

## Human Rights Defenders' Fact Sheet

### Private Military/Security Companies

#### **Disclaimer**

*This document is solely the property of Peace Brigades International. It does not necessarily reflect the views of Peace Brigades International but has been published in order to inform debate and discussion of this important issue. It is the culmination of work by Peace Brigades International and Simmons & Simmons LLP. Lawyers at Simmons & Simmons LLP undertook the legal research covered in the report on a pro bono basis which includes the analysis of the law in England and Wales.*

*This document does not constitute legal advice nor does the report represent the views of Simmons & Simmons LLP. For a definitive view as to the laws and application of those laws in other jurisdictions, advice must be sought from counsel in that jurisdiction. This Fact Sheet was updated in September 2020.*

#### 1. Introduction

1.1 Peace Brigades International (“**PBI**”) provides protection, support and recognition to human rights defenders (“**HRDs**”) working in areas of repression and conflict who have requested support. This may involve assisting HRDs in situations where private military/security companies (“**PMSCs**”) are present.

#### 2. What Are PMSCs?

2.1 PMSCs are private companies that provide military and/or other security services. Such services may include:

- (A) the provision of armed guards and the protection of personnel, convoys and buildings;
- (B) the maintenance and operation of weapon systems;
- (C) prisoner detention; and
- (D) advising and training local police and military forces.

2.2 PMSC personnel are not necessarily “*mercenaries*”.<sup>1</sup> The definition of a “*mercenary*” requires that certain narrow criteria set out in the relevant instruments of international law agreements (described in paragraph 4 below) are met. A State that has ratified one or both of the UN and African conventions against mercenaries has an obligation to prosecute mercenaries.

2.3 Whether or not the personnel of a PMSC may be defined as a “*mercenary*” makes little difference in practical terms. The only consequence in law is that a mercenary captured while participating in an international armed conflict is not entitled to be classified as an enemy combatant or prisoner of war. They are, however, still entitled to adequate conditions of detention and the right to a fair trial.

2.4 While States have an obligation to prosecute mercenaries, the reality is that HRDs who deal with mercenaries are likely to seek recourse against the party engaging the PMSC, whether a State or a company.

---

<sup>1</sup> For the purposes of this note, PMSC personnel include persons employed by, or contracted to, a PMSC, including its employees and managers.

### 3. Issues Faced by HRDs in Relation to PMSCs

3.1 Historically, PMSCs have had a reputation for violating human rights. Issues faced by HRDs may arise in relation to PMSC personnel who:

- (A) lack awareness of their obligations under local laws and/or international human rights law;
- (B) attack or harass a community or parts of communities;
- (C) inflame local conflict situations;
- (D) commit gender-based sexual or physical violence; and/or
- (E) transfer arms between public and private security forces.

3.2 These issues can be exacerbated by PMSC personnel being poorly paid, trained and commanded, and by their perception that there are no, or no likely, consequences for their actions.

### 4. The Legal and Regulatory Framework

4.1 The construction of international law and, in particular, international human rights law, enables it to act as an agent of control over PMSCs and their personnel. The following are of particular relevance:

- (A) Article 47 of the Protocol Additional to the Geneva Convention (1949) and relating to the Protection of Victims of International Armed Conflicts (“**Protocol I**”).<sup>2</sup>

Protocol I defines a “*mercenary*” and confirms that a “*mercenary*” shall not have the right to be a combatant or a prisoner of war.

- (B) The Organisation of African Unity Convention for the Elimination of Mercenarism in Africa (1977) (“**African Convention of Mercenarism**”).<sup>3</sup>

The African Convention on Mercenarism provides a definition of “*mercenary*,” provides for criminal liability and sets out the responsibility of signatory States and their representatives for the acts of “*mercenaries*”. It has been ratified by 31 African States.<sup>4</sup>

- (C) The International Convention against the Recruitment, Use, Financing and Training of Mercenaries (Resolution 44/34-1989) (“**UN Mercenary Convention**”).<sup>5</sup>

The UN Mercenary Convention prevents the recruitment, training, use and financing of mercenaries. It has been ratified by 35 States.<sup>6</sup>

<sup>2</sup> The full text of Protocol I can be found at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>

<sup>3</sup> The full text of the African Convention on Mercenarism can be found at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201490/volume-1490-I-25573-English.pdf>

<sup>4</sup> A full list of parties can be found at: [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=485](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=485)

<sup>5</sup> A link to the UN Mercenary Convention can be found at: [https://treaties.un.org/doc/Treaties/1989/12/19891204%2008-54%20AM/Ch\\_XVIII\\_6p.pdf](https://treaties.un.org/doc/Treaties/1989/12/19891204%2008-54%20AM/Ch_XVIII_6p.pdf)

<sup>6</sup> A full list of signatories can be found at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XVIII-6&chapter=18&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-6&chapter=18&clang=en).

- (D) 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies (“**Montreux Document**”).<sup>7</sup>

The Montreux Document was proposed and developed by the International Committee of the Red Cross and the Swiss Government, together with contributions from PMSCs and non-governmental organisations (“**NGOs**”). It reaffirms States’ legal obligations regarding PMSCs and recommends a series of non-binding good practices for the practical implementation of existing legal obligations (See Schedule 1 for a summary of the good practices). 54 States have now endorsed the Montreux Document.<sup>8</sup>

- (E) International Code of Conduct for Private Security Service Providers (2010) (“**International Code of Conduct**”).<sup>9</sup>

The International Code of Conduct builds upon the principles of the Montreux Document and the “*Respect, Protect, Remedy*” framework developed by the Special Representative of the UN Secretary-General on Business and Human Rights. It sets out a commonly-agreed set of principles for the conduct of PMSC personnel, including in relation to: the use of force; detention; the prohibition on torture and gender-based violence; and discrimination (See Schedule 2 for a summary of the International Code of Conduct principles).

The International Code of Conduct also sets out governance and oversight mechanisms for PMSCs, including in relation to: the selection and vetting of personnel; training; management of weapons; incident reporting; grievance procedures and meeting liabilities.

The International Code of Conduct has been adopted by seven Governments, 98 PMSCs and 18 Civil Society Organisations, all of which are members of the International Code of Conduct Association (“**ICoCA**”).<sup>10</sup> The functions of the ICoCA are threefold:

- (1) To certify member companies and assess whether their systems and policies meet the requirements of the International Code of Conduct.
- (2) To report, monitor and assess the performance of member companies’ compliance with the International Code of Conduct based on established human rights methodologies, including in the field.
- (3) To handle complaints or alleged violations of the International Code of Conduct.

- 4.2 Furthermore, there are other non-binding codes of conduct applicable to specific sectors or industries. For example, the Voluntary Principles on Security and Human Rights (the “**Voluntary Principles**”) are a collaborative effort by governments, major multinational extractive companies and NGOs to provide guidance on practical steps that can be taken to minimise the risk of human rights abuses by PMSCs and their personnel in communities located near extraction sites (See Schedule 3 for a summary of the practical steps).<sup>11</sup>

<sup>7</sup> The full text of the Montreux Document with explanatory comments can be found at:

[https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)

<sup>8</sup> A full list can be found at: <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>

<sup>9</sup> The full text of the International Code of Conduct can be found at [https://icoca.ch/sites/all/themes/icoca/assets/icoc\\_english3.pdf](https://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf)

<sup>10</sup> A full list of ICoCA members can be found at [www.icoca.ch/en/membership](http://www.icoca.ch/en/membership).

<sup>11</sup> Available at: [http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary\\_principles\\_english.pdf](http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/voluntary_principles_english.pdf)

Member organisations have also collaborated to produce associated guidance documents to assist companies and civil society actors to work within the Voluntary Principles.<sup>12</sup>

- 4.3 The UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination was established in July 2005. The General Assembly regularly adopts resolutions on the use of mercenaries that touch on the activities of the Working Group, most recently through resolution 74/138 in 2019 which encourages States to take steps against mercenaries.<sup>13</sup>

## 5. **Practical Steps for HRDs When Dealing with PMSCs**

### 5.1 **Dealing with PMSCs and their personnel**

- 5.2 HRDs should not engage directly with PMSCs and their personnel. If PMSCs and their personnel are operating in the same area as HRDs, the HRDs should (if possible):

- (A) Identify (i) the PMSC; and (ii) the body that has engaged the PMSC.
- (B) Document the conduct of the PMSC personnel as against guidance set out in the Montreux Document, the International Code of Conduct and/or the Voluntary Principles (as to which, see Schedules 1 to 3).
- (C) Document the impact of the PMSC personnel's conduct on local HRDs and the community.

PBI can then assist by raising concerns about breaches of the Montreux Document, the International Code of Conduct or the Voluntary Principles through the appropriate channel.

### 5.3 **Dealing with States that engage PMSCs**

- 5.4 States cannot absolve themselves of their obligations under local or international human rights law by hiring PMSCs; they remain responsible for ensuring that relevant standards are maintained and law respected. The State may be responsible for violations of local and/or international human rights law by the personnel of PMSCs, particularly if the PMSC acts on the instruction of the State or their representatives.

- 5.5 Furthermore, all States have an obligation to ensure that international human rights law is respected. This includes States in which PMSCs are incorporated or otherwise operate.

- 5.6 If it appears that PMSC personnel are violating local laws, local legal advice should be sought. HRDs should check whether that State issues licences or has otherwise established a regulatory framework in which PMSCs must operate. If so, HRDs should seek local legal advice in relation to the apparent breach of these standards.

- 5.7 If it appears that PMSC personnel are violating international human rights laws, HRDs should:

- (A) Check whether the State in which the infringement has occurred or the PMSC itself is a member of ICoCA. If so, HRDs should consider following the ICoCA complaints procedure.

---

<sup>12</sup> For example, in 2015 the Global Compact launched a Guidance Document on the Assurance of the Voluntary Principles to assist companies in assessing their degree of implementation of the Voluntary Principles.

<sup>13</sup> <https://undocs.org/en/A/RES/74/138>

- (B) Check whether the State in which the PMSC is incorporated is a member of ICoCA. If so, consider following the ICoCA complaints procedure.
- 5.8 PBI can also assist by raising concerns about breaches of the Montreux Document, the International Code of Conduct and Voluntary Principles through the ICoCA complaints procedure, with the State or with the UK Government, either directly or as part of an NGO coalition, as appropriate.
- 5.9 **Dealing with companies that engage PMSCs**
- 5.10 Companies often engage PMSCs, particularly when operating in dangerous or unstable environments. If a HRD is dealing with a company that has engaged a PMSC, it should:
- (A) Check whether the company has internal guidance on the use of PMSC on, for example, its website.
  - (B) Check whether any voluntary or non-binding codes have been adopted by, or are applicable to, the company and/or its operations.
  - (C) Check whether the company or the PMSC is a member of ICoCA.
- 5.11 PBI can then assist by raising concerns about breaches of the Montreux Document, the International Code of Conduct or the Voluntary Principles through the ICoCA complaints procedure or with a UK parent company, either directly or as part of an NGO coalition, as appropriate.
- 5.12 For further information on operating in conflict-affect areas, see the separate Fact Sheet on this topic.

## **SCHEDULE 1 –THE MONTREUX DOCUMENT (GOOD PRACTICES RELATING TO PRIVATE MILITARY AND SECURITY COMPANIES)**

### **1. Good Practices for Contracting States**

1.1 Contracting States are States that contract with a PMSC for its services, whether directly or indirectly. Good practices for Contracting States include the following:

- (A) In determining which services may or may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.
- (B) Introducing an adequate procedure for the selection and contracting of PMSCs which, amongst other things, ensures transparency and supervision.
- (C) Adopting criteria for the selection of PMSCs that considers a wide range of quality indicators.
- (D) Including contractual clauses and performance requirements in agreements with PMSCs to ensure adherence with national law, international humanitarian law and human rights law.
- (E) Monitoring compliance and ensuring accountability of PMSCs for their conduct.

### **2. Good Practices for Territorial States**

2.1 Territorial States are States in whose territory PMSCs operate. Good practices for Territorial States include the following:

- (A) In determining which services may or may not be carried out on their territory by PMSCs, Territorial States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.
- (B) Requiring PMSCs to obtain authorisation to provide military and security services in their territory.
- (C) Introducing an authorisation procedure which, amongst other things, ensures transparency in granting authorisations.
- (D) Ensuring that PMSCs fulfil certain quality relevant for the respect of national law, international humanitarian law and human rights law before granting authorisation.
- (E) Including, as terms of the authorisation, requirements to respect human rights.
- (F) Adopting rules on the provision of services by PMSCs and their personnel.
- (G) Monitoring compliance and ensuring accountability of PMSCs for their conduct.

### **3. Good Practices for Home States**

3.1 Home States are States in which a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the Home State. Good practices include:

- (A) In determining which services may or may not be exported, Home States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.
- (B) Establishing a system of authorisation for the provision of military and security services abroad.
- (C) Introducing an authorisation procedure which, amongst other things, ensures transparency in granting authorisations.
- (D) Ensuring that PMSCs fulfil certain quality criteria relevant for the respect of national law, international law and human rights law before granting authorisation.
- (E) Including, as terms of the authorisation, requirements to respect human rights.
- (F) Monitoring compliance and ensuring accountability of PMSCs for their conduct.

## **SCHEDULE 2 – INTERNATIONAL CODE OF CONDUCT (SPECIFIC PRINCIPLES REGARDING THE CONDUCT OF PERSONNEL)**

The International Code of Conduct sets out a commonly-agreed set of principles regarding the conduct of PMSCs and their personnel. The principles require the following conduct:

### **1. General Conduct**

1.1 Treat all persons humanely and with respect for their dignity and privacy and will report any breach of the code.

### **2. Rules on the Use of Force**

2.1 To adopt rules on the use of force.

### **3. Use of Force**

3.1 Take all reasonable steps to avoid the use of force. Any use of force should be proportionate and in a manner consistent with applicable law.

3.2 Not to use firearms except in certain circumstances.

3.3 Any use of force or weapons by personnel, when authorised to assist in the exercise of a State's law enforcement authority, to comply with all national and international obligations applicable to regular law enforcement officials of that State.

### **4. Detention**

4.1 Only guard, transport or question detainees if: (a) the company has been specifically contracted to do so by a State; and (b) its personnel are trained in the applicable national and international law.

4.2 Treat all detained persons humanely and consistent with their status and protections under applicable human rights law or international humanitarian law.

### **5. Apprehending Persons**

5.1 Not to take or hold any persons unless in defined circumstances.

5.2 Treat all apprehended persons humanely and consistent with their status and protection under applicable human rights law or international humanitarian law.

### **6. Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment**

6.1 Not to engage in torture or other cruel, inhuman or degrading treatment or punishment.

6.2 Report any acts of torture or other cruel, inhuman or degrading treatment or punishment, known to them, or of which they have reasonable suspicion.

### **7. Sexual Exploitation and Abuse or Gender-Based Violence**

7.1 Not to engage in or benefit from, sexual exploitation and abuse or gender-based violence or crimes, either within the company or externally.

7.2 Remain vigilant for all instances of sexual or gender-based violence and, where discovered, report such instances to competent authorities.

8. **Human Trafficking**

8.1 Not to engage in trafficking persons.

8.2 Remain vigilant for all instances of trafficking persons and, where discovered, report such instances to competent authorities.

9. **Prohibition of Slavery and Forced Labour**

9.1 Not to use slavery, forced or compulsory labour, or be complicit in any other entity's use of such labour.

10. **Prohibition on the Worst Forms of Child Labour**

10.1 Respect the rights of children to be protected from the worst forms of child labour.

10.2 Report any instances of child labour that personnel know of, or have reasonable suspicion of, to competent authorities.

11. **Discrimination**

11.1 Not discriminate on grounds of race, colour, sex, religion, social origin, social status, indigenous status, disability, or sexual orientation when hiring personnel and will select personnel on the basis of the inherent requirements of the contract.

12. **Identification and Registration**

12.1 Be individually identifiable when carrying out activities in discharge of contractual responsibilities.

12.2 Ensure that vehicles are registered and licensed with the relevant national authorities when they are carrying out activities in discharge of contractual responsibilities.

12.3 Ensure that all hazardous materials are registered and licensed with the relevant national authorities.

### **SCHEDULE 3 – VOLUNTARY PRINCIPLES (INTERACTIONS BETWEEN COMPANIES AND PRIVATE SECURITY)**

#### **1. Voluntary Principles**

- 1.1 The Voluntary Principles provide guidance to companies on practical steps that they can take to minimise the risk of human rights abuses by PMSCs:
- (A) Companies should include the voluntary principles to guide private security conduct as contractual provisions in agreements with private security providers and ensure that private security personnel are adequately trained to respect the rights of employees and the local community.
  - (B) Agreements between companies and PMSCs should require investigation of unlawful or abusive behaviour and appropriate disciplinary action. Agreements should also permit termination of the relationship by companies where there is credible evidence of unlawful or abusive behaviour by private security personnel.
  - (C) Companies should consult and monitor PMSCs to ensure they fulfil their obligation to provide security in a manner consistent with the principles. Where appropriate, companies should seek to employ private security providers that are representative of the local population.
  - (D) Companies should review the background of the PMSC they intend to employ, particularly with regard to the use of excessive force. Such reviews should include an assessment of previous services provided to a host government and whether these services raise concern about the PMSCs dual role as a private security provider and government contractor.
  - (E) Companies should consult with other companies, home country officials, host country officials, and civil society regarding experiences with private security. Where appropriate and lawful, companies should facilitate the exchange of information about unlawful activity and abuses committed by PMSCs.