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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Annual 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

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Summary

The present report presents an overview of the Working Group's activities in the period under review, including regular sessions of the Working Group, communications and country visits.

The thematic part of this report presents findings of the Working Group's ongoing survey of national laws and regulations relating to private military and/or security companies (PMSCs). In the present report, the Working Group focuses on laws and regulations from 13 African countries – namely, Botswana, Ghana, the Gambia, Kenya, Lesotho, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Uganda and Zimbabwe – and discusses trends and differences in regulatory approaches in these countries. The Working Group finds that, while there are common elements in laws of these countries, the diverse contexts at the national level affect the way in which PMSCs are regulated and the regulatory approach of each country significantly varies. The Working Group reiterates the need for effective regulations of the activities of PMSCs and invites all Member States to facilitate the Working Group's study on national legislation, which aims to identify trends and good practices and to develop guidance for Member States in exercising effective oversight of the activities of PMSCs.

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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 since its previous report to the Human Rights Council (A/HRC/21/43). The thematic section of the report provides results of the initial phase of the Working Group's global study on national legislation, which focused on selected countries in Africa.

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, Human Rights Council resolutions 7/21 and 15/12, in which the Council extended that mandate, and Human Rights Council resolution 21/8.

3. The Working Group is composed of 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 December 2012, the Working Group decided that Mr. Katz would act as Chairperson-Rapporteur of the Working Group from January 2013 to December 2013.

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 (NGOs) and experts. It reviewed allegations regarding the activities of mercenaries and private military and/or security companies (PMSCs) and their impact on human rights, and decided on the appropriate action.

5. For the purposes of the present report, PMSC may be defined as "a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities". Military services refer to "specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities", whereas security services refer to "armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities".¹

A. Sixteenth, seventeenth and eighteenth sessions of the Working Group

6. The Working Group held its sixteenth session in New York from 30 July to 3 August 2012. As part of this session, it convened round-table discussions with experts on the Draft Convention on Private Military and Security Companies, and with representatives of NGOs working in the field of business and human rights on the potential linkage between the work of the Working Group and the implementation of the Guiding Principles on Business and Human Rights. The Working Group expresses its gratitude to the experts and NGO representatives who participated in the discussions. In addition, the Working

¹ Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council, A/HRC/15/25, annex I.

Group met with Under-Secretary-General of the Department of Safety and Security, Gregory Starr, to discuss the development of policies regarding the use of armed private security companies by United Nations organs and agencies. At the end of the session, the Working Group decided to send comments on the drafts of the United Nations Security Policy Manual on Armed Private Security Companies (Policy Manual) and the Security Management Operations Manual and Guidelines on the Use of Armed Services from Private Security Companies (Operations Manual).

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

8. From 11 to 15 March 2013, the Working Group held its eighteenth session in Geneva, during which the Working Group consulted representatives of Member States, the Independent International Commission of Inquiry on the Syrian Arab Republic, the International Committee of the Red Cross, the Office for the Coordination of Humanitarian Affairs and NGOs. During this session, the Working Group decided to launch a study on the use of PMSCs by the United Nations and report on this issue to the General Assembly in 2014. As part of this study, it also decided to hold an expert panel event on this topic during its next session in New York. Furthermore, the Working Group reviewed responses from Bahrain, Bosnia and Herzegovina, France, Germany, Ghana, Mauritius, Poland, Switzerland and Togo to its request for information relating to persons convicted of mercenary activities.

B. Communications

9. Since its last report to the Human Rights Council, the Working Group has sent four communications to the Governments of Colombia, Honduras, Liberia and the United States of America, respectively. Summaries of the communications to Colombia, Honduras and Liberia were reported to the twenty-second session of the Human Rights Council (A/HRC/22/67) and a summary of the communication to the United States of America is included in the addendum to the present report. The Working Group expresses its appreciation to the Government of Colombia, which provided its reply, and invites the other Governments to do so as soon as possible.

C. Country visits

10. The Working Group conducted two country visits during the period under review. It visited Somalia from 8 to 14 December 2012 and Honduras from 18 to 22 February 2013. The reports on the visits to Somalia and Honduras are presented as addendums to the present report.

D. Comments on the policy and operations manuals on the use of armed services from private security companies

11. The Working Group has been following the development of the Policy Manual and the Operations Manual on the use of armed services from private security companies and

engaging with the Department of Safety and Security in order to contribute to the development of a coherent, human rights-compliant policy framework for the procurement and use of armed private security companies by the United Nations organs and bodies. On 28 August 2012, the Working Group provided comments on the draft Policy and Operation Manuals, underlining the need effectively to mainstream human rights norms in these documents. The Working Group recommended, *inter alia*, that the standards for the selection of armed private security companies should be strengthened by requiring that the company have a clean human rights record and carry out a human rights impact assessment.

E. Engagement with the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies

12. The Working Group made a submission to the second session of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, which took place from 13 to 17 August 2012. The then Chairperson-Rapporteur of the Working Group, Ms. Patel, participated in the second session as a resource person. Ms. Patel presented the Working Group's view that an international convention was the most efficient solution to the challenge of regulating PMSCs, as international law in its current form does not prohibit the outsourcing of State functions to PMSCs or clearly spell out the minimum content of States' due diligence obligations to ensure that PMSCs respect international humanitarian and human rights law. Ms. Patel also pointed to the lack of adequate national legislation governing PMSCs and the transnational nature of many PMSC activities as additional factors underscoring the need for an international convention on PMSCs.

F. Collecting information on individuals convicted of mercenary activities

13. Human Rights Council resolution 21/8 requested the Working Group to "establish a database of individuals convicted of mercenary activities" (para. 18). Pursuant to this request, the Working Group sent a note verbale to all Member States on 22 January 2013 requesting information on cases of mercenaries convicted by national courts. A reminder of this request was sent on 6 March 2013. At the time of writing, the Working Group had received replies from the following 17 countries: Bahrain, Bosnia and Herzegovina, Cuba, France, Germany, Ghana, Guatemala, Iraq, Mauritius, Montenegro, Poland, Russian Federation, Serbia, Switzerland, Togo, Tunisia and Ukraine. Of these responses, Cuba, France and Montenegro reported specific convictions, while others responded that there were no cases of mercenaries or no relevant information owing to the absence of specific legislation prohibiting mercenary activities.

G. Other activities of the Working Group members

14. From 6 to 8 September 2012, Ms. Patel participated in the 35th annual Round Table on Current Issues of International Humanitarian Law organized by the International Institute of Humanitarian Law in San Remo, Italy, where she provided an overview of the Draft Convention on Private Military and Security Companies.

15. On 21 September 2012, Mr. Rona participated in a civil society meeting on the draft charter of the oversight mechanism for the International Code of Conduct for Private

Security Service Providers in Washington, D.C., organized by Amnesty International and the Rockefeller Foundation.

16. On 5 February 2013, Mr. Rona presented a paper on the work of the Working Group at the University of Minnesota School of Law.

17. On 5 April 2013, Mr. Rona organized a panel on accountability of PMSCs at the annual meeting of the American Society of International Law in Washington, D.C., and Ms. Patel participated as a panellist.

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

III. Research on national regulation on PMSCs

A. Introduction

19. As indicated in last year's report to the Human Rights Council (A/HRC/21/43, paras. 24–26), the Working Group believes that it is critical to study and identify legislative approaches regarding the activities of PMSCs and to assess the effectiveness of such legislation in protecting human rights and promoting accountability for violations. Such a study would inform the Working Group's efforts to demonstrate the need for a legally binding international instrument regulating the activities of the industry. In addition, it would assist in identifying good practices and may inform future projects to develop guidance for Member States seeking to regulate PMSCs.

20. For the purpose of this study, the Working Group sent a letter to all Member States requesting copies of publicly available laws and regulations relating to PMSCs on 9 May 2012. A reminder of this request was sent on 26 June 2012. The Working Group would like to thank all Member States which submitted such laws and regulations.

21. Parallel to this request, the Working Group has been conducting independent research on national legislation relating to PMSCs on a region-by-region basis. The first phase of the research focused on samples of English-speaking countries in Africa and the present report presents the Working Group's findings of this research. The next phase of the study will focus on French-speaking African countries, followed by other regions of the world.

22. The African countries analysed in the present report are Botswana, Ghana, the Gambia, Kenya, Lesotho, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Uganda and Zimbabwe.

23. The study found that, with the exception of South Africa, none of the countries reviewed had legislation that covered the export of military or security services. Several countries did, however, have laws regulating domestic private security companies. The main topics addressed in the survey were: (a) whether the legislation in these countries covers both private military companies and private security companies; (b) whether the legislation applies to the export of security and/or military services beyond their borders; and (c) whether or not such laws, if in place, apply extraterritorially. The study also highlights requirements for the establishment of a PMSC, including relevant licensing and registration mechanisms. The question of whether there are laws and/or regulations dealing with the use of force and firearms and with trafficking of weapons by both security and military service providers was also reviewed. The enactment of laws aimed at implementing international instruments on mercenaries is also addressed.

B. Analysis

24. The study reveals widely divergent levels of regulation of the activities of PMSCs among the analysed countries. At one end of the spectrum, countries may specifically establish a licensing scheme and prohibit PMSCs from carrying out certain activities. South Africa is an example of that approach and the only country in the study which provides for comprehensive legislation regulating activities of PMSCs and specifically prohibiting the export of military and security services. Several of the other countries analysed regulate only private security companies to a varying degree within the domestic sphere and do not prohibit the provision of military or security services abroad. Efforts undertaken by these States to regulate the activities of PMSCs indicate their acknowledgement of a certain level of risk in outsourcing State functions to these private companies. At the other end of the spectrum, there are countries which have no legislation specifically addressing the activities of PMSCs or are currently considering establishing a legislative framework.

25. The South African legislation is also unique in that it prohibits mercenary activities. While the term “mercenary” is defined differently to the definition in the international or regional instruments, the South African legislation is specifically aimed at prohibiting mercenary activities and requires permission for the rendering of military or security services to a party to an armed conflict or to a designated country. The other countries analysed do not have any laws prohibiting mercenary activities.

26. While bearing in mind these varying approaches, there are common elements in the laws of the countries under review, which are used as a basis of comparative analysis below.

1. Regulation of the activities of PMSCs

27. Of the 13 countries analysed, all except Kenya and Swaziland have legislation addressing the private security sector.² There is currently no law that specifically deals with the private security industry in Kenya, whereas the Swazi legislation does not regulate the industry, the enterprises or companies, or even the security officers, but only the “wages” associated with those involved in the security industry, through the Regulation of Wages (Security Services Industry) Order, 2011.

28. Two countries, South Africa and Botswana, are currently undergoing a transitional phase as they are in the process of amending their existing laws. While Botswana is considering the Regulation of Private Security Services Amendment Bill, 2008, South Africa is considering the Private Security Industry Regulation Amendment Bill, 2012. This will arguably make the regulatory framework on private security in these two countries more effective. It is also likely that it may encourage other countries in the region to consider amending and/or enacting legislation in the near future in order to keep up to the developing dynamics of the private security industry.

² Botswana: Control of Security Guard Services Act No. 28 of 1984; Ghana: Police Service (Private Security Organisations) Regulations, 1992, Legislative Instrument No. 1571, as amended by Legislative Instrument No. 1579; the Gambia: Private Security Guard Companies Act No. 5 of 2011; Lesotho: Private Security Officers Act, 2002; Mauritius: Private Security Act No. 5 of 2004 as amended by the Private Security Service (Amendment) Act of 2008; Namibia: Security Enterprises and Security Officers Act No. 19 of 1998, as amended by the Security Enterprises and Security Officers Amendment Act No 21 of 2002; Nigeria: the Private Guard Companies Act No. 23 of 1986; Sierra Leone: National Security and Central Intelligence Act No. 10 of 2002; South Africa: Private Security Industry Regulation Act No. 56 of 2001; Uganda: Police (Control of Private Security Organisations) Regulations of 1997 and 2004; and Zimbabwe: Private Investigators and Security Guards Control Act, Chapter 27:10 (1996).

29. As mentioned above, South Africa has adopted the most comprehensive approach and legislation not only regulating the private security industry, but also prohibiting the export of military and security services. The Private Security Industry Regulation Act No. 56 of 2001 establishes the Private Security Industry Regulatory Authority and sets out in detail specific conditions under which a legal person may be registered as a security service provider by this Authority. Furthermore, the Regulation of Foreign Military Assistance Act (No. 15 of 1998) and the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act (No. 27 of 2006) specifically prohibit mercenary activities and regulate the provision of assistance or services to a party to an armed conflict or to a designated country. According to these laws, no person may provide any assistance or any service to a party to an armed conflict or in a “regulated” country as designated by the President upon the recommendation of the National Conventional Arms Control Committee.

30. Other countries adopt various approaches to regulating the private security industry at a domestic level. While the scope of legislation and the degree of control envisaged under such legislation significantly vary from country to country, many of them establish procedures and criteria for licensing, authorization and registration of PMSCs.

31. Zimbabwe has very strict regulations for the security industry, including the activities of private investigators, and sets out a licensing scheme and certain duties of private investigators and security guards.³ The private security sector in Botswana is regulated by the Control of Security Guard Services Act. This Act establishes a controller of security guard services, who is responsible for granting a licence to engage in business of providing security guards. It does not regulate the conduct of private security guards per se and the above-mentioned Regulation of Private Security Services Amendment Bill seeks to address this gap by establishing a Private Security Industry Regulatory Board to ensure that private security service providers adhere to minimum standards of conduct. In the case of Lesotho, the Private Security Officers Act regulates private security officers and guards through the Private Security Officers’ Board and prohibits any legal person from rendering private security services without a certificate of registration issued by the Board. The Namibian legislation, the Security Enterprises and Security Officers Act and the Security Enterprises and Security Officers Amendment Act, regulates “security enterprises” and “security officers” through the Security Enterprises and Security Officers Regulation Board.

32. The Gambian legislation governs “private security guard companies” and persons employed by such companies as private security guards. It also establishes the Licensing Authority for Private Security Guard Companies within the Ministry of Interior. In Uganda, the Police (Control of Private Security Organisations) Regulations prohibit any organizations from performing or offering to perform security services unless they are registered with the Inspector General of Police as a private security organization. Similarly, the Nigerian legislation, the Private Guard Companies Act, prohibits any organization from performing “the service of watching, guarding, patrolling or carrying of money for the purpose of providing protection against crime” unless it is registered with the Ministry of Internal Affairs.⁴

33. Except for Swaziland, the countries examined have similarities in terms of providing regulations to give effect to principal acts dealing with their respective private security industries. The relevant ministers (as prescribed in the various laws) are responsible for the promulgation of the regulations implement the laws on private security. Only in the case of

³ See Private Investigators and Security Guards Control Act.

⁴ Sect. 1(1) of the Private Guard Companies Act, 1986.

the engagement in certain activities in countries of armed conflict is the President – as the Head of State and Government – responsible for the promulgation of regulations, as in the case of South Africa.

2. Scope of legislation

(a) Terminology

34. The scope of legislation governing PMSCs differs from one country to another, partly owing to the different definitions of military and security services subject to such legislation. Of all the regulatory frameworks, the South African legislation is far more elaborate than the remaining countries' legislation, as "security service" is defined broadly to include protecting or safeguarding a person or property in any manner; giving advice on the protection or safeguarding of a person or property; providing a reactive or response service in connection with premises; manufacturing, importing, distributing or advertising monitoring devices; performing the functions of a private investigator; providing security training or instruction to a security provider; installing, servicing or repairing security equipment; and performing functions of a locksmith.⁵ By comparison, the Mauritian legislation, for instance, defines private security service as "the business of providing, for remuneration or reward, a security service, the services of a security guard, and the secure transportation and delivery of property", without specifying what "security services" means.⁶

35. While a number of other countries do not specifically set out a definition of "private security service", it appears that the term is often understood to only entail watching, guarding and patrolling for the purpose of providing protection against crimes. For example, the legislation of Ghana and Nigeria defines entities subject to the legislation as those providing the service of watching, guarding and patrolling for the purpose of providing protection against crimes. The Zimbabwean legislation also focuses on guarding, essentially defining a "security guard" as a person who carries on a business of guarding properties or persons for reward. Similarly, the Botswana legislation defines the term "security guard" as a person who acts as a guard or as a guard or watchman,⁷ and the Lesotho legislation defines a "private security guard" as a person employed to protect or safeguard people or property.⁸

36. This lack of consistency in the terminology and the ambit of services covered by the legislation in each country results in regulatory gaps, as PMSCs provide a diverse range of services besides simply guarding and patrolling, such as training and advisory services on security matters and implementation of security measures.

(b) Extraterritorial application

37. Only the South African legislation has an extraterritorial application and jurisdiction clause. This is found under section 39(1) of the Private Security Industry Regulation Act, which provides that any act constituting an offence under the Act and committed outside South Africa is deemed to have been committed in the country. Furthermore, as discussed above, South Africa specifically prohibits the provision of military and security services to a party to an armed conflict or to a "regulated" country.

⁵ Sect. 1(1) of the Private Security Industry Regulation Act, 2001.

⁶ Sect. 2 of the Private Security Service Act

⁷ Sect. 2 of the Control of Security Guard Services Act, 1984.

⁸ Sect. 2 of the Private Security Officers Act, 2002.

38. The laws related to PMSCs in other countries are applicable only at the domestic level and do not regulate the provision of military or security services abroad. In particular, the laws do not prohibit PMSCs from engaging in certain activities, such as direct participation in hostilities. This is the most critical gap, considering the growing role of PMSCs in armed conflicts, post-conflict and in low-intensity armed conflict situations.

3. Entities that control or regulate the private security actors

39. In a number of countries such as the Gambia, Nigeria and Zimbabwe, the entities and individuals that control and/or regulate the private security industry are appointed by and exist within the ministry responsible for internal security, such as the Ministry of Home Affairs or the Ministry of Interior. In the case of Nigeria, for example, the responsible official for private security is an officer within the Ministry of Internal Affairs who is essentially the licensing authority for private guard companies as established by the Nigerian law. In Botswana, the responsibility falls to the Ministry of Defence, Justice and Security. In the case of South Africa, the Ministry of Safety and Security is responsible for the regulation of the provision of private security, although the Ministry of Defence regulates the provision of foreign military assistance and/or engagement in certain activities in a country of armed conflict through the National Conventional Arms Control Committee.⁹

40. In some countries, the licensing and registration of PMSCs are handled by the Police Service. In Ghana, the private security industry is governed by the Police Services Act and the Ministry of Interior and Ghanaian Police Service are responsible for regulating the private security sector. In the case of Mauritius, the Commissioner of Police is responsible for granting a licence to provide private security services. Similarly, in Uganda, the Inspector-General of Police, the Chairperson of the District Committee and the Area Commander under the Uganda Police Force play a critical role in regulating the private security sector.

41. In other countries, such as Lesotho, Namibia and Sierra Leone, an intergovernmental body under the direction of the ministry in charge of internal security is responsible for the licensing and regulation of PMSCs. In Sierra Leone, for instance, the National Security Council comprising of political heads for various ministries in general and the Office of National Security in particular are responsible for regulating the private security industry. The Kenyan Private Security Industry Regulatory Bill also envisages that an intergovernmental Private Security Regulatory Authority will be responsible for regulating the private security sector.

42. None of the countries has a dedicated body exclusively responsible for the licensing, regulation and monitoring of PMSCs. While diverse models of oversight as informed by local contexts may be possible, the Working Group's experience indicates that such a dedicated body may be necessary and desirable in order to properly scrutinize the conduct of PMSCs and ensure effective oversight of their activities.

4. Regulations on the use of force and firearms by PMSCs

43. A number of countries set out regulations with respect to the possession and use of firearms by PMSCs, where it is permitted. In South Africa, the provision dealing with the use of firearms is found under section 35 (m) of the Private Security Industry Regulation Act, which provides that the Minister may make regulations relating to, inter alia, the

⁹ See the Foreign Military Assistance Act, 1998 and the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006.

issuing, possession and use of firearms and other weapons by security service providers. In Lesotho and Mauritius, the laws require the use of firearms by private security service providers to be in accordance with the laws governing the use of firearms by the populations at large. An interesting contrast in this regard is Ugandan Police (Control of Private Security Organisations) Regulations, which specifically spell out circumstances under which private security service providers may use firearms and require that all private security service providers who are detailed to use arms must be adequately trained and possess a certificate of competence in firearms management.

44. While the Sierra Leonean legislation provides for the use of firearms by the private security providers, this is generally not allowed in practice owing to the United Nations arms embargo. The Sierra Rutile company, however, does possess armed private security, which is sanctioned by the Sierra Rutile Agreement 1989 (Ratification) Act and the Sierra Rutile Agreement (Ratification) Act, 2002.

45. Some countries expressly prohibit the use of firearms by private security service providers. Insofar as the Gambia is concerned, the possession and/or the use of firearms or ammunition by a private security provider are prohibited. Similarly, the Nigerian legislation prohibits the use of firearms and ammunition during the course of their duties.

46. In other countries, the laws are silent on the use of firearms by private security service providers. For example, the Ghanaian legislation and the Kenyan bill on private security are silent on whether or not private security providers would be allowed to use firearms. This issue may be addressed in the regulations that will be developed in order to implement the Kenyan law on private security.

47. While the regulation of use of force and firearms is one of the most crucial elements of effective oversight of PMSCs, it appears that, based on the national legislation on PMSCs available to the Working Group, the countries that permit PMSCs to possess and use firearms do not provide for sufficiently detailed regulations in this respect. Although the international human rights and humanitarian laws and standards provide, *inter alia*, that firearms are used proportionately only in self-defence or defence of third persons and in a manner likely to decrease the risk of unnecessary harm, the laws analysed in this study do not incorporate these requirements or only include part of them.

5. The promotion of standards in regulations of the selection, training, equipping and conduct of PMSC personnel

48. The laws in some of the countries under review set out minimum criteria for the selection of PMSC personnel and such criteria commonly include whether or not the personnel in question have been convicted of any serious crimes, the fitness of their characters and their financial position. For example, the Lesotho legislation provides that no person shall qualify to register as a private security officer or guard if he or she has been convicted of any offence punishable by imprisonment or found guilty of any offence involving dishonesty or use of dangerous weapons, suffers from mental incapacity, habitual drunkenness, narcotics addiction or dependence, or is under the age of 18 years or an unrehabilitated insolvent. Some legislation goes further, requiring personnel to have been adequately trained. The South African legislation, for example, requires that personnel comply with training as certified by the Safety and Security Sector Education and Training Authority.

49. In some of the countries subject to this study, the entities responsible for regulating and/or controlling the private security sector are also entrusted with the responsibility of ensuring and promoting training standards for private security officers. For instance, the Namibian Security Enterprises and Security Officers Act provides that, among other things, the functions of the Security Officers Regulation Board shall give advice in connection with

the training of security officers in Namibia and promote the standard of such training.¹⁰ Under that Act, the Minister may also establish regulations relating to the training of security officers.¹¹ The South African Private Security Industry Regulation Act provides that the Authority shall, among other things, promote high standards in the training of security service providers and prospective security service providers.¹²

50. It appears from this research that the respect for international human rights and humanitarian laws has not been recognized as an important element in selecting PMSC personnel. On the basis of information available to the Working Group, none of the countries takes into account any records or reports of human rights violations committed by PMSC personnel in determining whether or not to select the concerned individual. Similarly, none of the countries has legislation specifically requiring personnel of PMSCs to be adequately trained on international humanitarian law and human rights law.

6. Ratification of regional and international instruments on mercenaries

51. None of the countries under review have ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, although Nigeria is a signatory State. Insofar as the definition of mercenaries is concerned, the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) defines “mercenary” in article 47, paragraph 2. Botswana acceded to Protocol I in 1979, Lesotho acceded in 1994, Namibia in 1994, South Africa and Swaziland ratified it in 1995 and Zimbabwe in 1992. This means that these countries are legally bound to implement the Protocol.

52. According to the status list for those countries that have ratified the 1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa, only the Gambia, Ghana, Lesotho, Nigeria and Zimbabwe have ratified the Convention. However, the countries that have ratified the Convention do not seem to have any laws that effectively implement it within their domestic jurisdiction.

IV. Conclusion and recommendations

53. The research on domestic legislation on PMSCs shows that the various African States analysed in this study have responded to the privatization of security differently. Given the absence of a legally binding international instrument on PMSCs, there is little guidance on how effectively to address the phenomenon of the privatization of security. This has resulted in divergent regulatory approaches at the national level, creating regulatory gaps in some respects.

54. The manner in which the countries’ laws are framed reflects the challenges that the privatization of security poses in the various States. Countries such as South Africa, which faced the phenomenon whereby its nationals with extensive military skills and experience provided military and security services abroad and some of whom became involved in mercenary activities, responded by enacting legislation specifically prohibiting mercenary activities and the export of military and security services, as well as regulating PMSCs within the domestic sphere. In other countries, where the private security industry mostly focuses on more traditional guarding of persons or properties, the laws have not yet evolved to address these challenges.

¹⁰ S 4 (c) of the Security Enterprises and Security Officers Amendment Act, 2001.

¹¹ S 38(1)(c) of the Security Enterprises and Security Officers Amendment Act, 2001.

¹² S 3(j) of the Private Security Industry Regulation Act, 2001.

55. The provisions on the use or non-use of firearms by the private security providers, particularly on the use of lethal force, are also indicators, among others, which reflect how those States view the private security sector. The prohibition of use of firearms by PMSCs in some countries signals the recognition of the risk of outsourcing what may be regarded as State functions. In other countries, where the use of firearms is permitted by law or where the laws are silent on this matter, there is a risk that the use of firearms by PMSCs may result in human rights violations, for the existing laws do not provide sufficient guidance on the use of force in accordance with the international human rights and humanitarian standards.

56. The Working Group stresses that the right to security is an inherent human right of all and underpins the enjoyment of other human rights.

57. Without effective oversight and control, the activities of PMSCs could, in some cases, seriously undermine the rule of law and the effective functioning of a democratic State institution responsible for ensuring public safety in accordance with international human rights standards and national laws. There is a critical need to establish minimum international standards for States to regulate the activities of PMSCs and their personnel in pursuing the realization of this fundamental human right.

58. It is hoped that with this study, which is still ongoing, the Working Group will be in a position to identify good practices and develop guidance for Member States in effectively regulating PMSCs and ensuring the enjoyment of the right to security by all. For instance, the regulation of the export of security and military services is one example of good practice, which States must consider addressing within their regulatory frameworks. Further research into effective national regulatory strategies is clearly needed in order to identify trends, gaps and good practices in regulating PMSCs. To this end, the Working Group encourages Member States which have not yet responded to its request to share with it laws and regulations relating to PMSCs to do so.

59. The Working Group reiterates its view that a comprehensive, legally binding international regulatory instrument is the best way to ensure adequate protection of human rights. In this regard, the Working Group welcomes 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 PMSCs and encourages all States to participate actively in this process.
