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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

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The report provides an overview of the findings of a global study conducted from 2013 to 2016 on the national legislation on private military and security companies in 60 States from all the regions of the world. The findings focus on existing regulatory gaps, commonalities and good practices and can provide guidance to Member States and various stakeholders on regulation. Existing regulatory gaps are real indicators that more robust measures are required for stronger protection against human rights violations by private military and security companies. The Working Group reiterates the need for a comprehensive, legally binding instrument to ensure adequate human rights protection within, and of, the industry.

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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

Contents

I. Introduction

1. The present report provides an overview of the findings of the Working Group's global study on national legislation covering private military and security companies in 60 States from five regions worldwide.[1]

2. Between 2013 and 2016, annual reports to the Human Rights Council covered the national legislation of thirteen anglophone African States,[2] eight francophone African States[3] and eight Asian States. The 2015 report[4] covered the laws and regulations of eight countries in Central America and the Caribbean,[5] eight countries in South America[6] and four countries in Europe.[7] The 2016 report[8] covered six countries of the Commonwealth of Independent States,[9] four countries in the Asia and Pacific region,[10] and the United States of America.[11] Additional background and research documents relating to the regional studies undertaken in the past four years are available on the Working Group's website[12] and can provide more comprehensive and in-depth coverage of the national legislation referred to in the present report.

3. The global study was conducted to provide analysis of national legislation in order to assess existing gaps, trends and good practices, which could help in developing guidance on regulation within and of the industry. The methodology for the study included a questionnaire sent to States[13] in 2012. Over 30 States responded. Additional research was conducted on States' laws and regulations relating to private military and security companies in all of the United Nations regional groups. The Working Group then analysed the available laws and regulations, on the basis of the following criteria: (a) references to conventions on mercenaries; (b) scope of application; (c) rules on licensing, authorization and registration; (d) regulations on selection and training; (e) prohibited and permitted activities of private military and security companies; (f) rules on acquisition of weapons by private military and security companies; (g) use of force and firearms; and (h) accountability.

4. The Working Group would like to thank the Member States and all stakeholders that contributed to the global study in the past four years.

[1] The report is non-exhaustive, and a more comprehensive coverage of the main issues can be found in the Working Group's annual reports to the Human Rights Council from 2013 to 2016.

[2] See A/HRC/24/45, in regard to Botswana, the Gambia, Ghana, Kenya, Lesotho, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Uganda and Zimbabwe.

[3] See A/HRC/27/50, in regard to Burkina Faso, Cameroon, Côte d'Ivoire, the Democratic Republic of the Congo, Mali, Morocco, Senegal and Tunisia, and to China, India, Malaysia, Pakistan, the Philippines, Singapore, Sri Lanka and the United Arab Emirates.

[4] A/HRC/30/34.

[5] Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panama.

[6] Argentina, the Plurinational State of Bolivia, Brazil, Chile, Colombia, Ecuador, Peru and Uruguay. (For Argentina, which has a federal system under which regulations are implemented by each province, the regulations of the Province of Buenos Aires were analysed.)

[7] France, Hungary, Switzerland and the United Kingdom of Great Britain and Northern Ireland.

[8] A/HRC/33/43.

[9] Azerbaijan, Kazakhstan, Kyrgyzstan, the Republic of Moldova, Tajikistan and Uzbekistan.

[10] Australia, New Zealand, Nauru and Papua New Guinea.

[11] Australia and New Zealand, along with the United States of America, are members of the Western European and Others Group at the United Nations, one of the geopolitical regional groups into which Member States have unofficially divided themselves.

[12] See www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx.

[13] With regard to the methodology for the Latin American States, the selection was focused on Spanish-speaking countries.

II. Good practices

5. This section provides a summary of some of the good practices identified in various States.

6. Three of the six countries reviewed from the Commonwealth of Independent States have ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries[14] and all six have enacted criminal offences relating to mercenary activities.[15] The laws of both Peru and South Africa also specifically prohibit mercenary activities.[16]

7. Regarding the scope of legislation, States vary on the definitions given to military and security services. Most States informed the Working Group that their laws only covered private security companies and not private military companies. South Africa has good model legislation that broadly defines a security service,[17] prohibits the export of military and security services,[18] and applies extraterritorially.[19] Any act that constitutes an offence under the applicable law and is committed outside South Africa is considered to have been committed in the country.[20]

8. The Swiss legislation is also progressive in relation to extraterritorial application, as it covers the activities of local private security companies,[21] and services provided by companies hired locally or abroad by the Government and by private security companies abroad.[22]

9. The legislation of the United States of America and of Australia is quite elaborate on extraterritoriality as well. The Military Extraterritorial Jurisdiction Act, of the United States, extends United States federal criminal jurisdiction to certain defence contractor personnel or contractors hired by other agencies who support the Department of Defense as regards criminal offences committed outside United States territory.[23] If a contractor in a designated operational area or supporting a diplomatic or consular mission is involved in conduct outside the United States that would constitute an offence punishable by imprisonment for more than one year, he or she may be potentially subject to the criminal jurisdiction of the United States of America.[24] In Australia, the contractors of the Department of Defence can be considered as "defence civilians", and criminal acts abroad are covered by the applicable criminal law and prosecution can take place in Australian courts.[25] As a result of the amendment of the Crimes (Overseas) Act 1964, criminal acts by private security or military contractors hired by government agencies other than the Department of Defence are covered by Australian criminal law.[26] The Crimes (Overseas) Act covers bodies corporate as much as individuals, which means that an Australian private

[14] Of 4 December 1989. A total of six countries from the Commonwealth of Independent States were reviewed.

[15] Art. 114 of the Criminal Code of Azerbaijan, arts. 170 and 267 of the Criminal Code of Kazakhstan, arts. 229 and 375 of the Criminal Code of Kyrgyzstan, arts. 141, 151 and 152 of the Criminal Code of the Republic of Moldova, arts. 185, 195, 196, 401, 403 and 405 of the Criminal Code of Tajikistan, and arts. 97, 104, 105 (chap. 1 of sect. 1) and 154 of the Criminal Code of Uzbekistan.

[16] With regard to South Africa, see Act No. 27 of 2006 (Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act).

[17] Sect. 1 (1) of the Private Security Industry Regulation Act, 2001.

[18] See the Private Security Industry Regulation Act No. 56 of 2001, 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).

[19] See the Private Security Industry Regulation Act, art. 39 (1).

[20] Ibid.

[21] Concordat on the Services of Private Security Companies of 2010.

[22] Decree on the Hiring of Private Security Companies of 2007.

[23] Military Extraterritorial Jurisdiction Act (18 U.S. Code, sects. 3261-3267).

[24] Military Extraterritorial Jurisdiction Act (18 U.S. Code, sects. 3261 et seq.), and 48 Code of Federal Regulations, chap. 1 (10-1-11 edition), 52.225-19, p. 210.

[25] Defence Force Discipline Act 1982, sects. 9 and 61.

[26] See sect. 3.

military company or private security company carrying out activities in a foreign country could be subjected to criminal prosecution as well.

10. Various States in Latin America[27] have specific registration systems at the national level for private security companies. Cameroon, Pakistan, the Philippines and Sri Lanka also have similar regulatory provisions. The Province of Buenos Aires also requires the supervisory authority to keep a registry of the persons authorized to provide private security services, and also of persons who have been rejected for infractions.[28]

11. With regard to the licensing and selection process, four States in Asia (China, the Philippines, Singapore and the United Arab Emirates) require licensing for a company providing private security services, and for individual security personnel or employees.[29] The requirement for personnel of private security companies to obtain licences can be an important vetting mechanism to ensure that qualified persons are employed, but also that persons with past convictions relating to human rights abuses are excluded. As for the relationship between the licensing and selection process and human rights standards, the Working Group notes that according to the Swiss legislation, "competent authorities" can decide to prohibit, wholly or partially, certain activities because they may be contrary to the aims of the law, including services that may be used to commit human rights violations. Another good example is the legislation of the Province of Buenos Aires, where private security companies are prohibited from having partners that have benefited from amnesties and been indicted for human rights violations, and a certificate issued by the competent human rights authorities is required as proof.[30] In Guatemala, candidates who have served in the army, the national civilian police, the government intelligence services or another private security company must prove that if they were dismissed it was not because they committed a crime or a human rights violation.

12. Good examples of references to international human rights and humanitarian law standards in the training of personnel of private security companies are found in the Swiss legislation, which requires companies to train their personnel in applicable national and international law, including on fundamental rights. Reference to "human rights" appears several times in Brazilian legislation, in which it is stated that training must cover preservation of the physical integrity of persons confronted with the use of force in their work, in accordance with the principles of human rights advocated by the United Nations.[31] El Salvador, Guatemala,[32] Mexico[33] and Colombia[34] require a private security company to offer training on human rights to its personnel. Colombia refers to a special training programme involving international humanitarian law.[35]

13. In the United States, Congress established a legislative framework in the National Defense Authorization Act requiring the Department of Defense, in coordination with the Department of State, to be in charge of the licensing of private military and security companies and to prescribe regulations on the selection, training, equipping and conduct of

[27] Brazil, Cameroon, Chile, Colombia, Ecuador and Peru. Also Pakistan, the Philippines and Sri Lanka, and the Province of Buenos Aires.

[28] Act. No. 12.297.

[29] Regarding China, see Order of the State Council No. 564, Regulation on the Administration of Security and Guarding Services, of 2009. Regarding the Philippines, see the Private Security Agency Law, 1969 (Act No. 5487), as amended by Presidential Decree No. 11, 1972, and, subsequently, by Presidential Decrees No. 100, of 1973, and No. 1919, of 1984. Regarding Singapore, see the Private Security Industry Act, 2007 (Act No. 38). Regarding the United Arab Emirates, see Federal Decree No. 37, of 2006, concerning Private Security Companies (art. 11, which provides that the company may not contract a security employee until it has obtained the approval of the competent authorities and fulfilled the restrictions and conditions specified in the law's executive regulations).

[30] Act No. 12.297, art. 8 (2); and Acts No. 23.492 and No. 23.521.

[31] Ordinance No. 3233, annexes; Act. No. 7102/1983, art. 16; and Ordinance No. 3233/2012, art. 155 (VI).

[32] Act No. 51/2010, art. 51 (c).

[33] Art. 25 (VIII), federal law of 2006.

[34] Act No. 365/1994, art. 74.

[35] Act. No. 2974/1997, art. 21.

personnel performing private security functions in an area of combat operations.[36] The Department of Defense also supported the development of a business and management standard,[37] now an international standard (ISO 18788), for private security companies, known as PSC-1, which includes training and accountability measures. Companies must implement the standard in order to compete for contracts.[38] Australia and New Zealand have also recognized and supported ISO 18788.

14. With regard to prohibited activities, it is stated in the laws of Guatemala that the private security industry cannot assume functions that are the tasks of the Government.[39] The United States limits the outsourcing of "inherently governmental functions" to private military and security companies. Federal law[40] and federal policy[41] define the scope of those functions which only governmental personnel, and not contractor employees, may perform. According to both the federal law and the policy regulation, "contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention",[42] and "gathering information for or providing advice, opinions, recommendations or ideas to Federal Government officials"[43] are not to be considered as inherently governmental functions.

15. Swiss law clearly prohibits direct participation in hostilities in an armed conflict abroad — including through the hiring, training and provision of security personnel for direct participation in hostilities abroad or the establishment, management or control of a company in Switzerland involved in such activities[44] — and provides specific sanctions, including fines and imprisonment, for violations of that provision. The laws of Costa Rica and Mexico include human rights violations among the prohibited activities.[45] It is stated in Costa Rican regulations that under no circumstances may simple obedience be invoked as justification for or to claim impunity for torture or cruel, degrading or inhuman punishment.[46]

16. Regarding the involvement of law enforcement officers in the activities of private military and security companies, some States in South America prohibit active members of the police and armed forces (public officials too, in the Plurinational State of Bolivia), as well as (with the exception of Chile) former members of the police and the armed forces who have committed infractions or crimes, from undertaking private security activities. Australia and Nauru have similar laws, and the majority of francophone African States' laws discourage private security companies from hiring former members of the military forces or the police as managers or employees. Some European countries, such as France[47]

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[36] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law 111-383; National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84; Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417; National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181. However, it needs to be noted that the National Defense Authorization Act is not a permanent piece of legislation, in that it is passed on an annual basis and can therefore change from year to year.

[37] American National Standards Institute, *Management System for Quality of Private Security Company Operations: Requirements with Guidance*, ANSI/ASIS PSC.1-2012, available from www.acq.osd.mil/log/ps/.psc.html/7_Management_System_for_Quality.pdf (now ISO 18788).

[38] Office of the Assistant Secretary of Defense for Logistics and Materiel Readiness, "Private security companies", available from www.acq.osd.mil/log/ps/psc.html.

[39] Act No. 51/2010, art. 59.

[40] Federal Activities Inventory Reform Act of 1998, Public Law 105-270, p. 112, Stat. 2382, and Federal Acquisition Regulation of 2005.

[41] Office of Management and Budget, circular A-76, and Office of Federal Procurement Policy, policy letter 11-01.

[42] Federal Acquisition Regulation, sect. (d) (19); and Office of Federal Procurement Policy, policy letter 11-01, appendix B, sect. 9.

[43] Office of Federal Procurement Policy policy letter 11-01, part 3, definitions (b) (1).

[44] Federal Act on Private Security Services Provided Abroad, of 2013, art. 8.

[45] The Costa Rican regulation regarding private security services, No. 8395/2003, and regulation No. 33128-SP/2006; and the Mexican federal law on private security, of 2006, art. 32 (X).

[46] Regulation No. 33128, art. 29 (3).

[47] Law No. 83-629, arts. 10, 11-3 and 11-7.

and Hungary,[48] prohibit former police or military personnel, those in the national security services performing official duties, and individuals who are not such staff but contribute to related official duties, from participating in private military and security companies' activities.

17. On the use of force and firearms, the reviewed States typically follow two approaches. Some choose to allow private security company personnel to carry and use firearms under certain conditions,[49] and others opt for prohibiting the use of firearms and provide a list of exception clauses with guarantees.[50] The United States generally prohibits personnel of private military and security companies from using force, but lists exceptions and conditions under which the use of force is allowed. Furthermore, "contractor personnel are only authorized to use deadly force in self-defence"[51] and "when such force reasonably appears necessary to execute their security mission to protect assets/persons".[52] Other good examples are from Kyrgyzstan and the Republic of Moldova, where the laws specify circumstances under which the use of firearms or special devices is justified: firearms may be used in defence against an impending attack that threatens human life or health, against a group attack or armed assault against protected property, to restrain individuals showing armed resistance, or to fire a warning shot in the air. The law of the Republic of Moldova includes further provisions: the security personnel or detective must issue a prior warning regarding his or her intention to use force.

18. Regarding training on the rules of engagement and the use of force, some States, including China, the Philippines and Uganda, govern the circumstances under which private security service providers may use firearms. The Democratic Republic of the Congo and Azerbaijan provide rules on the use of high-calibre weapons or special devices that usually involve lethal force. Personnel of private security companies are prohibited from patrolling and carrying arms that are normally reserved for the military and the police, in the Democratic Republic of the Congo. The United States law specifies that contractor personnel can only be armed for individual self-defence based on national and international law[53] and if "weapons familiarization, qualification, and briefings regarding the rules for the use of force have been provided".[54]

III. Gaps in national legislation

19. Notwithstanding the good practices mentioned, the global study showed that regulatory gaps were prominent.

A. Scope of application

20. The global study shows that with the exception of the United Kingdom of Great Britain and Northern Ireland (which adopts a self-regulatory approach within the framework of the British Association of Private Security Companies), and Kenya and

[48] Act CXXXIII of 2005, art. 2.

[49] As the Working Group saw from the global analysis, most of the States reviewed from the Asian and Latin American regions followed this path.

[50] For example, Burkina Faso, Côte d'Ivoire, the Democratic Republic of the Congo, the Gambia, Hungary, Kyrgyzstan, Morocco, Nigeria, the Republic of Moldova, Switzerland and the United States of America.

[51] 48 Code of Federal Regulations, chap. 2 (10-1-11 edition), (b) General, (3) (i); and Federal Acquisition Regulation, 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, General, (ii) (B) (3) (i).

[52] 48 Code of Federal Regulations, chap. 2 (10-1-11 edition), (b) General, (3) (ii); and Federal Acquisition Regulation, 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, General, (ii) (B) (3) (ii).

[53] Department of Defense instruction No. 3020.41, 20 December 2011, part 4 (e) 2 (a).

[54] Ibid., part 4 (e) 2 (b).

Swaziland (which have no legislation that addresses the private security sector),[55] all countries analysed covered mainly the activities of private security companies, with only very few or no provisions at all on private military companies and their services. However, the present report commonly refers to the term "private military and security companies" in order to cover the various types of companies in the diverse countries that have been reviewed in the global study.

21. The Working Group notes that private security companies also carry out functions that can be deemed "military" and that this issue needs to be addressed or assessed further. It is therefore important to assess the types of services offered by private security companies.

22. Regulated activities of private security companies include, in general, the protection and patrolling of sites and the protection and guarding of persons,[56] but this list is often extended with further activities. In Europe, Central America and anglophone Africa, the services of private security companies cover mostly surveillance, the transportation, protection and shipment of cash, jewels, precious metals and other valuables, and the conducting of investigations.[57] The United Kingdom law covers services provided by security consultants, and in Switzerland, activities related to traffic management, assistance to public authorities, the transport of detainees, and private detective services are also regulated. In Central America, private security companies also engage in the maintenance of order at public events, bodyguard services, transportation, the manufacture and marketing of security equipment and systems, and the provision of security advice.[58] In South American national legislation the range of activities of private security companies is more detailed and covers services including obtaining evidence for civil lawsuits.[59] Zimbabwean law covers activities of private investigators, which is also the case for the law of the Philippines and of Singapore. China and Sri Lanka are unique in covering services to the public sector. In the United Arab Emirates law, government bodies are included in the definition of private security companies, suggesting that a government body can be used to offer private security services.

B. Licensing, authorization and registration of private military and security companies

23. With regard to the bodies in charge of licensing and regulation of private military and security companies, the analysis shows that no specific bodies exist on private military and security companies. These functions are performed by the units or departments within ministries responsible for internal security[60] or justice[61] or defence,[62] or by a specialized intergovernmental body[63] or a central government[64] or local government[65] authority.

[55] 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.

[56] See Burkina Faso, Law No. 032/2003, art. 23, and Decree No. 2009-343, art. 2; Côte d'Ivoire, Decree No. 2005-73, art. 2, para. 1; Democratic Republic of the Congo, Ministerial Decree No. 98/008, art. 1; Morocco, Law No. 27-06, art. 1; Senegal, Decree No. 2003-447; and Tunisia, Decree No. 2002-81, art. 1 (a).

[57] France has Law No. 83-629; Switzerland has the Concordat on security companies, of 1996, and the decree on the hiring of private security companies, of 2007; Hungary has Act No. CXXXIII, of 2005; and the United Kingdom has the Private Security Industry Act, of 2001.

[58] See A/HRC/30/34, para. 40.

[59] In the Province of Buenos Aires, Argentina, Act No. 12.297/1999 covers the transportation, guarding and protection of any legal transfer, except the transport of funds. It also covers private services, such as obtaining evidence for civil law suits.

[60] For example, in the reviewed States in Central and South America (with the exception of Colombia), in some countries of anglophone Africa (such as the Gambia, Nigeria and Zimbabwe) and of francophone Africa (such as Burkina Faso, Côte d'Ivoire, the Democratic Republic of the Congo,

24. As for the registration of private security companies, apart from a few States' legislation that provides the possibility of a specific register,[66] States require either voluntary self-registration[67] or registration in the general trade and commerce register.[68]

25. As a precondition for obtaining a licence, States have a variety of requirements, including "suitability" or "good conduct/good behaviour", "moral standards", qualifications and training, and a clean criminal record. In francophone African countries, for example, the requirements of "good behaviour"[69] and "moral standards"[70] seem to be considered the most relevant, whereas in all reviewed States in Asia, it is equally important that private security company employees possess certain training qualifications and have clean criminal records. In Latin America, States put specific emphasis on the criteria of securely storing firearms used by private security company personnel, and they generally require additional information on the company's installations, equipment and firearms. Another important requirement in Central American States is that the owners of private security companies must be nationals;[71] the relevant laws provide only a very limited margin of operations for foreign companies.[72] This element is similarly important in some of the countries of the Commonwealth of Independent States, which stipulate that foreign security organizations are not allowed to conduct their operations within their territories.[73] In addition, in the legislation of South American States, the "suitability" and the "good moral character" of private security company employees are typically required to be certified by the police or by court records, and contracting third-party liability insurance[74] or insurance for employees[75] is also a common requirement for obtaining a permit.

C. Selection and training of personnel of private military and security companies

26. Among the minimum selection criteria for personnel, States often list a variety of requirements, including the applicant's clean criminal record,[76] fitness for the job,[77]

Mali and Tunisia), as well as in Asia (Malaysia and Singapore) and in Europe (France and the United Kingdom).

61 For example, in New Zealand.

62 For example, in Botswana, and in some cases in Latin America.

63 For example, in Cameroon, Colombia, Kenya, Lesotho, Namibia, Nauru, Papua New Guinea, Senegal and Sierra Leone.

64 For example, in China, India, Pakistan, the Philippines, Sri Lanka and the United Kingdom.

65 For example, in most of the States of the Asian region, or in federal States such as China, India and Pakistan. Moroccan law provides for a "competent administrative authority" in charge of reviewing the requests for authorization, but does not specify further responsibilities or the relationship with a supervising or monitoring ministry or other government body.

66 For example, in States of Latin America (Brazil, Chile, Colombia, Ecuador and Peru, and also in the Province of Buenos Aires, in Argentina), and in Cameroon, Pakistan, the Philippines and Sri Lanka.

67 For example, in Morocco and Tunisia.

68 For example, in general in the European States reviewed and in the Asian region.

69 See, for example, the legislation of Tunisia.

70 See, for example, the relevant laws of Burkina Faso and Senegal.

71 See, for example, the laws of Mexico and Panama.

72 See, more particularly, the legislation of Costa Rica and Honduras.

73 See, for example, the legislation of Azerbaijan and Uzbekistan.

74 For example, in the Plurinational State of Bolivia, Colombia and Ecuador.

75 For example, Brazil and Chile.

76 Burkina Faso, Costa Rica, Côte d'Ivoire, El Salvador, Lesotho, Mali, Morocco, Panama, Senegal and Tunisia, and the countries of South America and of the Commonwealth of Independent States, as well in general.

77 For example, in Costa Rica, El Salvador and Guatemala, a psychological and physical examination is required. In Brazil, Chile, Ecuador, Peru and Uruguay, and in the Province of Buenos Aires, a certification of physical and psychological aptitude is required. Kyrgyzstan excludes individuals with incapacity due to physical and mental disabilities, and Azerbaijan requires medical evidence in case of psychiatric disorders. In the Pacific region, the national legislation of Australia and of Papua New Guinea also sets as a requirement the fitness of the applicant.

nationality,[78] age,[79] good moral standards,[80] financial position[81] and education,[82] as well as the applicant's competences and experience.[83] At the same time, selection requirements vary significantly (for example, regarding the criteria relating to the applicant's criminal record, the selection requirements vary in relation to the gravity of the crimes involved).[84] Also, while some laws are very detailed,[85] others have no specific description of the selection process.[86] Furthermore, with only a very few exceptions (such as Guatemala, Switzerland, and the Province of Buenos Aires), the Working Group found no laws containing reference to international human rights and humanitarian law as part of the selection process.

27. As far as training the personnel of private security companies is concerned, overall there is an inconsistent trend. States in general place emphasis on the necessity of providing training to private security company personnel. Some States set adequate training as a prerequisite to the selection of personnel.[87] Other countries arrange such trainings only later, after the selection process, typically through those entities or organizations that are responsible for regulating and/or controlling the private security sector,[88] or through outsourced education centres.[89]

D. Prohibited and permitted activities of private military and security companies

28. Legislation generally permits private security companies to guard and protect persons and property or goods.[90] Mexican federal law even covers security services for obtaining information, including background reports, as well as the installation and sale of armour systems.

29. Many of the laws reviewed also specify that the permitted activities can only be carried out on private properties[91] and that the companies are required to indicate that their activities are private in nature,[92] in order to differentiate themselves from the armed forces and the national police or other public security forces. In the Hungarian legislation, for

[78] Staff of private military and security companies need to be nationals in Honduras, Mexico and Nicaragua and in Cuba they need to be resident in the country. (In Costa Rica and El Salvador personnel of such companies may be foreign residents.) Regarding South America, Brazil, Chile, Colombia and Ecuador require that personnel be a national of the country concerned, while Peru permits guards to have foreign nationality, and the Plurinational State of Bolivia permits foreign advisers and requires an INTERPOL background certificate. In Colombia, partners of private security companies and members of private security cooperatives must be native-born. In Azerbaijan, Azerbaijani citizenship is required for the selection process.

[79] Private military and security company personnel must be adults, according to the national legislation in Latin American countries, as well as in Azerbaijan, Kazakhstan, Kyrgyzstan, Nauru, New Zealand and the Republic of Moldova.

[80] For example, Burkina Faso, Côte d'Ivoire, Mali, New Zealand and Senegal.

[81] For example, in Nauru.

[82] A minimum level of education is required in the States of Central and South America, as well as in New Zealand.

[83] For example, in Australia and Papua New Guinea.

[84] Examples can be found among the francophone African countries reviewed, as well as among the analysed countries of the Commonwealth of Independent States.

[85] For example, in China, Pakistan, the Philippines and Singapore.

[86] In general, in the national legislation in Central America, but also in Tajikistan and Uzbekistan.

[87] For example, South Africa, all reviewed States in francophone Africa, and Australia, Azerbaijan, Kazakhstan, Kyrgyzstan and the Republic of Moldova.

[88] For example, in Malaysia, Namibia, New Zealand, the Philippines, South Africa and the United States of America.

[89] For example, in Azerbaijan, Kazakhstan, Kyrgyzstan, Peru and the Republic of Moldova.

[90] In the region of the Commonwealth of Independent States, the information available to the Working Group was limited to Azerbaijan and Kazakhstan.

[91] For example, such reference is included in the legislation of francophone African countries, as well as Central and South American States.

[92] See more in the laws of France and of the francophone African countries.

example, it is noted that those involved in private security activities have no public authority powers, must wear a uniform, cannot use the titles and insignia of the authorities and cannot prevent the authorities from carrying out their activities.[93] Similarly, the legislation of Central American States provides that to avoid confusion, uniforms, credentials, logos and vehicle colours similar to those used by the police or the armed forces cannot be used.[94]

30. In general, legislation typically prohibits all activities that private security companies are not entitled to carry out according to their licence. In addition, in France, in the States of francophone Africa, and also for example in Uruguay and in the Province of Buenos Aires, private security companies are not allowed to be involved in labour conflicts or in political or religious events, or to gather information on political, religious or trade union opinions. Furthermore, private military and security companies are in general prohibited from carrying out activities reserved for the armed forces and the police. Some States' legislation further specifies this prohibition or provides similar provisions, including that of the Democratic Republic of the Congo, Morocco and Tunisia, as well as that of the Plurinational State of Bolivia, Colombia, Ecuador and Peru. In some of the reviewed countries of the Asian region, private security companies are prohibited from conducting criminal investigations[95] or from exercising specific powers conferred on police, customs, immigration and prison officers.[96] In Central America, the list of prohibited activities is extended to the roles played by the administration or the judiciary[97] and to investigations that are the exclusive competence of the Public Prosecutor's Office or the national police.[98] Guatemalan law is the most detailed and provides that private security cannot assume functions that are the tasks of the Government.[99]

31. The legislation of the United States limits the outsourcing to private military and security companies of "inherently governmental functions" and provides a detailed list of those activities that "are so intimately related to the public interest as to require performance by Federal Government employees".[100] By excluding the "inherently State functions" from the ambit of the activities of private military and security companies, the United States appears to draw the line between permitted and prohibited activities for private military and security companies, with reference to combat and combat-related activities. However, this does not specifically address "high-risk activities", which would include a number of functions even outside of combat. Additionally, there is no clear enforcement mechanism for ensuring that agencies comply with the exclusion of "inherently governmental functions", which is particularly worrying considering the dramatic expansion of the government contractor industry and the massive increase in the role and involvement of contractors in intelligence analysis and targeting decisions.

32. With regard to direct participation of personnel of private military and security companies in hostilities, the study shows that with the exception of Switzerland,[101] States' national legislation does not address this specific question, and in cases where legislation prohibits personnel of private military and security companies from carrying out certain activities of the police and the armed forces, it is not clear whether the related provisions apply only in times of peace or during armed conflicts as well. Regarding the involvement of law enforcement officers in the activities of private military and security companies, the

[93] Act CXXXIII of 2005, art. 2.

[94] The laws of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

[95] In Malaysia and the United Arab Emirates.

[96] In Malaysia and Pakistan.

[97] Costa Rica.

[98] El Salvador and Mexico.

[99] Guatemala.

[100] Federal Activities Inventory Reform Act of 1998, sect. 5.2, and Office of Management and Budget circular A-76, Inventory Process B.1.a.

[101] United Kingdom law does not define what military or security activity can be outsourced to private companies, but there is an understanding that military activity in situations of armed conflict can be delivered only by military personnel under the command of a commissioned officer. (See A/HRC/22/41, para. 53, and the response of the Government of the United Kingdom to the Working Group's request for national legislation and regulations on private military and security companies.)

trend seen is that those few States that regulate this[102] usually prohibit active or former members of the police and the armed forces from taking part in private military and security companies' activities. However, the national legislation of the majority of States in the regions that were reviewed remains silent on this point, which is concerning.

33. The inconsistent regulation on permitted activities, the difference in the scope of prohibited activities, the lack of a clear dividing line between the functions of private military and security companies and law enforcement authorities, and the lack of rules on direct participation in hostilities, especially considering the growing role of private military and security companies in armed conflicts, post-conflict situations and low-intensity armed conflict situations, all increase the risks of ineffective control of these companies' activities and the potential for human rights abuses. This gives rise to challenges of enforcement, accountability and the availability of remedies.

E. Rules on acquisition of weapons

34. The research found rather scarce information in this field, which focused mainly on the varying means of legal acquisition of weapons. The Working Group notes that, in general, States allow the acquisition and possession of weapons for personnel of private military and security companies, though under very different conditions — even within the reviewed regions. For example, in some countries, personnel of private security companies are allowed to be armed and to possess weapons as determined by the relevant laws and regulations,[103] but elsewhere those personnel protecting people cannot be armed or perform guard services.[104] In some countries, special permits are required for the acquisition and possession of weapons and firearms[105] (and in certain countries the permit to carry firearms must indicate the activities for which the weapon or firearm will be used).[106] In others, permission to carry weapons is subject to having undergone training,[107] or to specific competence,[108] and there are other States again where only the acquisition and possession of special types of weapons and firearms is licensed or permitted or prohibited.[109] Examples were also found of countries in which private security service providers are not allowed to use firearms[110] or where the number of firearms or weapons is limited per company.[111] Some States also require specific measures for storing and depositing weapons.[112]

35. The Working Group found that most States had varying regulation regarding the legal acquisition and possession of weapons by private security companies. Only a few States addressed the issue of illegal acquisition and possession of weapons and had provisions concerning penalties. Those States[113] covered the subject of illegal acquisition and possession of weapons in their Criminal Codes[114] and Arms Export Control Acts.[115]

[102] For example, the reviewed States of South America, Australia and Nauru, the majority of the francophone African States analysed, and France and Hungary.
[103] Burkina Faso, Côte d'Ivoire, France, Morocco and Tunisia.
[104] Chile, Mali and Peru.
[105] The Democratic Republic of the Congo, Malaysia, Singapore, Sri Lanka and Tunisia, and the States of South America.
[106] Côte d'Ivoire and Mali.
[107] Pakistan, the Philippines and Singapore.
[108] Sri Lanka.
[109] For example, in Azerbaijan, Cameroon, Côte d'Ivoire, the Democratic Republic of the Congo, Kazakhstan, Kyrgyzstan, Mali and the Republic of Moldova. In South American States, the general rule is that prohibited firearms cannot be used, or that the use of certain firearms is restricted to the police or the armed forces.
[110] Plurinational State of Bolivia.
[111] Chile, Colombia and Ecuador.
[112] Cameroon and Tunisia, and the States of South America.
[113] Australia, Tajikistan, Tunisia, the United Arab Emirates, the United Kingdom, the United States of America and Uzbekistan.
[114] Tajikistan and Uzbekistan.
[115] Australia, Tunisia, the United Kingdom and the United States of America.

36. The legislation reviewed depicts a variety of regulations regarding the legal acquisition and possession of weapons by private security companies, and the research shows that only very few States address the question of illegal acquisition and possession of weapons and its consequences. The Working Group notes that the wide access by personnel of private military and security companies to weapons and firearms, and the lack of standard methods and regulation of such companies and their personnel in relation to both the legal and the illegal acquisition of weapons and also to trafficking in firearms, may result in increased risks of human rights abuses and of lack of accountability for related offences.

F. Use of force and firearms

37. The regulation on the use of force varies among States. Some States are silent, for instance, on the use of firearms by private military and security providers, while a number of States regulate this. Whereas certain States request personnel of private military and security companies to meet specific regulations, developed exclusively for such companies,[116] others are satisfied with private security companies' staff meeting the rules governing the use of firearms by the population at large.[117]

38. The Working Group notes that regarding the question of allowing or prohibiting private military and security company personnel to use force and firearms, the reviewed countries' legislation typically follows two approaches. Some choose to allow private security company personnel to carry and use firearms under certain conditions,[118] while others opt for prohibiting the use of firearms[119] and provide a list of exception clauses with certain conditions.[120]

39. Most of the States reviewed in the Asian and Central and South American regions allow private security company personnel to carry and use firearms, but require specific licences, permits, authorizations or registration, [121] including information about the ownership of the weapon,[122] or define certain activities (such as duty[123] or travel[124]) and places (e.g. where security and guard services are provided by contract[125]), during which and where the firearm is allowed to be used. Some of these States specifically note that private military and security companies are prohibited from using undue force[126] or from using force when it is not strictly necessary.[127]

40. States that choose the prohibition as the general rule (and those few whose relevant national legislation was available for analysis) provide exceptions for the use of force and firearms by private military and security company staff, such as legitimate defence (e.g. Burkina Faso, Côte d'Ivoire, the Democratic Republic of the Congo, Kyrgyzstan, Morocco, the Republic of Moldova and the United States of America), necessity or exigency (Kyrgyzstan, the Republic of Moldova and the United States of America) or both (Hungary and Switzerland). Some of these States (Kyrgyzstan, the Republic of Moldova and the United States of America) provide legislation on the conditions under which private

[116] Burkina Faso, Côte d'Ivoire, the Democratic Republic of the Congo, Morocco and Uganda.
[117] For example, in Lesotho and Mauritius.
[118] As the Working Group saw from the global analysis, most reviewed States of the Latin American and Asian regions follow this path.
[119] The Gambia and Nigeria.
[120] For example, Burkina Faso, Côte d'Ivoire, the Democratic Republic of the Congo, the Gambia, Hungary, Kyrgyzstan, Morocco, Nigeria, the Republic of Moldova, Switzerland and the United States of America.
[121] See, for example, the legislation of Cuba, Malaysia, Singapore and Sri Lanka.
[122] For example, in El Salvador and Panama.
[123] In general, in all reviewed Central American countries.
[124] For example, in Panama.
[125] In the national legislation of South American States.
[126] Guatemala.
[127] Costa Rica.

military and security companies may exceptionally use force or firearms. Again, there is no uniformity on the regulation of this issue.

41. While some good examples exist (Azerbaijan, the Democratic Republic of the Congo, Kyrgyzstan, the Republic of Moldova and the United States of America), most of the reviewed States' national legislation has no specific rules on the use of high-calibre weapons or special devices and equipment that usually involve lethal force. Only very few States' national legislation offers details about mandatory training of private military and security company personnel on the use of force and firearms (the Philippines, Uganda and the United States of America, and the States of South America), and even less on the rules of engagement of private military and security company staff (China and the United States of America).

42. The Working Group notes with concern that in most of the cases analysed, the requirements for the use of firearms are generally very diverse and broadly defined, the content of the training for using firearms is vaguely described, regulations on the type and the calibre of firearms that are allowed to be used is usually missing, only very few concrete regulations were found on the use of force and firearms in the light of human rights standards, and only few rules were found to punish the firearms-related behaviour of private military and security company personnel more severely than that of ordinary citizens. Furthermore, although international human rights standards require that firearms be used proportionately, only in self-defence or defence of third persons and in a manner likely to decrease the risk of unnecessary harm, States, with some exceptions, do not provide sufficiently detailed regulations, requirements and procedures for compliance with, and accountability and remedies for violations of, human rights norms in connection with private military and security companies' possession and use of firearms.

G. Accountability

43. Most States have an established system for monitoring the activities of private military and security companies, which is generally administered by the agency that authorizes or licenses such companies and that is in charge of conducting regular inspections.[128] However, the monitoring systems are usually very broad, vary in form and content, or lack specifics on the content of monitoring activities and inspections.[129] Determining compliance with the standards of international human rights law and, where applicable, of international humanitarian law is normally not part of the monitoring bodies' mandate.

44. With very few exceptions, States have no detailed rules on reporting obligations as regards infractions or violations of domestic and/or human rights law committed by private military or security companies. Basically, States do not provide much detail about the nature of infractions or violations that are required to be reported on,[130] and/or they cover only violations of provisions regarding permissible activities, licensing, authorization, recruitment and other administrative processes, which result mostly in administrative sanctions applied by the authorizing or licensing agencies in the form of a warning, a fine, a temporary suspension of the company's activities, or withdrawal of authorization.[131] Among all the laws analysed, the Working Group found examples of provisions for reporting on or punishing offences or violations related to international human rights law or international humanitarian law only in Colombia, Guatemala, Peru, Switzerland and Tajikistan.

[128] See, more particularly, the examples of the Plurinational State of Bolivia, Brazil, Chile, Côte d'Ivoire, Ecuador and Uruguay, and of the Province of Buenos Aires, as well as the examples of Kazakhstan, Kyrgyzstan, New Zealand, the Republic of Moldova and Tajikistan.

[129] As was noted by the Working Group, for example, in relation to the countries of the Commonwealth of Independent States.

[130] See, for example, Côte d'Ivoire, the Democratic Republic of the Congo and Senegal.

[131] See, for example, the States of francophone Africa, Costa Rica and Guatemala, the States of South America, and Nauru, New Zealand and Papua New Guinea.

45. It is also worrying that only in very few States does national legislation[132] expressly provide for penal and civil sanctions for violations committed by private military and security companies. In addition, the Working Group notes with particular concern the laws of India and Pakistan, which even include provisions for immunity for violations committed in "good faith" and exempt the persons involved from liability for indemnities. The global analysis shows that only very few States' national legislation (China, Pakistan, the Philippines and Switzerland) contain provisions on any forms of remedy for victims.

46. Without a proper and standardized monitoring mechanism for the activities of private military and security companies and an effective reporting, sanctioning and remedy system related to violations of the law, including human rights law, there is the risk that private military and security companies and their personnel in the countries of origin, registration and operation are not held accountable and liable for the human rights violations they commit during their operations.

47. The Working Group also notes that the absence of extraterritorial jurisdiction in the majority of jurisdictions studied is a significant impediment to accountability and to the availability of judicial remedy in the home State, considering the transnational nature of companies, particularly large companies, within the private military and security industry.

48. Additionally, with regard to territorial States, there is a lack of uniformity in national legislation on measures to assure mutual legal assistance, which can also impede accountability and access to remedies. Many States, for example, will not extradite their own nationals. Some States will only extradite where the offence in the seeking State is also an offence in the sending State.

IV. Analysis

49. Considering the transnational nature of private security and military services, as well as the generally significant likelihood of use of force by personnel of such companies and of their involvement in hostilities, the Working Group stresses that the different approaches and regulatory gaps demonstrated in the present study create potential risks to human rights, including the right to life, the right to security, prohibition of arbitrary deprivation of liberty, prohibition of torture and of cruel, inhuman or degrading treatment or punishment, and the right of victims to effective remedies. Regulatory gaps in national legislation can also provide incentives for misconduct and human rights violations by personnel of private military and security companies, and may result in serious undermining of the rule of law and of the effective functioning of democratic State institutions responsible for ensuring public safety.

50. The results of the global study clearly indicate the challenges that the privatization of security poses to various States. Most of the regulations analysed do not address military-like activities or private military and security companies directly. This is despite the fact that private companies are normally involved in various other activities as well, besides security, such as military services, use of force, armed conflicts and other complex scenarios such as the so-called war on drugs, or they often participate in hostilities in other ways. If it does not cover all activities that are actually carried out by private military and security companies, national legislation may overlook certain private military and security company activities that include an increased risk of human rights violations undertaken by private actors. Further, the global study shows that only very few States' legislation deals with military and security services provided abroad or provides for extraterritorial jurisdiction.

51. It is therefore useful to define, in terms of classifications, the activities or services of a company. These classifications can be used to assess which activities increase the risk of human rights violations when undertaken by private actors. The fact that companies provide a variety of military and security services across borders, the general likelihood of private military and security company personnel's use of force and involvement in hostilities

[132] Such as in Burkina Faso, Côte d'Ivoire, Mali, Morocco and Tunisia.

outside of their States of registration and origin, the lack of extraterritorial application of the laws concerned, and the missing provisions on the export of security and military services, are significant impediments to accountability and to the availability of judicial remedies in the home State. The lack of a dedicated body responsible for the licensing, registration, vetting and monitoring of private military and security companies is also problematic.

52. The global study has shown that reference to international human rights and international humanitarian law standards in licensing and authorization procedures is not a common practice. Neither is the exclusion of applicants from consideration for licensing and authorization for private military and security services who have a record of human rights violations. The study also shows an absence of vetting mechanisms or training on international human rights law and international humanitarian law for the licensing of individuals. Taking into account the nature of private military and security company activities and their potential effect on their environment, it is highly risky not to have a standard system of licensing and authorization that refers to international human rights law and international humanitarian law.

53. The Working Group notes that, in general, States have detailed selection criteria and place emphasis on the necessity of providing training to staff. However, there is a lack of uniformity in the laws reviewed with regard to the selection requirements and to the content of the training of private military and security company personnel. The reviewed national legislation uses a diverse set of selection criteria and often focuses on form and procedural conditions rather than on content. Also, regulations on the training of private military and security company personnel vary significantly in terms of mandatory and optional trainings, their content, their duration, and references to international human rights law and international humanitarian law. Apart from a few exceptions, the laws reviewed do not include in their selection and/or training procedures any references to international human rights law or international humanitarian law, nor do they take into account any records or reports of human rights violations committed by private military or security company personnel in determining whether or not to select the individual concerned.

54. There were also weaknesses in the requirements regarding the training and qualifications of private security company personnel, especially when only a relatively low level of education is required. It is essential to have minimum standards in both respects, which ensure that personnel acquire basic knowledge and internalize human rights standards as the ethical and legal framework for private military and security activities. They must act responsibly in situations involving possible legitimate use of force, especially since all regulations permit the use of weapons.

55. The legislation reviewed varied among the States with regard to the legal acquisition and possession of weapons by private security companies and the research shows that only very few States address the question of the illegal acquisition and possession of weapons, and its consequences. The Working Group notes the high risk of human rights violations resulting from the wide access by personnel of private military and security companies to weapons and firearms. The lack of standard methods for private military and security companies, and the lack of regulation on such companies and their personnel, as regards not only the legal but also the illegal acquisition of weapons, and trafficking in firearms, may result in increased risks of human rights abuses and a lack of accountability for related offences.

56. While much of the States' legislation analysed has a system established for monitoring the activities of private military and security companies, the monitoring systems are usually very broad, vary in form and content, or completely lack specific rules on the content of monitoring activities and inspections. The study shows that in general, national legislation does not explicitly make compliance with the standards of international human rights law and international humanitarian law the subject of monitoring bodies. The Working Group also notes that the vast majority of States have no detailed legislation on reporting obligations for infractions or violations of domestic and/or human rights law committed by private military and security companies. The Working Group found provisions for reporting on or punishing offences or violations related to international human rights law or international humanitarian law in very few countries. Also, very few

States' national legislation expressly provides for penal and civil sanctions for violations committed by private military and security companies, and even fewer States' national legislation contains provisions on any forms of remedy for victims. Without a proper and standardized monitoring and accountability mechanism for the activities of private military and security companies and an effective oversight, reporting, sanctioning and remedy system related to violations of the law, including human rights law, there is the risk that private military and security companies and their personnel in the countries of origin, registration and operation are not held accountable and liable for the human rights violations they commit during their operations.

57. The Working Group found great diversity and ambiguity in the description of permitted and prohibited activities, a lack of a clear dividing line between the functions of private military and security companies and law enforcement authorities, and a lack of rules prohibiting direct participation in hostilities in armed conflict — an especially significant concern considering the growing role of private military and security companies in armed conflicts, post-conflict situations and low-intensity armed conflict situations. This gives rise to challenges of enforcement, accountability and the availability of remedies to victims of violations.

58. The private military and security industry often operates in complex environments characterized by weakened rule of law. The Working Group believes that accountability under such conditions requires the increased exercise of extraterritorial and universal jurisdiction.

59. The Working Group is also of the view that regulation of non-State actors, such as private security providers, requires a multidimensional approach that includes improved international norms and standards, effective national regulation and enforcement, and industry-led efforts to improve compliance with human rights standards. The Working Group has been involved in various efforts at each of these levels, and in the present report focuses on domestic legislation. This global study of national legislation shows that, despite commendable efforts, norms and standards at the national level leave many gaps in the regulation of private military and security companies and in regard to their accountability in the face of human rights violations.

60. Given the regulatory gaps that have been identified, the Working Group is pleased at the development of voluntary initiatives such as the Montreux Document Forum and the International Code of Conduct for Private Security Service Providers, which have clearly led to improved standards across the industry. It is also encouraging to see that many companies have signed up to the International Code of Conduct for Private Security Service Providers' Association since its establishment and that the Montreux Document is also garnering a growing number of signatories. These are important complementary initiatives for the strengthening of regulation on private military and security companies.

61. However, an assessment of self-regulatory and voluntary initiatives such as those mentioned, as well as this global study on national legislation, show that self-regulation and voluntary initiatives cannot in themselves ensure comprehensive accountability for human rights violations and provide effective remedies for victims. Only clear legal norms backed by State enforcement can do this. The Working Group supports the incorporation of these norms into an international legally binding instrument rather than relying on self-regulation and voluntary initiatives that are non-binding.

V. Conclusions and recommendations

62. **The Working Group's global study indicates that States' approach to regulation of an increasingly transnational industry is patchy and inconsistent. The ever-increasing privatization of security and military functions and the general growth of the private military and security industry across international boundaries raise serious questions about the legitimacy of the private use of force and the capacity of States to control their territory effectively and to provide strong accountability mechanisms and effective remedies to victims of human rights violations committed by private military and security companies. The Working Group is concerned that**

weak national legislation and enforcement mechanisms, along with ad hoc and fragmented industry self-regulation, cannot address human rights concerns effectively.

63. **Licensing, registration, vetting of personnel, the scope of permissible and prohibited activities, the use of force, the use of firearms and other weapons, accountability and remedies for violations — especially in the light of the transnational nature and activities of private military and security companies — are all areas in which national legislation is wanting.**

64. **Even though a private military or security company may be registered in State A, may recruit personnel from States B, C and D, and may enter into a contract with State E (or a private entity in State E) to perform services in State F, few countries have national legislation that covers the activities of private military and security companies abroad. Considering the transnational nature of private security and military services, insufficient national regulation seriously weakens the rule of law. Where borders between countries are porous, it is necessary to fill the gaps and promote international, regional and subregional agreements for the regulation of private military and security companies, to effectively protect the rule of law, human rights, and, especially in conjunction with the use of private military and security companies in extractive industries, the exercise of the right of peoples to self-determination. The Working Group encourages States to promote discussion of the role of private security companies in the context of regional and international security, and therefore incorporate such discussions into the agendas of intergovernmental, regional and subregional organizations.**

65. **In order to ensure the restriction of the use of force to that which is necessary, mandated and proportional, in accordance with international law, regulation is necessary to outline clear conditions regarding the use of force, especially in relation to the right to self-defence. There should also be some consideration given to the distinction between offensive and defensive use of force. It should be noted that while the distinction might be workable in non-armed-conflict contexts governed by international human rights law, it does not work in armed conflict, where defending a legitimate military objective (i.e. being a voluntary human shield) amounts to direct participation in hostilities and renders private military and security company personnel targetable under international humanitarian law.**

66. **The Working Group welcomes the strengthening of national legislation to fill the regulatory gaps that have been identified in its global study. The Working Group also acknowledges the valuable impact of the Montreux Document and the International Code of Conduct for Private Security Service Providers in improving regulatory standards across the private military and security industry. However, both national legislation and voluntary initiatives have limitations in ensuring accountability and access to effective remedies when human rights violations are committed by private military and security company personnel, particularly in transborder contexts.**

67. **The Working Group thus reiterates its call for an international legally binding instrument to ensure consistent regulation worldwide and adequate protection of the human rights of all affected by the activities of private military and security companies. An international legally binding instrument can provide a standard regulatory framework and single dedicated body on issues related to the activities of private military and security companies, including accountability and the availability of effective remedies for victims.**

68. **A body established by an international legally binding instrument could be responsible for the licensing, regulation and monitoring of private military and security companies and could incorporate clear human rights and humanitarian law standards into contracting, licensing and monitoring procedures. Such procedures could also be the basis for due diligence, to introduce human rights-based vetting mechanisms as well as mandatory legal training on international human rights and international humanitarian law standards as a criterion for obtaining a licence to**

operate and for subsequent licence renewals. This instrument could go beyond mere compliance with selection-related formalities, instilling respect for rights and establishing the responsibility to impose concrete sanctions for infractions. Selection procedures and background checks must be improved, with training requirements that make specific reference to international human rights and international humanitarian law.

69. **A distinction must be drawn between the activities of private military and security companies and State authorities. An international legally binding instrument could describe the legitimate role and functions of private military and security companies, and can provide for the prohibition of the involvement of private military and security company personnel in inherently governmental functions such as combat or military activities.**

70. **States should also consider and implement regulations on the rules and methods of acquiring, exporting, importing, possessing and using weapons and to ensure that private military and security company personnel worldwide are also held accountable for illegal acquisition of weapons and illicit trafficking in arms.**

71. **An international legally binding instrument could also strengthen provisions on the accountability of private military and security companies and their personnel to the government of their country of origin, registration or operation, and establish, for this purpose, standardized and effective accountability mechanisms to ensure the enforceability of regimes regulating the activities of private military and security companies. Such mechanisms would establish penal accountability and civil liability of both individuals and corporate actors for human rights violations, as well as a framework for oversight, and for reparation and remedy for victims.**

72. **As further guidance to States, the Working Group prepared a concept note for consideration during the fourth, fifth and sixth sessions 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. The concept note incorporates critical elements to inform potential discussions on a possible international legally binding instrument on private military and security companies. These elements were identified as a result of expert consultations, meetings and discussions undertaken by the Working Group with States, civil society organizations and various stakeholders. The concept note is accessible on the website of the Working Group[133] and the open-ended intergovernmental working group on private military and security companies.**

73. **Regarding the various conventions on mercenaries, the Working Group calls upon States parties to ratify and incorporate the United Nations and African Union mercenaries conventions' standards into their national legislation.**

[133] See www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/IssuesFocus.aspx.