

**SECOND DRAFT ~~ZERO~~ INSTRUMENT ON AN INTERNATIONAL REGULATORY
FRAMEWORK ON THE REGULATION, MONITORING OF AND OVERSIGHT OVER
THE ACTIVITIES OF PRIVATE MILITARY AND SECURITY COMPANIES**

PREAMBLE

The [Signatory States][States Parties] to this Instrument:

(PP1) *Reaffirming* the principles and purposes of the Charter of the United Nations; ~~the sovereign equality, territorial integrity and political independence of all States, the right of self-determination of peoples, and the prohibition of the threat, or use of force, in international relations;~~

(PP1bis) Reaffirming the principles and purposes of the Charter of the United Nations the sovereign equality, territorial integrity and political independence of all States, the right to self-determination of peoples, the prohibition of the threat or use of force in international relations, the principle of non-intervention in matters that are essentially within the domestic jurisdiction of any State and the obligation of States to promote universal respect for, and observance of human rights and fundamental freedoms;

(PP1bis) Recalling the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant of Civil and Political Rights, and other relevant international instruments in the fields of human rights, International Humanitarian Law and international criminal law, and general international law principles on the responsibility of States for internationally wrongful acts;

(PP2) *Recalling* Human Rights Council resolution 15/26 of 1 October 2010 that established the open-ended working group to consider the possibility of elaborating an international regulatory framework on the ~~registration~~ regulation (1), monitoring

of and oversight over the activities of Private Military and Security Companies and their personnel; and

~~(PP3) Recalling further that the Human Rights Council in its resolution 36/11 of 28 September 2017 established a new open-ended intergovernmental working group for a period of three years, with a mandate to elaborate the content of an international regulatory framework, without prejudging the nature thereof, to protect human rights and ensure accountability for violations and abuses relating to the activities of Private Military and Security Companies, which was renewed for a further period of three years by resolution 45/16 adopted on 6 October 2020;~~(2)

(PP4) (a) Recalling the Geneva Conventions of 1949 and their Additional Protocols of 1977, the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work..., and (b) the obligation of High Contracting Parties and other parties to armed conflicts to respect and ensure respect for International Humanitarian Law in all circumstances, and the responsibility of non-State actors, including business entities, to respect international human rights standards and ensure respect for international humanitarian law in all circumstances;

(PP4bis) Bearing in mind other relevant international conventions, including the International Labour Organisation Conventions, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and its two Protocols;

(PP4ter) Concerned about the increasing delegation or outsourcing of inherently State functions which undermines States' capacity to retain their monopoly on the legitimate use of force;

(PP4quart) Expressing concern at the increasing and alarming violations of International Human Rights Law and abuses of human rights related to [linked to] the activities of Private Military and Security Companies and their personnel, including

but not limited to extrajudicial, summary or arbitrary executions, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, arbitrary detention, forced displacement, trafficking in persons, confiscation or destruction of private property, forced labour, recruitment and use of children and child labour, hostage-taking, sexual and gender-based violence and trafficking of weapons and drugs;

(PP5) Mindful thereof that States bear the primary responsibility to prevent violations of International Human Rights Law and of International Humanitarian Law and are therefore obliged to ensure respect thereof by Private Military and Security Companies and their personnel, and to take appropriate steps to prevent, investigate, prosecute, punish and redress abuses through establishing appropriate jurisdiction, effective remedies for victims, effective policies, legislation, regulations and adjudication, including to provide for civil, administrative or criminal liability for enterprises and associated persons present or operating in their territory or jurisdiction; (3)

(PP56) *Recognising* the right to protect all persons affected by the activities of Private Military and Security Companies and their personnel, whether civilians or military personnel **from violations and abuses** of their rights as provided for in International Human Rights Law (4) and violations of International Humanitarian Law, and the need to provide victims with equal ~~and effective~~ access to ~~justice and~~ judicial and other effective (5) remedies and reparation;

(PP6bis) Recognising the need to provide equal and effective access to justice and judicial and other remedies / equal access to judicial and other effective remedies and reparation as provided by international law, including the UN Basic Principles and Guidelines on the right to remedy and reparation;

- (PP67) *Recognising further the contribution of the Montreux Document on pertinent international legal obligations and good practices for States relating to operations of Private Military and Security Companies during armed conflict, the International Code of Conduct for Private Security Providers and the United Nations Guiding Principles of Business and Human Rights, amongst others, in establishing an expectation that PMSCs will respect human rights in their business operations, regulating the activities of Private Military and Security Companies and preventing abuses or violations during such activities as well as setting standards for access to effective remedies for abuses to which they have caused or contributed;*
- (PP78) *Acknowledging that self-regulation voluntary regimes/initiatives by Private Military and Security Companies isare not sufficient to ensure the observance of International Human Rights Law and International Humanitarian Law by their personnel and that business enterprises are required to respect human rights and International Humanitarian Law;*
- (PP89) *Recognising that international minimum legal standards and the effective implementation thereof in domestic law are required to enhance these existing voluntary regimes in order to prevent violations of International Human Rights Law and of International Humanitarian Law and to ensure that the activities of Private Military and Security Companies and their personnel are carried out in accordance with international law;*
- (PP910) *Mindful of the assistance rendered by Private Military and Security Companies to a variety of clients, inter alia public or private, while respecting International Human Rights Law and International Humanitarian Law; to States governments, humanitarian actors and peacekeeping missions; and that States retain their obligations under international law when contracting such companies;*

(PP11) *Mindful* of the assistance rendered by Private Military and Security Companies to a variety of clients, *inter alia* to governments, the United Nations, international organisations, humanitarian actors and peacekeeping missions;

(PP12) *Concerned* about the differentiated impacts of the activities of Private Military and Security Companies on different groups of the societies in States where such Companies are operating, and especially on individuals and groups in vulnerable situations, including, but not limited to, women, children, ~~and~~ people with disabilities, indigenous peoples, human rights and environmental defenders, migrants, refugees, and asylum seekers;

(PP12bis) Emphasising the need to integrate a gender perspective in all aspects of the regulation of Private Military and Security Companies to ensure that such regulation addresses the experiences and concerns of both men and women;

(PP12ter) Recognizing that in all actions concerning children, including in the context of the activities of Private Military and Security Companies, the best interests of the child shall be a primary consideration, and shall be respected in pursuing remedies for violations of the rights of the child, and that such remedies should take into account the need for child-sensitive procedures at all levels;

[Have reached the following understandings][Hereby agree as follows]:

[PARAGRAPH][ARTICLE] 1

DEFINITIONS

For the purposes of the present Instrument:

- (a) “Contracting State” means a State that directly contracts with Private Military and Security Companies for their services, including where the contracted company subcontracts with another Private Military and Security Company or where the

contracted Private Military and Security Company operates through its subsidiary companies;

- (b) “Home State” means a State where a Private Military and Security Company has its ~~centre of activity~~ principal place of management, is incorporated, registered or domiciled in or has its main place of business or conduct substantial activities;
- (c) “Military services” means specialized services that resembles or is related to military action, including strategic planning, intelligence, investigation, reconnaissance, flight operations, manned or unmanned, satellite surveillance, transfer of military technologies, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities, whether on land, in the air or at sea, or whether in cyberspace or space;(6)
- (d) “Private Military and ~~or~~ Security Company” means a private business entity, irrespective of how it describes itself, which provides on a compensatory basis military and/or security services through natural persons or other legal entities;
- (e-) “Personnel” means persons employed by, through direct hire or under a contract with a Private Military or Security Company, including employees and managers;
- (f) “Security Services” means armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing application, development and implementation of informational security measures and other related activities;

(g) “Subcontractors” means.....(input awaited)

(gh) “State Functions” are functions which are consistent with the principle of the State monopoly on the legitimate use of force that a State cannot outsource to Private Military and/or Security Companies under any circumstance, including but not limited to, direct participation in hostilities (as defined in international law),

waging war and/or conducting combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of, and other activities related to, weapons of mass destruction, exercising police powers, especially powers of arrest or detention and the interrogation of detainees. (7)

(h) “State of Nationality” means a State of the nationality of employees or other personnel of Private Military and Security Companies;

(i) “Territorial State” means a State where a Private Military and Security Company carries out activities regardless of whether the company is incorporated or not within such State’s jurisdiction, or the duration and kind of operations;

(k) “Victim” means a person or group of persons who suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions in the context of the activities of Private Military and Security Companies that constitute gross violations abuses of human rights and of international human rights law. A person shall be considered a victim regardless of whether the perpetrator of such abuses and violations is identified, apprehended, prosecuted or convicted.

[PARAGRAPH][ARTICLE] 2 OBJECTIVES

The objective of this Instrument is to:

- (a) Ensure that the rights of persons are not negatively impacted – by the activities of Private Military and Security Companies and their personnel [and sub -contractors?];
- (b) Provide for the regulation of and transparent oversight over the operations of Private Military and Security Companies, their personnel and sub-contractors, by [signatory States][States Parties] according to ~~minimum standards in~~ international law, to

ensure the protection and fulfilment of human rights and International Humanitarian Law by Private Military and Security Companies and their personnel in the environments wherein they operate, as applicable;

- (c) provide for the circumstances under which such companies their personnel and sub-contractors could be held accountable for abuses of human rights and violations of International Humanitarian Law;
- (d) ensure access to information, access to justice and effective avenues of redress and remedy for victims of rights abuses by Private Military and Security Companies, their personnel, and their sub-contractors;
- (e) prohibit Private Military and Security Companies and their personnel from exercising State functions;
- (f) strengthen awareness of the existing conditions where State Responsibility will be incurred for abuses of human rights and violations of International Humanitarian Law by Private Military and Security Companies and their personnel;
- (g) provide for effective investigation and prosecution of persons responsible for the abuses of human rights and violations of International Humanitarian Law.

[PARAGRAPH][ARTICLE] 3

SCOPE

- (1) In relation to a Home State, this Instrument is applicable in situations that involve persons, whether a legal person or a natural person, engaging in activities that provide private military and security services in any territory outside its Home State, or provide services in its Home State that is connected to the provision of private military and security services outside its Home State, or exercises control from its Home State over

a person that provides private military and security services outside the territory of the that person's Home State. (8)

- (2) Subject to paragraph (1), this Instrument shall apply to all situations, including situations of conflict, where private military and security services are provided by Private Military and Security Companies and their personnel and their sub-contractors.

[PARAGRAPH][ARTICLE] 4
GENERAL OBLIGATIONS OF STATES

(1) [Signatory States][States Parties] recognise their obligation to respect, protect and fulfil human rights and to respect and ensure respect for International Humanitarian Law and to ensure the respect of human rights and International Humanitarian Law by Private Military and Security Companies and their personnel within their jurisdiction.

(1bis) [Signatory States][States Parties] [undertake to][shall] adopt legislation for the regulation of and oversight over Private Military and Security Companies and their personnel and the provision of military and security services. (9)

(2) [Signatory States][States Parties] [undertake to][shall] take appropriate measures steps to criminalise in their domestic law abuses by Private Military and Security Companies and their personnel of international Human Rights Law and violations of International Humanitarian Law, specifically, but not limited to, war crimes, crimes against humanity, genocide, grave ~~violations of~~ breaches of the Geneva Conventions of 1949 and their Additional Protocols of 1977, forced labour, and other crimes under international law.

(3) [Signatory States][States Parties] [undertake to][shall] through their domestic law prohibit Private Military and Security Companies and their personnel from exercising State functions.

(4)[Signatory States][States Parties] [undertake not to][shall not] employ Private Military and Security Companies and their personnel in any function that would result in such personnel directly participating in hostilities. (10)

[PARAGRAPH][ARTICLE] 5
OBLIGATIONS WITH RESPECT TO
REGISTRATION, LICENSING AND RECRUITMENT

- (1) [Signatory States][States Parties] [undertake to][shall] adopt legislation for the regulation and monitoring of and oversight over Private Military and Security Companies and their personnel and the provision of military and security services.
- (2) [Signatory States][States Parties] [undertake to][shall] establish an effective licensing system in their domestic law to ensure that Private Military and Security Companies do not import and export their services without appropriate licenses.
- (3) [Signatory States][States Parties] [undertake to][shall] require Private Military and Security Companies, to qualify for a license, to adopt policies providing for:
 - (a) the integration of human rights and International Humanitarian Law principles across their operations, including an internal code of conduct, ethics and behaviour;
 - (b) gender commitments prohibiting discrimination and promoting gender and other forms of diversity and gender-specific internal policies;

(b)is) the undertaking of human rights due diligence to identify, prevent and mitigate negative human rights impacts arising from their activities which will include human rights, labour and environmental impact assessments prior and throughout their operations;

- (c) ensuring training in International Human Rights Law and International Humanitarian Law, the rules relating to the use of force and the use of weapons;
- (d) effective recruitment, selection and vetting procedures for personnel to prevent the employment of persons suspected of or convicted for human rights abuses and International Humanitarian Law violations as well as sexual and gender-based violence;
- (e) effective internal mechanisms for monitoring, supervising and ensuring accountability for alleged violations of International Human Rights Law and violations of International Humanitarian Law; and
- (f) compliance with fundamental international human rights labour and environmental standards.

(4) [Signatory States][States Parties] [undertake to][shall] monitor ~~criminalise in their domestic law~~ the activities of Private Military and Security Companies and their personnel and apply sanctions when these activities are undertaken without the required registration or license and authorisation, including the export and import of military and security services.

(5)[Signatory States] [States Parties] shall ensure that their licensing systems prohibit the provision of military and / or security services to a Territorial State without the permission of that State.

(6) [Signatory States][States Parties] [undertake to][shall] ensure that adequate human and financial resources are available for the regulation and monitoring of and oversight over Private Military and Security Companies.

(7) [Signatory States][States Parties][undertake to][shall] establish independent competent authorities to provide for monitoring, accountability and oversight of the Private Military and Security Company industry.

[PARAGRAPH][ARTICLE] 6
OBLIGATIONS OF CONTRACTING STATES

- (1) Without prejudice to the other obligations provided for in this Instrument, Contracting States [undertake to][shall], when entering into contracts with Private Military and Security Companies, ensure that such government contracts:
 - (a) incorporate requirements to ensure respect by such companies and their personnel for the domestic law of the Contracting State, International Human Rights Law and International Humanitarian Law;
 - (b) prevent the personnel of Private Military and Security Companies from engaging in any conduct amounting to either direct participation in hostilities or the exercising of State Functions;
 - (c) are not concluded with Private Military and Security Companies that are not registered and licenced; and
 - (d) prohibit sub-contracting to non-registered and non-licensed companies.
- (2) Contracting States [undertake not to][shall not] enter into contracts with Private Military and Security Companies for the provision of services that have been assigned by international law to States or State agencies as inherently State functions.

[PARAGRAPH][ARTICLE] 7
OBLIGATIONS OF TERRITORIAL STATES

- (1) Territorial States [undertake to][shall] ensure that no State Functions are carried out within their jurisdiction by Private Military and Security Companies and their personnel.

- (2) Territorial States [undertake not to][shall not] allow Private Military and Security Companies that are not registered and licensed in terms of this Instrument to operate within their jurisdiction.

[PARAGRAPH][ARTICLE] 8
OBLIGATIONS OF HOME STATES

In addition to the obligations of Territorial States, Home States [undertake to][shall] in their domestic law determine which military and security services cannot be exported and criminalise the export of such prohibited services.

[PARAGRAPH][ARTICLE] 9
OBLIGATIONS OF STATES OF NATIONALITY

States of nationality [undertake to][shall] adopt legislation to regulate the recruitment of their nationals by Private Military and Security Companies to serve abroad and prohibit their nationals to engage in any activity that is prohibited by this Instrument.

[PARAGRAPH][ARTICLE] 10
JURISDICTION

- (1) [Signatory States][States Parties] [undertake to][shall] provide for criminal jurisdiction over Private Military and Security Companies and its personnel when the company, or its parent or controlling company, is incorporated in, or is registered or domiciled in, or has its main place of business or substantial activities in the territory of that State or in a territory wherein it is able to exercise jurisdiction.
- (2) [Signatory States][States Parties] [undertake to][shall] establish its jurisdiction through its domestic law over applicable offences (11) provided for in this Instrument when such offences are committed:

- (a) in the territory of that State ~~(or a territory under its control)~~; (12)
 - (b) on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;
 - (c) by a national of or person ~~ordinarily~~ resident (13) in that State;
 - (d) against a national of or a person ordinarily resident in that State;
 - (e) outside the territory of that State ~~(or a territory under its control)~~, or its territorial waters, including to the extent allowed by the international Law of the Sea in the Exclusive Economic Zone of any State or on the High Seas and the offence constitutes a crime under international law; (14)
 - (f) by an alleged offender who ~~are~~ is present in the territory of the [Signatory State][State Party] after the commission of the offence in another State.
- (3) This Instrument does not exclude any additional grounds for criminal jurisdiction that ~~exists~~ under international law or the domestic law of [Signatory States][States Parties].

[PARAGRAPH][ARTICLE] 11

REGULATION OF THE USE AND ACQUISITION OF WEAPONS AS WELL AS THE USE OF FORCE

- (1) [Signatory States][States Parties] [undertake to][shall] adopt legislation to:
- (a) regulate the acquisition, licensing, ~~transferimport, export, storage, transport~~ and use of weapons by Private Military and Security Companies and their personnel in ~~terms of international standards relating to arms control; accordance with established international standards relating to arms control and norms, including International Humanitarian Law;~~

(abis) prohibit Private Military and Security Companies and their personnel from using weapons and/or engaging in any activities related to certain types of weapons, such as weapons of mass destruction, weapons which cause superfluous injury or unnecessary suffering, or which are to cause widespread, long-term and severe damage to the environment, as well as from trafficking in firearms, their parts, components or ammunition and other related accessories;

(ater) clarify that the use of force by Private Military and Security Companies must be guided by the personal right to self-defence unless explicitly authorised by law to perform wider tasks;

(b) require Private Military and Security Companies to effectively train their personnel in the law relating to the lawful use of force, with respect to the provision of private military and security services, including in a situation of armed conflict.

(2) [Signatory States][States Parties] [undertake to][shall] introduce effective customs control and other forms of control over the import and export and re-import and re-export of weapons used by Private Military and Security Companies and their personnel.

(3) [Signatory States][States Parties][undertake to][shall] refrain from transferring arms when they assess, in accordance with applicable domestic laws, regulations and procedures and international obligations and commitments, that there is a clear risk that such arms might be used to commit or facilitate serious (gross?) violations or abuses of international human rights law or serious violations of international humanitarian law.

[PARAGRAPH][ARTICLE] 12

STATE RESPONSIBILITY

Without prejudice to other possible grounds for responsibility of the State under international law and the prohibitions contained in [Paragraphs][Articles] 1(g), 4(4), 6(1)(b), and 9, and consistent with the principles international law, State Responsibility may arise pursuant to the use of Private Military and Security Companies.

[PARAGRAPH][ARTICLE] 13

ACCESS TO JUSTICE, ACCOUNTABILITY AND REMEDIES

(1) [Signatory States][States Parties] [undertake to][shall] ensure, through judicial, administrative, legislative or other appropriate means, that victims of abuses of human rights and violations of International Humanitarian Law within their territory or under their jurisdiction shall have equal ~~and~~ effective, child-friendly and gender-sensitive access to a remedy and adequate, effective and prompt reparations.

(1 bis) [Signatory States][States Parties] [undertake to][shall] guarantee that victims are treated with humanity and respect for their dignity and human rights, and their personal integrity, safety, physical and psychological well-being and privacy shall be ensured;

(1 ter) [Signatory States][States Parties] [undertake to][shall] guarantee victims, adults and children alike, access to information in relevant languages and accessible formats, including those with disabilities, and legal aid relevant to pursue effective remedies;

(1)(2) Without prejudice to Paragraph/Article 13(1), [Signatory States][States Parties] [undertake to][shall] provide for non-judicial grievance procedures that are legitimate, accessible, predictable, equitable, rights-compatible, transparent and a source of continuous learning to identify lessons for improving the mechanisms.

[PARAGRAPH][ARTICLE] 14

INVESTIGATION AND PROSECUTION

- (1) [Signatory States][States Parties] [undertake to][shall] conduct effective and impartial investigations and prosecute persons suspected of having committed applicable crimes.
- (2) [Signatory States][States Parties] [undertake not to][shall not] grant immunity from prosecution to Private Military and Security Companies, their personnel or their contractors for crimes committed anywhere they operate.

[PARAGRAPH] [ARTICLE 15 MUTUAL LEGAL ASSISTANCE, EXTRADITION AND SURRENDER

(1) [Signatory States] [States Parties] [undertake to] [shall] provide one another with mutual legal assistance in the investigation and prosecution of the ~~crimes covered by offenses provided for in~~ this Instrument.

(1 bis) [Signatory States][States Parties] may invite any State not party to this Instrument to provide mutual legal assistance and international judicial cooperation under this provision on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.

(2) [Signatory States][States Parties] [undertake to][shall] extradite or surrender persons suspected of having committed applicable crimes in terms of their domestic law or bilateral and multilateral agreements to a State or international criminal tribunal having jurisdiction over such crime.

(2 bis) If the law of the Requested State does not allow for the extradition of its citizens on the grounds of their nationality, the Requested State shall, by request of the Requesting State, submit the case to its competent authorities so that, if judged needed, procedures suitable can be performed. Such request shall be accompanied

by the relevant procedural documentation and evidence relating to the offence. The Requesting State shall be informed of the outcome of the case.

[PARAGRAPH] [ARTICLE 16]

COOPERATION

(1) [Signatory States] [States Parties] [undertake to] [shall] for the purpose of sharing information, establish a national contact point for the collection, analysis and exchange of information on companies providing military and / or security services and possible violations of national and international law.

(2) [Signatory States][States Parties] [undertake to][shall] share information on the activities of Private Military and Security Companies with a view to ensure effective regulation of and oversight over their activities with a view to investigate and prosecute possible crimes committed by such companies and/or their personnel.

(2bis) [Signatory States][States Parties] [undertake to][shall] establish a monitoring and reporting mechanism to which they will report on their implementation of the International Regulatory Framework on Private Military and Security Companies. Monitoring and reporting [is to be][shall] be undertaken by their respective National Contact Points. Monitoring [is to be][shall] be ongoing and conducted on a biannual basis. The respective reports [is to be][shall] be collected and disseminated to the membership by the Secretariat.

[PARAGRAPH][ARTICLE] 17

INTERNATIONAL HUMANITARIAN LAW

This Instrument is without prejudice to the ~~provisions~~ principles of International Humanitarian Law and International Human Rights Law, ~~including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949, the two Additional Protocols thereto of 8 June 1977, and the third Additional Protocol thereto of 8 December 2005, and other relevant obligations in International Humanitarian Law.~~

ARTICLE 18 SETTLEMENT OF DISPUTES

Legally binding text:

- (1) States Parties shall endeavour to settle disputes concerning the interpretation and application of this Instrument through consultations and negotiation.
- (2) Any dispute between two or more States Parties concerning the interpretation or application of this Instrument that cannot be solved through consultations and negotiation within six months of the date of request for such settlement shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of arbitration, those States Parties are unable to agree on the terms of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice in accordance with the Statute of the Court.

ARTICLE 19 SIGNATURE, RATIFICATION AND ACCESSION

- (1) This Instrument will be open for signature by all United Nations Member States from to
- (2) This Instrument shall be open for ratification by all States that signed it. Instruments of ratification shall be deposited with the Depositary.

- (3) Non-Signatory Member States of the United Nations may accede to this Instrument by depositing an instrument of accession with the Depositary.

ARTICLE 20 ENTRY INTO FORCE

- (1) This Instrument shall enter into force days after the deposit of the instrument of ratification or accession.
- (2) For each State acceding to this Instrument after its entry into force, it shall enter into force days after the depositing of the instrument of accession.

ARTICLE 21 AMENDMENTS

- (1) After expiry of five years from the entry into force of this Instrument, any State Party may propose an amendment to this Instrument to the Depositary, which shall circulate the proposal forthwith to all States Parties and other United Nations Member States for the purpose of considering and deciding on the proposal in the United Nations Human Rights Council.
- (2) States Parties shall make every effort to reach agreement on any proposed amendment to this Instrument by consensus. If all efforts at consensus have been exhausted, and no agreement is reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the State Parties present and voting during a meeting called by the Human Rights Council in terms of its procedures. For the purposes of this article, States Parties present and voting means States Parties present and casting an affirmative or negative vote.

- (3) The Depositary shall communicate any adopted amendments to all States Parties and other Member States of the United Nations.
- (4) An amendment to this Instrument adopted in accordance with this article shall enter into force for the States Parties which have consented to be bound by it on the ...day after depositing of its instrument of acceptance of the amendment. Any State acceding to the Instrument after the adoption of an amendment shall be bound by such amendment.

ARTICLE 22 RESERVATIONS

Note: Delegations will have to consider whether to allow for reservations.

ARTICLE 23 WITHDRAWAL

- (1) Any State Party may withdraw from this Instrument by giving written notice to the Depositary.
- (2) A withdrawal shall become effective one year after receipt of the notification by the Depositary, or at such later date as may be specified in the notification of withdrawal.

ARTICLE 24 DEPOSITARY AND LANGUAGES

- (1) The Secretary-General of the United Nations is designated as the Depositary of this Instrument.

- (2) The original of this Instrument, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Depositary.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised thereto by their respective Governments, have signed this Instrument.

DONE at on this day of20...

General remarks:

It has been attempted to include all the concrete textual proposals into the text, with the result that a number of new provisions have been added and others have been amended, sometimes reflecting more than one option. Where a preambular paragraph has been split into an (a) and (b) part, it reflects a proposal to contain the text in two preambular paragraphs. It has also been attempted to eliminate internal inconsistencies in the text.

Footnotes:

- (1) Aligned with text of Res 15/26.
- (2) PP2 and PP3 combined into one PP.
- (3) Aligned with text in par. 12 of *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and International Humanitarian Law*.
- (4) The original version of the text referred to “abuses of human rights and violations of International Humanitarian Law” and this is still the case in this (September 2022) text, except where reference is made to “International Human Rights Law” when “violations” is used. See also footnote 9.
- (5) Text aligned with *United Nations Guiding Principles on Business and Human Rights* par. 25.
- (6) It has been proposed that the definitions of respectively “Military Services” and “Security Services” in Paragraph 1 (c) and (f) be deleted as they contain closed lists of activities that may be too specific in view of the quickly changing nature of the PMSC industry, and that only the definition of “Private Military and Security Company” in Paragraph 1 (d) be maintained. However, this definition refers to military services and security services, and it is submitted that the including but not limited to” formula be used,

as is the case with Paragraph 1(g) (State Functions). There was also a proposal to define “Military Services” to mean “specialized services that resemble or are related to military action.” One delegation proposed that the definitions of military and security services overlaps with state functions that PMSCs are prohibited to exercise and proposed that a general provision be included along the lines of functions assigned to States by International Humanitarian Law.

(7) It has been proposed that a minimum threshold of activities be included to leave States some leeway on which activities to include. A proposal for a definition to read as follows was also made: “State functions are functions to be carried out exclusively by State organs and that cannot be outsourced to PMSCs.”

(8) It is recalled that the Working Group has discussed the scope of the Instrument in respect of whether it should also apply to the private security industry within a State, which is usually regulated by domestic legislation, or only to activities undertaken outside of the boundaries of a State or within a State but which has a linkage to operations abroad. In this respect, a proposal was received to delete Paragraph 3(1) and amend 3(2) to read as follows:

“This Instrument shall apply to all situations, including situations of armed conflict, to the relationship between States and PMSCs.”

(9) It has been proposed to amend Paragraph 4(2) to read as follows:

“In accordance with their international obligations, Signatory States/States Parties shall ensure that their domestic law criminalises conduct of PMSCs or their personnel that constitutes grave breaches of the Geneva Conventions of 1949 and Additional Protocol I of 1977 and other crimes, including war crimes, crimes against humanity and genocide.”

(10) It has been proposed to amend Paragraph 4(5) to read as follows:

“[Signatory States][States Parties] shall not employ services of Private Military and Security Companies in activities that entail direct participation in hostilities that would result in such personnel directly participating in hostilities.”

(11) The question has been raised on whether to use the terms “offences,” “crimes” or “violations” can be used interchangeably. The Oxford English Dictionary (Tenth Edition) defines these terms as such:

Crime: an action which constitutes a serious offence against an individual or the state and which is punishable by law;

Offence: an act or instance of offending;

Violate (verb): break or fail to comply with a rule or formal agreement.

In the text, in line with general practice, the term “crime” is used to denote crimes as established in international law: war crimes, crimes against humanity and other international crimes; “violations” denotes a breach of established law, namely International Human Rights Law or International Humanitarian Law, “abuses” refer in general to human rights being impaired and offences, in our experience, refers to the criminalisation of an act in the domestic law of a State. In the South African *Implementation of the Geneva Conventions Act, 2012* (Act No. 8 of 2012) grave breaches of the Geneva Conventions are criminalised in domestic law by providing that persons committing a grave breach will be guilty of an offence under South African law (Section 5(1)). The South African *Implementation of the Rome Statute Act* (Act 27 of 2002) provides in Section 4(1) for jurisdiction over any person who commits a crime is guilty of an offence”. The United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* distinguishes between “gross” and “serious” violations.

“Applicable offences” has been changed to “offences provided for in this Instrument”, which are the offenses provided for in Paragraph 4(2).

(12) It has been proposed that a footnote be included with respect to -Paragraph 10 (a) and (c) reading as follows:

“This article shall only have effects for the purposes of the present Instrument and its clauses and shall have no legal implications over territorial disputes or be interpreted as a change in the position of the parties involved in such disputes with regard to sovereignty.”

(13) The term “ordinarily resident” is understood to mean habitual residence in a State, which in itself is a vague term. In our experience it is a concept of domestic law which may be linked to formal residential status and is often used in international agreements on the avoidance of double taxation. By deleting the word “ordinarily”, the term “resident” may acquire a slightly more defined meaning.

(14) While a form extraterritorial jurisdiction is provided for in this provision, it is submitted that this is in line with contemporary international law and the domestic law of many states as the jurisdiction applies to international crimes. Shaw comments that the jurisdiction of States extends according to the universality principle, “irrespective of the place of commission of the crime and regardless of any link of active or passive nationality or other grounds of jurisdiction” to piracy, war crimes, crimes against the peace and crimes against humanity (Shaw, N.M., *International Law* 10th Ed., p. 668 – 671).