

BEFORE THE
OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
WORKING GROUP ON THE USE OF MERCENARIES

SUBMISSION ON BEHALF OF THE
NATIONAL INSTITUTE OF MILITARY JUSTICE

February 22, 2022

1. *Introduction.* This memorandum is respectfully submitted to the Working Group on the Use of Mercenaries in response to the call for inputs in the Working Group's annual thematic report to be presented to the Human Rights Council's 51st session. The memorandum is confined to two paragraphs of the call for inputs:

13- What efforts can be made to increase and secure the accountability of mercenaries, mercenary related actors and PMSC [private military and security companies] at a local level, in particular what effective structures and legal frameworks should be put in place to make mercenaries and PMSC accountable for their actions, abuses and violations?

14- In the case or situations where victims cannot seek justice and remedy domestically particularly in the absence of an effective judicial system or when state authorities are accomplice to the abuses how can other jurisdictions (for instance home jurisdictions for PMSC, or universal jurisdiction) take up prosecution or at least offer a forum for complaints, including the exercise of extraterritorial jurisdiction or other models of international cooperation, including international legal cooperation.

2. *Identity of the submitting organization.* The National Institute of Military Justice (NIMJ) is a nongovernmental organization founded in 1991 and incorporated in the District of Columbia. NIMJ's overall purposes are to advance the fair administration of justice in the armed forces and to foster improved public understanding of military justice. It has no connection with the government of the United States or with any PMSC. Its Directors, Officers, Fellows and Distinguished Fellows include law professors and private practitioners, many of whom have served on active duty as military lawyers. Earlier this year, NIMJ named a number of leading non-US experts as Fellows and Distinguished Fellows. More information about NIMJ and its leadership and activities may be found on our website, www.nimj.org.

3. *The Decaux Principles.* NIMJ Officers, Directors and Fellows were active in the Decaux Principles Workshop conducted at Yale Law School on March 23-24, 2018. Among the distinguished participants was Judge Diego García-Sayán, Special Rapporteur on the Independence of Judges and Lawyers. The workshop produced the "Yale Draft" revision of the 2006 Draft UN Principles Governing the Administration of Justice Through Military Tribunals (also known as the Decaux Principles, after Prof. Emmanuel Decaux), E/CN.4/2006/58. A copy of the Yale Draft is attached.

4. *NIMJ's suggestions.* First, in the search for effective accountability mechanisms, we recommend against any resort to military courts. Such courts should be reserved for the trial of service-connected offenses by serving military personnel. As Principle No. 3 of the Yale Draft provides: "The purpose of military courts is to contribute to the maintenance of military discipline inside the rule of law through the fair administration of justice. Military courts should only try cases that have a direct and substantial connection with that purpose, unless the accused is deployed overseas and it would not be appropriate to subject him or her to the jurisdiction of the ordinary courts of the sending or receiving States." Of relevance to the prosecution of offenses by PMSC personnel, Principle No. 6 of the Yale Draft provides:

Military courts have no jurisdiction to try civilians except where there are very exceptional circumstances and compelling reasons based on a clear and foreseeable legal basis, made as a matter of record, justifying such a military trial. Those circumstances only exist, where:

- (a) Such a trial is explicitly permitted or required by international humanitarian law;
- (b) The civilian is serving with or accompanying a force deployed outside the territory of the sending State and there is no appropriate civilian court available; or
- (c) The civilian who is no longer subject to military law is to be tried in respect of an offence allegedly committed while he or she was serving as a uniformed member of the armed forces or he or she was a civilian subject to military law under paragraph (b).

Paragraph 38 of the Yale Draft adds:

. . . If a State does try civilians in military courts, the circumstances in which this is permitted must be prescribed in national law. The State has the burden of proving that the circumstances are exceptional in the sense of this principle, both in general terms and in each specific case.

If the Working Group decides to suggest that the use of military courts is permissible as a last resort to punish offenses by mercenaries, it should stress that the foregoing limitations on the use of military courts (as well as the critical procedural protections set forth in Principles Nos. 2 and 4, among others, of the Yale Draft) must be scrupulously observed.

5. Second, as a corollary to the above, States should ensure that their domestic criminal law extends beyond their borders to reach major offenses that may be committed by their nationals and nationally-based companies. Thus, paragraph 38 of the Yale Draft provides that "States should consider extending the jurisdiction of their civilian courts to offences allegedly committed by civilians accompanying a force outside their national territory and ensuring that their civilian courts have the capacity to fulfill this role." There are many examples of extraterritorial criminal legislation. In the United States, for example, Congress enacted the Military and Extraterritorial Jurisdiction Act specifically for the purpose of filling gaps in the reach of the military justice system as a result of a series of judicial decisions construing the U.S. Constitution and the Uniform

Code of Military Justice (UCMJ). NIMJ notes that the UCMJ currently permits the exercise of military jurisdiction over civilians serving with or accompanying an armed force in the field in time of a declared war or contingency operation. The Supreme Court has not ruled on the constitutionality of that grant of jurisdiction, which has been exercised extremely sparingly. Other federal legislation reaches certain overseas criminal conduct of government contractors or occurring at American overseas installations and embassies.

6. Finally, if a State does not have a functioning civilian court system, it should establish or re-establish one forthwith rather than turning to its military justice system, even though that system may be the only currently functioning system of criminal justice.

7. *Disclosure of comments.* NIMJ has no objection to making this submission available to the public.

8. *Point of contact.* NIMJ's point of contact for this submission is Eugene R. Fidell, Senior Research Scholar in Law, Yale Law School, eugene.fidell@yale.edu.

Respectfully submitted,

NATIONAL INSTITUTE OF MILITARY JUSTICE

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