APPENDIX PART VIII

Selected Reports:
United Nations Human Rights Report

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Human Rights Council: Relationship Between Private Military and Security Companies and the Extractive Industry from a Human Rights Perspective

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Relationship between private military and security companies and the extractive industry from a human rights perspective

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

Summary

In the present report, the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination gives a summary of its activities from August 2018 to July 2019, then focuses on the relationship between private military and security companies and the extractive industry from a human rights perspective. The extractive industry in fact constitutes an important client base for such companies, and has been associated with allegations of serious human rights abuses and violations for many years.

The Working Group sets out key considerations with respect to the context of the extractive industry in which private military and security companies operate. It examines their role alongside other security providers in complex and often opaque mixed security arrangements. It outlines relevant international and national law provisions and other instruments, as well as non-binding initiatives of relevance to the conduct of security actors in the extractive industry, considering the limitations of these initiatives in the absence of strong national and international legally binding regulations for private military and security companies. The Working Group then examines the most commonly reported human rights abuses and violations committed and facilitated by private military and security companies mandated by extractive clients. It analyses the factors relating to the lack of accountability and effective remedies for victims for such abuses and violations.

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The Working Group is concerned at the lack of a clear, precise and legally defined role for each security actor operating in the extractive industry. This further raises concerns about the conduct of security providers, including private military and security companies, and their involvement in alleged human rights violations and abuses committed in the context of natural resource exploitation. The Working Group calls for transparency in security arrangements for extractive operations, given that the current opacity around them obstructs the identification of perpetrators and thus undermines efforts to achieve accountability and effective remedies for victims.

The Working Group concludes the report with recommendations to assist States, the extractive industry, private military and security companies and other stakeholders to strengthen human rights protections in the delivery of security in the extractive sector. In particular, it urges States to strengthen regulation and oversight of private military and security companies, including by supporting international and national legally binding instruments. It also calls upon States, extractive companies and private military and security companies to be more transparent with regard to security arrangements and responses to allegations of abuses.

I. Introduction

1. The present report is submitted pursuant to Commission on Human Rights resolution 2005/2, in which the Commission established the mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, and Human Rights Council resolution 33/4, in which the Council renewed that mandate. The report covers the activities of the Working Group since its previous report to the Council (A/HRC/39/49).

2. The Working Group is mandated by the Human Rights Council to monitor and study the effects of mercenaries and mercenary-related activities, as well as the impact of the activities of private military and security companies on human rights, particularly on the right of peoples to self-determination. Following on from its previous studies on national regulations of the said companies and on the privatization of security in places of deprivation of liberty (see A/HRC/36/47 and A/72/286), the Working Group continues its examination of the human rights impact of private military and security companies operating in specific sectors. In the present report, the Working Group considers the role of private military and security companies in the extractive industry, a sector that has witnessed significant growth across the world, which has in turn stimulated demand for security services in extractive projects, particularly for projects located in areas marked by weak governance or armed conflict.

3. In the present report, the Working Group seeks to shed light on the relationship between private military and security companies and the extractive industry and its human rights impact. In recent years, these two sectors have been at the centre of a number of allegations of human rights abuses in different regions. Although the human rights impact of the extractive sector on the one hand and the private military and security sector on the other have been studied and analysed and led to the establishment of several international initiatives, the interaction between the two has received significantly less attention.

4. The Working Group therefore explores the role played by private military and security companies within security arrangements put in place by extractive companies. It also examines the human rights impact of private military and security companies working for extractive companies, analyses the existing regulatory framework applicable to these actors, and considers the challenges in achieving accountability and providing remedies to victims of human rights abuses committed by private military and security companies in the service of extractive companies. Lastly, the Working Group makes recommendations to States, private military and security companies, extractive companies and other stakeholders.

II. Activities of the Working Group

5. On 31 July 2018, the term of office of Gabor Rona ended. The Working Group is grateful for his valuable expertise and contribution to initiatives and activities implementing the mandate during his six-year tenure. On 1 August 2018, following her appointment by the Human Rights Council at its thirty-eighth session, Sorcha MacLeod joined fellow members Jelena Aparac, Lilian Bobea, Chris Kwaja and Saeed Mokbil.

A. Thirty-fifth, thirty-sixth and thirty-seventh sessions of the Working Group

6. The Working Group held its thirty-fifth and thirty-sixth sessions in Geneva from 26 to 30 November 2018 and from 1 to 5 April 2019 respectively; it held its thirty-seventh session in New York from 15 to 19 July 2019. During the sessions, members of the Working Group held bilateral meetings with representatives of Member States, international and non-governmental organizations and other relevant interlocutors. At the thirty-fifth session, the members reflected on their future thematic priorities. At its thirty-sixth session, the Working Group convened two expert consultations with a view to gathering information for its thematic reports. Members and external experts engaged in vibrant and rich discussions on the gender dimensions of the private military and security industry on 2 April, and shed light

on the relationship between private military and security companies and the extractive industry on 3 April.

B. Communications

7. Since its previous report to the Human Rights Council, the Working Group addressed a number of communications jointly with other special procedure mandate holders. Communications were addressed to the Governments of Armenia, Australia, Belgium, Canada, France, Iraq, Kyrgyzstan, Tunisia, Turkey and the United Kingdom of Great Britain and Northern Ireland regarding the risk of arbitrary deprivation of life and violations of other human rights of foreign nationals facing prosecution and trials in Iraq in relation to their alleged membership in the Islamic State of Iraq and the Levant. A communication was addressed to the Russian Federation and the Central African Republic in relation to the killing of journalists who were reportedly investigating the activities of a private military security company. Communications were also addressed to the United States of America and to two companies based in the United States, and to Australia, highlighting allegations of human rights violations and abuses committed in two migrant detention centres that are serviced by private military and security companies.[1]

C. Country visits

8. Country visits are a key element in the implementation of the mandate of the Working Group, providing an insight into concrete practices and challenges on the ground, helping to reveal the impact of the activities of mercenaries, mercenary-related actors and private military and security companies on human rights while engaging constructively with States and other stakeholders on issues pertinent to the mandate. Many of the requests made by the Working Group for country visits are, however, not met favourably. The Working Group nonetheless strives to ensure a balanced geographical coverage in its visits.

9. In this regard, the Working Group recalls the annex to Human Rights Council resolution 16/21, in which the Council urged States to cooperate and assist the special procedures by responding in a timely manner to requests for information and visits. The Working Group also draws attention to the remarks made by the Secretary-General to the Security Council on mercenary activities in Africa on 4 February 2019, when he urged all countries to cooperate with the Working Group, including those to which the Working Group had sent an official visit request.

10. During the period under review, the Working Group conducted an official visit to Switzerland from 13 to 17 May 2019, and will present a report on the visit to the Human Rights Council at its forty-fifth session.

D. Selected activities of the Working Group members

11. On 17 October 2018, a member of the Working Group, Jelena Aparac, made a presentation to the First Standing Committee (on Peace and International Security) of the Inter-Parliamentary Union (IPU) at a hearing on “the non-admissibility of using mercenaries as a means of undermining peace and violating human rights”. The Working Group subsequently commented on the draft resolution prepared by the Standing Committee thereon. The IPU Assembly adopted a resolution on the non-admissibility of using mercenaries and foreign fighters as a means of undermining peace, international security and the territorial integrity of States, and violating human rights by consensus on 10 April 2019.

12. On 23 January 2019, Ms. Aparac delivered her remarks at the Security Dialogue on Private Military and Security Companies, organized by Switzerland as chair of the Forum for Security Cooperation of the Organisation for Security and Cooperation in Europe, in Vienna.

[1] Summaries of the communications are available from www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx.

Ms. Aparac provided an overview of the Working Group's mandate, elaborated on elements defining private military and security companies in national and international law, and addressed some of the current challenges and opportunities with respect to that sector.

13. On 4 and 5 February 2019, Lilian Bobea took part in a multi-stakeholder workshop on the regulation, oversight and governance of the private security industry in the Caribbean region, organized by the Caribbean Community Implementation Agency for Crime and Security and the Geneva Centre for the Democratic Control of Armed Forces in Trinidad and Tobago. The event provided an opportunity to interact with high-level State representatives, private companies and civil society from a region with a growing private security industry.

14. On 20 and 21 May 2019, Sorcha MacLeod participated in the first session of the open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and security companies, held pursuant to Human Rights Council resolution 36/11. On behalf of the Working Group, she expressed support for a legally binding instrument that would complement the existing regulatory framework laid out in other relevant instruments. She stressed the importance of ensuring strong human rights safeguards in any future regulatory mechanism on private military and security companies, such as transparent and effective State accountability mechanisms that ensure access to justice and remedies for victims of human rights abuses or violations of international humanitarian law related to the activities of private military and security companies; addressing jurisdictional issues and mutual legal assistance for effective vetting and accountability processes; and adequate and effective training. She also pointed out that any future regulatory mechanism should extend to subcontractors.

III. Relationship between private military and security companies and extractive industry companies from a human rights perspective

15. Historically, States have been the principal clients of private military and security companies, the activities of which were mainly examined through the lens of the privatization of State functions. More recently, however, private actors have become more prominent as clients of private military and security services. This shift in the client base towards non-State clients raises numerous questions regarding the evolving activities of private military and security companies in both the public and private spheres, given also that private actors appear to be given prerogatives traditionally attributed to the State, such as the use of force. Moreover, this trend may have implications for accountability for any human rights abuses committed by such companies. Indeed, if ensuring accountability for abuses committed by private actors contracted by States has proven difficult, the question of how this can be achieved in the framework of private-private relationships raises understandable concerns and merits special attention, particularly in the context of armed conflict, where corporate actions can give rise to international crimes (see A/HRC/17/32).

A. Definitions and methodological considerations

16. In the present report, the Working Group refers to extractive companies as "any company in the industries of extracting, harvesting or developing natural resources or energy", the definition used by the Voluntary Principles on Security and Human Rights.[2]

17. The Working Group furthermore understands a private military or security company to be "a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities". It defines military services as "specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite

[2] See www.voluntaryprinciples.org.

surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities", and security services as "armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities".[3] In the present report, the Working Group also refers to "private security" for different private security actors operating in the extractive industry (see para. 25 below).

18. The Working Group prepared its report on the basis of information obtained from a variety of sources. In July 2017, it organized an expert consultation on private military and security companies and the extractive industry in New York. In April 2019, another consultation, bringing together experts from Africa, Latin America, the Caribbean and Europe, was held in Geneva. In January 2019, a public call for submissions was issued.[4] The Working Group also relied on desk research and interviews with stakeholders.

19. The Working Group faced several challenges in preparing the report. The limited amount of recent, publicly accessible data proved to be a particular challenge when assessing current trends, while the lack of transparency associated with these sectors often obscured the distinction between different security providers operating in the extractive industry and their respective roles and responsibilities. While obtaining relevant data was challenging in peaceful contexts, gaps in information were even more significant in situations of armed conflict.

B. Extractive industry

20. Today, the extractive industry is an important client base for private military and security companies. It is also an industry with formidable economic power and considerable political influence, albeit regularly associated with concerns over access to land and human rights abuses on local communities. Data from 2016 show that extractive corporations are among the world's highest earning entities, and significantly exceed the national gross domestic revenues of many countries.[5] In 2018, five out of the 10 largest corporations in the world by revenue were oil and gas companies.[6] While the industry has been traditionally dominated by companies registered in the global North conducting operations in natural resource-rich countries in the global South, in recent years the market has diversified; currently, the two highest earning extractive companies in the world are from China.[7] The impact of the extractive industry on socioeconomic conditions and human rights has often been analysed through the North-South lens; such a premise is evolving, however, because of the strengthening of economic ties among countries in the global South.

21. At the same time, the extractive industry constitutes a major source of national revenue and exports for some States, especially those from the global South. According to the World Bank, 22 States – 10 of them in Africa, and none in the global North – rely on natural resources for more than 20 per cent of their gross domestic revenue.[8] Proceeds from the extractive sectors have regularly been associated with corruption and the accrual of wealth by ruling elites rather than improving everyday living standards. Moreover, the extractive industry is a high-investment sector with long-term commitments by companies to operate in a defined part of the territory where they exploit resources.[9] Such companies make multi-billion-dollar investments to build, maintain and operate extractive projects and employ a large number of workers, some of them recruited from abroad; they therefore have

[3] A/HRC/15/25, annex, art.2.

[4] See www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/Callforsubmissiones PrivateMilitarySecurity.aspx.

[5] Global Justice Now, "10 biggest corporations make more money than most countries in the world combined", 12 September 2016.

[6] See https://fortune.com/global500/search/.

[7] Ibid.

[8] https://data.worldbank.org/indicator/NY.GDP.TOTL.RT.ZS.

[9] Hugo Slim, "Business actors in armed conflicts: towards a new humanitarian agenda", *International Review of the Red Cross*, vol. 94, No. 887, p. 911.

the potential to have a long-lasting impact on local communities. They also have a vital interest in securing their operations by relying on different types of security providers, including, to a large extent, private security.[10]

22. The economic benefits generated by the extractive industry may lead some States to put its interests ahead of those of the local population and to treat those opposed to extractive projects as a threat to the State's economic interests. Indeed, some States invoke national economic and security interests to justify the suppression of dissent to extractive projects, for example by criminalizing environmental rights defenders.[11]

23. The extractive industry is also intrinsically linked to the issue of access to land. Traditionally, military and economic approaches were pursued to secure access to land. The military approach involved different strategies to acquire natural resources, ranging from direct conquest and invasion to secret wars.[12] The economic approach seeks to gain access to a territory through economic competition. While these approaches are distinct, they are often complementary in so far as security can be "sold" on several levels: by training public or private armies, performing intelligence services, or selling military equipment.[13] In some situations, extractive corporations and security actors work together to suppress opposition and impose their control over land rich in natural resources by repressing local communities, including indigenous peoples.[14]

24. Studies have shown that the more a State is rich in natural resources, the more likely it is to be subject to long-lasting armed conflicts and civil wars.[15] The exploitation of natural resources can therefore play a major role in conflict dynamics; for instance, non-State actors are more likely to profit from easily extractable resources, such as gemstones or gold, as their extraction does not entail sophisticated technology, important investments and specialized knowledge. By contrast, resources requiring feasibility studies, teams of experts and advanced technology, such as oil and gas, are more likely to benefit States.[16] The link between the exploitation of natural resources and armed conflicts has been widely recognized, including by the Security Council, for example in its resolutions 1173 (1998), 1237 (1999) and 1306 (2000) and 1343 (2001) on the conflicts in Angola, Sierra Leone and Liberia, and more recently in the Central African Republic (see A/HRC/39/70). These events also led to the adoption of several national and regional laws pertaining to "conflict minerals".[17]

C. Security providers in the extractive industry

25. Given the economic interests prevalent in the extractive industry and the environments in which they operate, it is not surprising that security plays a fundamental role in the exploitation of natural resources. Although a number of actors actually provide security services to the extractive industry, their respective roles, responsibilities and reporting lines are not always legally defined and are rarely publicly disclosed. In general, there are three

[10] See submission by the International Commission of Jurists.

[11] Jen Moore, *In the National Interest? Criminalization of Land and Environment Defenders in the Americas*, MiningWatch Canada and the International Civil Liberties Monitoring Group, August 2015.

[12] Jelena Aparac, "La responsabilité internationale des entreprises multinationales pour les crimes commis dans des conflits armés non internationaux", PhD dissertation, Université Paris Nanterre, 2019.

[13] Ole Kristian Fauchald and Jo Stigen, "Corporate responsibility before international institutions", *The George Washington International Law Review*, vol. 40, No. 4 (2009), p. 1033-1034. See also Andrew Feinstein, *The Shadow World: Inside the Global Arms Trade* (Picador Paper, London, 2012).

[14] See for example https://spcommreports.ohchr.org, communication PHL 1/2019.

[15] Karen Ballentine and Heiko Nitzschke, eds., *Profiting from Peace: Managing the Resource Dimensions of Civil War* (London, Lynne Rienner Publishers, 2005) See also International Committee of the Red Cross, "Le droit international humanitaire et les défis posés par les conflits armés contemporains", 31 October 2015.

[16] Aparac, "La responsabilité des entreprises". See also Paivi Lujala, "Deadly Combat over Natural Resources Gems, Petroleum, Drugs, and the Severity of Armed Civil Conflict", *Journal of Conflict Resolution*, vol. 53, No. 1, 2009.

[17] For example, Directive 2014/34/EU of 26 June 2013 and Regulation (EU) 2017/821 of 17 May 2017, outlining supply chain due diligence obligations for European Union-based importers of specific resources from conflict-affected and high-risk areas.

types of security providers in extractive operations: security professionals directly employed by an extractive company ("in-house security"); private military and security companies contracted by the company; and State security forces operating in and around the extractive site. More often than not, extractive companies rely on all these actors, resulting in what appear to be complex and fluid security arrangements to the general public. In some contexts, paramilitary groups and non-State armed actors may also be involved. Transparency with regard to private security arrangements within the extractive industry may be further complicated by the use in some regions of both formal private military and security companies (that is, those registered and authorized to offer security services in accordance with relevant national rules and regulations) and informal private security providers (those operating without a licence or with links to criminal entities).

26. According to information received by the Working Group, extractive companies contract private military and security companies to provide a broad range of "traditional" security functions, such as devising risk assessments and mitigation measures, securing and guarding premises, securing the transportation of extractive products, and conducting security training for onsite extractive staff. For these purposes, extractive companies contract either international or local private military and security companies, with further subcontracting possible. Private military and security personnel are not usually authorized to carry or use firearms or live ammunition, although many seem to be equipped with non-lethal weapons, such as tear gas.

27. In areas characterized by weak governance and in the absence of effective State security forces, extractive companies may, however, rely on private security (in-house and private military and security companies) to secure their operations. This may also be the case when State security forces have limited capacity and are asked to concentrate on key threats to national security. In such cases, private military and security companies can be engaged to perform functions beyond the regular ones; for instance, in one country, mining companies reinforced their private security personnel in response to a high risk of kidnappings of foreign national employees, coupled with additional security measures by State security forces.[18] Particularly acute security threats, such as criminal piracy, trafficking cartels, guerrilla forces and expropriation efforts by corrupt government regimes,[19] may also lead extractive companies to contract private security services.

28. In the specific context of armed conflict, the Working Group was informed about past situations where private security personnel, employed or contracted to support an extractive operation, allegedly conducted military-like operations either on their own or with the support of the State.[20] Depending on the particular aspects of such operations, determined on a case-by-case basis, such actions may qualify as direct participation in hostilities, in which case the relevant provisions of international humanitarian law would directly apply to those private actors. In such cases, the distinction between security and military services is blurred, even though a private military or security company might identify itself only as a security provider. In other cases, States have sought to augment their military capacity by engaging private military or security services in exchange for access to and proceeds from extractive operations. One well-known example is the involvement of Executive Outcomes in diamond mining in Sierra Leone.[21] Reports indicate, however, that such practices, whereby private military services are provided in exchange for mining or oil concessions, may be continuing in more recent conflicts.

29. Data shared with the Working Group by one extractive company illustrate how different types of security providers may be engaged in the same extractive project.[22] In this specific case, the contracted personnel largely outnumbered the security professionals

[18] Submission by the Business and Human Rights Resource Centre.

[19] Carlos Díaz Bodoque, "PMSC's and Extractive Industries in Southern Africa: a Good Business for Everyone?", Current Affairs.

[20] See for example Occidental lawsuit (re Colombia), Business and Human Rights Resource Centre, 18 February 2014.

[21] Sabelo Gumedze, "Addressing the use of private security and military companies at the international level", Institute for Security Studies, 2009.

[22] Newmont, Annual Report on the Voluntary Principles on Security and Human Rights, 2019.

directly employed by the company. Another international extractive company, however, informed the Working Group that it prefers to employ in-house security directly, both as a means to strengthen its relations with local communities living near its extractive projects and to have direct control over its private security personnel.

30. This also points to the awareness of some extractive companies of the reputational risks associated with allegations of misconduct and abuses by security providers operating in and around their sites. In some instances, extractive companies are more inclined to rely on their own employees or contractors than on State security forces in order to maintain direct influence and control over conduct by means of company policies and regulations, contracts, training and direct reporting lines. Moreover, extractive companies are likely to carefully weigh how to engage with State security forces in contexts where these forces have been accused of committing human rights violations. The reality of managing security in complex situations therefore presents sensitive challenges to extractive companies.

31. The Working Group received information suggesting that, in the context of mixed security arrangements at extractive sites, State security forces would normally be tasked with discharging major security operations, such as managing security during large-scale protests and demonstrations. In some countries, such as Ghana, where private security personnel are prohibited from carrying firearms (see A/HRC/39/49/Add.1), extractive companies rely on public forces in the event of serious security incidents. Some States have also established specialized units within the national police that are dedicated to protecting extractive and other large-scale projects.[23] While States have a duty to maintain public peace and order throughout their territory, including in locations near extractive operations, in some instances, the close association between State security forces and extractive companies raises questions about whose interest the public forces are defending. For example, the Working Group was informed that police personnel may be stationed within facilities belonging to an extractive company or that a police station was opened in a community as a result of the start of extractive operations in the area.

32. The line between public and private interests in the provision of security services to the extractive industry may be further blurred when State security agents perform public duties at one time and are permitted to work as private security personnel at another, in some cases reportedly keeping their uniforms and firearms (see A/HRC/7/7/Add.2). The contracting of police personnel to perform private security tasks is legal in some States, for example in Peru, where a large number of contracts between the national police and extractive companies has been documented.[24] Agreements of this type find their legal basis in the "extraordinary police services" that can be rendered by off-duty police personnel, pursuant to law No. 1267 on the National Police of Peru and related Decree 003-2017-IN.[25] At other times, State security agents are said to receive payments in-kind from an extractive company.[26] In one instance, a memorandum of understanding obtained by a non-governmental organization included provisions for a mining company to provide police with fuel, vehicles, maintenance, a per diem and other types of monetary support, accommodation and meals, and administrative support.[27]

33. State security personnel "moonlighting" by working as private security guards in parallel to their public functions can lead to confusion over their respective roles and responsibilities, in particular with regard to the appropriate use of force.[28] This also inevitably complicates attempts to clearly categorize security providers in the extractive industry, especially given that the nature and content of agreements between State security forces and

[23] Nigel D. White and others, "Blurring Public and Private Security in Indonesia: Corporate Interests and Human Rights in a Fragile Environment", *Netherlands International Law Review*, vol. 65, No. 2, 2018.

[24] EarthRights International, Informe: Convenios entre la Policía Nacional y las empresas extractivas en el Perú. Análisis de las relaciones que permiten la violación de los derechos humanos y quiebran los principios del Estado democrático de Derecho, 2019.

[25] See Jose Saldana Cuba and Jorge Portorcarrero Salcedo, "The Violence in Laws: The Use of Force and the Criminalization of Socio-Environmental protests in Peru", Derecho PUCP, 2017, No.79.

[26] Submission by MiningWatch Canada.

[27] Ibid.

[28] Alan Bryden and Lucia Hernandez, "Addressing Security and Human Rights Challenges in Complex Environments", *Business and Human Rights Journal*, vol. 1, p. 153.

extractive companies are often not disclosed to the public. As the Inter-American Court observed in a case regarding oil exploration and exploitation without free, prior and informed consent, the signing of agreements between States and extractives companies regarding the provision of security by the armed forces or the national police "did not promote a climate of trust and mutual respect".[29]

34. The different forms of cooperation between State security forces and private security personnel employed or contracted by extractive companies therefore form a complex web of relationships in which it is often difficult to identify or distinguish one security actor from another. Moreover, many studies and reports on the impact of the extractive industry on human rights describe security providers in such general terms as "mine security" because they, understandably, focus their attention on specific at-risk groups or on particular violations and abuses. For stakeholders striving to shine a spotlight on the respective chains of commands and roles and responsibilities of State security forces and private security personnel employed or contracted by an extractive company, transparent and up-to-date information is generally difficult to obtain, thus frustrating any efforts to make security providers accountable for their actions.

IV. International and national legal instruments and complementary initiatives

A. International human rights law and international humanitarian law

35. International human rights law, applicable in peace and armed conflicts, requires States to respect, protect and promote human rights. National and international human rights mechanisms recognize that corporate actors have an independent responsibility to respect, and not to infringe upon, human rights, and that the State has an obligation to prevent, or otherwise investigate and provide redress for, harm caused by such actors. This implies that the State should take all appropriate measures, including adopting legislation and administrative instructions to regulate corporations.

36. By its very nature, the extraction of natural resources touches upon core elements of the right of peoples to self-determination, one of the fundamental tenets of the international system. The Charter of the United Nations, in its Articles 1, 2 and 55, recognizes the principle of self-determination, and accords it equal recognition as the principles of international peace and security. It is further recognized as a rule of international customary law.[30] The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights begin with the right to self-determination (common article 1). In order for people to exercise that right, they should have the freedom to pursue economic, social and cultural development, and to "freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence".

37. International human rights instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, and related jurisprudence specifically highlight the rights of indigenous peoples in this regard, in particular securing indigenous peoples' free, prior and informed consent over developments proposed on their lands. Indigenous peoples and others have the right to oppose and actively express opposition to extractive projects, including by organizing and engaging in peaceful acts of protest (A/HRC/24/41, para. 19).

38. International humanitarian law provides a set of rules applicable to armed conflicts, distinguishing between international armed conflicts between two or more States and non-international armed conflicts (civil wars). According to common article 1 to the four Geneva Conventions, States are obliged to respect and ensure respect for international humanitarian

[29] Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, para. 193.

[30] Patrick Dailler., Mathias Forteau and Alain Pellet, *Droit international public*, 2009, p. 578.

law. According to common article 3, it applies to all actors on the territory of the State affected by armed conflict, including State and non-State actors, such as individuals and corporations. International humanitarian law is recognized to be the lex specialis, prevailing over other sets of rules, including international human rights law when the two branches of law are in contradiction. A private military or security company and its personnel providing services to an extractive company in a situation of armed conflict is therefore bound by the rules set out under international humanitarian law, and should respect human rights. The status of private military and security personnel under international humanitarian law is determined according to the nature and circumstances of the functions they perform, in particular whether they participate directly in hostilities.

B. Legal instruments and tools at the national and company levels

39. Extractive companies, like other business entities, are subject to national law in the country in which they operate. Nonetheless, in the majority of States studied by the Working Group, national laws and regulations governing private military and security companies (where such laws and regulations exist), contain inadequate human rights safeguards (see A/HRC/36/47). In addition, very few States have national legislation that provides for corporate criminal liability.

40. Even in the absence of such legislation, States have other means to strengthen human rights protections in the context of security arrangements in the extractive industry and to render the provision of security services to the extractive industry transparent and thereby more accountable. The following instruments provide opportunities to clarify the respective roles and responsibilities of different security actors and to regulate the activities of private security providers:

(a) Concession agreements (State – extractive companies): States can determine specific conditions under which a concession to extract may be granted, including human rights standards, the delineation of security roles and responsibilities between public security forces and private security personnel, mechanisms for security actors operating at the extractive site to engage and consult with local communities, and criteria for the engagement of private military and security companies, such as only hiring those that are registered in accordance with relevant national regulations.

(b) Regulation, licencing and certification of private security services (State – private military and security companies): States have the authority to define, monitor and sanction non-compliance with rules and requirements of private military and security companies, including building in adequate human rights safeguards. In addition, States may set up independent mechanisms to monitor the actions of such companies and vet their personnel operating in the extractive sector.

(c) Memoranda of understanding and similar agreements (State – extractive company): Memoranda of understanding and similar agreements on security arrangements between the State and the extractive company also provide an opportunity to clearly and publicly specify the roles and responsibilities of public and private security personnel in extractive operations and the terms under which they operate, and also the human rights standards and obligations of all actors providing security services, including private military and security companies.

(d) In-house security (extractive company – employee relationship): Extractive companies have control over recruitment processes, policies, regulations and training, and disciplinary procedures applicable to their own security staff. They also have the authority to make these instruments known to the public and to include human rights standards throughout (for example, by means of thorough vetting of prospective staff, specific human rights policies and training).

(e) Procurement procedures and private contracts (extractive company – private military and security company): Extractive companies determine the terms and conditions of calls for tenders and contracts with private military and security companies. Transparency with regard to privately contracted security personnel could be helpful in improving relations

with local communities, addressing some of the shortcomings in identifying and investigating perpetrators of alleged abuses and violations, and helping to distinguish between personnel under the direct authority and responsibility of extractive companies on the one hand, and other actors on the other.

(f) Subcontracting of security services (private military or security company to another): Subcontracting should not compromise the human rights standards to which private military and security companies must adhere, and these standards should be fully reflected in contracts with subcontractors.

41. In reality, the above tools do not appear to be utilized to further human rights protection, possibly owing to pressure on host Governments not to introduce stricter rules on extractive companies in order to keep incentives for foreign investment. Indeed, some southern countries have been accused of violating the principles of international economic law when they attempt to promote good governance and respect for human rights for corporate actors.[31] In addition, concession agreements, memoranda of understanding on security arrangements, and company-level data and policies on its security setup are often not publicly available, which prevents public scrutiny and accountability for the contents, implementation and overall conduct of security providers in the extractive industry.

C. Soft law and voluntary initiatives

42. In the absence of international legally binding regulation of corporations, recent decades have witnessed a proliferation of codes of conduct and multi-stakeholder and other initiatives for specific business sectors. Two main initiatives have been developed for the private military and security sector. The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict contains a compilation of international law obligations pertaining to private military and security activities that are addressed primarily to States, and focus on armed conflicts. International and non-governmental organizations, companies that contract private military and security companies, and the companies themselves are invited to use the good practices section of the document, which should be adopted during peacetime. The International Code of Conduct for Private Security Service Providers sets out human rights responsibilities and good governance principles and standards for its member companies, regardless of the identity of their clients.

43. Several sector-specific initiatives exist for extractive companies, such as the Extractive Industries Transparency Initiative, the Alliance for Responsible Mining and the Kimberley Process. The Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector, adopted by the Organization for Economic Cooperation and Development in 2017, proposes a framework for identifying and managing risks with regard to stakeholder engagement activities to ensure that companies play a role in avoiding and addressing any adverse effects. It briefly refers to security issues, including recommendations on contracting and managing private security personnel, and avoiding a violent response when taking security precautions in situations where there is opposition to the extractive project.

44. Two instruments apply to both private military and security companies and extractive companies, namely the Voluntary Principles on Security and Human Rights and the Guiding Principles on Business and Human Rights. The Voluntary Principles were developed almost 20 years ago to guide companies operating in the extractive industry on how to assess risks and to take public and private security measures in a manner that respects human rights. They include a number of important principles guiding private security conduct and functions; for example, they state that services provided by private security personnel should only be defensive and preventative, and not include activities that are exclusively the responsibility of the State. Private security should not employ individuals “credibly implicated in human rights abuses”, and should use force only when strictly necessary and with proportionality,

[31] See *Chevron vs. Ecuador*, International arbitration award, March 2019; see also Moore, *In the National Interest?*.

citing applicable international guidelines such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. They should not violate the rights of individuals to freedom of association and peaceful assembly, and there should be mechanisms for reporting and investigation, and referrals to local authorities in the event of inappropriate physical force.

45. Guidance tools have been developed through the Voluntary Principles to assist companies in identifying clear standards for and expectations of private security personnel, and to verify compliance through inspection, review and audit of the contract. In 2013, an audit protocol was developed to assess compliance with key indicators, such as whether a security and human rights training package existed and was in use, and whether security and human rights were taken into account and included as a requirement in a service contract with a private security contractor. A toolkit "on addressing security and human rights challenges in complex environments" also exists as an online knowledge hub and dedicates a module to working with private security providers.[32] The Voluntary Principles Initiative, currently comprising 10 Governments, 30 corporations and 15 non-governmental organizations, was established to promote respect for human rights when providing extractive industries with security services, in accordance with the Voluntary Principles; to strengthen implementation and accountability, and to expand the membership of the Initiative. One concrete outcome of the Initiative was the establishment of in-country implementation working groups in six countries.[33]

46. Much criticism has nonetheless been directed at the Voluntary Principles with regard to their limited impact for communities near extractive operations.[34] Multi-stakeholder collaboration, facilitated by the above-mentioned in-country groups, has provided a platform for highlighting critical issues and identifying practical solutions. In Ghana, for example, this has involved discussions among communities, non-governmental organizations, government ministries and the private security sector on broader issues of private security sector reform (see A/HRC/39/49/Add.1). Notwithstanding, the Voluntary Principles and other similar non-binding initiatives have to date failed to bring about the fundamental and practical changes that would strengthen prevention of abuses, or to bring about effective remedies for victims when required.

47. One common feature of the above-mentioned initiatives is the emphasis on corporate due diligence as a means for companies to manage proactively any potential or actual adverse impact on human rights. While a few States have introduced mandatory due diligence in national legislation, in most there is no legal obligation to do so, and no judicial monitoring of compliance. In this context, there has been a tendency for companies to focus on process rather than on tangible results for local communities.

48. Efforts are under way by the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.). In parallel, discussions are similarly being held by the open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and security companies. In the light of the experience accumulated over the years with regard to the limited effectiveness of non-binding initiatives, it is clear that national and international legally binding instruments are necessary to achieve greater protection of human rights in the area of private military and security companies and extractive industries, as well as in other business sectors.

[32] The hub, developed and managed by the Democratic Control of Armed Forces and the International Committee of the Red Cross, is available from www.securityhumanrightshub.org.

[33] Submission by the Voluntary Principles Secretariat.

[34] See Nigel D. White et al., "Blurring Public and Private Security in Indonesia: Corporate Interests and Human Rights in a Fragile Environment", *Netherlands International Law Review*, vol. 65, No. 2, 2018.

V. Human rights abuses by private military and security companies working for extractive companies

49. Human rights violations and abuses in the context of the exploitation of natural resources have been widely documented (see A/HRC/39/17 and A/HRC/41/54). Cases are most frequently reported in areas rich in natural resources in Latin America, Africa and Asia, and to a lesser extent in North America. A plurality of actors are allegedly responsible, including States and non-State actors, such as private military and security companies, paramilitary and criminal security groups, at times acting individually and at others undertaking coordinated action.

50. Those most at risk of human rights abuses are indigenous people and communities, environmental and other human rights defenders, and artisanal miners. Across these categories, women are frequently affected. In March 2019, the Human Rights Council adopted, by consensus, resolution 40/11, in which it recognized the critical role of environmental human rights defenders and the threats they faced from State and non-State actors. The consequences of abuses on the physical and mental health of victims are, in many cases, long-standing and severe.

A. Freedom of assembly and expression

51. In many extractive operations, risk assessments conducted by private military and security companies play an important role in creating or sustaining the narrative with regard to those who should be identified as a security risk. Individuals who oppose extractive projects, including by engaging in peaceful protests, appear to be depicted as a risk to public order, despite their rights to freedom of assembly and association. The Working Group received information regarding the direct involvement of private military and security companies in the repression of opposition activity to extractive projects; for example, in the United States of America, protests against the Dakota Access Pipeline that transports crude oil, passing through the lands of the Standing Rock Sioux Tribe, were allegedly met with excessive use of force by State law enforcement officials, the North Dakota National Guard and private military and security companies. Operating together, these parties were accused of using excessive force – including in one instance private military and security service staff allegedly using guard dogs – against protestors. According to media reports, the daily situation reports of one of the private military and security companies operating around the pipeline suggested that it had used infiltration techniques to sow discord and monitor actions of protestors in an attempt to thwart protest activity and to identify threats to the pipeline.[35] Tactics to divide local communities between supporters and opponents of extractive projects have also reportedly been used elsewhere to curb resistance by environmental and human rights defenders, indigenous peoples and others.

52. Artisanal and small-scale miners are also often categorized as a security risk without adequately taking into account broader socioeconomic factors. Figures show that artisanal and small-scale mining is an important livelihood and income source, with some 100 million workers and their families around the world dependent on artisanal mining compared to approximately 7 million people in industrial mining.[36] At the same time, some small-scale mining may pose security risks, as seen in Ghana, where reports were received of violence associated with unauthorized mechanized mining on concessions granted to large-scale legal mines. Armed illegal miners reportedly attacked and shot at unarmed mine security personnel, while police reportedly shot at unauthorized miners (see A/HRC/39/49/Add.1).

B. Physical integrity rights

53. Allegations brought to the attention of the Working Group include surveillance, death threats or other types, intimidation and campaigns to discredit those opposing extractive

[35] Alleen Brown, Will Parrish and Alice Speri, "Leaked documents reveal counterterrorism tactics used at Standing Rock to "defeat pipeline insurgencies", *The Intercept*, 27 May 2017. See also https://spcommreports.ohchr.org/Tmsearch/TMDocuments, JUA USA 7/2016 and JUA USA 14/2016.

[36] See www.worldbank.org/en/topic/extractiveindustries/brief/artisanal-and-small-scale-mining.

projects. There have also been allegations of extrajudicial killings, enforced disappearances, torture and ill-treatment, and sexual and gender-based violence, particularly in certain Latin American, Asian and African countries.[37] In other reports, in two mines, one in Asia, the other in Africa, of rocks being thrown at men, women and children, and of large rocks being pushed down on villagers, particularly in pits.[38] In some instances, the injuries sustained were aggravated by a lack of access to medical care, which was either not affordable or too distant. For example, in 2015, the Working Group documented the alleged beating, abduction and murder of environmental human rights defenders by private security guards hired by a subsidiary pulpwood supplier company in Indonesia.[39]

54. Global Witness, a non-governmental organization that tracks killings of land and environmental defenders, concluded that 2017 was the most dangerous year on record, when 207 community defenders were allegedly killed by State forces and non-State actors, of which eight killings were attributed to private security. Agribusiness and mining were the most dangerous sectors.[40]

C. Right of peoples to self-determination

55. Private military and security companies and other security actors provide the conditions that allow extractive companies to operate. Therefore, in situations where extractive companies fail to respect the right of peoples' to self-determination, such companies may be considered to be complicit in those abuses. This includes cases where indigenous peoples have been denied free, prior and informed consent in the awarding of concession contracts on their territorial lands, or when the extraction of natural resources prevents them from having access to their land, thus depriving them of their traditional means of livelihood. This is particularly noticeable in cases of forced displacement and evictions and of violence against environmental and other human rights defenders whose access to resources and the means necessary to sustain their livelihood is barred, with a significant impact on living standards and potential to exacerbate inter- and intra-community conflicts over the scarce resources that remain available. The loss and erosion of land, coupled with environmental pollution caused by the extractive operations and in some cases burning of homes in villages in and around the mine lease area, have in cases led to severely overcrowded and unhealthy living conditions.

D. Complicity in violations by State security forces

56. Some forms of cooperation between extractive private security personnel (in-house or private companies) and State security forces raise particular concerns from a human rights perspective. In addition to the elements described above, the Working Group is aware of several cases in which private security personnel allegedly assisted and supported State security forces in forcibly removing people or communities from their lands in the vicinity of an extractive site. For example, both public and private forces have been accused of concerted harassment, violence and destruction of property and possession of property of a local family near the Yanacocha mine in Peru.[41] In other instances, private military and security companies have contributed to violations by State security forces by providing logistical support, such as vehicles or intelligence obtained through video surveillance installed around the mine site.[42]

E. Sexual and gender-based violence

57. Allegations of widespread sexual violence, including rape and gang rape, have been reported around extractive projects, in particular those located in remote areas. Around the

[37] See for example the submission by the University of Denver.
[38] Submission by Mining Watch Canada.
[39] See https://spcommreports.ohchr.org/Tmsearch/TMDocuments, IDN 3/2015 and OTH 3/2015.
[40] Global Witness, "At What Cost? Irresponsible business and the murder of land and environmental defenders in 2017", 2018.
[41] Joint communications JUA PER 1/2016 and JUA PER 3/2015. See also www.frontlinedefenders.org/en/case/case-history-maxima-acuna-de-chaupe.
[42] Submission by Rights and Accountability in Development.

Porgera Joint Venture gold mine in Papua New Guinea, 119 women were allegedly subjected to sexual violence and excessive use of force by mine security and police guarding the mine. One of the victims alleged that she had been gang raped by five security personnel who caught her on the Kogai waste dump while she was selling betel nut to informal miners working there in September 2009. The acts allegedly took place during a period when the mine was majority-owned and operated by Canadian mining company Barrick Gold Corporation.[43] Like in so many cases of sexual violence, the perpetrators of these violations have not been brought to justice. Survivors of sexual or gender-based violence often suffer stigma and exclusion from their communities, leaving them in a vulnerable situation. The significant challenges that survivors of sexual violence, especially women, face have been well documented,[44] and may be further exacerbated when private military and security companies are involved.

VI. Accountability and access to remedy challenges

58. A major challenge to securing accountability for human rights abuses by private security companies operating in the extractive industry is, given the fluid and complex security arrangements that characterize the sector, the difficulty of identifying perpetrators. Private military and security companies and other private security personnel may not be easily identifiable in the absence, in many instances, of a uniform and/or insignia. This is problematic in cases in which such companies have directly committed human rights abuses. In other cases, where they are complicit through actions that enable, facilitate or contribute to abuses by extractive companies or violations by the State, documenting their involvement is equally challenging.

59. The opaque security arrangements prevalent in much of the extractive sector make it extremely difficult to ascertain chains of command, responsibilities and levels of coordination among the different security actors, and undermine transparency and monitoring efforts. Furthermore, it is usually difficult to find public confirmation of the identity of subcontractors in the event that they are hired.

60. A number of lawsuits involving human rights abuses by private security working in the extractive industry were brought to the attention of the Working Group. These were mainly legal claims for redress before national courts of the country where the parent company of the subsidiary running the project was domiciled. In most cases, a settlement was reached out of court, usually comprising financial compensation and sometimes short-term work contracts, and therefore falling short of achieving accountability and holistic remedies for the victims. Some cases were also dismissed owing to jurisdictional issues.

61. In the host State of an extractive company, access to justice is often compromised for a number of reasons, such as the high costs associated with bringing a case to court, and the lack of legal aid funding; lack of legal professionals with the requisite knowledge and/or experience and/or willingness to pursue such sensitive cases in some jurisdictions; fear of retaliation for reporting abuses, and lack of victim and witness protection; weak judicial systems; and lengthy court proceedings. Moreover, such abuses are committed in a climate of impunity, in which perpetrators are rarely held to account, which further discourages victims from reporting abuses. Fundamentally, there is also an imbalance of power between the company (extractive or private military or security company) and the individuals and communities affected by those companies' operations. This was striking in the case of *Chevron vs. Ecuador*, where the principles of international economic law, notably the corporation's right to profit, were favoured over protective human rights laws promoted by the State.

62. In the company itself, grievance mechanisms are frequently not known to persons with a reason to lodge a complaint, and in some cases are set up on an ad hoc basis. Where complaints are lodged, many are viewed as "unsubstantiated" or "inconclusive". They are

[43] Joint communication AL PNG 2/2017.

[44] See Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice; see also OHCHR, *Women's Rights are Human Rights*, 2014.

often poorly equipped to deal with the complexities of serious human rights abuses, such as the protection of victims from reprisals from alleged perpetrators and providing other forms of support to engage meaningfully with the process, especially for victims that have not been appropriately informed about their rights. In some cases, when victims have engaged with the company's grievance mechanism, they have been asked to sign a legal waiver that denies them the right to seek judicial remedy or that restricts their access to justice. They also fail to meet international standards of independence of investigations, when the latter are conducted by company employees. These mechanisms therefore also fail to provide justice and remedies to victims of serious human rights abuses.

VII. Conclusions and recommendations

63. **Private military and security companies are among a number of actors providing security services to extractive companies, amid generally complex and opaque security arrangements within the industry. In this context, they have been known to directly commit human rights abuses, as well as to facilitate abuses and violations committed by others, working under contract from extractive companies, and sometimes alongside State security forces. The Working Group is concerned over the lack of transparency with regard to the actors engaged in securing extractive operations and their respective roles, responsibilities and chains of command. The ambiguity surrounding the provision of security services in the extractive industry reinforces the lack of accountability and the unchecked power experienced by victims of human rights abuses and violations with respect to extractive corporations and their affiliates, including private military and security companies. In the view of the Working Group, there is a vital need to define the role of each security actor, and to introduce greater transparency and access to information, coupled with stronger monitoring and oversight of private military and security companies and other actors providing security services to the extractive industry in order to effectively prevent, address and remedy any abuses committed by private military and security companies in the service of extractive companies.**

64. **Although initiatives have already been taken to raise standards and respect for human rights, they are non-binding and have made only limited progress with regard to those affected by extractive operations. First and foremost, it is incumbent upon States to fulfil their international human rights obligations by making prompt efforts to address human rights concerns arising from the relationship between the extractive industry and private security. Secondly, as an industry that wields significant economic power and represents a major client base for private military and security companies, the extractive sector has the potential to leverage its influence by insisting that private military and security companies deliver services respectful of human rights of all stakeholders affected by extractive operations, and not commit human rights abuses or facilitate human rights abuses and violations by others. Lastly, private military and security companies should adopt policies and measures to avoid operating in environments with human rights risks and to redress human rights abuses should they be committed. In the light of the conclusions, the Working Group makes the recommendations below.**

A. States

65. **States should strengthen their regulation and oversight of private military and security companies with a view to improving human rights protections and taking into consideration the multiple sectors in which such companies operate, including the extractive industry. This should include strict processes of licensing and vetting, and provisions on mutual legal assistance.**

66. **In this regard, States should support international legally binding instruments on transnational corporations and other business enterprises and on the activities of private military and security companies, respectively. States should also enact other relevant legislative reform, notably on mandatory human rights due diligence and corporate liability.**

67. **States should utilize the tools at their disposal fully (see para. 40 above) in relation to security arrangements in the extractive industry, by building in human rights guarantees into their concession agreements, memoranda of understanding and other similar documents with extractive companies, and increase their capacity to monitor private military and security sector actions, including when private military and security companies are operating in remote locations.**

68. **With a view to increasing transparency, States should make public the agreements that they enter into with extractive companies, including those with a bearing on the provision of security services. Such agreements should clearly demarcate the respective roles and spheres of action for different security providers operating in and around the extractive site.**

69. **States should ensure that private military and security company personnel who have committed human rights abuses are brought to justice, and that victims are afforded effective remedies.**

B. Extractive companies

70. **Extractive companies should make public information regarding security arrangements in their operations. This should include key aspects of contractual agreements with private military and security companies, memoranda of understanding with State security forces, and rules and procedures guiding in-house security, and should publicize agreements and rules on the use of force by security providers. They should also issue periodic reports, including detailed information regarding the number and nature of complaints, the alleged involvement of security providers, and how complaints have been addressed. Investigation policies and procedures should also be publicly available.**

71. **Extractive companies should include human rights-related clauses and conditions in their calls for tenders and contracts with private military and security companies, notably with regard to expectations of professional and human rights-compliant conduct by private military and security personnel. This should include detailed rules on the use of force, the frequency and content of human rights training, expectations regarding vetting of employees, reporting on security incidents, appropriate coordination with State security forces, specific standards and certification required by private military and security companies, and restrictions and requirements for subcontracting security services.**

C. Private military and security companies

72. **Private military and security companies should make public the codes of conduct they expect their personnel to respect, and be transparent about the activities they carry out while working for the extractive company. To facilitate identification of their personnel, such companies should ensure that their employees wear a uniform or insignia that makes them distinguishable from other security providers operating in the same area.**

73. **Private military and security companies should ensure that their employees respect human rights and international humanitarian law, as applicable. To enable them to do so, all employees should have adequate and continuous training on human rights and international humanitarian law. Such companies should conduct extensive background searches on their employees to ensure they have not been involved in misconduct during previous assignments. They should also consider how their regular security activities may be used by other actors who commit human rights violations and abuses, and take steps to mitigate the risks of becoming complicit in those violations and abuses.**

74. **Private military and security companies should only respond to public and transparent calls for tenders issued by extractive companies. They should also publicly and periodically report on security incidents, including those in which their personnel**

may be involved in human rights abuses, and take steps to address them, in accordance with human rights standards and a victim-centred approach.

D. Multi-stakeholder initiatives and others

75. **States, extractive companies and private military and security companies should take all possible steps to strengthen the implementation of the Voluntary Principles on Security and Human Rights so that they have a meaningful impact on individuals and communities affected by extractive operations. They should continue efforts to expand the membership, increase public reporting around implementation, and increase the number and effectiveness of in-country working groups.**

76. **Increased monitoring of actions of private security providers, including of private military and security companies, should be ensured, including in remote locations, with a view to strengthening documentation of violations and abuses. In this process, the Working Group encourages human rights mechanisms, civil society organizations and others to make every effort in their investigations and reporting to identify perpetrators, to the extent possible.**

Selected Reports: United Nations Human Rights Reports

Firsthand observations of conditions surrounding the Dakota Access Pipeline delivered by Chief Edward John, Expert member of the U.N. Permanent Forum on Indigenous Issues

Report and Statement from
Chief Edward John
Expert Member
of the
United Nations Permanent Forum on Indigenous Issues

Firsthand observations of conditions surrounding the Dakota Access Pipeline
(North Dakota, USA)
November 1, 2016

In response to an October 28, 2016 letter of invitation (attached) to me as an Expert Member of the UNPFII from Standing Rock Sioux Tribal Chairman, David Archambault, I traveled from my community to North Dakota to see, firsthand, the conditions that he, his peoples and those from other communities have been facing in relation to the clearing of the right of way and subsequent construction of the Dakota Access Pipeline.

The deep sense of urgency in Chairman Archambault's letter is clear:

> The oil pipeline is proposed to cross the Missouri River or Lake Oahe, which is the Tribe's primary source of water, without our consent and without consultation with the Tribe… Currently, we are experiencing violence and intimidation from state law enforcement, private security as well as the North Dakota National guard which are moving to forcibly remove us from our encampment located on unceded Treaty lands. Over 120 arrests have been made in the last two days, and tear gas, mace, compression grenades and other forms of violence have been used against tribal members and our supporters representing over 300 US Native Nations who are peacefully protecting our human, environmental, cultural and Treaty rights.

I have spent the last three days (Oct. 29-31, 2016) in the Oceti Sakowin Camp and surrounding area in dialogue with many who are willing to share their experiences and views with me. However, I was not able to speak with all those who wished to talk. Their stories are important and must be heard. There are at least 3 separate camps in the area. I also met for several hours with senior commanding law enforcement officers from various parts of the state, who are now stationed in Morton County sheriff's office. They shared their perspectives about the October 27th arrests at the "north camp" on Highway 1806.

Mr. Baskut Tuncak, UN Special Rapporteur on Human Rights and Hazardous Substances and Wastes (informally "Toxics") was also present in his personal capacity and he too listened and met with those in the camp and in the surrounding area. Amnesty International has also sent several representatives to monitor and observe developments at Standing Rock. Mr. Roberto Borrero [Taino], from the International Indian Treaty Council (IITC), an NGO in general consultative status with the UN, traveled with me to observe and listen. I was advised that Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, who has a comprehensive, direct mandate from the Human Rights Council concerning these specific rights and issues, has been officially invited by the US Department of State to visit the United States, including Standing Rock Sioux territory and peoples.

The following information is based upon eyewitness accounts and my direct dialogue with numerous individuals presently in North Dakota at the site near the DAPL, many of whom are members of the Great Sioux Nation and the Standing Rock Sioux, in particular.

Threats to water source

Given the fact I was in the area for only three days this report necessarily reflects my observations from this perspective. I trust that the Special Rapporteur on the Rights of Indigenous Peoples will visit the area soon. Regardless, it is clear to me that the project has and will adversely impact the Standing Rock Sioux and their waters specifically, as well as cultural, spiritual, sacred and ancient village sites on their lands in their territory.

After much public protest the initial pipeline route because of the possible contamination of water sources due to potential pipeline failures, it was re-routed to an area now in question: in and through un-ceded Sioux Treaty lands and directly adjacent to and upstream from the Standing Rock reservation and their communities. The proposed pipeline construction route will cross the Missouri River/Lake Oahe immediately above the communities on the Standing Rock Sioux reservation. There are serious over-riding concerns about contamination of their primary water source in the event of a pipeline failure. I was shown a map by Tribal leaders of the areas adjacent to the reservation that reflect a significant number of confirmed pipeline breaches and oil spills. In fact, the only area where there are no oil spills is on the reservation itself.

Land rights and construction on Sioux territory

The Chairman of Standing Rock Sioux, the Chairman of the Cheyenne River Sioux and Sioux Elders and spiritual Leaders explained that the rights of the Sioux are recognized and affirmed in their treaties, agreements and other constructive arrangements with the United States, in various court decisions, in the US Constitution and in international human rights instruments. Despite such recognition, their rights are being violated by decisions made with respect to the pipeline project traversing un-ceded Sioux territory.

The pipeline right of way is now on lands, described by local enforcement officials as "private lands", adjacent to the Standing Rock Sioux reservation but which the Sioux leaders describe as un-ceded Sioux lands. Tribal Chairman Archambault advises me that he has been in dialogue with the State Governor who insists that the protestors must leave the area. His firm response has been that the company must stop construction. State interests are clearly aligned with the pipeline project and its construction.

With a noticeable federal government *absence,* the Standing Rock Sioux have been left to address and fight this matter all on their own, without the voice and aid of the United States government. Fortunately, they are not alone. The matter has gained the attention and public consciousness and attracted significant national and international support. One comment made to me was that when "Black Lives Matter" escalates to a serious public and security issue the US government is quick to act, but when the message is that "Indigenous Lives" matter, the message is not heard and little to nothing is done by the US government.

Construction on the right of way is now proceeding on a 24-hour work day basis, seven days a week. The construction is visible from the "south camp" as equipment is literally bulldozing their way to the

Missouri River/Lake Oahe. I was informed that the pipeline company has not received approval to drill on the shores of and under the Missouri River/Lake Oahe. Given that there are no approvals or authorizations in place, it is a significant expense and exposure for the company to proceed with the work. Critical legal issues have yet to be addressed and resolved as the Standing Rock Sioux have stated consistently and unequivocally that they own the river bed under which the proposed pipeline is to be built. Although the federal government has called on the company to voluntarily halt construction, the company's decision to proceed with right of way clearing and construction has put the Standing Rock Sioux in a difficult and untenable situation. They are not prepared to stand down from protection of their primary water source or the continued violations of the Treaties and human rights as articulated in various international human rights instruments.

Sacred sites

I am advised by a Sioux elder and cultural leader that so far some 380 cultural and sacred sites along the pipeline route have been destroyed by work associated with the right of way clearing for the pipeline. She confirmed that on October 31 an ancient village site near the "north camp" will be destroyed. She unequivocally exclaimed that "they want to take our footprints off the land, so they could take us off the land". She advises that the Sioux have done extensive research and have documentation of these sites. The estimated Standing Rock Sioux tribal members are 10,000 strong and that the Tribe holds some 2.3 million acres of land. They have managed to protect their lands from oil development even though for the last 6 years there have been extensive interests expressed by numerous oil and gas companies.

"War zone" conditions

Far beyond the original demands of the Standing Rock Sioux concerning lack of consultation or consent, on October 27, 2016 conditions have dramatically escalated. These matters are now potentially even more significant when compounded by the tumultuous events surrounding the arrests of over 141 individuals. The Sacred Stone Spirit camp and all those gathered advised me of the fact that they have acted based on peaceful protest and prayer with the objective of protecting the water and opposing the pipeline construction under the Missouri River. They have taken the name "water protectors". I was repeatedly told that no one is armed and "protectors" have not initiated any violence or violent protest.

I was repeatedly told of constant aerial surveillance by drones, airplanes and helicopters and on-the-ground surveillance by officers in vehicles stationed on high points of land adjacent to the south camp. While on site some Standing Rock, members pointed out several law enforcement vehicles parked on a nearby hill that is known by tribal members as a burial site. This together with the presence of significant levels of "security" forces from local police, neighboring state police forces, DAPL private company security contractors, and the national guard of North Dakota have all contributed to heightened insecurity and intensity.

Tribal authorities and those at the south camp indicated that there have been provocateurs present. They stated that one such incident involved an individual carrying a "semi-automatic rifle" with a clip for bullets, threatening to fire. He was quickly surrounded by many of those from the south camp and disarmed. He was subsequently arrested by the BIA police -- significantly not by the Morton County sheriff's officers who were nearby. This incident occurred off the Tribal reservation boundaries. The individual held pipeline company identification documents and the vehicle he was driving indicated that

it was signed out that morning from the company's compound. This individual has apparently been turned over to the Bureau of Criminal Investigations. I am uncertain as to whether any criminal charges have been laid. Details on this issue will certainly be revealed, including criminal proceedings, in due time. The result of this incident triggered a procedure for all those entering the south camp being required to sign in, be cleared and authorized to enter.

All these actions have directly contributed to a "war zone" atmosphere and intensified levels of scrutiny. On the bridge near the south camp I witnessed burned out vehicles stationed to prevent passage either way. Large concrete blocks have also been laid across the bridge beyond the destroyed vehicles. Nearby I met officers in body armor, fully armed and in full camouflage gear. Although they tentatively extended a hand of courtesy, I felt as though I was in an armed conflict zone on foreign soil. I felt compelled to show them my Expert Member of the Permanent Forum on Indigenous Issues identification from the UN.

Treatment of Standing Rock Sioux members and other supporters

The treatment of the water protectors and their supporters from across the western hemisphere, beginning on October 27, 2016 has included:

--being surrounded by heavily armed law enforcement officers, armed officers on ATV;
--being forcefully taken down to the ground by officers;
--violent mistreatment during arrest including use of "billy clubs", hands tightly bound with plastic zip ties;
--confiscation of their "chanupas" [sacred pipes and medicine bundles]; and
--confiscation of vehicles and other private property.

In one instance a confiscated sacred medicine bundle has not been returned. A Sioux spiritual leader stated that the significance of the sacred bundles is like sacred church objects: "that the church clergy have their bibles and as spiritual guides we have our chanupas."

Seven young horse riders, involved in the clash between law enforcement and the "water protectors", stated that they and their horses had been shot at in very close range with either bean bag guns or rubber bullets. One rider explained he was shot three times with a bean bag and when his horse was shot he was knocked off his horse. They were situated between protestors and police officers to protect those who were praying. All the riders were arrested and their property as well as their horses and riding gear confiscated. Three of the horses, including gear, have not yet been returned. One elder woman stated that she was holding her sacred bundle skyward in prayer and was suddenly forced to the ground, crying out as she watched her sacred bundle fall to the ground.

Those arrested were strip searched, many of them women who described this as humiliating in the extreme. Those arrested and detained were physically marked with numbers on their arms which they describe as being akin to the branding of Jewish persons in Nazi Germany. Many described how they were denied food and proper medical attention, including several who are diabetic. They were placed in detention in what they described to me as "dog kennels" or cages located inside the garage of the Morton County jail on a bare concrete floor. These "temporary holding cells" were said to hold up to 25 persons each. Despite the cold concrete flooring neither cots nor blankets were provided. After being

processed at this site many were then sent to other prisons, some over 4 hours away, for further processing.

Those arrested were not told why they were being arrested nor the charges they would face. They only learned of the charges after they were arraigned and released. All individuals arrested were charged with either misdemeanor and/or felony offences including maintaining a public nuisance; trespass on the private property of the pipeline builder; engaging in a riot; criminal conspiracy; and endangerment by fire. Upon release, with bond payments in the form of cash as high as $1,500.00, many were left on their own to return to their respective camps. Of course, many do not have such cash on hand. Fortunately, many such costs have been paid through a fund set by the Standing Rock Sioux legal team for this purpose.

There is clearly high tension and palpable anger in the main camp and with the leadership because of the conduct of the arrests and the subsequent jailing. Many, including Indigenous spiritual leaders, described to me the extensive psychological trauma experienced by those who were praying and singing and those in a sweat lodge located at the site. Legal counsel and human rights observers are documenting, through their interviews with the arrested protestors, the type, level and proportionality of response by law enforcement officers. As well as journalists and many on site have been developing extensive photo and video records.

Regarding the many stories of violation of civil and political rights, the arrest and criminalization of the over 141 individuals engaged in the protest of the construction of the Dakota Access Pipeline raise serious human rights issues. I expect the very significant and numerous details surrounding these matters will form a significant component in both the prosecution and defense of those charged. I understand these cases will be before the courts as early as mid-November and early December 2016.

The alarming acts that criminalize Indigenous peoples in their attempts to safeguard their human rights and fundamental freedoms that is unfolding in North Dakota should prompt the United States government into action. Indeed, this is one of the most alarming facts about the situation in North Dakota: the total lack of presence by the United States government.

Insecurity intensifies

As noted above, the senior law enforcement officials that I met with were directly involved in the planning and execution of the arrests of protestors at the north camp on October 27th. The incident commander advised that Americans have the right to protest but overall their role was to "defend the rule of law". They stated that they originally intended to move in on Wednesday, but they delayed until Thursday to give protestors another day to move from the north camp.

Their narrative about the events of the day is decidedly different from that of many others. They stated that they had been dealing with numerous individuals from the camps for the past 3 months and had a variety of minor and ongoing confrontations with various protestors, including some that they described as "militants who hijacked Tribal authorities" and further stated that no one should "use ideology to hurt people and trash property".

They stated that there has been a total of some 412 arrests, 9% of whom were from Standing Rock, including Standing Rock Sioux Tribal Chairman Dave Archambault. They spoke about their well-developed and executed plans in dealing with those protestors who were blocking a public road and/or trespassing on private property, without any serious incidents or deaths. They stated that their plan included a "restrained approach" and that they had "eased forward" slowly. They indicated that their specific action on October 27th was triggered by purported unauthorized obstruction of a public highway and of criminal trespass onto private property -- that of the pipeline company – by protesters.

Per these officers, the protestors were told to leave the obstruction on the highway and to end their trespass onto private property. Those who left were not arrested. Those who remained were arrested and transferred to the Morton County jail. As the 42 beds in the jail were in use, the arrested protestors were lodged in "temporary holding cells" recently built by a fencing company. I was further told that those arrested were treated with respect, fed, clothed and their medical needs attended to. Law enforcement officials denied allegations of human rights violations or abuses.

Regardless, this incident caused an immediate and dramatic increase in tension and a new level of state betrayal and rising hostilities towards law enforcement officials. It is my hope that those who have shown restraint and a modicum of respect for others continue to deal fairly and honorably with the Standing Rock Sioux tribal members and their political leadership. It must be understood that merely sending in police and security officials is absolutely no way to address the comprehensive and significant concerns raised by the Standing Rock Sioux.

In summary, this is understandably very complex with numerous legal and political matters, with two primary but very different narratives. However I cannot, nor will I, minimize or disregard in any the very compelling stories of those leaders, elders, cultural and spiritual leaders, supporters from many other Indigenous Nations -the "water protectors" who, many with tears of trauma, came forward freely, spoke with me openly, showed me their injuries, bruises, black ink markings on their arms, court documents as evidence of the criminalization of their protest, the necessity to appear in a criminal court to answer to the charges laid – all wondering about how and why this would happen in America.

There is the very important and critical role of the spiritual and cultural leaders. As they spoke, it was clear that they were providing guidance and counselling to those at the camps. They addressed the significant foundation of legal rights of the Sioux, including the Sioux Treaties with the US, the numerous court decisions and the many agreements entered with the US over time. They were clear that the camps must espouse peace and non-violence in their protests, that no one should be injured or killed, and that no one should use arms in any form.

<u>Lack of presence by the United States, human rights violations and need for engagement</u>

The total lack of presence and action by the United States government, at the federal level must be addressed. In addition to the Bill of Rights, the United States must be reminded of the ratification of the International Covenant on Civil and Political Rights as well as the 2010 public pronouncement of support for the UN Declaration on the Rights of Indigenous Peoples. If the US chooses not to act in response to the alarming actions being manifested in North Dakota, their rhetoric within the halls of the UN are nothing more than empty, meaningless promises.

In the context of the US re-election to the UN Human Rights Council on Friday, October 28, 2016, US Secretary of State John Kerry pronounced that the US would "work closely with the international community to address urgent and serious human rights concerns worldwide" and that "we look forward to cooperating with other Council members to address human rights concerns, advance human rights around the world" while simultaneously there are ongoing violations of civil and political rights being perpetrated against numerous individuals gathered in North Dakota. Furthermore, the United States is far from alignment with the Indigenous human rights affirmed in the UN Declaration on the Rights of Indigenous Peoples.

Specifically, it appears that the government of the United States and its political subdivisions at the state and local level are in violation of numerous provisions of the ICCPR. Furthermore, numerous provisions of the United Nations Declaration on the Rights of Indigenous Peoples have not been upheld, specifically considering what I witnessed, Article 7 [addressing physical and mental integrity, liberty and security of person as well as safeguards against genocide and any other act of violence] and Article 8 [destruction of culture, cultural values and integrity as distinct peoples] as well as Article 19 of the UN Declaration are of central concern.

Clearly, the UN Declaration is equally relevant to the inherent land rights of the Standing Rock Sioux, which derive from among other sources, the Treaty of 1851 and the Treaty of Fort Laramie of April 29, 1868 between the Great Sioux Nation and the United States. The 1868 Treaty originally provided for lands from the 46th parallel of north latitude to the east bank of Missouri River, south along the east bank to the Nebraska line, then west to the 104th parallel of west longitude [15 stat. 635]. I understand that there is substantial concern regarding un-ceded tribal territory. Therefore, the important, outstanding issues concerning the lands, territories and resources of the Standing Rock Sioux require immediate discussion and resolution. Numerous individuals have confirmed that there has been no consultation by the federal government related to the DAPL project.

I was told that an environmental impact statement issued by the company itself confirmed that over 380 sites would potentially be destroyed by the DAPL project despite the numerous federal laws and policies concerning such sacred, historical and archaeological sites ranging from the American Antiquities Act of 1906, the National Historic Preservation Act of 1966, the National Environmental Protection Act as well as the international law, and international human rights instruments, including the UN Declaration. I am advised by Tribal authorities and elders these sites have now been destroyed.

Regardless of both domestic and international law in favor of the Standing Rock Sioux, the pipeline construction has already damaged the security and integrity of the Standing Rock Sioux and the many others that have come to stand in solidarity with people of the Great Sioux Nation. Specifically, the owners and investors have in fact destroyed archaeological, historical and sacred sites of the Sioux.

Conclusion

I understand from Chairman Archambault that the Standing Rock Sioux have transmitted urgent human rights appeals to four Human Rights Mandate Holders, jointly with the International Indian Treaty Council, on August 19th, 2016 and September 4th, 2016. I fully support this action and urge the respective Special Rapporteurs to take this matter up immediately and furthermore, to implore the United States to take concrete action on an urgent basis. I further recommend and respectfully request

that the UN Committee on Elimination of Racial Discrimination consider undertaking an Early Warning and Urgent Action procedure on the basis of information reflected herein.

The United States, as a demonstration of its recent commitments to protect against human rights violations, must live up to its international human rights commitments with respect to Indigenous peoples and swiftly reverse its current approach of criminalizing Indigenous human rights defenders – those standing up for their solemn treaty rights to lands, territories and resources and their inalienable human rights.

More significant, in light of the nation-to-nation relationship that the Standing Rock Sioux and the Great Sioux Nation overall has with the United States government, the US must fulfill its trust responsibility and fiduciary obligations. The United States has a legal obligation and "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes in the United States, including the Standing Rock Sioux. There is no question that it is "one of the most important principles in federal Indian law." And, this federal Indian trust responsibility and fiduciary obligation includes protection of tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to the Standing Rock Sioux, including their "legal duties, moral obligations, and the fulfillment of understandings and expectations" of the Great Sioux Nation, especially when their lives and their cultural integrity is at stake.[1]

Furthermore, I strongly encourage the UN Special Rapporteur to visit Standing Rock on an urgent and priority basis to examine this difficult situation where the Sioux are left with protest as their main, perhaps only option, in their struggle to protect their lands, waters, sacred sites and territories. Their Treaties guarantee significant rights. Clearly, US laws and international instruments recognize and must assure their survival as Indigenous peoples and their dignity and well-being. No one should ignore, be indifferent nor run roughshod over these.

The stories of the Tribal leaders and those at the camps that I have heard, including those from the many Indigenous youth, women and men from diverse nations and communities as well as the non-Indigenous activists and journalists who are in support of the rights of Indigenous peoples are compelling and must not be ignored nor treated with indifference. I call upon the United States government to intervene to promote and protect the human rights affirmed in both the ICCPR and the UN Declaration to curb the discriminatory, retaliatory actions against the Indigenous peoples gathered in North Dakota and those being victimized in response to this escalation of violence.

The situation overall is not good. Winter weather is approaching. The protestors vow to stay despite this. There is much at stake.

[1] http://www.bia.gov/FAQs/