



General Assembly

Distr.: General
24 December 2012

Original: English

Human Rights Council

Twenty-second session

Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report 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 on its second session

Chair-Rapporteur: Abdul S. Minty (South Africa)

Summary

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 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.

The Human Rights Council also decided that the open-ended intergovernmental working group should hold one session of five working days a year for a period of two years. The first session was held from 23 to 27 May 2011. A full summary of the session is contained in document A/HRC/WG.10/1/4. The second session took place from 13 to 17 August 2012. A summary of the second session, together with the conclusions and recommendations of the open-ended intergovernmental working group, is reflected in the present report.

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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. The Human Rights Council also decided that the open-ended intergovernmental working group should hold one session of five working days a year for a period of two years. The first session was held from 23 to 27 May 2011. A full summary of the session is contained in document A/HRC/WG.10/1/4. The second session took place from 13 to 17 August 2012. A summary of the second session is set out in section II below.¹

3. Resolution 15/26 requests the working group to present its recommendations to the Council. On the basis of the deliberations of the first and second session, the inter-governmental working group has elaborated such recommendations that are contained in section III.

4. The second session of the working group was opened by Marcia V. J. Kran, Director of the Research and Right to Development Division of the Office of the High Commissioner for Human Rights (OHCHR). She recalled the mandate of the inter-governmental working group as set out in resolution 15/26 and noted that discussions at the second session would build upon those of the first session. She noted the issues at hand were complex, starting with the very definition of private military and security companies, which were engaged in a variety of activities and provide a broad range of services internationally and domestically. In this regard, she recalled that discussions during the first session underscored the importance of a clear definition of the term “private military and security companies”, with some suggesting the need to distinguish the activities of private military companies, on the one hand, and those of private security companies on the other.

5. Ms. Kran pointed to human rights challenges brought about by the increase in the outsourcing of security-related State functions to private companies, particularly given that such companies frequently operate transnationally. This increase had also raised questions related to the extent to which private actors could be held to account for human rights violations, and in what way. Protecting the human rights of individuals was especially difficult when private military and security companies operated in situations of conflict and post-conflict, where their employees may bear arms, operate places of detention, conduct interrogations and protect military facilities. In these contexts, it is especially challenging to ensure accountability for the activities of private military and security companies (PMSCs) and their personnel, in compliance with international human rights and humanitarian law. She highlighted that from a human rights perspective, what matters is essentially that there was no protection gap and no impunity, and that where violations occur, victims had access to an effective remedy.

¹ The documentation pertaining to the first and second sessions of the intergovernmental working group is available at:
www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitaryIndex.aspx.

II. Organization of the second session

A. Election of the Chairperson-Rapporteur

6. At its first meeting, on 13 August 2012, the working group elected the Permanent Representative of South Africa, Abdul S. Minty as its Chairperson-Rapporteur.

B. Attendance

7. Representatives of the following Member States attended the meetings of the second session: Algeria, Angola, Argentina, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Canada, Bulgaria, Chile, China, Republic of Congo, Cuba, Cyprus, Czech Republic, the Democratic People's Republic of Korea, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Germany, Greece, Guatemala, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Japan, Lesotho, Lithuania, Malaysia, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Philippines, Portugal, Qatar, Republic of Korea, Russian Federation, Rwanda, Saudi Arabia, Senegal, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Turkey, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Venezuela (Bolivarian Republic of). The African Union and the European Union participated in the session as well. The International Committee of the Red Cross also participated.

8. The following non-governmental organizations in consultative status with the Economic and Social Council were represented: International Commission of Jurists, International Peace Messenger Cities, International Organisation on the Elimination of Racial Discrimination, International Service for Human Rights, Mani Tese, and the Organisation de la mutualité des volontaires africains.

9. Pursuant to Human Rights Council resolution 15/26, Faiza Patel, Chairperson-Rapporteur 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 a resource person. Other invited resource persons were James Cockayne, Co-Director of the Center on Global Counterterrorism Cooperation; Patricia Feeny, Executive Director of Rights and Accountability in Development (RAID); Nils Melzer, Research Director of the Competence Center for Human Rights at the University of Zurich, and Chris Sanderson, chairman of the Security in Complex Environments Group of ADS. Stuart Groves participated as a regional expert.

C. Organization of the session

10. In his introductory remarks, the Chairperson-Rapporteur stated that the mandate of the working group might appear to be relatively straightforward, but the complexity of the issues made it a difficult one. He felt encouraged by the fact that there seemed to be agreement on the need to develop of a regulatory framework, although there were divergences on what aspects and segments of the industry should be regulated, how they should be regulated and at what level.

11. At its first meeting, on 13 August 2012, the working group adopted its agenda (A/HRC/WG.10/2/1) and the programme of work.

D. General discussion

12. In their initial remarks, a number of delegations emphasized the importance of continuing the discussion on the need to adopt an international legal framework to regulate the activities of PMSCs. Some delegations stated that further discussions were necessary on the need to ensure accountability for human rights and international humanitarian law violations, as well as the right of victims to remedy and reparation, and highlighted the responsibility of States in this respect. Several delegations expressed concern about human rights challenges relating to the private military and security industry, especially since PMSCs increasingly assume functions that were traditionally in the domain of States. It was emphasized that there was a need to distinguish the activities of PMSCs operating in conflict situations from activities of companies operating in peace time, where their activities may pose less challenges for human rights.

13. A number of other delegations, while acknowledging the importance of existing efforts to regulate PMSCs through industry self-regulation or national legislation, expressed the view that a legally binding international regulatory framework is needed. Other delegations expressed the view that it was premature to consider whether an international legally binding instrument is required and that what is needed instead is better implementation of existing international law, as well as improvements in law, regulation and policy at national level. They emphasized that the focus should be on national legislation, complemented by non-binding international initiatives such as 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 (Montreux Document) and the International Code of Conduct for Private Security Providers (International Code of Conduct).

14. One delegation expressed concern about the increased use of private military and security companies by the United Nations and called for a zero-tolerance policy with regards to companies involved in human rights violations.

III. Discussion on specific topics

A. Updates since the first session

15. Faiza Patel, providing an update on behalf of the United Nations Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination, highlighted that while the human rights challenges posed by activities that PMSCs carried out in situations of armed conflict were well-known, they also performed many activities outside of armed conflict situations such as protecting mines, refineries and ships, participating in drug-eradication efforts, providing logistics support to the United Nations or training security forces. These activities, which were often carried out in places where the rule of law is weak and/or where there were conflicts of one sort or another, also posed human rights risks. The international community had to ensure accountability for human rights violations in these contexts as well.

16. Ms. Patel conveyed the Working Group's view that an international convention was the most efficient solution to the challenge of regulating PMSCs, while noting that she is not committed to a particular text. A smart mix of international regulation, national legislation and enforcement, and industry self-regulation would allow States and other actors to use PMSCs and at the same time ensure that PMSCs respect human rights and are held accountable in case of violations. Although there were some standards in international law applicable to the activities of PMSCs, the regime was far from complete. First,

although there were indications of strong disapproval of the involvement of private actors in combat activities, there was no clear international prohibition. Second, while it is clear that States had the general international obligation to ensure respect for humanitarian law and human rights vis-à-vis PMSCs, the content of such obligations has not been explicated. While the Working Group has consistently encouraged States to adopt national legislation to regulate PMSCs and believed such regulation to be essential, it seemed unlikely that ad hoc efforts alone would be successful. Because PMSCs operate transnationally, it was not enough if only a few countries adopted legislation regulating their activities.

17. Regarding self-regulation initiatives, she noted that the International Code of Conduct constituted one element of an international system to meet the challenges of regulating PMSCs, but was by itself clearly insufficient to ensure comprehensive accountability for violations of human rights and to provide remedies to victims. With regard to the draft charter, she noted that the Working Group was of the view that the draft did not live up to the aspirations of the Code and does not conform to the Guiding Principles on Business and Human Rights. She noted that an inductive approach, whereby an international convention was developed on the basis of good national legislation adopted by several countries might be viable approach. She also noted that the good practices outlined in the Montreux Document provided a good basis, but that certain issues such as PMSCs activities outside of armed conflict as well as the treatment of third party nationals were not covered by it.

18. In the subsequent discussion, one delegation noted that currently 42 States and one international organization (the European Union) support the Montreux Document, while 464 companies had signed on the International Code of Conduct, respectively. The delegation also referred to the ongoing development of a draft charter for the oversight mechanism of the International Code of Conduct.

19. Another delegation stated that existing challenges could be attributed to gaps in international law, especially a failure to place limits on the types of activities that PMSCs might carry out and the regulation of their transnational activities outside their home States. Another delegation expressed support for stronger control of PMSCs, especially concerning their transnational activities.

20. The representative of the International Committee of the Red Cross (ICRC) noted that while international humanitarian law prohibited the outsourcing of certain activities to PSMCs, such as the command of prisoner of war camps and civilian internment camps, as well as the exercise of an occupying power, it did not explicitly prohibit the direct participation of any private persons in hostilities. However, on humanitarian reasons, in particular to maintain the distinction between civilians and combatants, and because civilian private contractors typically operated outside the chain of command, the ICRC concurred that PSMCs should not be contracted to directly participate in hostilities as long as they are not part of the armed forces. The ICRC also indicated that serious implementation and accountability problems remained due to the unwillingness or inability of States to uphold or enforce existing obligations, including by implementing the good practices set out in the Montreux Document.

B. Definition, scope and nature of private military and security companies and related challenges for member States, in particular with regard to extraterritorial activities of PMSCs

21. Stuart Groves focused his presentation on the ongoing process within the United Nations to adopt clear criteria for its use of armed private security companies. He noted that, under the policy being developed, the United Nations would not contract with

companies that have not signed the International Code of Conduct or with States that do not comply with the provisions and the good practices of the Montreux Document. In his view a legally binding international convention on the regulation of the activities of PMSCs would enable the United Nations to rely on the signatories of such an instrument to provide reliable information on security companies with which the Organization may seek to engage.

22. In the discussion, some delegations focused their remarks on the definition of PMSCs. One delegation took the view that a careful distinction should be made between private security companies, private military companies and mercenaries and cautioned against the development of a binding instrument on PMSCs that would take a “one size fits all” approach.

23. Noting the need to distinguish clearly between the activities of PMSCs and those of mercenaries, another delegation suggested that the definition of PMSCs should focus either on the nature of the company or the type of services it provides in a particular case. In this regard, another delegation took the view that it was difficult to distinguish between security companies and military companies and that a definitional categorization should depend on the type of services provided in a particular case.

C. Possibility of elaborating an international regulatory framework

24. The third and fourth meetings were dedicated to a discussion of the possibility of elaborating an international regulatory framework.

1. Existing specific initiatives including the Montreux Document and the International Code of Conduct

25. In his presentation on existing specific initiatives, Nils Melzer recalled the primary responsibility of States for the regulation, oversight and accountability of PMSCs and their activities. International initiatives supported and complemented, but did not replace this responsibility. He then drew attention to existing initiatives: the Montreux Document; the International Code of Conduct; and initiatives under the auspices of the Human Rights Council, including the Working Group on the use of mercenaries and the inter-governmental working group on the activities of PMSCs.

26. Based on a humanitarian initiative by Switzerland and the ICRC, the Montreux Document was adopted in September 2008. It aimed to promote respect for international humanitarian and human rights law, and addresses international obligations and good practices for States related to operations of PMSCs during armed conflict. It addresses the specific obligations of home States where a PMSC has its seat, the contracting State for which a PMSC works and the territorial State where it carries out its activities. The Montreux Document thereby demonstrates that PMSCs do not operate in a legal vacuum.

27. The International Code of Conduct is a multi-stakeholder initiative convened by the Government of Switzerland in November 2010. As at August 2012, 464 companies had signed on to the Code. The Code sets out principles of conduct for private security service providers, such as: commitments to humane treatment, dignity and privacy, and human rights standards like prohibitions on torture and ill-treatment, slavery, trafficking, and discrimination, as well as principles of management relating to the selection, vetting and training of personnel; the use of weapons and equipment; incident reporting on use of force; grievance procedures and financial undertakings in case of liability to pay compensation. Mr. Melzer noted that this self-commitment by private corporate actors was to be welcomed, especially in the absence of other regulatory frameworks at the international level.

28. He further briefed participants on the work of a temporary steering committee, consisting of representatives of States, the industry and civil society, to develop a draft charter for the oversight mechanism of the International Code of Conduct. The current draft foresees a certification process that signatory companies have to successfully undergo to become member companies, as well as continuous performance assessment and a grievance mechanism. He recognized that, although the proposed grievance mechanism allowed victims to seek a review of the substance of their grievances, practical obstacles and security concerns would probably make it impossible for the mechanism to investigate the alleged facts with sufficient reliability in the field. Therefore, rather than fact finding with regard to an alleged violation of the Code, the mechanism would probably have to focus on whether the company adequately cooperated in effectively addressing the grievance in question.

29. In the discussion, a number of delegations expressed their support for the Montreux Document and the International Code of Conduct and the proposed oversight mechanism as initiatives which complement national regulations. Some delegations noted that market pressures were one means for encouraging implementation and highlighted efforts by States to require adherence to the International Code of Conduct in contracts and tenders. One delegation also noted recent developments in producing performance standards for PMSCs. While there was room to discuss additional measures, including under the auspices of the Human Rights Council, these should complement existing initiatives and focus on human rights, taking into account and based on the viewpoints of all stakeholders. No one regulatory initiative could be viewed as the ultimate solution. Rather, a multifaceted approach was needed.

30. Some delegations felt that the existing initiatives, despite having many positive features, also had considerable gaps, which should be addressed through an international convention. For example, the Montreux Document failed to clarify the legal status of armed PMSC staff, whose presence in conflict zones created challenges in terms of ensuring respect for the principle of distinction. It also failed to limit the number of staff that could be deployed and the types of activities they may undertake. In this respect, the term “private military companies” was in itself problematic, as some member States considered military functions to be strictly a State prerogative.

31. Other delegations noted that other weaknesses from a human rights perspective include the fact that the Montreux Document did not refer to an obligation for member States to conduct human rights impact assessments prior to engaging the services of a PMSC. The International Code of Conduct also had inherent weaknesses in that it did not ensure remedies for victims. As the code is a voluntary initiative for industry, it cannot be invoked in a court of law unless it has been integrated into a contract or national legislation. Neither the Montreux Document nor the International Code of Conduct required that States contract only with companies that would sign and adhere to the Code. In some cases, States had contracted private military and security companies that faced serious allegations of human rights abuses.

32. Some delegations noted that existing initiatives did not ensure criminal accountability for abuses committed by PMSC staff. In this regard, one non-governmental delegation presented the findings of a study undertaken in one country that was emerging from armed conflict. The study found that no PMSC staff accused of serious crimes, including alleged violations of international human rights and international humanitarian law, had been held accountable either by the territorial, home or contracting State. In this regard, Mr. Melzer acknowledged the jurisdictional difficulties arising from the transnational nature of the private security business and recalled that it was up to States to take legislative measures to address these difficulties. He pointed to draft Swiss legislation

as a potential good practice and indicated that examples of other national legislation and practice can be accessed on the Private Security Monitor web portal.

33. On the issue of whether existing initiatives addressed accountability gaps arising where PMSCs personnel may be granted immunity from the jurisdiction of the territorial State, Mr. Melzer noted that under the Montreux Document, all States, including the contracting State and the home State, would still be obliged to hold perpetrators of war crimes accountable.

2. Perspective of the PMSC industry

34. In his presentation on the perspective of the private security company industry, Chris Sanderson noted that such companies provided armed and unarmed protective security services to a range of Government, international and non-governmental organizations and commercial clients in a spectrum of environments where politically, ideologically or criminally motivated threats are such that specialist protection was required. He emphasized that private security companies must be distinguished from private military companies that were involved in military operations, e.g. in interrogations of enemy combatants, and training and provision of specific military skills.

35. Mr. Sanderson highlighted that private security companies tended to adopt recognized best practice, but there were still variations in the quality of service and operational records of individual companies. The majority of companies operating internationally and with a significant interest and involvement in regulation were based mainly in the United Kingdom and the United States of America, where government and relevant industry associations were closely cooperating to raise industry standards and establish uniform national standards. He also noted that there are many companies delivering armed and unarmed security services in States where international regulatory initiatives and the development of best practice had much less traction.

36. Mr. Sanderson noted that in his view the majority of the private security industry welcomes effective regulation and the raising of standards and is keen to see improvement in the mechanisms for proper accountability. He also noted that Governments and international organizations constituted, alongside the extractive industry and the shipping industry, a significant client group for security services. Their procurement decisions could therefore be very influential in the industry's recognition and adoption of best practices.

37. Mr. Sanderson specified that regulatory frameworks, be they national or international, should meet four key criteria: (a) effectiveness, in that they must have a genuine, significant and positive impact on performance, rather than just offering process without substantive change and, to that end, must be based on third party rather than self-regulation; (b) inclusiveness, in that they must impact on the performance of all companies, and not just those companies who are already achieving appropriate standards, although perhaps not in a fully measurable and independently verifiable manner; (c) transparency through robust, independent processes which addresses broader concerns about the integrity of voluntary or self-regulatory systems; and (d) affordability, in that regulation must be proportionate to operational need, and companies should only have to demonstrate conformity with one accepted and recognized standard. He noted that, in his view, regulatory standards should cover elements of leadership, management and governance; operational processes; selection, screening and vetting of staff and sub-contractor organizations; collective and individual training, and maintenance of training records; procurement, licensing and management of firearms; rules for use of force; compliance with international and national law, including human rights obligations, and the specific regulatory requirements of the jurisdictions in which companies operate; reporting and documenting of incidents and grievance processes. He highlighted that many companies had already invested heavily in these areas, but formal measurable standards and

independent verification were important if they are to achieve market differentiation, and if those who do not comply are to be identified and prevented from operating or at least disadvantaged commercially.

38. Mr. Sanderson also stated that his own company did not recruit staff to carry out activities that their national laws prohibited them to undertake. On vetting generally, he noted that it was at times difficult to check the background of applicants from countries where national authorities did not keep complete and easily accessible criminal and military service records.

39. Finally, he noted that victims' access to grievance mechanisms offered by PMSCs was often not easy. Good practices in this field entailed making senior managers available to aggrieved parties, advertising the contact details of companies and clearly identifying staff and vehicles as belonging to a particular company.

3. Possibility of elaborating a legally binding instrument

40. In his presentation on the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, James Cockayne noted that States, the PMSC industry and interested civil society actors had made extensive efforts to identify the standards to which the industry ought to be held, but had not yet succeeded in developing implementation arrangements that would make those standards enforceable at the national level. He noted his opinion that legally binding instruments could ultimately be a part of an effective regulatory framework for this industry, as experience has shown that there could not be effective enforcement of standards in this industry without the use of binding enforcement mechanisms. In his view, legally binding arrangements would be more likely to emerge through the development of a set of coordinated international regulatory positions implemented through national law or international framework conventions coordinating national arrangements, rather than by moving immediately to adopt a single international treaty, code or regulatory body.

41. Mr. Cockayne noted that developing effective regulation would first require finding common regulatory positions on specific aspects of regulation, such as licensing, export controls and remedies for human rights abuses and violations. He suggested that discussions should focus on five areas: State contracting of private military and security services; State support for PMSCs' respect for human rights in conflict-affected areas; State licensing of private military and security services; human rights-sensitive export control arrangements; and the question of effective remedies and related grievance mechanisms. He noted that the United Nations Guiding Principles on Business and Human Rights adopted by the Human Rights Council, which also apply to private military and security service providers, provide a useful roadmap to guide discussions towards common regulatory positions in these areas, and could underpin a legally binding instrument or instruments. Existing regulatory initiatives specific to the PMSC industry, including the draft convention of the working group on mercenaries, the Montreux Document, the International Code of Conduct, and the working group on mercenaries' work on international basic principles, would also provide important guidance.

42. While acknowledging that the Montreux Document and International Code of Conduct provided a very rich source of guidance on the standards to which key States and companies should be held, he noted that they failed to stipulate meaningful consequences in cases of non-compliance. In particular, the grievance arrangements currently contemplated by the draft charter on oversight for the International Code of Conduct, would not meet the effectiveness criteria for grievance mechanisms laid out in the Guiding Principles on Business and Human Rights. Moreover, none of the States involved in the International Code of Conduct process had yet committed to contract only with private military and security companies that have been certified as compliant with the Code, although at least

one State has committed to a policy of dealing only with PMSCs that were signatories, while another has committed to dealing only with PMSCs that abided by the principles reflected in the Code.

43. In addressing the shortcomings of existing initiatives, he suggested that the draft convention prepared by the Working Group on mercenaries offered a rich set of insights on the issues to be addressed, but it contained unworkable implementation arrangements, *inter alia*, because the draft sought to regulate whole companies, rather than specific service offerings. He also noted that the draft sought to prohibit the outsourcing of inherent State functions to PMSCs and took the view that States were unlikely to agree what such inherent functions were, in light of their different constitutional traditions.

44. Mr. Cockayne observed that all delegations shared the objective of protecting human rights more effectively, but differed on the means to achieve this objective. Some delegations favoured setting limits through the adoption of an international convention on contracting PMSCs to undertake activities, which were considered to be inherently State functions. Others considered that it would be difficult to agree on what these limits should be and sought to focus on how to otherwise regulate the activities of PMSCs. He noted that these objectives were not mutually exclusive and that the Human Rights Council could seek to address both. At the same time, he urged delegations to focus on the substance of regulatory positions, rather than the form they might ultimately take. He underscored the importance of continuing an inter-governmental discussion under the auspices of the Human Rights Council, which would complement the multi-stakeholder dialogues linked to the Montreux Document and International Code of Conduct.

45. On the issue of whether a public listing of companies involved in human rights violations would be useful as a means for sanction, Mr. Cockayne referred to similar initiatives which have been effective in other sectors, including under the mandate of the Security Council, but that consideration would be needed as to the standards against which a listing decision would be made, who would make the listing decision and what consequences might flow from it. In this respect, he noted that the idea of establishing an international ombudsperson to assist States in making listing and de-listing decisions should be considered.

46. In the discussion, a number of delegations recalled the need for a legally binding international instrument. Some delegations referred to the draft convention developed by the Working Group on the use of mercenaries as a useful starting point, while others noted that they were not tied to any particular text. Some delegations noted that a convention could complement existing initiatives and fill regulatory gaps in areas such as accountability, remedies, licensing and oversight. A convention could also ensure that States would be prohibited from continuing to contract companies that had been involved in human rights violations. Some delegations also expressed concern that the State monopoly on the use of force and the core State functions related to the provision of security were increasingly being commodified and outsourced to PMSCs. Others expressed concern over the use of PMSCs in situations where their employees might participate directly in hostilities. They also emphasized the need for export controls and tight regulation in this respect.

47. With reference to the Guiding Principles on Business and Human Rights, one delegation reiterated its view that PMSCs should not be considered in the same vein as other businesses and noted further that the effectiveness of the Guiding Principles, which were not legally binding standards, was yet to be proven. Another delegation reiterated its support for the Guiding Principles, noting that it viewed the International Code of Conduct as entirely consistent with the Guiding Principles and that the International Code of Conduct was a good example of implementation of them in relation to a specific industry.

48. A number of delegations stated their view that it was premature to consider negotiations on a legally binding instrument at this stage. They noted the need to reinforce existing PMSC-specific initiatives, namely the Montreux Document and International Code of Conduct, and to carefully assess their impact, before embarking on new initiatives which might divert attention and resources, and result in a convention with only a few ratifications. A “one size fits all” convention might also unduly affect PMSCs whose activities do not require international regulation, such as companies providing ordinary security functions in a domestic setting. Some delegations expressed concern that the Human Rights Council might overstep its mandate in developing a convention that would also address aspects of international humanitarian law and international criminal law, in addition to international human rights law.

49. One delegation advocated a step-by-step approach focused on first reaching substantive agreement on different areas before committing to a specific form of regulatory framework.

D. Accountability for human rights violations/abuses of private military and security companies

50. The fifth meeting of the second session was dedicated to the discussion of accountability for PMSC-related human rights violations in national legislation, as well as the perspective of victims of such violations.

1. States with national legislation

51. The United States of America indicated that PMSCs and their activities were regulated in the United States by a web of interlocking provisions. Law in the United States prohibited contracting PMSCs for the performance of inherently governmental functions. Laws controlling the export of defence articles or defence services, such as weapons and military training, also applied to PMSCs. Carefully worded provisions in government contracts concluded with PMSCs concern selection and vetting of personnel, training, and standards of conduct. Breaches of contract could lead to a variety of consequences, including performance-based deductions, non-extension or termination of contract or debarment from future tenders. In addition, PMSC staff could be held criminally accountable under certain circumstances for offenses committed outside U.S. territory under the Military Extraterritorial Jurisdiction Act and Uniform Code of Criminal Justice. A Civilian Extraterritorial Jurisdiction Act bill had been introduced in the Senate to expand and clarify extraterritorial jurisdiction over federal contractors. That bill was pending. State common law and federal statutes in the United States also allowed for private parties to bring suit against PMSCs.

52. Switzerland stated that draft legislation had been developed, which would require PMSCs registered in Switzerland to notify the Swiss authorities about their activities abroad and prohibit certain activities by PMSCs, such as directly participating in hostilities. Violations could result in criminal sanctions, including imprisonment. The draft law also directed the Government only to contract PMSCs that had signed the International Code of Conduct.

53. The United Kingdom stated that it had a variety of domestic legislation relevant to the activities of PMSCs, whether at home or abroad. The United Kingdom did not have legislation on what governmental functions could be outsourced. However, there was an understanding that military activity would only be undertaken by military personnel under the command of a commissioned officer. The United Kingdom considered a certification system based on industry-specific standards the most effective way to address human rights

problems involving PMSCs and was working to put such a certification system in place. The United Kingdom will also use its leverage as a contractor of private security services to ensure respect for the principles laid down in the International Code of Conduct. Under the International Criminal Court Act of 2001 British employees of PMSCs involved in grave breaches of the Geneva Conventions, torture, genocide, war crimes and crimes against humanity committed by British nationals could be held criminally accountable. Certain other serious crimes committed overseas by British nationals can also be prosecuted in British courts. The Government of the United Kingdom is also developing standards on the use of armed guards on ships to protect against the threat of piracy. On the domestic level, the UK Security Industry Authority, set up under the Private Security Industry Act 2001, was the organization responsible for regulating the private security industry by inter alia operating a licensing regime.

54. The European Union emphasized that national legislation was an important means for ensuring accountability and providing redress for victims. The nature and precise modalities of the national legislation would depend on experiences and needs of a State, ranging from being a contracting State, territorial State, home State or a combination of these three dimensions. The extraterritorial dimension of many PMSC activities may pose challenges for the investigation of specific cases. Some States, including some European Union member States, already had legislation on PMSCs, while others would benefit from further guidance to legislate or otherwise regulate. The European Union suggested that the intergovernmental working group could consider compiling best practices and model laws that States could adapt to their country-specific needs. The development of national action plans, which covered legislative and other measures, could also be helpful as part of a comprehensive approach.

55. South Africa stated that its Foreign Military Assistance Act required that any military assistance provided by South Africans abroad had to be authorized and that such authorization would not be granted if the assistance rendered could result in the infringement of human rights and fundamental freedoms, endanger the peace, escalate regional conflict or support terrorist activities. The 2002 Private Security Industry Regulation Act imposed strict standards on the private security industry and provides for monitoring mechanisms.

56. China stated that in 2009, a new regulation on security services was enacted, which included all types of security services into its supervision network and tightened the monitoring of security companies. This regulation established a licensing system for security companies and a qualification system for security guards. It also provided for accountability mechanisms, including administrative and criminal sanctions and civil remedies.

2. Perspective of victims

57. In her presentation on the perspective of victims, Patricia Feeney provided several examples of cases in which PMSCs and/or their employees were responsible for human rights violations and, in some cases, alleged complicity in the commission of war crimes. She cited cases where PMSCs allegedly had acted together with State security forces in the commission of gross human rights violations and serious violations of international humanitarian law, for example, through indiscriminate aerial bombardments, murder and rape. She noted that in most of the cases to which she referred, victims had been denied justice and corporate actors not held to account.

58. Ms. Feeney noted that while non-judicial mechanisms have a role to play in providing redress to victims, their potential value should not be overstated. She cited the example of the National Contact Point (NCP) procedure under the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational

Enterprises, which resembled a mediation process, which is not appropriate for cases involving gross human rights violations. She further noted that it is inappropriate to expect victims of gross violations to pursue grievance procedures established by companies alleged to have committed such violations. According to Ms Feeney, an independent body attached to the oversight mechanism of the International Code of Conduct would have an added value for victims. However, the most appropriate grievance mechanism to address serious human rights violations would be an international body composed of independent experts.

59. She also noted that victims who sought to find redress in civil judicial proceedings were often at a serious disadvantage as compared to the corporate respondents, because procedures were often lengthy and expensive. She referred to the fluid and ad hoc nature of the PMSC industry and noted that the International Code of Conduct only addressed the most structured and visible segments of the industry. In the same vein, another speaker underscored the importance of regulation paying close attention to sub-contractors and subsidiaries used by established PMSCs.

60. In the subsequent discussion, non-governmental delegations highlighted various obstacles that victims currently faced when trying to obtain redress, in particular a lack of political commitment on the part of States to prioritize accountability, high costs of litigation, long duration of trials and other procedural obstacles. One delegation noted that the laws of many States do not allow for corporate entities to be held criminally liable.

IV. Views of member States and other stakeholders

61. The European Union noted that considerable progress had been made since the adoption of Council resolution 15/26. While the discussions had not been conclusive, there was an increased understanding of the complexities of the discussions related to the regulation, monitoring and oversight of activities of PMSCs. The European Union proposed to structure further discussions in a constructive and focused manner, as many aspects call for further analysis. The delegation noted that future discussions may benefit from a closer association of other relevant forums in this context, such as the International Maritime Organisation, which is engaged in drafting guidance for maritime PMSCs. Other forums, such as the Sixth Committee (Legal) of the General Assembly or the International Law Commission might be more suitable to deal with certain PMSC-related aspects. At the same time, it was pertinent for the Human Rights Council to stay engaged on the human rights aspects of the issue. In this regard, the European Union attaches importance to an inclusive process, where the organisation of meetings continues to follow a multi-stakeholder approach. The European Union also proposed that consideration be given to a report by OHCHR, which could look into the human rights issues raised during the meeting and provide an objective, evidence-based analysis with respect to human rights challenges. The European Union supported further discussion in the framework of the Working Group provided that the mandate remained focused on human rights issues.

62. South Africa noted that the expert presentations and subsequent discussions had demonstrated the complexity of the issues and that the inter-governmental working group had only scratched the surface of the issues at hand. Initiatives such as the Montreux Document and the International Code of Conduct were welcome steps. However, their existence did not preclude the possibility of a legally binding international instrument, which would provide victims with a mechanism for redress. National mechanisms by themselves were not sufficient, owing to gaps and challenges with regard to issues such as extraterritorial jurisdiction, the need for a comprehensive vetting of contractors and staff, and the need for responsible contracting in conflict areas. South Africa proposed to distinguish between private military companies and private security companies.

63. The United States of America observed that States had taken different approaches to regulating this industry, which was why, in the view of the American delegation, there should be recognition that there is no “one size fits all” solution. The delegation noted that PMSCs created a variety of challenges. It was important to take careful stock of existing initiatives before taking a decision on how to best address these challenges and review what States were doing at the national level. The United States was prepared to commence a consensus-oriented discussion on certain challenges identified even though it had opposed the establishment of the working group. In particular, the United States proposed a discussion of the following items: the distinction between private military companies and private security companies; national regimes for export licensing and procurement; accountability under domestic law for human rights-related abuses; and international measures to promote accountability, including discussion of law-enforcement cooperation and extradition.

64. Switzerland reaffirmed its commitment to ensuring that PMSCs respect principles of international human rights law. It emphasized the importance of the Montreux Document, the International Code of Conduct and other proposals aimed at preventing human rights violations and protecting victims. Switzerland noted that it was ready to participate in the working group in a constructive manner.

65. Egypt stressed that the next sessions of the intergovernmental working group should build upon the expert presentations heard to date. Egypt reiterated its concern about the lack of accountability, monitoring and oversight mechanisms related to the activities of PMSCs. Non-binding initiatives, such as the International Code of Conduct and the Montreux Document were interesting, but have gaps and lack a victims-oriented approach.

66. Pakistan stated that the discussions had demonstrated that a number of issues would require further clarification and better understanding. Gaps in international law related to accountability, redress and compensation for victims, the status of PMSCs and their personnel, and the extent to which States could be authorized to use PMSCs, needed to be addressed. Pakistan referred to weaknesses in, and limitations of, existing initiatives which did not offer a comprehensive solution. Discussions of the inter-governmental working group should continue in line with the mandate given by the Human Rights Council.

67. The Bolivarian Republic of Venezuela highlighted the need to elaborate principles and elements of a future convention. The various initiatives that deal with PMSCs can provide useful guidance. However, existing instruments were insufficient, in particular regarding victims of grave violations of human rights. National laws alone are also not sufficient to deal effectively with abuses. Currently there was no legally binding document that regulated the use of force by PMSCs. As a result, PMSCs often acted with full impunity and human rights violations occurred frequently. Venezuela indicated its strong support for the adoption of a legally binding document that sought to fill existing gaps.

68. Canada underscored that time should be allowed to assess the effectiveness of the Montreux Document and the International Code of Conduct and efforts should be made to avoid duplication of work. There is room for further discussions on specific aspects of the issue. However, the scope of this broad and complex subject extended beyond human rights issues to questions beyond the competence of the Human Rights Council, including issues that relate to the use of force, the application of international humanitarian law, and the sale and transfer of weapons. Canada expressed doubt as to whether there was a need for a binding international instrument, as it was not obvious whether the gaps were normative or whether they related to a lack of implementation. While there was no broad consensus on the need for a binding legal instrument, Canada believed there was room for further discussion on human rights issues related to the activities of PMSCs under the auspices of the Human Rights Council. The intergovernmental working group should have flexibility in moving forward and its future work should be directed to specific issues.

69. Belgium recalled that the International Convention against the Recruitment, Use, Financing and Training of Mercenaries did not solve the problem it was meant to address due to its low number of ratifications. The same problem could repeat itself if a convention on PMSCs was hastily negotiated. In the absence of a consensus on how to proceed, a convention should not be the only option on the table. Belgium suggested that priority should be given by the Human Rights Council and the intergovernmental working group to addressing a range of substantive issues such as the definition of PMSCs, extraterritoriality, reparations and accountability. Other subjects, such as arms exports, granting of licences and issues of international humanitarian law and international criminal law were beyond the mandate of the Human Rights Council and should be discussed in more detail in other relevant forums. Belgium questioned whether the issue could be approached with a “one size fits all” approach bearing in mind the difference between the activities of private military companies and private security companies. Belgium underscored that the second session of the intergovernmental working group had been more productive than the first session. It emphasized that the working group should continue its work on the basis of consensus before moving to the adoption of an international instrument.

70. China stressed that in light of the activities of PMSCs, especially outside their respective home countries, there was a lack of effective regulation, accountability and monitoring and oversight mechanisms. National legislation was important, but could not be relied upon on its own, given that many PMSC activities were transboundary in nature. China was open to the idea of a legally binding international instrument, and expressed its support for more in-depth discussions on the issue of elaborating an international regulatory framework.

71. The Russian Federation noted that the working group did not agree on everything but there was common ground. It was important to continue the working group on the basis of consensus and to develop a legal normative base. The second session showed that there were many gaps in the existing regulatory framework. In particular, the Montreux Document, despite the authority that this document carried, could not be considered a very strong and effective instrument given that few States had signed on to it.

72. France stated that it was important to continue the discussion with the objective of systematically untangling the complex issues at hand. It was important to recall that the working group was established by the Human Rights Council, which has a specific mandate, and that the Council should continue discussing those issues that relate to human rights violations linked to the activities of PMSCs. Other forums could also make a contribution. The starting point for the work of the intergovernmental working group should be a clear distinction between mercenaries and PMSCs. It was also important to look at actors other than States that contracted PMSCs, including international organizations and companies.

73. Algeria noted that existing regulatory initiatives were not binding and that they do not address the issues comprehensively. National legislation alone is not sufficient given the transnational nature of the activities of PMSCs and the fact that companies could circumvent national legislation by moving their headquarters. The inter-governmental working group should continue its discussions in a constructive spirit.

74. The International Organisation to Eliminate Racial Discrimination, a member of the Coalition for the Control of PMSCs, emphasized the limits of existing mechanisms in ensuring accountability and providing remedies to victims. The Montreux Document focuses on situations of armed conflict only; is not a legally binding instrument; and did not attempt to regulate the industry beyond recalling existing State obligations. The delegation noted that the draft Convention prepared by the Working Group on the use of mercenaries would be complementary to the Montreux Document and that it should be finalized and adopted.

V. Concluding remarks

75. In his concluding remarks, the Chairperson-Rapporteur noted that the issues addressed during the course of the two sessions of the intergovernmental working group were difficult and complex. He noted that in spite of these complexities, the discussions have made clear that there is agreement on the common goal of protecting human rights in the context of PMSC activities, and ensuring accountability for abuses where these do occur. He recalled the mandate of the working group as reflected in Council resolution 15/26 and noted, however, that much of the work in regard to the issues addressed in the mandate still needed to be done. He reviewed the issues which had been addressed in by the working group in the course of its discussions and noted that consideration of these issues had benefited greatly, and should continue to be informed by, the input of experts. The Chair noted the important progress achieved during the second session and expressed his gratitude to delegations for their open and cooperative engagement. He highlighted the high degree of commitment demonstrated by all participants and noted that this had shown that, through joint efforts, participants had mobilized the political will necessary to collectively move towards the consensus position, as reflected in the conclusions and recommendations. The Chairperson-Rapporteur noted the importance of continuing to build confidence and to work together in a constructive and positive manner in order to achieve common objectives.

VI. Conclusions and recommendations

76. The intergovernmental working group noted the positive discussions which took place on the basis of an agreed work plan. It identified existing gaps and/or areas of concern in relation to the promotion and protection of human rights regarding the activities of the PMSC industry, which led to a consensus that there is a need for further discussion in the open-ended intergovernmental working group. It also identified a range of existing and potential options for addressing these areas of concern at the domestic and international levels.

77. In view of the initial constructive and substantive discussions held during the first two sessions of the open-ended inter-governmental working group, and in light of the complexities of the issues, it recommends to the Human Rights Council the following:

- (a) Continuation of the substantive discussions in the intergovernmental working group with the participation of experts and all relevant stakeholders for a further two year period;
- (b) Consideration of the human rights aspects of, inter alia, the following:
 - (i) Accountability and the provision of appropriate remedies for the victims;
 - (ii) To distinguish between the activities of private security companies and private military companies, as well as other possible activities relevant to this issue;
 - (iii) Review of all measures, including existing National legislation for registering, licensing and contracting PMSCs.
- (c) Consideration of the possibility of an international regulatory framework, including the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of PMSCs, as well as other

approaches and strategies, including international standards, and the way in which they might interact to protect human rights.
