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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: Faiza Patel

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 reviews activities undertaken during the reporting period, including its engagement with the intergovernmental working group established by the Human Rights Council at its fifteenth session and its work in relation to the draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers.

In addition, the Working Group discusses its project to collect and analyse national legislation on private military and security companies. It presents a sample analysis of three sets of national legislation that represent distinct approaches to the issue. From that analysis, the Working Group begins to identify common elements in national laws and some of the challenges faced in regulating the sector.

Lastly, the Working Group makes recommendations for Member States, including encouraging them to continue to develop national legislation on private military and security companies and to participate in the Working Group's survey of national legislation.

As the Working Group has previously noted, national legislation should be complemented by a strong international regulatory framework. The Working Group recommends that Member States consider the possibility of developing a binding international instrument for the regulation of private military and security companies and urges all Member States to participate in the intergovernmental working group established by the Human Rights Council. The Working Group recommends that Member States ensure accountability for human rights violations involving private military and security companies, and provide victims of human rights violations with an effective remedy.

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–3	3
II. Activities of the Working Group	4–16	3
A. Thirteenth, fourteenth and fifteenth sessions of the Working Group	5–8	3
B. Communications	9	4
C. Comments on the draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers	10	4
D. Comments on the Swiss draft federal law on the provision of private security services abroad	11	4
E. Other activities of the Working Group members	12–16	4
III. Engagement of the Working Group in processes to elaborate standards for the regulation of private military and security companies at the international level	17–23	5
A. Intergovernmental working group on regulating private military and security companies	18	6
B. Draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers	19–23	6
IV. Research into national regulation of private military and security companies	24–66	7
A. Three models of national legislation: South Africa, United States and Switzerland	27–51	8
B. Analysis	52–66	13
V. Conclusion and recommendations	67–71	16

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 since its previous report to the Human Rights Council (A/HRC/18/32). The thematic section of the report is a comparative analysis of three approaches to national legislation that identifies common elements and challenges in the regulation of private military and security companies.

2. The present 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, Human Rights Council resolutions 7/21 and 15/12, in which the Council extended that mandate, and 18/4.

3. The Working Group comprises five independent experts serving in their personal capacities: Patricia Arias (Chile), Elzbieta Karska (Poland), Anton Katz (South Africa), Faiza Patel (Pakistan) and Gabor Rona (United States of America). In October 2011, the Working Group decided that Ms. Patel would act as Chair-Rapporteur of the Working Group until December 2012.

II. Activities of the Working Group

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

A. Thirteenth, fourteenth and fifteenth sessions of the Working Group

5. The thirteenth session of the Working Group took place in New York from 5 to 8 July 2011. It included an expert seminar to discuss the content and status of the State monopoly on the legitimate use of force and possible implications for the regulation of private military and security companies. The Working Group is grateful to the 10 experts who contributed to this endeavour.¹ On 8 July 2011, the Working Group held a press conference to discuss issues relating to its mandate.

6. The fourteenth session took place in Geneva from 24 to 28 October 2011. It included consultations with representatives of Member States, the Office of the United Nations High Commissioner for Human Rights, the International Committee of the Red Cross and non-governmental organizations. This was the first meeting of the five new members of the Working Group after the members appointed at the establishment of the Working Group completed their mandates in August and October 2011. After considering several country

¹ Alexander Volevodz, Moscow State Institute of International Relations, Russian Federation; René Värk, Faculty of Law, University of Tartu, Estonia and Estonian National Defence College; Mark Ungar, City University of New York, United States; Helena Torroja Mateu, University of Barcelona, Spain; Sarah Percy, University of Oxford, United Kingdom of Great Britain and Northern Ireland; Pratap Chatterjee, Center for American Progress, United States; Irene Cabrera, Universidad Externado de Colombia, Bogota; Sabelo Gumedze, Institute for Security Studies, Pretoria; Patricia Arias, Centro de Estudios del Desarrollo, Chile; Deborah Avant, University of California, Irvine, United States.

situations, by a letter dated 16 September 2011 the Working Group renewed its previous request to visit Côte d'Ivoire. That request was accepted by the Government of Côte d'Ivoire in a letter dated 14 November 2011.

7. The fifteenth session was held in Geneva from 12 to 16 March 2012. At that session, the Working Group consulted representatives of Member States, the Department of Safety and Security, the United Nations Children's Fund and non-governmental organizations. It decided to submit comments on the draft Charter of the Oversight Mechanism for the International Code of Conduct on Private Security Service Providers. It also met the Under-Secretary-General for Safety and Security to discuss the development of United Nations policies regarding the use of armed private security companies by United Nations organs and agencies. It welcomed efforts within the United Nations system to develop a coherent, human-rights-compliant policy framework for the procurement and use of armed private security companies, including relevant criteria, and agreed to continue to engage with the Department of Safety and Security in that process.

8. After considering several country situations, the Working Group requested visits to Libya and Somalia. By a letter dated 26 April 2012, the Government of Libya accepted the request.

B. Communications

9. The Working Group sent two communications and one follow-up letter to Governments relating to alleged mercenary activities and to the activities of private military and security companies and their impact on human rights. The Working Group expresses its appreciation to those Governments that provided substantive replies to its communications and invites those that have not replied to do so, in accordance with the mandate from the Human Rights Council and the General Assembly.

C. Comments on the draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers

10. On 16 January 2012, the Temporary Steering Committee of the International Code of Conduct for Private Security Service Providers issued the draft Charter of the Oversight Mechanism for the Code for public consultation. By a letter dated 30 March 2012, the Working Group submitted its comments on the draft Charter. These comments are discussed further below.

D. Comments on the Swiss draft federal law on the provision of private security services abroad

11. On 12 October 2011, the Federal Department of Foreign Affairs of the Government of Switzerland issued a draft federal law on the provision of private security services abroad for public consultation. The Working Group welcomed this open and transparent process and, by a letter dated 31 January 2012, submitted its comments. The Swiss draft law is discussed further below.

E. Other activities of the Working Group members

12. The Working Group signed an amicus curiae brief submitted by Human Rights First to the United States Court of Appeals for the Fourth Circuit in the cases of *Al-Shimari v.*

CACI International, Inc. and Al-Quiraishi v. L-3 Services, Inc., in which it was argued that contractors accused of international human rights violations, in this case torture, should not be granted a “combatant activities” exemption from civil liability in United States courts. On 11 May 2012, the full appeals court dismissed the appeal by the defendants and referred the case back to the district courts for further fact-finding.

13. The Chairperson-Rapporteur of the Working Group participated in the annual joint seminar of the United Nations Office at Geneva and the Geneva Centre for the Democratic Control of Armed Forces convened on 7 December 2011 on the subject of the privatization of security. She delivered a statement on the challenges of regulating private military and security companies, gaps in regulation at the international and national levels and the need for a binding international instrument to ensure accountability for private military and security companies involved in human rights violations and to provide effective remedies to victims. From 30 May to 1 June 2012, she participated in a conference convened at the Sié Chéou-Kang Center for International Security and Diplomacy at the University of Denver, United States, where she discussed current regulatory efforts and continuing challenges relating to the activities of private military and security companies.

14. Ms. Arias participated in a regional workshop for North-East and Central Asia 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, held on 12 and 13 October 2011 in Ulaanbaatar. The workshop was organized by the Governments of Mongolia and Switzerland, the International Committee of the Red Cross and the Geneva Centre for the Democratic Control of Armed Forces. She gave a presentation on activities of private military and security companies in the scenario of the use of force, their impact on human rights, risks and challenges.

15. During the thirty-first International Conference of the Red Cross and Red Crescent, held in Geneva from 28 November to 1 December 2011, Ms. Karska participated in a side event entitled “Protecting civilians in armed conflict: beyond the Montreux Document – international developments in private military and security company regulation”, which was organized by the Federal Department for Foreign Affairs of the Government of Switzerland, the Geneva Centre for the Democratic Control of Armed Forces and the International Committee of the Red Cross. She gave a presentation on gaps in international human rights and humanitarian law in relation to accountability for violations of international law involving private military and security companies.

16. On 28 March 2012, Mr. Rona participated as a resource person in the second session of the Committee on Enforced Disappearances, during which the Committee held consultations on the definition of non-State actors and their involvement in enforced disappearances, including issues of responsibility and accountability.

III. Engagement of the Working Group in processes to elaborate standards for the regulation of private military and security companies at the international level

17. The Working Group welcomes the continued efforts by the Human Rights Council and Member States to elaborate an international regulatory framework for private military and security companies and to establish voluntary standards for the industry. It appreciates the opportunity to inform these continuing processes.

A. Intergovernmental working group on regulating private military and security companies

18. The Human Rights Council, in its resolution 15/26, established an open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries. The members of the Working Group look forward to participating as resource persons in the second session of the open-ended intergovernmental working group, to be held from 13 to 17 August 2012 in Geneva.

B. Draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers

19. On 16 January 2012, the Temporary Steering Committee of the International Code of Conduct for Private Security Service Providers, a multi-stakeholder initiative supported by the Government of Switzerland, issued the draft Charter of the Oversight Mechanism for the Code for public consultation. By a letter dated 30 March 2012, the Working Group expressed its continued support for the process of developing the Code and the Charter as a means of improving the adherence of private military and security companies to international humanitarian and human rights standards. The Working Group recognized the challenges of developing the Charter and submitted extensive comments in an effort to improve the draft text so that it would better fulfil the promise of the Code to protect human rights in the context of activities of private military and security companies.

20. As the implementing mechanism of the Code, the Charter's structure and procedures have a critical bearing on the realization of the Code's principles, goals and rules. The Charter's effectiveness is the litmus test for the legitimacy of the Code as a means of improving the adherence of private military and security companies to human rights standards. The Working Group believes that the draft Charter does not live up to the promise of the Code in several ways, some of which illustrate the inherent limitations of a voluntary approach to regulation and demonstrate the need for a binding international instrument.

21. Generally, the Working Group believes that the Charter should be modified to explicitly mainstream the protection of human rights, which is the expressed goal of the Code and the Charter. The Working Group recommends that the Charter be brought further into compliance with the Guiding Principles on Business and Human Rights developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (see A/HRC/17/31, annex), which were unanimously endorsed by the Human Rights Council in its resolution 17/4. That framework is specifically embraced in the Code and the Working Group believes the Guiding Principles set out the basic parameters that an industry self-regulatory mechanism should meet. The Working Group is aware of criticism of the Guiding Principles, in particular by non-governmental organizations, but notes that such criticism does not

concern the usefulness of the Principles as setting out the basic parameters for a self-regulatory mechanism such as the Code and Charter.²

22. The Working Group suggested specific areas in which the Charter could be strengthened. For example, it should require field audits. In addition, the third-party grievance mechanism established by the Charter should be revised to address the substance of third-party complaints (as envisaged in the Code), rather than focusing only on the procedural compliance of member companies. Lastly, the draft Charter contains provisions that permit companies to refuse to share information with monitoring mechanisms owing to contractual provisions or the potential for parallel legal proceedings. While the Working Group recognizes the reasoning behind such provisions, it believes that they present significant loopholes that could prevent the effective operation of Charter mechanisms and that the inclusion of such provisions reflects the inherent limitations of a self-regulatory mechanism, which can never replace accountability through the law.

23. The Working Group welcomed the opportunity to participate in the public consultation on the draft Charter and hopes that its comments will assist the Temporary Steering Committee in strengthening the draft Charter and producing a final document that lives up to the commitments made by the signatory companies to the Code.

IV. Research into national regulation of private military and security companies

24. The Working Group believes that it would be useful to study and identify legislative approaches regarding the activities of private military and security companies and to assess the effectiveness of national legislation in protecting human rights. Such a study would inform the Working Group's efforts to demonstrate the need for a legally binding international instrument. In addition, it would assist in identifying best practices and may inform future projects to develop guidance for Member States seeking to regulate private military and security companies.

25. The Working Group is conducting this work in phases. First, it is analysing national legislation that is easily accessible to develop preliminary conclusions on the models used by States. An example of this approach is the analysis of the national legislation of three countries set out below. Second, the Working Group has initiated a survey to collect national legislation pertaining to private military and security companies. It has requested Member States to provide information in this respect and will supplement the information collected with additional research. Some of this research will be conducted in collaboration with civil society partners.

26. The Working Group plans to analyse national legislation on a region-by-region basis. It is anticipated that the first regional analysis will be included as part of the report of the Working Group to the Human Rights Council at its twenty-fourth session, in 2013.

² Examples of civil society statements are available from www.escr-net.org/usr_doc/Joint_Statement_draftGPs_wendorsements-final-2.pdf and <http://fian.org/news/press-releases/CSOs-respond-to-ruggies-guiding-principles-regarding-human-rights-and-transnational-corporations/pdf>.

A. Three models of national legislation: South Africa, United States and Switzerland

27. As noted above, the Working Group began its work on national legislation by analysing the national legislation of South Africa and the United States relating to private military and security companies and the above-mentioned Swiss draft law. This legislation reflects distinct approaches to the regulation of private military and security companies. South Africa, which was one of the first countries to seek to regulate such companies, severely limits the export of military services, whereas the United States and Switzerland take far less restrictive positions. Even between the United States and Switzerland, however, approaches vary. United States legislation is focused mainly on strengthening accountability for crimes committed by contractors overseas, while the Swiss draft law places greater emphasis on building a regulatory process for private military and security companies.

28. The Working Group is conscious that, whereas the national legislation of South Africa and the United States has been adopted, the Swiss legislation remains in the drafting process, and the Working Group looks forward to its adoption.

1. South Africa

29. South Africa was one of the first countries to adopt legislation regulating private military and security companies.³ That legislation is founded on section 198 (b) of the country's Constitution, which states that the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation. The legislation covering private military and security companies comprises the Regulation of Foreign Military Assistance Act (No. 15 of 1998)⁴ and the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act (No. 27 of 2006).⁵

30. To address the growing numbers of South Africans with military skills and experience offering their services abroad in the post-apartheid era, South Africa enacted the Regulation of Foreign Military Assistance Act in 1998. The Act covers both mercenary activities and private military and security companies. Mercenary activity, defined as "direct participation as a combatant in armed conflict for private gain", is forbidden, as is the recruitment, use, financing or training of mercenaries. The Act addresses private military and security companies through its regulation of the provision of foreign military assistance. Foreign military assistance is broadly defined to include military assistance to a party to an armed conflict (e.g. advice or training; personnel, financial, logistical, intelligence or operational support; personnel recruitment; medical or paramedical services; or procurement of equipment) in addition to security services (e.g. protection of individuals or property involved in armed conflict). Any action aimed at overthrowing a Government or undermining the constitutional order, sovereignty or territorial integrity of a State and other actions that further the military interests of a party to the armed conflict also form part of foreign military assistance.

31. Under section 4 of the Act, any person or company seeking to provide foreign military assistance is required to obtain authorization from the National Conventional Arms Control Committee, a Cabinet committee comprising eight ministers and three deputy

³ A/HRC/18/32/Add.3, para. 20.

⁴ Available at www.info.gov.za/view/DownloadFileAction?id=70672.

⁵ Available at www.info.gov.za/view/DownloadFileAction?id=75729.

ministers appointed by the President that was initially established in 1995 to deal with applications for arms sales. Upon receipt of such an application, the Committee makes a recommendation to the Minister of Defence, who makes a final determination according to criteria established in section 7 of the Act. Under this section, authorizations are not to be granted if they would be in conflict with the country's international legal obligations, result in the infringement of human rights, endanger the peace by introducing destabilizing military capabilities, contribute to regional instability or negatively influence the balance of power, or support or encourage terrorism.

32. The Committee is required to maintain a register of authorizations and approvals issued by the Minister of Defence. In addition, it must submit quarterly reports to the national executive, Parliament and the Parliamentary Committee on Defence and Military Veterans on the register and on its activities under the Act.

33. The Act criminalizes the undertaking of the activities prohibited by the law and the undertaking of activities without requisite authorization. To facilitate prosecutions, section 9 of the Act establishes the extraterritorial jurisdiction of national courts over offences under the Act. Specific sanctions for breaches of the Act are not identified, however.

34. As the Working Group noted in the report of its country visit to South Africa in 2010, the Act does not appear to have been effective in regulating the private military and security industry.⁶ Indeed, following revelations that a number of South African nationals were involved in a coup attempt in Equatorial Guinea,⁷ South Africa adopted stronger legislation, the Prohibition of Mercenary Activities and Regulation of Certain Activities in the Country of Armed Conflict Act, in 2006.

35. The Act mirrors the Regulation of Foreign Military Assistance Act in its approach. It maintains the dual aims of prohibiting mercenary activities⁸ and regulating the provision of "assistance or service", including "security services". It is more specific than the previous legislation about the activities to be regulated. The term "assistance or service" includes any form of military or military-related assistance, service or activity, or any form of assistance or service to a party to the armed conflict by means of advice or training; personnel, financial, logistical, intelligence or operational support; personnel recruitment; medical or paramedical services; or procurement of services. The term "security services" is defined as including guarding and protection services, security advisory services and training, installing, servicing or repairing security equipment, and monitoring signals or transmissions. Under section 3 of the Act, no person, unless specifically authorized under by the National Conventional Arms Control Committee, may negotiate or offer assistance, including rendering service, to a party to an armed conflict or in a regulated country; provide any assistance or render any service to a party to an armed conflict or in a regulated country; recruit, use, train, support or finance a person to provide or render any service to a party to an armed conflict or in a regulated country; or perform any other act that has the result of furthering the military interests of a party to an armed conflict or in a regulated country. Rather than rely solely on the loosely defined term "armed conflict" to determine the scope of the Act, section 6 provides that the President, on the recommendation of the

⁶ A/HRC/18/32/Add.3, paras. 27-39.

⁷ See Adam Roberts, *The Wonga Coup* (London, Profile Books, 2006). See also A/HRC/18/32/Add.2.

⁸ Under the prohibition of mercenary activity, no person may participate as a combatant for private gain in an armed conflict; directly or indirectly recruit, use, train, support or finance a combatant for private gain in an armed conflict; directly or indirectly participate in any manner in the initiation, causing or furthering of an armed conflict; or a coup d'état, uprising or rebellion against any Government; or directly or indirectly perform any act aimed at overthrowing a Government or undermining the constitutional order, sovereignty or territorial integrity of a State.

National Conventional Arms Control Committee, can proclaim a country as “regulated” by the Act.

36. The Act maintains the centrality of the Committee in implementing its provisions and even expands the Committee’s role. The Committee remains the authorizing authority and the keeper of records (section 8 of the Act maintains the requirement that the Committee submit quarterly reports to the national executive and Parliament with regard to the register and requires the Committee to record proclamations by the President as to regulated countries). The Committee is also mandated, however, to review and authorize requests to render humanitarian assistance in areas of armed conflict, unlike in the Regulation of Foreign Military Assistance Act, which expressly excluded “humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict” from the definition of foreign military assistance under article 1 (iii). Furthermore, as with the previous law, it establishes the extraterritorial jurisdiction of South African courts over offences committed under the Act.

37. Although the Act was adopted by Parliament on 17 November 2006 and received presidential assent on 12 November 2007, it has yet to enter into force. During its country visit in 2010, the Working Group was informed by the South African authorities that certain regulations, such as those dealing with application forms, fees and the list of regulated countries covered by the Act, needed to be adopted before it would enter into force.⁹ Because the Act has yet to enter into force, it remains to be seen whether it will effectively regulate the activities of private military and security companies.

2. United States

38. The United States has dramatically increased its reliance on the private military and security industry, most notably as part of its military missions in Afghanistan and Iraq.¹⁰ Consequently, it has also substantially increased its regulation of private military and security companies. The current framework consists of national legislation, military regulations and administrative contracting policies and procedures. Perhaps owing to this relationship between the increase in contracting by the United States Government and its operations in Afghanistan and Iraq, United States legislation on private military and security companies focuses on Government contractors rather than on those companies under contract with non-governmental organizations, private companies or other clients. The Military Extraterritorial Jurisdiction Act of 2000 and certain provisions of the National Defense Authorization Acts for recent fiscal years comprise the core of United States national legislation on private military and security companies. It should be noted, however, that significant elements of the United States regulatory structure are found in agency-level regulations that are beyond the scope of the present report.

39. The Military Extraterritorial Jurisdiction Act was designed to extend the reach of the civilian criminal justice system to individuals who accompany the United States Armed

⁹ A/HRC/18/32/Add.2, paras. 57-59.

¹⁰ Moshe Schwartz, *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis*, Congressional Research Service, 13 May 2011, available from www.fas.org/sgp/crs/natsec/R40764.pdf; Kristine A. Huskey and Scott M. Sullivan, *The American Way: Private Military Contractors & U.S. Law After 9/11*, PRIV-WAR Report – the United States of America, National Reports Series 02/08, available from <http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-02-08-usa.pdf>; and Kristine A. Huskey, *The American Way: Private Military Contractors & US Law After 9/11: An Update - 2010*, PRIV-WAR Report – the United States of America, National Reports Series 03/10, available from <http://priv-war.eu/wordpress/wp-content/uploads/2010/12/nr-03-10-USA.pdf>.

Forces abroad. It provides for the prosecution of crimes committed abroad that, if committed in the United States, would be considered felonies punishable by at least one year in prison.

40. The Act originally allowed for the prosecution only of contractors “employed by or accompanying the Armed Forces”, which appeared to restrict prosecution to Department of Defense contractors. The legislation was amended in 2004 to extend to contractors with any federal agency “to the extent such employment relates to supporting the mission of the Department of Defense overseas”.

41. In 2007, the United States established military jurisdiction over some contractors operating abroad. The John Warner National Defense Authorization Act for Fiscal Year 2007 amended the Uniform Code of Military Justice, which regulates the national armed forces. The amendment extended military jurisdiction over civilians “in time of declared war or a contingency operation” to “persons serving with or accompanying an armed force in the field”. The main change is the addition of contingency operations as situations in which such jurisdiction may be exercised. The Act defines the term “contingency operation” to include “a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force”.

42. Although the amendment seeks to extend military jurisdiction over civilian contractors, trial of civilians by court martial has previously been declared unconstitutional in several United States Supreme Court cases.¹¹ It therefore remains to be seen whether military courts martial will prove an effective, constitutional method of ensuring accountability for private military and security company employees.¹²

43. The national defence authorization acts for the fiscal years 2008, 2009 and 2011 focus on the promulgation of regulations for the use of private military and security companies by United States Government agencies. These laws require various Government authorities to prescribe regulations on the selection, training, equipping and conduct of private military and security company personnel in areas of combat operations,¹³ and to meet tracking¹⁴ and reporting¹⁵ requirements. In addition, the Office of Management and Budget was required to review existing definitions of the term “inherently governmental function” for clarity, and to develop a single consistent definition that would ensure that only Government employees or members of the armed forces perform inherently governmental functions and other critical functions necessary for the mission success of a federal agency.¹⁶

¹¹ *Toth v. Quarles* (1955), *Reid v. Covert* (1957).

¹² The first case specifically challenging the constitutionality of the authority of the Uniform Code of Military Justice over civilian contractors extended under the John Warner National Defense Authorization Act for Fiscal Year 2007, *United States v. Ali*, was heard by the Court of Appeals for the Armed Forces on 5 April 2012.

¹³ United States, National Defense Authorization Act for Fiscal Year 2008.

¹⁴ *Ibid.*, sects. 861 and 862. Title VIII of the National Defense Authorization Act for Fiscal Year 2011 noted with concern slow progress and significant challenges in implementing these requirements.

¹⁵ United States, Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, sect. 854.

¹⁶ *Ibid.*, sect. 321. In response to this provision, the Office of Federal Procurement Policy published policy letter 11-01 on 12 September 2011, available from www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf. It establishes a new, single definition of “inherently governmental function” and provides specific examples including combat and security operations in certain situations connected with combat or potential combat.

44. Separately, “sense of Congress” provisions state that private security contractors should not be authorized to perform inherently governmental functions in an area of combat operations and that interrogation is an inherently governmental function that “cannot appropriately be transferred to private-sector contractors”. The Secretary of Defense is instructed to issue policy guidance requiring the establishment of a third-party certification process for private military and security companies as a condition for selection for defence contracts for private security functions and requiring private military and security company employees that carry weapons to obtain basic weapons certification from a reputable certifying body. Intelligence activities are excluded from these requirements.

45. Although the national defence authorization acts require some Government authorities to promulgate the above-described regulations, the regulations themselves are beyond the scope of the present analysis.

3. Switzerland

46. As mentioned above, the Swiss draft law on the provision of private security services abroad¹⁷ is one of the most recent efforts to comprehensively regulate private military and security companies. Just as the South African legislation, the Swiss draft law follows two tracks. First, it prohibits certain activities, including direct participation in hostilities in an armed conflict,¹⁸ the hiring, training and provision of security personnel for direct participation in hostilities, and the provision of security services associated with serious infringement of human rights.

47. Second, it regulates private companies providing security services. Such services are defined to include a range of activities from protection tasks to guarding prisoners to operational or logistical support for armed or security forces and intelligence activities.

48. In addition to applying to natural persons, legal persons and partnerships, the Swiss draft law covers private security companies operating in Switzerland and companies that are registered in Switzerland and control security companies operating abroad. Any person or company seeking to carry out security services abroad is required to notify the Government, which will decide whether to prohibit or approve the activity, or to undertake further investigation. Draft article 12 provides a list of activities, such as those that take place in armed conflict, which may be contrary to the aims of the law and which the competent authority can consider when deciding whether to prohibit an activity. The Swiss draft law establishes clear deadlines for notification to the applicant at each stage in the process. It also requires private security companies to “observe the provisions” of the International Code of Conduct of 9 November 2010.

49. The Swiss federal authorities must follow certain guidelines to employ private security companies abroad. They may use private security companies for the protection of persons; guarding and surveillance of real estate; protection and transfer of tangible and intangible assets and data protection and handling. Before using private security services, the federal authorities must ensure that the company satisfies requirements concerning the recruitment, training and oversight of its personnel; demonstrates a clean human rights record; and provides sufficient internal controls to ensure that its personnel will observe the rules of conduct and be penalized for failure to do so. The federal authorities must also

¹⁷ Available from www.bfm.admin.ch/content/dam/data/sicherheit/gesetzgebung/sicherheitsfirmen/vorentw-f.pdf. The Working Group based its comments on an unofficial English translation of the draft law.

¹⁸ Draft article 4 (d) of the Swiss draft law defines direct participation in hostilities as “direct participation in hostilities developing within the scope of an armed conflict abroad within the meaning of the Geneva Conventions and Additional Protocols I and II”.

ensure that the company's personnel have been trained in the protection tasks that they will perform, applicable national and international law and other key areas, including fundamental rights, protection of personality and procedural law, conduct to be adopted with persons resisting or behaving violently, first aid, assessment of damage to health resulting from the use of force, and combating corruption. The Swiss draft law grants an exception to these standards if no company satisfying them is available and the protection task cannot be completed otherwise, but stipulates a maximum duration of six months for such contracts.

50. The Swiss draft law explicitly sets out the conditions necessary to authorize the use of arms by private security companies. Such companies may use arms only to execute a protection task or react in a situation of legitimate defence or state of need. In contracts with federal authorities, the use of arms must be stipulated.

51. Sections 19 to 21 set out specific sanctions, including fines and imprisonment, for violations, including serious violations of human rights. Public consultation on the Swiss draft law concluded on 31 January 2012 and a redrafting process to reflect comments received during the consultation period is under way.

B. Analysis

52. The national legislation described above illustrates the three primary elements at play in efforts to regulate private military and security companies: the banning of certain activities of such companies; requiring these companies to be registered with national authorities and licensing their activities abroad; and efforts to establish jurisdiction in the home countries of such companies for violations of human rights and criminal law that occurred abroad. The South African legislation and the Swiss draft law both include bans on certain activities and encompass registration and licensing. In contrast, in the United States, legislative efforts have focused primarily on jurisdictional issues. There is no legislative ban on activities or registration and licensing model comparable to that of South Africa and Switzerland, although some activities of private military and security companies (such as the export of weapons) may require licences, and vetting and training requirements are often included in United States Government contracts with private military and security companies.

1. Constraints on activities of private military and security companies

53. Under the South African legislation and the Swiss draft law, private military and security companies are prohibited from undertaking specific activities. In the former, this ban is reflected in the prohibition of mercenary activities. In the latter, it takes the form of an absolute prohibition on direct participation in hostilities and mandates Swiss authorities, when determining whether to issue a licence for activities abroad, to consider whether the activities will take place in the context of armed conflict.

54. The Swiss draft law also includes specific situations in which the State can use private security companies and the standards that such companies must meet to receive State contracts. Private military and security companies can be used only to protect people, guard facilities, for the protection and transfer of tangible and intangible assets and for data protection and handling. Some of the more controversial uses of private military and security companies, such as detention operations and interrogation, are notably absent from this list. While United States legislation does not preclude private military and security companies from performing any specific functions, there is a move in the legislature to reach an understanding about what activities are inherently governmental and should not be outsourced, with interrogation falling into this category.

2. Regulation of activities of private military and security companies

55. Both the Swiss draft law and the South African legislation embrace a regulatory approach to private military and security companies. The former mandates the registration and approval of private military and security company activities abroad. The latter does not require registration, but does require authorization for certain types of activities abroad.

56. While none of the legislation considered includes specific vetting and training standards for private military and security companies, Government authorities have been required to undertake additional steps to ensure the qualifications of the individuals who and companies that they seek to hire. Generally, legislation on private military and security companies leaves it to agency-level bodies to develop vetting and training requirements. This is the approach taken in the Swiss draft law. In the United States, the Secretary of Defense is required, under the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, to develop specific requirements for defence contractors, such as a third-party certification process and weapons certification for private military and security company employees who carry weapons.

57. The experience of South Africa in implementing a licensing scheme demonstrates some of the challenges that States face. The body charged with authorizing private military and security company activities abroad is a Cabinet-level body. While charging such a high-level body with this task may serve to ensure utmost care in authorizing the activities of private military and security companies, it has also resulted in administrative challenges. The South African legislation does not specify a time frame within which the Committee must make its determinations and there is little public information about its processes. For example, the Committee is required to report to Parliament on its own activities, including applications received and the status of authorizations, but this requirement has not been regularly met. It also remains unclear whether the Committee maintains the required register of authorizations and approvals issued by the Minister of Defence.¹⁹ This may have had the unintended effect of driving the private military and security company industry underground. During the Working Group's trip to South Africa, several companies reported that they often chose not to seek authorization for their activities because they possessed little confidence that the Committee would handle applications fairly and promptly.²⁰

58. None of the legislation reviewed included systematic monitoring and reporting by private military and security companies to ensure compliance with national laws and international human rights norms. It is therefore unclear whether, once a private military and security company is granted a licence to conduct certain operations, its activities under that contract are in any way monitored by the licensing authorities. The Swiss draft law does not require regular or periodic reporting on the activities of private military and security companies, nor does it require such companies to report allegations of crimes or human rights violations to the authorities. In South Africa, once a company has received authorization to offer its services abroad, the law does not provide for monitoring of its activities by the Committee or any other body. Companies are not required to report on their activities or undergo field auditing.

3. Scope of legislation

59. In defining the scope of regulation of private military and security companies, the States analysed have used various approaches, generally focusing on areas of armed

¹⁹ A/HRC/18/32/Add.3, paras. 27-29.

²⁰ *Ibid.*, para. 30.

conflict and particular types of activities related to armed conflict. Their experience in seeking to use these concepts demonstrates some of the challenges in this field.

60. The initial legislation passed in South Africa, the Regulation of Foreign Military Assistance Act (No. 15 of 1998), covered the provision of military assistance to a party to an armed conflict and the provision of security services in an armed conflict. The term “armed conflict” itself was, however, loosely defined to include any armed conflict between the armed forces of foreign States, the armed forces of a foreign State and dissident armed forces or other armed groups, or armed groups. This loose definition could allow private military and security companies to avoid seeking authorization on the grounds that a particular situation did not rise to the level of an armed conflict. As the Working Group learned during its country visit, the loose definition has also hampered prosecutions because of the need to present expert witnesses to testify that a given situation constituted armed conflict.²¹ Another issue arising from the scope of the law is that some companies have claimed that they are providing humanitarian services, rather than military assistance or security services, and are therefore not required to obtain permission.²²

61. In enacting the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act (No. 27 of 2006), South Africa sought to close those loopholes by requiring permission for the rendering of military assistance or security services to countries that have been declared “regulated” by the President on the recommendation of the National Conventional Arms Control Committee. It also specifically covers the rubric of humanitarian activities, the exclusion of which in the previous law had allowed some private military and security companies to evade the authorization process.

62. Switzerland has taken a somewhat different approach, providing the authorities with an indicative list of factors that may be “contrary to the aims of the law” to consider when deciding whether to license particular activities of private military and security companies. The authorities may, for example, consider whether a private military and security company’s activities would take place in international or internal armed conflict, “a crisis or conflict zone (defined as a zone in which an international or internal armed conflict exists; a zone of internal tension or internal disorder not constituting an armed conflict; and a zone in which human rights are systematically and seriously violated), or “a confrontation connected with internal tension or internal disorder”. Other activities potentially contrary to the aims of the law include providing “operational or logistic support for foreign armed or security forces”, or services “in the field of military know-how”. The use of the inclusive phrasing “contrary to the aims of the law” would also provide the competent authority with the flexibility to prohibit other potentially objectionable activities of private military and security companies.

63. In the United States, legislative efforts to extend jurisdiction over private military and security companies and their employees have generally referenced United States military operations abroad and have sought to ensure that contractors involved in such missions – even when not engaged by the Department of Defense – are covered. For example, when extending the Military Extraterritorial Jurisdiction Act to cover non-Department of Defense contractors, Congress maintained a link to Department of Defense missions, applying the law to contractors “supporting the mission of the Department of

²¹ Ibid., para. 37.

²² Marina Caparini, “Overview of national regulatory systems for the commercial export of military and security services: the United States and South Africa”, in *Private Military/Security Companies Operating in Situations of Armed Conflict: Proceedings of the Bruges Colloquium* (19-20 October 2006), p. 61.

Defense”. Similarly, when Congress extended military jurisdiction over civilians accompanying United States armed forces, it did so by making such jurisdiction available in “contingency operations” (operations where the Secretary of the Defense certifies that United States forces are engaged in, or likely to be engaged in, armed hostilities). Where contractors are not regarded as supporting United States military operations, however, it is unclear whether these jurisdictional expansions would apply.²³

4. Use of existing bodies to implement new legislation

64. The South African and United States legislation assigned obligations relating to private military and security companies to existing authorities, rather than creating specialized bodies. The Working Group has already discussed herein some challenges for South Africa in using a Cabinet-level body to review requests for authorization to provide military and security services abroad. In the United States, cases against contractors are brought by individual United States Attorneys’ offices, which also deal with other matters. There appears to be some recognition among United States lawmakers that a special unit might be better suited to bring these cases: the Civilian Extraterritorial Jurisdiction Act, which is pending in Congress, would establish new investigative units to investigate, arrest and prosecute contractors and employees who commit serious crimes.²⁴

65. It is unclear whether Switzerland will create a new body to administer its law or whether it will designate an existing body to be the “competent authority”. The explanatory report accompanying the Swiss draft law notes that it does not require the creation of a new authority and that the competence deriving from the law may be attributed to an existing authority.

5. Looking ahead

66. The above analysis is preliminary in nature. The project initiated by the Working Group to collect and analyse national legislation on private military and security companies will undoubtedly reveal further challenges and best practices. The Working Group looks forward to cooperating with Member States to gather all relevant legislation and other materials on national regulatory frameworks pertaining to private military and security companies and their personnel. The translation and publication of national legislation will provide a publicly available resource for use by stakeholders and will inform efforts to develop effective regulatory frameworks. Responses by Member States to the request by the Working Group for national legislation will also inform its report to the Human Rights Council at its twenty-fourth session, in 2013.

V. Conclusion and recommendations

67. **Given the risk to human rights of the activities of private military and security companies, the Working Group welcomes efforts by States to develop national legislation.**

68. **The Working Group is of the view that further research into effective national regulatory strategies is needed and recommends that Member States respond to its**

²³ See Charles Doyle, *Civilian Extraterritorial Jurisdiction Act: Federal Contractor Criminal Liability Overseas*, Congressional Research Service, 15 February 2012, p. 6. Available from www.fas.org/sgp/crs/misc/R42358.pdf.

²⁴ United States, Civilian Extraterritorial Jurisdiction Act of 2011.

request to collect all national legislation relevant to private military and security companies to facilitate analysis by multiple stakeholders.

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

70. 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 participate actively in the work of the intergovernmental working group established by the Human Rights Council with a view to considering the possibility of an international instrument for the regulation of private military and security companies.

71. States 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.
