**2nd Session of the OEWG on a Regulatory Framework on PMSCs**

26- 30 April, 2021, Palais des Nations

Presentation by Carlos Lopez

The activities of PMSCs, while sometimes providing meaningful support to the keeping of security and safeguarding human rights, have the potential to infringe human rights and humanitarian law, and in many instances PMSC personnel has engaged in conduct in violation of international obligations and committed human rights abuses.

The need for an international instrument that provides a set of internationally agreed standards in this field is clearer now than ever. The number of countries and private actors hiring PMSCs has grown in recent years and the areas where these companies operate has also expanded.

On one side, the use of PMSCs remains prevalent, especially in contemporary armed conflicts. There is continued use of PMSCs in Afghanistan, Iraq, and Syria, although their numbers have declined significantly over the past decade. PMSCs, with the backing of some states, have recently expanded across the Middle East and Sub-Saharan Africa. These PMSCs have allegedly directly participated in hostilities, conducted cyber-attacks and misinformation campaigns, and repressed local protests. Recent reports point to certain PMSCs as perpetrators of war crimes in Mozambique. Other reports point to the use of PMSCs in Libya and Yemen, and their engagement in cyber attacks against political opponents, human rights activists, and journalists. PMSCs are also being used to protect economic interests in large scale infrastructure projects across continents. Non-state armed groups are also starting to make use of PSCs.

The activities of PMSCs have also expanded to other fields. Their use in immigration and border control, provision of security for extractive industries, or humanitarian actors’ operations, pose a number of human rights risks resulting from their insufficient training and preparation for those tasks and the lack of oversight and public accountability, There are reports of some PMSCs engaging in exploitative recruitment practices which may amount to human trafficking and forced labour, gender-based discrimination and sexual violence, or infringements of the right to assembly and freedom of expression and repression of human rights defenders. PMSCs operating in armed conflicts run the risk of directly participating in hostilities creating challenges for their protection and that of other civilians as well as accountability under both human rights and humanitarian law.

On the other side, the success of existing regulatory models remains limited. There has been little growth in the number of states participating in the Montreux Document, and few new PMSCs have joined the International Code of Conduct for Private Security Providers Association. Further, the success of both frameworks is limited by the fact that key state players refused to join, and the scope of both instruments seems insufficient given the broad activities now carried out by PMSCs in different contexts.

**Need for a regulatory approach**

Therefore, a new approach to this issue is needed. It is gratifying to see that a decision to elaborate a United Nations instrument to provide for a Regulatory Framework has been adopted with unanimous support in the Human Rights Council. But it is also disappointing that the elaboration of this instruments makes very slow progress.

The elaboration of a Regulatory Framework within the UN human rights system is a unique opportunity at the multilateral level to provide meaningful and robust guidance and support to States and PMSC to enable them to fully respect and protect human rights in the context of their operations and to provide for accountability and reparation where abuses and harm occur.

In past sessions, some delegations have resisted the idea of a regulatory framework in the belief that regulation necessarily means the legitimization or normalization of the use of security companies. But regulating does not mean promoting more outsourcing. It simply recognises a reality in a growing number of countries who use or allow the use of those companies. States who do not want to use security companies for any purpose always retain their sovereign right not to do so.

The instrument to be drafted has to adopt a firm and clear human rights approach, focussed on the protection of the rights of people, accountability and justice. Such a human rights lens requires attention to several essential principles and elements that are sometimes overlooked. These include a protective and prevention approach, the entrenchment of a non discriminatory perspective that assigns important weight to a gender approach throughout the instrument; provisions on accountability and on effective remedies and reparations.

In this process, existing documents and instruments such as the Montreux Document on pertinent obligations of States and PMSCs (Montreux Document), the International Code of Conduct for Private Security Providers (ICoC) and the draft Convention prepared by the Working Group on the use of Mercenaries are a rich source of elements and should be taken into account or as a basis for further discussion.[[1]](#footnote-1)

The focus of the standards should be on regulating the practice of using PMSCs in various contexts so as to prevent or mitigate human rights violations.

I urge this assembly not to be entangled in endless discussions about definitions and adopt a pragmatic approach. The focus should be on the type of operations these companies carry out and not on labels or denominations. Virtually any security company could at some point engage in any type of security activity regardless of its official denomination.

**A regulatory approach is effective**

There is a growing number of states that are taking a regulatory approach.

An important example of a regulatory initiative is the Swiss Federal Act on Private Security Services Provided Abroad (“PSSA”), in force since 2015. This law imposes a mandatory declaration and review procedure for Swiss companies providing private security services abroad.[[2]](#footnote-2)

According to the most recent annual report on the implementation of this law, 478 declarations were submitted by companies providing private security services abroad in 2019.[[3]](#footnote-3) Some declarations concerned the protection of persons and guarding of goods in complex environments, but others concerned operational or logistical support, maintenance of weapons systems and training of security forces.[[4]](#footnote-4)

The Swiss administrative authority has reviewed more and more of these declarations and in 2019 issued two decisions prohibiting a company, Pilatus Aircraft Ltd, to export services to other countries in the middle-east where they could contribute to military operations in a neighbouring third country and were therefore “incompatible with the federal government’s foreign policy objectives”. This decision was unfortunately overturned by the Federal Administrative Court, apparently on the procedural and competence grounds.

An international instrument adopted at the United Nations, has the potential to provide clearer guidance to states, including their courts, on authoritative human rights criteria to be followed in this kind of cases.

Another important regulatory development is the 2017 French Law on duty of vigilance, which makes mandatory for companies of a certain size to adopt and effectively implement a plan of vigilance to identify, prevent and mitigate human rights abuses in their own activities or resulting from their commercial relationships. This law has spurred an important movement in other countries and at the EU level where similar legislation is now contemplated.

There are also a number of other laws, including in South Africa, that can be cited as examples, but the time does not allow us to expand on that. I refer you, in this regard, to the useful studies on national legislation by the WG on Mercenaries.

**The structure of the Regulatory Framework**

The Discussion Document on Elements has provided a useful basis for a rich discussion during the first session of the OEWG. Based on that discussion and existing instruments it is necessary to incorporate a section containing obligations applicable to all States, and obligations applicable to all PMSCs, at the beginning of the proposed Regulatory Framework.

The current structure of the “Discussion document” follows the structure of the Montreux Document, grouping all applicable rules into categories related to contracting States territorial States, home States, to which it adds “States of nationality”. But, the proposed Regulatory Framework is not meant to regulate only the activities of PMSCs in situations of armed conflict, nor only those PMSCs that operate in armed conflict or complex environments under contract with a State. Further, PMSCs may be contracted not only by States, but also by other non-State actors such as extractive industries, and in these circumstances, it is of paramount importance that States discharge their duty to protect human rights by providing a clear and protective regulatory framework. The scope of application of the Regulatory Framework currently under discussion in the OEWG is thus broader, and it should therefore adopt a structure that is also adapted to that broad scope.

This general section before the specific rules applicable to contracting, home, territorial and nationality States. Such a general section should contain human rights and international humanitarian law rules applicable to all States, and also rules to be observed by PMSCs themselves. This without prejudice to keeping the respective sections on states of origin, destination, operation and/or nationality.

States’ international obligation to protect includes acting to protect against the conduct of private actors such as PMSCs that would infringe human rights. It also includes an obligation to respect and ensure respect of international humanitarian law. This is an obligation that flows from IHL,[[5]](#footnote-5) and from International Human Rights Law[[6]](#footnote-6)

Among the obligations that could be contemplated in this general section are the following measures:

* States have the general obligation to respect, protect and fulfil human rights, and to respect and ensure respect for international humanitarian law. They should take measures to protect human rights and ensure the respect of humanitarian law including by third parties such as PMSCs within their territory or under their jurisdiction and that such jurisdiction will extend extraterritorially in certain circumstances.
* The State duty to protect human rights comprises the duty to take necessary and appropriate measures, including legislative, to ensure a PMSCs under its jurisdiction respects human rights in their global operations (i.e. including those taking place abroad).
* Under no circumstances should PMSCs be part of conduct of direct hostilities on behalf of any State. Waging war is not a private business.
* States must introduce human rights and humanitarian law standards into their processes of contracting, licensing and authorization procedures of PMSCs activities, especially those destined to foreign jurisdictions:[[7]](#footnote-7)
  + Vetting processes should exclude persons with past records of human rights violations or abuses, or conduct incompatible with human rights standards, from serving in a PMSCs.
  + Licensing the import and export of services to ensure companies do not provide prohibited services abroad; and licensing of arms to ensure weapons are acquired in full respect of international standards related to arms control,
  + Adoption of minimum criteria of knowledge and training on human rights and humanitarian law by prospective personnel of PMSCs
* States must provide in law for prompt, accessible and effective remedies, including judicial remedies, as against both State authorities and PMSCs, for those who claim that their rights have been violated or infringed by these actors.
* In respect of remedies for abuse or misconduct by businesses, judicial remedies must always be provided where the misconduct rises to the level of a serious crime and other public law offences. For less serious misconduct, non-judicial remedies may be provided, including, in the first instance, company grievance procedures or similar mechanisms that are fully compatible and do not prejudice the right to an effective judicial remedy.
* States have an obligation to enact necessary legislation to provide effective penal sanctions for PMSCs staff and the company as a legal person for the commission of grave breaches of the Geneva Conventions and, where applicable Additional Protocol I, and crimes under international law. As the Montreux document provides for, States have an obligation to search for those persons and to bring them, regardless of their nationality, before their own national courts, or to extradite the person to a State that has jurisdiction or to hand it over to an international criminal tribunal.
* States also have an obligation to carry out effective and impartial investigations and, as required by international law, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.
* States must vest their courts with jurisdiction over the criminal offences committed by PMSCs personnel when the PMSC is a national of the State, the victim is a national of the State, the crime was committed in the territory of the state or on the basis of universal jurisdiction, where the offence constitutes a crime under international law.

**Obligations of PMSCs**

Section 8 of the Discussion Document propose certain rules addressed to PMSCs themselves. I believe such a section is necessary. These duties or responsibilities of PMSCs should be understood as independent from the obligations incumbent upon States and shall be complied with by PMSCs in all circumstances and wherever they operate.

Of course, to be effective, these rules addressed to PMSCs themselves should be matched by monitoring, oversight and accountability from the State and stakeholders (in particular workers)

Duties for PMSCs should include:

* Respect and ensure respect by its personnel of international humanitarian law and international human rights law in all their operations regardless where they take place.
* To ensure they respect humanitarian law and human rights law, PMSCs should adopt a policy and carry out human rights due diligence including on IHL when there is risk of or they operate in situations of armed conflict, crisis or high instability.
* The internal processes and mechanisms adopted by PMSCs to ensure their respect with IHL and human rights law should not be seen as an ordinary compliance process, but a continuing process. These processes should comprise systems for the selection, vetting and training of personnel to serve in the PMSC in accordance with international standards.
* PMSCs should also participate in effective and legitimate mechanisms to provide remedy and reparations when the company has been involved in an infringement of human rights, or provide direct reparation to the victim without prejudice to the right of persons to have access to an effective remedy, including a remedy of judicial nature.

Mr Chairperson-Rapporteur, distinguished delegates, I would step here for now. There are elements to be discussed in relation to the other sections of this Regulatory Framework, which I think we will have time to address in the following days.

1. Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, 17 September 2008; the International Code of Conduct for Private Security Providers (ICoC); and Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/151/55/PDF/G1015155.pdf?OpenElement> [↑](#footnote-ref-1)
2. “[2019 annual report on the implementation of the Federal Act on Private Security Services Provided Abroad](https://www.newsd.admin.ch/newsd/message/attachments/62304.pdf)”, Swiss Directorate of Political Affairs, (December 2020), at page 2 [↑](#footnote-ref-2)
3. Ibid., at page 4. [↑](#footnote-ref-3)
4. Ibid., at page 5. [↑](#footnote-ref-4)
5. Sassoli, Marco International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, Cheltenham, Edward Elgar, 2019 [↑](#footnote-ref-5)
6. Committee on the Rights of the Child (CRC), General comment No. 16, UN Doc. CRC/C/GC/16, (2013); Committee on Economic, Social and Cultural Rights, General Comment No. 24, UN Doc. E/C.12/GC/24, (2017), para 14. [↑](#footnote-ref-6)
7. Concept Note on a Possible Legally Binding Instrument for the Regulation of Private Military Security Companies, 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, 4th session of the OEIGWG, 2015, p. 4 and ff. See also Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, prepared by the Working Group on the Use of Mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc A/HRC/WG.10/1/2 13 May 2011, articles 14, 15 and 19(3) [↑](#footnote-ref-7)