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Rapport du Groupe de travail sur l'utilisation de mercenaires comme moyen de violer les droits de l'homme et d'empêcher l'exercice du droit des peuples à disposer d'eux-mêmes

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Additif

Mission en Afrique du Sud (10-19 novembre 2010)*

Résumé

Sur l'invitation du Gouvernement sud-africain, le Groupe de travail sur l'utilisation de mercenaires comme moyen de violer les droits de l'homme et d'empêcher l'exercice du droit des peuples à disposer d'eux-mêmes a effectué une mission en Afrique du Sud du 10 au 19 novembre 2010. Conformément à son mandat, le Groupe de travail s'est principalement intéressé à la législation sur les mercenaires et les sociétés militaires et de sécurité privées et à son incidence sur la réalisation et la protection des droits de l'homme. Il s'est également penché sur la question de savoir si des mécanismes avaient été mis en place pour faire en sorte que les sociétés militaires et de sécurité privées aient à répondre de leurs actes en cas de participation à des violations des droits de l'homme.

Depuis la fin de l'apartheid en 1994, de nombreux militaires sud-africains très qualifiés et expérimentés n'ont pas voulu ou pas pu trouver un emploi en Afrique du Sud. Ils ont donc proposé leurs services à l'étranger et beaucoup d'entre eux ont été recrutés par des sociétés militaires et de sécurité internationales privées. Certains ont intégré des troupes mercenaires. En réponse à cette situation, l'Afrique du Sud a été l'un des premiers pays à

* Le résumé du présent rapport est distribué dans toutes les langues officielles. Le rapport proprement dit, joint en annexe, est distribué dans la langue originale seulement.

adopter un texte de loi sur la fourniture de «services militaires étrangers», en 1998. Le Groupe de travail a toutefois constaté que la mise en œuvre de cette loi était entravée par différents obstacles, dont certains étaient liés au fonctionnement du Comité national de contrôle des armes classiques, organe chargé d'examiner les demandes d'autorisation pour la fourniture de services de sécurité dans les zones de conflit armé et de délivrer les permis correspondants. D'autres obstacles étaient liés aux difficultés en matière d'exercice des poursuites. D'une manière générale, selon le Groupe de travail, il était clair que la loi de 1998 n'avait pas eu d'incidence significative sur l'activité des sociétés militaires et de sécurité privées.

À la suite de la tentative de coup d'État perpétrée en 2004 en Guinée équatoriale, à laquelle ont participé plusieurs mercenaires sud-africains, une nouvelle loi a été adoptée en 2006, mais elle n'est pas encore entrée en vigueur. Cette loi vise à répondre à certains des problèmes rencontrés dans le passé, mais reste à savoir si elle permettra de réglementer de manière effective la fourniture de services de sécurité dans les zones de conflit armé.

Le Groupe de travail a également examiné le cadre qui a été établi pour réglementer l'activité des entreprises nationales de sécurité privées dans le pays. Les règles régissant l'activité des entreprises de sécurité privées en Afrique du Sud et celles régissant l'activité de ces entreprises à l'étranger étant susceptibles de se recouper dans certains domaines, le Groupe de travail recommande aux autorités de coordonner et d'harmoniser les deux cadres réglementaires.

La mise en place d'un système de règles et de surveillance applicable aux entreprises militaires et de sécurité privées n'est que la première étape du processus visant à faire en sorte qu'en cas de violations des droits de l'homme les entreprises responsables soient tenues de répondre de leurs actes. Le Groupe de travail recommande aux autorités d'envisager de mettre en place dans le pays des mécanismes aux fins d'établir la responsabilité des entreprises militaires et de sécurité privées. Il recommande également à l'État partie d'assurer des recours utiles aux victimes potentielles de violations des droits de l'homme mettant en cause des entreprises militaires et de sécurité privées.

Annexe

Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination on its mission to South Africa (10 - 19 November 2010)

Contents

		Paragraphs	*Page*
I.	Introduction	1–7	4
II.	Background	8–17	5
III.	The current legislative and regulatory framework	18–45	8
	A. Regulation of Foreign Military Assistance Act of 1998	20–24	8
	B. National Conventional Arms Control Committee	25–31	9
	C. Lack of prosecutions	32–38	11
	D. Limited impact of the legislation on the industry	39–41	12
	E. Regulation of the domestic private security industry	42−45	13
IV.	Pending legislation on private military and security companies	46−60	15
	A. The 2006 legislation	46−53	15
	B. Potential challenges with the new legislation	54−56	16
	C. Delay in the entry into force of the new Act	57−-60	17
V.	Lack of accountability mechanisms for private military and security companies	61−62	18
VI.	Conclusions and recommendations	63−69	18

I. Introduction

1. At the invitation of the Government of South Africa, the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination visited South Africa from 10 to 19 November 2010. In accordance with general practice, the Working Group was represented by two of its members, Alexander Nikitin and José Luis Gómez del Prado.[1]

2. In its resolution 2005/2, the Commission on Human Rights requested the Working Group to monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world, and study and identify emerging issues, manifestations and trends regarding mercenaries or mercenary-related activities and their impact on human rights, particularly on the right of peoples to self-determination. In its resolution 7/21, the Human Rights Council also mandated the Working Group to monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities. In its resolution 15/12, the Council requested that the Working Group continue to monitor mercenaries and mercenary-related activities in all their forms and manifestations, including private military and security companies, in different parts of the world, including instances of protection provided by Governments to individuals involved in mercenary activities, as well as to continue to study and identify sources and causes, emerging issues, manifestations and trends regarding mercenaries or mercenary-related activities and their impact on human rights, particularly on the right of peoples to self determination.

3. The Working Group is grateful to the Government of South Africa for its invitation. In accordance with its mandate, the Working Group focused on the legislation on mercenaries and private military and security companies and the impact such legislation has had on the enjoyment and protection of human rights. It also examined whether mechanisms have been put in place in order to hold private military and security companies accountable for any involvement in human rights violations.

4. In the present report, the Working Group uses the term “mercenary” as defined in article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, namely, any person who (a) is especially recruited locally or abroad in order to fight in an armed conflict; (b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; (c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) is not a member of the armed forces of a party to the conflict; and (e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

5. Article 1 of the Convention also provides that a mercenary is any person who, in any other situation (a) is specially recruited locally or abroad for the purpose of participating in

[1] The Working Group is composed of five independent experts serving in their personal capacities. Alexander Nikitin (Russian Federation) was the Chairperson-Rapporteur from October to December 2010. The other members were Amada Benavides de Pérez (Colombia), Najat al-Hajjaji (Libyan Arab Jamahiriya), José Luis Gómez del Prado (Spain) and Faiza Patel (Pakistan).

a concerted act of violence aimed at (i) overthrowing a Government or otherwise undermining the constitutional order of a State; and (ii) undermining the territorial integrity of a State; (b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) is neither a national nor a resident of the State against which such an act is directed; (d) has not been sent by a State on official duty; and (e) is not a member of the armed forces of the State on whose territory the act is undertaken.

6. In the present report, a private military and/or security company is to be understood as a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities.[2]

7. During the mission, the Working Group held meetings in Cape Town and in Pretoria with Government officials from the Department of International Relations and Cooperation, the Department of State Security, the Department of Justice and Constitutional Development, the Department of Defence, the National Prosecuting Authority, the South African Police Service, parliamentarians, representatives of the diplomatic community, international organizations, academics, think tanks, journalists and representatives of the private military and security industry.

II. Background

8. South Africa became a fertile recruiting ground for mercenaries and private military and security companies for very specific historical reasons. National efforts to prohibit mercenaries and regulate private military and security companies operating in areas of armed conflict abroad must be analysed against this unique historical and political background. The issue of regulation has been the subject of significant debate by different stakeholders.

9. During the transition period early in the 1990s, many soldiers of the South African Defence Force (SADF) either left the Army or were demobilized. The SADF was replaced by the South African National Defence Force. Many of the ex-SADF soldiers had gained advanced military skills and extensive operational experience. The downscaling of the military created a massive surplus of potential recruits for the private sector. This has clearly facilitated the development of a private military and security industry in South Africa.

10. Executive Outcomes was one of the earliest private military and security companies to operate on the international market; its emergence prompted the former Special Rapporteur on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination to refer to a "new operational model".[3] The company was founded in South Africa by Eeben Barlow in 1989 and recruited many former members of the SADF. The South African authorities clearly mistrusted a company employing former members of the special apartheid forces (E/CN.4/1997/24, para. 98). Nonetheless, Executive Outcomes was very successful at securing contracts with several African Governments that, facing serious opposition movements, had requested military assistance from the company. For instance, Executive Outcomes was involved in supporting the Government of Angola in training its armed forces and fighting the National Union for the

[2] See the draft of a possible convention on private military and security companies (A/HRC/15/25, annex), art. 2.

[3] See the report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (E/CN.4/1997/24), paras. 92-111.

Total Independence of Angola (UNITA) insurgents in the early 1990s (ibid., para. 51). Paradoxically, many Executive Outcomes employees had served in the SADF in the late 1980s helping UNITA rebels against the Government of Angola.[4] Upon the request of the Government of Sierra Leone, the company also provided training to the country's armed forces and took part in some military operations against the rebel Revolutionary United Front (E/CN.4/1997/24, para. 52).

11. It appears that the Government of South Africa's disapproval of the activities of Executive Outcomes in other African countries was the main motivation behind the adoption of the Regulation of Foreign Military Assistance Act in 1998 (ibid., para. 98). More generally, the authorities were concerned about the impact of the activities of such companies on its foreign policy objectives. Executive Outcomes was dissolved on 31 December 1998. Many of the company's employees went on to seek employment with other private military and security companies.

12. After the experience of Executive Outcomes, South African private military and security companies became smaller, more specialized, and mainly involved in non-combat services.[5] It is not always clear where companies are incorporated, and there have been instances where companies have moved their headquarters from South Africa to other countries. It also appears that some companies were created and headed by South Africans, but established and incorporated elsewhere. There are few private military and security companies established in South Africa and there is no association of private military and security companies in South Africa. Nonetheless, one should refer to the recent establishment of the Pan-African Security Association, whose ambition is to represent the whole of the security industry in Africa. Several companies established and run by South Africans are currently members of the Association.

13. Many international private military and security companies are staffed by former members of the Special Forces and therefore closely associated with this strong network of military veterans. Some are former members of the 32 Battalion. Today, many South Africans work for private military and security companies such as Dyncorp International and Erinys International in places such as Iraq. Exact figures are hard to find, but it is estimated that between 2,000 and 4,000 South Africans might work in Iraq. According to the Department of International Relations and Cooperation, 35 South Africans employed in the private military and security industry died in Iraq between 2004 and 2010. Their bodies were repatriated to South Africa. Four others were abducted in 2006 and their status remains unknown. The figures for the injured are not available as such cases are not reported to the South African authorities.

14. In parallel to the growth of private military and security companies established and/or run by South Africans operating on the international market, the domestic private security industry, which had begun developing in the 1980s, also grew tremendously after 1994. The combination of persistently high levels of violent crime and insufficient police resources has favoured this growth. The arrival of international security firms on the South African market also contributed to the development of the domestic private security industry. The industry is largely dominated at the managerial level by white South Africans,

[4] Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithica, Cornell University Press, 2003), pp. 107-108.

[5] Raenette Taljaard, "Implementing South Africa's Regulation of Foreign Military Assistance Act", in Alan Bryden and Marina Caparini, eds., *Private Actors and Security Governance* (Zürich, LIT Verlag, 2006), p. 172.

while most employees are black.[6] According to the Security Industry Alliance, the private security industry in South Africa is estimated to have an annual turnover of close to R50 billion. Others estimate it at approximately R14 billion.[7]

15. At the end of March 2010, it was reported that 387,273 security officers were registered by the Private Security Industry Regulatory Authority (PSIRA) and actively employed by 7,459 private security companies.[8] In addition, there were 1,070,387 registered but currently inactive security officers.[9] The private security industry is the most important employer of entry-level workers in South Africa. As a point of comparison, there are 154,615 police officers (excluding civilians) working in the South African Police Service as of May 2011.[10] These figures represent a ratio of private security officers to police of 2.57 (almost three times more private security officers), or 806 private security officers per 100,000 inhabitants in relation to only 313 police.[11]

16. The private security industry is well organized in South Africa. There are several employers associations. The largest alliance of security associations in South Africa is the Security Industry Alliance, which seems to be relatively effective in representing the security industry in its dealings with the authorities.[12] Among other activities, it tries to work closely with the South African Police Service, the National Prosecuting Authority, the Department of Justice and other governmental entities involved in combating crime. The largest security companies operating in South Africa are core members of the Security Industry Alliance.

17. While the Government of South Africa has made it clear that it does not promote nor condone mercenary activities, some South African nationals have been involved in such activities on several occasions. In March 2004, several South Africans were arrested in Equatorial Guinea for their involvement in the attempted coup against President Obiang.[13] Nick du Toit, who was among this group, is a former army officer of the SADF. Other South Africans, led by a British national, Simon Mann, were arrested in Zimbabwe. They were tried in Harare and found guilty of arms smuggling on 22 July 2004. After serving their prison sentence in Zimbabwe, most of them were released in May 2005 and returned to South Africa, where they were prosecuted. However, Simon Mann was extradited to Equatorial Guinea. He and those arrested in Equatorial Guinea were tried in Malabo and found guilty of committing crimes against the Head of State and against the form of government, or being accomplices in such attempts. They received lengthy prison sentences, but were pardoned in 2009. The involvement of so many South Africans in the coup attempt orchestrated from South Africa was seen as a major embarrassment for the Government of South Africa and, as will be discussed below, prompted a revision of the legislation in 2006. After 2004, there were reports that South African mercenaries were still being recruited around Africa.

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[6] Raenette Taljaard, "Private and public security in South Africa", in Sabelo Gumedze, ed., *The Private Security Sector in Africa* (Pretoria, Institute for Security Studies, 2008), p. 75.

[7] Ibid., p. 73.

[8] Private Security Industry Regulatory Authority, *Annual Report 2009/2010*, p. 4. Available from www.psira.co.za/joomla/pdfs/PSIRAAnnualReport2009-2010.pdf.

[9] Ibid., p. 18.

[10] Figures available at the South African Police Service website: www.saps.gov.za/_dynamicModules/internetsite/buildingBlocks/basePage4/BP444.asp.

[11] See Small Arms Survey, *Small Arms Survey 2011: States of Security* (Cambridge University Press, forthcoming), chap. 4.

[12] Taljaard, "Private and public security" (note 6 above), p. 76.

[13] For more detail, see the report of the Working Group on mercenaries, mission to Equatorial Guinea (A/HRC/18/32/Add.2).

III. Current legislative and regulatory framework

18. South Africa is not a party to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries or to the Organization of African Unity Convention for the Elimination of Mercenarism in Africa.

19. The South African Constitution, adopted in 1996, does not explicitly mention mercenaries, or private military and security companies. Nonetheless, article 198 (b) of the Constitution provides that "the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, national or internationally, except as provided for in the Constitution or national legislation". This provision provided the legal basis for the adoption of the Regulation of Foreign Military Assistance Act (No. 15 of 1998).

A. Regulation of Foreign Military Assistance Act of 1998

20. South Africa was one of the first countries to adopt legislation on the provision of "foreign military assistance" in 1998 and such legislation has often been hailed as a model for other countries. The primary aim of the Regulation of Foreign Military Assistance Act is clearly to prohibit mercenary activities. Article 2 of the Act prohibits anyone within South Africa from recruiting, using or training persons for, or financing or engaging in mercenary activity, which is defined by the Act as the "direct participation as a combatant in armed conflict for private gain". Any person who does so commits an offence.

21. The second aim of the Act is to regulate the provision of foreign military assistance by South African citizens, companies and permanent residents in South Africa. Under the Act, foreign military assistance includes military assistance to a party to an armed conflict in the form of advice or training; personnel, financial, logistical, intelligence or operational support; personnel recruitment; medical or paramedical services; or procurement of equipment. It also includes security services for the protection of individuals involved in armed conflict or their property; any action aimed at overthrowing a Government or undermining the constitutional order, sovereignty or territorial integrity of a State; and any other action that has the result of furthering the military interests of a party to the armed conflict. The definition of foreign military assistance is thus very broad and open to interpretation.

22. Any person or company who seeks to provide foreign military assistance must be specifically authorized to do so. Article 4 of the Act establishes a two-stage process in which nationals, permanent residents or firms first need to seek authorization from the National Conventional Arms Control Committee (NCACC) to offer to provide foreign military assistance. In the second stage, the Committee forwards its recommendation to the Minister of Defence, who makes the final decision according to the criteria set out in article 7. This list provides for instance that authorizations will not be granted if they would result in the "infringement of human rights". Article 5 of the Act provides that the same process must be followed for the approval of agreements for the rendering of foreign military assistance.

23. The text of the Regulation of Foreign Military Assistance Act has a number of limitations. While the Act covers the provision of foreign military assistance to areas of armed conflict, it does not actually define the central notion of "armed conflict"; it merely provides that "armed conflict" includes any armed conflict between (a) the armed forces of foreign States, (b) the armed forces of a foreign State and dissident armed forces or other armed groups, or (c) armed groups (art. 1). The Working Group notes that the lack of a clear definition in the Act has resulted in some uncertainty as to the exact scope of

application of the legislation. In this connection, the South African authorities have pointed out that there is no internationally accepted definition of armed conflict and that this concept is by nature difficult to define (see also para. 37 below).

24. The Regulation of Foreign Military Assistance Act has also been criticized for excluding humanitarian assistance from its scope. The Working Group was told that a number of South African private military and security companies have sought to evade regulation under the Act by claiming that they were carrying out demining or other humanitarian activities.[14] Another limitation of the Act is that it covers only situations of armed conflict. As a result, the activities of private military and security companies in situations not involving armed conflict are not regulated by the Act. However, according to the South African authorities, the defence industry and military entities in South Africa have to apply according to the National Conventional Arms Control Act (No. 41 of 2002) in order to offer services outside South Africa. Yet another limitation of the Regulation of Foreign Military Assistance Act is that it does not specify what the sanctions are for breaches of the Act, which might limit its deterrence effect.

B. National Conventional Arms Control Committee

25. The NCACC plays a central role in the regulatory framework established by the Regulation of Foreign Military Assistance Act. Members of the NCACC, which is a Cabinet committee, are appointed by the President. It is comprised of eight Cabinet Ministers and three Deputy Ministers. The Directorate Conventional Arms Control acts as the Secretariat for the Committee. The NCACC is currently governed by the National Conventional Arms Control Act. It is supposed to meet once a month. It was initially appointed by the Cabinet in 1995 to ensure that arms trade and transfer policies conformed to internationally accepted practice. Its main and original function is to deal with applications for arms sales.

26. Under the Regulation of Foreign Military Assistance Act, as mentioned above, the NCACC is also mandated to make recommendations to the Minister of Defence to authorize offers to provide foreign military assistance and approve agreements for the rendering of foreign military assistance. The Working Group was informed by the authorities that the Committee was given this additional mandate because private military and security companies operating in areas of armed conflict often exported arms. The Working Group regrets that despite its requests, it was not provided with comprehensive information as to the functioning of the NCACC, requests received, authorizations provided, or regular reporting on its activities as required in the Regulation of Foreign Military Assistance Act.

27. While the NCACC plays a central role in the implementation of the Regulation of Foreign Military Assistance Act, it is unclear what the Committee has achieved in this regard. While article 6 of the Act provides that the NCACC shall maintain a register of authorizations and approvals issued by the Minister of Defence, as well as submit quarterly reports to the National Executive, Parliament and the Parliamentary Committee on Defence and Military Veterans on the register, the Working Group received information that such reports had not been received on a quarterly basis. While the NCACC submits annual reports to Parliament, such reports have not always been made public. For instance, the

[14] Marina Caparini, "Overview of national regulatory systems for the commercial export of military and security services: the United States and South Africa", in *Proceedings of the Bruges Colloquium – Private Military/Security Companies Operating in Situations of Armed Conflict (19-20 October 2006)*, p. 61.

reports of 2005, 2006 and 2007 were the subject of litigation before they were made available to the public. Even where information is publicly available on the activities of the Committee, it mainly refers to its activities on arms trade. There is very little public information available on how many applications have been received by the Committee under the Regulation of Foreign Military Assistance Act, how many were successful and how many were rejected. When the NCACC reported to Parliament on its activities in 2003-2004, it stated that the Committee had considered two applications for rendering military assistance in foreign countries and that both applications had been denied.[15] The applications were reportedly submitted by Meteoric Tactical Solutions and Grand Lake Trading.[16]

28. Subsequent reports did not even contain any information about the NCACC activities under the Regulation of Foreign Military Assistance Act. When the Minister of Justice and Constitutional Development and then Chairperson of the NCACC reported to Parliament on the activities of the Committee in November 2009, he did not report on the Committee's activities under the Act and explained that "up until now the NCACC had not dealt with it yet", but raised the question as to whether the previous NCACC may have dealt with the matter.[17] The Committee report for 2009 does not contain any information about NCACC activities under the Act either.

29. During the mission, the Working Group was not able to gather relevant and significant information on the activities of the NCACC under the Regulation of Foreign Military Assistance Act and found that there was a lack of transparency concerning the Committee. The Working Group notes that, according to the South African authorities, disclosure of information is often limited by the conditions and terms of sale in the agreements. Nevertheless, the South African authorities recalled that the Promotion of Access to Information Act (No. 2 of 2000) allows any South African to request information which is in an NCACC report, providing that the application satisfies the conditions of the Act. The Working Group received information indicating that very few, if any, applications were made to the Committee under the Regulation of Foreign Military Assistance Act. It was also unclear to the Working Group whether the register of authorizations and approvals which is to be maintained by the NCACC according to article 6 of the Act had been created and maintained.

30. The Working Group was told that many private military and security companies had chosen not to seek authorization from the NCACC to export their services. Indeed, many private military and security companies do not seem to have much confidence that their applications would be handled fairly and promptly by the Committee. It did not help that the reputation of the NCACC has been tarnished in recent years by allegations that it has approved controversial arms sales to countries with questionable human rights records. For instance, the Committee was much criticized when it authorized arms sales to Zimbabwe a

[15] NCACC, "Submission to Portfolio Committee on Defence: National Conventional Arms Control Committee's (NCACC) activities over the period 2002-2004", July 2005, para. 16. Available from www.pmg.org.za/docs/2005/050802nacc.htm.

[16] Taljaard, "Implementing " (note 5 above), p. 179. Two part-owners of Meteoric Tactical Solutions, Lourens Jacobus Horne and Harry Carlse, who were providing security to Western Embassies in Baghdad, took a two-week vacation to join the group of mercenaries who attempted the coup d'état in Equatorial Guinea in 2004 (Adam Roberts, *The Wonga Coup* (Profile Books, London, 2006), p. 144).

[17] See Parliamentary Monitoring Group, "National Conventional Arms Control Committee (NCACC) – Introductory and Annual Report 2008 briefing", summary. Available from www.pmg.org.za/report/20090902-introductory-briefing-ncacc-committee-briefing-annual-report.

few years ago.[18] It should also be noted that the Regulation of Foreign Military Assistance Act does not provide for a specific time frame within which the NCACC must make a decision on an application. During the visit, the Working Group was told that in some cases, the Committee took several years to reach a decision on an application for arms exports. It could be recommended that the NCACC should more regularly and publicly report on its activities and decisions.

31. Over all, the Working Group did not receive sufficient information to ascertain whether or not the NCACC is fulfilling its mandate in accordance with the provisions of the Regulation of Foreign Military Assistance Act. The Working Group believes that it may be useful to consider the reasons for the apparent insufficient performance of this body. Questions could be raised as to whether the Committee is the appropriate body to deal with applications under the Act. One should consider whether the NCACC, as a Cabinet committee, is the appropriate body to fulfil a regulatory role under the Act. An independent regulatory agency might fulfil that role more efficiently. As will be discussed below, there is also some possible overlap between the mandate of the NCACC and that of PSIRA.

C. Lack of prosecutions

32. In order to facilitate prosecutions, article 9 of the Regulation of Foreign Military Assistance Act provides for extraterritorial jurisdiction for national courts with regard to offences under the Act. However, despite public statements affirming that the violations of the Act would be prosecuted, there have been very few successful prosecutions since 1998.[19]

33. The NCACC has referred several cases to the National Prosecuting Authority, but none seems to have led to prosecution. In 2003, the Committee reported to Parliament that it had referred two cases to the National Prosecuting Authority for possible prosecution under the Regulation of Foreign Military Assistance Act. However, the National Prosecuting Authority indicated that there were difficulties in obtaining the evidence necessary to prosecute and secure convictions.[20] In 2004, the NCACC reported to Parliament that it had referred another three cases concerning Hover Dynamics, Meteoric Tactical Solutions and Liconex to the National Prosecuting Authority for possible prosecution under the Act. Again, the National Prosecuting Authority declined to prosecute on the ground that prima facie cases could not be established.[21]

34. During the mission, the Working Group was informed by the authorities that a total of eight cases had been prosecuted under the Regulation of Foreign Military Assistance Act so far, and was provided with documents concerning some of those cases. Six of the prosecutions on charges of mercenarism were successful, two were not. The prosecutions are considered by the National Prosecuting Authority to have a deterrence value. No private military and security companies were involved in any of these cases, only individuals. The first prosecution under the Act was that of François Richard Rouget, a former French soldier and naturalized South African citizen. The Working Group was informed by the authorities that he had recruited former members of the SADF for military services in Côte d'Ivoire. In August 2003, he pleaded guilty on a charge of recruiting mercenaries for the conflict in Côte d'Ivoire. He was sentenced to a fine of R100,000 or five years

[18] Institute for Security Studies, "Seminar report on the Prohibition of Mercenary Activities and Regulation of Certain Activities in Areas of Armed Conflict Act 27 of 2006" (2008), pp. 4 and 7.

[19] Taljaard, "Implementing" (note 5 above), p. 174.

[20] NCACC, "Submission to Portfolio Committee" (note 15 above), para. 16.

[21] Ibid., para. 26.

imprisonment. This sentence was reduced on appeal to R75,000.[22] In 2004, Carl Alberts was also arrested for alleged mercenary activities in Côte d'Ivoire. In the plea agreement, of which the Working Group received a copy, he pleaded guilty to contravening the provisions of article 3 (b) of the Regulation of Foreign Military Assistance Act (rendering of foreign military assistance) and was sentenced to a fine of R20,000.

35. The coup attempt in Equatorial Guinea in 2004 led to further plea bargains under the Regulation of Foreign Military Assistance Act. Crause Steyl and others were charged with violating the Act. They pleaded guilty on a charge of participating in a conspiracy to execute the coup, and sentenced with a fine of R200,000 or 10 years imprisonment. Mark Thatcher entered a plea bargain in 2005 for his financial involvement in the same coup attempt. He was sentenced to a fine of R3 million or in the event of non-payment to a term of five years' imprisonment, as well as a four-year suspended prison term.[23]

36. In one case, no plea bargain was reached and the case went to trial. It involved 11 men, mainly South Africans, accused of involvement in the same coup attempt**.** The men had been arrested in Zimbabwe in March 2004, together with Simon Mann. After spending 14 months in prison in Harare following convictions for immigration and arms smuggling offences, they were sent back to South Africa. The trial was held in the Pretoria Regional Court in February 2007. All were acquitted of all charges under the Regulation of Foreign Military Assistance Act.

37. In its discussions with the authorities, the Working Group was told that there were several reasons which could explain the low number of prosecutions under the Regulation of Foreign Military Assistance Act. First, the Act applies only where and when there is an armed conflict. However, there has been uncertainty as to whether the Act applies in a given situation or case because of the problems raised by the vague definition of "armed conflict" contained in the Act. According to the authorities, demonstrating the existence of an armed conflict has proved to be challenging in some cases. The Working Group was told that where there was uncertainty as to whether the Act applied, the National Prosecuting Authority sought expert witnesses who would state that a given situation was a situation of armed conflict. In cases related to Iraq, the National Prosecuting Authority struggled to find such expert witnesses. The Working Group was informed by the authorities that this was why the cases referred to the National Prosecuting Authority by the NCACC and involving private military and security companies operating in Iraq could not be prosecuted.

38. Furthermore, there have been serious difficulties in collecting evidence and finding witnesses in the countries concerned, especially in conflict areas. Aside from such difficulties, the ability to collect such evidence also very much depends on the level of cooperation offered by the country concerned. Finally, the Working Group also notes that the Priority Crimes Litigation Unit of the National Prosecuting Authority, which deals with cases prosecuted under the Regulation of Foreign Military Assistance Act, is a very small unit composed of only a few lawyers.

D. Limited impact of the legislation on the industry

39. The Working Group received information suggesting that the Regulation of Foreign Military Assistance Act had had little impact on private military and security companies and on South African nationals working for private military and security companies abroad.

[22] P. Jacobs, "South Africa's new counter-mercenary law", *Strategic Review for Southern Africa* (May 2008), pp. 72-73.

[23] Ibid., p. 73.

During the mission, the Working Group was told that the Act had prompted a large part of the industry to relocate or go underground in order to escape regulation.

40. There is a certain level of distrust among individuals working in the private military and security industry towards the authorities, with the result that they do not believe in the fair execution of the Regulation of Foreign Military Assistance Act.24 The Working Group was told that the industry did not see the NCACC as credible, that the great majority of companies have not seen the benefit of submitting requests to the Committee and that the failure to do so had not resulted in any sanctions. In addition, the Act has been perceived by some as targeting former SADF soldiers who are now offering their services abroad.25 As a result, it seems that most companies have not applied for a licence to operate abroad but have continued to operate abroad. Some have gone underground instead. While the private military and security industry has to some extent ignored the Act, such an attitude was allowed to continue because of the lack of prosecutions.

41. Despite the existence of the Regulation of Foreign Military Assistance Act, South African nationals continued to be recruited as mercenaries around the continent. As explained in the memorandum on the objects of a new bill on the issue, the 2004 coup attempt in Equatorial Guinea, which was mainly organized from South Africa and in which many of the mercenaries involved were South African nationals, was the main impetus for adopting new legislation to replace the Act, which was deemed inadequate for combating mercenary activities and regulating private military and security companies operating in areas of armed conflict abroad. When the then Minister of Defence introduced the new bill to the Defence Committee in November 2005, he explained that it was proposed as a replacement for the Regulation of Foreign Military Assistance Act, which had become insufficient to prevent former members of the SADF from being drawn into the Iraq war as "mercenaries". At the time, the South African Parliament was urged to adopt the bill urgently.[26]

E. Regulation of the domestic private security industry

42. The domestic private security industry is treated by the authorities as separate from private military and security companies operating abroad. As a result, two distinct legislative and regulatory frameworks have been established. Private security companies operating in South Africa are regulated by the Private Security Industry Regulation Act (No. 56 of 2001), whereas any person or private military and security company exporting their services is covered by the Regulation of Foreign Military Assistance Act 1998 (until the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act adopted in 2006 enters into force; see para. 46 ff. below).

43. South Africa has established an elaborate system of regulation of the domestic private security industry. Private security companies that operate within South Africa are regulated by PSIRA, which is a statutory body governed by a Council. Any person who seeks to provide security services in South Africa must register as a security service provider with PSIRA. To be eligible to register, the security service provider must fulfil a number of requirements, such as being a South African citizen, being at least 18 years old,

[24] Taljaard, "Implementing" (note 5 above), p. 173.

[25] Taljaard, "Private and public security" (note 6 above), p. 88.

[26] Parliamentary Monitoring Group, minutes of the Prohibition of Mercenary Activity Bill: Minister's briefing and the Department Annual Report: briefing, November 2005, www.pmg.org.za/minutes/20051107-prohibition-mercenary-activity-bill-minister%E2%80%99s-briefing-department-annual-report-br.

having complied with relevant training requirements, having a clean criminal record, being mentally sound and not being employed in the public service (art. 23 of the Private Security Industry Regulation Act). In addition, a company cannot offer private security services unless all the managers and owners of the company are also individually registered with PSIRA. Once obtained, registration can be withdrawn by PSIRA at any time if the security service provider is found to be guilty of certain offences. Under the Private Security Industry Regulation Act, a code of conduct has also been drawn up and is legally binding on all security service providers. PSIRA issues public annual reports which contain detailed figures as to how many companies and individuals have applied for registration and how many such applications have been accepted or rejected.[27]

44. The Private Security Industry Regulation Act has also established a system of monitoring by inspectors who have been granted broad powers to investigate security service providers (art. 34). However, the number of inspectors remains very low: at the end of March 2010, there were only 37 inspectors (which included three managers).[28] PSIRA is clearly too understaffed to fulfil its mandate of effectively regulating the private security industry. In addition, the Working Group was told that the Authority had faced recurring problems of poor management and inefficiency, which had undermined its reputation. The private security industry has complained about the performance of PSIRA and its inability to oversee the industry efficiently and keep convicted criminals out of it. This has prompted the Security Industry Alliance to develop its own employee history database. In order to address these problems, the authorities are currently considering a complete overhaul of the legislative framework on domestic private security providers. New legislation to replace the Private Security Industry Regulation Act is being drafted in consultation with all stakeholders. It remains to be seen whether PSIRA will be maintained or whether it will be abolished and its functions transferred to the South African Police Service.

45. While the Private Security Industry Regulation Act applies mainly to private security companies providing security services in the country, it is worth noting that it contains a provision on extraterritorial application and jurisdiction (art. 39). This suggests that the Act applies to domestic private security companies that are also offering their services abroad. As a result, such companies should in theory both register with PSIRA and seek authorization from the NCACC where they operate in areas of armed conflict. In contrast, a South African individual or company that does not operate within South Africa and only offers security services abroad is not obliged to register with PSIRA, but may be obliged to seek authorization from the NCACC under the Regulation of Foreign Military Assistance Act. In practice, not many private security companies that operate in South Africa also operate abroad, but this may soon change as some of these companies seek to expand on the international market. Considering that there might be some overlap between the two legislative frameworks, the Working Group believes that there should be coordination and harmonization of the regulatory frameworks.[29]

[27] See for instance PSIRA, *Annual report 2009/2010* (note 8 above).

[28] Ibid., p. 13.

[29] See also Taljaard, "Private and public security" (note 6 above), p. 85.

IV. Pending legislation on private military and security companies

A. The 2006 legislation

46. The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act (No. 27 of 2006, hereinafter the new Act) was adopted by Parliament on 17 November 2006 and received the President's assent on 12 November 2007. During the mission, the Working Group found that there was some confusion, including among certain governmental authorities, about whether the new Act was in force or not. According to its own provisions, it will come into force on "a date determined by the President by Proclamation in the [Government] *Gazette*". Such a date has not yet been determined by the President as certain regulations needed to implement the Act have not been issued. When the new Act comes into force, it will repeal the Regulation of Foreign Military Assistance Act. For the time being, the 1998 Act is still in force.

47. The new Act has many similarities with the Regulation of Foreign Military Assistance Act. It maintains the distinction between mercenary activities that are prohibited, and what is defined in the new Act as "assistance or service", including "security services", the provision of which is regulated. The new Act prohibits and criminalizes mercenary activities that are defined in more detail than in the previous Act. Article 2 of the new Act provides that no "person" in the Republic or elsewhere may participate as a combatant for private gain in an armed conflict; directly or indirectly recruit, use, train, support or finance a combatant for private gain in an armed conflict; directly or indirectly participate in any manner in the initiation, causing or furthering of an armed conflict, or a coup d'état uprising or rebellion against any government; or directly or indirectly perform an act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a State.

48. Unlike the Regulation of Foreign Military Assistance Act, the new Act is more specific about what is to be regulated. Indeed, security services are defined as including guarding and protection services, security advisory services and training, installing, servicing or repairing security equipment, and monitoring signals or transmissions. Assistance or service also includes any form of military or military-related assistance, service or activity, or any form of assistance or service to a party to the armed conflict by means of advice or training; personnel, financial, logistical, intelligence or operational support; personnel recruitment; medical or paramedical services; or procurement of services.[30]

49. Article 3 of the new Act provides that no person, unless specifically authorized under by the NCACC, may: (a) negotiate or offer assistance, including rendering service, to an armed conflict or in a regulated country; (b) provide any assistance or render any service to a party to an armed conflict or in a regulated country; (c) recruit, use, train, support or finance a person to provide or render any service to a party to an armed conflict or in a regulated country; or (d) perform any other act that has the result of furthering the military interests of a party to an armed conflict or in a regulated country. It must be emphasized that not only is authorization required for providing assistance or services, but also to negotiate or offer such assistance or service.

50. One major difference that is presented as an improvement on the current Act is that the new Act applies in relation to any country that has been proclaimed as a "regulated

[30] Jacobs, "South Africa's new counter-mercenary law" (note 22 above), p. 83.

country" under article 6 of the Act. A country can be proclaimed as "regulated" by the President upon a recommendation of the NCACC. Where there are doubts about the existence of an armed conflict and therefore as to whether the Act applies or not, the proclamation of regulated countries will settle the question.

51. Another difference between the current Act and the new Act is that the latter covers the provision of humanitarian assistance. Article 5 of the new Act provides that no South African humanitarian organization may provide humanitarian assistance in countries of armed conflict or in regulated countries, unless it is registered for that purpose. This provision was inserted in the new Act in order to cover private military and security companies that allegedly act under the umbrella of humanitarian assistance in order to avoid regulation. Nonetheless, the new Act provides for exemptions in order to facilitate emergency humanitarian aid.

52. Under the new Act, the role of the NCACC is expanded. It will have to deal with requests for authorization for the following three categories, namely, persons wishing to: (a) provide certain assistance or render services in area of armed conflict; (b) enlist in foreign armed forces; and (c) render humanitarian assistance in an area of armed conflict. Decisions are made according to the criteria listed the new Act. As in the current Act, the new Act provides that an authorization will not be granted if it would result in the "infringement of human rights". Similarly, a register of declarations, authorizations and exemptions must be maintained by the NCACC and quarterly reports must be submitted to the National Executive and Parliament with regard to the register.

53. Like the Regulation of Foreign Military Assistance Act, the new Act provides for extraterritorial jurisdiction. Accordingly, any act constituting an offence under the new Act and that is committed abroad is considered as having been committed in South Africa and the person who committed the act can thus be in tried in a South African court.

B. Potential challenges with the new legislation

54. The Working Group is of the opinion that the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act constitutes an improvement on the Regulation of Foreign Military Assistance Act since the definition of "armed conflict" is more comprehensive, the power to proclaim regulated countries should bring about more legal certainty, security services are clearly defined and the offence relating to mercenary activities is reformulated in more detail. However, the new Act has also been criticized for being even more unworkable and difficult to implement than the current one because its scope is even wider. Moreover, the new Act does not address some of the shortcomings of the legislation currently in place.[31]

55. During the mission, the Working Group was told about a number of potential challenges for the implementation of the new Act. First, the provisions of the new Act are seen as relatively stringent and there are concerns that it would make it unduly difficult for any South African to work abroad in the security sector. The Working Group was told that when the new Act comes into force, there are likely to be legal challenges to its constitutionality, on the ground for instance that every individual has the right to choose his or her profession under article 22 of the Bill of Rights. Another challenge that the new Act might raise relates to the prohibition for South Africans to enlist in the armed forces of any foreign State, unless authorized to do so by the NCACC (art. 4 of the new Act). It is estimated that some 1,000 South Africans are presently enlisted in the British Army.

[31] Taljaard, "Implementing" (note 5 above), p. 183.

56. The authorization system established under the new Act remains more or less the same as under the current Act and still relies mainly on the NCACC. This was criticized by some private military and security companies during the adoption process of the bill.[32] In the light of the shortcomings in the efficient functioning of the NCACC, it remains to be seen whether the Committee will be able to fulfil its mandate under the new Act. The Working Group also notes that the new Act does not set any time limits for the application procedure, which might create uncertainty for applicants who apply to the Committee for authorization. During the adoption process of the bill, some private military and security companies suggested that if authorizations were not granted within a certain period, they should be deemed to have been granted.[33] However, this suggestion was not taken up in the final text of the bill. Another concern expressed by some private military and security companies is that applications might be refused without giving adequate reasons for the decision.[34]

C. Delay in the entry into force of the new Act

57. The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act was still not in force by the time the present report was finalized, which is more than four years after its adoption by Parliament in November 2006. The Working Group was informed by the authorities that certain regulations needed to be adopted in order for the new Act to come into force. Some of the matters which need to be prescribed are the form and manner of applications and fees. The Working Group was told that it remained unclear whether each company and/or whether each employee seeking to offer security services abroad needed to apply for authorization. Under the new Act, only a company which is registered or incorporated in South Africa can apply for authorization. The Working Group heard that it was not entirely clear whether, for instance, a South African national working for a foreign private military and security company in Iraq would be obliged under the new Act to apply for authorization.

58. The question of delay in the entry into force of the new Act was discussed in the Parliamentary Committee on Defence in November 2008. Members of the Committee asked representatives of the Department of Defence, which is in charge of drafting the regulations, why the new Act was not yet operational, despite the fact that it had been signed by the President in November 2007. They asked why the necessary regulations still had not been enacted, especially since Parliament had been asked to urgently process the legislation. The Department of Defence responded that the National Conventional Arms Control Act had to be amended first and that such amendment had just been adopted by Parliament. At the time, the Department of Defence explained that the regulations were in the process of being finalized and would be enacted within the following six months.[35]

59. During the visit, the Working Group was informed by the authorities that the process of drafting the regulations had started in 2007 and ended in September 2009 and that the draft regulations had been submitted to the NCACC for approval in 2010. The regulations

[32] See for instance Omega International Associates LP, memorandum to the Portfolio Committee on Defence of the National Assembly, 16 May 2006, p. 7. Available from www.pmg.org.za/docs/2006/060522omega.pdf.

[33] See for instance British Association of Private Security Companies, submission to the Portfolio Committee on Defence on The Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in an Area of Armed Conflict Bill (2006), p. 13.

[34] See for instance Omega International Associates LP, memorandum (note 32 above).

[35] See Parliamentary Monitoring Group, "Department of Defence annual report 2007/08". Available from www.pmg.org.za/report/20081118-department-defence-annual-report-200708.

will then be submitted to the President for promulgation. Such regulations mainly consist in application forms. During the visit, the Working Group was told that these regulations would also list the "regulated countries" to which the new Act would apply, or at least provide more details on the process leading to the proclamation of regulated countries. While the Working Group requested specific information on the regulations, the process for their adoption and the reasons for delay, it regrets that the responses received remained of a general nature. At the time of finalization of the present report, the regulations have not been promulgated.

60. As mentioned above, when the then Minister of Defence introduced the new bill to Parliament in 2005, it was presented by the authorities as a renewed attempt to deal with former members of the SADF who were offering their military skills abroad, and especially in Iraq.[36] However, the Working Group was told that the South African National Defence Force was facing some difficulties and was slowly trying to "re-integrate" within its ranks some former SADF members with valuable military skills and expertise. Furthermore, the authorities may have become more interested in the employment and commercial potential of the private military and security industry than in monitoring the activities of military veterans. This might partly explain the delay in taking measures for the implementation of the new Act.

V. Lack of accountability mechanisms for private military and security companies

61. The establishment of a regulatory and monitoring regime for private military and security companies is only a first step towards ensuring accountability in cases of human rights violations. While South Africa has attempted to establish a regulatory framework for private military and security companies through the adoption of the Regulation of Foreign Military Assistance Act, the framework did not include a system of regular monitoring of the activities of private military and security companies. In other words, after a private military and security company seeks and obtains from the NCACC authorization to offer its services in areas of armed conflict, there is very little scrutiny of what that company actually does afterwards. While the authorization can be withdrawn at any time, it is not clear on what grounds it can or should be withdrawn. A private military and security company which is authorized to provide foreign military assistance does not have to report on a regular basis on its activities and is not subject to any inspections.

62. Furthermore, where there are allegations that a private military and security company and/or its employees may have been involved in human rights violations in the course of its activities outside South Africa, there is no mechanism to allow such allegations to be reported. It is therefore not clear how private military and security companies and/or their employees can be held accountable for any involvement in human rights violations. In the light of this absence of accountability mechanisms, potential victims of human rights violations involving private military and security companies do not have access to an effective remedy. The new Act does not address these important gaps.

VI. Conclusions and recommendations

63. The Working Group reiterates its appreciation to the Government of South Africa for extending to the Working Group an invitation to discuss the measures

[36] See for instance Parliamentary Monitoring Group, minutes (note 26 above).

taken by the Government to address mercenary activities and to regulate the activities of private military and security companies. Since the period bringing an end to apartheid in 1994, many South Africans with extensive military skills and experience have been unwilling or unable to find employment in South Africa. As a result, they have offered their services abroad and many have been employed by international private military and security companies. Some have become involved in mercenary activities. In order to address these developments, South Africa was one of the first countries to adopt legislation on the provision of foreign military assistance in 1998 and it must be commended for taking that important step.

64. The Working Group found that the regulatory regime established in South Africa for private military and security companies operating abroad has faced serious challenges in terms of implementation, with the result that such attempts at regulation have not had enough impact on the private military and security company industry. The Working Group has received information indicating that very few applications for authorizations to provide security services in areas of armed conflict have been received and considered by the National Conventional Arms Control Committee (NCACC). More generally, the Working Group found that both in the private military and security industry and within broader public circles, there was a lack of trust in the ability of the NCACC to examine such applications in a fair and timely manner. Furthermore, there are minimal sanctions for not seeking such authorizations: very few prosecutions have taken place so far, mainly because of the difficulties in collecting evidence in areas of armed conflict.

65. The attempted coup d'état in Equatorial Guinea in 2004 provided momentum to revise the legislative framework. The relevant legislation was thus revised in 2006. In some regards, the new Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act constitutes an improvement on the previous legislation to the extent that it provides more clarity as to the scope of application of the legislation. At the same time, the new Act has included more activities within its scope. Moreover, the Working Group found that the challenges in the implementation of the previous legislation are not all addressed. The new Act is still not in force as the regulations required for its entry into force and effective implementation have not yet been issued.

66. Once again, the Working Group emphasizes the important role in the effective implementation of the legislation of the NCACC, which retains the responsibility to authorize the export of military and security services to regulated countries under the new Act. No matter how comprehensive the legislation is, successful implementation depends on the effectiveness of the implementation mechanism.

67. In parallel to the regulatory framework put in place for private military and security companies operating abroad, South Africa has also established an elaborate system of practical regulation for private security companies that operate on the domestic market. The Working Group notes that some South African private military and security companies have both domestic and foreign operations and that there are potential areas of overlap between the regulatory rules covering those companies working within South Africa and those working abroad.

68. The Working Group also recalls that the establishment of a regulatory and monitoring regime for private military and security companies is only a first step towards ensuring accountability in cases of human rights violations. Considering the significant role played by the Government of South Africa in international efforts at the United Nations to establish an international regulatory framework, including a legally binding instrument (convention), to ensure the accountability of private military and security companies for human rights violations, the establishment of

accountability mechanisms for private military and security companies at the domestic level should be considered.

69. In the light of the above conclusions, the Working Group recommends that the Government of South Africa:

(a) Publicly release more information on the activities of the NCACC and in particular on the applications submitted by private military and security companies to the NCACC, their processing and the decisions taken;

(b) Allocate appropriate additional resources to investigating and prosecuting those companies operating abroad without the required authorizations;

(c) Strengthen its cooperation with other countries in order to facilitate investigations and prosecutions and consider accession to the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which contains provisions on, inter alia, mutual judicial assistance;

(d) Undertake the necessary steps to ensure the effective implementation of the Regulation of Foreign Military Assistance Act of 1998 and establish a mechanism for regular monitoring, pending the entry into force of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006;

(e) Ensure the adoption of the required regulations necessary for the entry into force and implementation of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006;

(f) Envisage harmonization between the two regulatory frameworks covering companies operating within South Africa and companies operating abroad;

(g) Consider the establishment of accountability mechanisms for private military and security companies at the domestic level;

(h) Ensure that potential victims of human rights violations involving private military and security companies be given access to effective remedies.