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Mr Chair,

The ICJ thanks Mr Cockayne for his presentation that provides interesting input for our discussion this afternoon. The ICJ views as positive the possible start of negotiations towards an international convention in this field, which in many respects is a necessary step forward.

We should be clear about what an international convention means and what can be achieved through it. As pointed out by the EU delegation this morning, no single instrument –whether binding or not- can be seen as the panacea in this field. An international convention is not the silver bullet that will solve all the problems and challenges that we face in this field. The international community must aim to establish a wise combination of tools and regulatory frameworks to cover the many complex aspects relating to the activities of PMSCs.

An international convention should therefore be approached with modesty, as another –but key - instrument in completing and adding value to existing instruments such as the Montreux document, the Code of Conduct and the Ruggie Guiding Principles. Each one of these have a different character and status under international law and address with varied degrees of precision the issues relating to PMSCs. All have something to offer, and it would be wrong to discard any one of them. But this Working Group should pay attention to the gaps left as this relates to the primary mandate of the Council, namely pertaining to accountability and access to justice, including remedies and reparations. Intimately linked to this are the issues of licensing and oversight.

A convention can complement and create synergies among various instruments and initiatives. It is widely recognized that existing non binding initiatives have weaknesses and limitations. A convention may contribute to addressing those limitations. For instance, within a convention, States might commit to contracting only companies that have signed on to and/or are certified by a system such as the International Code of Conduct or similar mechanism. In the field of remedies and accountability, States should undertake to put into practice several recommendations that appear as good practice in the Montreaux document, for instance, the enactment of corporate criminal liability for serious crimes.

A convention should not only complement existing initiatives but also take stock and develop the useful clarifications provided by regional human rights courts. For example, the European Court of Human Rights has stated that the obligation to safeguard the right to life requires the implementation of legislative and administrative frameworks designed "to provide deterrence against threats to the right to life". It added:

> "This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those

concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks".[1]

The ICJ believes these considerations also apply in the field of PMSCs.

The national and international regulatory frameworks that the ICJ has researched, and elaborated on in its written submission to this session, show substantial normative and supervisory gaps and insufficiencies in terms of setting minimum standards for improving respect of human rights and humanitarian law in the context of PMSCs' activities. The ICJ considers that the creation of an international convention would be an effective way to address these gaps. The viability of such an option was recognised by speakers during the First session of the OEWG.[2] Objections to the idea of a convention in this field seem to relate more to its suggested content and scope rather than its very feasibility.

As the European Commission for Democracy through Law (or the Venice Commission) pointed out, the mere existence of non binding frameworks is not *per se* an argument against a binding instrument.[3] The assertion that other non binding regulatory instruments could serve as an alternative to a binding instrument can be misleading because the two types of instruments belong to very different legal orders and fulfil different functions. One cannot be a substitute for the other, and both are needed. International practice in other areas shows a combination of both can be used effectively without significant problems.

In particular, a treaty is important to set obligatory parameters and standards for licensing, oversight, accountability and remedies. Such an instrument could also lay out the key elements that would form the basis of regulatory legislation at the domestic level.

Of course, the elaboration of an international convention in itself is not sufficient by itself. Ratification by both home States and territorial States is essential, as is good faith implementation. An international body with advisory, promotional and monitoring functions should also be considered

Further, a possible convention should differentiate between the regulation of private security services at home and abroad, and clarify the different roles of contracting, territorial and home States.

Using the services of PMSCs does not necessarily threaten the State monopoly on the use of force if States retain control and effective oversight of these companies. Although private security services are used in most States, divergences arise as to whether those services should be allowed to be exported and the extent to which they may be, or risk becoming, of a military nature involving personnel in hostilities. Using PMSCs (civilians) for tasks that may expose them to military hostilities runs against the humanitarian law principle of distinction. There is a growing consensus about the need to avoid the engagement of PMSC personnel in direct hostilities. A protective approach is needed and States should be required to ensure that civilians are not engaged in hostilities. The ICJ considers that there are also compelling human rights arguments in favour of not outsourcing the tasks of detention and/or interrogation including outside situations of armed conflict. Equally, PMSCS providing security services to clients including other companies in volatile environments must be closely and carefully regulated. This can be done through rigorous licensing, registration and oversight procedures for security services that examine and prevent risks, including those that are performed abroad and especially in volatile contexts. Heightened oversight of contracting practices is essential.

[1] *Oneryildiz v Turkey* Judgement 30 November 2004, paras 89-90. In *Tatar v Romania*, judgment 27 January 2009, the Court clarified that the obligations also apply in relation to private corporations.
[2] See report of OEIWG, for instance remarks by Mr Pachoud, p. 8
[3] Venice Commission Report 2009, *supra* note 1

Stricter processes of licensing, registration, monitoring and a democratic oversight requirement should be applied to security services in countries that allow export of these services, while respecting the choices of other States that do not allow such practice. Jurisdiction for investigation, accountability and provision of remedies are at present dissimilar and should be clarified. This lack of coherence creates an incentive for companies to seek a base in and to operate in countries with lower standards. The criticism of licensing as disproportionately costly for small business and unlikely to meet policy objectives does not bear out when viewed alongside the use of such systems at a national level.

At the level of oversight and accountability, human rights protection institutions such as National Human Rights Institutions, the judiciary or even parliaments seldom have a meaningful role in controlling PMSCs operations or ensuring investigation and remedy. The establishment of clear obligations in that direction is, in the long run, indispensable.

I thank you.

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