

Article

A Tour de Horizon of Issues on the Agenda of the Mercenaries Working Group*

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I. PRELIMINARY OBSERVATION: THE DISTINCTION BETWEEN MERCENARIES AND PRIVATE MILITARY AND SECURITY CONTRACTORS¹

Despite the common use of the term mercenaries to describe private military security contractors (PMSCs) and the fact that in some cases PMSC employees meet the criteria of mercenaries, international instruments that govern mercenary activities do not normally apply to PMSCs. This is because employees of PMSCs do not usually meet the legal definition of mercenaries set out under the First Additional Protocol to the four Geneva Conventions or the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

For example,

- Although some PMSC employees are reported to have taken part in hostilities, the majority do not conduct combat operations;
- PMSC employees are often nationals or residents of one of the State parties to the conflict;
- PMSC employees sometimes operate within the military

* The full title of the Working Group is “The Working Group established by the Commission on Human Rights on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.” Both Mercenaries and Private Military and Security Contractors fall within the mandate of the Working Group.

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1. This section draws heavily from Int’l Comm. of the Red Cross [ICRC], Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 47, June 8, 1977, 1125 U.N.T.S. 3.

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chain of command and are considered as members of the armed forces of the party to the conflict.

In addition to international humanitarian law, human rights law provides protections both in armed conflict situations and when PMSCs operate outside the context of armed conflict.² For example, human rights law would govern PMSC involvement in operations such as disaster relief or humanitarian aid situations that may also pose serious risks to human rights.³

While PMSCs and their employees are not normally recognized as direct subjects of human rights law, States are obliged to take appropriate measures and to exercise due diligence to prevent, punish, and investigate human rights violations and redress the harm caused by human rights violations involving those caused by PMSCs.⁴ Although States are obligated to ensure that PMSCs and their employees respect both international humanitarian law and human rights law, this system has not proved effective in providing accountability for victims. In the last several years, we have seen various obstacles to accountability that suggest there are certain gaps at the international level that still need to be addressed.

II. THE MERCENARY PROBLEM IN CONTEMPORARY CONFLICTS

A. UPDATE ON RECENT ACTIVITIES OF MERCENARIES⁵

The recent increase in mercenary activities in Africa serves as a reminder that mercenaries continue to pose a serious threat to the enjoyment of human rights.

1. Use of Mercenaries in Côte d'Ivoire

Presidential elections were held in October and November 2010 in Côte d'Ivoire.⁶ After some uncertainty about the final

2. See The Montreux Document, Sept. 17, 2008, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

3. *Id.*

4. *Id.*

5. This section draws heavily from Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Third Comm., Rep. on its 67th Sess., ¶¶ 6–12, U.N. Doc. A/66/317 (Aug. 22, 2011).

6. Rebecca Blackwell, *Ivory Coast*, N.Y. TIMES, Nov. 30, 2011, <http://topics.nytimes.com/topics/international/countriesandterritories/ivorycoast/index.htm>.

result, Alassane Ouattara was declared the winner of those elections in early December 2010.⁷ However, the outgoing President, Laurent Gbagbo, refused to concede defeat until he was arrested on 11 April 2011.⁸ For several months, he allegedly recruited Liberian mercenaries to consolidate his power base and attack the supporters of the President Elect. There were some reports that pro-Ouattara supporters had also recruited Liberian mercenaries.⁹ About 4,500 Liberian mercenaries were reportedly active in Côte d'Ivoire, mainly in the western part of the country bordering Liberia.¹⁰

Since the election, there have been numerous allegations that Liberian mercenaries were involved in serious human rights violations, including summary executions, forced disappearances, rape, torture, cruel, inhuman or degrading treatment, arbitrary arrests and detentions, arson, pillaging, and looting.¹¹ Some mercenaries were reportedly arrested upon their return to Liberia.¹² It is unclear, however, whether any mercenaries have been brought to justice in either Liberia or Côte d'Ivoire.

The Working Group has taken the following actions in response to the situation in Côte d'Ivoire.¹³ On 19 January 2011, it sent allegation letters to both Côte d'Ivoire and Liberia requesting further information on mercenary activities in Côte d'Ivoire, and on measures taken to prevent such activities and to hold those mercenaries involved in human rights violations accountable.¹⁴ To date, the Working Group has not received a response to its letters.¹⁵

On 28 January 2011, the Working Group requested a visit

7. *Id.*

8. See Rep. of the Independent, International Commission of Inquiry on Côte d'Ivoire, Human Rights Council, Rep. on its 17th Sess., May 30–June 17, 2011, U.N. Doc. A/HRC/17/48 (June 14, 2011).

9. *Id.*

10. *Id.*

11. See Rep. of the Independent, International Commission of Inquiry on Côte d'Ivoire, Human Rights Council, Rep. on its 17th Sess., May 30–June 17, 2011, ¶ 22, U.N. Doc. A/HRC/17/49 (June 14, 2011).

12. See, e.g., Reuters, Ivory Coast Mercenary 'Bob Marley' Arrested in Liberia, *The Guardian*, <http://www.guardian.co.uk/world/2011/jun/15/ivory-coast-liberia-mercenary-bob-marley-arrested> (last visited Feb. 13, 2013).

13. See Communications Rep. of Special Procedures, Human Rights Council, Rep. on its 18th Sess., Sept. 12–30, 2011, U.N. Doc. A/HRC/18/51 (Sept. 9, 2011).

14. *Id.*

15. *Id.*

to Côte d'Ivoire. In this regard, the Human Rights Council acknowledged the standing invitation issued by President Ouattara to all special procedures mandate holders, including the Working Group on the use of mercenaries, to conduct visits to the country.¹⁶ The Working Group hoped to conduct such a visit by the end of 2011, but has not yet been able to do so.

On 1 April 2011, the Working Group issued a press release, jointly with several other special procedures mandate holders, in which it expressed concern about the involvement of English-speaking mercenaries in attacks against civilians and recalled that the recruitment of such mercenaries is prohibited under international law.¹⁷

The Working Group notes that there is increasing concern regarding mercenary activities in West Africa generally, and growing interest in developing a regional approach to this problem.

In May 2011, President Ouattara called for such a regional approach, noting that many Liberian mercenaries who were active in Côte d'Ivoire had returned to Liberia, from where they may move on to Sierra Leone and then Guinea.¹⁸ The Secretary-General has also favored the development of a sub-regional strategy for addressing the mercenary problem.¹⁹ On 20 June 2011, the Economic Community of West African States (ECOWAS) called upon its member States to monitor movements across their borders, with a view to arresting perpetrators of crime and preventing mercenary activities.²⁰

On 30 November 2011, Laurent Gbagbo, the former President of Côte d'Ivoire, was transferred to the detention center of the International Criminal Court (ICC) in The

16. See G.A. Res. 16/25, ¶ 9, U.N. Doc. A/RES/16/25 (Apr. 13, 2011).

17. Press Release, Human Rights Council, Côte d'Ivoire: UN rights experts call on all parties to spare civilians and stop human rights violations, U.N. Press Release (Apr. 1, 2011), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10908&LangID=E>.

18. See *Ivory Coast: Alassane Ouattara Warns of Mercenaries*, BBC, <http://www.bbc.co.uk/news/world-africa-13500677?print=true>.

19. See Twenty-eighth Rep. of the Secretary-General on the U.N. Operation in Côte d'Ivoire, SCOR, ¶ 49, U.N. Doc. S/2011/387 (June 24, 2011).

20. See Press Release, Economic Community of West African States [ECOWAS], ECOWAS Commission Expresses Concern over Indiscriminate Movement of Weapons, Mercenary Fighters in West Africa, ECOWAS Press Release 104/2011 (June 20, 2011), <http://news.ecowas.int/presseshow.php?nb=104&lang=en&annee=2011> (last visited Feb. 13, 2013).

Hague.²¹ Mr. Gbagbo was charged with four counts of crimes against humanity for acts committed during the post-election violence in Côte d'Ivoire.²² The acts forming the basis of the charges against Mr. Gbagbo were allegedly committed by the Security and Defense Forces,²³ and reinforced by pro-Gbagbo youth militia and mercenaries.²⁴

Despite the removal of Gbagbo, mercenaries continue to pose a serious human rights and security problem in Côte d'Ivoire and their activities should be addressed in a systematic and comprehensive manner. Several reported incidents highlight this need.²⁵

On 13 April 2011, Liberian authorities captured the notorious Liberian mercenary, Isaac Chegbo (also known by his *noms de guerre* "Bob Marley" and "Child Could Die"), who allegedly helped orchestrate two massacres in which more than 120 men, women, and children were killed in and around Bloléquin, Côte d'Ivoire, on 22 and 25 March 2011.²⁶ Chegbo reportedly acknowledged that he had been hired as a mercenary to fight the new regular armed forces, the Forces républicaines de Côte d'Ivoire, as created on 17 March 2011, and to fight as a mercenary in support of pro-Gbagbo forces. Despite this admission, Liberian authorities failed to prosecute him and he was released on bail by the Monrovia Circuit Court on 1 February 2012.²⁷ The Working Group notes with concern that despite the attempts of the UN Panel of Experts on Liberia

21. Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Third Comm., Rep. on its 67th Sess., ¶ 22, U.N. Doc. A/67/340 (Aug. 30, 2012) [hereinafter *Use of Mercenaries, 2012*].

22. *Id.*

23. The Security and Defence Forces were the former regular armed forces of the Gbagbo regime.

24. *Use of Mercenaries, 2012, supra* note 22 at ¶ 22.

25. *Id.* ¶ 23.

26. U.N. Panel of Experts on Liberia, Rep., transmitted by letter dated Nov. 30, 2011 from the Chairman of the Security Council Comm. Established pursuant to resolution 1521 (2003) concerning Liberia addressed to the President of the Security Council, ¶ 33, U.N. Doc. S/2011/757; *see also They Killed Them Like It Was Nothing: The Need for Justice for Côte d'Ivoire's Post-Election Crimes*, HUMAN RIGHTS WATCH (Oct. 2011), available at <http://www.hrw.org/sites/default/files/reports/cdi1011WebUpload.pdf>.

27. U.N. S.C., Letter dated Jun. 15, 2012 from the Chair of the Security Council Committee Established Pursuant to Resolution 1521 (2003) Concerning Liberia Addressed to the President of the Security Council, ¶¶ 62–63, U.N. Doc. S/2012/448 (Jun. 20, 2012) [hereinafter *S.C. Jun. 15, 2012 Letter*].

to obtain clarification, it remains unclear whether the charges against Chegbo were dropped or whether he was released on bail.²⁸

Next, in January 2012, Liberian police arrested 73 Ivoirians and one Liberian national identified as a mercenary recruiter.²⁹ They were suspected of planning an attack on Côte d'Ivoire.³⁰ The report of the UN Panel of Experts on Liberia indicates that the County Attorney of Grand Gedeh did not properly investigate the charges and precipitously decided to release all 74 detainees on 20 February 2012.³¹

A third incident occurred on 24 April 2012, when a group of approximately 20 men attacked the Ivorian village of Sakré.³² According to the UN Panel of Experts on Liberia, the attackers were Ivoirians and Liberians aiming to create instability and loot property.³³ Seven civilians were killed, two were injured, several houses were destroyed, and more than 3,000 civilians fled to villages nearby.³⁴ The Forces républicaines de Côte d'Ivoire were able to capture four attackers, all of whom are Ivorian and all of whom are currently in custody.³⁵

The Working Group is particularly concerned about reports that armed militias, hostile to the Government of Côte d'Ivoire, recruited and trained Liberian children between the ages of 14 and 17 to carry out cross-border raids.³⁶

In June 2012, seven UN peacekeepers were killed in Côte d'Ivoire.³⁷ In its press statement on the incident, the UN Security Council expressed concern about the "prevailing insecurity in western Côte d'Ivoire and the border area, and continued cross-border movements of armed elements,

28. *Id.*

29. *Id.* ¶ 67; U.N. Secretary-General, *Special report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, ¶ 32, U.N. Doc. S/2012/186 (Mar. 29, 2012) [hereinafter *Côte d'Ivoire Special Report*].

30. *S.C. Jun. 15, 2012 Letter*, *supra* note 27, at ¶ 67.

31. *Id.* ¶¶ 67–77.

32. *Id.* ¶ 78.

33. *Id.* ¶¶ 78–79.

34. *Id.* ¶ 80.

35. *Id.*

36. *Liberia: Ivorian Government Foes Wage, Plot Attacks: Investigate, Prosecute War Criminals from Côte d'Ivoire Conflict in Liberia*, HUMAN RIGHTS WATCH (Jun. 6, 2012), <http://www.hrw.org/news/2012/06/06/liberia-ivorian-government-foes-wage-plot-attacks>.

37. U.N. S.C. Rep. of the Security Council, *Monthly Forecast: Jul. 2012*, at 24 (Jun. 29, 2012), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/July%202012%20Forecast.pdf>.

including militias and mercenaries.”³⁸

So far no national strategy has been developed in Côte d’Ivoire or in Liberia to address the issues identified by the Security Council.³⁹ The largely uncontrolled cross-border movement of armed elements, possibly including mercenaries, poses serious risks to the stability of the region, and to the human rights of the populations living in the border areas.⁴⁰

The Minister of Human Rights and Civil Liberties of Côte d’Ivoire met with the Working Group in March 2012 and indicated that his Government was prepared to receive a country visit. On 25 June 2012, the Working Group reiterated its previous request to visit Côte d’Ivoire by year’s end.⁴¹

2. Use of Mercenaries in the Libyan Arab Jamahiriya⁴²

Peaceful demonstrations by Libyan citizens seeking political change in the Libyan Arab Jamahiriya began in February 2011. Within a few weeks, there were allegations that foreign mercenaries were being used by the Libyan authorities to violently suppress political protests. The Working Group has noted that this alleged use of mercenaries by the Government of the Libyan Arab Jamahiriya departs from the traditional practices witnessed in the Twentieth Century and set out in the International Convention on the Recruitment, Use, Financing and Training of Mercenaries,⁴³ adopted by the General Assembly in 1989. Traditionally, mercenaries have been recruited to either participate in an armed conflict or overthrow a Government. The March 2004 attempted coup in Equatorial Guinea offers an example of the traditional use of mercenaries. In the Libyan Arab Jamahiriya, on the other hand, mercenaries were not used to overthrow the Government: allegedly, they were used by the Government to quell civilian protests. Such

38. Press Release, President of the Security Council, Deadly Attack on United Nations Operation in Côte d’Ivoire, U.N. Press Release SC/10668 (Jun. 11, 2012).

39. *Côte d’Ivoire Special Report*, *supra* note 29, ¶ 27.

40. *Id.* ¶ 25.

41. *Use of Mercenaries, 2012*, *supra* note 24, ¶ 30.

42. The following paragraphs draw heavily from U.N. Secretary-General, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶¶ 13–20, U.N. Doc. A/66/317 (Aug. 22, 2011) [hereinafter *Use of Mercenaries, 2011*], & *Use of Mercenaries, 2012*, *supra* note 24, ¶¶ 31–38.

43. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 2163 U.N.T.S. 37789.

mercenaries were believed to have been recruited from neighboring African countries and, possibly, also from Eastern Europe.⁴⁴

In relation to allegations concerning the use of mercenaries, the International Commission of Inquiry, established in March 2011 by the Human Rights Council to investigate alleged violations of international human rights law in the Libyan Arab Jamahiriya, concluded that foreign nationals have taken part in the conflict, including perpetrating human rights violations, particularly on the side of Government forces. However, the Commission of Inquiry noted that there is some uncertainty about whether these foreign nationals meet the international definition of a mercenary. The Working Group agreed with this assessment. Further information is required as to how, when and for what purpose these troops were recruited. For example, the Working Group does not know whether the foreign nationals were resident in the Libyan Arab Jamahiriya prior to their recruitment by the Government, whether they were engaged as part of an existing foreign military exchange, when exactly they were recruited and for what purpose (for example, to suppress the demonstrations or to take part in the subsequent armed conflict).⁴⁵

What is clear, however, is that where mercenaries have been involved in human rights violations against the civilian population, mercenaries must be held accountable.⁴⁶ In response to the events unfolding in the Libyan Arab Jamahiriya, the Working Group issued a press release on 22 February 2011, jointly with several other special procedures mandate holders, in which it expressed grave concern about the alleged involvement of foreign “mercenaries” in the killing of protesters.⁴⁷

On 23 February 2011, the Working Group also sent an urgent appeal to the Government of the Libyan Arab Jamahiriya, jointly with several other special procedures

44. Rep. of the Int'l Comm'n Inquiry to investigate all alleged violations of int'l human rights law in the Libyan Arab Jamahiriya, 17th Sess., ¶ 194, U.N. Doc. A/HRC/17/44 (Jun. 1, 2011).

45. *Id.* ¶ 201.

46. *See id.* ¶ 192.

47. Press Release, Office of the High Comm'r for Human Rights, Libya: “Stop the Massacre”—UN Experts (Feb. 22, 2011), *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10747&LangID=E>.

mandate holders, in which it expressed concern about the death of civilians and the excessive use of force against protesters by security forces in the context of peaceful demonstrations. The Working Group requested, inter alia, detailed information on measures taken to ensure that foreign armed individuals were held accountable for any possible human rights violations. No response has been received to date.⁴⁸

The Human Rights Council held a special session on the situation in the Libyan Arab Jamahiriya on 25 February 2011. The joint statement of special procedures mandate holders was delivered by the Chair-Rapporteur of the Working Group on the use of mercenaries.⁴⁹ In the statement, the mandate holders expressed concern about the authorities' enlistment of "mercenaries" from other countries to support the crackdown on demonstrators in Benghazi and other cities.⁵⁰

On 26 February 2011, the Security Council, in paragraph 4 of its resolution 1970 (2011), decided unanimously to refer the situation in the Libyan Arab Jamahiriya to the Prosecutor of the International Criminal Court. Pre-Trial Chamber I of the ICC concluded that there were reasonable grounds for believing that three Libyan officials were criminally responsible for indirectly committing crimes against humanity (murder and persecution). Arrest warrants were issued on 27 June 2011. The Office of the Prosecutor has reportedly gathered direct evidence on the role of Saif al-Islam, son of Moammar Qadhafi, in recruiting mercenaries.⁵¹

On 17 March 2011, the Security Council, in paragraph 16 of its resolution 1973 (2011), spoke against the continuing flows of mercenaries into the Libyan Arab Jamahiriya and called

48. U.N. Human Rights Council, Communications Report of Special Procedures, 58, A/HRC/18/51 (Sept. 9, 2011).

49. José-Luis Gomez del Prado, Chair of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination, Statement Delivered on Behalf of All Special Procedures Mandate Holders of the United Nations Human Rights Council at the Fifteenth Special Session of the Human Rights Council on the Human Rights Situation on the Libyan Jamahiriya (Feb. 25, 2011), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10761&LangID=E>.

50. U.N. Human Rights Council, Report of the High Commissioner Under Human Rights Council Resolution S-15/1, ¶¶ 7, 17, A/HRC/18/51 (June 7, 2011).

51. The cited material draws heavily from *Use of Mercenaries, 2012, supra* note 24.

upon all Member States to prevent the provision of armed mercenary personnel to the Libyan Arab Jamahiriya. Since the Working Group's report of November 2011, Saif al-Islam Gaddafi, the fugitive son of Libya's former head who had been accused of involvement in mercenary activities by the ICC was captured.⁵² In February 2012 the Security Council voted unanimously to refer the matter to the ICC, based on the arrest warrant that had previously been issued by the court. The Libyan Government rejected the surrender request. The Prosecutor of the ICC has asked the court to report Libya to the Security Council for failing to turn over Saif al-Islam.

On 17 March 2012, Mauritania arrested the Gaddafi-era intelligence chief Abdullah al-Senoussi. Al-Senoussi reportedly orchestrated the recruitment and operations of mercenaries in Libya. Mauritania has taken the position that it will conduct its own investigation before considering extradition requests from Libya, the ICC, and France.⁵³

Beyond the responsibility of high-level Gaddafi government officials for mercenary recruitment, a major issue that remains unresolved in Libya is the status of a number of foreign fighters who primarily came from other parts of Africa and who fought alongside the Gaddafi forces. In its March 2012 report, the International Commission of Inquiry on Libya (established in March 2011 by the Human Rights Council to investigate alleged violations of international human rights law in Libya) reiterated its view that while it was clear that fighters of foreign descent fought alongside Gaddafi's forces, it was unclear whether these fighters fell within the definition of "mercenary" under the UN Convention against Mercenaries or under the OAU Convention of Mercenaries. The main reason for this uncertainty was the "lack of information about the terms under and purpose for which they were contracted."⁵⁴

Among the categories of fighters that the Commission found would likely not be categorized as mercenary were: an organized group of Sudanese fighters who were brought in by the Gaddafi government; a group of Tuareg fighters who were recruited from different regions of Libya; and various Libyan nationals or residents who were originally from Chad, Mali, or Niger.⁵⁵ "The Commission of Inquiry also noted that the terms

52. *Id.* ¶ 32.

53. *Id.* ¶ 33.

54. *Id.* ¶ 34.

55. *Id.* ¶ 35.

'foreigners' and 'mercenaries' were used by the interviewees interchangeably to describe persons with dark skin who had taken part either in the conflict or in suppressing demonstrations against the Qadhafi regime."⁵⁶

Although it is far from clear that the foreign fighters in Libya were in fact mercenaries, they are being held as mercenaries at various facilities around the country.⁵⁷ The Working Group is concerned that, as reported by the Commission of Inquiry, *thumar* forces have been involved in the arbitrary arrest and enforced disappearance of perceived Gaddafi loyalists, security officers, alleged mercenaries, and members of the former government and detainees have been arrested without a warrant, without being told the reasons for their arrest, and without a reasonable suspicion that they have been individually involved in criminal activity.⁵⁸

"The Working Group is also concerned, that according to the Commission a number of detainees are being held outside any legal framework in unacknowledged centres."⁵⁹ Finally, the Working Group noted the concerns "expressed by the Commission of Inquiry regarding the conditions of detention of these fighters, including the maltreatment that is still taking place in centres under the control of local military councils and security committees and the fact that access to family members remains limited and that "access to lawyers is still not afforded."⁶⁰

In order to examine the situation of those held as mercenaries and to provide the Government of Libya with its recommendations on how to address this situation, the Working Group has expressed its willingness to the Government of Libya to visit the country. As noted before, the visit was scheduled to take place from 21 to 25 May 2012, but the Working Group had to postpone its mission to a later date. The Working Group hopes to carry out its visit in 2013, as agreed to by the Government of Libya.

56. *Id.* ¶ 36.

57. *Id.* ¶ 36.

58. *Id.* ¶ 37.

59. *Id.* ¶ 35.

60. *Id.* ¶¶ 36–37.

B. MERCENARIES: A RECURRING AND EVOLVING PHENOMENON⁶¹

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

Recently, rather than being hired to overthrow or undermine Governments, mercenaries have been employed by Governments to suppress opposition movements. The Libyan Arab Jamahiriya is a prime recent example of where Government efforts to quash political protests became an armed campaign. It could be argued that mercenaries were used by the Government and implicated in human rights violations, thus impeding the exercise of the right of the people to self-determination. Such mercenary activities to support Government action against civilians demonstrate that mercenarism remains a significant threat to human rights. However, as noted by the Commission of Inquiry and highlighted by the Working Group, there is some uncertainty about whether these foreign nationals meet the international definition of a mercenary. More clarity is needed as to how, when and for what purpose these troops were recruited. The Working Group is concerned that although it is far from clear that the foreign fighters in Libya were in fact mercenaries, they are being held as such at various facilities around the country. We also note the concern expressed by the Commission of Inquiry regarding the conditions of detention of these fighters.

III. THE LACK OF A BROAD ADHERENCE TO THE MERCENARY CONVENTIONS

The above recent examples highlight the importance of combating mercenarism and mercenary-related activities. In this regard, the Working Group urged States to adopt national legislation to combat mercenarism and to ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. As of 15 November 2012, there were only 32 State Parties to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and 53 to the OAU Convention for the Elimination of Mercenarism in Africa.

61. The following paragraphs rely heavily on *Use of Mercenaries, 2011*, *supra* note 42, ¶¶ 59–62.

IV. THE MONTREUX DOCUMENT ON PRIVATE MILITARY AND SECURITY COMPANIES

The Montreux Document is a joint project of the Swiss government and the ICRC, detailing the legal obligations and offering best practices to ensure that private military and security companies operating in armed conflicts comply with applicable international law.⁶² Its approximately 70 recommendations, derive from State practice and include verifying the track record of companies and examining the procedures they use to vet their staff. States should also take concrete measures to ensure that the personnel of private military and security companies can be prosecuted when serious breaches of the law occur.

The Montreux Document was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, Ukraine, the United Kingdom, and the United States, in meetings convened in January and November 2006, November 2007, and April and September 2008. Representatives of civil society and of the private military and security industry were consulted.⁶³

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

62. The Montreux Document, 5, Sept. 17 2008, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

63. The following paragraph draws heavily from *The Montreux Document on Private Military and Security Companies*, INT'L COMM. OF THE RED CROSS (Sept. 17, 2008), <http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm>.

accountability of the endorsing States for the companies' conduct.⁶⁴

V. THE INTERNATIONAL CODE OF CONDUCT

A. THE SCOPE OF APPLICATION AND CONTENT OF INTERNATIONAL CODE OF CONDUCT

Building on the foundations of the Montreux Document, which clarified the responsibilities of States in relation to the use of private military and security companies in armed conflict, the private military and security industry, with the support of the Government of Switzerland, developed the International Code of Conduct for Private Security Service Providers in November 2010.⁶⁵ The Code establishes a common set of principles for private military and security companies that commits signatory companies to provide security services in accordance with the rule of law, respect for human rights and the interests of their clients.⁶⁶

The Code of Conduct has proved popular with the industry and as of 1 February 2013, 594 companies had signed onto it.⁶⁷ While this is in itself a significant accomplishment, the process of translating the Code's principles into enforceable practical standards (the Charter) has not yet been completed.⁶⁸

B. THE DRAFT CHARTER OF THE OVERSIGHT MECHANISM FOR THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS

On 16 January 2012, the Temporary Steering Committee of the International Code of Conduct for Private Security Service Providers issued the draft Charter of the Oversight

64. Working Group on the Use of Mercenaries, Mar. 2, 2007–Mar. 27, 2007, ¶¶ 42–48, U.N. Doc. A/HRC/10/14; HRC, 10th Sess. (Jan. 21, 2009).

65. International Code of Conduct for Private Security Service Providers, Nov. 9, 2010, *available at* http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.

66. Working Group on the Use of Mercenaries, Sept. 12, 2011–Sept. 30, 2011, ¶ 7, U.N. Doc. A/HRC/18/32; HRC, 18th Sess. (Jul. 4, 2011).

67. *See* The International Code of Conduct for Private Security Service Providers Signatories Companies (Feb. 1, 2013), *available at* http://www.icoc-psp.org/uploads/Signatory_Companies_-_February_2013_-_Composite_List.pdf (listing all the signatories to the ICOC).

68. *See* Explanatory Note on the Draft Charter on the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers, May 16, 2012), http://www.icoc-psp.org/uploads/Explanatory_Note.pdf.

Mechanism for the Code for public consultation. As the implementing mechanism of the Code, the Charter's structure and procedures have a critical bearing on the realization of the Code's principles, goals, and rules. The Charter's effectiveness is a litmus test for the legitimacy of the Code as a means of improving the adherence of private military and security companies to human rights standards.⁶⁹

The Working Group expressed its continued support for the process of developing the Code and the Charter as a means of improving the adherence of private military and security companies to international humanitarian and human rights standards. The Working Group recognized the challenges of developing the Charter and submitted extensive comments in an effort to improve the draft text so that it would better fulfill the promise of the Code to protect human rights in the context of activities of private military and security companies.⁷⁰

Generally, the Working Group believes that the Charter should be modified to explicitly mainstream the protection of human rights, which is the expressed goal of the Code and the Charter.⁷¹ The Working Group recommended that the Charter be brought further into compliance with the Guiding Principles on Business and Human Rights developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (Ruggie Principles⁷²) which were unanimously endorsed by the Human Rights Council in its resolution 17/4.⁷³ That framework is specifically embraced in the Code and the Working Group believes the Guiding Principles set out the basic parameters that an industry self-regulatory mechanism should meet.⁷⁴ The Working Group was aware of criticism⁷⁵ of

69. Working Group on the Use of Mercenaries, Sept. 10, 2012–Nov. 5, 2012, ¶ 19, U.N. Doc. A/HRC/21/43; HRC, 21st Sess. (Jul. 2, 2012).

70. *Id.*

71. *Id.* ¶ 21

72. Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, May 30, 2011–Jun. 17, 2011, U.N. Doc. A/HRC/17/31; HRC, 17th Sess. (Mar. 21, 2011) (advance unedited version).

73. Working Group on the Use of Mercenaries, Sept. 10, 2012–Nov. 5, 2012, ¶ 21, U.N. Doc. A/HRC/21/43; HRC, 21st Sess. (Jul. 2, 2012).

74. *Id.*

75. For an example of civil society statement see Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights, Jan. 2011, available at http://www.escri-net.org/usr_doc/Joint_Statement_draftGPs_wendorsements-final-2.pdf.

the Guiding Principles, in particular by non-governmental organizations, but notes that such criticism does not concern the usefulness of the Principles as setting out the basic parameters for a self-regulatory mechanism such as the Code and Charter.⁷⁶

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

The Working Group welcomed the opportunity to participate in the public consultation on the draft Charter and hopes that its comments will assist the Temporary Steering Committee to produce a final document that lives up to the commitments made by the signatory companies to the Code. Nonetheless, the Working Group considered the Code to constitute but one element of an international system to meet the challenges of regulating PMSCs. As a voluntary and self-regulatory tool, the Code by itself is clearly insufficient to ensure comprehensive accountability for violations of human rights and to provide remedies to victims. The Working Group believed that the draft Charter's shortcomings illustrate the inherent limitations of a voluntary approach to regulation and demonstrate the need for a binding international instrument.⁷⁷

C. INDUSTRY-LED INITIATIVES

The American National Standards Institute approved and issued in March 2012 its quality standard for private security companies. The standard, which built on the Montreux

76. Working Group on the Use of Mercenaries, Sept. 10, 2012–Nov. 5, 2012, ¶ 21, U.N. Doc. A/HRC/21/43; HRC, 21st Sess. (Jul. 2, 2012).

77. *Id.* ¶ 23.

Document and the International Code of Conduct, aimed to provide requirements and guidance for a management system for private security providers with auditable criteria consistent with human rights, legal obligations and good practices. Those involved in the development of the standard have indicated that the goal is to undertake the process for becoming a standard approved by the International Organization for Standardization.⁷⁸

VI. THE WORKING GROUP'S EFFORTS TO COLLECT INFORMATION ON NATIONAL LEGISLATION

A. RESEARCH INTO NATIONAL REGULATION OF PRIVATE MILITARY AND SECURITY COMPANIES⁷⁹

The Working Group believed that it would be useful to study and identify legislative approaches regarding the activities of private military and security companies and to assess the effectiveness of national legislation in protecting human rights. Such a study would inform the Working Group's efforts to demonstrate the need for a legally binding international instrument. In addition, it would assist in identifying best practices and may inform future projects to develop guidance for Member States seeking to regulate private military and security companies.⁸⁰

The Working Group has been conducting this work in phases. First, it analyzed national legislation that was easily accessible to develop preliminary conclusions on the models used by States. Second, the Working Group has initiated a survey to collect national legislation pertaining to private military and security companies. It has requested Member States to provide information in this respect and will supplement the information collected with additional research. Some of this research will be conducted in collaboration with civil society partners.⁸¹

The Working Group will then analyze national legislation on a region-by-region basis. The first regional analysis, which

78. U.N. Secretary General, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, GAOR, U.N. Doc. A/67/340 (Aug. 30, 2012).

79. Working Group on the Use of Mercenaries, Sept. 10, 2012–Nov. 5, 2012, ¶¶ 24–26, U.N. Doc. A/HRC/21/43; HRC, 21st Sess. (Jul. 2, 2012).

80. Working Group on the Use of Mercenaries, Sept. 10, 2012–Nov. 5, 2012, ¶ 24, U.N. Doc. A/HRC/21/43; HRC, 21st Sess. (Jul. 2, 2012).

81. *Id.* ¶ 25.

will focus on Africa, will be included as part of the report of the Working Group to the Human Rights Council at its twenty-fourth session, in 2013. The other regional analyses will be included in the subsequent reports of the Working Group to the Human Rights Council.⁸²

VII. THE USE OF PMSCs BY THE UNITED NATIONS

Over the past year, the Working Group has, on several occasions, engaged in discussions with the United Nations Department of Safety and Security regarding the development of policies on the Organization's use of armed private security companies. On 28 August 2012, the Working Group provided its written comments on the draft UN security policy manual on armed private security companies, the UN Security Operations Manual and the guidelines on the use of armed services from private security companies. It reiterated its view, expressed during its discussions with the Under-Secretary-General for Safety and Security on 1 August 2012, that the framework could be strengthened by further mainstreaming human rights in the Organization's policy and operational documents. The Working Group intends to conduct an assessment of the use of PMSCs by the United Nations in 2013 and is planning to hold a consultation on this issue in the coming months.

VIII. THE CONTENT AND REASONS FOR PROMOTION OF A NEW INTERNATIONAL CONVENTION

A. SELF-REGULATION CANNOT ADDRESS THE PROBLEM OF IMPUNITY

The International Code of Conduct signed in November 2010 by a number of PMSCs in essence recognizes that these companies need standards. While the Code is an important initiative and the Working Group is hopeful that it will raise standards across the industry, it does not address the key issue of accountability. As a non-governmental instrument which is not legally-binding and is not backed by State sanctions, it cannot address the essential human rights issue of accountability for those PMSCs and their employees who commit human rights abuses. In addition, the voluntary nature of the Code of Conduct means that it cannot meet the goal of

82. *Id.* ¶ 26.

ensuring that all PMSCs are covered.⁸³

B. NATIONAL REGULATION IS NOT SUFFICIENT TO ADDRESS THE PROBLEM OF IMPUNITY

Regulatory tools to monitor the activities of PMSCs are sorely lacking at the national level. Given the danger posed by the types of activities carried out by PMSCs and the types of environments in which they operate, at the very minimum, States should register and license these companies and regulate the types of functions that they can perform.⁸⁴ They should also monitor their activities and ensure that they have the ability to prosecute where necessary in order to ensure accountability.⁸⁵ Only a handful of countries currently have legislation that meets these minimum criteria.⁸⁶ Even where national regulation has been adopted, it has serious limitations. The transnational nature of much PMSC activity means that some PMSCs can easily escape national regulation.⁸⁷ Only an international convention could ensure that participating States apply minimum standards to regulate PMSC activities. Moreover, national prosecutions have rarely been successful because of the difficulty in identifying witnesses and collecting evidence abroad.⁸⁸ In light of these limitations, the problem of impunity needs to be address at the international level.⁸⁹

C. CURRENT INTERNATIONAL LAW DOES NOT SUFFICIENTLY ADDRESS THE ISSUE OF PMSCS

PMSCs, as non-State actors, are not subject to international human rights obligations. Moreover, employees of PMSCs, even in cases when they conduct mercenary-like activities, cannot usually be considered as mercenaries under the definitions set out in either the Geneva Conventions or the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.⁹⁰

83. Working Group on the Use of Mercenaries, May 23, 2012–May 27, 2012, ¶¶ 5-10, U.N. Doc. A/HRC/WG/10/CRP.1; HRC, 1st Sess. (May 17, 2011).

84. *Id.* ¶ 26.

85. *Id.* ¶ 24.

86. *Id.* ¶ 26.

87. *Id.* ¶ 27.

88. *Id.* ¶ 28.

89. *Id.* ¶ 31.

90. *Id.* ¶ 8.

Although States are obliged under international human rights law to take appropriate measures and to exercise due diligence to prevent, punish, investigate, and redress the harm caused by PMSCs, in practice that obligation is rarely fulfilled. In light of the current lack of accountability of PMSCs for their activities, it is imperative to enumerate the obligations of States vis-à-vis PMSCs in a legally binding document in a more explicated and detailed manner.⁹¹

D. VICTIMS SHOULD HAVE THE RIGHT TO AN EFFECTIVE REMEDY

In addition to the need to hold PMSCs and their employees accountable for their actions, victims of human rights violations involving PMSCs should be able to exercise their right to an effective remedy. Ideally, they should be able to do so locally. However, victims often live in countries with weak judicial systems. Even where victims are able to bring cases to the courts in the countries where PMSCs are established, such cases are rarely successful for the same reasons that criminal prosecutions often fail (availability of witnesses, lack of evidence, etc.). An international convention would reaffirm the right of victims to an effective remedy, create an obligation of mutual legal assistance and provide an international avenue for those who cannot exercise this right at the national level.⁹²

There are some standards in international law applicable to the activities of PMSCs, but the regime is far from complete. First, although there are indications of strong disapproval of the involvement of private actors in combat activities, there is no clear international prohibition. Second, while it is clear that States have the general international obligation to ensure respect for humanitarian law and human rights vis-à-vis PMSCs, the content of such obligations has not been explicated. The Working Group believes that developing such content is critical for PMSCs because many of their activities pose particular risks for human rights.⁹³

While the Working Group has consistently encouraged States to adopt national legislation to regulate PMSCs and believes such regulation to be essential, it seems unlikely that

91. *Id.* ¶ 19.

92. *Id.* ¶ 10.

93. Working Group on the Use of Mercenaries, Aug. 13, 2012–Aug. 17, 2012, ¶ 36, U.N. Doc. A/HRC/WG.10/2/CRP.1; HRC; 2d Sess. (Aug. 6, 2012).

ad hoc efforts alone will be successful. Because PMSCs operate transnationally—they are often located in one country, recruit employees outside their home countries and deploy them in yet another country—it is not enough if only a few countries adopt legislation regulating their activities. So, although national legislation is a critical piece of the regulatory puzzle, an international convention serves as vehicle for making sure that such legislation is adopted by all the countries affected by PMSC activity and that the domestic legislation adheres to certain minimum standards.⁹⁴

Finally, an international convention serves to highlight the commitment of the international community to address the issue of PMSCs. We often face situations where robust national legislation is vital and we use international mechanisms to get us there. For example, the attacks of September 11th highlighted the danger posed by terrorist attacks carried out by non-State actors. A critical part of preventing such attacks was to ensure that countries adopted and enforced national legislation.⁹⁵ The route chosen was, however, an international one: the UN Security Council adopted a resolution to ensure that States passed legislation to control and criminalize their activities.⁹⁶

For all of these reasons, the Working Group believes that an international convention is the most efficient solution to the challenge of regulating PMSCs.⁹⁷

IX. CONCLUSION

The Working Group has expressed deep concerns about the alleged involvement of mercenaries in Côte d'Ivoire in killing and injuring civilians, the recruitment of children and in looting private property.⁹⁸ It urged Côte d'Ivoire and Liberia to identify, arrest, and promptly prosecute the mercenaries responsible for violations of human rights and to take the measures necessary to prevent the recruitment and training of mercenaries, with special emphasis on children, on their

94. *Id.* ¶ 37.

95. *Id.* ¶ 38.

96. See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

97. Working Group on the Use of Mercenaries, Aug. 13, 2012–Aug. 17, 2012, ¶ 39, U.N. Doc. A/HRC/WG.10/2/CRP.1; HRC; 2d Sess. (Aug. 6, 2012).

98. U.N. Secretary General, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, GAOR, U.N. Doc. A/67/340, ¶ 28 (Aug. 30, 2012).

territories.⁹⁹ The Working Group further requested the President of Côte d'Ivoire, in his capacity as Chair of the Authority of Heads of State and Government of the Economic Community of West African States, to tackle the threats to human rights posed by mercenary activities in the sub-region.¹⁰⁰

The Working Group has also expressed concerns about the measures taken by the Government of Libya against alleged mercenaries, their detention conditions and their rights to a fair trial. The Working Group urged the Libyan authorities to charge detainees being held in connection to the conflict for their involvement in specific criminal acts and to release those against whom there is no evidence of crime.¹⁰¹ It requested Libya to ensure that conditions of detention of persons accused or suspected of being mercenaries comply with applicable international law, including proper treatment of detainees, access to lawyers and family, and the ability to lodge complaints of torture and ill-treatment.¹⁰²

Given the risk to human rights of the activities of private military and security companies, the Working Group welcomed efforts by States to continue discussing the possibility of international regulation, in addition to the progress at the regional and national levels and industry-led initiatives. The Working Group is of the view that further research into effective national regulatory strategies is needed and called on Member States to respond to its request to collect all national legislation relevant to private military and security companies to facilitate analysis by multiple stakeholders.¹⁰³

The Working Group welcomed efforts to clarify obligations under international law and identify good practices, such as the Montreux Document, and industry self-regulation initiatives, such as the International Code of Conduct for Private Security Service Providers.¹⁰⁴ It urged States to recognize these initiatives as complementary to, but no substitutes for, strong international and national regulatory frameworks. In the view of the Working Group a comprehensive, legally binding international regulatory instrument is the best way to ensure

99. *Id.* ¶ 70.

100. *Id.* ¶ 71.

101. *Id.* ¶ 72.

102. *Id.* ¶ 73.

103. *Id.* ¶ 75.

104. *Id.* ¶ 77.

adequate protection of human rights. The Working Group therefore encourages all States to participate actively in the work of the intergovernmental working group established by the Human Rights Council with a view to considering the possibility of an international instrument for the regulation of private military and security companies. Finally, the Working Group encourages States to ensure the investigation and prosecution of violations of international human rights law involving private military and security companies, to guarantee accountability for human right violations and provide an effective remedy for victims.¹⁰⁵

105. *Id.* ¶ 79.