



**Economic and Social
Council**

Distr.
GENERAL

E/CN.4/2006/11
23 December 2005

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sixty-second session
Item 5 of the provisional agenda

**THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND ITS
APPLICATION TO PEOPLES UNDER COLONIAL OR ALIEN
DOMINATION OR FOREIGN OCCUPATION**

**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
people to self-determination**

Chairperson: Amada Benavides de Pérez

Summary

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 was established in July 2005 pursuant to Commission on Human Rights resolution 2005/2.

The Working Group is composed of Ms. Najat Al-Hajjaji (Libyan Arab Jamahiriya), Ms. Amada Benavides (Colombia), Mr. José Luis Gómez del Prado (Spain), Mr. Alexander Nikitin (Russian Federation) and Ms. Shaista Shameem (Fiji). The Chairperson-Rapporteur is Ms. Benavides.

This report presents the results the Group's first session, held from 10 to 14 October 2005 in Geneva. The Working Group met with representatives of the Office of the High Commissioner for Human Rights and consulted States and intergovernmental and non-governmental organizations on implementation of the Group's mandate.

Concerning its methods of work, the Working Group addressed the frequency of meetings, meeting location, whether the meetings should be private or public, the periodicity of the chairpersonship, the establishment of a complaint mechanism, and consultation with private sector actors and field missions. The Working Group decided to hold its second session in early 2006.

Concerning substantive areas of work, the Working Group agreed to concentrate initially on two issues: first, the role of the State as the primary holder of the monopoly of the use of force, and related issues such as sovereignty and State responsibility to protect and ensure respect for human rights by all actors. Second, the Group intends to address governmental agreements that provide private military and security companies and their employees with immunity for human rights violations.

The members also agreed to continue discussions on the mandate and methods of work; to send a letter of introduction and inquiry to Governments and intergovernmental and non-governmental organizations; to explore the establishment of a network of academics working on mercenary-related activities; to undertake a comparative analysis of relevant national legislation; and to consider convening a round table to discuss the role of the State as primary holder of the monopoly of the use of force.

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Introduction

1. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of persons to self-determination (hereinafter the Working Group) was established in July 2005 pursuant to Commission on Human Rights resolution 2005/2. It succeeds the mandate of the Special Rapporteur on the use of mercenaries, which had been in existence since 1987 and was serviced by Mr. Enrique Bernales Ballesteros (Peru) from 1987 to 2004 and Ms. Shaista Shameem (Fiji) from 2004 to 2005.

2. In paragraph 12 of its resolution the Commission requested the Working Group:

(a) To elaborate and present concrete proposals on possible new standards, general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, while facing current and emergent threats posed by mercenaries or mercenary-related activities;

(b) To seek opinions and contributions from Governments and intergovernmental and non-governmental organizations on questions relating to its mandate;

(c) To monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world;

(d) To study and identify emerging issues, manifestations and trends regarding mercenaries or mercenary-related activities and their impact on human rights, particularly on the right of peoples to self-determination;

(e) To monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities.

3. The Commission further requested the Working Group to continue the work already done by the previous Special Rapporteurs on the strengthening of the international legal framework for the prevention and sanction of the recruitment, use, financing and training of mercenaries, taking into account the proposal for a new legal definition of a mercenary drafted by Mr. Ballesteros (E/CN.4/2004/15, para. 47); to report annually on the progress made in the fulfilment of its mandate to the Commission and to the General Assembly; to take into account, in the discharge of its mandate, that mercenary activities are continuing to occur in many parts of the world and are taking on new forms, manifestations and modalities and, in this regard, to pay particular attention to the impact of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights by everyone and every people and, in particular, on the exercise of the right of peoples to self-determination. The present report is submitted in accordance with the request contained in resolution 2005/2.

4. The Working Group is composed of Ms. Najat Al-Hajjaji (Libyan Arab Jamahiriya), Ms. Amada Benavides (Colombia), Mr. José Luis Gómez del Prado (Spain), Mr. Alexander Nikitin (Russian Federation) and Ms. Shaista Shameem (Fiji). The Working Group elected Ms. Benavides as Chairperson-Rapporteur. The members decided to leave the Vice-Chairpersonship open, to be decided as needed on a case-by-case basis.

5. Given the complexity of the mandate of the Working Group, members agreed to concentrate initially on two issues: first, the role of the State as the primary holder of the monopoly of the use of force, and related issues such as sovereignty and State responsibility to protect and ensure respect for human rights by all actors. Second, the Group intends to address governmental agreements that provide private military and security companies (PMSCs) and their employees with immunity for human rights violations.

I. ACTIVITIES OF THE WORKING GROUP

6. The Working Group held its first session in Geneva from 10 to 14 October 2005. Ms. Al-Hajjaji, Ms. Benavides and Ms. Shameem attended the whole session. Mr. Gómez del Prado participated from the afternoon of 11 October to the end of the session. Mr. Nikitin participated on 14 October.

7. The Working Group met with the High Commissioner for Human Rights, who sought feedback on their approach to the mandate. The Chairperson identified several issues as areas of focus. The High Commissioner assured the members of the support of her Office in carrying out their mandate.

8. Staff of the Office of the High Commissioner for Human Rights (OHCHR) briefed the Working Group on the history and status of United Nations work on mercenaries, procedures relating to security and travel, and transition from the Commission on Human Rights to the proposed Human Rights Council.

Consultations with States

9. During the first session, the Group met with the representatives of the coordinators of the five regional groups to discuss regional and country concerns and to seek their cooperation with the mandate. This included sharing information, encouraging regional group members to ratify the International Convention on the Recruitment, Training, Financing and Training of Mercenaries, and suggesting the establishment of regional and national legislative frameworks. The Working Group emphasized the importance of continued dialogue with States in making progress in addressing mercenarism.

10. Representatives expressed the wish to learn more about how the Working Group would interpret its mandate and intended to approach its work. The Chairperson explained that the Group was still in the process of interpreting its mandate and setting up its working methods.

Consultations with intergovernmental organizations

11. The Working Group met with representatives of the International Committee of the Red Cross (ICRC) and with the Office of the United Nations High Commissioner for Refugees (UNHCR).

12. A representative of ICRC made a presentation on “Privatization of war, the outsourcing of military tasks”. She asserted that outsourcing of military activities was likely to remain a Western phenomenon insofar as that region was the main source of recruitment. It was noted that the staff of PMSCs operating in situations of armed conflict were clearly bound by international humanitarian law (IHL). Their possible direct participation in hostilities had implications for their status and thus protection under IHL. The question was raised of the degree to which military commanders had effective control over contractors and could be held liable for the acts of contractors.

13. The representative emphasized that the primary concern of ICRC was respect for IHL, in particular that staff of private military companies (PMCs) were aware of IHL, that their operations and rules of engagement complied with IHL, and that mechanisms of accountability were established.

14. She also emphasized the responsibility of States that hired PMCs to ensure that those actors respected IHL and pointed out that in case of violations States had concurrent responsibility. While such responsibility was well established as a matter of law, its enforcement had proved problematic. The near absence of national regulation of PMSCs was mentioned. The representative further raised the following questions:

- Would PMSCs be willing to genuinely respect IHL beyond the “rubber-stamping” of their activities?
- Did PMSCs have the ability to undertake their IHL responsibilities given, inter alia, the absence of standing forces available to them?
- How should situations be addressed which were only marginally covered by IHL?

15. Follow-up discussion addressed the use of amnesties extended to paramilitary groups. It was stressed that ICRC found worrying the lack of accountability of paramilitaries even to militaries, and thus insisted that States had to ensure respect of IHL by all persons whom they contracted. It was also noted that in internal conflicts, which were more prevalent in modern warfare, there were fewer treaty rules of IHL. Moreover it was not clear at what stage situations of violence reached the threshold of armed conflict and, consequently, it was unclear what laws were indeed applicable, for example to paramilitaries; in situations that did not reach this threshold it was international human rights law that applied.

16. The representative of UNHCR briefed the Working Group on areas of mutual concern and possible collaboration. He noted that special procedures mechanisms were helpful in providing additional attention to refugee-related issues and thereby contribute to the fulfilment of the Office’s protection functions. While he believed that the links to the Group’s work were “peripheral”, he identified as a significant connection the use of mercenaries in causing

displacement. Another area of common concern was preventing the recruitment of refugees and other persons of concern to UNHCR to become mercenaries. He also encouraged coordination between UNHCR and the Working Group in order to avoid the development of diverging standards which might affect refugee status. The members thanked the representative and expressed the wish for UNHCR to share information which could be useful for the implementation of the Working Group's mandate.

Consultations with non-governmental organizations

17. The Group met with representatives of three NGOs during its first session - Amnesty International, Quaker's United Nations Office and International Service for Human Rights.
18. The representative of one organization noted its interest in the interface between mercenaries and armed conflict. She expressed the opinion that the phenomenon of mercenarism was largely unconsidered by the United Nations, was likely to grow in prominence, and covered a range of activity. She identified as key problems the application of human rights and humanitarian law, the obligations of States, and the need for accountability within a clearer legal framework.
19. Another representative wanted to know how the Working Group perceived its mandate, whether it viewed self-determination as a governing factor which would not constrain other concerns, and how it would approach the human rights effects of private companies offering their services on the international market. The Group noted that it was still framing its working methods, and that while self-determination was a concern, it was not an overriding issue and, as indicated in the title of the resolution, it was clear that activities of mercenaries were being examined in terms of violations of human rights, including the right to self-determination. The Working Group expressed its intent to prioritize an examination of the role of the State in the use of force.
20. Concerning the definition of mercenary and the proposal of principles to address mercenary activity, one representative expressed her organization's opposition to the imposition of human rights obligations on non-State actors. She found troubling, for example, the trend toward privatizing the operation of social services such as prisons. She underlined that the State was ultimately accountable for human rights violations, not non-State actors.
21. Another representative noted his organization's concern with changes in the mandates and activities of special procedures. He stated that the change from Special Rapporteur to Working Group had been controversial since in his opinion it represented a weakening of the mandate. He feared that decision-making, clarity, focus and strength would be negatively affected by the need to work as a group. The change had also been controversial because it was perceived that the appointments to the Working Group had not been made on an independent basis. He suggested that what was needed was not a body of legal experts in Geneva discussing legal questions such as definitions, but rather more substantial engagement on the ground where mercenary activities were taking place. He encouraged the Working Group to undertake field missions and to serve more as a human rights than a legal body.

22. The Group noted that concerns bearing upon the location and frequency of meetings were being considered in relation to the Group's methods of work. It was further suggested that there were possible benefits of a Working Group rather than an individual, including flexibility of schedules for missions and contribution of regional expertise and knowledge. The Chairperson expressed the Group's hope to act flexibly and access a wide range of information. She also stressed that the Group was working with a larger vision than just applying sanctions, with an intent to prevent human rights violations and promote a culture of peace. Members pointed out that with information from NGOs on allegations of human rights violations emanating from mercenaries or mercenary-related activities, it would be possible for the Working Group to avoid focusing only on legal issues and to reorient the mandate towards monitoring human rights violations.

Other activities

23. On 12 October members participated in the Seminar on Enhancing and Strengthening the Effectiveness of the Special Procedures, held at the Palais des Nations.

24. Members also met on separate occasions during the period of their session with two other special procedures mandate holders, for exchanges of views on the interpretation of mandates and development of methods of work.

25. One member briefed the Working Group on recent legal developments in the Commonwealth of Independent States (CIS) in Eastern Europe. He outlined the elaboration the draft CIS Model Law "On Counteracting Mercenarism", an effort which he had led with a team of lawyers and military and academic experts. The group collected and studied existing legislation on mercenarism in the Penal and Civil Codes of the CIS States and applied the methodological guidelines proposed by Mr. Ballesteros, as well as guidelines suggested by previous expert meetings convened by OHCHR. The draft CIS Model Law was circulated to 12 countries and the group received feedback from more than 20 ministries and parliamentary committees. On 12 and 13 October 2005 the Commission on Defense and Security of the CIS Inter-Parliamentary Assembly considered the draft law in the third reading and approved it, and the Law was to be placed before the Inter-Parliamentary Assembly for voting and adoption at its full session on 19 November 2005.

II. METHODS OF WORK

26. The Working Group deferred its decision on the frequency of meetings until next year when the situation regarding the establishment of a Human Rights Council was clarified, since that would bear upon the Working Group's activities. It decided to hold its second session before the next session of the Commission, preferably in January/February, in order to discuss the interpretation of its mandate and outstanding issues relating to methods of work. Meetings would be held in Geneva unless otherwise decided, depending on the specific needs of the mandate.

27. In principle, the Working Group's meetings would be private, but the Group would hold consultative meetings with representatives of Governments, intergovernmental and

non-governmental organizations and non-State actors and individuals as needed. In addition, given the specificity of the mandate, the Working Group might consult with private companies or individuals working for those companies.

28. Members agreed that the chairpersonship would be for a one-year period, starting from October, during which time the Chairperson would represent the Group at all relevant meetings. The chairpersonship would rotate on a regional basis so as to ensure democracy within the group and benefit from global insights.

29. No decision was taken on a possible complaints mechanism. It was agreed that more discussion was needed during the next session of the Working Group.

30. Regarding field missions, members decided that the Working Group would undertake visits largely on the invitation of Governments, but could also take the initiative to approach Governments when appropriate.

III. FURTHER ACTIVITIES

31. The members agreed to continue discussions on the mandate and methods of work, with a view to clarifying their approach and activities. Those two issues would be the main agenda items for the Group's next session.

32. To continue its consultations with relevant actors, the Group agreed to send a letter to Governments and intergovernmental and non-governmental organizations requesting theoretical and technical information on the implementation of its mandate.

33. The Working Group decided to explore the possibility of establishing a global network of academics working on mercenary-related activities, which would support its conceptual and analytical work. The network could include persons proposed by representatives of Governments through the regional coordinators.

34. Working Group members also decided to undertake a comparative analysis of national legislation concerning mercenaries and mercenary-related activities. That activity could be supported by the above-mentioned academic network.

35. To address one of its priorities, the Working Group agreed to explore the convening of a round table on the State as primary holder of the monopoly of the use of force.

IV. CONCLUSIONS

36. The Working Group on the use of mercenaries is newly constituted and held its first session from 10 to 14 October 2005. At the meeting the Group consulted with relevant actors on issues relating to its methods of work and mandate.

37. The Working Group made decisions on key elements of its methods of work, including the location of meetings, whether meetings would be private or public, the periodicity of the chairpersonship, field missions, and consultations with private sector actors. Outstanding issues were the frequency of meetings and a possible complaints mechanism.

38. The Group decided that its initial substantive focus would be on the role of the State as the primary holder of the monopoly of the use of force, and agreements between Governments which led to immunity from accountability for human rights violations by PMSCs and their employees.

39. The Group decided to hold its second session in January/February 2005. It also determined that future activities would include discussions on the interpretation of the mandate and methods of work; correspondence with relevant actors; the possibility of establishing a global network of academics working on mercenary-related activities; a comparative analysis of relevant national legislation; and the convening of a round table to discuss the role of the State as primary holder of the monopoly of the use of force.
