



**INTERNATIONAL COMMISSION OF JURISTS' WRITTEN CONTRIBUTION ON THE
DISCUSSION DOCUMENT ON ELEMENTS FOR AN INTERNATIONAL REGULATORY
FRAMEWORK ON THE REGULATION, MONITORING AND OVERSIGHT OF THE
ACTIVITIES OF PRIVATE MILITARY AND SECURITY COMPANIES**

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Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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Introduction

Pursuant to its call for submissions in line with Paragraph 4 of HRC Resolution 36/11, the International Commission of Jurists (ICJ) welcomes the opportunity to make written contributions on the discussion document on elements for an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, to the Open-ended Intergovernmental Working Group (OEWG) to elaborate the content of an international regulatory framework , without prejudging the nature thereof, relating to the activities of private military and security companies (established under HRC Resolution 36/11).

The report of the first session of the OEWG, which took place from 20-23 May 2019, contains a specific invitation by the Chair-Rapporteur for written contributions from Governments, relevant special procedure mandate holders and mechanisms of the Human Rights Council, the treaty bodies, regional groups, intergovernmental organizations, civil society, the industry and other stakeholders with relevant expertise, including the Co-Chairs of the Montreux Document Forum and the International Code of Conduct Association.

The ICJ is committed to engage with the OEWG in its efforts to elaborate an international regulatory framework (Regulatory Framework) on the activities of Private Military and Security Companies. The ICJ also participated in the past sessions of the OEWG under its previous mandate. 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 potential 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.

The ICJ is mindful that the issue of the legally binding character of the proposed Regulatory Framework has been deferred to a later stage in the process.¹ However, whether the emergent instrument is legally binding or non-binding has a decisive bearing on the structure, content and the manner in which it is drafted, in addition to the institutional machinery that may or may not established through the instrument, and as such it is decision that should not be postponed for too long. The ICJ considers that a legally binding instrument is necessary in the long run in this field, which presents specific characteristics that may not be adequately addressed by the application of general norms or guidance in the field of business and human rights.

¹ Human Rights Council Resolution 36/11 Mandate of the open-ended intergovernmental working group to elaborate the content of an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies; 9 October 2017, UN Doc A/HRC/36/11

The present comments are preliminary in nature and exclusively by reference to the Discussion Document: Elements for an international framework.² The ICJ may submit further comments and recommendations in due course, or as the discussions and negotiations move forward. 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.³

The present contribution starts with general comments on a proposed new section with general obligations for States and PMSC; then it contains comments on the specific sections of the Elements paper plus additional proposals by the ICJ; and then provides some concluding remarks.

1. General comments

The ICJ appreciates that 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 its own assessment, the ICJ would recommend the incorporation of 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". Addressing in that way the relevant actors, the Montreux Document attempted to regulate PMSCs activities in conflict situations. But, unlike the Montreux document, 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 exercise their duty to protect 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.

The ICJ recommends that the Regulatory Framework include a 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.

All States have obligations to respect, protect and fulfil human rights. The 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

² Discussion document: Elements for an international regulatory framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies", available at <https://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/IGWG.aspx>

³ 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>

international humanitarian law. This is an obligation that flows from IHL,⁴ and from International Human Rights Law⁵

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). A State has jurisdiction over a PMSC when the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled or has its main place of business or substantial activities in the territory of that State or under its control.
- Under no circumstances should PMSCs be part of conduct of direct hostilities on behalf of any State.
- States must introduce human rights and humanitarian law standards into their processes of contracting, licensing and authorization procedures:⁶
 - 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. Excluded persons comprise those who have committed violations but benefited from amnesties and/ or other exemptions of responsibility. The same standards apply to associates in the company.
 - Licensing the import and export of services to ensure companies do not provide prohibited services abroad;
 - Licensing of arms to ensure weapons are acquired in full respect of international standards related to arms control, including under the UN Arms Trade Treaty, arms transfer and trafficking of arms, as well as the accountability of PMSC staff;
 - Licensing the possession of security equipment other than arms;

⁴ Sassoli, Marco International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, Cheltenham, Edward Elgar, 2019

⁵ 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.

⁶ 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)

- 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. The right of action must arise in relation to all rights guaranteed under international law and applicable to the State in question.
- In cases where a State or a State agent is accused of having participated in the abusive conduct of a PMSC, the principle that the victim has a right to an effective remedy and reparation from the State should be given effect, in accordance with the principal human rights treaties and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law.
- Consistent with basic principles of State responsibility, the responsibility of the State will also be engaged and subject to remedial action in circumstances where a business is acting on the instructions or under the direction or control of the State; or where a business is empowered to exercise elements of governmental authority and has acted in such capacity when committing the abuse.
- 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 company grievance procedures or similar mechanisms in the first instance 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. They 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. (based on Montreux doc)
- 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. (based on Montreux document)
- 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

Element 8 of the Discussion Document propose certain rules addressed to PMSCs themselves. The ICJ agrees that such section is necessary, which is also in line with the provisions in the Montreux Document and the ICoC. In the same way as in the Guiding Principles on Business and Human Rights, these duties for 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.

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.
- With regard to Element 8 (i), the ICJ considers that 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. It agrees that these internal processes should comprise systems for the selection, vetting and training of personnel to serve in the PMSC in accordance with international standards.
- Regarding Element 8 (ii), PMSCs should 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.

2. Contracting States

In relation to the specific obligations of States that decide to contract the services of PMSCs, the ICJ agrees with the opinion expressed by State delegations during the First session of the OEWG that there should be a distinction between those obligations, mostly deriving from IHL, that apply in situations of armed conflict and obligations that apply in all circumstances. Further, it should also be clear that this Regulatory Framework as applicable to the contracting of PMSCs by States or other entities should not be construed as endorsing or recommending such practice.

If States decide to contract the services of PMSCs, they should bear in mind the ensemble of their obligations under international law and take measures to implement them in good faith. Regarding the Discussion Document on elements, the ICJ considers that the Regulatory Framework should not leave total freedom to States to “determine which military/security services the state may not contract for” (Element 4.i), but it should provide strong guidance as to which services cannot be outsourced.

National law should prohibit the contract of services that entail PMSC personnel direct participation in hostilities and should attach criminal sanctions to breach of such a prohibition. Contracting States have the obligation not to put PMSC staff into ambiguous situations in order to maintain a clear distinction between civilians and combatants and to avoid that such staff lose their protection as civilians in armed conflict.⁷

In addition, contracting States have an obligation not to contract PMSCs to carry out activities that IHL explicitly assigns to a State agent or authority, such as:

- The exercise of power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions.⁸

⁷ Sassoli, Op cit at 10.153

⁸ Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, art 39

- Requisitions in kind and for services in an occupied territory may only be demanded on the authority of the military commander of the occupying power;⁹
- The law of naval warfare prohibits private ships from privateering as well as from intercepting and capturing enemy ships and their cargo.¹⁰

Consistent with States' obligations under international human rights law, a PMSC must not be contracted to perform inherently public functions such as administration of criminal justice, incarceration and arrest without final supervision and decision-making power in the hands of State officials.

Element 4 (ii) contains a useful rule regarding procurement of PMSCs services. The ICJ recommends the Regulatory Framework provides basic criteria for States to assess a company's capacity to perform and for the selection of a company. Such criteria should include consideration of past records of respect for IHL and human rights, and the company's internal policies and procedures for the selection and training of its staff. These criteria should extend to subcontractors to ensure contractor companies do not circumvent their obligations by subcontracting with third companies.

The ICJ considers that paragraph 4 (iv) should more clearly require contracting States to exercise their jurisdiction over PMSC staff and the company as a legal entity and prohibit the granting of any form of immunity from prosecution to PMSCs contractors for crimes committed anywhere they operate.

In addition, the ICJ recommends consideration to the following rules that would apply for contracting states:

- A restatement of a well settled rule of international law that States retain their obligations under international law even if they contract PMSCs to perform certain activities.
- States have an obligation to ensure the respect of human rights and IHL by PMSCs they contract. As part of this obligation States should, in their contracts or otherwise, ensure that PMSCs and their personnel are aware and trained in HR and IHL, and that they have been properly vetted, and operate in accordance with local laws and regulations; take measures to prevent violations of international HL and HR by PMSCs, including by requiring due diligence; and investigate and punish as appropriate. (Partially MD)
- Contracting States have an obligation to provide access to an effective remedy and reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility.

The OEWG should also extend the foregoing rules to international organizations who contract the services of PMSCs to the extent that they are applicable to them. International organizations are currently one important user of private security services, including in peace keeping and similar operations. The United Nations has adopted its own guidelines which the OEWG should also consider in its own discussions.

⁹ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907., art 52

¹⁰ Paris Declaration Respecting Maritime Law, 16 April 1856, para 1

Territorial state

A territorial state should be understood as the one where a PMSC carries out operations regardless of whether the company is incorporated or not within the jurisdiction, the duration of such operations and the kind of operations.

The ICJ recommends that:

- States where a PMSC operates should ensure its domestic courts are able to exercise jurisdiction over the PMSC personnel operating within its territory or under its jurisdiction, without prejudice to the rules on jurisdiction established under the law of the sea.¹¹
- The State where a PMSC deploys its personnel to carry out activities has the responsibility to establish a legal framework to ensure the company operations take place in full respect to human rights and IHL and will establish a framework of accountability and sanctions for those that commit abuses.
- Of interest is the situation where a PMSC operates in the territory of one State but the effects/impacts of its activities take place in the territory of another state. Such would be the case of technology or digital companies, those dedicated to surveillance or intelligence gathering of persons and situations in other territories using remote technology/technologically advanced devices. Often, these companies operate extraterritorially. The Regulatory Framework should establish that the state in whose territory the activities take place should be responsible to ensure the PMSC respects human rights and IHL in the territory of the other state where the effects of its actions take place.

Home states

A home state should be defined as the state where a PMSC is incorporated or has its main place of management.

Discussion Document Element 6 (i) provides that the home State determines which military/security services may not be exported and Element 6 (ii) requires the State to “establish a process to grant authorization for the export of military and security services with robust criteria for licensing”. The ICJ supports the inclusion of those two elements which nevertheless need more precision and detail to be useful for States. In particular, the Regulatory Framework should clearly provide for the responsibility of home states to establish a system of authorization for the export of military or security services abroad, which will prohibit the export of services that the State itself cannot contract out (this should correspond to the prohibitions to contract). PMSC should not be allowed to provide services abroad that are otherwise prohibited in their home State.¹²

The ICJ also agrees with Element 6 (iii) which should be more detailed in providing minimum standards for licensing for operations and recruitment of local personnel. However, Element 6 (iv) on monitoring and accountability, may be difficult to carry out abroad without impinging on the sovereignty of other States.

¹¹ Regulating PMSCs at Sea: Operational and Legal Specificities, Presentation by Dr. iur. Anna Petrig, Researcher, University of Basel, Switzerland, 14 December 2016 at the Fifth session of the IGWG on PMSCs. https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session5/Petrig_RegulatingPMSCsSea_OperationalLegalSpecificities.pdf

¹² See in this regard as example the Swiss Federal Act on Private Security Services Provided Abroad, 2015 <https://www.eda.admin.ch/eda/en/home/foreign-policy/security-policy/bundesgesetz-ueber-die-im-ausland-erbrachten-privaten-sicherheit.html>

States of nationality

The State of nationality should be defined as the State of nationality of the PMSC employees and other staff. It should be distinguished from the State of nationality of the PMSC itself (the home State), or the State of nationality of any potential victim of a human rights violation committed with the involvement of a PMSC, which is in fact the territorial State where a PMSC operates and where the violation occurred.

The ICJ considers it important that the Regulatory Framework addresses specific rules to States of nationality of PMSC staff with a view to support their efforts to establish a legal and policy framework that will better protect the rights of their nationals who are recruited to work in PMSCs. The PMSCs in question could provide services in the country of recruitment, but it does so mainly in third countries, which many times contributes to the creation of situations of vulnerability for nationals regarding working conditions and benefits, repatriation and sick and injuries benefits.¹³

States of employees' nationality should adopt laws and other measures to regulate the recruitment of their nationals into PMSC to serve abroad. They should prohibit their nationals from taking employment in a PMSC to carry out activities abroad providing services that are prohibited within the State of nationality.¹⁴ The ICJ concurs with the proposals in Element 7 that States of nationality should establish processes to grant authorization for the nationals to perform security services abroad to ensure there is no recruitment to provide prohibited services, and should prohibit the recruitment of their nationals for the same purpose, establishing penalties for the infringement of the law.

Definitions

The ICJ considers that the definitions of "Private Military and Security Companies" provided by the Montreux document and the Draft Convention are close to each other and can be used as working bases. The definitions of contracting States, territorial States and home States, provided in the Discussion Document, are a good bases for discussion, to which a definition of States of nationality should be added.

Concluding remarks

The regulation of the activities of PMSCs has long been an objective of the international community with a view to ensure better respect for human rights and international humanitarian law. The creation of the OEWG on PMSC with its mandate to elaborate a Regulatory Framework provides new impetus to those efforts, which the ICJ hopes will bear fruit within the shortest period. It is encouraging that this time there is a higher degree of consensus among States represented in the Human Rights Council on the elaboration of such a Regulatory Framework, while disagreements may still subsist on specific areas or topics for regulation. The ICJ encourages concerned States to persevere in this path and redouble their efforts to build the broadest possible consensus on the Regulatory Framework on the basis of the content and

¹³ See Report of the working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: mission to Perú, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/104/19/PDF/G0810419.pdf?OpenElement> ; and Report of the working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: mission to Honduras; <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/109/69/PDF/G0710969.pdf?OpenElement>

¹⁴ See for example South Africa's Regulation of Foreign Military Assistance Act (No. 15 of 1998) <https://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/SouthAfrica6.pdf> The law was also reported by the Working Group in its report of its visit to South Africa: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/144/01/PDF/G1114401.pdf?OpenElement>

recommendations provided by existing documents and instruments as well as reports by relevant especial procedures of the Human Rights Council.