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PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT*

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

Chairperson-Rapporteur: Mr. Alexander NIKITIN

* Late submission.

Summary

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 was established in July 2005 pursuant to Commission on Human Rights resolution 2005/2. The Working Group is composed of Ms. Najat Al-Hajjaji (Libyan Arab Jamahiriya), Ms. Amada Benavides de Peréz (Colombia), Mr. José Luis Gómez del Prado (Spain), Mr. Alexander Nikitin (Russian Federation) and Ms. Shaista Shameem (Fiji). Mr. Alexander Nikitin was elected as Chairperson-Rapporteur on 7 April 2008.

The present report is presented in accordance with the terms of the resolution requesting that the Working Group report annually on the progress made in the fulfilment of its mandate to the Human Rights Council.

Section I introduces the report and section II presents an overview of activities undertaken during the reporting period. Section III describes envisioned future activities, notably a process of regional consultations with States, to discuss the fundamental question of the role of the State as a holder of the monopoly of the use of force.

The Working Group devotes a thematic section of the report to standards, principles and guidelines for a new international convention on regulating private military and security companies and other legal regulatory instruments.

Section IV contains the Working Group's conclusions and section V its recommendations. In particular, the Working Group recommends the elaboration and adoption of a new international convention on the regulation of private military and security companies, including an accompanying model law to assist Governments in the adoption of appropriate national legislation. The Working Group also proposes basic principles for the regulation of private military and security companies and recommends, when this set of principles are converted by it into draft legal instruments, the establishment in due time of an intersessional intergovernmental open-ended working group for the preparation of such a convention.

Finally, section VI addresses the status of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

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Introduction

1. 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 was established in 2005, pursuant to Commission on Human Rights resolution 2005/2 assumed by the Human Rights Council, replacing the prior mandate of the Special Rapporteur (established in 1987).

2. In 2008, the Working Group was composed of the following experts: Ms. Najat Al-Hajjaji (Libyan Arab Jamahiriya), Ms. Amada Benavides de Pérez (Colombia), Mr. José Luis Gómez del Prado (Spain), Mr. Alexander Nikitin (Russian Federation) and Ms. Shaista Shameem (Fiji). Mr. Alexander Nikitin was elected Chairperson-Rapporteur on 7 April 2008, a position that rotates on an annual basis.

3. For the purposes of this report, and while recognizing the definitional challenges, the Working Group refers to private military and private security companies (PMSCs) as including private companies which perform all types of security assistance, training, provision and consulting services, i.e. ranging from unarmed logistical support, armed security guards, to those involved in defensive or offensive military and/or security-related activities, particularly in armed conflict areas and/or post-conflict situations.

4. In order to implement respective General Assembly and Human Rights Council mandates, the Working Group recommends that an intergovernmental open-ended working group be established at the international level, consisting of nominated representatives of interested States and experts, tasked with drafting the text of a new international convention on regulating private military and security companies. At the same time, the Working Group will present to the intergovernmental open-ended working group its findings and conclusions in the form of the draft convention based upon principles outlined further in the present report as an instrument for national level of regulation.

I. ACTIVITIES OF THE WORKING GROUP

A. Third, fourth and fifth sessions of the Working Group

5. The Working Group held its third session in Geneva from 7 to 11 April 2008. It elected Mr. Alexander Nikitin as its Chairperson-Rapporteur for the coming year. It convened consultations with representatives of Member States, United Nations agencies and organs, the Office of the High Commissioner for Human Rights, the International Committee of the Red Cross, academics, non-governmental organizations and an association of private military and security companies.

6. After having considered a number of country situations, the Working Group decided to send letters of request, or renewed requests, to visit Armenia, Azerbaijan, Colombia, Equatorial Guinea and the United States of America. By letter dated 24 June 2008, the Government of the United States accepted the request of the Working Group to visit the country. At the same session, the Working Group decided that in compliance with Human Rights Council resolution 7/21 the next regional consultation would be held for countries of the Eastern

European Group and Central Asia region. It also decided on the procedure to follow in drafting guidelines for regulations of private security and military companies. On 14 April 2008, at the conclusion of its third session, the Working Group issued a press release.

7. The Working Group held its fourth session in New York from 2 to 5 September 2008. It held discussions with Member States, United Nations departments including the Department for Peacekeeping Operations, the Office of Legal Affairs and the Department of Disarmament Affairs, representatives of civil society, academics, and representatives of private military and security companies. In particular, the fourth session was an occasion to discuss with relevant actors the key principles for a system of regulation of private military and security companies.

8. After having considered a number of country situations, the Working Group discussed forthcoming visits to the United States of America and Afghanistan, and decided to send letters of request, or renewed requests, to visit Chad, Iraq, South Africa and the Sudan, and followed up on country situations, including the conflict in Georgia. On 9 September 2008, at the conclusion of its fourth session, the Working Group issued a press release.

9. The Working Group held its fifth session in Geneva from 15 to 19 December 2008. It convened consultations with representatives of Member States, United Nations agencies and organs, the Office of the High Commissioner for Human Rights, the International Committee of the Red Cross, academics, non-governmental organizations and private military and security companies. The Working Group discussed ways to strengthen the international legal framework and also considered various allegations related to mercenary activity that it had received. The Working Group met with representatives of the permanent missions of Honduras and Ecuador to discuss follow-up to the Working Group's visits to these countries with the respective Governments. Following the Working Group's visit, the Government of Honduras acceded to the Convention. The authorities of Ecuador had taken all the necessary measures to become a party to the Convention, but due to the adoption of the new Constitution and the establishment of a new parliament, accession had been delayed. The Working Group also met with representatives of the Democratic Republic of the Congo to discuss the political and social situation in the eastern part of the country. The delegation welcomed the request of the Working Group to conduct a visit to the country.

10. The Working Group also decided that in compliance with Human Rights Council resolution 7/21 and General Assembly resolution 62/145 the next regional consultations would be held for the regions of Asia and Africa. In this respect, it also held meetings with a representative from the Permanent Mission of Egypt as Regional Coordinator of the African Group on matters related to human rights issues, and with the Permanent Representative of South Africa to inform about the goals of the regional consultations.

B. Field missions

Field mission to the United Kingdom of Great Britain and Northern Ireland

11. A delegation of the Working Group, composed of its Chairperson-Rapporteur and one member, visited the United Kingdom from 26 to 30 May 2008.

12. During the visit, the Working Group collected and analysed information on the system of regulation of activities of private military and security companies registered in the United Kingdom. In the process, the Working Group met with representatives from government agencies, civil society, private military and security companies and an association of such companies.

13. The Working Group recommended that the Government undertake a new comprehensive inquiry into the status and regulation of private military and security companies in the United Kingdom, make a policy choice between the six options for regulation elaborated in its formerly publicized Green Paper, extend its supervision beyond the limited circle of companies working on government contracts to the broader circle of British private military and security companies working for foreign, international and private contractors, and take an active stand in the United Nations towards the elaboration of new international regulatory instruments for the private military and security industry.

14. The report of the mission, including its conclusions and recommendations, is contained in an addendum to the present report.

Other missions in preparation or requested

15. The Working Group is currently preparing a mission to Afghanistan, scheduled for February 2009, and envisages a visit to the United States of America in the course of 2009. By letter dated 21 January 2008, the Government of Afghanistan accepted the request of the Working Group to visit the country and in 2008, the Working Group has been coordinating with the Government of Afghanistan the dates for its mission. At its fifth session, the Working Group was informed by the Permanent Representative of Afghanistan that due to “technical issues”, the visit of the Working Group would be postponed for at least a month, that is, not before 15 March 2009.

16. The Working Group reiterates its appreciation to the Member States who have invited it to visit, thus enabling it to fulfil its mandate. It has requested visits to the following countries: Armenia, Azerbaijan, Central African Republic, Chad, Colombia, Equatorial Guinea, Ghana, Iraq, Mexico, Papua New Guinea, South Africa, the Sudan and Zimbabwe, and renews its appeal for invitations.

17. In March 2007, the Working Group had requested a visit to Iraq and received a response from the Government in April 2007 that the security situation in Iraq would not allow the Working Group to work in an effective manner; the Government of Iraq would however look forward to receiving the Working Group when the security situation improved. In October 2008, the Working Group reiterated its request.

C. Regional consultations

18. The Working Group recognizes the importance of a regional perspective on the issue of the prevalence and regulation of private military and security companies. The Working Group has so far convened regional consultations for the Latin American and Caribbean region and for the

Eastern European Group and Central Asia. During the regional consultations the Working Group considered opinions and reports from 22 countries, as well as submissions from more than 20 experts.

19. The regional consultation for countries of the Eastern European Group and Central Asia was held from 17 to 18 October 2008 in Moscow, in accordance with paragraph 15 of General Assembly resolution 62/145. Representatives from the Governments of 11 countries from the region participated in the consultation, as well as academics and representatives of international organizations, civil society, a regional inter-State organization (the Collective Security Treaty Organization) and a private military and security company.

20. The Working Group requested and considered at the regional consultation analytical reports made on the private military and security industry situation in three regions: Western Europe, Eastern Europe and Central Asia, and Latin America and the Caribbean. The Working Group was briefed by a broader group of experts on the situation in Eastern Europe, the Caucasus and Central Asia. The Working Group took note of these regional submissions and considers them to be part of the process of establishing within the United Nations community a shared understanding of standards, guidelines and principles for the regulation of private military and security industry. Additionally, a briefing was given by the Collective Security Treaty Organization, a regional organization of seven States (Armenia, the Russian Federation, Belarus, Kazakhstan, Tajikistan, Uzbekistan and Kyrgyzstan), on specific forms of military and security activities in the region. The report of the consultation (A/HRC/10/14/Add.3) contains a summary of all these briefings and analytical overviews.

21. Also at that regional consultation, drafts of potential new legal instruments - a draft international convention on the regulation and oversight of private military and security companies and a draft model law for the national level of regulation - were introduced by experts, upon request of the Working Group, and discussed with representatives of participating States.

22. In compliance with the relevant General Assembly and Council resolutions, the Working Group is planning in 2009-2011 to hold regional consultations for the Asian, African and Western Europe and other regions. New legal instruments on regulating private military and security companies which are currently being elaborated, would be discussed with Member States at these consultations, in order to provide wide input into the content and consensus on the format of these instruments.

D. Communications

23. The Working Group received information from Governments, non-governmental organizations and individuals concerning situations involving mercenaries, mercenary-related activities and private military and security companies. During the year under review, communications were sent to Australia, Chile, Colombia, Israel, Mexico and the United States of America. These communications and summaries of responses received from Governments are reflected in an addendum to the present report.

E. Other activities

24. The Chairperson-Rapporteur presented the Working Group's annual report to the Human Rights Council on 18 March 2008 (A/HRC/7/7 and Add.1-5) and the Working Group's annual report to the General Assembly on 3 November 2008 (A/63/325). The Chairperson-Rapporteur reiterated before the General Assembly the concerns of the Working Group regarding the lack of regulation at both national and international level of the activities of private military and security companies. He highlighted that these companies recruit and train thousands of citizens from all over the world, from both developed and developing countries, to perform tasks in Afghanistan, Iraq and other zones of armed conflict. Activities of private military and security companies cannot be regulated on the basis of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries alone, and a new international legal instrument, possibly in the format of a new convention, is required, which might be supplemented by another legal instrument, such as tentatively a model law, which would assist national Governments in the elaboration and adoption of national legislation on the regulation of the sector.

25. On 31 January and 1 February 2008, Mr. Gómez del Prado and Ms. Benavides de Pérez participated in the international conference "The Privatization of Security and Human Rights in the Americas: Perspectives from the Global South" at the University of Wisconsin-Madison, which established an international research network on private military and security companies.

26. On 5 and 6 June 2008, Mr. Gómez del Prado participated in the conference "The Social Construction of Threat and the Changing Relation between Liberty and Security" at the Centre for European Policy Studies in Brussels.

27. On 11 September 2008, Mr. Gómez del Prado addressed 43 students from 33 countries in a course within the Programme in Security, Stability, Transition and Reconstruction and participated at a panel discussion at the Marshall European Center for Security Studies in Garmisch-Partenkirchen (Germany).

28. From 24 to 27 September 2008, Mr Gómez del Prado participated in Caracas at the 7th Social Summit for the Union of Latin America and the Caribbean, organized by the Latin American Parliament and the Government of Venezuela. Following his participation, a paragraph was included in the Declaration for Peace, against Terrorism adopted at the Summit urging countries to ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and to elaborate common legislation to prevent private military and security companies usurping inherently State functions, such as the monopoly of the legitimate use of force.

29. On 24 and 25 November 2008, the Chairperson-Rapporteur Alexander Nikitin participated in a workshop on the consequences of the rise of private military and security services at the Institute of Strategy at the Royal Danish Defence College, and on 26-27 November 2008, made two presentations on regulating private military and security companies at the plenary session and section of the symposium "Humanitarian space and military operations" organized by the Danish Ministry for Foreign Affairs, Ministry of Defence, the Danish Red Cross and the Danish Institute for Human Rights. He also prepared and published a book devoted to privatization in the military and security spheres, with a special emphasis on principles for the regulation of private military and security companies.

30. On 28 November 2008, Mr. Gómez del Prado participated in the workshop "The Challenges to the Regulation of Private Military and Security Companies" held in Rome, organized by LUISS Guido Carli University within the Project PRIV-WAR, a collaborative research project carried out by a consortium of seven European universities. The project is funded by the European Union and aims at formulating proposals for a satisfactory scheme within the European Union to ensure accountability and responsibility of PMSCs.

31. At the initiative of the Chairperson-Rapporteur, the Working Group created a website containing documents and analytical materials on mercenaries and private military and security companies.

32. In 2007, Ms. Benavides de Pérez established an academic network composed of academics and NGOs to investigate the phenomenon of mercenarism and private military and security companies. The network meets on a monthly basis.

33. Since June 2008, Mr. Gómez del Prado has been a member of the Geneva Centre for the Democratic Control of Armed Forces advisory group of Private Security Regulation.Net, an Internet resource on private military and security company regulations.

F. Future activities

34. In 2009, the Working Group will continue to promote the widest ratification/accession of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. It will also pursue its consultations with Member States and specifically with Armenia, Azerbaijan, the Central African Republic, Chad, Colombia, Equatorial Guinea, Ghana, Iraq, Papua New Guinea, South Africa, the Sudan and Zimbabwe, with a view to obtaining invitations to carry out country visits.

35. The Working Group is in active discussion with the Governments of Afghanistan and the United States of America and hopes to carry out visits to these countries in the course of 2009. The purpose of these visits will be to examine, in a spirit of cooperation and dialogue, the situation regarding the activities of private military and security companies either originating from or operating in that country, and their effects on the enjoyment of human rights.

36. In 2009, the Working Group will hold another regional consultation in order to gather a further regional perspective about the current practices of private military and security companies recruiting personnel to be deployed in armed conflict, and to review steps taken by States to regulate and monitor the activities of private military and security companies. It will also attempt to develop regulatory options and best practices aimed at ensuring that private military and security company activities are in conformity with international human rights standards. The regional consultation will also provide an opportunity for the Working Group to discuss with States the retention by States of the monopoly of the use of force.

37. This regional consultation, like the others already held, will be used as a first step in view of the proposal recommended by the Working Group to convene a high-level round table, under the auspices of the United Nations, to discuss the fundamental role of the State as holder of the monopoly on the use of force. The Working Group intends to conduct in total five regional governmental consultations, similar to the ones held for the Latin America and Caribbean region

and for the Eastern European Group and Central Asia region, in order to present to the high-level round table of States a global view of the emerging issues, manifestations and trends regarding mercenary-related activities and their impact on human rights.

II. THEMATIC ISSUES: STANDARDS, PRINCIPLES AND GUIDELINES FOR A NEW INTERNATIONAL CONVENTION ON REGULATING PRIVATE MILITARY AND SECURITY COMPANIES

A. Elaboration process for new regulatory instruments

38. In resolution 7/21, the Human Rights Council mandated the Working Group to elaborate and present "concrete proposals on possible complementary and new standards aimed at filling existing gaps, as well as general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, while facing current and emergent threats posed by mercenaries or mercenary-related activities". Based on its country visits and consultations with various stakeholders, and having studied many existing or proposed standards, guidelines and principles for the regulation of the private military and private security industry, the Working Group has started to develop a framework of standards, principles and guidelines that could be used in the elaboration of national and international regulatory mechanisms to fill the existing gaps and address mercenarism and the activities of private military and security companies. These standards and principles were discussed by the Working Group with Governments in the course of regional consultations and country visits, and with representatives of companies, and presented in the Working Group's annual report to the General Assembly (A/63/325). The Working Group defines regulatory principles in six topic areas: legal standards; registration; licensing; accountability mechanisms; vetting, legal and human rights training; and oversight. It suggests the establishment of an intergovernmental open-ended working group, consisting of nominated representatives of interested States, as well as experts, to draft the text of a new international convention on regulating private military and security companies, based on draft texts prepared by the Working Group derived from coordinated principles.

B. Standards, principles and guidelines

39. Since the preparation of its annual report to the General Assembly, the Working Group has further considered existing and emerging standards, principles and guidelines, which are to be placed as the foundation for new regulatory legal instruments.

Legal standards

40. The Working Group considered that the initial step required to regulate effectively the activities of private military and security companies and their employees is to establish concrete legal standards that would define a juridical framework for the activities of private military and security companies. In resolution 7/21, the Human Rights Council refers to "gaps" in existing legal norms that need to be filled, which the Working Group believes requires the development of new legal norms. In identifying these gaps, the Working Group recognizes that whilst the Convention remains the only universal instrument dedicated to addressing mercenarism, many activities performed by private military and security companies under government contracts do not easily fall within the definition of "mercenary" as set out in the Convention.

41. As highlighted in the report to the General Assembly, international humanitarian law only refers specifically to mercenaries on one occasion, namely in article 47 of Protocol Additional I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts. This article does not prohibit mercenarism, but only States that mercenaries are denied combatant or prisoner of war status. The definition of mercenary in article 47 is such that many activities performed by private military and security companies under government contracts do not easily fall within that definition. Therefore, the Working Group believes that many private military and security companies are operating in a "grey zone", which is not defined at all, or at the very least not clearly defined, by international legal norms.

42. Against this background, the Working Group has been following with interest the activity of the Swiss Initiative, a joint initiative launched in 2006 by the Government of Switzerland and the International Committee of the Red Cross to address the demand for a clarification of legal obligations under international humanitarian and human rights law as regards private military and security companies. The Working Group learned with interest that in September 2008, 17 States had come to an understanding on the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (A/63/467), setting out what the signatories view as the relevant international humanitarian and human rights law applicable to private military and security companies as well as a set of good practices for them.

43. The Working Group made a detailed study of the results of the Swiss Initiative which collated in the Montreux Document good practices of the national and international regulation of private military and security companies. The Working Group notes that this initiative represents only part of the wide spectrum of countries and their approaches. The Working Group considers the Montreux Document useful in identifying existing obligations of States and private military and security companies and their personnel under international humanitarian and human rights law. The description of good practices section could prove to be a useful tool for setting out guidelines on both private military and security companies and State activities. The Working Group agrees with the principle, also reflected in the Montreux Document, that States retain their obligations under international human rights and humanitarian law even if they choose to contract with private military and security companies to perform certain activities. The State continues to have the duty to respect and ensure human rights. The document provides a number of good practices, such as good practices 5-13, 16 and 32, which take into account concerns expressed by the Working Group (see A/HRC/7/7, paras. 47 and 51).

44. While it is a good promotional document on existing international humanitarian law, the Montreux Document has nevertheless failed to address the regulatory gap in the responsibility of States with respect to the conduct of private military and security companies and their employees. One of the problems is that the Swiss Initiative has not been as broad a consultative process as required under the United Nations system. For example, States from Latin America and the Caribbean region did not participate in its work, and the unbalanced representation of Western Group States (9 out of the 17 adopting States) denotes the heavy involvement of countries where most of the security industry originates and operates from. Neither United Nations departments nor the Working Group took part in the Initiative.

45. The Working Group notes that the document places a heavier burden of responsibility on "Territorial States" (States where private military and security companies operate) than on "Contracting States" or "Home States" from where these companies originate or operate. The limited scope of obligations for "Contracting States" or "Home States" can be seen throughout the whole document. Moreover, the restrictive character of the document is illustrated by the indication that international humanitarian law only applies in armed conflict, and it fails to include a reference to the State obligation to protect and to apply the principle of due diligence.[1]

46. The commercial logic of the private military and security industry appears to be the impetus behind the Swiss Initiative document. For example, good practice 17 proposes "to consider pricing and duration of a specific contract as a way to promote relevant international humanitarian law and human rights law", and the Initiative has therefore de facto recognized the validity of the new industry instead of proposing a moratorium on such recognition until the good practices which it has developed are translated into reality and relevant mechanisms have been put in place. The Working Group notes that the industry lobby appears to have participated quite strongly in the Initiative's process.

47. Nothing in the Montreux Document indicates that States should ensure that existing laws, including criminal laws, are enforced, particularly, but not exclusively, the prohibition on torture and other cruel, inhumane or degrading treatment, and requirements that private military and security companies and their employees be held accountable for serious crimes. Nor is there any provision in the document that States should strengthen government standards for procurement, contracting and management of the private military and security industry backed by an effective reporting mechanism.[2]

48. Finally, the approach on Contracting, Territorial and Home States excludes those States from where the manpower is recruited by private military and security companies, in most cases without consultations with the respective Governments.[3] It also fails to provide for a centralized system at the State level which would be responsible for registering all private military and security industry contracts for applying common standards and for monitoring contracts.

49. The Working Group believes that new international regulations, most likely in the form of a new international convention with an accompanying model law are needed in order to bring private military and security companies fully out of the legal "grey zone". The Working Group has started drafting and discussing with Governments and with companies the possible elements of such a convention.

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[1] Amnesty International Public Statement on the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict (AI Index IOR 30/010/2008).

[2] Human Rights First: How to End Impunity for Private Security and Other Contractors, Blueprint for the Next U.S. Administration, November 2008.

[3] See A/HRC/7/7/Add.4.

50. The Working Group also suggests initiatives to the PMSC industry to formulate an industry-wide binding instrumental code of conduct, which would set appropriate human rights perspective, standards and guidelines, with punitive measures to be included in this code for companies which breach the standards.

51. The Working Group has also come to the conclusion that States should agree on a list of activities in the military and security sphere that are non-outsourceable to the private sector and remain a prerogative of the State. In agreeing upon such a list, States should consider that whilst official policy may be that private military and security companies do not engage in "combat" or in "offensive" military operations, they are routinely tasked with security functions that blur into these lines of conduct. For example, by tasking such companies with protecting assets that are lawful military targets under the law of war, States virtually ensure that private military and security companies will engage in combat. National legislation on the industry also should clearly list types of activities prohibited for nationally registered private military and security companies, including of mercenary-related activities banned by the International Convention against the Recruitment, Use, Financing and Training of Mercenaries or participation in overthrowing legitimate governments and political authorities.

Registration

52. There is currently no international register for private military and security companies at the international level, and the Working Group recommends setting up such a register. It could be based on the experience of other registers, such as the United Nations Register of Conventional Arms, which was established by General Assembly resolution 46/36 L. The Register of Conventional Arms has been in operation since 1992 and 172 States have reported to it one or more times, capturing the bulk of the global arms trade in the categories of conventional weapons it covers.

53. The Working Group considered a draft convention[4] which envisages the establishment of an international register of international arms transfers. This draft convention provides that contracting parties would submit to this register an annual report on arms transfers from or through their territory or subject to their authorization, and the register would publish annual and other periodic reports, as appropriate, on international arms transfers. Export of military and security services should be considered a similar category to an export of arms or military equipment, with consequent requirements to report regularly to the United Nations.

54. The Working Group also is aware that many Governments do not possess systematized information on which private military and security companies are registered in their territory, and which of these companies originating in their country are incorporated or registered abroad, perhaps in off-shore jurisdictions. Governments should consider creating a separate register for private military and security companies with certain required detailed information for such companies. The Working Group believes that Member States should prohibit, under their national laws, the incorporation or registration of private military and security companies in off-shore "minimal transparency" jurisdictions.

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[4] See http://www.iansa.org/documents/2004/att_0504.pdf.

Licensing

55. The draft framework convention on international arms transfers[5] states that contracting parties should establish authorization and licensing mechanisms under their national laws, as necessary, in order to ensure that the requirements of the convention may be effectively applied, with each application being reviewed individually.[6] At both national and regional level, arms control licensing procedures are already taking place in many places around the world, and the Working Group believes that Governments should extend this to the export of military and security services.

56. As mentioned in the Working Group's report to the General Assembly, the European Union also has a European Code of Conduct which contains a list of prohibited destinations and a system for verifying and monitoring the use of arms, and establishes an information sharing and consultation system on granting national export licences. Although the Code of Conduct is non-binding on the States parties and does not have an enforcement mechanism, it defines eight criteria that must be addressed by States in cases of arms exports, including the respect for EU member States' international commitments, in particular to Security Council sanctions, and human rights in the destination country.

57. Nineteen members of the Organization of American States have signed the Inter-American Convention on Transparency in Conventional Weapons Acquisitions, an agreement on conventional arms transfers which requires signatories to annually disclose information on major arms imports and exports. However, it does not have a registration or licensing system, either for arms or military and security services.

58. The Working Group is also considering devising or promoting the use of a model data or set of information on private military and security companies, in order to obtain the information required for policy development. Such a data set, essentially a map of all the information that would be required to have a full picture of the private military and security company industry, would enable stakeholders to consider systematically all information, and be a useful tool for policy development.

Accountability mechanisms

59. As set out in its report to the General Assembly, the Working Group is of the view that in order for any regulation mechanism to be implemented for private military and security companies, enforcement mechanisms should be put in place. Minimum obligatory transparency criteria for private military and security companies should be formulated, which may require them to annually submit data on the main parameters of their actual current structure, contracts and operations. Domestic criminal law could play a role in enforcing these regulations. Accountability of individuals and companies providing security or military services must be ensured under all circumstances and wherever they are carried out.

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[5] See http://www.iansa.org/documents/2004/att_0504.pdf.

[6] See http://www.iansa.org/documents/2004/att_0504.pdf, Commentary, Note (2).

60. The Working Group also is considering whether an international court of arbitration for issues relating to private military and security companies should be established. This would consist of a formal dispute resolution mechanism, especially created to hear complaints of wrongdoing by private military and security companies, with investigations led by, for example, a "PMSC oversight mechanism" referred to below. A "PMSC code" could also be established, which would run in conjunction with the court and is the "law" which it considers. In contrast to international conventions which traditionally apply only to States and their agents, private military and security companies and their staff and personnel would be directly bound by obligations under the PMSC code (after signing up to it). The Working Group does not consider that this would be the appropriate venue to try crimes, however, as the only remedies would be of a civil nature.

61. In the context of crimes committed by private military and security companies and their employees, the Working Group is also considering whether an additional international criminal legal convention or a protocol to the Statute of the International Criminal Court could be effective for such companies. This instrument would both articulate that companies and their employees, including directors, may be legal persons capable of committing international crimes, as well as set out appropriate punishments for the company and its employees. This protocol or convention could be overseen by an international commission which would conduct criminal investigations into alleged violations.

Vetting, legal and human rights training

62. In its report to the General Assembly, the Working Group noted that in its view, established vetting mechanisms[7] which apply to the public institutions of post-conflict States could also be applied to private military and security companies. The concept of a commission created to lead the reform of personnel could be applied to these companies during their hiring process. This could take the form of a three-phase process - registration, screening and certification.

63. The registration phase is a relatively straightforward process, obtaining basic information on an employee and her or his professional record. Screening takes place to determine whether an employee meets certain set criteria specific to the post, and consists of applying employment criteria to data on individual employees. All this information is systematically collected and stored. Certification takes place if the individual meets the employment criteria, but there may still be a probationary period within which full registration is restricted.

64. In its discussions with various stakeholders, the Working Group has noted that one element in any regulation mechanism that is repeatedly stressed is the need for mandatory human rights, legal and laws of war training of employees of private military and security companies. Some companies have started to conduct such trainings, but no institutionalized course is integrated into the employees' induction process. The Working Group welcomes the fact that some countries have issued regulations requiring such training for private military and security

[7] OHCHR, *Rule-of-Law Tools for Post-Conflict States, Vetting: an operational framework*, 2006.

company employees, but it also recognizes that such reforms do not go far enough. States need to employ sufficient numbers of contract managers who are trained in international human rights and humanitarian law and ensure that there are sufficient monitors embedded with private military and security companies in the field.

Oversight

65. As set out in its report to the General Assembly, the Working Group believes that parliamentary oversight of private military and security companies could be established at the level of the State and involve regular parliamentary hearings, inquiries, investigations, as well as creating a specific committee, subcommittee or commission within the parliamentary structures of countries exporting security and military services aimed at scrutinizing the delivery of licences and monitoring and investigating actual activities of these companies.

66. The Working Group also believes that the international community should move away from perceiving private military and security companies as part of regular exports under commercial regulations and towards perceiving them as a highly specific field of exports and services, requiring supervision and constant oversight by national Governments, civil society and the international community led by the United Nations. Both Governments and the United Nations system must take greater responsibility for what, where and how private military and security companies are doing worldwide, and where and how they operate.

67. The Working Group also considers that an international oversight mechanism could be established to receive complaints from all interested private military and security company industry stakeholders regarding private military and security services and to conduct preliminary investigations to help determine which complaints deserve further attention and which authorities would be best suited to address them. While the Working Group currently carries out some of these tasks, it has neither the resources nor the mandate to provide this oversight mechanism as effectively as it ought to be done.

III. CONCLUSIONS

68. The Working Group expresses deep concern about the lack of regulation at the national and international level of the activities of private military and security companies which recruit and train thousands of citizens from all over the world, from developed and developing countries, to perform tasks in Afghanistan, Iraq or in other zones of armed conflict, and in post-conflict and low intensity conflict areas.

69. As the Working Group’s interaction with Governments in the course of country visits shows, most Governments do not possess systematized information on which military and security companies are registered in their territory, and which companies originating from their country are registered abroad.

70. In conformity with the mandates of the General Assembly and the Human Rights Council to elaborate guidelines and principles for the regulation of private military and security companies, and ensuring the prevention of any violation by them of human rights norms, the Working Group, after consultation with many national Governments in the course of regional

consultations and country visits, has come to the conclusion that legal codification of the comprehensive system of oversight and regulation for the private military and security industry should be based upon the following principles:

(a) Respect by private military and security companies, as corporate bodies, and their employees, as natural persons, of universal human rights norms and international humanitarian law;

(b) Respect by private military and security companies and their employees of the national law of the countries of origin, transit and operation;

(c) Respect by all parties of the sovereignty of States, of internationally recognized borders and of the right of peoples to self-determination;

(d) Non-participation by private military and security companies and their employees in any activities aimed at overthrowing legitimate governments or authorities, the violent change of internationally recognized borders or foreign taking control by force of natural resources;

(e) Guaranteeing only authorized methods of acquiring, exporting, importing, possessing and using weapons by private military and security companies and their employees;

(f) Guaranteeing that only adequate, mandated and proportional use of force is allowed;

(g) Restraint in the use of weapons generally and a total prohibition on the use of weapons of mass destruction, or weapons resulting in overkill, mass casualties or excessive destruction;

(h) Accountability of private military and security companies to the Government of their country of origin and registration, and their country of operation;

(i) Adequate public transparency of private military and security companies;

(j) A mechanism of detailed registration of private military and security companies;

(k) A mechanism of licensing of private military and security companies' contracts for operation abroad;

(l) A mechanism of monitoring inquiries, investigations, complaints and allegations regarding the activities of private military and security companies;

(m) A mechanism of sanctions which may be applied nationally and/or internationally to private military and security companies in the case of violations;

(n) A mechanism of self-regulation of private military and security companies through providing for enforcement of industry codes of conduct and allowing the monitoring of activities of private military and security companies by national associations of such companies. Although not sufficient if considered alone, such a mechanism of self-regulation still can and should be part of a broader, binding and compulsory system of regulation.

71. Lessons can be learned from some best practices in the field, such as export control, arms licensing, arms control verification mechanisms and the experience of the United Nations Register on Conventional Arms. These should be taken into consideration while elaborating regulations for the export of military and security services.

72. The Working Group believes that the International Convention against the Recruitment, Use, Financing and Training of Mercenaries remains an important international legal instrument for the prevention of the use of mercenaries as a means of violating human rights and the rights of peoples to self-determination. The Working Group strongly recommends to those countries that have signed but not yet ratified the Convention to do so as soon as possible, and to those countries which are not yet party to the Convention to consider acceding to it.

73. One of the main conclusions of the Working Group is that the activities of private military and security companies cannot be regulated only on the basis of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, even after any potential amendment. Rather, a new international legal instrument in the format of a new convention on private military and security companies should be elaborated and adopted by the United Nations.

74. Such a convention is potentially to be supplemented by another legal instrument, a model law on regulating private military and security companies, which will assist Governments in the elaboration and adoption of legislation on the national regulation of such companies.

IV. RECOMMENDATIONS

75. **The Working Group recommends that Governments consider the creation of a separate national register for military and security companies with comprehensive information on each company, and preferably the prohibition, by national regulation, of the registration of companies operating in the field of military and security services in off-shore "minimal transparency" zones.**

76. **The United Nations system might consider extending the existing mechanism of the United Nations Register of Conventional Arms to cover export and import of major military and security services, at least those involving the possession and use of lethal arms, and require nations to include data on State contracts on exporting and importing military and security services into the set of data submitted annually to the Register.**

77. **The Working Group recommends that in addition to more rigid and detailed national registration of private military and security companies, the setting up of an open international register of private military and security companies would constitute an important step in regulating their activities. This register could be based on the experience of other registers (such as the Register of Conventional Arms) set up at the international level, and would require the adjustment of national regulations regarding registration of military and security companies within each State.**

78. **Furthermore, the Working Group is of the view that in order for there to be effective implementation of any private military and security industry regulation, accountability mechanisms should also be put in place to ensure that such a regime is enforceable. Obligatory transparency criteria for private military and security companies are to be**

formulated, which may require private military and security companies to submit annually data on their current corporate structure, contracts and operations. Whilst domestic criminal jurisdictions could be in charge of enforcing regulations, other mechanisms could be put in place to ensure accountability of individuals and companies providing security or military services, such as a vetting mechanism of the employees of private military and security companies and mandatory human rights and legal training for them.

79. **In principle, the export of military and security services, even military consultancy and training services, should be placed within a category similar or comparable to the export of arms or military equipment. States could be required to report regularly to the United Nations on contracts over a certain size for both outgoing and incoming military and security services.**

80. **Issuance of a licence might require training of employees on international humanitarian law and human rights, as well as vetting of new and existing employees, including both national and international criminal checks. Thus, a human rights abuses prevention regime would be built into the general export criteria for the military and security services industry.**

81. **In addition to a monitoring mechanism, a complaint mechanism open to individuals, State agencies, foreign Governments and other companies and entities should also be put in place to ensure criminal responsibility of individuals and civil liability of companies.**

82. **Member States may also legally define the types of activities in the military and security field which under no circumstances could be outsourced by a State to the private sector, for example gaining access to weapons of mass destruction, declaration of war or armed invasion. National legislation on the private military and security industry should clearly list the types of activities prohibited for nationally registered companies, including mercenary-related activities banned by the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, or participating in overthrowing legitimate governments and political authorities.**

83. **The Working Group recommends that parliamentary oversight of private military and security companies must be established at the State level and could involve regular parliamentary hearings, inquiries and investigations. In States exporting security and military services, a specific committee, subcommittee or commission could be created within the national parliamentary structure, aimed at scrutinizing the issuance of licences and monitoring and investigating the actual activities of private military and security companies.**

84. **In order to implement the General Assembly and Human Rights Council mandates regarding the creation of new legal instruments to fill the gaps in existing legislation, it is recommended to create in due time, when the Working Group on mercenaries will finalize its range of consultations on drafting legal instruments, an intersessional intergovernmental open-ended working group within the United Nations framework, consisting of representatives and experts nominated by States, with the task to elaborate**

and submit to the General Assembly for approval a new international convention on the regulation of private military and security companies and, possibly, a complementary model law to be used as a model for national legislation on the private military and security industry.

85. **The Working Group finally recommends that the approach of the international community to private military and security companies should move away from perceiving them as part of a State's regular exports under commercial regulations towards perceiving them as a highly specific field of exports and services requiring supervision and constant oversight by or on behalf of national Governments, civil society and the international community, led by the United Nations. Both Governments and the United Nations system must take greater responsibility for what, private military and security companies are doing worldwide, and where and how they operate.**

V. STATUS OF THE INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES

86. The International Convention against the recruitment, use, financing and training of mercenaries was adopted by General Assembly resolution 44/34 on 4 December 1989, and entered into force on 20 October 2001. This section reflects the status of the Convention as of 2 December 2008.

Participants	Signature, succession to signature[(d)]	Ratification, accession,[(a)] succession[(d)]
Angola	28 December 1990	
Azerbaijan		4 December 1997[(a)]
Barbados		10 July 1992[(a)]
Belarus	13 December 1990	28 May 1997
Belgium		31 May 2002[(a)]
Cameroon	21 December 1990	26 January 1996
Congo	20 June 1990	
Costa Rica		20 September 2001[(a)]
Croatia		27 March 2000[(a)]
Cuba		9 February 2007[(a)]
Cyprus		8 July 1993[(a)]
Democratic Republic of the Congo	20 March 1990	
Georgia		8 June 1995[(a)]
Germany	20 December 1990	
Guinea		18 July 2003[(a)]

Participants	Signature, succession to signature[(d)]	Ratification, accession,[(a)] succession[(d)]
Honduras		1 April 2008[(a)]
Italy	5 February 1990	21 August 1995
Liberia		16 September 2005[(a)]
Libyan Arab Jamahiriya		22 September 2000[(a)]
Maldives	17 July 1990	11 September 1991
Mali		12 April 2002[(a)]
Mauritania		9 February 1998[(a)]
Montenegro	23 October 2006 [(d)]	
Morocco	5 October 1990	
New Zealand		22 September 2004[(a)]
Nigeria	4 April 1990	
Peru		23 March 2007[(a)]
Poland	28 December 1990	
Qatar		26 March 1999[(a)]
Republic of Moldova		28 February 2006[(a)]
Romania	17 December 1990	
Saudi Arabia		14 April 1997[(a)]
Senegal		9 June 1999[(a)]
Serbia	12 March 2001 [(d)]	
Seychelles		12 March 1990[(a)]
Suriname	27 February 1990	10 August 1990
Syrian Arab Republic		23 October 2008[(a)]
Togo		25 February 1991[(a)]
Turkmenistan		18 September 1996[(a)]
Ukraine	21 September 1990	13 September 1993
Uruguay	20 November 1990	14 July 1999
Uzbekistan		19 January 1998[(a)]
