

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

PREAMBLE

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

- (PP1) *Reaffirming* the Purposes and Principles of the Charter of the United Nations;
- (PP2) *Recalling* the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, [the International Convention on the Protection of All Persons from Enforced Disappearance](#), [the Convention on the Prevention and Punishment of the Crime of Genocide](#) –and the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts;
- (PP3) *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 regulation, monitoring of and oversight over the activities of Private Military and Security Companies and their personnel and in its resolution 36/11 of 28 September 2017 that 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 by resolutions 45/16, adopted on 6 October 2020, and 54/11, adopted on 11 October 2023;

Commented [CG1]: The following inputs are not meant to be an exhaustive account of TRIAL International’s views on the draft prospective instrument but are aimed at highlighting some preliminary areas of concern, and at formulating the corresponding recommendations.

- (PP4) *Recalling* the Geneva Conventions of 1949 and ¹ their Additional Protocols of 1977 and 2005, the 1907 Hague Convention IV Respecting the Laws and Customs of War and its Annexed Regulations and the obligation of each High Contracting Party and other parties to an armed conflict to respect (and ensure respect)² for International Humanitarian Law, including customary International Humanitarian Law, (all International Humanitarian Law obligations) in all circumstances;
- (PP5) *Recalling further* the responsibility of business entities and their personnel to respect international Human Rights Law, International Humanitarian Law, and International Criminal Law;
- (PP6) *Bearing in mind* the International Labour Organisation Conventions, notably the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work as amended in 2022, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and its two Protocols; the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children;
- (PP7) *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] negatively impacts State capability to protect human rights³; / *Concerned* about the risk posed by excessive or otherwise inappropriate use of Private Military and Security Companies by States for certain functions, including the use of force⁴;

Commented [CG2]: Here the **Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition** (2001) might also be referenced. It has been ratified by 123 States and this would make it consistent with Draft Art. 11, para.c.

¹ Deletion of "as applicable" proposed by two State delegations noting that the Additional Protocols are part of Customary International Law.

² A State expressed concern about the obligation to "ensure respect" for IHL. As no consensus has been reached on deletion, this wording has not been deleted in the remainder of the text.

³ Proposal by a delegation.

⁴ New proposal made by a State delegation.

(PP8) Expressing concern at reports of **crimes under international law**, violations of International Humanitarian Law and **abuses and violations of** International Human Rights Law ~~and abuses of human rights~~ [related to][linked to] the activities of [some] Private Military and Security Companies, their personnel and sub-contractors, 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, including forced labour, the unlawful recruitment or use of children in armed conflict, the unlawful use of child labour, confiscation or destruction of private property, hostage-taking, all forms of sexual and gender-based violence, including sexual exploitation, abuse and harassment, and illicit trafficking of weapons and drugs;

Commented [CG3]: It is here contended that, to capture the range of conducts attributable to PMSCs, their personnel and sub-contractors, the phrase "**crimes under international law, abuses and violations of International Human Rights Law and violations of International Humanitarian Law**" should be preferred and used consistently across the entire text. Where the relevant provision refers to State responsibility, it is suggested that the phrase should be "**violations of International Human Rights Law and International Humanitarian Law**" -

(PP9) Affirming that States bear the primary responsibility **[] certain duties** to prevent violations of International Human Rights Law ~~and~~ International Humanitarian Law **as well as International Criminal Law** and have an obligation, **[within their capacity]**, to ensure respect for International Humanitarian Law by Private Military and Security Companies they contract, their personnel and sub-contractors;

Commented [CG4]: We suggest to erase "certain duties". The fact that States bear the responsibility to prevent violations of IHRL and IHL perpetrated by PMSCs (as well as any other private actor) is well established in the case law as well as referenced in General Comments of human rights mechanisms.

A good summary can be found in Human Rights Committee, General Comment No. 36, 2018, paras. 15 and 21 (and relevant footnotes).

Along the same lines, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgement, 26 February 2007, at paras. 428-430; IACtHR, *Case of Velásquez-Rodríguez v Honduras*, Series C 4 (1988), at paras 174-177; *Case of González et al. ('Cotton Field') v Mexico*, IACtHR Series C No 205 (2009) at paras 252 and 280; *Case of the Hacienda Brasil Verde Workers v Brazil*, at paras 322-323; *Case of López Soto and others v Venezuela*, IACtHR Series C No 362 (2018) at paras 130 and 138-141; ECtHR, *Osman v United Kingdom*, Application No 23452/94, Merits and Just Satisfaction, 28 October 1998, at paras. 115 - 116; ECtHR, *Case of Mastromatteo v Italy* Application No 37703/97, Merits and Just Satisfaction, 24 October 2002, at paras. 67-68.

The African Commission on Human and Peoples' Rights, General Comment No. 3 on the Right to Life, 2015, paras. 38-40 can also be referenced.

With regard to IHL, a good summary can be found here: <https://www.icrc.org/en/document/ihl-and-private-military-security-companies-faq>

Commented [CG5]: According to our previous comment we would suggest here to erase the sentence in brackets as the references quoted above with regard to the duty to prevent apply here and refer to a full-fledged obligation (not only "within their capacity").

(PP10) Recalling the obligation on High Contracting Parties to the Geneva Conventions of 12 August 1949 to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Conventions and noting that ensuring accountability for abuses or violations of International Human Rights Law and International Humanitarian Law linked to the activities of Private Military and Security Companies, requires that States take appropriate steps to prevent, investigate, prosecute, punish and redress abuses and violations through establishing appropriate jurisdiction, effective remedies for victims, effective policies, legislation, regulations and adjudication, including to provide for civil, administrative or criminal liability as applicable for Private Military and Security Companies, their personnel and sub-contractors present or operating in their territory or jurisdiction;

(PP11) *Mindful* thereof that State Responsibility may be incurred ~~under specific conditions~~ for abuses and violations of International Human Rights Law ~~of human rights~~ and violations of International Humanitarian Law by Private Military and Security Companies, their personnel and their subcontractors;⁵

(PP12) *Recognising* the obligation to protect all persons within their power and within their territory and jurisdiction, from violations and abuses of their rights as provided for in International Human Rights Law instruments and violations of International Humanitarian Law, ~~(and the need to provide victims with equal access to judicial and other effective remedies and reparation)~~⁶;

(PP13) *Recognising* the obligation need to ensure access to information, and provide fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive equal and effective access to justice and effective avenues of redress and remedy for victims, their families and dependants, and judicial and other remedies / equal access to judicial and other effective remedies [and reparation] as provided by international human rights law, including as detailed in the UN 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 on the right to remedy and reparation;

(PP14) *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 on Business and Human Rights*, amongst others, in establishing an expectation that Private Military and Security Companies will respect human rights in their business operations, and will seek to mitigate abuses and adverse human

Commented [WU6]: We suggest to retain and replace "need" with obligation, bearing in mind well established international human rights jurisprudence on the matter.

Commented [WU7]: The language proposed draws from Art. 4, para. 2 (c), of the forthcoming legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises – version of July 2023 (Draft instrument on human rights and transnational corporations). See also Principle 5, as well as Principle 7, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation: "Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms." See also the language contained in Art. 1, para. 9, of the Draft instrument on human rights and transnational corporations and consider adding more harmonized language.

⁵ A delegation proposed that the matter of State Responsibility be moved to the Preamble, resulting in the deletion of Paragraph/Article 2(f) and 12. A reference to the ILC's Draft articles on State Responsibility has been included in pp2.

⁶ Deletion of this text proposed by a State delegation. However, other delegations insisted that text with respect to reparations be strengthened.

rights impacts during such activities as well as setting standards for access to effective remedies for abuses to which they have caused or contributed;

- (PP15) *Concerned* about the risk and reports of an increase in abusive and unlawful labour practices, trafficking in persons, including forced labour and forced child labour, on the part of some Private Military and Security Companies and their sub-contractors⁷;
- (PP16) *Acknowledging* that voluntary regimes/initiatives by Private Military and Security Companies should be supplemented to promote the observance of International Human Rights Law and compliance with International Humanitarian Law by their personnel and sub-contractors and that business enterprises have a responsibility to respect human rights and applicable International Humanitarian Law;
- (PP17) *Recognising* that international standards and the effective implementation thereof in domestic law and practice enhance these voluntary regimes in order to prevent abuses of International Human Rights Law and violations of International Humanitarian Law and to ensure that the activities of Private Military and Security Companies, their personnel and subcontractors are carried out in accordance with international law;
- (PP18) *Mindful of* the assistance rendered by Private Military and Security Companies, their personnel and subcontractors to a variety of clients, public or private;
- (PP19) *Concerned* about the differentiated impacts that unlawful activities of Private Military and Security Companies, their personnel and sub-contractors have on different groups of the societies in States where such Companies are operating, and especially on individuals and groups in vulnerable situations and other marginalized communities, [including, but not limited to], women, children, elderly persons, personseple with disabilities, indigenous Ppeoples, members of the LGBTIQ+ community, members of marginalized racial, ethnic and indigenous

⁷ This text overlaps with PP8, but was included as proposed by a number of delegations.

communities, human rights –defenders, including those working on environmental matters, internally displaced persons, migrants, refugees, and asylum seekers;

(PP20) *Emphasising* the need to adopt a gender transformative perspective in all aspects of the regulation of Private Military and Security Companies to ensure that ~~its~~ ~~such~~ ~~regulation~~ addresses the experiences and concerns of individuals;

(PP21) *Recognizing* that in all actions concerning children, including in the context of the activities of Private Military and Security Companies, their personnel and sub-contractors, the best interests of the child [shall] [should] be a primary consideration, and [shall][should] be respected in pursuing remedies for abuses 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 contracts for the services of Private Military and Security Companies, including where such a Private Military and Security Company operates through its subsidiary companies or where the contacted company subcontracts with another Private Military and Security Company under a contract with the Contracting State.
- (b) “Home State” means a State of nationality of a Private Military and Security Company, i.e. where a Private Military and Security Company is incorporated or registered; if the State where the Private Military and Security Company is incorporated is not the one where it has its principal place of management then the State where the Private Military and Security Company has its principal place of management is the “Home State”;

- (c) “Private Military and Security Company” means a private business entity, including entities owned or partially owned by a State, and irrespective of how it describes itself, which provides military and/or security services, and include internal business units providing such services. Military and security services include, in particular, guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; advice to or training of local forces and security personnel, 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 space⁸.
- (d) “Personnel” means persons employed by, through direct hire or under a contract with, a Private Military and Security Company, including employees and managers;
- (e) “Subcontractor” means an independent natural or legal person, including a private business entity, who undertakes by a contractual arrangement with a Private Military and Security Company to fulfil military or security services or obligations outsourced to it by such Private Military and Security Company. A subcontractor is not employed by the Private Military and Security Company.
- (f) [“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 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

⁸ As guided by delegations, the definitions of military and security services have been deleted as they overlapped with the definition of Private Military and Security Company. This definition includes the definition of Military and Security Services contained in par. 9 (a) of the Preface of the Montreux Document as well as text from the now deleted definition of Military Services

activities related to, weapons of mass destruction, exercising police powers, especially powers of arrest or detention and the interrogation of detainees.]⁹

- (g) “State of Nationality” means a State of the nationality of employees or other personnel of Private Military and Security Companies;
- (h) “Territorial State” means a State on whose territory Private Military and Security Companies operate;
- (i) “Victim” means a person who, whether individually or collectively as a member of a group has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights and fundamental freedoms, **including as a consequence of environmental damage or degradation**, as a direct **or indirect** result of acts or omissions ~~of the activities of Private Military and Security Companies~~, that constitute violations or abuses of human rights or violations of International Humanitarian Law. ~~Where appropriate, and in accordance with domestic law,~~ The term “Victim” also includes the immediate family or dependants of the primary victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. **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 [provide a (regulatory) framework]:

- (a) ensure that the rights of persons, including the personnel of Private Military and Security Companies and their subcontractors, are not negatively impacted by the activities of such Companies and their personnel and sub-contractors and agents;¹⁰

⁹ A number of delegations proposed the deletion of this definition and reference to “State functions” in the text. However, there is not yet consensus in this regard.

¹⁰ Proposed by a State delegation. “Agent” has not been defined and only included where indicated by the delegation and not throughout the text.

Commented [CG8]: For language see: ILC, Draft principles on protection of the environment in relation to armed conflicts (Draft principles on the protection of the environment), 2022; See also Terminology on Disaster Risk Reduction, United Nations International Strategy for Disaster Reduction (UNISDR).

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Commented [CG9]: Consider either erasing the words in brackets or modifying with the following formulation: in accordance with domestic law, international principles and jurisprudence
For language, see Principle 5, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation: “8. (...) Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”. See also Art. 24, para. 1, of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED).

Commented [CG10]: We suggest to delete the brackets and keeping this sentence. See Principle 5, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation

- (b) provide, in accordance with States' obligations under international law, in particular international human rights law and International Humanitarian Law, for the regulation of and transparent oversight over the operations of Private Military and Security Companies, their personnel, sub-contractors and agents, to prevent such violations of such law arising from their conduct in the environments wherein they operate.
- (c) ~~describe the circumstances under which~~ provide for [Signatory States][States Parties] to prevent and take all necessary measures to hold accountable PMSCs such companies, their personnel, sub-contractors, and clients and agents for crimes under international law, ~~could be held accountable for~~ abuses and violations of International Human Rights Law and violations of International Humanitarian Law;
- (d) ensure access to information ~~and provide fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive~~ access to justice and effective avenues of redress and remedy for victims, ~~as defined in Draft art. 1, para. ii in the context of activities by Private Military and Security Companies, their personnel, their sub-contractors and agents~~;
- (e) prohibit Private Military and Security Companies, their personnel, their sub-contractors and agents, in view of the State monopoly on the use of force, from exercising State functions; [enable States to determine which services may or may not be performed by Private Military and Security Companies within their respective jurisdictions] [prohibit States from contracting Private Military and Security Companies to carry out activities that International Humanitarian Law explicitly assigns to a State agent or authority]/ Encourage States to define the scope of inherently governmental functions that may not be performed by Private Military and Security Companies.¹¹
- (f) provide for effective reporting and grievance mechanisms, ~~protection of including~~ whistleblowers ~~and victims~~ – as defined in Draft art. 1 para. i, ~~protection and take all necessary measures for the~~ the investigation and ~~(appropriate)~~ prosecution of persons ~~(allegedly)~~ responsible for ~~crimes under international law, for~~ abuses of human rights

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Commented [CG11]: See for language art. 33 UN Convention against Corruption: "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention". See also, and consider reproducing in whole or in part, the language of Art. 5 of the Draft instrument on human rights and transnational corporations: "5.1. States Parties shall protect victims, their representatives, families, and witnesses from any unlawful interference with their human rights and fundamental freedoms, including prior, during and after they have instituted any proceedings to seek access to effective, prompt, and adequate remedy, as well as from re-victimization in the course of these proceedings. 5.2. States Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence, insecurity, harassment, or reprisals. 5.3. States Parties shall investigate human rights abuses covered under this (Legally Binding Instrument), effectively, promptly, thoroughly, and impartially, and where appropriate, take action against those natural or legal persons responsible, in accordance with domestic and international law. 5.4. States Parties, pending the resolution of a case, shall adopt, either ex officio or on request by the victim, precautionary measures related to urgent situations that present a serious risk of or an ongoing human rights abuse".

¹¹ Proposed by a State delegation. No consensus has been reached about this paragraph.

and violations of International Humanitarian Law (in accordance with Draft art. 4, para. 3).

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[PARAGRAPH][ARTICLE] 3
SCOPE

This Instrument shall apply/ applies to all situations, including [situations of conflict][situations of armed conflict and humanitarian actions], where private military and security services are provided by Private Military and Security Companies, their personnel and their sub-contractors.

[PARAGRAPH][ARTICLE] 4
GENERAL OBLIGATIONS / COMMITMENTS OF STATES

- (1) [States Parties][States Participants] recognise that nothing in this instrument impairs their obligations to respect and protect -human rights and to respect and ensure respect for International Humanitarian Law and to ~~seek to promote~~ ensure/secure the respect of human rights and International Humanitarian Law by Private Military and Security Companies, their personnel and subcontractors within their jurisdiction.
- (2) [States Parties][States Participants] [should][shall] enact any legislation and other measures necessary for the regulation of and oversight over Private Military and Security Companies, their personnel and subcontractors and the provision of military and security services.¹³
- (3) [States Parties][States Participants] [undertake to][shall] take appropriate measures, in line with their obligations in accordance with international law, to criminalise and

¹² A delegation has proposed that a provision be included here on the legal effects of the Instrument should it be decided that it will be not legally binding. However, it is considered that such a provision can only be included once finality has been obtained in this regard.

¹³ Two delegations proposed deletion of this text. Another noted that the text should be amended to reflect that the provision of penal sanctions for grave breaches of the Geneva Conventions is an existing obligation in terms of the Conventions and not a new obligation. This can be done by replacing in specific circumstances” with “in accordance with their international obligations.”

Commented [CG12]: By becoming parties to International human rights treaties, States also assume obligations under international law to protect human rights. This obligation requires States to protect individuals and groups against human rights abuses (including those perpetrated by non-State actors). Reference is mostly found in international jurisprudence of human rights courts (ECtHR, ACPHRs, IACTHR) and Treaty Bodies. For examples of specific references, see above the comment to preambular paragraph 9.

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Commented [CG13]: We would suggest and welcome a rephrasing of this paragraph by the Experts to reflect/clarify conducts States are already under the obligation to criminalize (notably crimes under international law, as provided by IHL, IHRL and ICL) and new potential conducts this Instrument wishes to ask States to criminalize (also by referring to pertinent international law instruments). In terms of forms of liability, commission and ordering are limited and do not encompass all liability forms. We therefore suggest to consider language contained in Art. 6, para. 2 and 3, Draft articles on Prevention and Punishment of Crimes Against Humanity, adopted by the International Law Commission at its seventy-first session, in 2019, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/74/10). See also Art. 6, para. 1 (a) (b) and (c), ICPEd as well as Arts. 25 and 28 of the Rome Statute of the International Criminal Court for additional language.

provide effective penal sanctions in their domestic law for the commission of and the ordering of the commission of abuses by Private Military and Security Companies, their personnel and subcontractors of International Human Rights Law and for violations of International Humanitarian Law, including, but not limited to, war crimes, crimes against humanity, genocide, grave breaches of the Geneva Conventions of 1949 and where applicable, their Additional Protocols of 1977, forced labour, trafficking in persons, illicit trafficking of drugs, long-term and severe damage to the environment and the use of weapons prohibited under international law and other crimes under international law.

- (4) [States Parties][States Participants] [undertake to][shall] through their domestic law prohibit Private Military and Security Companies, their personnel and sub-contractors from exercising State functions.
- (5) [States Parties][States Participants] [undertake not to][shall not] contract Private Military and Security Companies, their personnel or sub-contractors to carry out activities for the purpose of direct participation in hostilities/combat / that International Humanitarian Law explicitly assigns to a State agent or authority or that would result in their participation in acts of aggression or other unlawful uses of force¹⁴.

[PARAGRAPH][ARTICLE] 5

OBLIGATIONS / COMMITMENTS WITH RESPECT TO
REGISTRATION, LICENSING AND RECRUITMENT

- (1) [States Parties][States Participants] [undertake to][shall] adopt and maintain legislation, regulations and policies/appropriate measures for the regulation and monitoring of and oversight over Private Military and Security Companies, their personnel and sub-contractors subject to their jurisdiction and the provision by those persons of military and security services.

¹⁴ New proposal made by a State delegation.

- (2) [States Parties][States Participants] [undertake to][shall] establish an effective¹⁵ licensing system in their domestic law to ensure that Private Military and Security Companies do not offer/provide their services without appropriate licenses.
- (3) [States Parties][States Participants] [undertake to][shall] require Private Military and Security Companies, to qualify for a license, adopt and implement policies / legislation to promote:
- (a) the integration of standards of human rights and International Humanitarian Law and other international standards on the prevention and combating of corruption and trafficking in persons across their operations, including an internal code of conduct, ethics and behaviour;
 - (b) gender commitments prohibiting discrimination and promoting gender equality and other forms of diversity and gender-specific internal policies;
 - (c) the undertaking of human rights due diligence and human rights impact assessment to identify, prevent and mitigate the risks of negative human rights impacts and abuses arising from their activities which will include human rights, labour and environmental impact assessments prior and throughout their operations;
 - (d) training for PMSCs and sub-contractors' personnel in International Human Rights Law and International Humanitarian Law, and relevant standards and rules governing the individual use of force and, where applicable, the use and management of weapons and ammunition, as well as rules on protection of the environment, the use of lethal and non-lethal equipment and the prevention of labour and sexual exploitation and abuse, ~~where applicable~~;

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¹⁵ A delegation proposed that reference must be made to potential risks. However, this provision focuses on a licensing system, the term "risk-based" having been proposed by a delegation. If delegations agree, the text can be amended to include that such a licensing system should take into account the risk of violation of international human rights law or International Humanitarian Law, or other risks that may be applicable.

- (e) effective recruitment, selection, and vetting procedures for personnel and the keeping of records to prevent the employment of persons likely to commit/with a record of involvement in human rights abuses and International Humanitarian Law violations, sexual offences and sexual and gender-based violence, corruption-related acts, serious crime (including organised crime), and violent crime;
 - (f) effective internal mechanisms [including through third party independent verification] for monitoring, supervising and ensuring accountability for alleged abuses and violations of International Human Rights Law and violations of International Humanitarian Law;
 - (g) compliance with international human rights, applicable environmental standards as specified in international environmental agreements and applicable international labour standards;
 - (h) transparency of contracts for the provision of military and security contracts for prime contractors and sub-contractors and adequate transparency of the beneficial ownership status;
 - (i) **clear identification** of their personnel by means of distinctive uniforms, emblems, and insignia; and
 - (j) recruitment and employment policies and procedures to ensure that force, fraud, or coercion are not used in the recruitment and employment of personnel, including personnel of subcontractors.
- (4) [States Parties][States Participants] [undertake to][shall] monitor compliance including by means of regular reporting systems, by Private Military and Security Companies, their personnel and sub-contractors, and consider imposing applicable civil and criminal penalties when activities are undertaken without the required registration or license and authorisation, including the export and import of military and security services.

Commented [CG14]: We support the importance of clear identification to allow victims to identify potential perpetrators of crimes under international law, abuses and violations of International Human Rights Law and violations of International Humanitarian Law

- (5) [States Parties][States Participants] shall ensure that their licensing systems prohibit [adequately regulate] the provision of military and / or security services [in a Territorial State without the permission of that State] and provide adequate oversight.
- (6) States Parties][States Participants] [undertake to][shall] allocate adequate human and financial resources for the regulation and monitoring of and oversight over Private Military and Security Companies, including by establishing competent authorities to provide for monitoring, accountability and oversight of the Private Military and Security Company industry in relation to the requirements for registration, licensing, recruitment and training and contract transparency.

[PARAGRAPH][ARTICLE] 6
OBLIGATIONS / COMMITMENTS OF CONTRACTING STATES

Without prejudice to the other obligations/ commitments provided for in this Instrument, Contracting States [undertake to][shall], when entering into contracts with Private Military and Security Companies:

- (a) Provide that such government contracts promote adherence [ensure respect] by such companies, their personnel and sub-contractors for the domestic law of the Contracting State, International Human Rights Law and International Humanitarian Law [incorporate applicable requirements under the domestic law of the Contracting State and International Human Rights Law and International Humanitarian Law];
- (b) prohibit the personnel of Private Military and Security Companies or the personnel of sub-contractors from carrying out activities in any conduct amounting to either direct participation in hostilities or the exercising of functions or the provision of services that have been assigned by international law to States or State agencies as inherently State functions; or that International Humanitarian Law explicitly assigns to a State agent or authority, or that would result in their participation in acts of aggression or other unlawful uses of force.

- (c) Ensure that such contracts are not concluded with Private Military and Security Companies that are not in compliance with applicable laws and regulations, including registration and licensing requirements; and that such companies do not sub-contract with non-registered and non-licensed companies;

[PARAGRAPH][ARTICLE] 7

OBLIGATIONS/ COMMITMENTS OF TERRITORIAL STATES

- (1) Territorial States should determine which services may or may not be performed by Private Military and Security Companies within their respective jurisdictions.
- (2) Territorial States [undertake not to][shall not] allow Private Military and Security Companies not in compliance with their applicable registration and licensing requirements to operate within their jurisdiction.

[PARAGRAPH][ARTICLE] 8

OBLIGATIONS / COMMITMENTS OF HOME 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.]
[Home States should ensure that their domestic law sufficiently regulates the provision of services by Private Military and Security Companies].

[PARAGRAPH][ARTICLE] 9

OBLIGATIONS / COMMITMENTS OF STATES OF NATIONALITY

States of nationality [undertake to][shall] adopt or strengthen legislation and policies [appropriate measures] to regulate the recruitment of their nationals [and persons resident

in the State] by Private Military and Security Companies to serve abroad, including to mitigate the risk that such nationals and residents are subjected to trafficking in persons, including forced labour, by the imposition of recruitment fees, and to prohibit their nationals to engage in any activity that is prohibited by this Instrument [by applicable and domestic international law].

[PARAGRAPH][ARTICLE] 10
JURISDICTION

- (1) [States Parties][States Participants][undertake to][shall] provide for criminal, ~~and civil, administrative~~ jurisdiction over Private Military and Security Companies and their personnel when the company, or its parent or controlling company, is incorporated in, or is registered or domiciled in, or has its principal place of management or substantial activities in the territory of that State or in a territory wherein it is able to exercise jurisdiction.
- (2) [States Parties][States Participants] [undertake to][shall] establish their jurisdiction through domestic law over offences referenced in [article] [paragraph] 4(3) of this Instrument based on applicable international law when such offences are committed:
- (a) in the territory of that State;
 - (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 habitually resident in that State;
 - (d) against a national of or a person resident in that State;
 - (e) outside the territory of that State or its territorial waters, including to the extent allowed by the United Nations Convention on the Law of the Sea and provided in

Commented [CG15]: We would welcome the Experts contribution on this clause to specify conditions for criminal, administrative and civil jurisdiction over legal persons. Reference here could be made to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation; UN Guiding Principles on Business and Human Rights; preambular para. 10 of this Instrument and the Draft instrument on human rights and transnational corporations.

Commented [CG16]: We are looking forward to the Experts contribution on conditions for criminal jurisdiction over natural persons. As an example, language can be taken from other instruments, such as the Draft articles on Prevention and Punishment of Crimes Against Humanity, art.7: Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in the following cases: (a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory; (c) when the victim is a national of that State if that State considers it appropriate. 2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles. 3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law; See also Art. 5, para. 1, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): "1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate". See as well Art. 9, para. 1, ICPED: "1. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance: (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is one of its nationals; (c) When the disappeared person is one of its nationals and the State Party considers it appropriate".

each case that the offence constitutes a crime under international law and the establishment of jurisdiction is appropriate;

(f) by an alleged offender who is present in the territory of the [State Party] [State Participant] after the commission of the offence in another State, and where the establishment of jurisdiction is appropriate.

(3) This Instrument does not exclude any additional grounds for criminal jurisdiction that exist under international law or the domestic law of [States Parties][States Participants].

[PARAGRAPH][ARTICLE] 11

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

(1) [States Parties][States Participants] [undertake to][shall] adopt and maintain national laws and regulations / appropriate measures to:

(a) regulate the acquisition, licensing, transfer, storage, transport and management of weapons by Private Military and Security Companies and their personnel in accordance with legal obligations and established international standards relating to weapons;

(b) prohibit any transfer to Private Military and Security Companies and their personnel or subcontractors of weapons the use of which is prohibited under applicable international law and prohibit such Companies, their personnel and subcontractors from engaging in any activities related to such weapons, [which include weapons of mass destruction, weapons which cause superfluous injury or unnecessary suffering, or which are to cause indiscriminate, long-term and severe damage to the environment and inherently abusive security goods and equipment].

- (c) prohibit Private Military and Security Companies, their personnel and subcontractors from trafficking in firearms, their parts, components or ammunition and other related accessories;
- (d) require Private Military and Security Companies to effectively train their personnel in the law governing the individual use of force, guided by the personal right to self-defence (or defence of others) with respect to the provision of private military and security services, including in a situation of armed conflict.
- (2) [States Parties][States Participants] [undertake to][shall] introduce effective customs control and other forms of control over the transfer, including import, export, re-import, re-export, transit, trans-shipment and brokering of weapons, military or related equipment used by Private Military and Security Companies, their personnel and subcontractors.¹⁶
- (3) [States Parties] [States Participants] [undertake to][shall] not authorise any transfer of arms to Private Military and Security Companies when they assess, in accordance with applicable domestic laws, regulations and procedures and international obligations and commitments, that there is an overriding risk that such arms might be used to commit or facilitate violations or abuses of international human rights law or serious violations of international humanitarian law./ [States Parties] [State Participants] should develop standards governing the transfer of arms to Private Military and Security Companies, and sub-contractors, including consideration of the risk that such arms might be used to commit or facilitate the commission of crimes under international law, violations and ~~violations of abuses of International Human Rights –human rights–~~ or violations of International Humanitarian Law, in accordance with applicable international and domestic law.

[PARAGRAPH][ARTICLE] 12

¹⁶ It has been proposed that the text of the Arms Trade Treaty be used to cover this provision as well as (3) (of which the basic elements are based on the ATT. Articles 7 – 9 of the ATT seem to cover this matter and are quite detailed.

ACCESS TO JUSTICE, ACCOUNTABILITY AND REMEDIES

- (1) [States Parties][States Participants] [undertake to][shall] ensure, through judicial, administrative, legislative or other appropriate means, that victims, as defined in art. 1, para. 1, of abuses of human rights and violations of International Humanitarian Law caused by Private Military and Security Companies, their personnel and sub-contractors within their territory or under their jurisdiction shall have equal effective, child-friendly and gender-responsive access to a remedy and adequate, effective and prompt reparations including environmental remediation and ecological restoration.
- (2) [States Parties][States Participants] [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 is protected;
- (3) [States Parties][States Participants] [undertake to][shall] without discrimination guarantee victims, adults and children alike, including those with disabilities, access to information in relevant languages and accessible formats, and legal aid relevant to pursue effective remedies to the extent possible or practical in accordance with domestic law;
- (4) Without prejudice to [Paragraph][Article] 13(1), [States Parties][States Participants] [undertake to][shall] provide [should consider providing] for non-judicial grievance procedures that are legitimate, independent, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.

[PARAGRAPH][ARTICLE] 13 INVESTIGATION AND PROSECUTION

- (1) [States Parties] [States Participants] [undertake to][shall] conduct effective, thorough and impartial investigations in relation to related to alleged crimes committed within their territory or [subject to their] jurisdiction by Private Military and Security Companies, their personnel and sub-contractors and, where appropriate, prosecute

Commented [CG17]: Consider the inclusion of a dedicated paragraph along these lines – that could be complemented by further provisions :

"1. States [Parties] shall adopt adequate legislative measures to guarantee that victims and their families and dependants have fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice and fair and impartial proceedings. To that end, States [Parties] should:

(a) Disseminate, through public and private mechanisms, information about all available remedies;

(b) Take measures to minimise the inconvenience to victims and their families, dependants and representatives; protect them from unlawful interference against their privacy and ensure their protection from re-victimization as well as safety from intimidation and retaliation, before, during and after any proceedings, as well as that of witnesses and whistle-blowers, including through appropriate protective and support services that are gender and age responsive;

(c) Provide proper assistance, including psycho-social support and free legal aid, to victims seeking access to justice and remedy, their families and dependants;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims, their families and dependants can have fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice and exercise their right to an effective remedy and prompt, integral, effective and adequate reparation".

For language see Principle 8, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation. See also the language of Art. 4, para. 2 (c) and (e), of the Draft instrument on human rights and transnational corporations.

Commented [CG18]: We believe this paragraph could benefit from borrowing some language from the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, UN Guiding Principles on Business and Human Rights, and the Draft instrument on human rights and transnational corporations especially current art. 4, 5 and 7. For instance, we suggest consider spelling out specific measures of reparation victims should be provided with, that can encompass compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.

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Commented [CG19]: See Art. 4, para. 2 (c), of the Draft instrument on human rights and transnational corporations.

Commented [CG20]: We would suggest here to consider, in accordance with Principle 31 of the UNGP on Business and Human Rights, to include "and adopt legislative measures to ensure that PMSCs and their sub-contractors equally provide non-judicial grievance procedures following the same standard".

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persons suspected/alleged perpetrators of ~~having committed~~ such crimes in accordance consistent with their domestic law and international obligations.

- (2) [States Parties][States Participants][undertake not to][shall not] grant immunity [in their courts] from prosecution to Private Military and Security Companies, their personnel or their contractors for crimes committed anywhere they operate except for the purpose of the effective prosecution of perpetrators.

Commented [CG21]: We would welcome suggestions by the Experts to complement this paragraph on immunity with prohibition of amnesty and other related measure. Some language to be considered :
 "Ensure that PMSCs, their personnel and sub-contractors that have or are alleged to have committed crimes under international law, abuses of International Human Rights Law and violations of International Humanitarian Law - in accordance with the definition contained in draft article 4, paragraph 3 -, do not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanctions".
 See for instance Art. 18, para. 1, of the Declaration on the Protection of all Persons from Enforced Disappearance adopted by General Assembly resolution 47/133. See also Principle 24 of the UN Principles against Impunity.

[PARAGRAPH] [ARTICLE] 14

MUTUAL LEGAL ASSISTANCE, EXTRADITION AND SURRENDER

- (1) [States Parties][States Participants] [undertake to] [shall] provide one another with mutual legal assistance in the investigation and prosecution of the offenses referred to in [Paragraph][Article] 4(3) of this Instrument [in terms of their domestic law or bilateral or multilateral agreements].¹
- (2) [[States Parties][States Participants] 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.¹⁷
- (3) [States Parties][States Participants] [undertake to][shall] in accordance with domestic legislation extradite or surrender persons suspected of having committed offences referred to in [Article][Paragraph] 4(3), where appropriate, to a State or international criminal tribunal having jurisdiction over such crime.
- (4) 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] [pursue prosecution consistent with its domestic law and international obligations]. Such request shall be accompanied by the

Commented [CG22]: We would welcome suggestions from the Experts on the reformulation of this paragraph.

As a basis, we might suggest to use language contained in the Ljubljana-The Hague Convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes and other international crimes as well as human rights treaties.
 See for instance: Art. 9, para. 1, CAT: "1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings".
 Art. 14, para. 1, ICPEP: "1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings". See also Art. 15 ICPEP: "States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains". See as well Art. 12 of the draft instrument on human rights and transnational corporations for alternative wording.

¹⁷ A delegation has proposed that this provision be deleted.

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

[PARAGRAPH] [ARTICLE] 15
COOPERATION

- (1) [States Parties][States Participants][undertake to][shall], consistent with their domestic law and their international obligations [for the purpose of sharing information], establish a National Contact Point or other authority for the collection, analysis and exchange/sharing of information on companies and their sub-contractors providing military and / or security services and possible violations of national and international law provided for in this Instrument.
- (2) [States Parties][States Participants][undertake to][shall], consistent with their domestic law, including the law related to privacy, and international obligations share information on the activities of Private Military and Security Companies with a view to ensure effective regulation and monitoring of and oversight over their activities with a view to investigate and prosecute possible crimes committed by such companies, their personnel or subcontractors.
- (3) States Parties][States Participants] [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]¹⁸.

[PARAGRAPH][ARTICLE] 16

¹⁸ It has not as yet been agreed that a Secretariat will be established.

INTERNATIONAL -LAW

(1) This Instrument [is without prejudice to][reaffirms applicable] International Humanitarian Law, International Human Rights Law, [International Criminal Law](#) –and other applicable International Law, including the law relating to disarmament].

(2) Nothing in this Instrument may be interpreted in a manner inconsistent with International Humanitarian Law, [International Human Rights Law and International Criminal Law](#).

[ARTICLE 17 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 18 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 19
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 20
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 theday 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 21 RESERVATIONS

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

ARTICLE 22 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 23 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...]
