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**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 fourth session*

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

Summary

The Human Rights Council, in its resolution 22/33, extended the mandate 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 for a period of two years in order for it to undertake and fulfil the mandate as outlined in paragraph 77 of its report on its second session (A/HRC/22/41). The Council also requested the working group to present its recommendations to the Council at its thirtieth session. Those recommendations are contained in section V of the present report.

* The annexes to the present report are circulated as received.



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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 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 22/33, the Human Rights Council extended the mandate of the open-ended intergovernmental working group for a further period of two years in order for it to undertake and fulfil the mandate as outlined in paragraph 77 of its report on its second session (A/HRC/22/41). The Council also requested the working group to present its recommendations to the Council at its thirtieth session. Those recommendations, which are based on deliberations held at the working group's third and fourth sessions, are contained in section V below.

3. On 26 March 2015, the Human Rights Council decided, in its resolution 28/7, to extend the mandate of the open-ended intergovernmental working group for a further period of two and a half years in order for it to undertake and fulfil its mandate, as contained in resolution 22/33.

4. The open-ended intergovernmental working group has held four sessions.¹ Its fourth session, held from 27 April to 1 May 2015, was opened by the Chief of the Rule of Law, Equality and Non-Discrimination Branch, on behalf of the Deputy High Commissioner for Human Rights. She highlighted several developments that had occurred since the third session, including the establishment by the Human Rights Council in its resolution 26/9 of an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. She also said that the Office of the United Nations High Commissioner for Human Rights (OHCHR) would shortly publish a progress report on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses (as requested in Council resolution 26/22),² which is intended to contribute to a more effective implementation of the Guiding Principles on Business and Human Rights (see A/HRC/17/31, annex).³

5. The Deputy High Commissioner stressed that private military and security companies had a responsibility to respect human rights, as stipulated in the Guiding Principles on Business and Human Rights. That might include implementing training procedures for employees, establishing grievance procedures in cases of alleged abuses and conducting regular monitoring to ensure adequate oversight, immediate cessation of abuses and accountability. If cases of human rights abuses occurred, States had the obligation to ensure that they were referred to the authorities concerned for investigation, prosecution and reparation. From a human rights perspective, she stressed the importance of ensuring

¹ See summaries of first session (23–27 May 2011, A/HRC/WG.10/1/4), second session (13–17 August 2012, A/HRC/22/41) and third session (21–25 July 2014, A/HRC/WG.10/3/2).

² More information is available from www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

³ Endorsed by the Human Rights Council in its resolution 17/4.

that there was no protection gap and no impunity for private military and security companies, including for those that operated transnationally.

6. The Deputy High Commissioner indicated that the prosecution and recent sentencing by a United States federal judge of four Blackwater contractors who had killed 14 unarmed Iraqi civilians in 2007 had sent a strong signal that human rights abuses committed by private military and security companies should never remain unpunished. However, as flagged by the Working Group on mercenaries in its press release of 14 April 2015: “Justice is served in this case but must be assured globally.”⁴ She mentioned that other initiatives were also relevant when considering an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies. Those included the International Code of Conduct for Private Security Service Providers and 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, which sought to promote respect for international humanitarian law and human rights law whenever such companies were present in armed conflicts.

II. Organization of the fourth session

A. Election of the Chair-Rapporteur

7. At its first meeting, on 27 April 2015, the working group elected the Permanent Representative of South Africa, Abdul S. Minty, as its Chair-Rapporteur.

B. Attendance

8. The list of attendance is contained in annex I to the present report. Pursuant to Human Rights Council resolution 28/7, the open-ended intergovernmental working group invited experts and relevant stakeholders to participate in its work, including the Chair-Rapporteur of the Working Group on mercenaries, Elżbieta Karska; the Director of the Security in Complex Environments Group, Paul Gibson; senior researcher in international law at the University of Pretoria, Stuart Casey-Maslen; and the United Nations Under-Secretary-General for Safety and Security.

C. Organization of the session

9. In his introductory remarks, the Chair-Rapporteur recalled the mandate of the open-ended intergovernmental working group. He indicated that at previous sessions a range of issues and challenges to the effective regulation of the activities of private military and security companies had been addressed, focusing on existing law and practice, on issues of accountability for human rights abuses linked to such activities and on the provision of appropriate assistance and remedies for victims. He also recalled that delegations had reaffirmed the shared goal of protecting human rights and ensuring accountability for violations and abuses relating to the activities of private military and security companies; and that there was widespread agreement about gaps in the current regulatory framework, not least because only very few States had specific legislation on such companies. The Chair-Rapporteur mentioned that how to ensure effective remedies and accountability

⁴ Available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15840&LangID=E.

remained one of the central challenges, and he highlighted the clear mandate of the working group in that regard.

10. At its first meeting, on 27 April 2015, the open-ended intergovernmental working group adopted its agenda (A/HRC/WG.10/4/1) and programme of work.

11. One delegation commended the Chair-Rapporteur for his ability to get consensus in the past and referred in particular to paragraph 77 of A/HRC/22/41, but regretted that the sponsor of the resolutions presented at the twenty-second and twenty-eighth sessions of the Human Rights Council had disregarded the potential for consensus and had opted instead to divide the Council, with a view to discussing a draft convention on which there had been no consensus in 2011. The same delegation pointed to the underlying question as to why some delegations invested in building consensus during sessions of the open-ended intergovernmental working group if that consensus was meant to be undermined with a voted resolution. It also regretted that its request to invite stakeholders to provide updates on recent developments in the processes on the International Code of Conduct for Private Security Service Providers and the Montreux Document had not been met. Some delegations noted that paragraph 77 set forth the scope of the mandate of the working group and the basis for continued cooperation.

12. Some delegations highlighted the need for victims to have the right to an effective remedy, including reparations, and for an international legally binding instrument in addition to national initiatives on the activities of private military and security companies. Those delegations indicated that such companies, given their specificities, should not be allowed to regulate their own behaviour, which could only be done by an independent authority. In their opinion, the current normative framework, including the Montreux Document and the International Code of Conduct, failed to address the complexities of the problem, nor did they establish proper mechanisms for accountability, effective remedies for victims, regulation, monitoring and oversight of those entities and their personnel. Some delegations recommended that the open-ended intergovernmental working group begin discussions on concrete elements for inclusion in a legally binding instrument during the fourth session.

13. In that regard, Pakistan indicated that it had submitted draft elements for a possible instrument, based on human rights instruments, the Montreux Document and the International Code of Conduct, the draft which had been prepared by the Working Group on mercenaries.⁵ The delegation urged the Chair-Rapporteur to present the text of a draft convention based on those elements and the deliberations at the session, for the consideration of States, before the next session. South Africa suggested that norms should be elaborated in international law to (a) define private military and security companies; and (b) hold such companies accountable under international humanitarian and international human rights law. The new instrument should complement national and regional mechanisms, particularly in the area of combating impunity and effective punishment. It should also include mechanisms for recourse in cases of violations. Such mechanisms would include a committee on the regulation, oversight and monitoring of private military and security companies, an enquiry and a complaint procedure and reporting mechanisms on compliance with new norms and standards in international human rights and humanitarian law by private military and security companies.

14. Some delegations added that international regulation must be complemented by effective national laws and policies that would allow States to investigate and prosecute violations of international human rights and humanitarian law. In their view, as a second

⁵ See www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session4/Pakistan.pdf.

step, any regulatory gaps in areas such as accountability, remedies, licensing and oversight should be filled through an international legally binding instrument that would complement existing initiatives.

D. General discussion

15. Some delegations provided an update on the Montreux Document and the International Code of Conduct Association processes. The Montreux Document, which has been signed by 52 States and three international organizations, applies to companies operating during armed conflicts and recalls the existing obligations of States under international humanitarian law in situations of armed conflict. The Montreux Document Forum was formally launched on 16 December 2014. Some delegations questioned the effectiveness of the Montreux Document and referred to concerns expressed in *Progress and Opportunities, Five Years On: Challenges and Recommendations for Montreux Document Endorsing States*.⁶

16. Some delegations also noted recent developments regarding the International Code of Conduct Association, which had held its first annual plenary in December 2014. Some delegations noted that the International Code of Conduct was aligned with the Guiding Principles on Business and Human Rights, and that the Association was not purely a self-regulation body, as its board was composed of States, companies and civil society. Some delegations said that the Association could develop oversight mechanisms on certification, monitoring and compliance. In the view of some delegations, the complementarity of the Montreux Document and the International Code of Conduct, in addition to domestic legislation, confirmed that there was no legal vacuum.

17. Some delegations also referred to the International Organization for Standardization (ISO) and its new *Management System for Private Security Operations: Requirements with Guidance* (ISO 18788),⁷ which was expected to be released in June 2015 and which incorporated relevant elements of the Guiding Principles on Business and Human Rights. The new standard was a development from the *Management System for Quality of Private Security Company Operations: Requirements with Guidance* (ANSI/ASIS PSC.1-2012). One delegation referred to the OHCHR-led project to improve access to remedy for victims of business-related human rights abuses, which had the potential to identify effective ways to progress on access to remedies.

Developments at the national level

18. The United States of America highlighted that the Department of State required that companies bidding on its worldwide protective services programme must have membership in good standing in the International Code of Conduct Association and confirmed compliance with PSC 1-2012. It also referred to possible criminal charges under the False Claims Act for those private security companies which falsely stated that they were in compliance with the required standard. The delegation further referred to the Department of Defense's work with the International Institute of Humanitarian Law and the United Nations Office on Drugs and Crime on separate initiatives to assist States in the development of rules on the use of force by private military and security companies in support of provisions in the Montreux Document. The delegation also noted the recent convictions of four Blackwater contractors, which demonstrated the commitment and

⁶ Available from www.dcaf.ch/Publications/Progress-and-Opportunities-Five-Years-On-Challenges-and-Recommendations-for-Montreux-Documents-Endorsing-States.

⁷ Available from www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=63380.

ability of the United States Government to pursue and obtain justice in cases of violent crimes committed by contractors.

19. South Africa referred to the Regulation of Foreign Military Assistance Act No. 15 of 1998, which regulated “the rendering of foreign military assistance by South African juristic persons, citizens, persons permanently resident within the Republic and foreign citizens rendering such assistance from within the borders” of South Africa. It added that while law enforcement agencies had consistently sought to look into those activities, they had not often been successful in the light of the non-cooperation of countries where the activities had taken place, which were often those countries involved in the Montreux Document and International Code of Conduct processes.

20. Norway referred to the 2001 Act on private security companies operating on Norwegian territory, which had been subject to substantive changes in 2011. The purpose of the Act was to ensure the rights of individuals who were handled by representatives of private security companies; a high quality of services; sufficient control and oversight over such businesses; and that they only operate within the parameters of the Act itself. Norway became a member of International Code of Conduct Association in early 2014 and believed that it could be significant in ensuring that private security companies in complex environments respected international law and in improving oversight and accountability.

21. The European Union recalled its view that private military companies and private security companies should be addressed separately, given their very broad and diverse range of activities. With regard to accountability and access to remedies, the European Union recalled the existing solid provisions in the “Brussels I” regulation, as revised. The European Union noted that States and international organizations, as clients, could enhance standards in the operations of companies. It stated that the European Union and its member States were determined to further consider how best to make use of the International Code of Conduct, including in their procurement processes. It added that much had been done by the European Union and others to implement the Guiding Principles on Business and Human Rights, as they were instrumental in preventing and remedying abuses across sectors, including by private military companies and private security companies.

22. Australia noted that it was a signatory to the Montreux Document, was an active member of the International Code of Conduct Association and had participated in the development of new standards. The Department of Foreign Affairs and Trade required that private military and security companies be signatories to the Code and comply with relevant provisions of the Montreux Document in order to provide ad hoc services. Any international regulatory framework should focus on strengthening compliance with existing international law and on ensuring accountability. A multifaceted approach encompassing national legislation and international cooperation was the most effective response.

23. The United Kingdom of Great Britain and Northern Ireland referred to its Security Industry Authority, set up under the Private Security Industry Act 2001, which was responsible for regulating the private security industry by, inter alia, operating a licensing regime for individual security operatives and a voluntary approvals scheme for security businesses. Furthermore, the International Criminal Court Act 2001 provided jurisdiction to prosecute certain crimes committed by British nationals in or outside the United Kingdom. The Department of Transport also issued interim guidance to United Kingdom flagged ships on the use of armed guards to defend against the threat of piracy in exceptional circumstances. The United Kingdom Accreditation Service accredited auditors for professional standards, and was a signatory to the International Accreditation Forum Multilateral Agreement.

24. Switzerland referred to its new federal law on private security companies, which had been adopted in September 2013 and was expected to come into force in September 2015.

The law would apply to individuals and companies providing security services abroad, from Switzerland, or who would provide, in Switzerland, services linked to security services provided abroad. The law also applied to companies established in Switzerland that exercised control over security companies active abroad, and prohibited certain activities relating to direct participation in hostilities or to grave violations of human rights.

25. The Russian Federation recalled that its legislation did not provide for the extraterritorial activities of private military and security companies, including military activities. Those functions could only be undertaken by State institutions. In view of global trends, legal and political experts in the Russian Federation were discussing the advisability of expanding the activities of private military and security companies and outsourcing some State functions. Arguments in favour included considerations of professionalism, mobility, effectiveness and cost-effectiveness. The Russian Federation noted that any such move would need to be carried out within existing international human rights and international humanitarian law, and highlighted that challenges included the lack of State control over those activities, the lack of remedies and the current legal norms, which were insufficient or ineffective.

26. The Chair-Rapporteur indicated several possible points for discussion such as the implementation of existing standards by States, including grievance procedures for victims, cases brought against companies and their outcome.

27. The Colombian Commission of Jurists referred to general comment No. 35 of the Human Rights Committee, in which it was noted, *inter alia*, that when private individuals or entities are empowered or authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence and ensuring adherence to article 9 of the International Covenant on Civil and Political Rights.

28. The Executive Director of the International Code of Conduct Association⁸ provided an update on the key governance and oversight functions of the Association, indicating that a draft certification procedure was pending consideration by the Association's Board of Directors and its General Assembly. The Association anticipated that its reporting, monitoring and assessment of performance functions would be significantly developed in the future, and would involve extensive stakeholder outreach. The Executive Director also noted that clients of private security companies had approached the Association to discuss making membership in the Association a requirement in contracts with companies, as well as an authorization criterion in national legislation (Switzerland). Some had also raised the intention of the United States Department of State to make membership in the Association a requirement for potential contractors involved in the Department's worldwide protective services programme.

29. The second meeting of the fourth session concluded with an interactive dialogue. One delegation and the Chair-Rapporteur queried the ability of the International Code of Conduct Association to ensure accountability, access to remedy and transparency in the process of examining a complaint. The Executive Director responded that the Association was limited by its articles of association and by the powers conferred to it by its members (Governments, companies and civil society). He added that the Association would never be able to supplant the role of national laws and national law enforcement bodies, but it would

⁸ Before giving the floor to Mr. Orsmond from the International Code of Conduct Association, the Chair-Rapporteur recalled Human Rights Council resolutions 22/33 and 28/7, in which the Council decided that the intergovernmental working group "shall invite experts and all relevant stakeholders to participate in its work". He also recalled that during the third session, industry representatives had been welcome to participate in the session either as an independent stakeholder or member of a delegation (A/HRC//WG.10/3/2, para. 12).

certainly have the ability to influence the industry from a business standpoint. He concluded that, although the Association's grievance mechanism was not as developed as its certification mechanism, respect of national and international law was viewed as a fundamental responsibility.

III. Discussion on specific topics

A. Substantive report of the Chair of the Working Group on mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

30. In her statement on 28 April 2015, Ms. Karska said that the Working Group on mercenaries had undertaken additional research on national laws and regulations regarding private military and security companies in eight countries in Central America and the Caribbean, eight countries in South America and four countries in Europe (A/HRC/30/34).⁹ Three other reports had already been submitted to the Council.¹⁰ Its 2016 report to the Council would address the national legislation of countries in Eastern Europe, North America and the Pacific. Those studies had assessed existing national laws regarding private military and security companies and their effectiveness in protecting human rights and promoting accountability for violations, and had aimed at identifying common points, good practices and regulatory gaps that might exist. A global analysis would be presented to the General Assembly in 2016.

31. Ms. Karska said that the Working Group had held two expert meetings and consulted with stakeholders, including on the use of private military and security companies by the United Nations. Those efforts had informed the discussions of the Working Group on a possible legally binding instrument for the regulation of such companies. Those reflections were contained in the concept note prepared by the Working Group for consideration at the current session of the open-ended intergovernmental working group.¹¹

32. Ms. Karska added that the concept note reflected the perspectives and experiences of government officials, experts and civil society representatives, and was the result of extensive consultations held by previous members of the Working Group. The first draft of a possible convention was the basis for that reflection (see A/HRC/15/25, annex), while the concept note was also the outcome of the ongoing research on national legislation referred to above. Moreover, the concept note represented the commitment of the Working Group to advancing a coherent, focused and realistic framework for the consideration of the open-ended intergovernmental working group.

33. In seeking to achieve the above, the Working Group on mercenaries had distilled its key concerns into the following eight main points:

⁹ Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panama; Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Ecuador, Peru and Uruguay; and France, Hungary, Switzerland and the United Kingdom.

¹⁰ Burkina Faso, Cameroon, Côte d'Ivoire, the Democratic Republic of the Congo, Mali, Morocco, Senegal and Tunisia (A/HRC/27/50); China, India, Malaysia, Pakistan, the Philippines, Singapore, Sri Lanka and the United Arab Emirates (A/HRC/27/50); and Botswana, Ghana, the Gambia, Kenya, Lesotho, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Uganda and Zimbabwe (A/HRC/24/45).

¹¹ Available from www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session4/WG_MercenariesCN_14April2015.pdf.

(a) The Working Group acknowledged that certain functions were inherent to the State, for which it retained ultimate responsibility regardless of whether or not it outsourced that function. Some inherent State functions might not be outsourced, namely direct participation in hostilities in armed conflict, and detention and interrogation of prisoners of war, as defined in the Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War. The Working Group proposed that recommendations for the recognition of different classifications of service activity be included in the draft. Those classifications were predicated on identifying which activities increased the risk of human rights violations when undertaken by private actors. They also addressed the gap left by the Montreux Document, which applied solely to armed conflicts;

(b) Intergovernmental organizations, as well as States, could become party to the convention. While that was not new, it reinforced the notion of accountability of intergovernmental organizations and supported the growing trend of such organizations assuming their objective international legal personality in becoming party to international instruments;

(c) The Working Group proposed one article on implementation, bringing together the different related articles in the first draft convention. Obligations under that article would apply to domestic and international companies, as well as to services offered to States and to intergovernmental, non-State and corporate clients;

(d) The Working Group offered a new definition of a licence, which would serve as a modality for establishing and enforcing standards;

(e) The Working Group put forward one coherent article on licensing covering five focus areas, again bringing together related elements in the first draft convention;

(f) Registration should take place as a secondary step following licensing. That built on the registry of the first draft convention and would serve as a monitoring system of related actors and activities;

(g) The Working Group introduced a new framework of regulation of jurisdiction. The new draft sought to strengthen accountability and extraterritorial provisions, notably to cover the complex environments in which the security industry often operated. The framework applied the following hierarchy of principles for establishing jurisdiction: active person; passive person; territoriality; and universal jurisdiction;

(h) The Working Group deemed it essential to establish a mechanism for the purposes of oversight and ensuring remedy and reparations for victims. The modality, be it a committee or ombudsperson or other modality, had not yet been determined, but any mechanism that could regularly, efficiently and comprehensively undertake monitoring and investigation and guarantee remedy for victims was worthy of review.

34. Ms. Karska concluded by hoping that that new formulation of key principles would be a source of fruitful and constructive discussion among the open-ended intergovernmental working group, and would build a stronger foundation for mutual consideration and shared positions as deliberations progressed.

35. During the subsequent discussion, some delegations welcomed the concept note prepared by the Working Group. According to one delegation, the concept note comprehensively covered the elements that might be included in the kind of legally binding instrument for which the open-ended intergovernmental working group had been created. It also suggested that the Chair-Rapporteur consolidate all proposals, including the concept note, for future deliberations and as a basis for future work. Furthermore, it expressed its appreciation for the work of the International Code of Conduct Association and the Government of Switzerland in relation to the Montreux Document, and said that it was time for the intergovernmental working group to pull together all those efforts in a

comprehensive manner. Another delegation suggested that the draft be discussed among Governments, and not only within an expert body.

36. One delegation pointed out that the work of the Working Group on mercenaries to map existing legislation on private security and military companies might be undermined if it was meant to support a pre-established position that a legally binding instrument was the “best way to ensure adequate protection of human rights” without developing arguments that could highlight the advantages of other options. The same delegation expressed concern about the Working Group’s plan to further elaborate a draft convention, which seemed to go beyond its mandate and risk complicating discussion in the intergovernmental process. Some delegations said that they did not support the draft convention elaborated by the Working Group, which had not met with consensus at the open-ended intergovernmental working group’s first session. They recalled that the mandate of the open-ended intergovernmental working group had been broadened (see A/HRC/22/41, para. 77). Some delegations reiterated that a convention was not necessary, but that there was a need to strengthen domestic laws and their implementation, as well as to see how the International Code of Conduct and other initiatives translated into practice. One delegation noted that the concept note was highly problematic as it took discussions back to those held during the first session of the intergovernmental working group in 2011. The delegation suggested that other options could be explored, including guidelines, possible plans of action, model laws, good practices and mutual legal assistance programmes.

37. The Colombian Commission of Jurists welcomed the concept note as a good starting point, while noting that it was linked to a new set of articles that was not yet available and that could not, therefore, be properly commented upon.

38. In response to questions from delegations, Ms. Karska said that the Working Group was convinced that an international convention would be the best mechanism to regulate the issue of private military and security companies. That did not exclude other options, including guidelines, model laws and legal assistance programmes, which in the opinion of the Working Group were complementary. Gaps in national law still existed and the analysis of the Working Group had not shown much progress in that regard. As such, an international convention would be an effective mechanism for a better implementation of a system of control. Ms. Karska highlighted that the Working Group welcomed all comments and suggestions from States on its concept note, as it sought to finalize its proposed new draft convention by the end of 2015. In that regard, the Chair-Rapporteur of the open-ended intergovernmental working group suggested that any comments should be forwarded to the secretariat by the end of May 2015, for transmission to the Working Group on mercenaries.

39. Delegations discussed the way forward with regard to the elaboration of possible recommendations on the future programme of work for the open-ended intergovernmental working group. Some noted that there was no consensus on any further discussion on the draft convention elaborated by the Working Group on mercenaries and discussed by the intergovernmental working group in 2011. One delegation noted its preference for the recommendations from the session not to refer to the concept note or the possibility of a revised draft convention, while recognizing that the report of the intergovernmental working group would duly reflect what was said by all delegations and speakers. Delegations discussed the mandate of the intergovernmental working group, which one delegation said was to look into elaborating a new instrument, while another said that it did not call specifically for the drafting of a legally binding treaty but rather to considering the possibility of elaborating an international regulatory framework. One delegation mentioned that the intergovernmental working group had not explored the range of options; instead, there seemed to be an attempt to discuss a draft on which there was no consensus.

B. Discussion with representative of private military and security companies

40. On 28 April 2015, the Director of the Security in Complex Environments Group, Mr. Gibson, indicated how responsible companies within the private security sector were embracing standards and regulations to ensure that their operations were transparent, accountable and compliant with international and national legislation, including human rights law.

41. Mr. Gibson first addressed the notion of the “complex environments” in which security companies worked. He admitted that the hitherto unregulated private security sector had fallen short of internationally recognized standards and that not all of those shortcomings had been addressed. However, he contended that the private security companies with which he had engaged were demonstrably embracing standards and regulations to ensure that they operated in an appropriate and transparent manner, and within the rule of law.

42. As for the companies that he represented, Mr. Gibson clarified that they did not employ mercenaries, a term he labelled emotive and implying action for financial gain. Those companies did not conduct offensive military operations but provided a range of risk management and protective services for their clients that were essentially defensive in nature. He said that weapons were rarely fired and then only for self-defence.

43. Mr. Gibson proceeded with an overview of self-regulation initiatives with regard to private security companies, including the Montreux Document and the International Code of Conduct. He highlighted the PSC-1 standard, which had been endorsed by the Government of the United Kingdom in 2013, and stated that British companies were being independently audited and certified against that standard. He recalled that the standard was expected to become fully international in 2015 and would be known as ISO 18788. He mentioned that full members of the Security in Complex Environments Group were required to demonstrate that they were working to achieve certification under PSC-1. Mr. Gibson also recalled the core functions of the International Code of Conduct Association, and explained his organization’s engagement with it, including to encourage others to develop coherent, transparent and affordable standards and oversight mechanisms. With regard to regulations in the maritime sector, Mr. Gibson briefly outlined the most recent developments, calling the publication of ISO 28007 in March 2015 a game changer that offered maritime security companies a robust auditable standard.

44. Mr. Gibson acknowledged that the key to the success of those standards had been the identification of independent third-party accreditors, who ensured that companies claiming to comply with the standard did so fully and in an auditable fashion. The United Kingdom Accreditation Service had accredited four certification bodies and they conducted rigorous third-party audits of companies to certify them against PSC-1 and ISO 28007. Those bodies, for example, had to assess how well the company’s human rights impact assessments had been incorporated in their management processes. In support of those international standards, the Security in Complex Environments Group had established an enhanced vetting process, using a credible and respected national body: the Disclosure and Barring Service. Mr. Gibson also mentioned that City and Guilds had developed a Maritime Security Operative Qualification that encapsulated all the core competencies required by ISO 28007, and that the United Kingdom had put in place a licence regime for the export, control and disposal of weapons used by private security companies.

45. Mr. Gibson also highlighted some of the industry’s frustration with the understandably cautious approach of the Government of the United Kingdom in handling operational issues affecting the sector, including with regard to floating armouries, a feature

of maritime security operations in the Indian Ocean. Mr. Gibson pointed out that following sustained engagement the British Department for Business Innovation and Skills had announced that it would issue British trade licences authorizing the use of floating armouries for the storage of controlled equipment, including firearms. While he described that as a significant step, he asserted that more needed to be done to facilitate a floating armoury operating under a United Kingdom flag. He further stated that the restrictive nature of the firearms legislation currently prevented appropriate firearms training in the United Kingdom.

46. Finally, Mr. Gibson commented on the decline of Western defence spending without a commensurate decline in political ambition, creating a strategic deficit that would have to be filled by the private sector. Governments would have to increasingly outsource contracts to the private sector in areas that until recently had been considered to be the exclusive prerogative of the military. He also recalled that private security companies were in the business of making a profit, and that it was important that the costs of increasing regulation should not make companies uncompetitive — so as not to penalize those who wished to comply. He emphasized that it was everyone's responsibility to ensure that clients understood the importance of regulation, and that the additional costs arising from it were worth accepting.

47. Some delegations raised questions regarding the potential of the International Code of Conduct Association to become an effective mechanism and the consequences of non-compliance with applicable law. In his response, Mr. Gibson stated that the Association was still in an early phase of its operationalization, and that the complex issues of certification and oversight were still being discussed. He was confident, however, that there was a real consensus within the Association to make it an organization with teeth. The representative of the Association similarly recalled that it was a three-pillar organization that also included States and civil society. There was agreement that the Association must have effective oversight mechanisms, the ability to exclude those who did not comply and effective grievance mechanisms also offering access to remedies. Some delegates clarified that voluntary regulatory frameworks and recourse avenues neither replaced national legislation and regulation, which took precedence, nor replaced criminal proceedings where appropriate. Mr. Gibson confirmed that the majority of members were from Europe or the United States and that the success of the initiative would depend on the ability of the Association to reach out to other regions. The Executive Director of the Association added that the most recent applications had come from non-Western States, indicating an increased interest and awareness in other regions.

48. Delegations sought Mr. Gibson's views on issues regarding the use of private military and security companies in complex environments, for example: (a) cases where foreign nationals had engaged in military activities and committed violations, but had benefited from diplomatic immunity; (b) cases where private military and security companies had been in charge of administrating detention centres and prisons; (c) cases where private military and security companies had been hired to protect extractive industries and had committed human rights abuses; (d) reports that floating armouries were placed on the high seas to circumvent national regulations and control; (e) the employment of South African citizens by private military and security companies in violation of South African law, which made it illegal for any South African to render foreign military assistance; and (f) the industry's lack of denials of, or credible responses to, numerous allegations of human rights abuses committed by private military and security companies.

49. In his responses, Mr. Gibson stated that the companies he represented had no diplomatic immunity and that they, their employees and subcontractors were fully accountable under domestic and international legislation. He confirmed that some companies had indeed been involved in the administration of detention facilities and that

they should be subject to regulation and be held accountable for any abuses committed. He also conceded that some environments were particularly problematic owing to the absence of the rule of law. He emphasized that, in order to avoid abuses, it was critical to vet and train employees of private security companies, but also to make clients understand that they bore responsibility for contracting reliable companies only.

50. Mr. Gibson explained that floating armouries were placed in the Indian Ocean near the routes of ships that required protection, and not as a way to circumvent control. He said that those armouries fell under the jurisdiction of the flag State, but also expressed sympathy for the view that in some of those States the regulatory frameworks were not sufficiently robust. He refuted the suggestion that staff of maritime security companies might find it easier to shoot first and ask questions later. He explained that companies adhered to strict rules on the use of force that mandated proportionate and escalatory measures, that experience had shown that the firing of warning shots was enough to deter and avert pirate attacks, and that maritime security companies did not detain pirates. He also stated that privately contracted armed security personnel on ships wore helmets fitted with cameras to provide full visibility and accountability for their actions.

51. With regard to the employment of South African citizens by private military and security companies, Mr. Gibson agreed that South Africa should receive a considered response on why there had so far been no commitment in the context of the Montreux Document or the International Code of Conduct not to recruit South Africans in violation of South African law. The representative of the International Code of Conduct Association concurred with that view. With regard to the suggestion that private security companies were not responding to allegations of human rights abuses, Mr. Gibson said the companies he dealt with had grievance mechanisms embedded in their business models that enabled thorough investigations to take place following an allegation of a human rights abuse. The industry welcomed civil society and others bringing such allegations to the fore to enhance the transparency and accountability of those investigations. In due course, oversight mechanisms would also be in place under the auspices of the Association.

52. One delegation described the International Code of Conduct as a gentlemen's agreement and the Association as a gentlemen's association, and considered them insufficient to protect victims of human rights abuses. Pointing out that the self-regulatory system in the banking industry had proved insufficient, it was questioned whether self-regulation processes could be trusted and whether there was any experience with such processes functioning satisfactorily. Mr. Gibson explained that, in his view, considerable success had been achieved with voluntary regulation in the private security sector. In a short time frame and with the industry as catalyst, two international standards recognized by ISO had been developed and the Association had been created. However, Mr. Gibson added that the industry would not be opposed to an international legally binding instrument, with the critical proviso that it must create a genuinely level playing field at the global level. If that were achieved, the industry would be fully supportive. Some delegations commended Mr. Gibson for that statement, recalling their view that a global and binding convention laying out the minimum standards was necessary.

C. Specificities of regulating sea-based private security activities

53. On 29 April 2015, senior researcher in international law at the University of Pretoria Mr. Casey-Maslen presented some of the issues regarding the use of force by private maritime security service providers, in particular with respect to counter-piracy operations and how they might affect the possible international regulatory framework governing private security companies. While the Security Council, in its resolution 1851 (2008), referred to "applicable international humanitarian law", counter-piracy operations and

measures were undertaken not within the realm of the law of armed conflict, but under international law of law enforcement, which combined international human rights law and general principles of domestic criminal law with international criminal justice standards.

54. The use of armed private security providers to protect commercial shipping had increased in recent years, and had been an important factor in reducing the number of successful acts of piracy and armed robbery at sea. Bringing weapons on board a vessel had its own risks, in terms of physical security to crew members and respect for a State's obligations under international law on the transfer of conventional weapons and in terms of the risk of reckless and excessive use of force, including lethal force, by personnel in an environment where effective monitoring and oversight were exceptionally hard to ensure.

55. Mr. Casey-Maslen noted that, in carrying out their duties, State law enforcement officials were required to use force only when necessary and to employ only such force as was necessary in the circumstances and proportionate to the threat.¹² Lawful use of force by private maritime security service providers was limited to acts carried out in defence of any person from unlawful violence. That might encompass lawful acts involving use of force when under imminent threat of attack, either in self-defence or in defence of others. The determination of whether any particular use of force in the maritime environment met the legal criteria might be contentious given the lack of detailed guidance at the domestic level on what was and was not lawful; materially differing domestic criminal law thresholds for justified use of force in self-defence; and a lack of consensus as to which national law should determine legality.

56. Mr. Casey-Maslen undertook a review of selected national jurisdictions and standards, including the 2012 interim guidance of the International Maritime Organization (IMO).¹³ He also referred to the case before an Indian court in which two Italian marines had allegedly opened fire on a vessel, killing two Indian fishermen on board; the trial of the two marines had recently been postponed to July 2015.

57. Mr. Casey-Maslen noted that a detailed code on use of force in the maritime environment was lacking and that that lacuna could not be filled in the proposed international regulatory framework. He also referred to the guidelines elaborated by the Geneva Academy of International Humanitarian Law and Human Rights in 2012.¹⁴

58. He noted that the core law enforcement function of arrest, and a concomitant power to use force in order to effect a lawful arrest involving use of force, were functions inherent to the State. He added that, to some extent, those powers were delegated in the maritime environment. Whether or not private security service providers had been granted those powers, they might need to use them, leading to concerns about treatment of suspected pirates in detention and respect for the fundamental right to habeas corpus.

59. Finally, as recognized by the Security Council in its resolution 2184 (2014), the solution to the problem of piracy lay on land rather than at sea. Mr. Casey-Maslen concluded that, in the meantime, use of armed private security service providers looked likely to continue, with all the risks that that entailed.

60. One delegation noted that it was essential to acknowledge the work undertaken by IMO and that the Human Rights Council should not duplicate the work done by IMO. Another delegation underlined the primary role of IMO in the context of sea-based

¹² See principle 9 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, available from www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx.

¹³ See www.imo.org/OurWork/Security/SecDocs/Documents/Piracy/MSC.1-Circ.1443.pdf.

¹⁴ Available from www.geneva-academy.ch/docs/projects/Counterpiracy.pdf.

activities of private military and security companies and stressed the relevance of the 2012 IMO interim guidance in that regard. Some delegations requested further information about the IMO interim guidance and its implementation. A delegation and the Chair-Rapporteur expressed regret at the absence of IMO at that session. The Chair-Rapporteur confirmed that he would continue to invite IMO to cooperate with the open-ended intergovernmental working group and provide any information relevant to its work. He also encouraged stakeholders to provide relevant information on that issue for the consideration of the working group. He noted that the working group was particularly concerned with accountability and ensuring remedies for victims of human rights abuses and sought clarification on any cases involving such issues, including evidentiary issues of incidents at sea.

61. One delegation asked about the phenomenon of “floating arsenals” located outside territorial waters, which by their name pointed possibly to a type of unofficial warship. It also described the situation by which armed merchant ships would sail into territorial waters and be granted temporary firearms permits; once that system was implemented, the ships stopped entering the waters and instead were floating arsenals outside those waters. The same delegation asked how the challenges with regard to the flag State (in situations where flags of convenience were used) could be addressed. Some delegations requested information about trends in piracy and which parts of the world were affected. One delegation queried how national legislation could address the extraterritorial nature of companies in that sector in the absence of a legally binding instrument. Another delegation acknowledged other processes such as the Contact Group on Piracy off the Coast of Somalia.

62. In response to a suggestion to use the terms “floating armoury” or “floating safe” instead of the term “floating arsenal”, Mr. Casey-Maslen agreed that such terms might be more appropriate and he acknowledged the risks associated with using them. He clarified that they had been created as an attempt to address the problem of weapons being thrown overboard, when vessels sought to enter ports in States that did not allow weapons to be brought into their territorial waters. He also acknowledged the challenges associated with flags of convenience and with vessels that did not fly a flag, and pointed out that the general principle of the duty of the flag State¹⁵ might need to be considered in terms of the reality of counter-piracy operations. Mr. Casey-Maslen further questioned the credentials of some of the companies that undertook armed security services. He noted that the IMO interim guidance was widely referred to, while he considered that it did not go into enough detail with regard to when the use of force would be lawful. He referred to the ongoing case in India and the questions regarding the limits of self-defence.

63. Mr. Casey-Maslen noted that the Contact Group on Piracy off the Coast of Somalia had encouraged the adoption of laws to allow for prosecutions in the light of the practice of “capture and release”. He clarified that the guidelines of the Geneva Academy of International Humanitarian Law and Human Rights had been developed as a contribution to the debate, and noted that existing guidance by States was not sufficiently detailed with regard to self-defence. Demand for armed security services had been driven by a perception of a very real risk, especially in the Gulf of Aden, the Gulf of Guinea and the South China Sea, and he pointed to IMO reports on piracy for further details.¹⁶ The crime of piracy was a domestic crime, while domestic legislation could encourage States to exercise jurisdiction on the high seas. The United Kingdom clarified that it had moved to address the crime of piracy and that the United Kingdom interim guidance was intended for use of British

¹⁵ See the United Nations Convention on the Law of the Sea.

¹⁶ Available from www.imo.org/OurWork/Security/PiracyArmedRobbery/Reports/Pages/Default.aspx.

flagships, and not for jurisdiction over other ships. Finally, Mr. Casey-Maslen noted that evidentiary issues and ensuring the respect for the fundamental right to habeas corpus on vessels were a challenge.

64. Norway provided further details of its national legislation and regulations. The use of private security companies on board ships registered in Norway was not regulated by the act on private security companies, but by Regulation 972/2004 on Ship Security. Particular rules governing shipowners' use of private security companies were included in the regulation in 2011. The regulation did not provide requirements directed towards the security companies themselves. Rather, it addressed the responsibilities of shipowners of informing Norwegian authorities when and why use of private security services were required; providing an assessment of the company in question including its internal recruitment and training procedures; and its regulations on use of arms. Shipowners were required to emphasize IMO guidelines in the selection and use of private security guards on board. Norwegian authorities had the competency to decide that certain private security companies might not be used by Norwegian shipowners. The regulation also stipulated when armed guards might be used; how weapons were to be stored on board; and procedures for the use of armed weapons. In 2011, Regulation 904/2009 Relative to Arms was supplemented with a provision regulating the circumstances under which ships registered in Norway might store arms on board on behalf of private security companies. Such storage was only allowed for the objective of protecting the ship against acts of terror or piracy, and required permission granted by Norwegian police. Only ships certified under the International Ship and Port Facility Security-regulations of IMO might be granted such permission, and the permission was only valid when sailing in, to or from certain geographic areas. That regulation was also followed by reporting requirements, in line with IMO guidelines, including to the Norwegian National Criminal Investigation Service if there was reason to believe that the use of force had resulted in personal injury or death. Whenever arms had been used, that had to be reported to the Maritime Directorate.

D. Use of private security companies by the United Nations

65. On 29 April 2015, the Under-Secretary-General for Safety and Security outlined the main features of the current global security context. He referred to a recent report on the safety and security of humanitarian personnel and protection of United Nations personnel (A/69/406), according to which personnel served in increasingly dangerous environments and encountered a variety of threats not previously encountered. He added that the existing threat had been aggravated by the blurring of the lines between criminal and extremist groups, the expansion of the latter and the emergence of new extremist groups. Against that background, the United Nations had engaged armed private security companies in selected duty stations as a last resort, in an effort to strengthen the safety and security of its personnel and to enable the Organization to deliver its programmes and mandates in high-risk environments. That was particularly true in high-risk areas where peacekeeping forces had yet to be deployed and where critical political or humanitarian needs existed. To date, the United Nations had contracted armed private security services in three countries where peacekeeping and political missions had been established (Afghanistan, Haiti and Somalia) out of the more than 170 countries in which the United Nations maintained a presence.

66. The Under-Secretary-General stressed that the "last resort principle" guided the United Nations as to when it might be appropriate to seek out armed private security services. He added that armed private security services were engaged exceptionally, when other options, namely security services by the host Government and other Member States

were not provided for or, alternatively, when security professionals and officers from within the United Nations system were unavailable. The principle was articulated in the United Nations Policy on Armed Private Security Companies,¹⁷ which clarified the roles and responsibilities for recommending and approving the use of specific companies; and outlined specific selection criteria, along with screening and training requirements for contracted personnel. It also covered roles and responsibilities with respect to management and oversight.

67. The above-mentioned United Nations policy was accompanied by Guidelines on the Use of Armed Security Services from Private Security Companies,¹⁸ which further specified roles and responsibilities for determining when it might be appropriate to obtain armed private security services. They set forth specific criteria for recommending the use of specific armed private security companies, based on the latest security risk assessment, while identifying the types of services that might or might not be contracted out to such companies. The Guidelines also provided further details, including on screening and training requirements of contracted personnel.

68. The Under-Secretary-General recalled that respect for international human rights law and international humanitarian law was among the core values of the United Nations, including the Department of Safety and Security. It took all measures in that regard, including collaborating with other United Nations departments, offices as well as agencies, funds and programmes on various policies, procedures, standards and other arrangements, in accordance with the Human Rights Up Front initiative. That initiative aimed to mainstream human rights considerations in all United Nations activities and programmes and foster engagement with Member States on human rights issues. The United Nations Security Management System Policy Manual and related guidelines sought to contract only with those armed private security companies with the highest standards of integrity, competence and performance in line with internationally accepted human rights standards and principles, while barring contracts with those convicted or implicated in human rights abuses or criminal offences. At the same time, the most efficient way of ensuring that international human rights and humanitarian principles were adhered to was to properly implement such a policy and its guidelines.

69. The Under-Secretary-General congratulated the Working Group on mercenaries on the comprehensive nature of its report to the General Assembly (A/69/338) and expressed sincere appreciation for the opportunity to express views on its content. He referred to the measures undertaken pursuant to one of the report's recommendations, namely to extend the United Nations Security Management System Policy Manual to unarmed private security companies. In line with that recommendation, the Inter-Agency Security Management Network recognized the importance of further clarifying the United Nations position on the use of unarmed private security companies, and thus endorsed the establishment of a working group on the subject. In March 2015, the unarmed private security services working group had been formally established, had agreed upon its terms of reference and taken initial steps in determining the need for a separate policy and related guidelines relating to the use of unarmed private security services.

70. The Under-Secretary-General pointed out that there was arguably more to be done in terms of how the existing United Nations Security Management System Policy Manual and related Guidelines were implemented at the operational and tactical levels. In that regard,

¹⁷ Available from www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session4/UNSecurityPolicyManual.pdf.

¹⁸ Available from www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session4/GuidelinesUseArmedSecurityServices.pdf.

one of the greatest challenges was to ensure that the contracted private security companies had adequate internal oversight and accountability mechanisms, including complaint and performance reporting mechanisms, as recommended by the Working Group on mercenaries. Given current resource constraints, the United Nations had yet to allocate additional resources for establishing external monitoring mechanisms in order to ensure the proper execution of a given contract, and accountability of contracted companies and personnel with respect to improper or unlawful conduct. He also noted that, at the policy level, the main gap lay in the lack of an international normative framework on the use of private security companies, whether armed or unarmed. He stated that that issue could not be addressed by a single or even multiple international organizations. Key actors — including States in which private security companies were based or operated and the private armed security companies themselves — must also be involved in a formal process whereby a common and internationally agreed upon normative framework could be established.

71. In the discussion that followed, delegations raised questions about: (a) the number of countries in which the United Nations had engaged unarmed private security companies; (b) the involvement of private security companies in peacekeeping operations and whether any further increase in their involvement could be anticipated in the light of their greater use by States; and (c) whether there was a risk that companies contracted by the United Nations would participate directly as combatants or might be involved in interrogation or detention of prisoners of war.

72. The Under-Secretary-General replied that currently the United Nations employed unarmed security companies in 10 missions of the Department of Peacekeeping Operations, in 11 special political missions and in its support bases in Kenya and Spain, among others. He expressed the hope that there would be no need to increase their use, while noting the security and safety situation in which the United Nations operated. Such a decision was not taken lightly and would be a matter of last resort on the basis of security risk assessment and on the advice of the security team in the mission concerned. Finally, the Under-Secretary-General confirmed that private security companies employed by the United Nations neither participated directly as combatants nor were they involved in interrogation or detention of prisoners of war. The principal role of private security companies was the protection of United Nations personnel, premises and assets.

73. One delegation noted that while States might have different views on contracting private security companies, all States were part of the United Nations and probably recognized that their use by the Organization had become a practice, if not a necessity, for it to operate in certain situations. With reference to oversight and accountability, the delegation asked for further information on instances in which the United Nations had been called upon to take steps to prevent abuses and facilitate access to remedy.

74. In his response, the Under-Secretary-General reiterated that all measures were taken to ensure that international humanitarian law and human rights law were observed. Since his appointment and in the prior handover period, no abuses had been brought to light. There was a monthly review and Department of Safety and Security personnel had day-to-day responsibility for oversight. Furthermore, the process of recruitment was stringent and designed to minimize all abuses. Should any abuses occur, they were brought to the attention of the Under-Secretary-General.

75. The Chair-Rapporteur enquired about the possibility of sharing United Nations experience in using unarmed security companies, and its detailed standards and guidelines, as a basis for discussion and possible use by States. He also queried the extent to which, and under what conditions, national contingents of peacekeeping missions were allowed to use private military and security companies. One delegation asked about the security situation facing other humanitarian actors, and what collaboration the United Nations had

with actors in challenging security environments. In response, the Under-Secretary-General mentioned close collaboration with States and referred to a colloquium in June 2015 to share experiences, including on delivery of security. He also clarified that the United Nations employed private security companies and not private military companies. Finally, he pointed out that the United Nations collaborated with international non-governmental organizations in complex and challenging security environments, including in the Syrian Arab Republic and Yemen.

IV. Concluding remarks

76. On 1 May 2015, the Chair-Rapporteur thanked the delegations and expressed gratitude to the experts for their excellent contributions. He mentioned the increased use of private military and security companies in various sectors and contexts, both on land and at sea. Specific challenges discussed included: jurisdiction issues linked to “flags of convenience”; weapons storage in the context of “floating armouries” in international waters, including possible circumvention of national laws limiting the import and export of weapons; ensuring that private military and security companies respected applicable national legislation; and challenges relating to international cooperation in legal matters, in particular mutual legal assistance.

77. The Chair-Rapporteur suggested that the open-ended intergovernmental working group consider including the following text as part of its conclusions and recommendations:

[Paragraph 1] The intergovernmental working group noted the multifaceted and diverse issues raised throughout its third and fourth sessions. These included: the distinction between the activities of private military companies and private security companies; measures for registering, licensing and contracting private military and security companies; ensuring accountability and provision of assistance and remedies for victims; possibility of an international regulatory framework; specificities of regulating sea-based private security activities; and the use of private security companies by the United Nations. The intergovernmental working group noted the initiatives undertaken by various stakeholders relating to those issues, while highlighting the challenges that remain.

[Paragraph 2] Different views were offered as to how to achieve the shared goal of protecting human rights and ensuring accountability for violations and abuses relating to the activities of private military and security companies. Some delegations proposed that the intergovernmental working group begin elaborating a legally binding instrument for the regulation, monitoring and oversight of private military and security companies, and submitted elements of a draft convention for the consideration of the intergovernmental working group. Other delegations proposed the consideration of the range of options to be explored to further develop an international regulatory framework, including international standards setting and development of guidelines, possibly actions plans or model laws, contract templates based on the Montreux Document, good practices and mutual legal assistance programmes.

[Paragraph 3] Taking account of Human Rights Council resolution 28/7 of 26 March 2015, the intergovernmental working group will continue its work on the above-mentioned issues and also recommends further consideration of human rights issues relating to, inter alia, (a) the operation of private military and security companies in the maritime context; (b) the use of private military

and security companies by humanitarian actors; and (c) access to justice and remedies for victims of violations and abuses linked to the activities of private military and security companies.

78. The Chair-Rapporteur regretted that, despite the approval expressed by some delegations, the second and third paragraphs had not found consensus.

79. The concluding remarks of the European Union and the African Group are reproduced, in annex II and III respectively, in the language of submission only.

V. Conclusions and recommendations

80. The open-ended intergovernmental working group noted the multifaceted and diverse issues raised throughout its third and fourth sessions. These included: the distinction between the activities of private military companies and private security companies; measures for registering, licensing and contracting private military and security companies; ensuring accountability and provision of assistance and remedies for victims; possibility of an international regulatory framework; specificities of regulating sea-based private security activities; and the use of private security companies by the United Nations. The intergovernmental working group noted the initiatives undertaken by various stakeholders relating to those issues, while highlighting the challenges that remain.

81. The open-ended intergovernmental working group will continue its work on the above-mentioned issues and also recommends further consideration of related human rights issues.

Annex I

[English only]

List of participants

States Members of the United Nations

Algeria, Argentina, Australia, Bangladesh, Belgium, Brazil, Colombia, China, Cuba, Egypt, France, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Ireland, Italy, Japan, Jordan, Kazakhstan, Latvia, Libya, Luxembourg, Mexico, Morocco, Namibia, Norway, Pakistan, Panama, Paraguay, Republic of Korea, Russian Federation, Saudi Arabia, Senegal, South Africa, Spain, Sri Lanka, Sudan, Switzerland, Syrian Arab Republic, Thailand, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam

Non-member States represented by an observer

State of Palestine

United Nations funds, programmes, specialized agencies and related organizations

World Trade Organization

Intergovernmental organizations

African Union, European Union

Other entities

International Committee of the Red Cross

Special procedures of the Human Rights Council

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

Non-governmental organizations in consultative status with the Economic and Social Council

American Association of Jurists, Colombian Commission of Jurists, Centre for Socio-Economic Development

Annex II

[English only]

Concluding remarks by the European Union

The European Union would like to thank the Chair and the Secretariat for the work in preparation of this session and during the session.

The European Union believes that private security companies need to respect international humanitarian law and international human rights law.

The European Union has actively and constructively engaged in the discussion of this intergovernmental working group over the past four years. Several presentations during this session were particularly informative and confirm that this industry is complex, and evolving. The presentations also confirm that many steps have already been taken to prevent abuses, and provide remedy when abuses occur. A range of obligations for States already exists, as well as several processes to set new standards, to elaborate concrete guidance for specific sectors, and to ensure oversight and accountability.

The discussion confirmed the specificities of regulating sea-based private security activities and the need to look into progress made in other fora. It is particular important not to duplicate the work carried by the International Maritime Organization (IMO). IMO has a leading role on this issue.

The European Union is prepared to consider other options, and has come forward with a set of possible action oriented recommendations to ensure that this intergovernmental working group can progress in its deliberations. The European Union would like to share with the plenary its proposed recommendations, as circulated on the third day of this session and presented during the informal consultations on the fourth day :

In view of the substantive discussions held during the past 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 to take stock of progress at the national and international levels — including in widening the support to the Montreux Document and its Forum, and the development of the International Code of Conduct Association — regarding the regulation, monitoring and oversight of the activities of Private Military Companies and Private Security Companies;

(b) Review the implementation of the Guiding Principles on Business and Human Rights, with particular emphasis on the third pillar regarding access to remedies, in the case of the activities carried out by private military companies and private security companies;

(c) Consideration of the range of options to be explored to further develop an international regulatory framework, including international standards setting, development of guidelines, possibly actions plans or model laws, contract templates based on the Montreux Document, good practices and mutual legal assistance programmes;

(d) Consideration of the tasking of a high-level group of legal experts/the Office of the United Nations High Commissioner for Human Rights to prepare a document for consideration at the fifth session to outline the modalities for each possible option, drawing when possible on past experience.

The European Union showed willingness to work on a compromise which would have allowed this intergovernmental working group to agree on a set of solid and action oriented recommendations. The European Union would like to thank delegations from across regions who offered compromise language, and regrets that other delegations insisted on language which clearly would never allow for consensus. The European Union further regrets that some delegations called inter alia for the deletion of the paragraph referring to the implementation of the Guiding Principles on Business and Human Rights and in particular to the third pillar on access to remedies. The European Union is committed to the implementation of the Guiding Principles on Business and Human Rights and hopes that all States are also committed to their implementation.

Finally, the European Union would like to refer to the important role of civil society organizations and human rights defenders who are actively engaged in this area of work.

I thank you Mr. Chair.

Annex III

[French only]

Déclaration et observations finales du Groupe africain

Le Groupe africain regrette que le Groupe de travail ne soit pas parvenu au consensus eu égard à l'importance de cette question et le Groupe africain regrette qu'il n'y ait pas eu de consensus au cours de cette session.

Le Groupe africain souhaiterait encore une fois réitérer l'importance qu'il attache au mandat de ce groupe de travail qui selon le Groupe doit se focaliser sur l'élaboration d'un instrument international à caractère contraignant. La nécessité et l'opportunité et les éléments qui peuvent constituer ledit instrument ont fait à notre avis l'objet de présentations détaillées au cours de la semaine écoulée ainsi qu'au cours des sessions précédentes. A ce titre, le Groupe de travail sur l'utilisation de mercenaires comme moyen de violer les droits de l'homme et d'empêcher l'exercice du droit des peuples à disposer d'eux-mêmes a été explicite à ce sujet et ce, en soulignant que la manière la plus efficace d'adresser cette question devrait se faire par le biais d'un instrument international à caractère contraignant. Cela permettrait sans nul doute de prendre en charge les violations des droits de l'homme et la question de reddition de comptes.

Le représentant [des sociétés de sécurité privées] a mis en avant clairement l'opportunité d'élaborer un instrument international à caractère contraignant. Le représentant des Nations Unies également n'a pas fait d'intervention qui était contraire à l'opportunité de travailler sur un instrument. Je pense que cela a été dit au cours de nos différentes discussions qui se sont tenues dans le cadre de ce groupe de travail aussi bien de la part du Groupe africain que de la part d'un certain nombre de délégations.

Pour le Groupe africain, nous appelons ce groupe de travail à poursuivre ses travaux dans le cadre du mandat qui a été mis en place et qui consiste en l'élaboration d'un instrument international à caractère contraignant.
