**Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families**

## COMMENTS 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

The Working Group (WG) on Mercenaries appreciates the work of the Committee on the Protection of All Migrant Workers and Members of Their Families and the work on this General Comment. The WG wishes to thank the Committee for the opportunity to comment on Draft General Comment No. 5 on migrants’ rights to liberty and freedom from arbitrary detention. The WG also welcomes constructive dialogue and engagement between the United Nations treaty bodies, Special Procedures and States Parties on issues such as the content of General Comments.

The specific comments below are not exhaustive, but rather highlight areas for potential further development and identify some areas of concern, stemming from the WG’s continuous monitoring and reporting over the last years on the use of private military and security companies in immigration control and management, through country visits and extensive consultations with relevant stakeholders.

***General comments***

As a general comment, the Committee may wish to add a brief discussion on the ever-increasing involvement of private military and security companies[[1]](#footnote-1) in immigration detention alongside the subsequent human rights risks for migrants as extensively examined in the WG’s recent reports on this matter (A/HRC/45/9 [[2]](#footnote-2) and A/72/286).

The WG wishes to note that the involvement of private military and security companies in immigration detention and border control is part of a broader process of outsourcing inherent State functions to private actors across all areas of governance. Their operations in this domain have grown in parallel with the securitization[[3]](#footnote-3) of State approaches to handling migration supported by large increases in State budgets to fund these approaches.

As assessed in detail in paragraphs 17-21 in the WG’s A/HRC/45/9 report, with severe restrictions imposed on regular migration pathways around the world, migrants with varying protection profiles have been increasingly forced to travel by irregular means amid complex and mixed migration movements, often in large numbers. States, particularly countries of destination, have adopted laws and policies to tighten border controls and further reduce irregular entry. These responses have failed to address root causes, and diverge from a human rights-based approach that considers migrants as rights holders under international human rights law and in some instances international refugee law. More recently, several States have also criminalized organizations and individuals that have provided humanitarian assistance to migrants, such as search and rescue operations, or subjected them to political attacks or other punishments.

Today, immigration and border management has become a multibillion-dollar business, with global border security identified as a potential market for further growth in the coming years. The amount of outsourcing to private security has surged with migrants used to justify privatization of State security functions. Diverse corporate actors have positioned themselves to benefit from the aforementioned security approaches to migration and the corresponding hikes in public budgets for border security, with privatized border management and security now a lucrative source of contracts. While the biggest markets have traditionally been concentrated in countries of destination as part of policies to stem migration, demand for such services in countries of transit and/or departure is steadily growing, spurred by externalization and other measures.

The locus of immigration control has shifted further away from the physical border, it is de-territorialised and often states have distanced themselves, legally and geographically, from immigration control, insufflating opacity into the process and reducing accountability and responsibility from those states to which refugees are making their appeal for protection.

Moreover, private companies are increasingly being used to govern immigration and, specifically, in several cases to circumvent legal constraints, such as the principle of nonrefoulement and many others. In turn, they have to deal with multifaceted government structures with fragmented responsibilities and oversight functions across ministries and departments, making it all the more challenging to establish direct monitoring, accountability and reporting lines in the event of violations.

Overall, the considerable and ever increasing corporate involvement in this sector has led to a commodification of immigration and border management services, with such services being seen primarily as economic, profitmaking activities, rather than as an essential function of the State to ensure security and appropriate protection, as guaranteed by international law, for all those on its territory.

In Europe and North America, where most of the companies providing security services for immigration detention and border control are concentrated, industry lobby organizations representing arms and security companies were established to support the industry’s interests. Profit making provides a strong incentive to push for repressive immigration laws and practices, such as further criminalization of migration and increased use of immigration detention.

Over the years, such companies’ influence has become pervasive and entrenched. Many States have become dependent on private military and security companies for a wide range of aspects of immigration and border management. This has resulted in a regressive shift of expertise away from States and towards the private sector. The increasing reliance on technological “solutions” that are constantly updated in line with new innovations has also made the companies behind them indispensable to the practical development and implementation of State security-centric migration policies. This has not only paved the way for the massive growth of the border security industry, but also ensured a steady demand for its services. Thus, a system with self-reinforcing dynamics and lock-in effects has been created, with wide-ranging negative human rights impacts.

In 2017, in its report on privatized places of detention (A/72/286), the WG raised concerns about the appalling conditions in immigration detention centres. It highlighted the mistreatment of migrants by company personnel, manifesting at times in sexual violence, deaths in custody, the use of solitary confinement as punishment, and other serious human rights abuses. Other concerns included the lack of adequate physical and mental health care of detainees, economic exploitation, restrictions on religious freedom, and lack of access to legal representation and other due process violations. In light of these concerns, and of the risks to respect for human rights generated by outsourcing services relating to the deprivation of liberty, the Working Group called on States to terminate the practice of outsourcing the overall operation of immigration detention facilities to private security companies.[[4]](#footnote-4)

Given the heightened risk of gross human rights and/or refugee rights violations associated with the provision of private military and security services in immigration and border management, companies in this sector should pay particular attention to the human rights risks that their business activity or business relationships may pose. They therefore need to comply with their legal obligations and exercise adequate due diligence to avoid causing, contributing to or becoming directly linked to such impacts, acts that may amount to gross human rights and/or refugee law violations and abuse.

The WG notes with concern that these calls have gone unattended as it continues to receive credible reports demonstrating that serious human rights abuses continue to occur. In some cases, conditions in these facilities have deteriorated further. In countries that outsource the overall operation of immigration detention centres to private security companies, there are persistent and widespread reports of abuse by company personnel. Moreover, the COVID-19 pandemic confirmed the glaring shortcomings of the systems in place and reinforced the need for prompt action to address the concerns raised in the Working Group’s 2017 report and by other United Nations human rights mechanisms.[[5]](#footnote-5) As happens with many of those deprived of their freedom within mainstream privatized prisons, immigrants and refugees have been for the most part denied accessibility to legal support, particularly during the difficult times of the COVID-19 pandemic.

States should become fully aware of the potential unintended consequences of current immigration and border policies in terms of sustaining and nurturing parts of the increasing commodification and privatization of immigration management. They should also exercise stronger oversight and accountability functions with clear distinction of labor among all actors involved.

***Comments on Specific Paragraphs***

In **paragraph 18**, the WG fully shares the concerns raised by the committee on the ‘criminalization of the irregular entry or stay of migrant workers and members of their families and the practice of punishing such conduct with deprivation of liberty.’ The WG wishes to further note that often laws, policies and other measures adopted by many States in recent years have significantly reduced protections for migrants, including refugees and asylum seekers. Such measures include: laws enacted to make leaving, entering or staying in a country irregularly or using the services of a smuggler criminal offences, including criminalizing the mere act of crossing a border; increased recourse to detention without seeking alternatives; restricted access to asylum; and rapid returns and removals, including of unaccompanied children, with insufficient due process guarantees resulting in violations of the principle of nonrefoulement and collective expulsion, as well as the separation of minors from their parents and deporting parents without accurately registering the relationship with their children. This has resulted in the situation of children abandoned to their fate due to the inability to effectively identify and locate their parents or legal guardians.

In addition, the creation of the so-called hotspots in some European countries has raised significant concerns. Established in order to ensure the identification, registration and fingerprinting of migrants arriving on European shores, to avail asylum seekers of an asylum procedure, and to coordinate the return of those migrants who are not granted permission to remain, they allegedly operate without a clear national legal framework and are often used more as detention centres than registration centres.

In **paragraphs 33 and 34** the Committee pointedly acknowledges the presence of private personnel in guarding migrant workers and members of their families who are deprived of their liberty. The Working Group cautions on the significant challenges explained in detail in its report in the absence of an international legally binding instrument for the regulation, monitoring and oversight of the activities of private military and security companies.

The WG would highlight the importance of two main initiatives developed to raise standards within the PMSC industry: 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 (2008); and the International Code of Conduct for Private Security Service Providers (2010). The WG however notes with caution that both initiatives have notable gaps in relation to the immigration and border management sector as neither document mentions this sector specifically and they are not Human Rights instruments. Gaps that have been proved in other fields in which the WG has also investigated, such as extractive companies. Additionally, the former is applicable in armed conflict situations and the latter in so-called complex environments (see the definition in sect. B of the Code). They therefore fail to capture the broad range of companies that provide security-related services for immigration and border management and the variety of contexts and environments in which they operate. **These companies are thus often left unregulated**.

In **paragraph 86**, regarding the last sentence on `*reports of detained migrants who are subjected under threat of punishment, to prolonged forced and/or unpaid labour,’* the WG would highlight the importance and extent of migrants’ economic exploitation as per paragraph 59 in its A/72/286 report. Although detained migrants or asylum seekers are generally not authorized to work, reports show that privately run immigration detention facilities sometimes hire detainees, on a voluntary basis, to conduct simple day-to-day tasks, such as cleaning and catering. In order to reduce the operational cost and maximize profits, detainees at for-profit facilities are paid less than the national minimum wage for their work. In order to reduce the operational cost and maximize profits, detainees at for-profit facilities are paid less than the national minimum wage for their work. These practices should be recognized as exploitation, and in some cases forced labor.

In **paragraph 101**, the Committee may wish to add language on private military and security companies operating in this sector, requesting them to exercise heightened human rights due diligence to avoid causing, contributing or becoming directly linked to adverse human rights impacts. It could urge companies to be more transparent by complying with domestic legislation, publicly disclosing accessible, clear and non-ambiguous information with regard to their contracts and operations, as well as adverse human rights impacts by their operations. Such companies should also be encouraged to provide or cooperate to remedy violations and abuses through legitimate processes, including cooperating with judicial mechanisms where appropriate.

In reality, States often overlook these duties when it comes to private military and security companies, as noted by the Working Group in its 2017 global study of 60 States, in which it concluded that national regulation of these companies is generally weak or non-existent and accountability is severely lacking (A/HRC/36/47).

In **paragraph 104** on supervision and accountability, the Committee may wish to integrate language to reiterate the call on States to terminate the practice of outsourcing the overall operation of immigration detention facilities to private military and security companies, and to favour the use of alternatives to detention, (non-custodial) in accordance with relevant international standards. Furthermore, the Working Group stresses the need for States to introduce and strengthen measures to ensure effective oversight as well as accountability of companies and their personnel for human rights violations and abuses against migrants caused directly or indirectly by their business activities.

It is ultimately States that have a duty to respect, promote and fulfil the human rights of all migrants within their jurisdiction or effective control, including under conditions of extra territoriality, where applicable. These obligations remain regardless of whether States have outsourced certain immigration detention and border control functions to a private actor. States must take urgent measures to fulfil these obligations, including by strengthening the legal and regulatory frameworks applicable to private military and security services. Particular attention must be paid to companies to whom they have contracted inherent State functions, such as detention

In **paragraph 105**, the WG wishes to draw the Committee’s attention on the increasing use of border technologies by private entities as analyzed in paragraphs 39-43 it its A/HRC/45/9 report. In the absence of adequate privacy safeguards in many countries, there are risks that personal data of people crossing borders or being taken to detention centers is gathered in a non-transparent manner and without informed consent, stored for long periods, and becomes outdated even while the database is still in use. Decisions taken during screening processes for migrants, including refugees and asylum seekers, that rely heavily on such technology with its presumed rationality and superiority, lack nuanced human judgment and risk potentially serious errors.

While stressing the urgency to stop the engagement of private security companies in the assumption of the role of controllers, we also insist that States must publicly disclose detailed and appropriate levels of information on immigration detention and border control functions outsourced to business entities. Regarding the collection, storage and use of biometric and other data on migrants, States must require companies to ensure that the systems they provide and manage are regulated by law and comply with international standards and best practice on data protection and privacy. Such data should be, *inter alia*, proportionate to a legitimate aim, obtained lawfully, accurate and up-to-date, stored securely for a limited time and disposed of safely and securely

On a final note, related to a key aspect of the preservation of migrants, refugee and asylum seekers’ dignity and human rights, the WG would suggest using non-gendered language where possible (for example, using the terms “they/them/their” instead of “he/she”, “his/her(s)” and “him/her”. Using binary gendered language excludes persons who identify outside these binary distinctions.

***Conclusion***

In conclusion, the WG reiterates its appreciation of the opportunity to review the Draft General Comment, and more generally its support for the work of the Committee. The WG avails itself of the opportunity to renew to the Committee the assurances of its highest consideration.

Geneva

30 October 2020

1. The Working Group uses the term “private military and security companies” to refer to corporate entities providing, on a compensatory basis, military and/or security services by physical persons and/or legal entities. This definition focuses on the activities performed by corporate entities rather than the way a company may self-identify. Services include, for example: knowledge transfer with security, policing and military applications; development and implementation of informational security measures; land, sea or air reconnaissance; satellite surveillance; and manned or unmanned flight operations of any type. For the full definition, see A/HRC/15/25, annex, art. 2. [↑](#footnote-ref-1)
2. A/72/286 as presented to the HRC on 17 September 2020. [↑](#footnote-ref-2)
3. By securitization the WG refers to the militarization of those detention sites, the use of military and intelligence technology to capture information, the treatment of immigrants and refugees as a threat to national security which consequently derive in their constant surveillance and physical control, as well as the deprivation of their liberty. [↑](#footnote-ref-3)
4. See detailed description in A/72/286, paras. 40-59. [↑](#footnote-ref-4)
5. See, for example, USA 18/2018, OTH 60/2018 and OTH 61/2018. [↑](#footnote-ref-5)