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### Right of peoples to self-determination

## Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

### Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly, in accordance with Commission on Human Rights resolution 2005/2, the 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 people to self-determination.

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\* A/68/150.



## **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**

### *Summary*

The Working Group begins by presenting an overview of its activities during the period under review. It also provides a brief update on the recent trends related to mercenaries and private military and security companies. The Working Group notes that the activities of private military and security companies have continued to evolve, with contractors involved worldwide in an expanding range of activities. The Working Group reviews efforts made by States to regulate private military and security companies and introduces its conclusions related to the first phase of the national legislation survey. The Working Group notes that various gaps remain regarding the transparency and accountability of private military and security companies and reiterates its position on the need for an international regulatory framework to monitor their activities.

## I. Introduction

1. Pursuant to its mandate, the Working Group on the use of mercenaries as a means of violating human rights and the exercise of the right of peoples to self-determination has continued to monitor mercenaries and mercenary-related activities in all their forms and manifestations, as well as to study the effects on the enjoyment of human rights of the activities of private companies offering military assistance, consultancy and security services on the international market. In accordance with Human Rights Council resolution [21/8](#) and General Assembly resolution [67/159](#), the Working Group submits the present report to the Assembly. It covers the period following the submission of the previous report ([A/67/340](#)) in August 2012 to August 2013.

2. The use of mercenaries remains a matter of serious concern. As noted in the previous report of the Working Group to the General Assembly, the recent trend of Governments of hiring foreign fighters to repel insurgencies and rebel groups, restore internal order and suppress internal riots or disturbances is particularly troubling. The Working Group understands the importance of following closely this new trend and describing its impact on human rights.

3. The activities of private military and security companies also continue to be of concern, as companies are contracted by different role players and operate in increasingly varying capacities. The report takes stock of various frameworks aimed at regulating private military and security companies' activities. In particular, it looks at the support provided by States in the process of elaborating an international framework for the regulation of the activities of private military and security companies and the outcomes of the related discussions. On the basis of the results of the first phase of its national legislation survey, the Working Group notes that there is a widely divergent level of regulation of private military and security companies activities among the countries analysed, resulting in inconsistencies and gaps. In addition, a review of the existing international regulatory framework indicates some significant shortcomings. The Working Group takes the position that, in order to ensure effective regulation of private military and security companies, there is a need for an international legally binding instrument.

4. The Working Group examines these issues in more detail below. In section II, it provides an update on its activities, while in section III it briefly considers some recent trends related to mercenaries. In section IV, it presents some facts related to private military and security companies and in section V, it describes the continued support of the Working Group for the need of an international convention to regulate their activities. In section VI, the Working Group presents its conclusions and recommendations.

5. Since the last report of the Working Group considered by the General Assembly, in December 2012, a new Chair-Rapporteur was elected, Mr. Anton Katz (South Africa).

## **II. Activities of the Working Group during the past year**

### **A. Regular sessions of the Working Group**

6. In accordance with its usual practice, the Working Group held three regular sessions: two in Geneva and one in New York. It held regular meetings with Member States representatives, non-governmental organizations (NGOs) and experts, reviewed allegations regarding the activities of mercenaries and private military and/or security companies and their impact on human rights and decided on appropriate action to be undertaken.

7. The Working Group held its seventeenth session in Geneva from 17 to 19 December 2012, during which it held a press conference on its visit to Somalia from 8 to 14 December 2012, as well as consultations with representatives of Member States and the Office of the High Commissioner for Human Rights. Furthermore, in order to comply with Human Rights Council resolution 21/8, which requested the Working Group to establish a database of convicted mercenaries, the Working Group decided to send a note verbale to Member States seeking information on cases of mercenaries convicted by national courts.

8. The Working Group held its eighteenth session in Geneva from 11 to 15 March 2013. At that session, the Working Group consulted representatives of Member States, the Independent International Commission of Inquiry on the Syrian Arab Republic, the International Committee of the Red Cross (ICRC), the Office for the Coordination of Humanitarian Affairs and NGOs. In addition, the Working Group decided to launch a study on the use of private military and security companies by the United Nations and to report on this issue to the General Assembly in 2014.

9. The Working Group held its nineteenth session in New York from 28 July to 2 August 2013. On 31 July 2013, as part of its study on the topic, it held an expert panel event to discuss the use of private military and security companies by the United Nations. The Working Group appreciates all the experts who participated in the event and intends to reflect the discussions at the panel in its forthcoming report to the General Assembly in 2014. In addition to the panel event, the Working Group held consultations with Member States.

### **B. Country visits**

10. The Working Group conducted two country visits since the submission of its last report to the General Assembly. It visited Somalia from 8 to 14 December 2012 and Honduras from 18 to 22 February 2013. The reports on these will be presented to the twenty-fourth session of the Human Rights Council in September 2013.

### **C. Communications**

11. Since its last report to the General Assembly, the Working Group sent communications to the Governments of Colombia, Honduras, Liberia and the United States of America, respectively. Summaries of the communications to Colombia, Honduras and Liberia were reported to the twenty-second session of the Human Rights Council (see [A/HRC/22/67](#)) and a summary of the communication to the

United States of America will be reported to the twenty-fourth session of the Human Rights Council in September 2013. The Working Group expresses its appreciation to the Government of Colombia, which provided a reply, and invites the other Governments to do so as soon as possible.

#### **D. Collecting information on individuals convicted of mercenary activities**

12. Pursuant to Human Rights Council resolution 21/8, the Working Group sent a note verbale to all Member States on 22 January 2013 requesting information on cases of mercenaries convicted by national courts. A reminder of the request was sent on 6 March 2013. At the time of writing, the Working Group had received replies from the following 18 countries: Azerbaijan, Bahrain, Bosnia and Herzegovina, Cuba, France, Germany, Ghana, Guatemala, Iraq, Mauritius, Montenegro, Poland, Russian Federation, Serbia, Switzerland, Togo, Tunisia and Ukraine. Out of these responses, Cuba, France and Montenegro reported specific convictions, while others responded that there were no cases of mercenaries or relevant information owing to the absence of specific legislation prohibiting mercenary activities.

#### **E. Other activities of the Working Group**

13. In addition, individual members of the Working Group carried out the following activities.

14. From 6 to 8 September 2012, Faiza Patel participated in the thirty-fifth annual round table of the International Institute of Humanitarian Law in San Remo, Italy, where she provided an overview of the draft convention on private military and security companies.

15. On 21 September 2012, Gabor Rona participated in a civil society meeting on the draft charter of the oversight mechanism for the International Code of Conduct for Private Security Service Providers in Washington, D.C., organized by Amnesty International and the Rockefeller Foundation.

16. On 5 February 2013, Mr. Rona presented a paper on the work of the Working Group at the University of Minnesota Law School. The paper, entitled “A Tour de Horizon of Issues on the Agenda of the Mercenaries Working Group”, is published in volume 22 of the *Minnesota Journal of International Law*.

17. On 5 April 2013, Mr. Rona organized a panel on accountability of private military and security companies at the annual meeting of the American Society for International Law in Washington, D.C. Ms. Patel participated in the panel.

18. On 11 April 2013, Ms. Patel and Mr. Rona hosted a delegation from the Dwight D. Eisenhower School for National Security and Resource Strategy to discuss contemporary challenges involving the activities of private military and security companies.

19. From 24 to 28 June 2013, Anton Katz participated in the twentieth annual meeting of the Special Procedures mandate holders, which was held in Vienna.

### III. Update on mercenary activities

20. The Working Group remains concerned about the continuing activities of mercenaries along the border of Côte d'Ivoire and Liberia and about the detention of alleged mercenaries in Libya. During the reporting period, the Working Group addressed related matters with the respective Governments, initiated country visits and acknowledged with satisfaction the willingness of both Côte d'Ivoire and Libya to receive the Working Group. The Working Group hopes that visits to Côte d'Ivoire and Libya will take place soon and that it will have further opportunities to discuss related issues with the respective Governments.

21. With regard to Côte d'Ivoire, the Working Group notes the recent report of the Secretary-General on the United Nations Operation in Côte d'Ivoire (UNOCI) to the Security Council (S/2013/197), issued in March 2013, in which the Secretary-General pointed out that "the overall progress notwithstanding, Côte d'Ivoire continues to face significant threats to its peace and security" and, among some of the major threats, he pointed to the "reported presence of mercenaries, former combatants and other armed elements along the border with Liberia".

22. At the same time, the Working Group, together with the United Nations independent expert on Côte d'Ivoire (see [A/HRC/23/28](#)), commends the work of the National Dialogue, Truth and Reconciliation Commission, supports the extension of its mandate beyond September 2013 and acknowledges its crucial role in supporting the judicial system and addressing post-election crimes, including the acts of mercenaries.

23. Finally, the Working Group notes the decision of 19 June 2013 of a court in Monrovia, denying the defence motion to dismiss a case involving 19 Liberians allegedly linked to mercenaries.<sup>1</sup> According to the indictments, the defendants were recruited and trained for mercenary activities to be committed in the territory of Côte d'Ivoire and various criminal acts (including murder, arson, rape and theft of property) with the aim of destabilizing the country.

24. The Working Group is looking forward to discussing related matters with the Government during its visit to Côte d'Ivoire.

25. The Working Group also remains concerned about the detention of alleged mercenaries in the aftermath of the conflict in Libya.

26. The Working Group echoes the concerns expressed by the Secretary-General in his February 2013 report to the Security Council on the United Nations Support Mission in Libya (UNSMIL) ([S/2013/104](#)) that the lack of adequate judicial process for the thousands of detainees who remain in custody continues to represent a serious human rights issue and shares his concerns about the acts of revenge against detainees. While the Working Group, in support of the Human Rights Council,<sup>2</sup> commends the Government of Libya for its efforts to stabilize the security situation and to bring all detainees and detention camps under government authority, it encourages the Government to continue these efforts to establish full control of such facilities in order to ensure that detainees, including foreign detainees, are treated in

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<sup>1</sup> See "Liberia: 'Mercenaries' Hope Dashed", by M. Welemongai Ciapha, 19 June 2013; available at <http://allafrica.com/stories/201306201044.html> (accessed on 22 June 2013).

<sup>2</sup> See Human Rights Council resolution 22/19.

accordance with its international obligations, especially with regard to due process, humane conditions of detention and fair trials.

27. The Working Group is concerned about the fate of an estimated 7,000 to 8,000 detainees still waiting to be charged or released and about whom the Special Representative of the Secretary-General and Head of UNSMIL, in his statement on 18 June 2013 to the Security Council (see [S/PV.6981](#)), noted various cases of torture.

28. The Working Group is looking forward to learning more from the Government of Libya about alleged Eastern European and African fighters who have been arrested and sentenced on charges related to mercenary activities and those still awaiting trial, as reported to the Security Council by the Panel of Experts on Libya established pursuant to resolution [1973 \(2011\)](#) in February 2013 (see [S/2013/99](#)).

## **IV. Continued emergence of private military and security companies**

### **A. Remaining stable private military and security companies industry in Afghanistan and Iraq**

29. Estimates suggest that global demand for private contract security services is increasing and will increase 7.4 per cent annually to \$244 billion in 2016.<sup>3</sup> The Working Group is closely following the different regions and forms in which contractors carry out their activities.

30. The United States reportedly spends \$138 billion a year on private security. While the business environment for these contractors may be changing with the war in Iraq over and the conflict in Afghanistan winding down, these private companies remain.<sup>4</sup>

31. Whereas over the last five fiscal years United States Department of Defense contract obligations reportedly decreased by more than \$35 billion (9 per cent), from a high of \$395 billion to \$360 billion, this decrease is not due to a drop in contract operations in Iraq and Afghanistan, which have remained relatively stable over the past four years at \$26.2 billion in 2009 and \$26 billion in 2012.<sup>5</sup>

32. In 2012, the United States Department of Defense spent \$44 billion for contracts performed overseas, out of which approximately 60 per cent are still active in Afghanistan and Iraq. As estimated over the last five years, contract obligations for the region have remained relatively stable, ranging from \$26 billion to \$28.5 billion.<sup>5</sup>

33. While contract obligations for work performed in Iraq reportedly dropped by more than \$6.3 million over the last two fiscal years, clearly showing a decrease in military obligations, there is relative stability in other private contract obligations performed. In addition, it is reported that in Afghanistan, there is a corresponding

<sup>3</sup> Freedonia, *World Security Services — Industry Study with Forecasts for 2016 and 2021*, Study No. 2978, January 2012; available at [www.freedoniagroup.com](http://www.freedoniagroup.com) (accessed on 21 July 2013).

<sup>4</sup> Anna Fifield, "Contractors reap \$138bn from Iraq war", *Financial Times*, 18 March 2013; available at [www.ft.com](http://www.ft.com) (accessed on 21 July 2013).

<sup>5</sup> Moshe Schwartz and Wendy Ginsberg, *Department of Defense Trends in Overseas Contract Obligations*, 1 March 2013; Congressional Research Service; available at [www.fas.org](http://www.fas.org) (accessed on 21 July 2013).

increase of approximately \$6 billion in private contract obligations.<sup>5</sup> According to information available, there were approximately 108,000 Department of Defense contractor personnel in Afghanistan as at March 2013, representing 62 per cent of the total force. Of this total, it is estimated that there were nearly 18,000 private security contractors, compared to 65,700 United States troops.<sup>6</sup>

34. Most recently in June 2013, DynCorp International reportedly won a contract to support the Defense Logistics Agency (the largest logistics combat support agency of the United States Department of Defense) in managing military equipment supplies at seven sites in Afghanistan.<sup>7</sup>

35. As for the kind of activities performed by private contractors in general, as they are involved less in military operations, they provide a wide variety of services and products to support operations in Afghanistan and Iraq, including base support, construction, security, training of local security forces and transportation.<sup>6</sup> In 2011, the United States State Department was expected to pay \$3 billion over the next five years on private security services to protect its embassy buildings in Baghdad alone, but contractors are hired increasingly by oil companies.<sup>4</sup>

## **B. Maritime security**

36. As reported by the Working Group following its country visit to Somalia in December 2012, maritime private military and security companies have greatly expanded their operations protecting commercial shipping with over 140 firms operating in the Indian Ocean region (see [A/HRC/24/45/Add.2](#)). As the International Chamber of Commerce International Maritime Bureau indicated recently, one of the reasons for the significant drop in piracy attacks in the region was the employment of “Privately Contracted Armed Security Personnel”.<sup>8</sup> At the same time, as noted by the Working Group, only approximately 26 per cent of civilian ships transiting the Gulf of Aden have declared the use of armed private military and security companies (see [A/HRC/24/45/Add.2](#)).

37. As reported in the latest quarterly report of the International Chamber of Commerce International Maritime Bureau, whereas the overwhelming majority of piracy cases in 2011 and 2012 were from Somalia, in the period from January to June 2013, Indonesia was the country most affected by piracy and armed robbery, with 48 registered cases of actual and attempted attacks during the first six months of the year.<sup>8</sup>

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<sup>6</sup> Moshe Schwartz and Jennifer Church, Department of Defense’s Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress, 17 May 2013; available at [www.fas.org](http://www.fas.org) (accessed on 21 July 2013).

<sup>7</sup> George Krivo, “DynCorp to Lease, Manage Military Equipment in Afghanistan”, ExecutiveBiz, 4 June 2013; available at <http://blog.executivebiz.com> (accessed on 19 July 2013).

<sup>8</sup> See the report of the International Chamber of Commerce International Maritime Bureau for the period of 1 January 2013-30 June 2013; available at [www.icc-deutschland.de/fileadmin/icc/Meldungen/2013\\_Q2\\_IMB\\_Piracy\\_Report.pdf](http://www.icc-deutschland.de/fileadmin/icc/Meldungen/2013_Q2_IMB_Piracy_Report.pdf).



### **C. Use of private military and security companies by the United Nations**

38. The United Nations uses private military and security companies extensively in a variety of activities and locations around the world. Private military and security companies provide guard services for United Nations offices, residential security for staff, and support for humanitarian activities, including risk assessments, threat analysis, logistical support and contributing to the development of security strategy.

39. The Working Group has followed the issue of the use of private military and security companies by the United Nations and believes that the United Nations should serve as a model for Member States and other organizations in its use of private military and security companies. The Working Group is of the opinion that there is a risk that, without proper standards and oversight, the outsourcing of security functions by the United Nations to private companies could have a negative effect on the image and effectiveness of the United Nations in the field.

40. The Working Group takes note of the efforts taken by the United Nations in this field and acknowledges several recent policy changes, such as the adoption of the United Nations Human Rights Due Diligence Policy on United Nations support to non-United Nations security forces (July 2011) and the implementation of the United Nations Policy on Armed Private Security Companies and Guidelines on the Use of Armed Security Services from Private Security Companies, published by the United Nations Department of Safety and Security in 2012.

41. In order to foster open and productive dialogue on these recent changes in United Nations policy, the Working Group held an expert panel event on 31 July 2013 on the issue of the use of private military and security companies by the United Nations, involving stakeholders from the United Nations, human rights groups and academia. Panelists discussed two broad sets of issues: (1) the use of armed private security companies to protect United Nations personnel and property in the field; and (2) the use of private military and security companies in United Nations peace and humanitarian operations. While acknowledging the recent adoption by the United Nations of policies and guidelines on the use of armed security services from private security companies, the panel discussions highlighted gaps in those documents, including the lack of vetting of security contractors by the United Nations and of an oversight mechanism to hold them accountable for any human rights violations committed while providing services to the United Nations. The Working Group encouraged the United Nations to engage in a vibrant and transparent debate on the use of private military and security companies in the interests of human rights and not to wait for violations to occur, as they surely will, before enacting measures to prevent and remedy them.

## **V. Regulation of private military and security companies: reinforced support for an international convention**

### **A. Overview of the history of the draft convention<sup>9</sup>**

42. In 2005 the Commission on Human Rights requested the Working Group to monitor and study the effects of the activities of private military and security companies, and prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities (see [E/CN.4/2005/2](#)). The Human Rights Council reiterated this request in 2008 (see [A/HRC/7/21](#)). In 2009, the Human Rights Council requested the Working Group to consult with intergovernmental and non-governmental organizations, academic institutions and experts on the content and scope of a possible draft convention on private military and security companies, to request States' input, and to share with Member States elements of such a draft convention on private military and security companies (see [A/HRC/10/11](#)).

43. At the same time, during its visits to various countries, the Working Group noted that the enjoyment of the exercise of human rights was impeded by transnational private military and security companies, as their role continued to expand in security operations (see [A/HRC/7/7/Add.5](#)). Therefore, the Working Group decided to hold, from 2007 to 2010, regional consultations in all five regions.<sup>10</sup> Participants in the regional consultations discussed the expansion of the operations of such companies in each region. They exchanged views regarding such companies' practices and the implications of the transfer of certain functions to private, non-State actors as part of the growing international trend to outsource traditional State functions to private military and security firms. Participants shared information regarding the potential repercussions of this practice on national sovereignty and discussed the regulations and other measures that States have adopted to ensure that private military and security companies respect international human rights standards. During the regional consultations, the Working Group and participants discussed general guidelines, norms and basic principles for the regulation and oversight of the activities of private military and security companies, with the outcome of the discussions serving as a useful base for the work of the Working Group related to drafting a new binding international legal instrument to encourage the further protection of human rights.

44. The Working Group thereafter circulated a draft text of a convention in 2009 to experts, academics and non-governmental organizations. As a result of comments received and discussions with various stakeholders, the Working Group prepared a note on the elements for a possible draft convention on private military and security companies, which was transmitted in 2010 to all Member States for comments. At the conclusion of this broad and inclusive consultative process, the Working Group presented a draft text of a possible convention to the Human Rights Council at its fifteenth session (see [A/HRC/15/25](#)). The proposed convention is a comprehensive text consisting of more than 40 articles. It elaborates not only general principles, but further proposes elements, including definitions and detailed provisions, for a legally binding instrument.

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<sup>9</sup> See [A/HRC/18/32](#).

<sup>10</sup> See [A/HRC/7/7/Add.5](#); [A/HRC/10/14/Add.3](#); and [A/HRC/15/25/Add.4-6](#).

## B. Sessions of the intergovernmental working group

45. In 2010, the Human Rights Council established an open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on private military and security companies.<sup>11</sup> In the same resolution, the Council also provided that members of the Working Group should participate in the open-ended intergovernmental working group as resource persons.

46. The first session of the open-ended intergovernmental working group was held from 23 to 27 May 2011, with the participation of representatives of 70 Member States, the European Union, the African Union and the members of the Working Group participating as resource persons (see [A/HRC/WG.10/CRP.1](#)). At the end of the session there was broad agreement that the activities of private military and security companies should be properly regulated. The disagreement among the participants focused on the form that such regulation should take; that is, whether an international convention was necessary, or whether current international and national obligations combined with self-regulation was sufficient, or whether national legislation needed to be strengthened, in particular with regard to the extraterritorial activities of private military and security companies. At the first session, many States also emphasized the need to ensure that private military and security companies involved in human rights violations are held accountable, and that victims of human rights violations are provided with effective remedies (see [A/HRC/WG.10/2/CRP.1](#) and [A/HRC/WG.10/1/4](#)).

47. The second session of the open-ended working group was held from 13 to 17 August 2012, with the representatives of 65 Member States, the European Union and the African Union, and the Working Group members participated as resource persons (see [A/HRC/WG.10/2/CRP.1](#)). The submission of the Working Group to the second session of the open-ended working group emphasized that an international convention was the most efficient solution to the challenge of regulating private military and security companies, as international law in its current form does not prohibit the outsourcing of State functions to private military and security companies or clearly spell out the minimum content of States' due diligence obligations to ensure that private military and security companies respect international humanitarian and human rights law. During her presentation to the open-ended working group the then Chair of the Working Group pointed to the lack of adequate national legislation governing private military and security companies and the transnational nature of many private military and security companies activities as additional factors underscoring the need for an international convention (see [A/HRC/WG.10/2/CRP.1](#) and [A/HRC/24/45](#)).

48. At the second session of the open-ended intergovernmental working group, there was agreement among States on the common goal of protecting human rights in the context of private military and security companies activities and ensuring accountability for abuses. Many delegations recalled the need for a legally binding document by pointing to the weaknesses of national legislation, the Montreux Document on private military and security companies,<sup>12</sup> and the International Code

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<sup>11</sup> See para. 11 of the present report and Human Rights Council resolution 15/26.

<sup>12</sup> [www.eda.admin.ch/psc](http://www.eda.admin.ch/psc).

of Conduct for Private Security Service Providers,<sup>13</sup> more particularly related to criminal accountability and remedies for victims. Some delegations stated that it was premature to consider negotiations on a legally binding instrument. Nevertheless, there was agreement and a commitment to continue discussions, and States recommended to the Human Rights Council the extension of the mandate of the open-ended intergovernmental working group for another two years (see [A/HRC/22/41](#)).

49. The Human Rights Council decided on 22 March 2013 to extend the mandate of the open-ended intergovernmental working group for a further period of two years to fulfil the following mandate:

- (a) Consideration of the human rights aspects of, inter alia, the following:
  - (i) Accountability and the provision of appropriate remedies for the victims;
  - (ii) To distinguish between the activities of private security companies and private military companies, as well as other possible activities relevant to this issue;
  - (iii) Review of all measures, including existing national legislation for registering, licensing and contracting private military and security companies;

(b) Consideration of the possibility of an international regulatory framework, including the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, as well as other approaches and strategies, including international standards, and the way in which they might interact to protect human rights.<sup>14</sup>

50. In addition, the resolution of the Human Rights Council emphasized the importance of providing the open-ended intergovernmental working group with the expertise and expert advice necessary to fulfil its mandate. In this context, it decided that the Working Group will be invited to participate in the work of the open-ended working group.<sup>15</sup> The Working Group is looking forward to providing input for the next session of the open-ended working group.

## C. Limitations of national legislation: field examples

### National legislation survey

51. Existing national legislation provides a rather patchy and inadequate framework for addressing the challenges posed by private military and security companies. Examples include inadequacies related to registering, licensing and providing effective and transparent mechanisms for accountability and remedies for human rights violations. These limitations are further exacerbated by the transnational nature of private military and security companies and the related difficulties with regard to establishing jurisdiction to prosecute relevant cases or to collect related evidence. Civil liability for alleged violations by private military and security companies remains rare owing to legal obstacles such as immunity, or

<sup>13</sup> [www.icoc-ppsp.org/](http://www.icoc-ppsp.org/).

<sup>14</sup> See Human Rights Council resolution 22/33 and A/HRC/22/41.

<sup>15</sup> See Human Rights Council resolution 22/33.

situations in which cases may not be heard because they would require the disclosure of “State secrets” (see [A/HRC/WG.10/2/CRP.1](#)).

52. In its most recent report to the Human Rights Council ([A/HRC/24/45](#)), the Working Group presented the results and its conclusions following the first phase of its national legislation survey. The aim of the survey is to identify legislative approaches to the activities of private military and security companies, assess their effectiveness in protecting human rights and addressing issues related to accountability for violations, and identify good practices. On the basis of the analysis of the legislation of 13 anglophone African countries,<sup>16</sup> the Working Group concluded that these States did not have adequate legislation on private military and security companies operating in international markets. More particularly, the Working Group noted that, with the exception of South Africa, the legislation was found applicable only at the domestic level, did not regulate the provision of military or security services abroad, and did not prohibit engaging in certain activities, such as direct participation in hostilities.

53. The main issues examined in the survey were: (a) whether the legislation in these countries covers both private military companies and private security companies; (b) whether the legislation applied to the export of security and/or military services beyond their borders; and (c) whether or not such laws, if any, apply extraterritorially. The study also highlighted requirements for the establishment of a private military and security company, including relevant licensing and registration mechanisms. The question of whether there are laws and/or regulations dealing with the use of force and firearms and with trafficking of weapons by both security and military service providers was also reviewed, as was the existence of laws implementing international instruments on mercenaries.

54. The study revealed widely divergent levels of regulation of private military and security company activities among the analysed countries.<sup>17</sup> With regard to the scope of the legislation, the Working Group noted inconsistencies in the terminology and the ambit of services covered in the legislation of different countries, resulting in a lack of proper oversight over the entire range of services that private military and security companies may provide. The Working Group noted that the lack of extraterritorial jurisdiction was problematic, as private military and security companies often carry out transnational activities. It was particularly disturbing that private military and security companies are not prohibited from taking direct part in hostilities, in the light of their ever-increasing role in armed conflict situations.

55. The study also showed that none of the countries analysed had a dedicated governmental agency with exclusive responsibility for the licensing, regulation and monitoring of private military and security companies. The Working Group noted that, while different models of oversight mechanisms are appropriate, in order to ensure proper scrutiny of conduct of private military and security companies, it is necessary and desirable to have an effective oversight mechanism. Without such a mechanism, the activities of private military and security companies could seriously undermine rule of law and the effective functioning of democratic State institutions

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<sup>16</sup> Botswana, Ghana, the Gambia, Kenya, Lesotho, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Uganda and Zimbabwe.

<sup>17</sup> Of the 13 countries analysed by the Working Group, all except Kenya and Swaziland had legislations addressing the private security sector.

responsible for ensuring public safety in accordance with international human rights standards.

56. The Working Group also expressed concerns about countries that permit private military and security companies to possess and use firearms, but do not have sufficiently detailed regulation to meet applicable international human rights and humanitarian standards. Legislation does not generally include provisions on the proportionate use of firearms only in case of self-defence or in defence of third persons and in a manner likely to decrease the risk of unnecessary harm.

57. Finally, the Working Group pointed out that international human rights and humanitarian law norms and rules have not been recognized as a relevant element in the selection or training process of private military and security company personnel.

58. The Working Group wishes to continue the survey on national legislation in order to identify good practices and to develop guidance for Member States to effectively regulate private military and security companies in compliance with international human rights and humanitarian law obligations.

### **Country visits**

59. In December 2012, the Working Group visited Somalia. It assessed the impact of the activities of private military and security companies on the enjoyment of human rights, as well as their deployment in Somalia and at sea as part of anti-piracy efforts. Private military and security companies in Somalia provide various military services, armed protection and other security services. While the Working Group commended the Government of Somalia for its commitment to draft laws to regulate the activities of private military and security companies, it also noted that there was no specific relevant national legal framework existing in this respect, which created a rather uncertain situation with regard to the operations of private military and security companies (see [A/HRC/24/45/Add.2](#)).

60. After its visit to Honduras in February 2013, the Working Group noted that the legal and regulatory framework fell short of international standards, and implementation was hampered by the lack of institutional capacity of the authorities responsible for private military and security companies. These shortcomings, coupled with the prevailing violence and insecurity in the country, and the lack of guarantee of security by the State, produced an environment in which private military and security companies have grown exponentially, gained power in the security sector and acted, in some situations, with impunity (see [A/HRC/24/45/Add.1](#), forthcoming).

61. In the view of the Working Group, the gaps seen in national legislation may best be filled by an international convention that requires States to adopt law meeting certain minimum criteria.

## **D. Update on the Montreux Document and the International Code of Conduct for Private Security Providers — still not a complete solution**

62. The Working Group notes with satisfaction that, on the occasion of the fifth anniversary of the Montreux Document on pertinent international legal obligations

and good practices for States related to operations of private military and security companies (Montreux Document), the Government of Switzerland, in cooperation with ICRC, will organize a conference on private military and security companies, to be held in December 2013 (“Montreux plus 5”). The aim of the conference is to enable the signatory parties to share their experiences related to the implementation of the obligations and best practices of the Montreux Document. The Working Group welcomes the initiative and is looking forward to participating in the event, which will discuss current challenges and identify good practices.

63. The Working Group acknowledges the value of the Montreux Document in affirming the legal obligations of home, host and contracting States under international humanitarian law and international human rights law with regard to the activities of private military and security companies in armed conflicts, and in providing a set of good practices that can be considered as a source of inspiration for States regarding their due diligence obligations. At the same time, the Working Group reiterates its position that the Montreux Document is not a complete solution to the regulatory gaps concerning private military and security companies. First, while the document reiterates legal standards and articulates some “soft law”, it is not a legally binding instrument. Moreover, it applies only in situations of armed conflict, whereas private military and security companies carry out various activities in peacetime as well. Indeed, the latter type of activity is likely to increase as the wars in Iraq and Afghanistan wind down.

64. Alongside the Montreux Document, the Government of Switzerland, in cooperation with other Governments, has supported the development of the International Code of Conduct for Private Security Providers. After the Code was adopted in November 2010, various stakeholders worked to develop an oversight mechanism. This mechanism — the Charter for the International Code of Conduct for Private Security Service Providers — was adopted in February 2013. During the drafting of the Charter, the Working Group submitted extensive comments and made clear that, in its opinion, the Charter did not live up to the aspirations of the Code of Conduct. The final version of the Charter included modifications directed at addressing some of the concerns of the Working Group (for example, a reference to the need for a human rights assessment for private military and security companies operating in complex environments), but several other critical concerns were not addressed. For example, with regard to the complaints procedure, the Charter does not provide a means to address the substance of a third-party complaint, but only permits the review of a company’s lack of internal grievance procedures. Also, the Charter places insufficient emphasis on field audits in certifying companies and in conducting monitoring and compliance reviews. More generally, as a voluntary and self-regulatory tool, the Code is clearly insufficient to ensure comprehensive accountability for violations of human rights and to provide remedies for victims.

65. The Working Group believes that while the Montreux Document and the Code of Conduct are important achievements, they cannot be a substitute for an international system to regulate the activities of private military and security companies. The majority of support for the Montreux Document and the International Code of Conduct is from States from the Western European and Others Group,<sup>18</sup> which suggests that the process does not necessarily reflect the consensus

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<sup>18</sup> Out of the total number of 46 States that to date support the Montreux Document, 20 belong to the Western European and Others Group, and out of the 659 private military and security

of the entire international community, but rather the consensus of States where private military and security companies are headquartered. Finally, while the Montreux Document and the Code of Conduct may enhance corporate responsibility of private military and security companies, an international convention is needed to address the responsibility of States. A convention, in turn, would complement the Montreux Document and strengthen the efficacy of the Code of Conduct.

#### **E. Support for an international convention on private military and security companies: issues in focus**

66. The Working Group reiterates its position that the most efficient way to regulate the activities of private military and security companies is through an international legally binding instrument. The current means of protection are incomplete in providing the necessary legal framework for these corporate actors whose operations pose particular risks to human rights.

67. As was pointed out by the Working Group in its submission to the second session of the open-ended intergovernmental working group, while international human rights and humanitarian law include various provisions that apply to private military and security companies, the particulars of these obligations remain unclear (see [A/HRC/WG.10/2/CRP.1](#)). International legal instruments, the jurisprudence of regional courts, United Nations treaty and Charter-based monitoring bodies provide examples of due diligence standards of preventing, investigating, punishing and providing remedies for acts of violence committed by non-State actors (see [A/HRC/WG.10/2/CRP.1](#)). Also, the Rapporteurship on the Rights of Women of the Inter-American Commission on Human Rights noted in a report on the situation of women victims of violence<sup>19</sup> that the duty of due diligence implies the duty of States parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised so that they are capable of juridically ensuring the free and full enjoyment of human rights.<sup>20</sup> The Commission pointed out that “the obligation of the States to act with due diligence in response to acts of violence applies as well to non-State actors”<sup>20</sup> and that States’ responsibilities “extend well beyond the relationship between a State’s agents and the persons subject to its jurisdiction; those effects manifest themselves in the positive obligation the State has to adopt the measures necessary to ensure effective protection of human rights in interpersonal relationships”.<sup>21</sup>

68. While these are good examples of general due diligence-related obligations, there is no legally binding instrument or jurisprudence explicating the minimum standards that States should meet related to their specific due diligence obligations regarding the activities of private military and security companies. This creates a significant gap and leaves States without guidance in situations that involve serious

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companies that signed the International Code of Conduct, 432 are headquartered in one of the States of the Western European and Others Group.

<sup>19</sup> Rapporteurship on the Rights of Women of the Inter-American Commission on Human Rights, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser.L/V/II, Doc. 68, 20 January 2007; available at [www.cidh.oas.org/women](http://www.cidh.oas.org/women) (accessed on 9 July 2013).

<sup>20</sup> *Idem*, para. 27; see also Inter-American Commission on Human Rights, Velásquez Rodríguez case, Judgement of 29 July 1988. (Series C) No. 4, para. 166.

<sup>21</sup> *Idem*; see also Inter-American Commission on Human Rights, Mapiripán Massacre case, Judgement of 15 September 2005. (Series C) No. 134, para. 111.



human rights violations caused by private military and security company personnel. It is this gap that the Working Group suggests would be filled by the adoption of an international treaty that would offer a detailed set of rules to apply in order to ensure that private military and security companies, as a form of corporate social responsibility, respect the standards of international human rights and humanitarian law in their activities and, with State support, provide effective remedies, where necessary.

69. The Working Group believes that the successful regulation of private military and security companies requires a multilayered approach involving international standard-setting, robust national legislation and industry self-regulation, and therefore it acknowledges the value of national legislation and soft law instruments, and it notes that they should be complementary to an international legally binding regulation. For example, the Working Group believes that the International Code of Conduct may serve as a useful set of standards across the industry, and the good practices of the Montreux Document provide a solid starting point for developing minimum standards for States' conduct and for national regulation of private security companies. The Montreux Document should also serve as a source of inspiration for the international framework in situations of armed conflict. However, as noted above, the Working Group believes that these tools are only some of the elements required for an international system to regulate the activities of private military and security companies.

70. The Working Group retains the position that the due diligence-related obligations of States through the activities of private military and security companies should be regulated by an international treaty. Reflecting on related concerns raised by some States during the second intergovernmental working group session on the regulation of private military and security companies (see [A/HRC/WG.10/2/CRP.1](#)), the Working Group notes that the draft convention draws a clear distinction between the activities of mercenaries and private military and security companies in that it aims to regulate only the activities of private military and security companies. With regard to the scope of the regulation, the Working Group takes the position that, while it acknowledges the difference between the activities of private military and private security companies and their services, it finds it is necessary to regulate both because of the equally dangerous nature of their activities, which may involve the use of force, and their impact on the enjoyment of human rights.

71. International law does not clearly prohibit States from outsourcing any functions, but it does imply disapproval of some types of outsourcing, particularly with regard to direct participation in hostilities,<sup>22</sup> and similar references are included in the good practices of the Montreux Document.<sup>23</sup> In addition, some States (for example, South Africa, Switzerland and the United States) have already taken steps in their national laws to prohibit certain activities from being outsourced (see [A/HRC/WG.10/2/CRP.1](#), para. 10).

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<sup>22</sup> Art. 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989; and art. 2 of the Convention of the Organization of the African Unity for the Elimination of Mercenaries in Africa, Organization of African Unity CM/817 (XXIX), annex II, Rev.3.

<sup>23</sup> [www.eda.admin.ch/psc](http://www.eda.admin.ch/psc).

72. Whereas the position of the Working Group is that there are many other private military and security company activities that States could potentially agree not to outsource in addition to direct participation in hostilities<sup>24</sup> (the draft convention proposed by the Working Group contains an expansive list of such activities), States' opinion may vary in this regard. For this reason, while the Working Group continues to support the general agreement among States not to outsource direct participation in hostilities and/or combat operations, the inclusion of other activities in the list is open to debate. The Working Group nevertheless continues to maintain that the privatization of any State function must be regulated and controlled, and States must guarantee that the responsibility for violations of international law is not outsourced and remains with the State.

73. The Working Group underlines that, bearing in mind the transnational activities of private military and security companies and the noted divergent levels and inconsistencies of their regulation and the implementation of the relevant laws, a legally binding set of common international standards is required to guide national efforts as a minimum in the fields of registering, licensing, vetting and training private military and security company personnel, as well as with respect to investigating, prosecuting and punishing violations and providing remedies, if necessary. Whereas the guidance provided by the good practices of the Montreux Document regarding the content of States' due diligence-related obligations is appreciated, their non-legally binding nature and the fact that they are applicable only in armed conflict situations pose considerable limitations to their implementation.

74. The Working Group refers, by analogy, to the recent successful negotiations of States that led to the adoption of the Arms Trade Treaty as an example of States' commitment to regulate the international transfer of conventional weapons through a legally binding instrument. The Working Group notes that a possible convention on the regulation of the activities of private military and security companies could be a similar success story in that it would regulate the international transfer of certain services that pose threats to the enjoyment of human rights that are at least as serious as those posed by the international transfer of conventional weapons. Similarly, to export control arrangements, an international convention to control the private military and security service export would require States to conduct appropriate human rights diligence before granting an export licence. The Working Group therefore calls upon States to join the efforts, discuss the scope of the regulation and agree on the necessary terms of an international legally binding document so that private military and security company members are brought to account for violations of human rights and victims are provided effective remedies.

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<sup>24</sup> Examples could include: waging war and/or combat operations; taking prisoners; law-making; espionage; intelligence operations; knowledge transfer with military, security and policing application; use of certain arms; and police powers such as arrest, detention and the interrogation of detainees.

## **VI. Conclusions and recommendations**

### **A. Mercenaries**

75. The Working Group requests States that have not replied to their request for relevant information on convicted mercenaries under their jurisdiction, according to Human Rights Council resolution 21/8, to do so as soon as possible.

76. The Working Group appeals to Member States that are not yet parties to consider acceding or ratifying promptly and as a matter of urgency to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

### **B. Private military and security companies**

77. The Working Group encourages States to ensure the investigation and prosecution of violations of international human rights law involving private military and security companies, guarantee accountability for human rights violations and provide an effective remedy for victims.

78. The Working Group is of the view that further research into effective national regulatory strategies is needed, and recommends that Member States respond to its request to collect all national legislation relevant to private military and security companies to facilitate analysis by multiple stakeholders.

79. Taking into account the risk to human rights posed by the activities of private military and security companies, the Working Group welcomes efforts by States to continue discussing the possibility of international regulation, in addition to progress at the regional and national levels and industry-led initiatives.

80. The Working Group welcomes efforts to clarify obligations under international law and identify good practices, such as those contained in the Montreux Document, and industry self-regulation initiatives, such as the International Code of Conduct for Private Security Service Providers. The Working Group urges States to recognize these initiatives as complementary to, but not substitutes for, strong international and national regulatory frameworks.

81. The Working Group reiterates its view that a comprehensive, legally binding international regulatory instrument is the best way to ensure adequate protection of human rights. The Working Group therefore encourages all States to participate actively in the work of the intergovernmental working group established by the Human Rights Council with a view to considering the possibility of an international instrument for the regulation of private military and security companies.