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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: José Luis Gómez del Prado***Summary***

In the present report, 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 provides an overview of activities undertaken during the reporting period, including a summary of its missions to Equatorial Guinea, South Africa and Iraq, and the participation of the members as resource persons in the intergovernmental working group established by the Human Rights Council at its fifteenth session. The Working Group reviews the activities and achievements of the mandate since its establishment by the Commission on Human Rights in 2005, including its progress in the elaboration of a possible draft convention on private military and security companies (private military and security companies), the consultations held in each of the five geographic regions pursuant to General Assembly resolution 62/145, and the communications and country missions of the Working Group in the past six years.

The Working Group subsequently identifies the key challenges for the mandate. It discusses new forms of mercenary activities that have emerged in recent years and demonstrate that mercenarism continues to pose a threat to human rights and the right of peoples to self-determination. It then discusses the need for an international regulatory framework for private military and security companies. In particular, it analyses the relationship between the draft convention elaborated by the Working Group, 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, which clarifies the responsibilities of States with regard to private military and security companies and lists good practices, and the International Code of Conduct for Private Security Service Providers for those companies. Furthermore, the Working Group discusses the need for the adoption of national legislation regulating private military and security companies and the difficulties encountered to date in ensuring accountability for human rights violations and violations of national laws by private military and security companies.

Lastly, the Working Group makes a number of recommendations for Member States in order to address the challenges identified in its report. The Working Group recommends, *inter alia*, that Member States adopt legislation to regulate private military and security companies, take measures to ensure their accountability for human rights violations, and provide victims of human rights violations with an effective remedy. The Working Group also recommends that Member States consider the possibility of elaborating a binding international instrument for the regulation of private military and security companies and participate in international efforts, such as the intergovernmental working group established by the Human Rights Council.

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I. Introduction

1. In the present report, 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 describes its activities its previous report submitted to the Human Rights Council (A/HRC/15/25). It covers the communications sent between 18 April 2010 and 30 April 2011. As the present report is the last one for a majority of the initial members of the Working Group who are ending their second term in 2011, it focuses on the activities and achievements of the Working Group over the past six years.

2. The report is submitted pursuant to resolution 2005/2 of the Commission on Human Rights, in which the Commission established the mandate of the Working Group, and Human Rights Council resolutions 7/21 and 15/12, in which the Council extended that mandate.

3. The Working Group is composed of five independent experts serving in their personal capacities: José Luis Gómez del Prado (Spain), Chairperson-Rapporteur; Amada Benavides de Pérez (Colombia); Najat al-Hajjaji (Libyan Arab Jamahiriya); Faiza Patel (Pakistan); and Alexander Nikitin (Russian Federation). In April 2010, the Working Group decided to operate under a three-monthly rotating chair until the end of the year. Accordingly, Ms. Benavides de Pérez was Chairperson from July to September 2010. Mr. Nikitin followed, from October to December 2010. At its eleventh session, the Working Group decided that Mr. Gomez del Prado would act as Chairperson-Rapporteur until August 2011.

II. Activities of the Working Group over the past year

4. In accordance with its usual practice, the Working Group continued to hold three regular sessions each year, two in Geneva and one at Headquarters. The Working Group held its eleventh session from 29 November to 3 December 2010, and its twelfth session from 4 to 8 April 2011, in Geneva. At the sessions, the Working Group met with representatives of several Governments and regional organizations, United Nations officials and non-governmental organizations in order to discuss, *inter alia*, recent activities of mercenaries and private military and security companies, and preparations for the intergovernmental working group.

5. The Working Group continued to monitor the activities of mercenaries and private military and security companies around the world and their impact on human rights. It also carried out three country visits, held regular meetings with representatives of Member States, non-governmental organizations and experts, reviewed allegations regarding the activities of mercenaries and private military and security companies and their impact on human rights, and decided on appropriate action. Members of the Working Group were also invited to participate as resource persons in the first session of the open-ended intergovernmental working group on the regulation of private military and security companies, which was held in May 2011.

A. Communications

6. The present report covers communications sent from 18 April 2010 to 30 April 2011 and replies received from 1 June 2010 to 30 April 2011.

7. A total of seven communications were sent to seven countries, one¹ relating to alleged involvement of country nationals in mercenary activities in a foreign country and to activities of private military and security companies and their impact on the enjoyment of human rights. The Working Group also sent two reminder letters and a follow-up letter requesting further information. In some cases, the Working Group sent similar communications to several Governments whose nationals were allegedly involved in the same activities. For three of the communications sent, the Working Group received a complete or partial response from the Government concerned. The Working Group expresses its appreciation to those Governments that provided substantive replies to its communications and invites those that have not done so to cooperate with its mandate by providing the information requested.

B. Press releases

8. In addition to its media advisories or press releases issued in connection to country visits and the holding of its regular sessions, the Working Group issued two press releases in connection with alleged mercenary activities in Côte d'Ivoire and the Libyan Arab Jamahiriya. On 22 February 2011, the Working Group issued a press release on the situation in the Libyan Arab Jamahiriya together with a number of other special procedures mandate holders, in which it expressed its grave concerns at allegations that mercenaries had been involved in the killing of protesters. On 1 April 2011, the Working Group, again with a number of other special procedures mandate holders, issued a press release on the situation in Côte d'Ivoire, in which it expressed its concerns about numerous reports regarding the involvement of English-speaking mercenaries in attacks against civilians, and recalled that the recruitment of mercenaries was prohibited under international law.

9. On 19 October 2010, the Working Group issued a statement following a report issued by the United States Senate Committee on Armed Services on the role and oversight of American private security contractors in Afghanistan. It recommended stronger oversight of American private security contractors in Afghanistan and elsewhere and noted that the findings in the Senate report were consistent with those of the Working Group following its visit to Afghanistan in 2009. The Working Group also recalled its findings that, owing to the lack of effective vetting procedures, in particular, some private military and security companies employed individuals who may have been involved in human rights abuses in the past and continued to be involved in human rights violations while employed by these companies. In this regard, it recommended once again that the Government of the United States of America should establish a more vigorous vetting procedure before awarding contracts.

10. In addition, on 21 October 2010, following the reports of the death of a passenger being deported from the United Kingdom of Great Britain and Northern Ireland on a flight to Angola, while in the custody of the private security company G4S, the Working Group, together with the Special Rapporteur on the human rights of migrants, issued a statement expressing their deep concern over the incident. Jimmy Mubenga, a national from Angola, who was being deported from the United Kingdom after losing his appeal to remain in the country, died 50 minutes after boarding a British Airways flight at Heathrow airport on 13 October 2010. Mr. Mubenga was sitting at the rear of the aircraft, surrounded by three guards working for G4S, which has been contracted by the British border agency to escort deportees. Passengers reported that the guards restrained heavily Mr. Mubenga, who consistently complained about his breathing and begged for help from other passengers.

¹Colombia, Côte d'Ivoire, Honduras, Israel, Liberia, the Libyan Arab Jamahiriya and the United Kingdom of Great Britain and Northern Ireland.

11. In its statement, the Working Group noted that although G4S employees were not law enforcement officials, they had been contracted by the Government of Great Britain to carry out governmental functions and, as such, the Government should ensure that they were subject to the same rules as the law enforcement officials who would normally carry out such functions. In this regard, the Special Rapporteur and the Working Group recalled the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,² which provides that such officials, in carrying out their duty, should, as far as possible, apply non-violent means before resorting to the use of force, and questioned the outsourcing of the public use of force to private security companies.

C. Country visits

12. The Working Group undertook three country visits during the reporting period, to Equatorial Guinea, South Africa and Iraq.

13. The Working Group's visit to Equatorial Guinea, from 16 to 20 August 2010, focused on the investigations and prosecutions relating to the attempted coup d'état of March 2004 and to the armed attack on the presidential palace by alleged mercenaries on 17 February 2009. The coup attempt of March 2004 was the most widely reported incident that clearly involved mercenaries, some of whom were current or former employees of private military and security companies from several other countries. The Working Group found that the attempt illustrated disturbing links between mercenaries and some private military and security companies, making the monitoring of such links all the more necessary.

14. With regard to the armed attack on the presidential palace by alleged mercenaries on 17 February 2009, the Working Group regretted the lack of transparency on the part of the authorities and the lack of cooperation extended to the Working Group during its visit. In this regard, the Working Group recommended that the Government should provide full information regarding the attack on the presidential palace and, in particular, that all judgements rendered in the criminal cases relating to the attack be rendered public. In addition, the Working Group urged the Government to provide explanations as to how the four men on trial for their alleged involvement in the attack had been brought back from Benin to Equatorial Guinea. The Working Group strongly condemned their execution on 21 August 2010, which followed a summary trial that was lacking in fundamental due process and was carried out so quickly that the four men were denied all possibility of appeal.

15. The Working Group recommended that the Government should consider developing national legislation to criminalize mercenarism and mercenary-related acts. In this context, it suggested that the Penal Code be revised and updated to bring it into line with the State's international human rights obligations. It also urged the Government to consider acceding to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries as a matter of priority. Since all mercenaries should be held accountable for their actions, the Working Group advised that anyone accused of involvement in a mercenary-related incident should be tried by a competent, independent and impartial tribunal. It also recommended that anyone accused of involvement in a mercenary-related incident should be treated in accordance with international human rights standards, in particular the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. The full report and recommendations are contained in an addendum to the present report (A/HRC/18/32/Add.2).

² Adopted at the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, held from 27 August to 7 September 1990.

16. From 10 to 19 November 2010, the Working Group visited South Africa to examine the country's legislation on mercenaries and private military and security companies and its impact on human rights.

17. Since the end of apartheid in 1994, many South Africans with extensive military skills and experience have been unwilling or unable to find employment in South Africa. As a result, they have offered their services abroad and many have been employed by international private military and security companies. Some have become involved in mercenary activities. In order to address these developments, South Africa was one of the first countries to adopt legislation on the provision of "foreign military assistance" in 1998. However, the Working Group found that there were a number of challenges in the implementation of this legislation, some of which relating to the functioning of the National Conventional Arms Control Committee, the entity charged with reviewing requests for authorization to provide security services in areas of armed conflict. Others are linked to difficulties with prosecutions. Overall, it was clear to the Working Group that the 1998 legislation has not had a significant impact on the private military and security industry.

18. Following the coup attempt in Equatorial Guinea in 2004 in which several South African mercenaries were involved, South Africa adopted new legislation in 2006 to address some of the gaps in the 1998 legislation. This more recent legislation is not yet in force and it remains to be seen whether it will effectively regulate the provision of security services in areas of armed conflict.

19. The Working Group and the authorities also discussed the framework for regulating the domestic private security industry in South Africa. Since there are some potential areas of overlap between the regulatory rules covering those private security companies working in South Africa and those working abroad, the Working Group encouraged the authorities to coordinate and harmonize the two regulatory frameworks.

20. The Working Group recalled that the establishment of a regulatory and monitoring regime for private military and security companies was only a first step towards ensuring accountability in cases of human rights violations. It recommended that the authorities should consider the establishment of accountability mechanisms for private military and security companies at the domestic level. The Working Group also recommended that effective remedies should be offered to potential victims of human rights violations involving private military and security companies. The full report and recommendations are contained in an addendum to the present report (A/HRC/18/32/Add.3).

21. The Working Group undertook a visit to Iraq from 12 to 16 June 2011. During the visit, the Working Group examined the measures taken by the Government to regulate the activities of private military and security companies operating in the country and their impact on the enjoyment of human rights. The Working Group learned that the number of incidents involving private military and security companies had decreased in recent years. This could be attributed to several factors: the decrease in their military-related activities in Iraq (especially in mobile protection); stricter regulation by the Iraqi authorities; and efforts by the United States to tighten oversight of its private security contractors operating in Iraq. The Working Group commended the efforts of the Iraqi and United States authorities in this regard.

22. Despite this decrease in incidents, Iraq continues to grapple with the granting of legal immunity extended to private security contractors under order 17 issued by the Coalition Provisional Authority. The immunity prevented prosecutions in Iraqi courts. Nor have prosecutions in the home countries of such companies been successful. Four years after the Nissour Square incident, the case against the alleged perpetrators is still pending in United States courts.

23. In a welcome development, the 2009 Status of Forces Agreement reached between Iraq and the United States contains a provision removing the immunity of some private foreign security contractors in Iraq. It is not clear, however, whether this removal of

immunity covers all contractors employed by the Government of the United States and whether it is fully applied in Iraqi courts. In any case, the removal of immunity fails to provide justice to those who were victims of serious human rights violations prior to 2009.

24. Coalition Provisional Authority order 17 remains the legal basis for the regulation of private military and security companies by the Government of Iraq. In the view of the Working Group, this is not a firm basis for regulation. Iraq has introduced legislation regulating security companies, which has been pending since 2008. The Working Group urged the Government to adopt this legislation as a matter of priority. It also urged the Government to remain vigilant and devote the necessary resources to ensure that security companies – whether international or Iraqi – were stringently regulated and that they respect the human rights of the Iraqi people. The full report and recommendations are contained in an addendum to the present report (A/HRC/18/32/Add.4).

D. Participation in the intergovernmental working group on the regulation of private military and security companies

25. The Human Rights Council, in its resolution 15/26, established an open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework, including, *inter alia*, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group. In the resolution, the Council also provides that members of the Working Group on the use of mercenaries who were involved in the elaboration of the principles, main elements and draft text for a possible convention should participate in the open-ended intergovernmental working group as resource persons.

26. Accordingly, the members of the Working Group on the use of mercenaries participated as resource persons in the first session of the intergovernmental working group, which was held in Geneva from 23 to 27 May 2011. Members of the Working Group on the use of mercenaries made presentations on the law and practice in relation to private military and security companies, national legislation and practices, the elements of an international regulatory framework and accountability and the right to an effective remedy for victims.

E. Other activities of the Working Group members

27. The Chairperson-Rapporteur of the Working Group, Mr. Gómez del Prado, and Ms. Benavides de Pérez participated in Forum 2010, an international cultural gathering, which was held in Santiago de Compostela (Spain) from 4 to 15 December 2010. Ms. Benavides de Pérez made a presentation at the World Forum on Education, Research and Culture of Peace on the theme “Threats and challenges posed to the international community by the privatization of security”.

28. On 18 January 2011, the Chairperson-Rapporteur made a statement to the Advisory Committee of the Human Rights Council on the occasion of the consideration of the progress report on the right of peoples to peace. The drafting group of the Advisory Committee proposed several provisions in the progress report regarding private military and security companies, namely that (a) States should refrain from outsourcing inherently State military and security functions to private contractors; and that (b) States should ensure that private military and security companies, their personnel and any structures related to their activities perform their respective functions under officially enacted laws consistent with international human rights and humanitarian law.

29. On 22 February 2011, the Chairperson-Rapporteur delivered a joint statement of special procedures mandate holders to the Human Rights Council at its fifteenth special session.

30. On 22 March 2011, the Chairperson-Rapporteur attended a conference at the Catalan International Institute for Peace in Barcelona on the theme “The new private providers of the physical use of force in the twenty-first century”, which was organized in conjunction with the launching of the book *Hacia la regulación internacional de las empresas militares y de seguridad privadas*, authored by Mr. Gómez del Prado and Helena Torroja. Mr. Gómez del Prado also authored additional articles, including “Privatising security and war”, in *Forced Migration Review*, in March 2011; “A UN instrument to regulate and monitor private military and security contractors”, in the *Notre Dame Journal of International, Comparative, & Human Rights Law*, in April 2011; “Privatizing and commercializing the use of force: accountability and implications for local communities”, in *Rethinking Transitions*; and “Impact on human rights of a new non-State actor: private military and security companies”, in *The Brown Journal of World Affairs* (Fall/winter 2011). He was also requested to endorse *The Small Arms Survey 2011: States of Security*, which provides an insight into key trends in security provision around the world.

31. On 28 April 2011, the Chairperson-Rapporteur gave a presentation on the draft convention elaborated by the Working Group at the Final Conference in Brussels of the PRIV-WAR Project, an academic project funded by the European Commission on private military and security companies, human rights, humanitarian law and the role of the European Union. On 17 May 2011, he discussed the draft convention elaborated by the Working Group at the conference “Armées privées: situation en Suisse et dans le monde”, sponsored by Centre Europe-Tiers Monde and Groupe pour une Suisse sans armée.

32. From 23 to 25 March 2011, Ms. Benavides de Pérez participated in the thirteenth Congress of the Latin-American Association of Asia and Africa Studies, held in Bogota, which focused on the theme, “The new south: theories and practices about Asia, Africa and Latin America in the twenty-first century”. She delivered a presentation on the use of mercenaries and contractors in Equatorial Guinea, Afghanistan and Colombia. On 12 and 13 May 2011, she participated in a regional consultation on the Montreux Document in Santiago. Ms. Benavides de Pérez presented as part of a panel on international initiatives.

33. The activities of the Working Group on mercenaries were widely covered by the international media, including BBC World News, TVE (Spain), TV3 of Barcelona, Radio Catalunya, US National Public Radio Talk of the Nation, *El Mundo*, *Público*, *Le Courier* (Geneva), *Foreign Policy* (Spanish edition), *L'Humanité*, *El País* and *Mainichi Shimbun*.

III. Activities and achievements of the mandate

34. In the past six years, the Working Group (a) undertook country visits; (b) sent and received communications; (c) organized regional consultations with Member States; and (d) elaborated elements of a possible draft convention on private military and security companies. Each of the above activities is described in detail below.

A. Country visits

35. Since the Working Group was established, it has undertaken 11 country visits to examine the situations in countries regarding mercenaries and/or private military and security companies. In the course of its visits, it engaged in a constructive dialogue with Governments, international organizations, representatives of civil society, private military and security companies and other relevant stakeholders. In particular, the Working Group examined the national legislative and policy frameworks in these countries and their

effectiveness in protecting human rights and ensuring accountability for human rights violations involving mercenaries and private military and security companies.

36. The Working Group has undertaken visits to a broad range of countries in which the activities of private military and security companies or mercenaries are reported, including Afghanistan, Chile, Ecuador, Equatorial Guinea, Fiji, Honduras, Iraq, Peru, South Africa, the United Kingdom and the United States of America. The Working Group wishes to express its sincere gratitude to these Governments for having extended invitations and for their cooperation during these country missions.

37. The Working Group's country visits were designed to examine the broadest possible range of activities conducted by private military and security companies and mercenaries, as well as the effects of these activities across most geographical regions. In its investigation of mercenary activities, the Working Group visited Equatorial Guinea in 2010 to understand the circumstances surrounding the attempted coup by mercenaries in 2004 and the Government response. In its efforts to collect information and better understand activities of private military and security companies and their impact on human rights, the Working Group conducted country visits to Afghanistan and Iraq, in which companies of this type operate. The Working Group also visited the United Kingdom, the United States and South Africa, in which many private military and security companies are established, to exchange views regarding the regulation of their activities and to discuss the need to ensure accountability for human rights violations. Lastly, the Working Group conducted country visits to Chile, Fiji, Honduras, Peru and South Africa, where private military and security companies recruit personnel, to study the human rights impact of these activities.

38. During its country visits, the Working Group made several important findings. With regard to mercenaries, the Working Group found that national legislation and judicial processes were not always effective in ensuring accountability for mercenary activities and were not always conducted in line with international human rights standards. The Working Group recommended that accused mercenaries should be tried by a competent, independent and impartial tribunal and in compliance with international human rights standards. It also found evidence of disturbing links between mercenaries and some private military and security companies, making the monitoring of the activities of these companies and their employees all the more necessary. The Working Group urged Governments to consider acceding to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries as a matter of priority.

39. With regard to private military and security companies, the Working Group found that many States did not have national legislation regulating the activities of such companies and their employees. In countries with national legislation in place regulating the private military and security industry, the Working Group found gaps in regulatory frameworks and discussed the importance of revising legislation or adopting new legislation to clarify and strengthen domestic regulations to ensure accountability for human rights violations.

40. In countries where private military and security companies operate, the Working Group found several challenges in holding the companies accountable for possible human rights violations. The Working Group discussed various approaches to ensuring accountability and protecting human rights in connection with the activities of such companies. It exchanged views with the Governments concerned in an effort to identify gaps in national legislation and recommended continuing efforts to develop national legal frameworks to ensure accountability for private military and security companies and an effective remedy for victims of human rights violations. Where such companies are required to obtain licenses, the Working Group discussed the need for oversight mechanisms to continue monitoring their activities even after they have received the appropriate licenses. The Working Group recommended the establishment of an independent mechanism to which the local population could submit complaints about violations of human rights by private military and security companies as a step towards

eliminating impunity. The Working Group suggested that Governments in countries where private military and security companies operate investigate, disarm and prosecute any such companies operating without the necessary licenses, and investigate all reported cases of incidents involving casualties committed by them, to prosecute perpetrators and provide victims with an effective remedy.

41. The Working Group found that countries in which private military and security companies were established also faced significant challenges in their efforts to ensure accountability and to protect human rights in relation to the activities of such companies. The Working Group found that some Governments had engaged with professional associations representing the private military and security industry to develop good practices. The Working Group exchanged views with these Governments regarding such industry initiatives as codes of conduct. It shared ideas with the Governments regarding means of improving the compliance of private military and security companies with international humanitarian law and human rights norms. The Working Group highlighted gaps in oversight and accountability and recommended the adoption of comprehensive national legislation to ensure accountability for human rights violations and an effective remedy for victims.

42. During its visits to countries where private military and security companies recruited, the Working Group found that recruitment of personnel by such companies took several different forms. Governments shared their experiences of transnational private military and security companies recruiting nationals to work abroad, as well as domestic security companies hiring personnel to operate locally. The Working Group found that even Governments with broad legislative frameworks addressing the domestic private security industry fell short of similarly comprehensive regulation regarding the recruitment of their nationals by private military and security companies to work abroad. The Working Group noted with concern that countries where private military and security companies recruited, contracted and trained nationals to work in conflict areas abroad lacked protections against both contractual irregularities and the poor working conditions that their citizens often encountered. In addition to strengthening and clarifying regulatory frameworks governing the conduct of private military and security companies abroad, the Working Group recommended the establishment of a complaint mechanism and urgent measures to protect the human rights of company employees currently working in conflict areas.

43. A number of requests for country visits did not receive a favourable response. The Working Group encourages Governments to accept its requests to conduct country visits.

44. The Working Group has attempted to hold follow-up consultations during its sessions with the countries visited to discuss the implementation of its recommendations. It held follow-up meetings with the permanent missions of Afghanistan, Ecuador, Fiji, Honduras, Peru and the United States on its missions to these countries.

B. Communications

45. Since the Working Group was established, it has received a number of reports alleging human rights violations involving mercenaries and private military and security companies. The Working Group regularly sends communications to Governments concerning individual allegations of human rights violations involving mercenaries and private military and security companies.

46. Over the past six years, the Working Group sent a total of 35 allegation letters to 25 Governments³ and three urgent appeals to two Governments.⁴ The Working Group has also sent five reminder letters and three follow-up letters to request further information.

47. Communications concerned many issues arising in connection with the activities of mercenaries and private military and security companies. Some addressed serious human rights violations, including the alleged unlawful killings of civilians. Others addressed registration and licensing procedures, the use of third-country nationals by private military and security companies abroad, the recruitment and training of such personnel, and their conditions of employment and treatment by the companies. The Working Group also noted alleged threats and violence against human rights defenders by private security companies and the use of private security companies to carry out deportations.

48. Although the Working Group regularly sends reminder letters when a Government does not reply to a specific allegation letter or urgent appeal, 11 Governments failed to respond to any of the Working Group's communications.⁵

49. The Working Group expresses its appreciation to those Governments that have provided substantive replies to its communications and invites those that have not done so to cooperate with its mandate.

C. Regional consultations

50. In its resolution 62/145, the General Assembly requested the Working Group to hold regional consultations on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, in particular regarding the effects of the activities of private military and security companies on the enjoyment of human rights.⁶

51. Pursuant to the above-mentioned resolutions, the Working Group held regional consultations in all five regions from 2007 to 2009. The consultation for Latin America and the Caribbean were held in Panama, in December 2007. It was followed by the consultation for Eastern Europe and Central Asia, in Moscow, in October 2008; the consultation for Asia and the Pacific, in Bangkok, in October 2009; the consultation for Africa, in Addis Ababa, in March 2010; and the consultation for the Western European and Others Group, in Geneva, in April 2010.

52. Participants in the regional consultations noted that the enjoyment and exercise of human rights were increasingly impeded by the emergence of several new challenges and trends relating to mercenaries or their activities and by the role played by private military and security companies registered, operating or recruiting personnel in each region. Participants discussed the expansion of the operations of such companies in each region and the use in some places of private security guards instead of national police or security forces. They exchanged views regarding such companies' practices and the implications of

³ Afghanistan, Australia, Bolivia (Plurinational State of), Chile, Colombia, Côte d'Ivoire, Croatia, Cuba, Ecuador, Equatorial Guinea, Fiji, Hungary, Iraq, Ireland, Israel, Liberia, the Libyan Arab Jamahiriya, Mexico, Papua New Guinea, Peru, Romania, South Africa, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

⁴ Guinea and Honduras.

⁵ Afghanistan, Côte d'Ivoire, Equatorial Guinea, Fiji, Guinea, Liberia, the Libyan Arab Jamahiriya, Mexico, Papua New Guinea and Peru.

⁶ See also Human Rights Council resolution 10/11.

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.

53. The Working Group and participants discussed general guidelines, norms and basic principles for the regulation and oversight of the activities of private companies offering military assistance, consultancy and security services on the international market. The Working Group also took the opportunity to report on its work towards a possible new binding international legal instrument on the regulation of private military and security companies to encourage the further protection of human rights.

D. Elaborating a draft convention on private military and security companies

54. In its resolution 2005/2, the Commission on Human Rights requested the Working Group to monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities. The Human Rights Council reiterated this request in its resolution 7/21.

55. In March 2009, in its resolution 10/11, 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 companies offering military assistance, consultancy and other military security-related services on the international market, and an accompanying model law, and other legal instruments, and to share with Member States, through the Office of the United Nations High Commissioner for Human Rights, elements for a possible draft convention on private military and security companies, to request their input on the content and scope of such a convention and to transmit their replies to the Working Group.

56. Pursuant to the request of the Human Rights Council, the Working Group, on the basis of extensive consultations with Governments, academics and non-governmental organizations, prepared the text of a possible new draft convention to regulate the activities of private military and security companies. The Working Group circulated a draft of such a convention in July 2009 to more than 250 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 January 2010 to all Member States for comment. The Working Group also received input regarding elements of a possible draft convention during the regional consultations referred to earlier.

57. In total, the Working Group received more than 400 suggestions, amendments, proposals and formulations from a wide variety of stakeholders, including Member States, international organizations and private military and security companies. At the conclusion of this broad and inclusive consultative process, the Working Group presented a draft text of a possible convention on private military and security companies to the Human Rights Council at its fifteenth session (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 the elements, including definitions and detailed provisions, for a legally binding instrument.

IV. Key challenges

58. Since its establishment in 2005, the Working Group has gained a deeper understanding of the impact of mercenary activities on the enjoyment of human rights. It has also been able to undertake significant research and analysis to address the rising phenomenon of private military and security companies operating around the world. In many cases, the question of accountability for human rights violations was the most prominent concern. In this regard, the Working Group's research and consultations with various stakeholders demonstrate that several key challenges remain.

A. Mercenaries: a recurring and evolving phenomenon

59. As the attempted coup by mercenaries in Equatorial Guinea in 2004 made clear,⁷ mercenaries remain active in many parts of the world, with devastating effects on human rights and the right of peoples to self-determination.

60. Recently, the phenomenon of mercenarism has seen a trend whereby rather than being hired to overthrow or undermine Governments, mercenaries have been employed by some Governments to suppress opposition movements. For instance, in the Libyan Arab Jamahiriya, the Government allegedly recruited African and other mercenaries to violently suppress peaceful demonstrations. As Government efforts to quash political protests have become an armed campaign to put down an opposition movement, it could be argued that mercenaries used by the Government and implicated in human rights violations are impeding the exercise of the right of the people to self-determination. Such mercenary activities to support Government action against civilians demonstrate that mercenarism remains a significant threat to human rights.

61. In Côte d'Ivoire, there have been reports of the use of mercenaries by the Government to protect itself from opposition movements and to suppress dissent. After losing the presidential election of 28 November 2010, the former President refused to leave office and allegedly hired Liberian mercenaries to maintain control of the country and to attack supporters of the newly-elected President. These mercenaries are reported to have been implicated in the killings of hundreds of civilians and, insofar as they were involved in supporting Government efforts to bypass the results of democratic elections, impeded the right of the people to self-determination.

62. The above recent examples highlight the importance of combating mercenarism and mercenary-related activities. In this regard, the Working Group urges States to adopt national legislation to combat mercenarism and to ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

B. Developing an international regulatory framework for private military and security companies

63. Owing to the increasing use of private military and security companies by some Governments, a number of States are of the opinion that it is necessary to develop an international regulatory framework to regulate these companies and have begun discussions on the subject in the above-mentioned intergovernmental working group.

64. In the process of consulting with various stakeholders with regard to private military and security companies, the Working Group has identified the existence of a regulatory gap

⁷ See A/HRC/18/32/Add. 2.

and the corresponding need for an international legal instrument to regulate private military and security companies. The Working Group remains of the opinion that an international regulatory framework should take the form of a new binding international convention on private military and security companies, including improved registration, licensing and vetting procedures, strengthened national legislation and accountability, and oversight mechanisms.

65. The Working Group is of the view that international law does not sufficiently regulate the activities of private military and security companies. As non-State actors, these companies are not directly subject to international human rights obligations. Furthermore, company employees cannot usually be considered mercenaries according to the definition set out in article 47 of the first Additional Protocol to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts, and article 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. It is therefore necessary to strengthen and clarify the accountability mechanisms for private military and security companies that violate human rights and to elaborate more explicitly the obligations of States with regard to them.

66. Similarly, the Working Group ascertained that national regulation is insufficient to ensure that all private military and security companies are subject to adequate registration, monitoring and oversight procedures. The transnational nature of their activities raises jurisdictional obstacles as well as practical difficulties for the prosecution of human rights abuses at the national level in that a State's ability to locate witnesses and collect the necessary evidence in another State in order to ensure successful prosecution is limited. Only an international convention could sufficiently counter the problem of impunity for private military and security companies that violate international human rights law.

67. In countries with weak judicial systems or without sufficient national legislative mechanisms for prosecuting private military and security companies, an international convention would reaffirm the right of victims to an effective remedy, create an obligation of mutual legal assistance, and provide an alternative international recourse for those who cannot exercise their rights at the national level.

68. In addition to analysing the use of private military and security companies by Governments, the Working Group examined their use by international organizations, such as the United Nations, which sometimes employs such companies to facilitate operations in conflict areas. The Working Group has requested information from several United Nations departments with a view to assessing the extent of the use of private military and security companies, the types of activities the United Nations outsources to private contractors, and the strength of United Nations regulatory policies and monitoring of private military and security companies.⁸ Drawing on this information and discussions with the Department of Safety and Security, the Working Group determined that the United Nations currently lacks a firm system-wide policy governing the hiring of such companies. Furthermore, the problem of accountability for their conduct becomes more complex in cases where international organizations rather than States employ private military and security companies. While the United Nations is in the process of developing its policy regarding the use of private military and security companies and has sought the guidance of the Working Group, the Working Group considers that an international convention would be invaluable in strengthening and clarifying the institutional responsibility of international organizations, such as the United Nations, for the conduct of private military and security companies. An international convention would ensure the establishment of formal, system-wide policies for registration and oversight of companies and vetting and human rights training requirements for employees.

⁸ A/65/325, paras. 30-37.

69. The Working Group is aware of a joint initiative of the Government of Switzerland and the International Committee of the Red Cross. The result of this initiative, 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, was finalized in September 2008 and has been endorsed by 36 States.⁹ The Montreux Document underlines the existing international legal framework that applies to private military and security companies in armed conflict. It also lists good practices, including transparent registration and licensing procedures and mechanisms to improve accountability and oversight. It also makes clear, however, that these good practices are in no way binding obligations.

70. The Working Group has welcomed this effort to clarify States' commitments to international law and good practices, and considers the Montreux Document useful in recalling existing obligations of States under international human rights and international humanitarian law. In particular, the Working Group agrees with the principle, highlighted in the document, that although Governments may choose to outsource certain functions to private military and security companies, States retain their obligations under international human rights and humanitarian law. The Working Group believes, however, that the Montreux Document fails to address the regulatory gap in the responsibility of States vis-à-vis the conduct of such companies and their employees as it presents no assurance of enforceability of its good practices or the accountability of the endorsing States for the companies' conduct.¹⁰

71. Building on the foundations of the Montreux Document, which clarified the responsibilities of States in relation to the use of private military and security companies in armed conflict, the private military and security industry, with the support of the Government of Switzerland, developed the International Code of Conduct for Private Security Service Providers in November 2010.¹¹ The Code establishes a common set of principles for private military and security companies that commits signatory companies to provide security services in accordance with the rule of law, respect for human rights and the interests of their clients.

72. The Working Group has supported fully these efforts to clarify good practices and improve and formalize industry self-regulation as a means of protecting human rights. The Working Group recognizes the valuable contributions of the Montreux Document and the International Code of Conduct to the efforts to develop an international regulatory framework for private military and security companies. However, the Working Group disputes assertions by some States and companies that these efforts, and the existing national and international legislative frameworks cited therein, are sufficient to ensure the accountability of these companies for human rights violations. Rather, the Working Group believes that these voluntary, non-binding instruments cannot provide the full extent of regulation and oversight necessary to comprehensively protect human rights in the context of private military and security activities. Nonetheless, it envisions that these initiatives will effectively complement a binding international legal instrument, such as the proposed draft convention discussed at the first session of the intergovernmental working group in May 2011.

⁹ A/63/467 – S/2008/636.

¹⁰ See A/HRC/10/14, paras. 42-48.

¹¹ Available from www.icoc-psp.org.

C. Encouraging States to adopt national legislation on private military and security companies

73. Although an international regulatory framework is to be developed over the next few years, national measures will be critical to ensure effective regulation of private military and security companies. This is envisaged in the draft convention, which provides that States parties should establish a comprehensive domestic regime of regulation and oversight over the activities in its territory of private military and security companies and their personnel, including all foreign personnel, in order to prohibit and investigate illegal activities as defined by the convention and by relevant national laws.

74. Very few States have adopted national legislation on private military and security companies; some States have even excluded the possibility of adoption of national legislation and favoured self-regulation by the industry instead. For instance, the Government of the United Kingdom announced in Parliament in March 2011 that it would seek to establish a code of conduct setting out national standards derived from the International Code of Conduct, and to monitor and audit compliance of private military and security companies based in the United Kingdom. However, the Government does not consider it necessary to pass legislation to regulate private military and security companies.

75. While there is currently no specific international requirement that States should adopt national legislation on private military and security companies, the Working Group recommends that States adopt such legislation, particularly when they are contracting States, States on whose territory such companies operate or States on whose territory these companies are established. It recalls that States have international legal obligations relating to private military and security companies and that the most effective way for States to implement such obligations is through the adoption of legislation.

76. Drawing from the experience of its many country visits, the Working Group reached the conclusion that it is only through comprehensive national legislation that States can ensure adequate monitoring and oversight over the activities of private military and security companies. Such legislation should address such specific issues as vetting of companies and employees, licensing, training requirements, regular reporting and monitoring, regular audits and/or inspections, complaints mechanisms and so on.

77. The adoption of national legislation is of course only a first step towards the establishment of a comprehensive domestic regime of regulation and oversight over the activities of private military and security companies. Even where States have adopted specific legislation to address the phenomenon of private military and security companies, they have encountered challenges in the implementation of such legislation. As is discussed below, prosecutions under the legislation have proved especially difficult for a variety of reasons.

D. Holding private military and security companies accountable for human rights violations

78. The purpose of efforts to develop an international regulatory framework for private military and security companies and national regimes of regulation is ultimately to prevent human rights violations and ensure the accountability of the companies and individuals involved in such violations when they occur. The Working Group has noted, however, that prosecutions of these companies and their employees remain rare. Prosecutions have proved difficult for a variety of reasons, such as jurisdictional issues when the company was operating as part of, or in the context of, the military forces deployed to a country, lack of detailed and consistent reporting of incidents involving the companies, and difficulties in the collection of evidence, compounded by the fact that incidents often occur in conflict areas. In States where private military and security companies are operating, issues such as

claims by the companies that their employees are immune from jurisdiction and the general weakness in capacity and rule of law in the countries where they operate further compromise accountability.

79. As a first step towards resolving these issues, States should adopt national legislation that would allow their courts to exercise jurisdiction over their own nationals and companies established in their territory and operating abroad. States should develop mechanisms to facilitate reporting of human rights violations involving private military and security companies by various stakeholders, including Governments, non-governmental organizations, companies and victims. This information should be shared with the Governments of home States and territorial States. Drawing from its experience of conducting country missions, the Working Group believes it may be useful to establish specific units responsible for the investigation and prosecution of violations of national law by private military and security companies. Such units should be staffed by experienced prosecutors and investigators and be adequately resourced.

80. As evidence and witnesses are often located in a different jurisdiction, prosecutors and investigators should have access to them or at least be able to benefit from the cooperation of their counterparts in the relevant country. To this end, States could explore means of international cooperation with a view to setting up coordination and cooperation mechanisms for the investigation of alleged violations of human rights. States should ensure that such cooperative investigations are conducted so that any evidence and testimony acquired is admissible in national courts.

81. While it is important that private military and security companies be held accountable for their actions, it is equally important that victims be able to exercise their right to an effective remedy; this would include the right to access to mechanisms to provide compensation for wrongful deaths or injuries caused by private military and security companies, as well as rehabilitation for injuries sustained.

V. Conclusions and recommendations

82. From its country visits, communications and consultations with Governments, non-governmental organizations, industry representatives and academic experts, the Working Group found that mercenary activities continue to have an adverse impact on the enjoyment of human rights. The increasing use of private military and security companies around the world and the lack of accountability for human rights violations in connection with their activities is of significant concern. In this regard, the Working Group is of the opinion that a binding international regulatory instrument, such as an international convention, is essential to ensure accountability for human rights and an effective remedy for victims.

83. The problem of mercenaries remains a relevant and important consideration. Recent events have proven that, whether they are utilized to overthrow Governments or employed by Governments to suppress dissent, mercenaries continue to pose a risk to human rights and to the right of peoples to self-determination. In this regard, the Working Group is concerned by the fact that only 32 States are parties to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and therefore makes the following recommendations:

(a) All States should condemn and take steps to combat the use of mercenaries on their territories and to prevent the recruitment of their nationals as mercenaries, including through the adoption of appropriate legislation and policies;

(b) Those States that have signed but not ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries

should do so as soon as possible, and those countries which are not yet party to the Convention should consider acceding to it.

84. The trend towards the privatization of many functions traditionally performed by States, including military assistance operations, domestic security and policing, poses an increasing risk to human rights. During its country visits, sessions and expert meetings, the Working Group engaged in consultations with a range of stakeholders to exchange views regarding the impact on human rights of private military and security companies and approaches to effective regulation of their activities. The Working Group found that insufficient attention is paid to the problems raised by the activities of private military and security companies and that further research is needed into the impact on human rights of their activities and effective regulatory strategies. In this regard, the Working Group makes the following recommendations:

(a) The Working Group welcomes efforts to clarify obligations under international law and identify good practices, such as 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, and industry self-regulation initiatives such as the International Code of Conduct for Private Security Service Providers. However, the Working Group reiterates its view that a comprehensive, legally binding international regulatory instrument is necessary to ensure adequate protection of human rights. The Working Group therefore encourages all States to study carefully the draft convention that it proposes and to participate actively in the work of the intergovernmental working group established by the Human Rights Council with a view to supporting the drafting of an international instrument for the regulation of private military and security companies;

(b) States should adopt national legislation regulating private military and security companies and should ensure its effective implementation. Such legislation should, at a minimum, require licensing, registration, vetting, human rights training, Government oversight and regular monitoring, and provide for civil and criminal responsibility in the event of human rights violations;

(c) States that contract private military and security companies should ensure investigation and prosecution of violations of international human rights law involving private military and security companies to guarantee accountability for human rights violations and provide an effective remedy for victims.

85. The Working Group makes the following general recommendations to States regarding the performance of its mandate:

(a) All States should continue to cooperate with the Working Group in the fulfilment of its mandate by, *inter alia*, extending invitations to the Working Group to visit and accepting the Working Group's requests to conduct country visits;

(b) States should consider carefully the allegation letters and urgent appeals sent by the Working Group and endeavour to respond promptly, accurately and in detail.
