 24(1)) goes beyond the tasks conferred upon PMSCs, these companies should be aware of these specific IHL obligations, as well of the general provisions protecting civilians, in order to avoid any violations thereof in the course of their operations.

C. International Criminal Law Instruments

Also the statutes of the Special Court for Sierra Leone (SCSL), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) include several provisions concerning children. Given the geographical limitation of the SCSL and the ICTR, as well as their applicability to a specific conflict during a defined period of time which has expired in both cases, they have no relevance for current and future PMSC activities and possible criminal acts committed by their employees. However, the following provisions of the ICC Statute may apply to acts of PMSC employees, if the jurisdictional conditions are met. Apart from the recruitment of children into armed forces or groups and using them to actively participate in hostilities, which will be discussed below,

¹¹ See Francioni, F., *The Responsibility of the PMSC's Home State for Human Rights Violations Arising from the Export of Military and Security Services*, EUI Working Papers AEL 2009/18; Hoppe, C., *Positive Human Rights Obligations of the Hiring State in Connection with the Provision of Coercive Services by a PMSC*, EUI Working Papers AEL 2009/19 ; and Bakker, C., *Private Military and Security Companies: Positive Human Rights Obligations of the Host State*, EUI Working Papers AEL 2009/20.

¹² Convention (IV) Relative to the Protection of Civilian Persons in time of War, Geneva, 12 August 1949, U.N.T.S. No. 973, vol. 75, p. 287

children can become victims of several other international crimes which are defined either as war crimes or as crimes against humanity. These include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions (ICC Statute, Articles 8(2)(b)(xxii) and 8(2)(e)(vi)). These same crimes are also included as crimes against humanity (ICC Statute, Article 7(g)), adding ‘any other form of sexual violence of comparable gravity’. Of these crimes, rape and sexual violence against girls have been committed by PMSC employees in practice, and should therefore be included among the risks for children posed by the use of such companies.

D. Violations of these Rights by PMSC Employees

Several incidents have been reported in the press or by human rights organisations whereby children have become victims of violence or abuse by PMSC employees. In most cases, these incidents have not been investigated and no prosecutions have been launched against those responsible.

In Colombia, children have become victims of sexual abuse by PMSC agents. According to a press report,¹³ in October 2004 employees of an American PMSC, together with US marines, committed acts of sexual violence against three minors and widely distributed videos of the abuse among the local population. The marines and private contractors worked as advisors to Colombian military personnel on the Tolemaida Air Base, near the town of Melgar. No investigations or prosecutions have been launched, since US military personnel and private contractors benefit from an immunity agreement between the USA and Colombia.¹⁴

Concerning Guatemala, there are reports that “(n)on-state actors with links to organized crime, gangs, private security companies, and alleged “clandestine groups” committed hundreds of killings and other crimes.”¹⁵ However, no details were provided on the specific involvement of PMSCs.

Children were also among the victims of the Nisour Square incident in Iraq, in which 17 civilians were killed and 20 others injured by employees of the PMSC Blackwater International in September 2007. At least one of the persons who were killed was a child (an 11 year old boy) and several children were injured after a grenade was thrown into a nearby school.¹⁶ Five of these employees have been indicted by the District of Columbia on 8 December 2008. The indictment represents the first prosecution under the Military Extraterritorial Jurisdiction Act (MEJA) to be filed against non-Defense Department private contractors. This was not possible prior to the 2004 amendments to MEJA that specifically expanded the reach of MEJA to non-Defense Department contractors who provide services “in support of the mission of the Department of Defense overseas.” The trial is scheduled to start in February 2010 in Washington. According to a press report of November 10th, 2009, senior management of this company agreed to pay up to 1 million USD to Iraqi officials to keep them from criticizing the company and from providing information to the authorities investigating these crimes.¹⁷

Due to the absence of investigations in all but one of these incidents, very scarce information is available, including about the names of the PMSCs and the nationality of the employees who were allegedly involved. Therefore, the question whether they benefitted from any immunity agreement cannot be answered, except in the Colombian example, where this was indeed the case. Nevertheless, despite the lack of details, this overview shows that reports do exist about the violation of children’s

¹³ http://www.elcorreo.eu.org/esp/article.php3?id_article=4747

¹⁴ Bi-national Agreement, September 17, 2003

¹⁵ US State Department, Country Reports on Human Rights Practices 2006: Guatemala, 6 March 2007, www.state.gov, cited by www.childsoldiersglobalreport.org, at p. 155.

¹⁶ New York Times, 10 November 2009, *Blackwater Said to Pursue Bribes to Iraq After 17 Died* available at http://www.nytimes.com/2009/11/11/world/middleeast/11blackwater.html?_r=1

¹⁷ Idem.

rights by PMSC personnel, which confirms the risk of such violations through employment of PMSCs, as well as the need to prevent them.

2. Recruitment of Children and Using Them to Take Part in the Hostilities of an Armed Conflict

The recruitment of children by the parties to an armed conflict and the use of children to take part in hostilities are explicitly prohibited in various international conventions, both of IHL and of human rights law. Even though it may seem unlikely that PMSCs recruit children to work for them, such situations have occurred in practice. Indeed, in Afghanistan, boys under 18 years of age have been seen working for private security companies. According to a senior government official, cited in a report of IRIN of December 2007¹⁸, this occurred particularly in the Kandahar and Helmand provinces.¹⁹ Even though the information of such under-age recruitment by PMSCs is scarce, it is not at all inconceivable that in certain African, Asian or Latin-American states, such recruitment may occur, either directly by a PMSC, or through sub-contracting. In particular in developing countries, minors might be willing to join such a corporation for economic reasons. PMSC personnel should therefore be aware of this risk and receive adequate information to avoid such under-age recruitment.

Moreover, if PMSCs operate in a situation of armed conflict in a country where child soldiers are being used, they may find themselves confronted with armed children who are participating as actors in the conflict. An appropriate training on IHL and human rights norms related to children is required in order to avoid violations of these children's rights by PMSC employees.

A. International Humanitarian Law

The first Additional Protocol to the Geneva Convention applicable to international armed conflicts stipulates that: *'The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces'* (Article 77(2)). The same provision further states that in recruiting among those persons who have attained the age of fifteen but not the age of eighteen, the Parties to the conflict *'shall endeavour to give priority to those who are oldest'*. The provision in Additional Protocol II, which concerns armed conflicts not of an international character, is a bit stronger: *'Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'*²⁰. The main elements of these provisions have also been included in the statutes of the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL), albeit with some refinements, as will be shown below.

¹⁸ See www.irinnews.org/PrintReport.aspx?ReportId=75904, report of 19 December 2007. IRIN, Humanitarian News and Analysis is a project of the UN Office for the Coordination of Humanitarian Affairs.

¹⁹ Two private security companies working in those provinces at that time declined to comment and turned down requests by IRIN to visit their headquarters. The same report signals that according to the Afghanistan Independent Human Rights Commission, child-soldiers are also being recruited and in some cases sexually abused by the Afghan police and various militias supporting the police, as well as by the Taliban.

²⁰ Article 4 (Protocol II, on non-international armed conflicts).

B. International Criminal Law

1. The Statutes of the ICC and the SCSL

The Rome Statute of the ICC and the Statute of the SCSL also set the minimum age for the recruitment of children into armed forces or groups or using them to actively participate in the hostilities of an armed conflict at fifteen.²¹

The distinction between voluntary and compulsory recruitment is explicitly made in the Statutes of the ICC and the SCSL, which speak of ‘conscripting or enlisting children under the age of fifteen into armed forces (or groups²²)’ or ‘using them to participate actively in hostilities.’²³ While the term ‘conscripting’ refers to compulsory recruitment, ‘enlistment’ is used for situations where children voluntarily join armed forces or groups. Therefore, even if children were not obliged or forced to become actively involved in an armed conflict, but allegedly joined one of the parties voluntarily, this does not diminish the criminal responsibility of the adults who are responsible for their enlistment or use in hostilities.

2. International Judicial Practice

In May 2004, the Special Court for Sierra Leone (SCSL) held that the conscription, enlistment and use in hostilities of children under the age of fifteen constitute crimes under customary international law.²⁴ The Appeals Chamber considered that there was sufficient evidence of state practice and *opinio juris* to conclude that these acts attracted individual criminal responsibility since at least November 1996, when the Special Court’s temporal jurisdiction starts.²⁵ By establishing the ‘criminalisation’ of under-age recruitment and use of children in hostilities under customary law, the SCSL also confirmed the applicability of this norm to all states. The SCSL has convicted several persons for this crime²⁶ and one last case including the same charge is still under consideration.²⁷

In the first cases before the ICC, under-age recruitment constitutes the principal charge. After several postponements, the trial of the case *Prosecutor v. Thomas Lubanga Dyilo* has started in January 2009. The charges were confirmed by Pre-trial Chamber I of the ICC in January 2007, and cover the war crimes of enlisting and conscripting of children under the age of fifteen years into the FPLC, (the military wing of the *Union des Patriotes Congolais* (UPC))²⁸ and using them to participate actively in

²¹ Rome Statute Article 8(2)(b)(xxvi) for international armed conflicts and Article 8(2)(e)(vii) for armed conflicts not of an international character; and the Statute of the Special Court for Sierra Leone, Article 7.

²² *Idem*; the term ‘and groups’ is only included in Rome Statute, Article 8(e)(vii), concerning non-international armed conflicts.

²³ *Supra*, note 22. The same interpretation of the term ‘recruitment’ was given by the International Committee of the Red Cross on the relevant articles of the two Additional Protocols. See Smith, Alison, *Child Recruitment and the Special Court for Sierra Leone: Some Considerations*, in 2 *Journal of International Criminal Justice* (2004) , pp. 1154-1162

²⁴ SCSL-2004-14-AR72(E), *Hinga Norman*, Decision of the SCSL Appeals Chamber of 31 May 2004 (hereafter referred to as *Hinga Norman*). This point was brought to the attention of the SCSL in an *Amicus brief* presented by UNICEF working together with No Peace without Justice and others, of 21 January 2004. For a detailed analysis of this case, see Smith, *supra*, note 24.

²⁵ *Hinga Norman*, paras 52-3

²⁶ See SCSL-04-14-T, Judgment of 2 August 2007; SCSL-2004-16-PT, Judgment of 20 June 2007 and SCSL-04-15, *Prosecutor v. Sankoh, Bockarie, Kallon and Gbao (the RUF Accused)*

²⁷; SCSL-03-01, *Prosecutor v. Charles Taylor*, trial taking place in The Hague.

²⁸ Comment between brackets added .

hostilities (...).²⁹ The Pre-Trial Chamber also clarified the terms 'conscription' and 'enlistment'. Notably, the decision refers to specific human rights instruments, to support the conclusion that 'a distinction can be drawn as to the very nature of the recruitment that is to say between forcible and voluntary recruitment of children.'³⁰

The ICC Pre-Trial Chamber also provides a detailed and rather broad interpretation of the term 'active participation in hostilities', which is not limited to participation in combat. The SCSL has contributed to the interpretation of these terms as well in the *Armed Forces Revolutionary Council* case,³¹ the first conviction by an international criminal tribunal on crimes related to the recruitment and use of child soldiers, in June 2007. A second conviction followed a few months later, also involving the enlistment of children in an armed force or group, in the *Civil Defence Forces* case.³²

The SCSL determined that '(a)ny labor or support that gives effect to or helps maintain operations in a conflict constitutes active participation. Hence, carrying loads for the fighting faction, finding or acquiring (...) ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields are examples of active participation as much as fighting and combat.'³³ The *Lubanga* decision on confirmation of charges takes the same approach and also mentions the examples of spying, scouting and sabotage.³⁴ This broad interpretation clearly lowers the threshold for holding the accused responsible for the crime of using children to actively participate in hostilities.³⁵

In the case *Prosecutor vs Germain Katanga and Mathieu Ngudjolo Chui*³⁶ before the ICC, the charges range from several crimes against humanity, including sexual enslavement of women and girls, to war crimes. The use of children under the age of fifteen years to participate actively in hostilities is among the main charges in this case as well. Although the trials of the ICC in these cases have to be awaited, the priority given to the prosecution of these crimes against children in these first cases before the ICC is significant.

C. Relevance of the IHL and ICL Provisions and Judicial Practice for PMSCs

The provisions of IHL are explicitly designed to apply both to states and to individuals, since their violation may give rise to both state responsibility and individual criminal responsibility. By its very

²⁹ICC-01/04-01/06, 29 January 2007, conclusion, available at www.icc-cpi.int

³⁰ *Lubanga*, *supra* note 30, at para 245. The cited instruments are the CRC; the Optional Protocol on the Involvement of Children in Armed Conflicts; ILO Convention No. 182 on the Worst Forms of Child Labour and the conclusions of the Committee on the Rights of the Child

³¹ *Prosecutor v. Brima (AFRC)*, Case No. SCSL-2004-16-T, Judgment, SCSL Trial Chamber II, 20 June 2007, available at www.sc-sl.org/AFRC.html

³² *Prosecutor v. Fofana (CDF)*, Case No. SCSL-04-14-T, Judgment, SCSL Trial Chamber II, 2 August 2007, available at www.sc-sl.org/CDF.html

³³ *AFRC* Judgment, *supra* note 27, at para 737; these examples also fall within the range of activities mentioned in the *Lubanga* decision, *supra* note 30., para 261-263. The two Chambers seem to have a different opinion on the activity of delivering food to an armed force or group; according to the SCSL this does constitute an active participation in hostilities; whereas the Pre-Trial Chamber explicitly excludes this example from the scope of this specific crime (*Lubanga*, para 262).

³⁴ *Lubanga*, *supra* note 30., at para 262.

³⁵ It should be noted, however, that under IHL persons who actively participate in hostilities are considered as combatants. Combatant status, in its turn, can weaken the protection of these children, compared to civilians. It is clear that the purpose of the ICC chamber and the SCSL was to increase the level of protection of the minors, so that obviously, the higher level of protection of civilians (and even a higher one because of their young age) must be provided, also by PMSCs when they may be confronted with children carrying out such tasks.

³⁶ Mr. Katanga acted as the main commander of the FRPI, an armed group in the Ituri region and subsequently as a general in the armed forces of the DRC, whereas Mr Ngudjolo Chui was the highest-ranking commander of the *Front des nationalistes et intégrationnistes* (FNI).

nature, the ICC statute provides for the possibility of prosecuting individuals for the international crimes included therein. Therefore, individuals, including managers or other employees of PMSCs, could in principle be held accountable for the crime of recruiting children or using them to actively participate in armed conflict.

The next question is whether a PMSC manager or employee who recruits a child to work for its company, or uses him/her to participate in the hostilities of an armed conflict, falls within the scope of the relevant provisions, which only speak of recruitment into 'armed forces or groups'. According to art. 43(1) of Protocol I, the term 'armed forces' refers to 'all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.'³⁷ IHL provides several bases for considering PMSC employees as members of the armed forces, if certain criteria are met. However, the debate among scholars and other experts on the exact interpretation of these provisions is still ongoing.³⁸ In practice, states employing a PMSC usually do not contract them as part of their armed forces, but rather for specific security services and with their own internal command structure. Therefore, while PMSC employees may, under certain conditions, be regarded as members of the armed forces of a state, this is rather an exception than a general rule.

The term 'armed groups' is not specifically defined as such in the main IHL instruments related to international armed conflicts. However, in the context of non-international conflicts, Protocol II refers to groups which, 'under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations (...)'.³⁹ Even though a PMSC might in practice exercise such control in a certain territory, it generally would do so on behalf of the state (or possibly another entity) by which it is contracted. Even though it is not excluded that either PMSC employees form part of an armed group, or that a PMSC as such may act as an armed group itself, there is very little practice supporting such a conclusion. In particular the second hypothesis, that of a PMSC as such acting as an armed group, for example as an armed opposition group, has not occurred in practice.⁴⁰ Therefore, the conclusion seems warranted that PMSCs can not generally be considered to fall within the scope of the term 'armed groups' under IHL; this would be an exceptional situation, in which several criteria must be fulfilled.⁴¹

This leads to the question whether the act of 'using a child to actively participate in hostilities' also constitutes a violation of IHL, even though the child is not recruited into armed forces or groups, but by a PMSC instead. The provisions in the two Additional Protocols do not speak of 'using' children to take part in the armed conflict; they require states 'to take all feasible measures in order that children under 15 years do not take a direct part in hostilities (...)'(AP I, article 77(2)), and 'Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups *nor allowed to take part in hostilities*'(AP II, article 4, emphasis added).

On the other hand, the ICC Statute explicitly speaks of 'using them to participate actively in hostilities.'⁴² The element of recruitment (or conscription, enlistment) is separated from the element of using the children to participate in hostilities. Consequently, these are two distinguishable acts each of

³⁷ Additional Protocol I, Article 43(1)

³⁸ See Mirko Sossai, *Status of PMSC Personnel in the Laws of War: the Question of Direct Participation in Hostilities*, EUI Working Paper, AEL 2009/6, pp.4-5 and subsequent analysis; and Luisa Vierucci, *Private Military Companies in Non-International Armed Conflicts: Ius ad Bellum and Ius in Bello issues*, EUI Working Papers, AEL 2009/14, at pp. 18-21.

³⁹ Additional Protocol II, Article 1

⁴⁰ For a more detailed analysis of this question, see Luisa Vierucci, *supra* note 38, at p.23.

⁴¹ *Idem*

⁴² Art 8(2)(b)(xxvi), applicable to international armed conflicts and Art 8(2)(e) vii, applicable to non-international armed conflicts.

which may give rise to individual criminal responsibility.⁴³ Therefore, the ICC Statute provides a more explicit definition of the separate crime of 'using' children than the two additional protocols. When states parties to the ICC have incorporated the definitions of the Rome Statute into their national criminal code, the relevant provision could therefore be used to prosecute PMSC managers or other employees who allegedly used children under 15 years to actively participate in hostilities, before their national court, provided that it has jurisdiction over that particular crime.⁴⁴ In theory, the responsible PMSC employees could also be prosecuted before the ICC itself, if the necessary conditions under the complementarity regime are met (see below, paragraph 2). As mentioned above, the distinction between the elements of recruitment and use is relevant in cases where a PMSC has recruited a minor as its own employee and uses it to participate in hostilities, while it cannot be qualified to form part of the armed forces of a state, nor to form an armed group itself.

As will be shown in the next paragraph, human rights law applies a higher standard for child-recruitment and their participation in an armed conflict, increasingly setting the minimum age at 18 years.

D. Human Rights Law

Several international and regional human rights instruments adopted since 1990, establish a minimum age of eighteen years for compulsory recruitment by armed forces and for the use of children to actively participate in hostilities.

1. ILO Convention and African Charter

The minimum age of eighteen for forced or compulsory recruitment for use in armed conflict is also included in Convention No. 182 of the International Labour Organisation (ILO) on the Worst Forms of Child Labour, adopted in 1999. At the regional level, the 1990 African Charter on the Rights and Welfare of the Child is the first to prohibit the recruitment or direct participation in hostilities *or internal strife* of anyone under the age of eighteen. These human rights instruments thus go beyond the minimum age determined by the existing instruments of international humanitarian law, as well as the Statutes of the ICC and the SCSL.

2. OPAC

The CRC Optional Protocol on the Involvement of Children in Armed Conflict (OPAC), which entered into force in 2002, distinguishes between armed forces and armed groups as follows: Armed forces may not use children below eighteen years of age to take a direct part in hostilities; *compulsory* recruitment is banned below eighteen years; and for *voluntary* recruitment states shall raise the

⁴³ This is also confirmed by the ICC Elements of Crimes: Article 8 (2) (b) (xxvi) : 1. The perpetrator conscripted or enlisted one or more persons into the national armed forces *or used one or more persons to participate actively in hostilities*. 2. Such person or persons were under the age of 15 years. (...) (emphasis added).

Article 8 (2) (e) (vii): '1. The perpetrator conscripted or enlisted one or more persons into an armed force or group *or used one or more persons to participate actively in hostilities*. 2. Such person or persons were under the age of 15 years. (...)', and Article 8 (2) (b) (xxvi) : 1. The perpetrator conscripted or enlisted one or more persons into the national armed forces *or used one or more persons to participate actively in hostilities*. 2. Such person or persons were under the age of 15 years. (...) (emphasis added).

⁴⁴ A national court can only try such a case if it can exercise either territorial jurisdiction, when the crime was committed on its own territory; or active personality, when the suspect has the nationality of the forum state; passive nationality, when the victim has the nationality of the forum state, or in exceptional cases, universal jurisdiction.

minimum age from 15 years (as set out in the CRC, Article 38(3)) with certain specific conditions.⁴⁵ For non-state armed groups, states shall take all feasible measures to prevent the recruitment or use in hostilities of persons under eighteen years.⁴⁶ The Committee on the Rights of the Child, which is also mandated to monitor the implementation of the OPAC, has consistently emphasised in its Concluding Observations on the initial reports of States Parties, that a state party to this Protocol should explicitly criminalise the recruitment of children and their use in armed conflicts as prohibited by the OPAC. It also held that States Parties should establish territorial jurisdiction and extraterritorial jurisdiction based on active and passive nationality for these offences.⁴⁷

E. Relevance of these Human Rights Provisions for PMSCs

This overview shows that the human rights provisions related to the recruitment and use of children in armed conflict are more stringent than those under IHL. Again, the question arises whether these provisions apply to PMSCs. The notion that non-state actors are also bound to comply with these instruments is increasingly accepted, both in judicial practice and in legal literature.⁴⁸ The extent to which such horizontal effect applies depends on the approach adopted in each national jurisdiction. In any event, each human rights instrument imposes on its states parties certain positive obligations to prevent violations of the rights enshrined therein within their jurisdiction, and to investigate and try those responsible for such violations. PMSC employees who engage in such violations must therefore, in principle, be held accountable for their acts through national investigations and prosecutions.

Even though the OPAC is the most far-reaching human rights instrument for the question considered here, its applicability to PMSCs seems to be more limited than the IHL provisions. Indeed, the OPAC appears to link the recruitment and use of children directly to armed forces⁴⁹ or ‘armed groups distinct from the armed forces of a state’.⁵⁰ As argued above, the qualification of PMSC employees as members of armed forces, or of the PMSC as an armed group, although not excluded, is rather an exception than a general rule.⁵¹

However, as stated in its Preamble,⁵² the purpose of the OPAC is to *increase* the protection of children from involvement in armed conflict, compared to the provisions in the ICC and the CRC. Therefore, it could be argued that the higher standards of protection of the OPAC should be considered to apply to all actors who may potentially recruit minors for their participation in hostilities, including PMSCs. If this reasoning is followed, then the minimum age for PMSCs to recruit employees would be 18 under all circumstances, since there can be no question of *compulsory* recruitment by a private actor.

⁴⁵ Optional Protocol on the Involvement of Children in Armed Conflict, Articles 1 to 3. To date, this Protocol has been ratified by 123 states.

⁴⁶ *Idem*, Article 4

⁴⁷ See for example CRC/C/OPAC/BGR/CO/1, 5 October 2007, (Bulgaria), paras 7 a and b; CRC/C/OPAC/CRI/1, 15 January 2007 (Costa Rica), para 7(c).

⁴⁸ For more details on this point and the notion of *Drittwirkung* of human rights, see Kalnina, I. and Zeltins, U., *The Role of Human Rights in the Regulation of Private Military and Security Companies, General Report - The European System*, EUI Working Papers, AEL 2009/17, at paras. 208-212.

⁴⁹ OPAC, Articles 1 and 2

⁵⁰ OPAC, Article 4(1).

⁵¹ See above, notes 40 and 41 and accompanying text.

⁵² OPAC, Preamble, paras 5 and 6: Noting the adoption of the Rome Statute of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict; Considering therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict.

F. 'Soft Law' Provisions on Child-Recruitment or their Use in Hostilities

A series of resolutions have been adopted in the United Nations Framework, including by the UN Security Council (SC) and the UN General Assembly calling for the prevention, termination and criminalisation of unlawful recruitment of children in armed conflict.⁵³ The issue of children and armed conflict was added to the permanent agenda of the SC in 1998. Since then, the SC has adopted a series of Presidential Statements and resolutions condemning the recruitment and use of children in armed conflict, culminating in the provision of possible targeted measures against states that do not take action to end such violations. Considering that these resolutions do not have any direct applicability to the activities of PMSCs, this point will not be further developed here.⁵⁴

Finally, it should be noted that in February 2007, a set of standards was endorsed which go beyond the existing legally binding instruments, namely the *Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups* (hereafter 'Paris Commitments'), and the *Paris Principles on Children Associated with Armed Forces or Armed Groups* ('Paris Principles'). Although the standard setting value of the Paris Commitments is limited, they do indicate the direction in which a consensus may be evolving.⁵⁵ The participating states confirm their commitment to refrain from conscripting children younger than 18 into their armed forces as laid down in the OPAC. Beyond that, they also commit themselves to raise the minimum age for *voluntary* recruitment to 18 years as well.⁵⁶ Finally, the states having endorsed these documents, commit themselves to 'effectively investigate and prosecute those persons who have unlawfully recruited persons under 18 years of age into armed forces or groups, or used them to participate actively in hostilities (...).'⁵⁷ Such investigations and prosecutions could also concern the use of children by PMSCs.

Apart from the recruitment of minors by PMSCs themselves, another way in which private contractors may risk to violate children's rights, is when they are *confronted* with children who are actually participating in hostilities as part of the armed forces or an armed group.

⁵³ UNGA Res. A/48/157, March 1994; UNGA Document A/S-27/2, October 2002: *A World Fit for Children*; SC Res. 1261 (1999); SC Res. 1314 of 11 August 2000; SC Res. 1332 (2000); SC Res. 1341 (2001); SC Res. 1355 (2001); SC Res. 1460 (2003); UN Doc.A/58/546-S/2003/1053 (2003); *Children in Armed Conflict: Report of the Secretary-General*; SC Res. 1539 (2004); SC Res. 1612 (2005).

⁵⁴ In its resolutions 1314 and 1379 the SC reaffirms its condemnation of child abuses in war time, and declares its intention to include child protection advisors (CPAs) in all UN peace keeping operations (PKOs). It urges Member States to end impunity and to consider measures to ensure the respect for children's rights. The Secretary General is asked to add in his reports a "black list" of parties to armed conflicts that recruit and use child soldiers. In resolution 1460 the SC mentions its intention to take "further steps" against parties on this list, and in resolution 1539 it declares its readiness to consider targeted and graduated measures against parties in armed conflict who refuse to cooperate. In its resolution 1612 adopted in 2005, the SC reaffirms the intention to impose targeted measures, such as ban on export and supply of military equipment and assistance, on parties to an armed conflict that refuse to cooperate. To date, such targeted measures have not been imposed on any state.

Most recently, in August 2009, the criteria for including states in the abovementioned list were broadened through SC Resolution 1882, to include also 'killing and maiming of children and or/rape and other sexual violence' in situations of armed conflict and calls upon states listed as such to prepare concrete timebound action plans to halt those violations and abuses.⁵⁴

⁵⁵ These two documents were endorsed at a conference convened by the French government and UNICEF, with participants partly at ministerial level from 58 countries, as well as representatives of intergovernmental organisations and of 30 NGOs. The process leading to the adoption of the Paris Commitments and Principles was a follow-up to the Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilisation and Social Reintegration of Child Soldiers in Africa ("the Cape Town Principles"). By September 2009, the number of states having endorsed the Paris Commitments and Principles was 84.

⁵⁶ Paris Commitments, par 4: Participating states commit themselves '(t)o take all feasible measures, including legal and administrative measures, to prevent armed groups within the jurisdiction of our State that are distinct from our armed forces from recruiting or using children under 18 years of age in hostilities'.

⁵⁷ Paris Commitments, par. 6

G. *Situation where PMSC Employees are Confronted with Children who are Participating in Hostilities*

Children are being used to participate in a large number of armed conflicts around the world, including in Afghanistan, Iraq, Colombia, and several countries in Africa such as the DRC, Uganda and the Central African Republic.⁵⁸ Since PMSCs are also increasingly deployed in conflict situations around the world, it is far from inconceivable that employees of these companies may be confronted with children who take part in hostilities and are carrying arms. Such a confrontation may require a response that is different from a comparable situation in which the persons involved are adults.

Indeed, as shown in this paper, both humanitarian law and human rights law require that specific measures are taken to protect children, both in an armed conflict and in peace time. However, if PMSC employees actually find themselves threatened by an armed force or group which includes armed children, they obviously have a serious dilemma.⁵⁹ Since, to the author's knowledge, IHL does not provide any specific guidelines on how to deal with such a situation, it is the responsibility of each state whose armed forces - or a PMSC that it has contracted-, are involved in an armed conflict, to take appropriate preventive measures. At the same time, the armed forces or private contractors who are faced with such a situation in practice need to find an appropriate answer in each concrete case. Some possible measures were mentioned by a high ranking military expert who has specialised in human rights training, at a conference on child- soldiers held in Turin in November 2009.⁶⁰

According to this expert,⁶¹ who addressed the more general scenario of soldiers of a national army who may encounter child-soldiers in the course of a conflict, the following steps may be taken to prepare members of an armed force for such a situation. In the planning and preparation phase, intelligence should be gathered to ascertain whether child-soldiers are involved in a conflict; who are the commanders, what are the numbers etc. The personnel to be deployed in that particular conflict should be informed and educated about the modalities of the use of force against children, and about their legal accountability. The use of non-lethal weapons should be favoured, with the objective not to kill the child-soldiers, but if necessary, to capture them. In the conduct phase, encounters with child-soldiers should be avoided if possible; but in case of a confrontation, certain safeguards should be taken. The expert also recommended that the soldiers should subsequently coordinate with government and non-governmental organisations about the reintegration of the child-soldiers; and that psychological support be provided to the soldiers who are confronted with such a situation.

3. Possible Remedies against Violations of Children's Rights by PMSCs

The remedies against violations of children's rights clearly depend on the legal instrument in which these rights are included. Again, a distinction must be made between violations of IHL and violations of human rights provisions. The following overview of remedies aims to indicate, in general terms,

⁵⁸ According to the international Coalition 'Stop the Use of Child Soldiers', in 2007 an estimated number of 250.000 children were directly involved in hostilities, in 17 armed conflicts.

⁵⁹ Although the term 'child-soldiers' is often used to refer to children recruited into armed forces or groups, the authors of this paper prefer to use the more general terms of children, or children participating in hostilities, since also children who may not participate as 'soldiers' but perform other tasks are entitled to the protection provided under the relevant legal provisions.

⁶⁰ International Conference *Childhood Spoiled by War: Child Soldiers*, Turin, 16 November 2009, organised by the Istituto per gli Studi di Politica Internazionale (ISPI), the International Institute of Humanitarian Law, San Remo (IIHL) and the Italian Red Cross., at the Comando delle Scuole- Scuola di Applicazione and Army Institute of Military Studies.

⁶¹ Oral intervention by General Flaviano Godio, Vice Director, Post Conflict Operations Study Center. The points presented here are taken from the slides presented at the Turin conference (notes taken by the author). Since General Godio did use the term child-soldiers in his intervention, this term is exceptionally used in the context of the points he made.

which paths could be followed by victims of the rights discussed in this paper in order to obtain some form of reparation.

A. Remedies against Violations of IHL

As mentioned above, violations of IHL provisions can give rise to both individual criminal responsibility, and to state responsibility. Regarding the first type of responsibility, investigations and national prosecutions could in principle be launched against the PMSC employees and/or their superiors in a state having jurisdiction over them. This could be the state where the violation occurred, if the judicial system is functioning adequately and if that state has incorporated the crime (as included in the Additional Protocols to the Geneva Conventions or in the ICC Statute), in its national criminal code. Since these two conditions are often not fulfilled in host states of PMSCs in situations of armed conflict or post-conflict conditions, the more logical choice would be either the contracting state or the home state of the PMSC. Here again, the viability of a criminal prosecution depends on the incorporation of the crime in the national criminal legislation, but also on the question whether these criminal provisions also apply extra-territorially.

As for state responsibility, in theory a state on whose territory children have become victims of serious violations of the Geneva Conventions by employees of a PMSC, could introduce a complaint against the contracting state or the home state of the PMSC before the International Court of Justice. However, this is an unlikely scenario, considering the general reluctance of states to launch inter-state proceedings and the uncertainty as to the attribution of acts of private actors such as a PMSC to the contracting or home state.⁶²

A State Party to the ICC Statute could also refer a complaint against a manager of a PMSC (or even an individual employee) to the Prosecutor for using children below 15 years in the hostilities of an armed conflict. Or the ICC Prosecutor could launch an investigation into such conduct at his own initiative. However, based on the principle of complementarity, such a complaint could only be taken up by the ICC if the case is not or has not been the subject of an investigation or prosecution by a state having jurisdiction over it, and if this state is unwilling or unable genuinely to carry out the investigation or prosecution itself.⁶³ Moreover, the alleged crime must be of sufficient gravity to justify a prosecution by the ICC Prosecutor. Therefore, a complaint should always first be made to a national court in a state having jurisdiction over the PMSC and the operations involving the use of the minor. The ICC Statute does not provide for the possibility that complaints be lodged against private entities or corporations. Therefore, it does, to date, not provide the option to prosecute a PMSC for international crimes, including crimes against children.

B. Remedies against Violations of Human Rights

Several remedies are possible against violations of the human rights provisions protecting children's rights as outlined above.

In the first place, a complaint can be made before a national court against the contracting state; the state where the PMSC is registered; or the host state for a violation of their positive obligation to prevent the violation of children's rights as included in the human rights instruments discussed above to which this state is a party. Indeed, the *contracting state* is bound to prevent such violations, in particular through the contract with the PMSC, which should require that the company provides specific training on human rights (and IHL) to its employees prior to its deployment in the armed conflict; and to ensure adequate supervision. The state where the PMSC is registered is also under an

⁶² For an analysis of the rules of attribution under international law, see Francioni, F., *supra* note 11.

⁶³ Article 17(1) of the ICC Statute

obligation to require the corporation to provide such specific training, as a pre-condition for granting a licence to the PMSC. Finally, the *host state* also has a positive obligation to prevent human rights violations, through making the authorisation of the PMSC (if applicable) conditional upon respect for human rights by the company, including the rights of children.⁶⁴

In the second place, if the national remedies are exhausted, a complaint could be presented to the European Court of Human Rights against the contracting state, the home state or the host state, provided that they are Parties to the ECHR and the violation falls within its jurisdiction. The question whether the ECHR has an extra-territorial scope, thus also covering violations which occurred outside the territory of its State Parties is not entirely and consistently solved by the ECtHR. However, in its recent case-law, in particular in *Issa v Turkey*⁶⁵ and subsequent cases, the Court has explicitly recognised this possibility when certain conditions are met.⁶⁶

Moreover, cases of child rights violations may be reported to the African Committee of Experts on the Rights and Welfare of the Child which can receive individual complaints of breaches of the African Charter on the Rights and Welfare of the Child. It should be noted, however, that this committee can only make recommendations and that it has not yet established itself as a forceful monitoring body.

Finally, a complaint can be presented to the Human Rights Committee for a violation of the ICCPR (including Article 24). In order to submit an individual complaint the state concerned must be a party to the ICCPR and the First Optional Protocol, and the domestic remedies must first be exhausted.

It would go beyond the scope of this paper to outline the conditions, procedures and jurisdictional limitations of each of these remedies.

4. Some Suggestions for Ensuring Respect of Children's Rights by PMSCs

As outlined in this paper, states have obligations to protect children, both under IHL, in situations of international or internal armed conflicts; and under international human rights law. Several human rights instruments have been adopted which specifically establish children's rights. In particular the CRC, but also the OPAC; and at the regional level, the African Charter on the Rights and Welfare of the Child contain detailed provisions on the protection that states are required to ensure for children, with a special emphasis on children in situations of armed conflict.

Therefore, those states that have ratified these instruments are obligated to ensure these rights by taking all necessary measures, including at the legislative and administrative levels. This implies that states are also bound to take such measures in their relations with PMSCs who are recruited to perform security tasks in a conflict or post-conflict situation.

When applying the positive human rights obligation to prevent violations to the protection of children's rights which may be at risk by the deployment of PMSCs, the following measures could be promoted with a view to preventing such violations.

Firstly, the home state and contracting state of a PMSC should explicitly include in the licence granted to the corporation, as well as in the contract for a specific assignment, that PMSC employees charged with security (or combat) operations, must be adequately trained, as part of their broader training on human rights and IHL, of the need to take specific measures to protect children and children's rights. Also the host state, as far as its institutional capacities allow this, should make authorisations for PMSCs to operate on its territory, conditional on an express commitment of the PMSC to provide such training to its employees. PMSC personnel should also be made aware that they could individually be

⁶⁴ See Francioni, F., Hoppe, C. and Bakker, C., *supra* note 11.

⁶⁵ *Issa and Others v Turkey*, Judgment (2004), App. No. 31821/96

⁶⁶ Bakker, C., *supra* note 11, at pp.3-5.

held accountable for violations against children, and that the young age of possible victims may constitute an aggravating factor in the sentencing for certain acts.⁶⁷

Secondly, the planning and organisation of the operations and tasks in which PMSCs are involved should include an assessment of the risks involved for children, as part of the overall preparation phase. All possible measures should be taken as from the preparatory stage to minimise these risks. In this regard, the specific measures outlined above in par. 1.2.5 could be useful in situations where children are being used in combat activities of a conflict where a PMSC is deployed.

Thirdly, during the actual implementation of the military or security tasks, those persons responsible for the supervision of these tasks 'on the ground' should constantly be aware of the need to protect children and their rights as outlined above, and take them into account when making decisions on concrete actions. Depending on the exact chain of command (*i.e.* direct supervision by a military commander from the contracting state or the host state, or supervision of operations within the PMSC structure itself without direct involvement of the contracting or host state); in particular the contracting state of the PMSC should provide detailed instructions on how to deal with situations where civilians, including children may be at risk.

Finally, measures should be taken to ensure accountability of individual PMSC employees for violations of children's rights. In this regard, host states of PMSCs should avoid adopting immunity agreements with states that deploy these companies on their territory. Moreover, measures should be taken by the home state, contracting state and, -if it is capable to do so- the host state of a PMSC, to establish jurisdiction over acts amounting to violations of children's rights or international crimes against children committed by PMSC personnel, before their courts.

⁶⁷ See David Tolbert, *Children and International Criminal Law: the Practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY)*, in Arts, Karin and Popovski, *International Criminal Accountability and the Rights of Children* (Hague Academy Press, 2006), pp. 147- 154, at p. 153. The citations are from ICTY, *Prosecutor v Kunarac et al.*, Case No. IT-96-23T and IT-96-23/1-T-, Trial Judgment, at par. 874, and from the Appeal Judgment, at par. 355.

PART II: The European Union and the Protection of the Rights of the Child

The European Union (EU) has, during the last few years, paid special attention to children's rights and protection, and has adopted several instruments that address different types of child abuses. Some of these instruments are part of the EU's internal policy, and relevant only for the Member States, whereas others play an important role in the EU's external relations. These last set standards aim at influencing the conduct of other countries and constitute an integral part of Europe's important role in the promotion of human rights.

Therefore, this second part of the paper provides, in its first section, an overview of the existing European legal framework for the protection of children, both within the EU and with regard to its external relations. In the second section, some of these instruments are further examined, and the risk that they may be insufficient to adequately guarantee children's rights is addressed. Lastly, a few suggestions on how the EU could strengthen the protection of children's rights with regard to PMSC regulation are presented.

As can be seen in the reports on national legislation⁶⁸, PMSCs have, for the most part, been established in the UK, the US, Canada and South Africa, but are very often deployed in situations of strife or armed conflict on the African continent or in countries such as Afghanistan and Iraq. Due to the conflict situation in many of these countries, the occurrence of serious violations of children's rights (comprised in both human rights law and international humanitarian law (IHL)) is distinctly possible, for instance the recruitment and use of child soldiers. In such a context, it is necessary to consider the implications that the deployment of PMSCs could have, on one hand, on the rights of the child and, on the other, on the responsibility or obligations of the (European) PMSC agents involved in situations where children's rights are violated.

Violations of human rights and children's rights may be committed either by the PMSC personnel or by members of armed forces or groups of the country in which the PMSC is deployed (i.e. the host country). In any of the two scenarios, a good preparation of PMSC agents on international and European standards regarding the protection and rights of the child can contribute to reducing the risk of proper misconduct and, possibly, prevent others' violations of these rights.

On the EU level, propositions for new measures framing PMSCs registered in Europe, and their activity within the EU's territory or abroad, should specifically take into account issues related to responsibility for human- and child rights violations. Whereas this may seem obvious for activity carried out within the territory of the Union, it may be of even greater importance with regard to PMSC activity abroad, especially in situations of armed conflict, where the host country may not, for various reasons, be able to guarantee considerations related to human rights issues.

1. Children's Rights in the EU

Although all EU members have ratified the UN Convention of the Rights of the Child (CRC) and are thus bound to respect the rights it establishes, the EU does not have general competence in matters of fundamental rights, including children's rights, under the Treaties. However, the EU seeks to facilitate Member State compliance with the CRC through various actions, such as funding and policy measures.⁶⁹ Importantly, in accordance with article 6:2 of the Treaty on the European Union (TEU), the EU must respect fundamental rights in all its actions.⁷⁰

⁶⁸ See: www.priv-war.eu/publications

⁶⁹ See: http://ec.europa.eu/external_relations/human_rights/child/index.htm

⁷⁰ Commission of the European Communities, "Towards an EU Strategy on the rights of the child", Brussels, 2006. §1:3 "Legal basis for an EU strategy", and: Jan Klabbers, "An introduction to international institutional law", Cambridge

A. The EU and Generic Children's Rights

While the European Convention of Human Rights (ECHR), which is binding for all the Member States of the Council of Europe (and to which all EU members are party), has no specific article for children's rights, the EU has created instruments of its own that address the rights of the child. Article 24 of the European Charter of Fundamental Rights explicitly recognises children's rights:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Moreover, children's rights were identified as a top priority in the EU strategic objectives for 2005 – 2009, in which the important goal of the EU to ensure the respect for human rights, and especially the rights of the child, was emphasised.⁷¹

The EU Commission has also adopted the document, "Towards an EU Strategy on the Rights of the Child", which clearly highlights the significant role that the EU could play in promoting children's rights in international forums and third country relations. In fact, the document sets forth that the respect for children's rights must be ensured and mainstreamed in all internal and external EU policies, as well as when drafting both EC legislative and non-legislative actions that may affect these rights.⁷² This was, in 2008, followed by a communication on behalf of the Commission to the Council and others⁷³ on the "special place of children in EU external action", addressing the need for placing children at the centre of EU external relations.

B. The EU and the Protection of Children in Armed Conflict

The instruments mentioned in the previous section demonstrate the European commitment to guarantee compliance with children's rights in general. The adoption of the "EU Guidelines on children and armed conflict" (hereinafter the Guidelines) in 2003 instead represents an example of European involvement in more specific issues regarding the child. This fundamental step towards a greater protection of children's rights in the EU's external policy sets out the following main objective:

- ...to influence third countries and non state actors to implement international human rights norms and standards and humanitarian law, as well as regional human rights law instruments and to take effective measures to protect children from the effects of armed conflict, to end the use of children in armies and armed groups, and to end impunity.⁷⁴

(Contd.)

University Press, 2002. P.264. For further information on the respect of human rights within the EU, see Ieva Kalnina and Ugis Zeltins, *supra*, note 48.

⁷¹ "Europe should be the point of reference worldwide for the practical application of fundamental rights. A particular priority must be effective protection of the rights of children, both against economic exploitation and all forms of abuse, with the Union acting as a beacon to the rest of the world" Commission of the European Communities, "Strategic objectives 2005-2009", Brussels, 2005. §2.3 "Common responsibilities for common values"

⁷² Commission of the European Communities, "Towards an EU strategy on the rights of the child" Brussels, 2006, § III.1.3.

⁷³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Brussels, 2008.

⁷⁴ Council of the European Union, "EU Guidelines on children and armed conflict", 8 December 2003. § 6.

The Guidelines are intended to give more prominence to EU actions in the area of children and armed conflict and, through its updated version from June 2008, they set forth that “where EU-led crisis management operations are concerned, decision making will proceed on a case-by-case basis, bearing in mind the potential mandate for the specific action and the means and capabilities at the disposal of the EU”.⁷⁵

To date, the EU has been active in a series of projects that relate to children and armed conflict. Some of these, such as the programmes for the protection or rehabilitation of children involved in armed conflict, have been funded by the European Initiative for Democracy and Human Rights (EIDHR). For example, EIDHR has financed several projects in Colombia, Nepal and Sri Lanka. Other activities, including (emergency) child protection, have been funded in countries, such as Lebanon, Liberia and Burma/Myanmar, by the European Union’s Humanitarian Aid Office (ECHO).⁷⁶

C. Imposing a Right: The Possibility of Using Targeted Measures

Among the tools for action envisaged in the Guidelines, and that the EU could use in its relations with third countries, various forms of diplomatic action are listed, but, more importantly, the imposition of targeted measures is considered an option.⁷⁷ Whereas the other tools are limited to dialogue and cooperative measures, paragraph 19 of the Guidelines explicitly introduces the possibility of resorting to stronger means if necessary. This is a clear sign of the importance that children’s rights have gained in the EU and its Member States. It is noteworthy that the UN Security Council (SC), in its Resolution 1539 (2004), on the involvement of children in armed conflict, mentions this same possibility (without referring to the EU already having done so). The SC, however, takes a step further, and not only considers the option of targeted measures, but also more precisely envisages what those measures could consist in: “inter alia, a ban on the export or supply of small arms and light weapons and of other military equipment and on military assistance, against these parties if they refuse to enter into dialogue, fail to develop an action plan or fail to meet the commitments included in their action plan...”⁷⁸

Thus far, the SC has only resorted to the use of targeted measures in a very limited way, imposing a travel ban on an armed group leader in Côte d’Ivoire in 2006.⁷⁹ Through its Resolution 1698, the SC further decided that sanctions should be imposed on political and military leaders in the DRC who, in violation of applicable international law, have recruited or used children in armed conflict.⁸⁰

The initiatives undertaken by EU agencies have, so far, not included the targeted measures mentioned in the Guidelines, but this in no way means that future situations could not require such action.

D. Children’s Rights and Military Operations

Moreover, the Guidelines are relevant to EU military operations, and could possibly be so also to military activities carried out by PMSCs. Its text notably states that the review of implementation of the guidelines has to be effectuated in close cooperation with Heads of mission and EU military commanders.⁸¹

⁷⁵ Council of the European Union, Update of the EU Guidelines on children and armed conflict, Brussels, 5 June 2008. § 4.

⁷⁶ Summary of CAAC-related EU projects. See also: http://ec.europa.eu/echo/index_en.htm

⁷⁷ EU Guidelines, § 19.

⁷⁸ UNSC Resolution 1539, 2004. § 5(c)

⁷⁹ Coalition to stop the use of child soldiers, Global Report 2008, Bell and Bain, UK, 2008. p.14.

⁸⁰ UNSC Resolution 1698, 2006, § 13

⁸¹ EU Guidelines, § 20(c)

In 2006, an implementation strategy for the “Guidelines on children and armed conflict” was adopted by the Council of the European Union (hereinafter: the Council), in which EU Special Representatives (EUSRs) and Heads of European Security and Defence Policy (ESDP) missions are encouraged to use the Guidelines in their work. The Council also adopted the “Checklist for the Integration of the Protection of Children Affected by Armed Conflict into ESDP Operations”, intended for use in mission planning and support, as well as on the field.⁸² The goal is to ensure that child rights and protection concerns are consistently addressed throughout the entire process of ESDP operations, including both planning and implementation phases. In order to do so, the Checklist suggests that each component taking part in a mission consider how to deal with child protection issues. A major element in the Checklist is that the rules of engagement for the forces shall address key child protection concerns, including the involvement of children with fighting forces.⁸³

On behalf of the personnel, any violation of children’s rights should be investigated by law enforcement authorities and specialists. When intervening in armed conflicts, ESDP personnel must call upon the parties to the conflict to protect children, especially from abduction and recruitment, and seek agreements with such parties to end these practices. Along with the aforesaid activities to guarantee the respect for the rights of the child, the EU, and all its State Members, ought to advocate for the accountability of crimes against children, and support justice and truth-seeking mechanisms.

With regard to the training on children’s rights, the updated version of the Guidelines also mentions explicitly that the question of the protection of children should be adequately addressed in the planning process of an operation, as well as in any of the different approaches whether the mission is of a preventive nature, carried out during an ongoing armed conflict or in a post-conflict context.⁸⁴

The EU does not specify any particular mechanisms for training on children’s rights within each Member State, but assumes that this is something that should be carried out within the national training programmes of each country.

E. Children’s Rights and PMSCs

As illustrated above, the European Union has developed a rather comprehensive framework for children’s rights, with regard to both its internal and external relations. However, the protection of the rights of the child, at its current state, is not sufficient to guarantee that these rights are not, or will not be, violated by the presence or use of PMSCs. It is therefore necessary to envisage how the protection of children’s rights can be inserted in PMSC regulation, either directly or through the creation of a separate instrument. This will be addressed in the second part of the paper.

As mentioned in the National Reports drawn up in the context of the PRIV-WAR project,⁸⁵ there are active military companies (at least) in the following EU countries: UK, Denmark, Netherlands and France. These companies operate both at home and abroad, in countries such as: Iraq, Afghanistan, Bosnia, Kosovo, Colombia, Nigeria, Sudan and the Democratic Republic of Congo. Other PMSCs from the UK, US and South Africa, have also been involved, militarily and not, in Sierra Leone, Uganda etc.

The work tasks differ depending on where the company and its agents are deployed. Likewise, the risks are far from the same and can change quite drastically depending on whether the context is European or that of a country where, for instance, the frequent use of child soldiers represents/has

⁸² See: http://ec.europa.eu/external_relations/human_rights/child/ac/index.htm#intro

⁸³ Note by the Council of the European Union regarding checklist for the integration of the protection of children affected by armed conflict in ESDP operations, Brussels, 26 May 2006.

⁸⁴ Update of the EU Guidelines on children and armed conflict, op.cit.

⁸⁵ See [www.priv-war.eu/publications/National Reports Series](http://www.priv-war.eu/publications/National_Reports_Series).

represented a serious problem. So far, there have been no recorded casualties, nor any litigation or controversies, regarding violations of children's rights in relation to PMSC activity. Nevertheless, with the increase in missions and operations carried out by PMSCs, and with these companies being (partly) European, the risk that the rights of the child, binding upon all EU members, be disregarded or violated cannot be ignored. Moreover, the confidentiality that still surrounds PMSC contracts raises issues regarding responsibility for eventual violations of human- and children's rights and, arguably, even more so as these companies' activity is steadily expanding.

As illustrated, the EU members already have obligations with regard to children's rights, but a main problem is that, for the time being, it seems impossible to know whether these are actually being respected or even taken into consideration by PMSCs. No proper monitoring body exists to report on eventual violations, and no controls are presently being made on contracts that have been concluded between the companies and their "employers" (i.e. states or international organisations).

These actors thus appear as though they are situated, at least partially, in a grey zone of the law, and defining their obligations under international, European and national laws is problematic. The rights and protection of the child, however, form part of the framework of all these legal regimes and must therefore be respected at all times.

This takes us to the second section of this part of the report, which aims, firstly, at demonstrating why existing instruments for the rights of the child prove to be insufficient (or insufficiently implemented) and, secondly, at finding ways to either effectively implement them or proposing new possible tools to guarantee respect for children's rights during PMSC missions.

2. Implementing Existing EU Rules for the Protection of the Rights of the Child or Creating New Instruments

As mentioned previously, the EU currently has no specific regulation of PMSC activity, whereas the normative and policy framework for the protection of the rights of the child has been growing steadily over the last few years. The European Council has especially emphasised the situation of children in armed conflict or in post-conflict contexts.⁸⁶ The question is whether these instruments are of sufficiently broad scope so as to be able to address the increasing activities of PMSCs.

A. *Why Consider Children's Rights in the Context of PMSCs?*

It must be highlighted that, although particular attention has been accorded to children in armed conflict, and although situations of armed conflict represent a frequent context for Western PMSCs operating abroad, the existing European instruments for the protection of the rights of the child have not been developed with specific considerations for PMSC activities.

Moreover, there is a gap between written commitments and actual implementation of the existing rules on behalf of EU Member States. This, of course, is intimately linked to the fact that the protection of the rights of the child is mostly ensured by 'soft law' instruments, adopted in the context of EU external relations. Also, most of the existing instruments presented above illustrate a situation where it is presupposed that the EU or its Member States will not be the actor committing a violation, but the one promoting the "remedy" or engaging in negotiations with third states in order to ensure their compliance with human rights and children's rights. These types of development cooperation-measures may prove rather limited when it comes to the protection of children's rights during PMSC operations, where the PMSC agents could actually become the "violators" of these rights.

⁸⁶ Note by the Council of the European Union on the promotion and protection of the rights of the child in the EU's external action, 27 May 2008, especially § 24-29. See: <http://register.consilium.europa.eu/pdf/en/08/st09/st09739.en08.pdf>

B. The Importance of EU Action

The EU has, with regard to its external relations, declared itself to be a promoter of human rights (and of children's rights in particular) and has, through its actions in this sphere, proven to take this role seriously. Therefore, it seems only logical, and certainly justified, that the EU would be concerned with the risks that the use of PMSCs represent for human rights and children's rights, and eager to control these risks in order to limit violations to any extent possible.

However, the EU cannot legislate exclusively on children's rights. Any consideration of the rights of the child with a binding effect would thus have to be realised within the framework of a new PMSC regulatory measure. This holds true even as the European Charter of Fundamental Rights becomes legally binding with the upcoming entry into force of the Lisbon Treaty⁸⁷. According to the "Declarations concerning provisions of the treaties", following the text of the consolidated versions of the TEU and the TFEU: "the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union".⁸⁸

Two types of proposals can be made in order to strengthen the protection and respect for the rights of the child in view of an increasing use of PMSCs. The first is to include provisions on the rights of the child directly and explicitly into any form of EU measure that would set common standards for the Member States' regulation of PMSCs. The second option is to develop a separate instrument that provides for the stronger protection of children's rights, and shape this instrument in order to ensure that it addresses any possible violations deriving from the use and/or activity of a PMSC.

C. Inclusion

At the moment, as has already been mentioned, there is no specific EU regulation governing the activity of PMSCs abroad. Any proposal for a regulatory framework regarding PMSCs has to be compatible with fundamental rights (art. 6 TEU) and therefore cannot undermine children's rights. This was also made clear in the PRIV-WAR national report on Finland, which mentioned that outsourcing of state functions cannot permit human rights and humanitarian law standards to be avoided or disregarded.⁸⁹ As the EU 2005 Guidelines on internal and external compliance with IHL can be of interest for PMSCs⁹⁰, so could the 2003 EU Guidelines on Children and Armed Conflict, to which the first are complementary.⁹¹

It can be asked how EU protection of children's rights could be made explicit in a regulatory measure on PMSCs, and whether such a measure would have to involve harmonisation of criminal laws: a highly debated issue in EU law today.

The case-law of the European Court of Justice (ECJ) may shed some light on this question. Although the competence of the ECJ will be broadened with the entry into force of the Lisbon Treaty and the strict division according to the current three pillar structure will no longer be of relevance, it here seems reasonable, for the sake of simplicity, to present the selected cases pillar by pillar.

⁸⁷ The Lisbon Treaty was ratified by the Czech Republic while this article was being written, and will enter into force on 1 December 2009.

⁸⁸ Consolidated version of the Treaty of European Union and the Treaty on the Functioning of the European Union, A1: *Declaration concerning the Charter of Fundamental Rights of the European Union*, p.427. See: <http://www.consilium.europa.eu/showPage.aspx?id=1296&lang=EN>

⁸⁹ Ottavio Quirico, *National Regulatory Models for PMSCs and Implications for Future International Regulation*, EUI Working Paper MWP 2009/25, p.9

⁹⁰ *Ibid.*

⁹¹ <http://europa.eu/scadplus/leg/en/lvb/l33605.htm>

In its rulings in the “Environmental Crimes case” and in the “Ship-Source Pollution case”, the ECJ made it clear that the EC has the implied competence to enact first pillar legislation requiring Member States to adopt national rules to criminalise conduct where such EC legislation is considered by the Community legislature to be an essential measure for combating serious environmental offences.⁹² Thus, despite the fact that criminal law does not belong to the first pillar, if enforcement through criminal law is necessary for the effective protection of the environment, the Community is, to a certain extent, competent.⁹³

The adoption of a regulation of PMSCs under the current first pillar of the EU’s legal framework would imply that the PMSC activities abroad are considered primarily as a supply of services, and therefore as falling within the scope of Community law. The aspects of criminal law to be applied would then have to figure as an element “necessary for the effective prevention of serious violations of human rights”.

If, instead, the emphasis is put on the issue of peace and security, as was the argument of the Council in the ECOWAS case⁹⁴ concerning small arms and light weapons, the Common Foreign and Security Policy (CFSP) (now second pillar) legal basis could be correctly used. This is also mentioned in paragraph 7 of the “EU Guidelines on Children and Armed Conflict”, which emphasises that the respect for human rights features among the key objectives of the EU’s CFSP. This last includes the European Security and Defence Policy (ESDP), which is directly addressed by the Guidelines and other EU documents for the rights of the child.

Although CFSP may seem to be the most logical “domain” under which to claim legal basis for any regulatory measure, it is not crystal clear (looking at the ECJ judgement in the ECOWAS case and considering that the Court does not have jurisdiction on CFSP matters, but can only review the choice of legal basis) whether the Court would accept this option in case there is any chance of finding a legal basis in the domain of the current first pillar. In fact, in the ECOWAS case, the Commission argued that a Council decision supporting a moratorium on small arms and light weapons in West Africa should have been adopted under the EC Treaty as development aid. In its judgment, the ECJ held that if a measure can be adopted within both the EC and within an intergovernmental pillar (following the ‘main purpose’ test, i.e. content and aim), adopting it within the latter would infringe article 47 EU.⁹⁵

A last possibility would be to hold that the provisions contained in Title VI of the TEU, which expressly refer to Union cooperation in the field of criminal matters, constitute the appropriate legal basis for such a legislative initiative. This would imply that the purpose of the regulatory measure lies in combating crime, an issue falling under the PJCC pillar, and not in the regulation of a service.

⁹² European Court of Justice, Cases C176/03 and C440/05, and: Martin Hedemann-Robinson, “The EU and Environmental Crime: The Impact of the ECJ’s Judgement on Framework Decision 2005/667 on Ship-Source Pollution”, *Journal of Environmental Law*, 20:2 2008, p.279-292. p.292

⁹³ Ronald Van Ooik, “Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences”, *European Constitutional Law Review*, 4, p. 399-419, 2008. Note also, that from the Ship Source Pollution case it became clear that this competence does not include the type and level of the criminal penalties to be imposed.

⁹⁴ See the ECOWAS case, C-91/05, *Commission v Council*

⁹⁵ Para.108 of the ECJ Judgment: “... taking account of its aim and its content, the contested decision contains two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP.” And 109: “...it must be concluded that the Council has infringed Article 47 EU by adopting the contested decision on the basis of Title V of the EU Treaty, since that decision also falls within development cooperation policy.” For full judgment see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0091:EN:HTML>

The still existing pillar structure represents some difficulties and, as shown by recent ECJ case law, the debates on potentially overlapping pillar competences have been intense.⁹⁶ Nevertheless, this problem could be overcome when the Lisbon Treaty enters into force in December 2009.

D. Separate Regulation

The second way to strengthen the protection of children's rights in and by the EU would be through the adoption of a distinct and separate instrument. The difficulty of doing this lies in ensuring the legally binding character of such an instrument. As has previously been mentioned, the EU does not have a general legal basis to legislate on human rights issues. However, the margin of discretion of the EU and its Member States when adopting legislation is wide enough to cover most human rights issues, as long as there is a link with other objectives of the Union.

Therefore, the possibilities of creating a separate instrument are somewhat limited, and would have to follow the same pattern of the already existing instruments. This means that existing European guidelines and/or strategies for the protection of the rights of the child could be revised and new provisions introduced, or new instruments of a similar nature, and complementary to the already existing ones, ought to be adopted.

It may be argued that, while the EU "Guidelines on Children and Armed Conflict" and the 2005 "Guidelines on promoting compliance with the IHL" both wish to provide the EU with tools to actively promote human rights and humanitarian laws in situations of armed conflict, these instruments lack the fundamental ability to ensure the compliance of European actors (whether they be PMSCs, their agents or others) when operating in third countries.

The EU and its Member States are, according to the Guidelines, encouraged to promote the *fight against impunity* for war crimes and ensure that penal legislation is introduced to punish violations of international humanitarian law, but only in third countries and, it seems, for crimes committed by nationals of those countries. The adoption of a supplementary set of guidelines, or the revision of the existing ones with the addition of a section that clearly addresses the actions of PMSCs and their agents on the field, could complement these two instruments and strengthen the protection of the rights of the child. As illustrated above, the EU does not specify any particular mechanisms as for the training on children's rights, but leaves it to each Member State to decide how to include it in its national training programmes. The inclusion of such mechanisms in a new instrument could be a good addition to the already existing tools.

E. The Lisbon Treaty

As mentioned above, the current pillar-structure can appear rather complicated in terms of division of competences and many issues regarding overlapping have been raised. The Lisbon Treaty will establish a new and clearer legal basis for the enactment of Union legislation seeking to harmonise aspects of criminal law.⁹⁷ In fact, the current EC Treaty and the current EU Treaty on PJCC (Title VI EU) will merge and become the Treaty on the Functioning of the European Union (TFEU); the ECJ will then attain full jurisdiction on police and justice cooperation.⁹⁸

⁹⁶ Read more about this in: Ronald Van Ooik, "Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences", Op.cit.

⁹⁷ Martin Hedemann-Robinson, "The EU and Environmental Crime: The Impact of the ECJ's Judgement on Framework Decision 2005/667 on Ship-Source Pollution" Op.cit, p.281

⁹⁸ Ronald Van Ooik, "Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences", Op.cit, p.407

One of the functions of the Lisbon Treaty is also to attribute to the European Union Charter of Fundamental Rights, mentioned in paragraph 1.1, a legally binding character. Moreover, as amended by this Treaty, the new Article 6 of the TEU provides specifically that fundamental rights, such as the rights guaranteed by the ECHR, will continue to constitute general principles of EU law.

With regard to EU external relations, it is noteworthy that the Lisbon Treaty introduces, for the first time in EU history, a specific legal basis for humanitarian aid. This provision stresses the specificity of the policy and the application of the principles of international humanitarian law.⁹⁹

F. The Rights of the Child in Focus

The most important thing for the purpose of this paper is that, in any form of regulatory measure, a serious and well articulated children's rights-clause be included. Such a clause would be in line with the EU policy, as it has been declared in the 2006 document "Towards a Strategy on the Rights of the Child", to systematically take into account the rights of the child in all internal and external policies. The aim of a clause on children's rights would be to emphasise the necessity of training programmes on the rules that exist for the protection of the child, both in human rights law and in IHL. More importantly, the clause should require that all parties involved, whether a sending or a receiving state, a contracting state or international organisation, are aware of their responsibilities and take all necessary measures to ensure compliance with these rules, including by private actors. The role of the European Union in the field of PMSCs, although largely neglected so far, could be a much more active one. The EU should at least strive for the establishment of a set of common standards and assure effective monitoring of PMSC contracts and activity, in order to guarantee compliance with international human rights and humanitarian rules, including children's rights. Lastly, a solid training on these legal regimes ought to be a *sine qua non* for any PMSC and its agents.

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Concluding Remarks

As this paper demonstrates, a comprehensive body of international human rights instruments and specific IHL provisions exist, aiming at the protection of children in armed conflict. These international legal instruments impose specific obligations on states in terms of prevention and sanctioning of children's rights. Therefore, in the authors' view, there is no immediate need for the adoption of additional international legal standards specifically focusing on PMSCs and the rights of the child at the international level. There is rather a need for an improved compliance by states with the existing international obligations in this field, as suggested in the first part of the report.

The main measures to be taken are, firstly the inclusion of a firm requirement in the contracts with PMSCs, as well as in the licence awarded to these companies by their home state, to provide adequate training to their personnel on the specific measures to be taken to protect children and their rights as laid down in IHL and human rights instruments, in the broader context of the training on human rights and IHL. Secondly, the contracting state and the host state should require the PMSC to take due account of the specific protection of children as from the planning and organisation phase of the operations. Thirdly, adequate supervision should be ensured throughout the command structure between the home state, the contracting state and within the PMSC itself, with a particular attention to minimising the risks for children during their operations on the ground. Finally, measures should be taken by the states involved in the deployment of PMSCs, to ensure accountability of PMSC employees for acts amounting to violation of children's rights or international crimes against children,

⁹⁹ http://europa.eu/lisbon_treaty/faq/index_en.htm

before their national courts. Specific regulation at the EU level may contribute to improving such compliance with the existing international norms.

Several options have been discussed for improving the existing legal framework for ensuring children's rights at the EU level, applying to PMSCs. Also the current institutional limits for the adoption of such measures have been highlighted. It is uncertain whether the adoption of regulatory measures specifically addressing the respect of children's rights by PMSCs and their personnel can be envisaged in the near future. However, in any regulatory measure proposed for adoption at the EU level addressing PMSCs and their services, explicit reference should be made to the need to ensure respect for children's rights. In particular, whenever reference is made to the training that PMSCs are required to provide to their employees on human rights and IHL, specific training on children's rights should be included.

It seems neither credible nor justified that the EU should require compliance of human rights and humanitarian standards from third states, while at the same time allowing its own Member States to conduct activities that risk severely compromising these same rules. Measures ought to be taken to complete EU law with regard to PMSCs and children's rights and to ensure the compliance with these rules by its Member States, even when acting outside EU territory.