United Nations A/HRC/WG.10/1/4

General Assembly

Distr.: General

22 November 2011
Original: English

Human Rights Council
Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies
First session
Geneva, 23–27 May 2011

Summary of the first session of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies

Chairperson-Rapporteur: Luvuyo L. Ndimeni (South Africa)

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I. Introduction

1. The Human Rights Council decided, in its resolution 15/26, to establish an open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by 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.

2. In its resolution 15/26, the Human Rights Council also decided that the open-ended intergovernmental working group should hold a session of five working days a year for a period of two years, and that its first session should take place no later than May 2011. In addition, the Council requested the working group to present its recommendations to the Council at its twenty-first session. Pursuant to resolution 15/26, it was decided that the working group would meet from 23 to 27 May 2011.

3. The session of the working group was opened by the Deputy United Nations High Commissioner for Human Rights, who recalled that, over the past two decades, there has been a significant increase in the number of private military and security companies around the world. She explained that these companies provided services to Governments, national and transnational corporations, non-governmental organizations, the media and international organizations. The Deputy High Commissioner noted that private military and security companies engaged in a broad range of different services in a wide variety of contexts. She pointed out that, while initially the majority of these services related to logistical and administrative support and certain guard functions, over the past years, there had been a growing involvement of private companies in functions traditionally performed by the military and other State security institutions, including in conflict and post-conflict situations. She emphasized that there was no doubt that the increase in the outsourcing of security-related State functions to private companies had raised human rights challenges and helped fuel the important discussion on the extent to which private actors can be held accountable for human rights violations, and in what way. The Deputy High Commissioner underlined the fact that, from a human rights perspective, it was important that there was no protection gap allowing for impunity. She pointed out that it was necessary to ensure that the rights of individuals were not negatively affected by the activities carried out by such private military and security companies. She recalled that States were duty-bound to protect individuals against human rights abuses by third parties, including private military and

security companies. She added that the companies themselves also had a responsibility to respect human rights. The Deputy High Commissioner concluded that, where violations occur, victims must have the right to an effective remedy, including the right to appropriate reparation for the harm suffered.

II. Organization of the session

A. Election of the Chairperson-Rapporteur

4. At its first meeting, on 23 May 2011, the working group elected Luvuyo L. Ndimeni (South Africa) as its Chairperson-Rapporteur in the absence of the Permanent Representative of South Africa.

B. Attendance

5. Representatives of the following States members of the United Nations attended the meetings of the working group: Afghanistan, Algeria, Angola, Argentina, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Costa Rica, Côte d'Ivoire, Cuba, the Czech Republic, Ecuador, Egypt, Equatorial Guinea, Estonia, France, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, India, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Jordan, Lebanon, Malaysia, Mexico, Morocco, the Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Poland, Portugal, Qatar, the Republic of Korea, Romania, the Russian Federation, Saudi Arabia, Slovenia, South Africa, Spain, Sweden, the Sudan, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay, Venezuela (Bolivarian Republic of) and Zimbabwe.

6. The African Union and the European Union were represented at the meetings of the working group.

7. The United Nations Children's Fund (UNICEF) and the World Health Organization (WHO) also participated in the session.

8. The following non-governmental organizations in consultative status with the Economic and Social Council were represented: Agence suisse de coopération au developpement économique Nord-sud, the Al-Hakim Foundation, the Association of World Citizens, the International Commission of Jurists, the International Peace Bureau and the World Federation of Trade Unions.

9. Pursuant Human Rights Council resolution 15/26, the following experts 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 attended the session as resource persons: José Luis Gómez del Prado (Chairperson-Rapporteur) (Spain); Alexander Nikitin (Russian Federation), Najat Al-Hajjaji (Libyan Arab Jamahiriya), Amada Benavides de Pérez (Colombia) and Faiza Patel (Pakistan). The other invited resource persons were Anne-Marie Buzatu, Programme Coordinator, Geneva Centre for the Democratic Control of Armed Forces; Nils Melzer, Legal Adviser, International Committee of the Red Cross; and Gerald Pachoud, Special Adviser to the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie.

C. Documentation

10. The working group had before it the following documents:

- Provisional agenda (A/HRC/WG.10/1/1)
- Programme of work
- Draft of a possible convention on private military and security companies, prepared by the Working Group on the use of mercenaries (A/HRC/WG.10/1/2)
- Submission by the Working Group on the use of mercenaries (A/HRC/WG.10/1/CRP.1)

11. The working group also had before it the following background documents:

- 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, submitted to the Human Rights Council (A/HRC/15/25)
- 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, submitted to the General Assembly (A/63/325)
- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (A/HRC/17/31)

- Montreux document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (A/63/467-S/2008/636, annex)

D. Organization of the session

12. In his opening statement, the Chairperson-Rapporteur recalled that, following the mandate given to the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, the Working Group had elaborated a draft text of a possible convention to regulate the activities of private military and security companies further to various multi-stakeholder consultations. While recognizing the initiative pertaining to the elaboration of the code of conduct for private security service providers, which attests to the need for standards in the industry, the Chairperson-Rapporteur stated that the code of conduct did not address the issue of accountability for human rights violations committed by private military and security companies. He added that regulation at the national level also had its own limitations owing to the transnational nature of the activities of such companies, which affected the ability of victims to exercise their right to an effective remedy. In recognition of the fact that there were concerns relating to the elaboration of a legally binding framework to regulate the activities of private military and security companies provided for in the draft convention, the Chairperson-Rapporteur explained that the intergovernmental working group had been established to appraise the situation, to discuss the draft convention prepared by the Working Group and to chart the way forward.

13. At its first meeting, on 23 May 2011, the working group adopted its agenda (A/HRC/WG.10/1/1) and the programme of work. In connection with the adoption of the agenda and programme of work, it was emphasized that the participation of a broader group of experts at future sessions of the intergovernmental working group would be essential, as well as that questions regarding the appropriateness and type of an international regulatory framework would remain open.

III. Introductory remarks

14. Delegations exchanged views on how expertise could be brought in from different regional and professional backgrounds for the second session of the intergovernmental working group. Some States highlighted the need for additional expertise for the future process.

15. Some delegations recalled the mandate of the intergovernmental working group, that of considering the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by 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. Some delegations cautioned against discussing matters exclusively related to the draft convention proposed by the Working Group on the use of mercenaries, and suggested that the intergovernmental working group consider other ways of regulating the activities of private military and security companies.

16. Delegations underlined the necessity to clearly define the term “private military and security companies”. Given the various situations in which these private companies are engaged and the broad range of services that they provided internationally and/or domestically, some delegations expressed the need to draw a distinction between private military companies and private security companies. It was also pointed out that a distinction should also be made between transnational and domestic companies.

17. Some delegations noted that other forums, such as the Sixth Committee of the General Assembly and the International Law Commission, were also concerned with questions relating to legal aspects pertinent to the regulation of the activities of private military and security companies.

IV. Discussions on specific topics

A. Law and practice in relation to private military and security companies

18. The topic of law and practice in relation to private military and security companies was introduced by three experts on 23 May 2011, followed by two experts presentations, held on 24 and 25 May.

19. José Luis Gomez del Prado highlighted the reasons to support the adoption of an international binding instrument to regulate private military and security companies. Referring to the right to effective remedy of victims of human rights violations, he pointed out that neither self-regulation nor national regulation could effectively address the problem of impunity of abuses caused by activities of private military and security companies. In addition, existing international law did not sufficiently address the issue of such companies. Mr. del Prado noted the potential negative impact of their activities on human rights in general, and pointed more specifically to the examples of summary and

extrajudicial executions, torture, arbitrary detention, human trafficking and the violation of peoples' right to self-determination, as well as the violations of the rights of the employees of private military and security companies. In addition, he made reference to recent positions proposing legally binding solutions from the House of Commons of the United Kingdom, the Parliamentary Assembly of the Council of Europe, and the recommendations made by the European University Institute following a study recently commissioned by the European Commission on possible European Union regulations on private military and security companies.

20. Faiza Patel explained the legal and political reasons for which international regulation of the activities of private military and security companies was needed. She pointed out that the code of conduct was an important instrument; it remained insufficient, however, in cases in which serious human rights violations occur, as its grievance mechanism was focused on reporting to the client of the companies rather than to State authorities. Moreover, the code of conduct was voluntary; as a result, it would not cover all companies. Ms. Patel also stated that comprehensive national legislation was still a rarity and, in general, lacked efficacy when it came to cases of human rights abuses for a variety of reasons. She added that, owing to the transnational nature of their work, private military and security companies could easily escape to States where no or less domestic regulation existed. Ms. Patel pointed out that, to date, private military and security companies were not direct subjects of international humanitarian or human rights instruments; therefore, they could only be regulated through States that had the obligation to ensure that their contractors respected these rules. She recalled that the Montreux document on the pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict only covered armed conflict situations, and that the specific rules contained in the good practices part of the document did not represent legal obligations. She concluded by referring to the key issue of an effective remedy that should be available to victims. In view of the absence or insufficiency of remedy mechanisms at the domestic level in a great number of cases, international regulation was needed.

21. Anne-Marie Buzatu identified the key challenges to the regulation of the activities of private security companies. Among those, she mentioned the lack of coherent international standards, the deficits in democratic and State responsibility and the lack of independent oversight and effective accountability mechanisms. According to Ms. Buzatu, the code of conduct was the result of a multi-stakeholder process that sets out obligations and operational standards for private security service providers on the basis of international human rights law. She explained that, in the code of conduct, international law standards

had been “translated” into specific principles of conduct of personnel, on the one hand, and specific principles of management and governance, on the other. Ms. Buzatu pointed out that, until an effective oversight and compliance mechanism was adopted, the process was in an interim stage where companies could unilaterally declare that they were obliged by the standards of the code of conduct. She added that the oversight and compliance mechanism would include a system of certification, a form of independent oversight by a third party, and a complaints resolution process. This mechanism will not, however, substitute criminal law, as it is only meant to complement national and international regulation. Lastly, Ms. Buzatu pointed to the role of States in a dual capacity, as client and as regulator. As clients, States could include the standards of the code of conduct in their contracts with private security companies, whereas, as regulators, they could implement procedures and policies so that the companies in their jurisdiction would have to comply with the standards required by the code of conduct.

22. Nils Melzer pointed to the increased presence of private military and security companies in conflict situations. He stated that the Montreux document contained a compilation of existing legal obligations and good practices of States with regard to private military and security companies, with a focus on operable law and State responsibility. Like the Montreux document, the objective of the code of conduct was to strengthen the protection of individuals affected by armed conflicts and other situations of violence. He stated, however, that the code of conduct had not yet developed a proper governance and oversight mechanism. The lack of a proper accountability system made it difficult to ensure respect for the code’s provisions. Mr. Melzer pointed out that self-regulation was not in itself sufficient to regulate the activities of private military and security companies, and that States remained responsible for ensuring respect for international humanitarian law and other international legal obligations in situations of armed violence. He however pointed to the added value of the code of conduct in that the industry pledged to abide by a set of standards. With regard to the draft convention, Mr. Melzer stressed that this was one initiative, among others, that aimed at strengthening the protection of victims of armed conflicts and other situations of violence. He argued that the Montreux document, the code of conduct and the draft convention were both competitive and complementary in nature. Each of the initiatives approached the issue from a different perspective while aiming at the same goal, which was to strengthen the protection of those affected by armed violence and to ensure the rule of law.

23. Gerald Pachoud introduced relevant aspects of the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to clarify standards of responsibility and

accountability for business enterprises. He referred to the Guiding Principles on Business and Human Rights (see paragraph 11 above) elaborated by the Special Representative and which were centred on three main pillars: (a) the State duty to protect from human rights abuses by third parties, including business enterprises; (b) the corporate responsibility to respect human rights; and (c) the need for improved grievance mechanisms. Regarding the second pillar, Mr. Pachoud underlined the responsibility of business enterprises to act with due diligence to avoid infringing on the rights of others and to assess and address adverse effects which with they were involved. Regarding the grievance mechanisms, he emphasized that those mechanisms should be established by business enterprises themselves to provide for avenues for remedy early on. He pointed out, however, that these grievance mechanisms should not replace domestic judicial avenues, but should rather constitute a complementary instrument. Mr. Pachoud pointed out that the Guiding Principles would be applicable to private military and security companies since they constituted business enterprises. Mr. Pachoud noted that the Guiding Principles were a risk-management tool for business enterprises. He pointed out that business enterprises, including private military and security companies, acting in situations of conflict must adhere to a higher threshold of due diligence since the risk of gross human rights abuses was heightened in conflict-affected areas. He added that, while business enterprises should respect human rights standards, States were obliged to protect human rights standards and should therefore provide business enterprises with relevant guidance. Mr. Pachoud concluded that such guidance could take many forms; adopting a convention was one possibility.

24. During the ensuing discussion, some delegations pointed out the need to gain first a full understanding of the private military and security company industry, the nature of its work, the factors that had led to its growth and the reasons for which it posed challenges for the international community. Some delegations pointed to the difficulties that the activities of transnational private military and security companies created for States in terms of management, overview and control, as well as with regard to the complex regulation of applicable laws and jurisdiction.

25. Some delegations believed that the intergovernmental working group should start by taking stock of existing national and international legal frameworks, in particular those relating to international human rights and humanitarian law. In addition, emphasis should be placed on the analysis of the implementation and enforcement of those frameworks.

26. In this connection, some delegations mentioned the value of recent initiatives, such as the Montreux document and the code of conduct. A large number of States supported

both as initiatives to be welcomed. Some delegations stated both of these most recent mechanisms should be given time to operate and prove their impact in practice.

27. Some States pointed to the fact that they had not been involved in the elaboration of the Montreux document and raised questions with regard to the absence of provisions providing for the accountability of States that recruit personnel of private military and security companies. It was also noted that the code of conduct contained certain principles stemming from human rights standards, which could be included in contracts with companies as contractual obligations. Doubts were raised, however, with regard to the enforceability of these obligations. Furthermore, it was questioned whether the grievance procedure to be established by signatory companies was an appropriate mechanism to ensure accountability. One State referred to its policy on Government use of private military and security companies, whereby the Government would only sign contracts with companies subscribing to the code of conduct. In this connection, it was suggested that the mechanism of an independent ombudsman operating in the corporate world to enforce the code of conduct could be a solution.

28. Some States emphasized the need for regulation of the activities of private military and security companies. Differing views were expressed, however, about the form that regulation should take. In this regard, some delegations noted that self-regulatory measures were insufficient to regulate the activities of private military and security companies. Some suggested that national legislation needed to be strengthened to provide for a robust framework, in particular regarding the extraterritorial activities of companies. Others argued for international regulation, pointing to the increasing number and growing power and impact of companies in the area of inherently State functions, the cases of serious human rights violations caused by their activities, and the importance of the State's role in holding individuals accountable for human rights violations.

29. Some delegations raised doubts about the appropriateness of an international convention, considering that such an instrument would primarily create obligations for States while having no direct impact on the activities of private military and security companies. Others emphasized that, if universal protection of the rights of individuals was to be achieved, a voluntary instrument would not be the appropriate way forward. In this connection, it was also mentioned that the intention to create legally binding provisions for the regulation of companies should not necessarily imply that the instrument would take the form of the draft convention as proposed by the Working Group. A non-governmental organization stated that the feasibility of an international instrument should be considered on the basis of an assessment of needs, taking into account the scope and nature of the

human rights problems arising from the activities of private military and security companies and existing gaps in the international legal framework.

30. Several delegations expressed support for the Guiding Principles elaborated by the Special Representative of the Secretary-General, and underlined the usefulness of this approach for the topic. It was noted that the Guiding Principles should be implemented by all relevant stakeholders. When discussing questions raised by delegations and experts, Mr. Pachoud pointed out that the Special Representative's mandate was to focus on business enterprises and, as such, did not examine private military and security companies specifically. Furthermore, he drew a distinction between the means and the aim, recalling that while the aim was to avoid human rights violations by private military and security companies, the means could take a variety of forms, including a convention.

B. National legislation and practices

31. Alexander Nikitin referred to the fact that regulation of the activities of private military and security companies was multi-layered, including regulations at the national, regional and international levels. He referred to national regulation in a number of countries, including the United States of America, the United Kingdom, South Africa, France, the Russian Federation and Afghanistan. At the regional level, he mentioned, inter alia, the Organization of African States Convention on the Elimination of Mercenarism in Africa and the model law adopted in the context of the Commonwealth of Independent States, and recommendations on the democratic control of security forces in the context of the Council of Europe. He concluded that the existing regulation of private military and security companies at the national, regional and international levels was insufficient and inadequate. Specific regulations for private military and security companies existed only in a handful of countries, and rarely as a comprehensive law. Moreover, regional regulations applied to companies only marginally. The draft convention prepared by the Working Group therefore sought to overcome most of these gaps in the legal regulation of companies by strengthening both international and national regulation.

32. Amada Benavides de Perez stated that there had been a sustained increase in the security industry, in particular in Latin America. That increase concerned both companies working in the military sector and those in security activities. The growth in the number of security companies had led to an increase in the use of lethal force, the number of weapons in circulation and the number of private security officers compared with national police officers. In that respect, private security companies had begun to replace national police, border police, management of prison facilities and other national security services. They were also used extensively in the extractive industries. The Working Group had examined

the possibility of both international and national regulation of private military and security companies. In the draft convention, it referred to some of the elements to be included in national legislation, inter alia, a definition of the type of services that private military and security companies could offer; the clarification of the relationship between the companies and national policy and military forces; the obligation of the companies to respect human rights; their obligation to undergo a vetting process and to provide adequate training of private security guards, in particular on human rights issues; the establishment of a national oversight authority over the activities of companies and the licencing of firearms; and the establishment of a system of accountability for the activities of private military and security companies and their personnel. A convention on their activities would be complementary to national legislation.

33. In the ensuing general discussion, South Africa stated that its domestic legislation attempted to regulate the activities of private military and security companies. Because of their impact abroad, however, legislation also sought to regulate companies when operating in third States. Challenges remained, because legislation only covered situations of armed conflict. Companies tried to circumvent legislation by involving themselves in situations under the cover of humanitarian goals. The extraterritorial application of national legislation also remained a challenge. Similarly, the country had faced considerable difficulties trying individuals for alleged violations because its requests for the extradition of suspects had been unsuccessful. In that respect, an international binding legal instrument would be useful to assist countries facing similar challenges.

34. Spain stated that its national legislation provided that public security was to be exercised by public authorities; given, however, that other actors were increasingly involved in certain aspects of security, new legislation had been adopted to regulate in detail all aspects relating to security services. As a result, the provision of private security services had been functionally integrated into the State's monopoly of the use of force, because it acknowledged that certain areas could not be adequately dealt with by national security forces. National legislation therefore established that private security services were complementary and subordinated to public security services, and provided for strict controls and administrative interventions to regulate the provision of private security. Moreover, private security companies were not permitted to provide services extra-territorially. Similarly, private security services could not be contracted abroad. National legislation also provided for the ethical requirements applicable to all personnel working for a private security company, including its administrators and managers. The use of firearms was to comply with the law and be previously authorized by the relevant

government authority. Lastly, national legislation also provided for accountability mechanisms, including administrative and criminal sanctions.

35. Switzerland was in the process of adopting new national legislation to regulate the activities of private military and security companies when exercised abroad. The main principle of the new legislation was that the companies were required to inform the Government in advance of their activities abroad, and that such activities should be carried out in strict compliance with the national Constitution and the law, and in accordance with the principle of neutrality.

36. The United States of America stated that its national courts had applied criminal law extra-territorially in cases involving Government contractors. Moreover, its parliament was considering the enactment of further legislation to expand and clarify such extra-territorial applications. Its national authorities had prosecuted individuals for alleged violations and sanctions had been imposed. As a home State for a number of private military and security companies, it imposed strict export licencing requirements that covered a range of activities. Such licencing was necessary for the performance of a number of activities, including the export of certain materials and equipment involved in security services. In the delegation's view, experience showed that there were significant challenges relevant to all countries. One was the importance of oversight mechanisms within a Government when interacting with its own contractors. Another challenge involved the practical difficulties of enforcing criminal law extra-territorially, in particular the gathering of evidence. These challenges would remain relevant for all countries even after the adoption of a convention.

37. The Russian Federation stated that its national legislation on this matter had been significantly strengthened in 2010, and that now it did not allow for the possibility of establishing private military companies on its territory. In that respect, all military activity was the exclusive responsibility of the State, and only security companies were allowed to operate.

38. The European Union had taken various steps concerning private military and security companies. In 2006, a communication of the European Commission on security sector reform referred to non-statutory forces as part of the security system, meaning that non-statutory forces were also subject to the basic rules of good governance, transparency, accountability, rule of law and democratic control. Reference was also made to the European Union guidelines on the compliance with international humanitarian law, as well as to the PRIV-WAR Project, an independent research project financed by the European Commission and coordinated by the European University Institute, which has recently been finalized and had issued a set of recommendations.

C. Elements of an international regulatory framework of activities of private military and security companies

39. Mr. del Prado referred to the main elements of the draft convention prepared by the Working Group. He explained the structure of the draft and recalled that it took as its main principles the Charter of the United Nations, existing *erga omnes* obligations and the principle of the sovereign equality of States. Its legal sources were international human rights law and international humanitarian law, as well as the Statute of the International Criminal Court. The draft convention defined, inter alia, those inherently State functions that could not be outsourced and recalled that applicable principles of international law included the responsibility of the State for the legitimate use of force; the principles of sovereignty, equality and territorial integrity; the prohibition of outsourcing inherent State functions to private military and security companies; the prohibition of outsourcing the use of certain firearms; the obligation to respect international human rights and humanitarian law and to ensure accountability for violations; the liability of private military and security company superiors for crimes under international law committed by personnel under their effective authority and control; the obligation to prevent private military and security companies from trafficking and illicitly manufacturing firearms; and the obligation to observe rule of law principles. He recalled that States had an international legal obligation to impose criminal, civil and/or administrative sanctions on offenders and to provide remedies for victims. Lastly, he explained the rationale and functioning of an international committee on the regulation, oversight and monitoring of private military and security companies.

40. Mr. Nikitin explained that the main principles and elements underlying the draft convention were that States should establish a system of registration for private military and security companies that was separate from that for regular businesses, and that they should prohibit the registration of private military and security companies in off-shore zones. The proposed convention would also create a United Nations-based international register for private military and security companies and would seek to apply the experience acquired in the context of the Register of Conventional Arms. Other principles would include the obligation to be transparent, responsible and accountable. The draft convention also proposed the creation of a reporting obligation for States concerning main State contracts with private military and security companies, as well as information on registration and licensing. It also sought to give territorial States entry control over companies and personnel, the right to expel misbehaving companies, and the right to check entering personnel. Furthermore, the draft convention stipulated that private military and security companies could only employ legitimate ways of acquiring, importing and transporting

weapons. It imposed certain limitations on the use of force and the use of weapons by private military and security companies, and required them to provide appropriate training in international humanitarian law and international human rights law, as well as in the national law of the country in which they operated. The draft convention reinforced the principle of the monopoly of the State over use of force, and required each State to define by legislation the military and security functions that were in principle not subject to outsourcing. Mr. Nikitin pointed out that the set of proposed elements and principles could be used in different proportions in different instruments at different levels, including national laws, regional agreements, model laws and the draft convention.

41. After the presentations, some States recalled the mandate of the intergovernmental working group, in particular the fact that it was expected to consider the possibility of adopting an international regulatory framework. In that respect, it was stated that, at the current stage, discussions on the elements of the draft convention were premature, given that there was still no clarity with regard to whether an international regulatory framework was at all needed and, if so, whether it would take the form of a convention. The delegations therefore reiterated their wish to hear the views of a wider representation of international experts at the second session of the intergovernmental working group, including a wider geographic representation, as well as more diversified expertise. This new expertise could help to clarify whether a regulatory framework was necessary and what form a new regulatory framework could take, including, inter alia, model legislation, guiding principles or an international convention.

42. Some delegations insisted on the fact that one of the premises of the preparation of the draft convention by the Working Group was that current international law did not sufficiently address private military and security companies, and expressed the view that, since non-State actors are not bound by international law, States rarely address violations by the companies. Other delegations recalled that discussions during the first session of the intergovernmental working group showed that there was a considerable amount of law that applies to private military and security companies, including international humanitarian law, international human rights law, international criminal law and public international law on the use of force. More discussions were therefore required in order to clarify how existing law covered private military and security companies, as well as to identify any gaps and avenues to close them.

43. With regard to legal considerations relating to the elements in the draft convention, some delegations expressed concerns about the fact that some of the principles incorporated in the draft convention seemed to run counter to existing legal principles or principles that had been identified or are on the agenda of other forums, in particular the International Law

Commission. Some delegations pointed out that it was problematic that the draft convention attempted to solve legal problems that were under discussion by Member States, including in areas such as State responsibility, the implementation of the principle of the responsibility to protect, regulation of the notion of legitimate self-defence and the use of force in international law. One delegation pointed out that the draft convention might prevent States from contracting out certain core State functions, the scope of which remained unclear and might vary from State to State. It was also noted that the creation of a new treaty monitoring mechanism was inopportune at a time when the entire treaty bodies system was being reviewed. Lastly, mention was made of the fact that the draft convention did not take fully into account other legal frameworks currently being negotiated, such as the draft arms trade treaty.

44. Other delegations welcomed the discussion on the elements of the draft convention, and indicated that an international legally binding instrument was required to address current problems, which had proved to be highly complex, and thus required international regulation to create a homogenous approach by the international community. The same delegations emphasized that the current framework for the regulation of the activities of private military and security companies, including the Montreux document and the code of conduct, did not adequately address the complexity of the problems raised by the operation of these companies and, in particular, did not establish proper mechanisms for accountability and for effective remedies for victims. In this regard, some delegations considered that the rights of victims should be at the core of any regulatory framework. It was stated that the elements contained in the draft convention as proposed by the Working Group were crucial for the regulation of private military and security companies and should therefore be further considered at the second session of the working group.

45. Some States pointed to the applicability of recognized principles of the State's responsibility that consider acts of persons or groups of persons as an act of the State only if such act can be attributed to it.

46. UNICEF recalled that, since June 2010, it had been leading an initiative to develop a set of principles for business on children's rights. The representative of UNICEF explained that the principles called on businesses to respect and support children's rights and to avoid complicity in abuses of children's rights. The principles were also relevant to the activities of private security companies, especially with regard to how companies understood, prevented and addressed any negative impact of their activities on children; how companies addressed children's rights in the workplace, including the use of child labour; how companies could take action to protect children during emergencies, including through the application of conflict-sensitive business practices; and the essential role of companies in

supporting communities and in reinforcing Government efforts to fulfil children's rights. The representative concluded by stating that the principles built on the Convention on the Rights of the Child, the optional protocols thereto, the ILO convention, the Guiding Principles on business and human rights, as well as the Global Compact principles.

D. Accountability and right to an effective remedy for victims

47. In her presentation, Amada Benavides elaborated on individual cases that had been brought to the attention of the Working Group with regard to the accountability of private military and security companies. She discussed how the Montreux document, the code of conduct and the draft convention addressed the issues of accountability and remedy for victims of human rights violations. In her view, the Montreux document required contracting, territorial and home States to enact legislation to sanction violations of international humanitarian law and bring to justice members of the private military and security companies that committed other crimes under international law. Ms. Benavides pointed out that the Montreux document only mentioned the right of victims to reparations with regard to contracting States, but not in relation to territorial and home States. She explained that the code of conduct contained principles on companies' obligations to establish grievance mechanisms and to ensure that they had sufficient financial capacity to compensate victims. The draft convention provided for the obligation of the State to impose criminal, civil and/or administrative sanctions to offenders. Ms. Benavides emphasized that, according to the provisions of the draft convention, States should also provide victims with remedies, particularly with regard to criminal, civil and/or administrative offences, and liability of legal persons and entities; prosecute or extradite alleged offenders; transfer criminal proceedings; and notify victims of the outcome of proceedings. The draft convention also provided for the establishment of an international fund for the rehabilitation of victims and for the establishment of a committee on the regulation, oversight and monitoring of private military and security companies and related international register. Ms. Benavides concluded that, owing to the difficulties in establishing proper jurisdiction, national legislation was not sufficient to address the transnational operations of private military and security companies and that the draft convention offered one possibility of providing victims with more effective remedies.

48. Najat Al-Hajjaji pointed out that the concept of accountability of States for human rights violations was established for a variety of situations in a number of international human rights instruments. She stated that the Special Rapporteur for the Subcommission on Prevention of Discrimination and Protection of Minorities, Theo van Boven, had recommended the inclusion in new human rights instruments relevant parts on

compensation and reparation for the victims of serious violations of human rights, and had suggested that human rights treaty bodies include in their work the monitoring of these aspects. Ms. Al-Hajjaji stated that the draft convention confirmed these steps and obliged States to take measures not only to hold personnel of private military and security companies accountable for their acts, but also to provide effective victims with remedies. She pointed out that compensation must meet the needs of the victims, be proportional to the damage caused and include rehabilitation and reconciliation elements, and should provide guarantees of non-repetition. Concerning the definition of impunity, she stated that this implied a situation in which the victims had no legal ability to ensure that those responsible for certain crimes were held accountable. In relation to the importance of reparations, the draft convention envisaged the possibility of an international fund managed by the Secretary-General to pay compensation to victims of human rights violations. Ms. Al-Hajjaji lastly recalled that personnel of private military and security companies were also affected by human rights violations, in which case the contractors would need to be provided with appropriate legal ways to ensure justice and to be compensated for their losses.

49. In the general discussion, the ongoing work relating to redress, guarantees of non-repetition of human rights violations and the importance of ensuring accountability for all human rights violations committed by personnel of private military and security companies was underlined. Accountability was considered a key issue in both general terms and in relation to the subject matter. In this regard, it was emphasized that States had to take all necessary measures to this end.

50. During the discussion, the question was raised whether the adverse impact of private military and security companies was a worldwide problem. It was noted that, in fact, there are a number of such cases that had been identified in all regions of the world.

51. Lastly, concerning national legislation on accountability mechanisms and remedy for victims, a non-governmental organization pointed out that it was difficult to define the root cause of the problem. It noted that this might be the result of the lack of sufficient norms, insufficient implementation or a failure to respect the applicable law. It concluded that, irrespective of the regulatory framework selected, any solution had to concentrate on the issue of effective remedies and the rights of victims. If a given State denied that it violated the law while victims went without remedies, it should be concluded that the legal framework was inadequate.

V. General observations

52. On the last day, several delegations expressed their general observations.

53. Recalling that the private military and security industry had to be properly regulated to prevent and remedy possible human rights violations, the European Union suggested that the discussion should focus on the level and type of regulation. It noted the solid basis of regulation of the Montreux document, the code of conduct and the Protect, Respect and Remedy framework. While recognizing the work carried out by the members of the Working Group on the use of mercenaries, the European Union pointed to the differing views expressed on the need for an international convention to regulate the matter, and stated that certain legal issues included in the draft convention were not within the competence of the Human Rights Council. It suggested that, at the second session, the proposed draft convention not be addressed, but rather that the possibility of elaborating an international regulatory framework be considered by taking into account other options. The European Union welcomed the flexibility of one member of the Working Group to consider different options regarding the type of regulatory framework to be developed.

54. The United Kingdom emphasized the principle of the rule of law and the obligation of private military and security companies to respect the applicable laws in challenging environments, and pointed to the importance of accountability. While it acknowledged the work of the Working Group on the use of mercenaries in assessing different mechanisms of regulation, it particularly pointed to the code of conduct, which it considered the most effective way of regulating private military and security companies. It pointed out that the temporary steering committee of the code of conduct was working on issues of international oversight and governance and the resolution of third-party grievances, and should establish an international governance and oversight mechanism for the code of conduct in early 2012. The United Kingdom stated that this might usefully feed into a needs assessment of any existing gaps in the international legal framework before any further work was carried out on a draft convention or alternative regulatory measures.

55. Switzerland pointed out that the discussions at the first session had demonstrated that, before a new convention to regulate the activities of private military and security companies could be considered, it was appropriate the experience acquired from existing instruments, such as the Montreux document and the code of conduct and their development, as well as from additional expertise available within the United Nations.

56. Honduras concluded that there were legislative gaps at the national and international levels that allowed for impunity in cases of human rights violations by private military and security companies, and supported the elaboration of an international legally binding

document. It suggested that the next session of the intergovernmental working group should focus not only on the activities of private military and security companies in armed conflicts, but also in other situations.

57. Algeria reiterated the risks that private military and security companies pose for the sovereignty of States in terms of security, defence and responsibility for human rights. It recalled the challenges that States faced with regard to private military and security companies owing to their complexity in legal status, human resources, their transnational nature and the possible human rights violations involved in their activities. In addition, it pointed to the fact that the Montreux document did not cover all relevant aspects in a comprehensive manner and supported the idea of an international legally binding instrument. Algeria suggested that, at the second session, discussions be continued on the proposed draft convention.

58. Nigeria, on behalf of the African Group, pointed out that private military and security companies escaped the effective control and monitoring of both national legislation and existing international instruments, and stated that an enforceable, international, legally binding instrument with a deterrent effect was needed to ensure that the rule of law was respected by such companies.

59. The United States of America noted an area of agreement among delegations, namely that the activities of private military and security companies could pose challenges in terms of accountability and oversight. It pointed, however, to the different views expressed regarding the question of whether an international convention was needed or appropriate. The delegation recalled its position of not supporting the notion of pursuing a convention for various reasons, including many that were shared with other delegations at the meeting, such as possible overlaps with other areas of international law that had not been considered, and the attempt by the proposed convention to tackle issues on which no international consensus had yet been reached. In addition, it noted the possible yet unintended negative consequences for the training of United Nations peacekeepers. The delegation emphasized that the main challenge in this area was the implementation of existing laws, and that the development of new international treaty law would not address it. Instead, it encouraged States to review and consider steps to update their national legislation relevant to private military and security companies, and to engage in robust collaborative efforts with other States, industry and civil society to raise standards within the industry. The United States of America remained open for a dialogue at the second session on gaining a better understanding of the factual and legal issues involved in the activities of private military and security companies and for a discussion on ways that the intergovernmental working group might proceed other than with a convention.

60. South Africa recalled paragraph 4 of Human Rights Council resolution 15/26, and confirmed its support for the proposed draft convention. It recalled that complementary initiatives did not substitute accountability and the remedy mechanisms of a convention.

61. Spain confirmed its willingness to continue the discussion about an international binding regulatory framework for private military and security companies in order to avoid impunity for human rights violations committed by such companies. It noted, however, that there was no consensus among States on whether an international convention was needed. Spain therefore called upon States to use effectively and broaden the scope of existing initiatives of the Montreux document and the code of conduct.

62. Zimbabwe supported the idea of an international instrument to hold companies and States of origin accountable for the human rights violations committed by private military and security companies, and reminded States that the code of conduct was insufficient to regulate the matter.

VI. Concluding remarks

63. **In his concluding remarks, the Chairperson-Rapporteur reminded participants of the mandate given to the intergovernmental working group by Human Rights Council in its resolution 15/26, and pointed out that the summary of the first session would not be submitted to the Human Rights Council, but would be forwarded to the intergovernmental working group at its second session as part of the documentation. He informed participants of his intention to continue consultations with all relevant stakeholders on possible resource persons and experts to be invited to the next session, and requested States to submit relevant proposals. Lastly, he pointed out that States would be consulted on the provisional agenda and programme of work for the second session well in advance in order to facilitate informed and constructive deliberations for that session.**