

Mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Submission to the Open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies

September 2019

I. Introduction

The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (Working Group) is mandated by the Human Rights Council to consider issues related to the use of mercenaries and mercenary-related activities in all their forms and manifestations, as well as private military and security companies (PMSCs), with a view to assessing their impact on the enjoyment of human rights, particularly the right of peoples to self-determination.

In its reports to the Human Rights Council and General Assembly on thematic issues and on country visits, the Working Group has published extensive findings attesting to the human rights impacts of PMSCs, and highlighting allegations of serious human rights abuses by PMSCs worldwide and widespread impunity. In 2010, the Working Group published a draft possible Convention on PMSCs (hereafter: Draft Convention) for consideration and action by the Human Rights Council (A/HRC/15/25). Moreover, in 2012, the Working Group launched a global study of national regulation of PMSCs and shared its findings through annual reports to the Human Rights Council, culminating in the publication of a final report in 2017 (A/HRC/36/47). The study covered 60 States from all world regions and identified significant regulatory gaps at the national and regional levels. Most recently, the Working Group studied the human rights impact of PMSCs engaged in the extractive industry (A/HRC/42/42) and the gender dimensions of the private military and security industry (A/74/244).

Building on this previous body of work, the Working Group is pleased to present this submission to the Open-ended intergovernmental working group (OEIGWG) to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies. The submission begins with a section on the scope of an international regulatory framework for PMSCs, arguing that a legally binding international instrument is needed and setting out elements to clarify its purpose, principles and overall scope. A second section then outlines some of the key elements for an international regulatory mechanism. The submission elaborates and expands on selected

points in the OEIGWG's Discussion document on elements for an international regulatory framework (Discussion document), and does not seek to provide a comprehensive review or template.

II. Scope of an international regulatory framework for PMSCs

A. The need for an international legally binding instrument

The Working Group has long supported efforts to establish an international legally binding instrument to regulate the activities of PMSCs. The above-mentioned global study of national regulations of PMSCs further bolstered the Working Group's conviction of the need for binding international regulation. Besides the gaps in national legislations, policies and the ensuing human rights risks and impacts, identified in the Working Group's reports to the Human Rights Council and the General Assembly, there are other compelling reasons for legislating internationally. For instance, many PMSCs operate at a transnational level or may relocate from one country to another in order to avoid tighter national regulations. Additionally, weak oversight and the stark lack of accountability for violations of international human rights law and international humanitarian law in the context of PMSC operations drives the need for international law.

The Working Group believes that an international legally binding instrument would complement the existing non-binding regulatory framework, specifically the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (Montreux Document) and the International Code of Conduct for Private Security Providers (ICoC) and fill the existing gaps. The Working Group is robust in its support of these international initiatives, and recognises their positive contribution towards, and potential for ensuring, greater awareness of the responsibilities of PMSCs to respect human rights and international humanitarian law, prevention of abuses by their personnel, and access to an effective remedy in the event of such abuses. Nevertheless, both the Montreux Document and ICoC are subject to crucial limitations particularly in relation to: their narrow scope; few States and PMSCs that have committed to them; and their limited effectiveness in securing accountability and effective remedies for victims.

B. Purpose

The purpose of this international regulatory framework should be, *inter alia*, to:

- strengthen the respect for, and the protection and fulfilment of human rights in the context of PMSC operations, as well as for international humanitarian law. This should be irrespective of whether the client is a State or a non-State actor;
- set out State and PMSC obligations in the area of PMSC operations;
- seek to uphold the rights of victims, notably with regard to ensuring access to effective remedies, including access to justice;
- promote and strengthen international cooperation to prevent and address violations and abuses arising in the context of the provision of private military and security services;
- promote transparency, responsibility and accountability in the use of PMSCs and their personnel.

C. Wide scope

The scope of a future international regulatory framework should not be limited to ‘complex environments’, ‘complex situations’, ‘armed conflicts’ or other delimiting language. Rather, it should be broad and inclusive of all settings where private military and security services are offered and operational in order to capture the many varied situations where private military and security services are delivered and in which there may be a risk of human rights abuses and/or violations of international humanitarian law. It should apply to the private military and security services provided by corporate entities (see III.A. below), including but not limited to those of a transnational character. In addition, entities providing such services should ensure that all of their subcontractors adhere to the same standards laid out in the framework.

D. Integrating a gender perspective

Given the prevalence of gendered human rights impacts of PMSCs, both for the local communities where they operate and PMSC employees (see A/74/244), it is essential to conduct a gender analysis of an eventual draft international regulatory framework. This would help to ensure that the framework incorporates the differentiated impacts of PMSC operations on women, men, girls, boys and lesbian, gay, bisexual, transgender, intersex and gender non-conforming (LGBTI) persons in local communities, as well as differentiated gender perspectives inside PMSCs.

E. Consultation with civil society and affected communities

As the OEIGWG progresses in its efforts to elaborate the content of an international regulatory framework for PMSCs, the Working Group encourages it to pro-actively consult with civil society organisations, local experts, including women leaders, affected communities and, to the extent possible, with victims themselves to ensure that the framework responds to the realities on the ground.

III. Content of an international regulatory framework

Drawing on the content of the above-mentioned 2010 Draft Convention, and taking into account subsequent developments, the Working Group urges States to take note of the following *non-exhaustive* list of substantive elements for inclusion in any future international regulatory mechanism. Greater detail on most of the points below can be found in the Draft Convention.

A. Definitions

While a future international regulatory framework would need to include a set of definitions pertinent to its contents, for the purposes of this document, the Working Group will focus on addressing the issue of a definition of PMSCs.

The Working Group recommends using the following definition: “a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities”. Military services are defined as: “specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight

operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities”. Security services are defined as: “armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities” (A/HRC/15/25).

This definition thus focuses on the ‘services’ provided and ‘activities’ undertaken, rather than how the entity providing them defines itself. Not only would this approach help to overcome long-standing definitional difficulties, but it would also be a more effective means for capturing the diversity of private military and security operations and the variety of entities providing such services, and therefore the array of potential human rights concerns and impacts.

B. Purpose and principles

States have the primary obligation to respect, protect and fulfil human rights, as well as ensure respect for international humanitarian law. This includes, *inter alia*, protecting against human rights abuses by third parties, including PMSCs, and taking positive steps to fulfil human rights by adopting appropriate measures to prevent, punish, investigate or redress the harm caused by acts of private persons or entities in the context of PMSC operations.

PMSCs are obliged to uphold international humanitarian law and international human rights law imposed upon them by applicable national law. The personnel of PMSCs are obliged, regardless of their status, to comply with applicable international humanitarian law in any activity related to an armed conflict.

With regard to principles, the Working Group broadly concurs with those outlined in the Discussion document, and would further add the following vital principles:

- a reaffirmation of the basic principles in the Charter of the United Nations, the *erga omnes* obligations related to the protection of human rights and the strict adherence to principles of the sovereign equality of all States, the territorial integrity and political independence of every State, the right of peoples to self-determination, the prohibition of the threat, or the use, of force in international relations, the prohibition of propaganda for war and the prohibition of interference in affairs which are essentially within the domestic jurisdiction of any State;
- a reaffirmation of the principles and rules of international human rights law, including *inter alia* the principle of non-discrimination common to all international human rights treaties and the right of access to information;
- a reaffirmation of the principle of humanity that underpins humanitarian assistance and of the principles and rules contained in the body of international humanitarian law and in the Statute of Rome of the International Criminal Court.

C. State regulation, oversight and monitoring

Regulation

States should develop and adopt a comprehensive domestic regime of regulation, oversight and monitoring of the activities of PMSCs and their personnel, including foreign personnel, in their

territory. Ahead of adopting such a regime and related legislation, States should conduct human rights and gender impact analyses and assessments in order to ensure that regulations developed and adopted are well-suited to the specific national context. They should also develop administrative or other appropriate measures that stipulate the minimum standard requirements that public authorities should adhere to when contracting private military and security services. Equally important, States should further establish mandatory human rights due diligence for PMSCs within their national legislation.

Licensing or authorization

States should take legislative, judicial, administrative and other measures to put in place a licensing or authorization mechanism that ensures that PMSCs and their personnel carry out their activities exclusively under the respective licences or authorizations. Clear criteria for granting licences or authorizations to PMSCs should be established that set out certain minimum standards to which companies should adhere. These should include, *inter alia*: a general human rights policy; stand-alone policies and procedures to integrate human rights and, when applicable, international humanitarian law principles across their operations, including an internal code of conduct, ethics or behaviour anchored in a commitment to respect human rights and international humanitarian law, including specific gender commitments prohibiting discrimination, and promoting gender and other forms of diversity both internally and externally; providing and/or ensuring training in international human rights law and international humanitarian law; the mandatory collection of gender-disaggregated data and adoption of gender-specific internal policies; gender-sensitive human rights impact assessments; robust policies for vetting personnel, particularly in relation to allegations of, or convictions for, human rights abuses and/or international humanitarian law violations; and accessible, suitable and effective mechanisms for dealing with alleged abuses and violations. In addition, the State regulatory body should examine records and investigate reports of human rights abuses committed by the companies and/or their personnel.

States should ensure that their licensing or authorization procedures are rigorous and secure and that the authenticity of licensing or authorization documents can be independently verified or validated; and such procedures should be transparent. Licensing or authorization should also extend to the import and export of private military and security services.

Recruitment, vetting and training

States should adopt legislative, judicial, administrative and/or other measures that require PMSCs and sub-contractors to adopt stringent recruitment, selection and vetting procedures. Public authorities should also conduct thorough background checks on PMSC personnel in order to prevent individuals with prior records of misconduct or convictions, notably in connection with human rights abuses, sexual and gender-based violence and violations of international humanitarian law, from being hired or re-hired by PMSCs. Given the frequent practical obstacles to carrying out record-based background checks, particularly in conflict affected, post-conflict and transitional environments, vetting procedures should extend to finding alternative means to conduct background checks, such as oral testimonies from local communities. PMSCs should be required to establish internal reporting systems to enable reporting to a suitable regulatory authority. Mutual cross-border cooperation and mutual legal assistance between and among States are also crucial to ensuring effective vetting procedures.

Policies on continual training for PMSC personnel should also be a legal requirement. Thus, States should require PMSCs to provide adequate and effective training procedures for PMSC personnel to foster responsible staff conduct. This should include specific training on human rights, including gender and non-discrimination, and, where applicable, international humanitarian law, as well as on the rules on the use of force and weapons training, where relevant. Similar standards should apply to subcontractors of PMSCs. Public authorities have a role to play in verifying the content and delivery of such training.

Registration

States should take legislative, judicial, administrative and other measures to establish specific and obligatory procedures on national registration of PMSCs, including instituting an official national registry and creating a governmental regulatory body for monitoring and oversight.

D. Prohibited activities

States should take legislative, judicial, administrative and/or other measures to clearly define and limit the scope of activities of PMSCs irrespective of their client, and further delineate military and security tasks or functions that can, and cannot, be delegated by public authorities to private contractors.

Tasks or functions that should not be delegated by public authorities to private contractors include functions that are consistent with the principle of the State monopoly on the legitimate use of force. These include, *inter alia*: direct participation in hostilities; waging war and/or combat operations; taking prisoners in the context of the conduct of hostilities; espionage; intelligence, knowledge transfer with military, security and policing applications, including through the use of hardware and software technologies; the use of and other activities related to weapons of mass destruction; and police powers, especially the powers of arrest or detention including the interrogation of detainees. Furthermore, the provision of private military and security services in specific areas, such as cybersecurity and maritime security, should be clearly delineated and meet well-defined criteria.

Moreover, States should ensure that PMSCs and their personnel do not provide training that could facilitate their clients' direct participation in hostilities. In addition, States should prohibit the practice of police officers or military personnel providing private military and security services in parallel or additional to their public functions.

PMSCs and their personnel must refrain from committing, or contributing to, violations of international humanitarian law and international human rights law, including but not limited to: war crimes, crimes against humanity and genocide; extrajudicial, summary or arbitrary executions; torture, cruel, inhuman or degrading treatment; sexual- and gender-based violence; arbitrary detention; forced displacement; trafficking in persons; attacks on the right of peoples to self-determination; and restrictions on access to health care and food.

E. Regulation of the use of force and the use and acquisition of firearms and other weapons

States should take legislative, judicial, administrative and/or other measures to establish detailed rules on the use of force and of firearms and other weapons by PMSC personnel. These

rules should cover private provision of security services in law enforcement contexts as well as the use of force by private entities in a situation of armed conflict. They should include, *inter alia*, the following aspects: specific circumstances in which employees may use force or firearms (e.g. in self-defence); the duty of precaution; the principles of necessity and proportionality; prohibition of the intentional lethal use of force unless it is proportionate and necessary; a process of review, with an independent investigation in the event of loss of life or serious injury; and accountability mechanisms in place where such an investigation suggests the use of force may have been unlawful, including remedies for victims. Specific reference may be made in the framework to existing standards, notably the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

States should also take the necessary measures to introduce effective customs controls and other forms of control over export/import and re-export/re-import of firearms and other weapons used by PMSCs. States should prohibit the use and/or engagement in any activities related to certain types of weapons, such as nuclear, chemical, biological and toxin weapons; and should prohibit PMSCs, their personnel and any subcontracted personnel from trafficking in firearms, their parts, components or ammunition and other related accessories.

F. Access to justice, accountability and remedy

States must ensure transparent and effective access to justice and accountability mechanisms at the national level. Moreover, States have an obligation to ensure access to remedies for victims of human rights abuses and violations of international humanitarian law by PMSCs. This should include mechanisms for prompt investigation, prosecution and appropriate sanction of human rights abuses and violations of international humanitarian law, in accordance with international law and standards, including the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

With a view to achieving accountability, States should also establish the liability of legal persons and entities for the offences contained in the international regulatory framework. Superiors of PMSC personnel, such as Government officials, whether they are military commanders or civilian superiors, or directors or managers of PMSCs may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. No clause in a contract shall be interpreted as permitting evasion of responsibility on the part of superiors or personnel under international law.

Critical to this process, States should enact in their domestic law measures to address jurisdictional issues, in particular by establishing their jurisdiction over the offences set out in the international regulatory framework, as well as over crimes committed by PMSC personnel providing services in the territory of another State. States should undertake all measures to facilitate investigation, prosecution and punishment for abuses and violations, including, *inter alia*, in relation to extradition and mutual legal assistance. With regard to the latter, States should afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings. This may include, *inter alia*: taking evidence or statements from persons; executing searches and seizures; providing relevant information for

evidentiary purposes; assistance to, and protection of, victims and witnesses; and all other appropriate measures.

IV. Conclusion

While the Working Group strongly supports the creation of a binding international regulatory instrument, this paper highlights some of the key elements that should be contained in any international regulatory framework for PMSCs. The Working Group stands ready and willing to engage in and contribute to the next phase of deliberations of the OEIGWG and to further expand on the proposals put forward here.