

Remarks by Dr. Jelena Aparac

Member of the Working Group on the Use of Mercenaries

Fourth session of 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

17 April 2023

Mr. Chairperson,

Ladies and Gentleman,

Dear Colleagues,

On behalf of the Working Group on the use of mercenaries, I would like to thank the Chairmanship of South Africa and the secretariat for convening and organizing the fourth session of the new IGWG on PMSC. I would also like to thank you for inviting us to contribute to the discussion on the future instrument.

I have the honor to share this statement on behalf of the Working Group on the use of mercenaries and convey the apology of Mr. Ravindran Daniel, the present Chair of the Working Group who is unable to join today.

The Working Group on the use of Mercenaries welcomes the Second Revised Draft. We appreciate the extensive work that has gone into its creation. Nevertheless, I would like to address few concerns that we believe may improve the instrument.

1. The nature of the instrument

The Second Revised Draft still does not contain a provision on the nature of the instrument. As the Working Group has been consistently highlighting, the future instrument must be legally binding if we are to achieve the effective regulation of PMSCs.

We have always appreciated the efforts to strengthen regulation in the PMSC industry including those related to the Montreux Document, ICoC/ICoCA, as well as national efforts. However, year after year our thematic reports, country visits and communications demonstrate the need for a more robust legal framework to regulate PMSCs. PMSCs evolve rapidly, with an extraordinary capacity to adapt quickly to new situations, clients' needs and challenges. The existing voluntary frameworks do not address the challenges that we face in the contemporary PMSC landscape, such as the negative impact on the environment and in particular on the rights of people to self-determination, the development of private cyber operations, relationships with non-state actors, climate change and migration, to name the few.

For these reasons, the Working Group believes that only clear legal norms contained in an international, legally binding instrument on PMSC can guide States in their use, recruitment, authorization and licensing of PMSCs.

2. Scope of the instrument

Moreover, the Second Zero Draft still focuses only on the extraterritorial provision of PMSC services. However, as we have repeatedly emphasized, the instrument should be expanded to include the domestic provision of services. States should take all measures necessary to ensure the legal liability of companies based in or managed from the State party's territory regarding human rights violations as a result of their activities conducted domestically and abroad. National legislation should contain extraterritorial provisions, which can facilitate the prosecution of PMSC and their personnel for abuses.

3. Key provisions that the instrument should consider

State use of force

The draft instrument should reiterate the State monopoly on the use of force. In particular, the future instrument should specify operations that should be forbidden and others that should be specifically regulated.

For instance, the future instrument should outlaw the direct participation in hostilities, and should prohibit contracting States from outsourcing activities that international law assigns to States, such as exercising the power of the responsible officer over detention including prisoners of war or internment camps, or in peace time, the police powers of arrests, and interrogations. Furthermore, the instrument should ensure that States adopt a clear and precise domestic legal framework on the use of force and firearms.

IHL, Human rights abuses and crimes

The Second Revised Draft still lacks a broad and detailed articulation of applicable human rights and IHL. The instrument should adopt stronger measures on the prevention of human rights abuses by PMSCs. The reference to international humanitarian law should include all relevant rules of IHL, including the Hague Conventions, as well as to make a clear reference to customary IHL as relevant for contemporary armed conflicts. Furthermore, the future instrument should recognize PMSC obligations under IHL. In addition, the instrument should contain a clear list of abuses that will fall within its scope.

Transfer of weapons

Very few States address the question of the illegal provision, acquisition and possession of weapons, and its consequences. The future instrument should contain clear provisions on illegal provision, acquisition and possession of weapons as well as the transfer of weapons during and post conflict.

Transparency and victim-centered approach

The instrument should contain strong provisions on transparency which would facilitate effective access to justice and remedies and should contain provisions to ensure accountability.

In the majority of cases, victims remain without effective redress including access to justice and remedy decades after the alleged violations and abuses occurred. As the Working Group has regularly noted, in addition to transparency, issues such as corruption, complex legal structures of companies or contractual relationships, often cross-border, pose major challenges. The instrument should ensure mutual legal assistance that would allow States to investigate and share evidence in support of any relevant judicial proceedings.

We welcome the opportunity to engage constructively on this process during this session and in future. Chair, delegates, colleagues, thank you for your kind attention.

On behalf of the Working Group on the use of Mercenaries
Geneva, 17 April 2023, Dr. Jelena Aparac