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IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED "HUMAN RIGHTS COUNCIL"

Report of the Working Group on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Chairperson: Ms. Amada Benavides de Pérez

Addendum

MISSION TO ECUADOR *****

* Reissued for technical reasons.

** The summary of this mission report is being circulated in all official languages. The report itself is contained in the annex to the summary and is being circulated in the language of submission and in Spanish only.

*** This report was submitted late to reflect the most up-to-date information.

Summary

This report provides the observations and findings of the Working Group on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination on its visit to Ecuador, which took place from 28 August to 1 September 2006. During the visit, the Working Group delegation held meetings in Quito, Porto Viejo and Manta. The Working Group expresses its appreciation to the Government of Ecuador for its cooperation and constructive consultations.

The visit to Ecuador forms part of an assessment by the Working Group on a regional tendency in Latin America towards the privatization of security services, including the recruitment in recent years of nationals of countries in the region by private military and security companies (referred to as PMSCs) to perform security services in foreign countries. During its visit to Ecuador, the Working Group intended to verify information received concerning one of these private security companies, "Epi Security and Investigations", which was said to post advertisements in the press and recruit individuals. The Working Group focused its visit on five issues: (a) national mechanisms and legislation, including licensing and registration, to ensure that PMSCs in Ecuador operate within a legal framework in accordance with human rights standards; (b) the status of foreign staff and Ecuadorian nationals working in private military and security companies operating in Manta, including concerns of immunity and impunity; (c) the contracting of foreigners by PMSCs based in Manta, possibly subsidiaries of foreign companies, to work abroad, including in countries in conflict; (d) PMSCs and army protection of oil companies and the effects of these activities on local populations; (e) the involvement of PMSCs in the aerial spraying of narcotic crops under the "Plan Colombia" and the impact on the environment and the population. The Working Group notes recent developments adopted by the Government of Ecuador, including 2003 Law on Monitoring and Private Security, and 2005 Law on Subcontracting, which aims at enhancing the protection of labour conditions of subcontractors. This legislation could hold significant potential, considering that security guards in Ecuador are commonly exploited and work in inhuman conditions. The Working Group was informed of the ongoing elaboration of accompanying regulations, which provide for tripartite arrangements involving the Government, private companies and labour union representatives. The Working Group welcomes the fact that arrangements will include social assistance and psychological support for PMSC staff.. This is important given the high suicide rates of personnel in the security-services sector.

The Working Group recommends, inter alia, that the Government of Ecuador:

- Accede swiftly to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries;

- Consider incorporating the legal obligations thereof by means of a separate national law, or inclusion of mercenary acts as an offence in the Criminal Code;

- Complete promptly the investigations surrounding the PMSC "Epi Security and Investigations";

- Ensure effective remedies to those affected by the involvement of private military and security companies in the spraying programme under "Plan Colombia".

Annex

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE USE OF MERCENARIES AS A MEANS OF VIOLATING HUMAN RIGHTS AND IMPEDING THE EXERCISE OF THE RIGHT OF PEOPLES TO SELF-DETERMINATION:

MISSION TO ECUADOR (28 AUGUST-1 SEPTEMBER 2006)

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Introduction

1. At the invitation of the Government of Ecuador, the Working Group on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination visited the country from 28 August to 1 September 2006. The Working Group was represented by its Chairperson, Ms. Amada Benavides de Pérez, and one of its members, Mr. José Luis Gomez del Prado. The Working Group expresses its appreciation to the Government of Ecuador for the speedy invitation and cooperation with the preparations and undertaking of this visit, and commends the Government for its efforts and openness in consulting in a constructive and progressive manner. This was consistent with the country's standing invitation issued in 2003 to all special procedures mandates and its current membership in the Human Rights Council.

2. The purpose of the visit was to obtain information which would contribute to fulfilling the mandate of the Working Group to study and identify emerging issues, manifestations and trends regarding mercenaries, mercenary-related activities and the functioning of private military and private security companies (hereinafter PMSCs) and their impact on human rights.[1] The visit to Ecuador forms part of a regional assessment by the Working Group on tendency towards the privatization of security in Latin America, including a phenomenon in recent years where nationals of countries in the region have been recruited by private military and private security companies.[2] These PMSCs are often subsidiaries of foreign-based companies, contracted to work in conflict situations in other regions, including in Iraq and Afghanistan.

3. The areas of particular interest of the Working Group in Ecuador were fivefold: (a) national mechanisms and legislation, including licensing and registration, to ensure that PMSCs in Ecuador operate within a legal framework in accordance with human rights standards; (b) the status of foreign staff and Ecuadorian nationals working in PMSCs operating in Manta, including concerns of immunity and impunity; (c) the contracting of foreigners by PMSCs based in Manta, possibly subsidiaries of foreign companies, to work abroad, including in countries in conflict; (d) PMSCs and army protection of oil companies and the effects of these activities on local populations; (e) PMSCs and the impact on the environment and the population of the aerial spraying of narcotic crops under "Plan Colombia".

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[1] For the purposes of this report, and while recognizing the definitional challenges, the Working Group refers to private military and private security companies (PMSCs) as companies which perform all kinds of security assistance, training, provision and consulting services, i.e. from unarmed logistical support to armed guards involved in defensive or offensive military operations.

[2] With a view to undertaking a regional visit, the Working Group decided at its meeting in February 2006 to request invitations to visit Chile, Colombia, Ecuador, Honduras and Peru (Report of the Working Group, E/CN.4/2006/11/Add.1, para. 23).

4. During its visit, the Working Group delegation held meetings in Quito, Porto Viejo and Manta. The Working Group benefited from constructive dialogues with the respective Ministries for External Relations, Labour, Internal Affairs and Police, deputies from the National Congress, the Attorney-General, the Constitutional Court, the Joint Command of the Armed Forces, the Office of the Ombudsperson, as well as with departmental and municipal authorities in Porto Viejo and Manta. The Working Group delegation also benefited from meetings with a wide range of non-governmental organizations, academia, individuals, and representatives of the international community in Ecuador. As reflected in the report, a significant portion of the consultations in Ecuador, particularly with the civil society representatives, centred on the activities of the multinational private company DynCorp Aerospace Technologies (hereinafter DynCorp). The Working Group also notes that during the visit, it did not interview first hand any Ecuadorian private contractor of a PMSC having worked in a country of conflict abroad and returned.

I. MANDATE

5. The mandate of the Working Group includes to monitor and to study the activities of PMSCs and their impact on all human rights.[3] The Working Group considers that State authorities have the primary responsibility in maintaining public security and law and order in the State, under international and domestic law. Noting the trends of privatization of security and the use of force, the Working Group is concerned that some PMSCs are committing human rights violations with impunity whilst operating in armed conflicts, in the control of national security or in other situations.

6. This phenomenon is often associated with the creation by transnational companies of satellite subsidiaries with legal personality in one country, providing services in another country and recruiting personnel from third countries. As indicated in the Working Group's 2006 report to the General Assembly (A/61/341, paras. 65-76), the international legal framework and regulatory schemes remain to meet the needs to ensure accountability and oversight of these companies.[4] In the light of limited international regulation of PMSCs, the Working Group notes the critical importance of complementing international efforts by establishing national-level registration and licensing systems for PMSCs and employees. Such regulation should include defining minimum requirements for transparency and accountability of firms, screening and vetting of personnel, and establishing a monitoring system including parliamentary oversight.

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[3] The mandate of the Working Group includes "[t]o 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", pursuant to Commission on Human Rights resolution 2005/2, para. 12 (e).

[4] Available at http://www.ohchr.org/english/issues/mercenaries/index.htm.

II. POLITICAL AND LEGAL STRATEGY AND INSTITUTIONAL FRAMEWORK

A. International level

7. Ecuador is a State party to all seven major international human rights instruments and has ratified Optional Protocols to enable individual petition under the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child (it is currently carrying out consultations for ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). In February 2002, Ecuador ratified the statute establishing the International Criminal Court. Ecuador has also ratified the main conventions of the Inter-American human rights system and accepted in 1984 the jurisdiction of the Inter-American Court of Human Rights.

8. Ecuador has signed the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which was sent to Congress for accession in 1992 and assessed by the Committee on National Defence. In meetings with the National Congress and the Ministry of External Relations, respectively, the Working Group received positive indications that steps are taken towards the accession by Ecuador to this instrument. The Working Group welcomes this process and extends its support and assistance for a speedy accession.

9. As PMSCs and their employees fall into a grey area not specifically covered by the 1989 Convention, this demonstrates the need for appropriate national regulation, control and monitoring of the activities of PMSCs.

B. National level

10. The 1998 Constitution of Ecuador states that international treaties have supremacy on domestic laws. Articles 16-17 of the Constitution contain the primary provisions concerning the duties of the State to ensure the respect of human rights.

11. In meeting with the National Congress, the Working Group was informed that the Criminal Code Reform Bill No. 26804 prohibiting the recruitment, use, financing and training of mercenaries was in the process of adoption by the National Congress. The Working Group supports this initiative, while noting that an alternative approach for inclusion in national legislation is to establish acts committed by mercenaries as well as mercenary-related activities as offences in the Criminal Code.

12. As to other legislative and regulatory measures, the Working Group was informed by Ecuador authorities of recent developments, including the 2003 Law on Monitoring and Private Security. This law prohibits ownership by and recruitment of currently serving army and police personnel in PMSCs, with a view to avoid possible conflicts of interest. Furthermore, section 13 of the Law on Private Companies provides for the following necessary elements in order to successfully register a PMSC in Ecuador: (a) establish an office and designate a local

representative; (b) get authoritization from the Ministry of Defence; (c) by US$ 2,000 minimum; and (d) to have a legal counsel. If PMSC personnel are to utilize weapons in their work, the PMSC needs to obtain an additional licence from the Ministry of Defence. The Working Group was informed by the Ministry of the Interior of special regulations under elaboration to implement the Law on Private Companies. Existing legislation requires PMSCs to request profiles of employees to be recruited, and their inclusion into an official register.

13. The Working Group was informed in meeting with the Ministry of Labour of the enacted 2005 Law on Subcontracting, which aims at enhancing the protection of the labour conditions of subcontractors. The Working Group notes the significant potential of this legislation and associated measures to counter a situation, described by non-governmental organizations and authorities alike, of security guards and other personnel in the security sector in Ecuador who are exploited, work in harsh conditions and experience high suicide rates. The Working Group notes that the Ministry of Labour has already issued the Implementing Regulations of the "Labour Code Amendment Act regulating the subcontracting of ancillary services". It has also been informed that the Minister for Labour and Employment has introduced a Citizens' Action Mailbox, where workers in Ecuador can deposit their complaints and concerns when their rights have been violated or infringed by companies to which ancillary services have been subcontracted. The Working Group welcomes these measures.

III. PRIVATE MILITARY AND SECURITY COMPANIES IN ECUADOR

A. Situation of private military and private security companies and licensing the use of force

14. According to information received by the Working Group when meeting with the Ministries of Interior, Defence and Labour, and the National Police, respectively, the procedure to establish a PMSC in Ecuador appears to be the following: (a) registration as a limited liability company in the business register; (b) obtaining a licence from the Ministry of Defence; (c) obtaining a licence from the National Police; (d) obtaining a licence at the Ministry of the Interior; (e) if arms are to be used, the National Police issues licences and maintains control over the existence and calibre of such weapons through the "Centre of Operations for Private Matters". When a PMSC has been licensed, the so-called "Superintendente de Compañías" institution registers the PMSC and performs a monitoring role. Once a PMSC recruits staff, the Ministry of Labour also becomes involved, and performs an additional supervisory function. The Working Group was informed that, under the Law on National Security, the Ministry of Defence can cancel and withdraw licences if warranted. The Working Group was also informed of the existence of a "white book" manual for army actors and operations, which lists activities which face criminal and civil punishments; for the more serious offences the Criminal Code applies.

15. NGOs informed the Working Group that individuals recruited by PMSCs in Ecuador are often primarily retired police and army personnel. In discussing the average background of private contractors with the Ministry of Defence, the Working Group was informed of their understanding of the preference of PMSCs to hire professionals, including ex-military personnel, who have already been trained on performing security services. The Working Group was

informed by the Ministry of Defence that, among the criteria to establish a PMSC in Ecuador, it must have one partner or shareholder who is a former army officer. However, NGOs also highlighted to the Working Group that, according to article 3 of the Law on Companies, an employee is not allowed to be an active serving employee of the armed forces or police; only retired personnel should be involved in PMSCs. The Ministry of Labour stated to the Working Group that PMSC staff in Ecuador were often abused and exploited, including by working more than 10-12 hours per day for less than US$ 200 per month. The prospect of being hired by one of these companies and earning US$ 1,000 per month for work abroad provides a strong incentive and explains the supply of interested, often unemployed, security personnel in Ecuador.

16. The National Police informed the Working Group of a new human rights unit within the police providing staff training. The National Police has suggested to include a training component on international human rights standards also for employees of private security companies, in a module in the training organized for PMSCs on the use of weapons. The Working Group discussed the matter with the Ministry of the Interior, which indicated that such training could be offered to PMSCs at the "Technological Institute", similar to the training currently offered to national police. The Ministry of the Interior also referred to draft regulations which could set up training centres for their staff, and which in time could possibly be accessible also for training of PMSC staff. The Ministry of the Interior also informed the Working Group of the establishment of a trade association of PMSCs in Ecuador. While not including all PMSCs, the trade association includes several legally registered and licensed PMSCs and could provide a vehicle for regulatory initiatives by the industry to complement international and national regulatory frameworks.

17. The Working Group notes the multiple risks involved when handing the functions of public security to private entities. To this end, the Working Group emphasizes the obligation of the State according to article 17 of the Constitution of Ecuador, which guarantees to all inhabitants, without distinction, the free and effective exercise and the enjoyment of the rights enshrined in the Constitution and international instruments to which Ecuador has adhered.

18. The authorities and NGOs in Ecuador informed the Working Group of increased outsourcing of the use of force, and in particular security services, to private actors. Although article 183 of the National Political Constitution grants to the National Police the function of guaranteeing security and public order, two tendencies are recurrent: (a) the surrender of this privilege to private entities, with consequences such as the presence of multiple actors in controlling security; and (b) the privatization of services provided by the police, with consequences such as excluding people who cannot afford to pay for them and distracting the police from their primary functions and constitutional obligations.

19. The Working Group notes that the recent proliferation of PMSCs in Ecuador is often attributed to the need to fill gaps in law enforcement and provide security in urban and in rural areas. In meeting with the Ministry of Labour, the Working Group was informed of an increasing number of companies registering security guards and providing protection of property. The Under-Secretary responsible for multilateral relations reported that the Armed Forces had not privatized security services and that, moreover, the oil companies had at no time sought the help of the Ecuadorian Army in recent years in guarding oil installations. The

Ministry of Foreign Affairs submitted that activities of security guards providing additional protection outside banks are in no way different from similar functions performed in many other countries. In meeting with the Ombudsperson, the Working Group noted this institution's estimation that Ecuadorians, in general, consider that the growth of PMSCs in the country has enhanced their security without violating their human rights.

20. The Working Group was informed by the National Police that the total number of national police amounted to 42,000 policemen, which does not include the separate entity of municipal police. While the estimates of PMSCs in Ecuador vary, representatives of NGOs submitted to the Working Group that approximately 40 per cent are not registered, which was noted by the NGOs as indicating diminishing State control of PMSCs.

21. The Working Group was informed by NGOs of a situation in Guayaquil, where municipal authorities had subcontracted private security firms as a temporary measure until sufficient numbers of national police officials had been recruited and trained to meet law enforcement requirements. According to media reports, high crime rates in the city (one robbery every 21 minutes), widespread kidnapping, robberies of banks, public and private property, encouraged municipal authorities to hire private security companies to guard over 40 public installations considered particularly at risk.[5] After a bidding process, a private security company won a US$ 1,314,000 contract. Under the contract, the guards were required to be unarmed, while their tasks included facing dangerous local crime. Several guards have been wounded for lack of appropriate protection elements in the exercise of their duties.[6] The Working Group was informed by an NGO of one example of the consequences of this privatization of security. On 26 July 2005, a person was robbed by five persons in a mall in Guayaquil, just 25 metres from a location where two security guards had been hired by the municipality. Although bystanders activated alarms, the guards alleged that they could neither move nor undertake any other action because they had been assigned merely to work in the place where they were physically located.[7]

22. The Working Group considers that the circumstances and situation in Guayaquil invite further reflection of Ecuadorian authorities. The question can be raised of why the allocated funds to hire private security guards were not directed to enhance the resources of the National Police working in this municipality. The Working Group noted one argument which NGOs reported as used in favour of this arrangement, which was that private guards can guarantee their work in a professional manner, whereas the "national police is unarmed, not well paid and infiltrated by corruption", as reported in one media comment.[8] NGOs informed the Working Group of their concerns about the effectiveness and even legality of this privatizing measure.[9]

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[5] *El Tiempo*, Guayaquil, 15 August 2003, "Asesor extranjero entrena a policías".

[6] *Diario Expreso*, 20 April 2006.

[7] Cf. *Diario Expreso*, 20 April 2006.

[8] Jijión, Carlos, "Retorno a la ciudad Gótica", *Diario Hoy*, Opinión, 6 April 2006.

[9] Cf. Carrión, Fernando, "De la represión a la prevención", *Diario Hoy*, Opinión, 15 April 2006.

23. The Working Group received information from NGOs that a similar situation has arisen based on allegations that the National Police charges entertainment entrepreneurs, and even other State institutions, for providing security to private enterprises. The Working Group was informed that this practice was normalized by Special Police regulation signed by the executive on 12 October 2005. Public accounts indicate that some 900 serving officers belong to this police force (2.5 per cent of the total).[10] In the view of the Working Group, such a measure would transform and limit the National Police into an entity that offers security to those who can afford to be secured.

24. The Working Group was informed that the National Association of Security Companies denounced this regulation as violating the Law of Surveillance and Private Security, which in article 3 prohibits active public force members from being involved with the security and surveillance companies. By charging entities and individuals for security services, this would transform the National Police into something very similar to a private security company. State resources would in this case be used for private and commercial ends, while using public uniforms, facilities, weapons and ammunition. Furthermore, the important principle of the State providing equitable service to every individual in Ecuador would be infringed, and alter the social contract between the State and its inhabitants. The Working Group considers that such privatization of the public service of maintaining security could violate constitutional principles and the equal enjoyment of rights under international law.

25. A third example presented to the Working Group by NGOs concerns the case of *the Juntas de Defensa del Campesinado* (peasants' defence groups). The Ecumenical Commission of Human Rights (CEDHU) has carried out monitoring of the processes of private security and the actions of self-defence groups, and registered information about 47 accusations, involving 87 victims having suffered violations of their human rights due to the Juntas de Defensa del Campesinado.[11] The Working Group was informed by NGOs that Juntas de Defensa del Campesinado act in cases of security, land conflicts and common crimes. In many of these cases, they apparently assume functions of public authorities, with accusations of abuses to include violation of the right to privacy, acts of tortures and degrading treatment, homicides and disappearances, as exemplified in the case of Mr. Fredy Nuñez, who went missing in 2001.[12] The Working Group received a list from an NGO of all penal processes underway against the leaders of the Juntas de Defensa del Campesinado.

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[10] Neira, Mariana, "Revista Vistazo", 2 February 2006.

[11] This is based on information submitted by CEDHU, Complaints on defence areas 2003-2005, Quito, Ecuador. Las Juntas de Defensa del Campesinado are peasants' groups that are organized in rural areas to guarantee security and to control thefts of livestock and crops. These groups were organized due to the limited capacity of the National Police in rural areas and their lack of resources. Las Juntas operate in the provinces of Bolivar, Cotopaxi, Chimborazo and Tungurahua in the Sierra and in the Provincia de los Rios by the Coast, and involve approximately 20,000 individuals.

[12] Ibid.

B. Status of the staff of PMSCs working in Ecuador

26. The Working Group recognizes the sovereign freedom of States in the signing and ratification of treaties and bilateral and multilateral agreements. However, the Working Group draws attention to the need for coherence among the constitutional norms and international obligations. In this regard, the Working Group reiterates that, according to the 1998 Constitution of Ecuador, international treaties have primacy over domestic laws.

27. On 25 November 1999, the Government of Ecuador and the Government of the United States entered into an "Agreement of Cooperation" (hereinafter "Agreement"). The purpose of the Agreement is "the granting of access to and the use of the Ecuadorian air force base at Manta to conduct detection and surveillance operations to curb illegal aerial drugs trafficking.[13] In the Agreement, the "entities of central operations and foreign command" (*"entidades del centro operativo de avanzada"*, hereinafter COA) are defined as "any individual or juridical person and its employees which have a valid contractual relationship with the United States of America".[14] The Agreement grants to such entities or individuals a series of privileges: it allows United States personnel, its clerks and the COA entities the access to and use of the Ecuadorian air force base in Manta, as well as to the port of Manta and the facilities related with the base or its vicinity.[15] The Agreement also allows the entrance to and exit from Ecuador for United States personnel working for COA without visa, by only requiring a valid passport.[16] Furthermore, the Agreement discharges all the import and export procedures, tariffs, direct and indirect taxes on products and other goods, as well as on baggage, furniture and other belongings for those serving at the location.[17]

28. The Agreement provides that "the Government of Ecuador shall grant to United States personnel and their dependants in Ecuador a legal status equivalent to that granted to administrative and technical staff of the United States Embassy, in conformity with the Vienna Convention on Diplomatic Relations of 18 April 1961".[18] The Working Group thus notes with concern the immunity that United States military and civilian contractors enjoy in Ecuador. Although the Agreement excludes civil and administrative immunity in acts carried out outside of service, it requests the prompt handover of suspects to the competent authorities of the United States.

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[13] Registro Oficial No. 326, Función ejecutiva Decreto 1505.

[14] Cooperation Agreement between the Republic of Ecuador and the United States Government, Registro Oficial No. 326, Función ejecutiva Decreto 1505.

[15] Ibid., art. II (Literal a, Numeral 1).

[16] Ibid., art. VIII (Numeral 2).

[17] Ibid., art. IX (Numerales 1 a 4).

[18] Ibid., art. VII (Numeral 1).

29. Civil society representatives in Ecuador informed the Working Group of the concerns voiced by some Ecuadorian academics and NGOs, who challenge the constitutionality of the Agreement, and that a complaint has been filed to the Constitutional Court in this regard.[19] One major concern expressed by NGOs is that the activities of PMSCs contracted to work in the base, including DynCorp, would not be limited to counter-narcotics tasks provided for in the Agreement, but to include maintenance, operational support, logistical support, crime prevention, intelligence, training (police and military), security of persons of facilities and demining.

30. The Working Group was informed by NGOs that since March 2002, DynCorp was incorporated into the base of Manta, through a contract with the United States Department of State, to provide logistical support to the United States military operating at the base. According to information received, DynCorp provides services, including administration, maintenance of installations, delivery of mail, food and beverages, protocol and transportation.[20] According to public reports, DynCorp in Ecuador employs 137 staff, including 82 Ecuadorians, with their logistical and maintenance work involving 134 foreigners.[21] The Working Group was informed by NGO representatives of an increasing number of United States contractors and military working in the base.

31. The Working Group was further informed by NGOs that on 7 May 2002 a statement of NGOs was published in the Ecuadorian press complaining that DynCorp was carrying out Manta-based counter-insurgency and anti-drug operations, which should be undertaken exclusively by agents of the United States army operating in Manta, and not by private contractors. As a result, NGOs informed the Working Group that the (then) Minister for Defence, Mr. Hugo Unda, and members of the Combined Command of the Military Forces, testified before the Commission of International Matters of the Congress. In this testimony, the authorities are reported to have explained that the activities carried out by DynCorp from the airbase at Manta were only anti-drug activities, with the United States Embassy in Ecuador also having certified that DynCorp carried out exclusively administrative and logistical tasks, i.e. not military tasks.[22]

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[19] According to professor Diego Delgado Jara, writing in the Revista Economía y Política, No. 10, Facultad de Ciencias Económicas y Administrativas, the accord is unconstitutional on 10 normative and procedural grounds: three grounds with regard to the National Congress, two grounds relevant to the functions of the Constitutional Court, and on three grounds relevant to the President and the functions of the State.

[20] *Diario Hoy*, 26 April 2002.

[21] *Diario Hoy*, 8 May 2002.

[22] *Diario Hoy*. Sección Política, 1 May 2002. However, the Working Group notes indications of the capacity of some DynCorp employees to engage in direct combat if necessary. This was publicly reported in 2001 when in the course of DynCorp's logistical operations in Colombia, its employees engaged in direct combat against Colombian rebels to rescue the crew of a helicopter that had been shot down by guerrillas. See Jeremy McDermott, "US Crews Involved in Colombian Battle", *Scotsman*, 23 February 2001.

C. Contracting of foreigners by PMSCs based in Manta

32. The Working Group reiterates the State's responsibility in the protection of nationals, and the importance of the monopoly of the State in the use of force. To ensure these principles, the Working Group recognizes the necessity of demanding registration and licensing procedures to be completed by all security companies operating in Ecuador. It is only through comprehensive regulating and monitoring of PMSCs, whether armed or unarmed and whether operating at the national or international level, that the situation can be managed and controlled.

33. In August 2005, a PMSC in Ecuador received much public attention for advertising in the press and supposedly recruiting Ecuadorians and Colombians for security work abroad. The Working Group was informed that the PMSC in question, "Epi Security and Investigations", conducted interviews for the recruitment of more than 1,000 contractors for security work in Iraq and Afghanistan. The owner of Epi Security and Investigations, a United States national, arrived in Ecuador on 29 January 2004, and worked until May 2005 in the military base of Manta as fireman, and then driver and operator for the company DynCorp.

34. According to declarations of the Ecuadorian Superintendent of Companies, Fabian Albuja, and as confirmed by the General-Attorney and other authorities in meetings with the Working Group, the company Epi Security and Investigations was neither registered with Ecuadorian authorities in Quito nor with provincial authorities in Mantabi/Porto Viejo. However, this did not hinder the company from engaging in recruitment activities, with the Working Group being informed by NGO representatives that interviews took place in Manta and in Medellin (Colombia), through advertisements in the press and via the website www.iraqijobcenter.com.[23]

35. The Working Group discussed with Ecuadorian authorities the events surrounding Epi Security and Investigations in 2005 and subsequent actions by the State. The Ministry of Foreign Affairs conveyed to the Working Group the shared understanding of Ecuadorian authorities that due to the non-registered status of "Epi Security and Investigations", these activities were denounced as illicit and did not reflect State policy. The Working Group was informed of the range of public declarations by senior Government officials at the time of the incidents, including from the Minister for Foreign Affairs, the Minister for Interior, the Minister for Defence, the Superintendent of Companies of Ecuador, the Superintendent of Companies of the province of Manabí, and the Commander of the Manta Police.[24] In September of 2006,

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[23] The website www.iraqijobcenter.com has since been closed with the following message: "Due to misusing our service by some individuals we shut down the website for one week to check all postings on our website. Our service will be back soon with new rules to overcome scams and offer good service to our members. Thank you for your visit. IJC Team." Website visited on 30 August 2006.

[24] See Metro Hoy, Section Al, 16 August 2005; *Diario Hoy*, Politics, 15 August 2005; Hoy Online, Quito, 15 August 2005; and *Diario Hoy*, Politics, 17 August 2005.

following the completion of the visit of the Working Group, the Working Group was informed that the Minister for Foreign Affairs appeared before the Commission on External Relations of the Parliament for a session addressing the subject.

36. Once the events in 2005 were reported upon, a preliminary inquiry was carried out, headed by the Manta public prosecutor, Sonia Barcia de Plúas, and steps were taken to obtain information on the supposed offence of trafficking in persons. The public prosecutor concerned initiated the investigation on the basis of media reports that an office operating in Manta was recruiting staff to work in security firms in Iraq. The police launched an official investigation of the private company and its owner, and confiscated relevant computers and disks. The Working Group was informed in meeting with the Attorney-General of Manabi of this preliminary investigation.[25] Investigations remained to be concluded at the time of the visit of the Working Group in early September 2006. The mayor of Manta in Manabi province informed the Working Group that he was among those contacting the police and calling for an investigation. The mayor further stated to the Working Group that the reported incidents were acts committed by a foreigner without the consent of authorities and without the support of the local population.

37. In meeting with the Attorney-General in Quito, the Working Group was informed that the owner of Epi Security and Investigations had left Ecuador and remained in the United States. The Attorney-General informed the Working Group of approaches made to the United States Department of Justice with requests for information concerning the owner of "Epi Security and Investigations", as he was allegedly located in Las Vegas. Having not yet received the requested information by early September 2006, the Attorney-General noted to the Working Group that this was one cause for the delay in completing the investigations.

38. The Ombudsperson of Ecuador reported to the Working Group that he has not received any complaints from individuals having served in Iraq for Epi Security and Investigations or other PMSCs. The Ombudsperson had not either received any complaint against a private contractor for having violated the rights of others. The Working Group received informal accounts from both authorities and NGO representatives that the high remunerations received by private contractors, which enabled them to send remittances to their families, might have discouraged the individuals recruited by Epi Security and Investigations from reporting publicly on their experiences of having served in Iraq.

39. NGO representatives informed the Working Group of alleged involvement of Chilean instructors and Colombian ex-military figures in the operations of Epi Security and Investigations. The Working Group also notes the consideration by several NGOs which doubted that the operations of Epi Security and Investigations could be carried out by a single individual, indicating possible connections and joint cooperation with other entities.

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[25] Report by the National Police of Ecuador, National Directorate of the Criminal Investigation Service, Manta Criminal Investigation Division, on the case of presumed trafficking in persons against Jeffrey Roberth SIPI and Martha Isabel Cañarte Delgad, August 2005.

40. The Working Group notes the calls from NGOs in Ecuador for the speedy investigation and elucidation by the relevant authorities of the situation surrounding "Epi Security and Investigations", and notes the concerns voiced by civil society over delays in completing and making public the results of these investigations. In this regard, the Working Group was informed by NGOs that when they requested further information on the investigations in August 2005, on the basis of the Freedom of Information Act, the Attorney-General referred to article 215 of the Criminal Code as a basis for not sharing information with third parties.

41. The Working Group received accounts from NGOs of prior advertisements on DynCorp's web page concerning recruitments for security work abroad. However, the Working Group has not received information that DynCorp in Ecuador has been directly involved in hiring individuals to perform security work in Iraq.

D. PMSCs and protection of oil companies

42. The Ecuadorian Constitution (art. 184) lays down that the Armed Forces have as their fundamental mission the preservation of national sovereignty, the defence of the integrity and independence of the State and the safeguarding of its legal system. The Working Group reiterates the constitutional provision in Ecuador that the National Army protects all individuals in the Republic without distinction. The Army of a State should not operate as a PMSC, offering security services for those who can pay for it, as this contravenes constitutional provisions and violates the principle of equal enjoyment of rights and security under related international human rights law.

43. The Working Group recognizes the position of the Ministry of Defence and Ministry of the Interior that petroleum facilities and their infrastructure are strategic installations which may require special protection for reasons of national security. In meeting with the Ministry of Foreign Affairs, the Working Group notes their assertion that oil companies may outsource security in order to provide additional protection to facilities and to prevent attacks. However, the Working Group is concerned by information received from NGOs and media that it is the Ecuadorian Army itself, contracted by the petroleum companies, which provide protection of wells, pipelines and other facilities owned by oil companies. The Working Group considers this contracting of the Ecuadorian Army to resemble that of engaging a private security company.

44. The Working Group was informed by NGOs of several such agreements signed in 2000 between the Ecuadorian Army and oil companies. On 1 April 2000, the Ministry of Defence and the Oil Western Exploration and Production Company in the Amazon region were reported to have signed an "Agreement of Cooperation on Military Security".[26] On 30 July 2001 the former Minister for Defence signed a "Framework Agreement" valid for five years with 16 oil companies. In this agreement the Ecuadorian Army committed to guarantee the security of the oil facilities, as well as the people that work with them "through patrolling, terrestrial and fluvial

[26] *Diario Hoy*, Politics, 7 December 2005.

journeys in the jurisdiction of the IV Division and in that of the Force of Task II, to carry out intelligence work and counter-intelligence, to make a control of weapons and explosive and of undocumented people in its jurisdiction, and to establish a net of communications".[27] The Working Group was informed by NGOs that on 26 March 2004, the Texas Petroleum Company and the Fourth Division of the Ejército Amazonas signed a similar agreement.

45. However, the Working Group notes that on 8 December 2005, the Minister for Defence, Oswaldo Jarrín, reported that the so-called "Convenios Marco" carried out between the Ministry of Defence and the oil companies to provide them security would be suspended. "The State has decided to grant to the Ministry of Energy the control of the tasks of protection of the FFAA and to guarantee transparency", Mr. Jarrín noted to the national press.[28] Nevertheless, the Working Group received information from NGOs which reflect the note from one commentator that "the security of the oil sector remains in the hands of the military. The agreements also include the rent of ships of the aviation of the Army for the transport of materials of the transnational companies".[29]

46. Furthermore, the Working Group is concerned by information received from academics, and representatives of indigenous communities, that the actions taken by indigenous peoples to claim their rights, including the right to land and the right to a clean environment, have been considered as acts of sabotage by elements of the army which are providing security services for oil facilities. In raising these concerns with the Government, the Working Group notes the position of the Ministry of Foreign Affairs that illegal acts of persons should be considered as sabotage, regardless of which community to which they belong. The Working Group was informed by the Ministry of Foreign Affairs about the implementation of precautionary measures adopted by the Inter-American human rights system to protect the rights of various indigenous communities, including the Sarayaku.[30] The Attorney-General informed the Working Group of precautionary measures pursued, including withdrawal of explosive materials in regions of oil extraction.

E. PMSCs and Plan Colombia

47. The Working Group was informed by NGOs of the so-called "Plan Colombia", which includes spraying activities which are carried out by PMSCs to combat narcotics cultivation, production and trade along the northern border zone of Ecuador and southern Colombia. The Working Group was informed of actions taken by the authorities of Ecuador with regard to the spraying activities and of their effects. In this regard, in meeting with the Ombudsperson of Ecuador, the Working Group notes and welcomes resolution No. DAP-001-2004, of the

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[27] Ibid.

[28] Ibid.

[29] "El ejército seguirá al servicio de las petroleras" *Diario Expreso*, 17 February 2006.

[30] Cf. *the Kichwa Peoples of the Sarayaku community and its members v. Ecuador*, case 167/03, report No. 62/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 308 (2004).

Ombudsperson, and resolution No. R-25-132 of the National Congress, exhorting the President of the Republic to "request and commit by means of the subscription of the agreement corresponding to their Colombian counter-parts, so that, in case new spraying is carried out, this is carried out from within Colombia, at least 10 km from the border with Ecuador, to guarantee the avoidance of further border contamination" (translated from Spanish).[31]

48. The Working Group received information that from 1991, the United States Department of State contracted the private company DynCorp to supply services for this air spraying programme against narcotics in the Andean region. In accordance with the subscribed contract of 30 January 1998, DynCorp provides the essential logistics to the anti-drug Office of activities of Colombia, in conformity with three main objectives: eradication of cultivations of illicit drugs, training of the army and of personnel of the country, and dismantling of illicit drug laboratories and illicit drug-trafficking networks. According to one public account: "DynCorp works directly with the United States military, with the Anti-Drug Directory of the police of Colombia and with the brigade against drugs of the Colombian Army … activities that International DynCorp has taken under the contract, were agreed and in connection with the precise specifications of the Office".[32]

49. During its visit to Ecuador, the Working Group received information from NGOs on the consequences of the spraying carried out within the Plan Colombia had on persons living in the frontier region.[33] An NGO report indicated that one third of the 47 women in the study exposed to the spraying showed cells with some genetic damage.[34] This investigation was undertaken

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[31] Libro Auténtico de Legislación Ecuatoriana, Resolución No. R-25-132 del Congreso Nacional, San Francisco de Quito. 11 March 2004.

[32] Deposition of the former Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, on 27 November 2001, in the case of *Venacio Aguasanta Arias, et al., v. Dyncorp, et al.*, United States District Court for the District of Columbia, case No. 1:01CV01908.

[33] Cf. Maldonado, Adolfo. "Frontera: daños genéticos por las fumigaciones del Plan Colombia. Investigación noviembre de 2002 y primeras reacciones oficiales: Defensoría del Pueblo y Congreso Nacional" Acción Ecológica y Comité Andino de Servicios, March 2004, Quito, Ecuador.

[34] Ibid. "The study establishes the relationship of the air fumigations of the Plan Colombia with damages in the genetic material. 47 women were analysed, 22 in the frontier line, in Ecuador and Colombia where they were exposed by the air fumigations from the Plan Colombia to the 'glifosato' mixture with POEA + Cosmuflux 411 F. 100 per cent of women, besides the intoxication symptoms, presented genetic damages in a third of the sanguine cells. In front of them, the group control of 25 women to more than 80 km of the fumigated area, they presented cells with scarce genetic damage; most of the cells are under good conditions."

in 2003, and demonstrates that when the population is subjected to fumigations "the risk of cellular damage can increase and that, once permanent, the cases of cancerous mutations and important embryonic alterations are increased that prompt among other possibilities the rise in abortions in the area".[35]

50. An NGO in Ecuador provided the Working Group with a copy of the demand of class action submitted before a court of the District of Columbia in the United States by a group of Ecuadorian citizens, representing approximately 10,000 persons, against DynCorp (DynCorp Aerospace, DynCorp Technical Services, and International DynCorp). This complaint concerned the spraying with toxic herbicides in Colombian territory between January and February 2001 less than a mile from their homes in Ecuador.[36] The Working Group is informed that the case was dismissed by the Court of the District of Columbia in the United States. While therefore not commenting on the allegations made and further analysing the case, the Working Group refers to this case for the sole reason that one argument presented by DynCorp before the Court offers a useful insight, and exemplifies the necessity of legislation at the national and international levels regarding PSMCs as non-State actors exercising military or security functions. In the proceedings, DynCorp alleges that the demand should be rejected in its entirety for the following, among other, reasons:

(a) The demand looks to impose responsibilities on the behaviour of DynCorp, specifically authorized by the United States Congress and as elaborated by the United States Department of State;[37] and

(b) In reference to the claim of the plaintiffs under the ATCA and TPVA of the federal Law, DynCorp "*emphasizes that it is necessary to keep in mind that the ATCA and the TVPA don't cover the behavior of the private corporations*" (italics added).[38]

51. The Working Group considers the last point raised by DynCorp imply that some States could be hiring PMSCs in order to avoid direct legal responsibilities. This legal loophole of PMSCs as non-State actors is of concern to the international community, as expressed in the resolution establishing the Working Group, and highlights the need to prepare international basic principles to ensure that private companies promote the respect of the human rights in their

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[35] Ibid.

[36] Demanda Bajo Acción de Clase. Acta 28 USC-2201. The claimants alleged that they had been subject to serious human rights abuses, "including systematic damages to their people and their properties, tortures and crimes against the humanity, in violation to the Records of Torture to Foreigners ('ATCA'), 28 U.S.A. #1350, to the Records of Protection to the Victims of Torture ('TVPA'), 28 U.S.A. #1350 …".

[37] Submission by DynCorp in the case of *Venacio Aguasanta Arias, et al., v. Dyncorp, et al.*, United States District Court for the District of Columbia, case No. 1:01CV01908.

[38] Ibid.

activities.[39] The Ministry of Defence points out that the Joint Command of the Armed Forces, pursuant to the Act governing the manufacture, import and export, sale and possession of weapons, munitions, explosives and accessories, carries out legally specified measures through the Weapons Control Department of the Command's Logistics Directorate, including the public registration of private security firms and their representatives.

IV. CONCLUSIONS

52. As for specific conclusions of their visit to Ecuador, the Working Group:

(a) Expresses its appreciation to the Government of Ecuador for the speedy invitation and cooperation to undertake the visit, which was consistent with the country's standing invitation to all special procedures mandates and its current membership in the Human Rights Council;

(b) Recognizes the efforts carried out by the Government and the Ecuadorian State on the regulation of the PMSC through legislation and regulation of the 2003 Private Security Companies and the 2005 Law on Subcontracting;

(c) Notes the immunity conferred to certain PMSCs in Ecuador, as in the case of DynCorp and their employees, with the consequence of placing them in a grey field of the legislation. In enjoying immunity, and while not constituting officials of either Ecuador or the United States, PMSCs and their employees can evade responsibility for human rights violations;

(d) Notes the situation in Guayaquil, where municipal authorities have subcontracted private security firms as a temporary measure until sufficient numbers of national police officials had been recruited and trained to meet law enforcement requirements. The Working Group invites further study and evaluation of this experience, while submitting its opinion that such privatizing of public security should be temporarily and closely monitored, and preferably avoided altogether;

(e) Notes its concern of the perception which seems to be growing among the population of security and justice being linked to private means, rather than functions ensured by State authorities. This would appear to reflect the saying: only those who can pay for it have security.

V. RECOMMENDATIONS

53. **In concluding its visit to Ecuador, the Working Group therefore:**

(a) Calls for the swift accession by Ecuador to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The Working Group notes with appreciation the positive indications from the National Congress and the Ministry of External Relations that steps are being taken in this direction;

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[39] Cf. Commission on Human Rights resolution 2005/2, para. 12 (e).

(b) Emphasizes the need for rigorous national legislation, to regulate and monitor the activities of national and transnational PMSCs, in order to ensure the responsibilities of the State to effectively protect and promote human rights. In this regard, the National Congress is encouraged to enact law No. 24804 to prohibit the recruitment, use, financing and training of mercenaries, submitted on 17 August 2005 by a Member of Parliament. An alternative approach would be to establish acts committed by mercenaries as well as mercenary-related activities as an offence in the Criminal Code.

(c) Urges the Ecuadorian authorities, especially to the Public Ministry and the General Fiscal Minister of the State, to complete promptly the investigations surrounding the PMSC Epi Security and Investigations in Manta, which offered to recruit Ecuadorian and foreign nationals for security work in Iraq. The Working Group encourages appropriate follow-up action on the basis of these investigations, and invites the authorities to share the conclusions and results thereof openly with civil society;

(d) Takes note of resolutions DAP-001-204 of the Ecuadorian Ombudsman and R-25-132 of the National Congress and urges the competent authorities to accept the resolutions emanated by these organs regarding the consequences of the spraying in the north frontier of Ecuador;

(e) While recognizing the Government's efforts and those of other organs of the Ecuadorian State to adopt measures and to establish the necessary legislation for the regulation of this sector, the Working Group notes with concern the advance of a trend and the appearance of new modalities in private security. The Working Group calls upon the authorities to be vigilant and alerts the State about the necessity to ensure that the Juntas de Defensa del Campesinado do not become paramilitary actors;

(f) Considers that the lack of complaints filed regarding the activities of PMSCs in Ecuador demonstrates the limited knowledge by the population about human rights procedures. In this sense, the Working Group invites Ecuador to pursue measures, in line with articles 3 and 16 of the National Constitution, relating to: (a) the defence, promotion and protection of the rights of Ecuadorians; and (b) the plans provided for in the Political Constitution of Ecuador, in particular the National Human Rights Programme, issued under Executive Decree No. 1527 of 24 June 1998, aimed at fostering human rights education for diverse sectors of the society in schools, jails, among vulnerable populations and minorities, and to include among them the staff of private military and security companies, so that these rights are recognized and demanded by the population.
