Madam Chairperson, Distinguished Delegates, Ladies and Gentlemen,

I am pleased to be here on behalf of the Working Group on mercenaries and to participate in this fifth session of the intergovernmental process on the regulation of PMSCs.

As many of you know, the Working Group has actively participated in this forum since it began in 2011 and over the years, has engaged in various meetings with stakeholders who are here today on the issue of PMSC regulation.

From the outset, I would like to reiterate the mandate of the Working Group given to it by the Human Rights Council since its establishment in 2005, which is to monitor and study the effects of the activities of private military and security companies and their impact on human rights, particularly the right to self-determination. In its 2005 resolution, the Human Rights Council also requested the Working Group to prepare draft international basic principles that encourage respect for human rights by PMSCs in their activities. In this regard, the Working Group adopted a draft Convention on PMSCs in 2009. Recognizing that the draft Convention needed further refining, the Working Group has engaged in various consultations and expert meetings in order to produce a concept note incorporating principal elements that would assist in informing a legally binding instrument on PMSCs. Last year, this concept note was submitted to the fourth session of this forum and we hope that it remains a useful reference to the discussion on a possible legally binding instrument for the regulation of PMSCs.
National legislation study on PMSCs

In the last three years, the Working Group has devoted much time and effort to a study on national legislation on PMSCs in order to identify trends, gaps and good practices in various regions. Since 2013, we have reviewed national legislation in 54 countries from the regions of Africa, Asia, Latin America and the Caribbean and Europe. Next year, the study will conclude with a global analysis of all the regions that have been under review and the findings will be presented in our report to the Human Rights Council.

The extensive work we have undertaken on national legislation has been supplemented by other activities which addressed PMSC regulation including country visits, expert meetings and consultations involving States, civil society organisations and victims of PMSC violations. The Working Group also presented a report to the General Assembly in 2014 on the UN’s use of PMSCs. The Working Group is particularly pleased that the majority of this report’s recommendations have been implemented by the UN.

Good practices in national legislation

I would like to give a brief overview of our findings from the national legislation study we undertook. Firstly, some good practices were evident in various States that were reviewed, though these States were very few in number. These practices include: the inclusion of international human rights and humanitarian law references in PMSC legislation; the stipulation of specific sanctions, including criminal responsibility, for human rights violations; the prohibition of direct participation in hostilities abroad and fines and imprisonment for serious human rights violations; the requirement for civil liability insurance for risks related to the PMSC activities; the requirement to maintain a centralised registry of companies; the requirement to have an accountability structure and security management system in place; the liability of legal persons as well as PSCs; and the prohibition of PSC personnel exercising powers reserved for public security officers.
Gaps in national legislation

Notwithstanding the existence of some good practices, the majority of national laws reviewed showed that State approaches to regulation are patchy and inconsistent and do not provide robust safeguards against potential human rights violations by PMSC personnel.

Considering the diverse activities and transnational nature of PMSCs, the Working Group observed worrying trends and gaps in national legislation. For example, most national laws lacked specific rules on the content of monitoring and inspections of PMSCs and there were very few provisions requiring a rights-based vetting mechanism to ensure PSC personnel are appropriately trained and comply with international human rights and humanitarian law standards. There are also significant gaps in penal accountability, and civil liability of individuals and corporate actors. Given the likelihood of PMSC personnel engaging in the use of force and involvement in hostilities, the gaps mentioned underscore a real risk to human rights.

The study also showed that despite existing provisions on permitted and prohibited activities for these companies, there were still regulatory gaps relating to the acquisition of weapons and trafficking in arms by company personnel. There were also divergent approaches to the use of force and firearms in the course of duty. Furthermore, a lack of clear regulation on oversight by the authorities was evident. Legislation was particularly silent on how the conduct of PSCs and PMSCs is regulated during potential events of unrest and armed conflict. What was clearly lacking and which is of great concern, was reference to effective remedies for victims of human rights violations committed by PMSC personnel.

The issue of extra-territoriality was also not addressed in the majority of national laws which creates a significant protection gap for local populations where those companies operate.

Self-regulation initiatives

The study on national legislation has clearly underscored the need to address human rights risks posed by PMSCs. Given the regulatory gaps in domestic law, the Working Group is pleased with the development of initiatives such as the Montreux Document and voluntary initiatives such as the Montreux Document forum and the International Code of Conduct for
private security service providers (ICOC) which have clearly led to improved standards across the industry. It is also encouraging to see that many companies have signed up to the ICOCA since its establishment and that the Montreux Document is also garnering a growing number of signatories.

The Working Group has considered the objectives of ICOC and the Montreux Document as important complementary initiatives to its own work in advocating for more robust regulations of PMSCs. Indeed it appreciates the close co-operation it has had over the years in sharing information and engaging in regular dialogue with the ICOCA and DCAF, the Secretariat for the Montreux Document.

**Gaps in addressing accountability and remedies for victims for human rights violations**

We recognize the important steps that have been taken by both the Montreux Document Forum and the ICOCA in building constituencies among States, PMSCs, civil society organizations and international organizations and in developing best practices, regulations and procedures (for example, the certification and complaints mechanisms for the ICOC in particular). Analysis of these initiatives, along with existing national legislation, confirms the need for an international legally binding instrument to plug gaps in accountability and availability of effective remedies for victims of human rights violations.

While important progress has been made in accumulating support for self-regulation among States and companies, the Montreux Document and ICOC cannot in themselves ensure comprehensive accountability for human rights violations and remedies to victims. We believe that only clear legal norms backed by state enforcement can do this.

Certainly the Montreux Document encompasses international human rights and humanitarian law standards that States are obligated to adhere to. However, it refers to existing IHL standards stipulated in the Geneva Conventions and thus only applies to situations of armed conflict.

Yet we all understand that PMSCs perform many activities outside of armed conflicts: they protect mines and oil refineries, work extensively within the extractive industry; for example, they participate in drug eradication efforts, they train national security forces and carry out
intelligence operations. In increasing numbers, we are also seeing PMSCs operate in detention centres such as those for migrants in various parts of the world.

The incorporation of best practices in the Montreux Document provides valuable guidance. However, due to its voluntary nature, it is also non-binding. Further, mandatory accountability measures are very narrow where human rights violations are concerned. Important issues that need consideration which may be problematic with the Montreux Document also relate to extra-territoriality and jurisdictional concerns particularly where companies are based in one country but have contractual and operational services in various others. It is also important to note that IHL only requires States to criminalise a very narrow set of IHL violations. The Geneva Convention standards which are incorporated into the Montreux Document only require prosecution and extradition if violations are defined as grave breaches. What’s more, the grave breach regime applies only to international armed conflicts and the vast majority of armed conflicts today are non-international.

These issues are complex but require thorough consideration given the human rights risks that PMSC operations pose and also as many companies are increasingly engaging in activities that can involve the use of force.

The voluntary nature of self-regulation means that only States and companies willing to be part of the process will be covered. ICOC membership will hopefully grow in the coming years. However, there is a likelihood that smaller or less resourced companies would not be able to fulfil the requirements for membership and thus will not be obliged to adhere to ICOC standards. Further, unless home States, contracting States and territorial States require companies to be members in good standing, the ICOC, provides no real framework for accountability in the event human rights abuses or violations occur. Associations do not sanction human rights violations. It is States that need to do this in order to ensure effective remedies are provided for victims. For the most part, States do not require ICOC membership and the only real sanction that companies may face is a loss of membership. However, this does not translate to effective remedies for victims.

These points I have mentioned continue to highlight the essential issue on which the Working Group bases its support for an international binding instrument to regulate PMSC activities,
which is the lack of existing strong accountability framework and the lack of mechanisms by which victims of human rights violations can access effective remedies.

*Elements for a legally binding instrument*

Madam Chairperson, without going into great detail, I wish to recall the concept note that the Mercenaries Working Group presented to this forum in its fourth session last year, outlining the main elements which could inform the existing draft of a possible Convention on PMSCs. The Working Group believes these elements are significant and need to be addressed when discussing PMSC regulation.

The concept note provides guidance on issues including inherent state functions, noting that some State functions such as direct participation in hostilities in armed conflict, detention and interrogation of prisoners of war may not be outsourced. The classification of service activity is also covered where services are identified by activities which increase the risk of human rights violations when undertaken by private actors. Classification looks into whether services are military in nature or not; whether service providers are armed or not and the different contexts in which these services are offered. These contexts are not restricted to armed conflict situations and thus can cover any situation where PMSCs operate.

An additional important element which the Working Group puts forward is that intergovernmental organizations can also be party to a Convention on PMSCs, thus reinforcing the notion of accountability and supporting the growing trend of such organizations becoming party to international instruments.

Other critical issues which are covered include a proposed framework for regulating jurisdiction which would strengthen accountability and extra-territorial provisions notably to cover complex environments in which PMSCs operate. Furthermore, the establishment of an oversight mechanism to ensure remedy and reparations for victims is also an important factor. Though the modality of this mechanism is not determined, the Working Group deems that any mechanism which can regularly, efficiently and comprehensively undertake monitoring and investigation and guarantee remedy for victims is worthy of review. These may include a committee or an ombudsperson for example.
Further elements that are covered in detail and which are important in addressing existing regulatory gaps include having a coherent provision to regulate licensing of companies, vetting of personnel, licensing of services, possession of arms and the requirement for company registration which would assist in monitoring company personnel and activities. The use of a State-appointed authority to authorize licensing to companies is also crucial.

The Working Group highlighted these elements based on its research and consultations which have shown inconsistent regulation or regulatory gaps concerning these issues. The Concept Note is annexed and can elaborate further on these elements.

**Conclusion**

Madam Chairperson,

I wish to conclude my statement by saying that all the points that I have mentioned have shown that more work is still needed to adequately address the regulatory gaps in the PMSC industry. The Working Group hopes that the discussions this week would be productive in terms of having a victim-oriented approach when addressing PMSC regulation.

In the last five years since this forum began, we have heard of best practices in the context of voluntary self-regulation and we have also heard opposition to adopting an international legally binding instrument on PMSCs. However, these submissions have not provided adequate responses to the questions on accountability and remedies for victims of PMSC violations. As some civil society representatives have said time and time again in this forum, reports of human rights violations associated with the activities of PMSCs are increasing, thus raising questions about the legitimacy of the private use of force, the capacity of States to effectively control their territory and the issue of accountability and access to effective remedies. We have also heard from stakeholders that weak national legislation and enforcement mechanisms, along with ad hoc and fragmented industry self-regulation cannot address these concerns effectively. Victims of human rights violations related to PMSCs face tremendous hurdles in having their grievances addressed and are often at a disadvantage compared to corporate respondents due to lengthy and expensive judicial procedures. This is further worsened when the concerned States do not have the political will to prioritise accountability for victims.
It is in this context that the Working Group continues to call for an international legally binding instrument on PMSCs which would complement national legislation and voluntary initiatives in providing effective and robust regulation of PMSCs.

The Working Group also views that an international binding instrument is the best option forward in ensuring that human rights, particularly of those belonging to vulnerable groups, are fully protected wherever private contractors operate. This includes operations in detention facilities and the extractive industry. A binding instrument would also ensure that remedies are available for victims and that perpetrators are held accountable, should human rights violations occur.

I thank you all for your attention.
CONCEPT NOTE ON A POSSIBLE LEGALLY BINDING INSTRUMENT
FOR THE REGULATION OF PRIVATE MILITARY SECURITY COMPANIES

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

The Working Group is pleased to contribute to the evolution of the discussion on a possible legally binding instrument on private military and security companies (PMSCs). Its 2010 report (A/HRC/15/25), further to Resolution 10/11 of the Human Rights Council, recommended the establishment 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 (OEIGWG). The first draft of a possible convention, also in that report, has been the subject of deliberation at the three sessions of the OEIWG, in which the Working Group has also participated.

The Working Group decided to refine its work on this issue through undertaking a national legislation study on a regional basis. The research has sought to identify trends, gaps and good practice in the field, with three reports thus far submitted to the Human Rights Council and a global analysis to be presented to the General Assembly in 2016. The Working Group has also held two expert meetings and consulted with stakeholders, including on the use of PMSCs by the UN. These efforts have contributed to preliminary conclusions and to the development of its recommendations with respect to the core elements of a draft convention, which the Working Group presents in this paper.

The research has revealed, inter alia, that while some countries have legislation regulating PMSCs, each country approaches the privatization of the security industry differently. This results in patchy and inconsistent regulation. Considering the transnational nature of private security and military services, as well as the generally significant likelihood of PMSC personnel use of force and involvement in hostilities, the Working Group stresses that the different approaches and regulatory gaps demonstrated in the study may result in serious undermining of the rule of law, the effective functioning of a democratic state institution responsible for ensuring public safety, as well as the accountability of PMSC personnel for violations of the law. Furthermore, the noted regulatory gaps create potential risks to various fundamental human rights. These include the right to life, right to security, the prohibition of arbitrary deprivation of liberty, the prohibition of torture, cruel, inhuman or degrading treatment, and the right of victims to effective remedies.

As such, the following text outlines the main elements informing the revision of the existing Draft of a possible Convention on Private Military and Security Companies.
1. The Working Group acknowledges that certain functions are inherent to the State. Functions that are inherent to the State are those for which the State retains ultimate responsibility regardless of whether or not the State outsources that function. The Working Group also believes that some inherent State functions may not be outsourced.

The Working Group has sought to define in part the nature of inherent functions of the State (Draft Art. 2 (i)). The definition provides for responsibility and accountability by the State for all its inherent functions, regardless of whether these functions are outsourced to other entities or not.

It also identifies the two core functions that cannot be outsourced to other entities (Draft Art. 7). These derive from obligations under international humanitarian law, notably the Third Geneva Convention. As such, the following activities cannot be outsourced by States to PMSCs:

a) Direct participation in hostilities in armed conflict;

b) Detention and interrogation of prisoners of war, as defined in the Third Geneva Convention.

In this latter respect, Article 39 of Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 reads: “Every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power.” Similarly, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in its Article 99 states that “Every place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power.”

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1 Regarding Article 43 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, one commentary notes that ‘the conditions which should all be met to participate directly in hostilities are the following: a) subordination to a “Party to the conflict” which represents a collective entity which is, at least in part, a subject of international law; b) an organization of a military character; c) a responsible command exercising effective control over the members of the organization; d) respect for the rules of international law applicable in armed conflict. These four conditions should be fulfilled effectively and in combination in the field.

https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?key=direct%20participation%20in%20hostilities&action=openDocument&documentId=0CDB7170225811A0C12563CD00433725
Furthermore, the Working Group study has shown significant regulatory gaps as a consequence of vague definitions of the ambit of services, and because so little of the analysed legislation covers private military companies or their military activities. This is especially so considering that PMSCs normally provide various other services besides guarding and patrolling, such as military services, as well as training and advisory services on security matters, and implementation of security measures.

Given this observation, the Working Group finds it useful to define in terms of classifications of activity the services it deems necessary to address. These classifications are predicated on identifying which activities increase the risk of human rights violations when undertaken by private actors. Notably, they also fill the gap presented by the Montreux Document, which applies solely to armed conflict.

The Working Group thus proposes to include in the draft legislation recommendations for recognition of different classifications of service activity, in terms of the following:

1. Whether the services are:
   a) military services
   b) services not of a military character

2. Whether the service providers are:
   a) armed
   b) unarmed

3. The different scenarios under which services are offered:
   a) armed conflicts
   b) anti-terrorism activity
   c) drug wars
   d) border control and immigration
   e) detention centres
   f) maritime context
   g) other context

4. Different types of services:
   a) offensive or defensive operations
   b) implementation of security measures
   c) provision of arms and equipment
   d) intelligence, training and advisory services
   e) guarding, patrolling and transport
   f) other type of services
2. Inter-governmental organizations, as well as States, can be Party to the Convention

This (Draft Art. 3) links to pre-ambular paragraph 11 on accountability of inter-governmental organizations, and reflects the growing trend of intergovernmental organizations, such as the EU, to assert their objective international legal personality and become Party to international instruments. It is also a reinforcement of the same assertions made in the first draft of the possible convention (A/HRC/15/25).

3. There is one coherent article (Art. 6) on implementation, covering obligations

Obligations apply to domestic and international companies, as well as to services offered to states, inter-governmental, non-state or corporate clients. This Article assembles the various implementation related Articles of the first draft convention, in particular its Articles 7 (1), Article 12, Article 13, and Article 19 (4).  

4. A license is defined as permission evidenced by a document authorizing specified activities under a law of general application issued by a State-appointed body authorized to grant such permission

A license serves as a modality for establishing and enforcing standards, and a revised definition is offered.

5. There is one coherent article on licensing (Draft Art. 9), encompassing:

While some national laws, such as those of Costa Rica and Mexico, make reference to human rights, this is not common practice globally. The Working Group thus asserts that incorporation of clear human rights and humanitarian law standards into contracting, licensing, and authorization procedures should serve as minimum standards in regulation. It must also be the basis for due diligence. This effort further serves to make explicit and legally binding what are now voluntary standards, such as in the International Code of Conduct, the Montreux Document, and the UN Guiding Principles on Business and Human Rights.

This Article aims to be comprehensive in the subject and content of licensing regimes, addressing the spectrum of relevant actors and activities potentially impacting on the protection of human rights. It brings together the license related Articles of the first draft possible convention, including its Article 14, Article 15 and Article 19 (3).
a) Licensing of companies, including vetting of personnel

The Working Group research revealed that, in Europe, with the exception of Switzerland, none of the analysed legislation included international human rights and humanitarian law references in the criteria of authorisation of PMSC activities. The same situation applied to any other related standards regarding the selection process and the training materials.

Similarly, Guatemala is the only country in Central America whose regulation excludes the activities of PSCs whose personnel have served in another security company and have been discharged for violation of human rights. In South America, most of the countries examined do not have specific requirements regarding background information on human rights violations.

One exception is the Buenos Aires Act prohibiting associates of private security companies who benefited from the law of amnesty and were indulted for acts constituting human rights violations during the period 1975-1983, who must be accredited with an extended certificate by the competent human rights bodies.

The Working group thus recommends explicit reference to human rights violations and standards in related legislation and regulation.

b) Licensing the import and export of services

c) Licensing the possession of arms

The Working Group study demonstrates that in the laws relevant for the activities of PMSCs in Europe, there are no specific provisions on the illegal acquisition of weapons and on illicit trafficking in arms by PMSC personnel, revealing a clear gap of regulation. In order to ensure that PMSC personnel respect the international standards related to arms control licensing procedures, arms transfer, acquisition of weapons, trafficking in arms and that the staff of PMSC can be held accountable for illegal acquisition of weapons and illicit trafficking in arms, it is essential to establish some standard methods of acquiring, exporting, importing, and possessing weapons by private military and security companies and their employees.


3 Note: The Buenos Aires requirements are a good practice to have strict controls on the conduct of the staff of private security companies demanding certification from the authorities, and not making a difference between willful or negligent offenses.

Note: Honduras has an exceptional rule, which states that PSCs may not maintain a number of personnel that exceeds 6% of the total workforce police. This requirement is presented as a good practice.
In Latin America, in the special laws for PSCs, there are no particular provisions regarding the origin of the weapons and their acquisition by PSCs. Only Panama (Decree No. 21) requires that weapons are purchased in the domestic market.\(^4\) There are no rules on the acquisition of weapons in national or international illegal markets by PSCs and no specific sanctions on such incidents if they incur within a PSC. This is a common gap in the region in the case of infringements or offenses committed by private security providers, in particular companies.\(^5\)

\(d\)  **Licensing the possession of equipment other than arms e.g. vehicles, drones**

\(e\)  **Licensing of individuals, with minimum criteria, including training**

While some countries include human rights in their training programs, such as Brazil, Colombia and Switzerland, incorporation is inconsistent. The Working Group therefore finds it is essential to ensure mandatory legal trainings with references to the relevant international human rights and humanitarian law standards.

\(^4\) Art. 8 Decree 21/1992.

\(^5\) Note Regarding the possession and carrying of weapons, some good practices are:

- defining in law the highest caliber and type of weapon;
- requiring training for bodies accredited by the authority,
- registries of firearms and ammunition with a report on the quantity, type and condition of weapons, updated periodically;
- regulating the ultimate purpose and use of the weapons in the case of significant downsizing or termination of the company;
- limiting carrying of arms to the working areas in accordance with the contract;
- regular inspections of the repositories of guns and ammunition.
6. **There is an article on registration (Draft Art. 10), as a secondary step following licensing, and serving as a monitoring system**

With regard to the national registration of PMSCs in Europe, the Working Group study points out that none of the analysed States’ national legislation requires from PMSCs a specific registration other than the general registration in the trade and commerce register.\(^6\)

The license registry definition (c) and operative paragraphs (Article 16, 2 and 3) in the first draft of the possible convention are thus retained.

7. **Regulation of jurisdiction is redefined (Draft Art. 15)**

In Europe, with the exception of Switzerland, the absence of rules on direct participation in hostilities of PMSC personnel and the lack of extraterritorial application of the concerned laws, as well as the missing provisions on the export of security and military services abroad, further add to the regulatory gaps. This is especially relevant in light of the transnational nature of private security and military services, and the generally high likelihood of PMSC personnel’s use of force and involvement in hostilities.

With respect to Latin America, none of the laws address the provision of services abroad, except in one case, and there is no provision on the extraterritorial application of these laws.

Given the above analysis, and that the private military and security industry often operates in complex environments characterized by weakened rule of law, accountability may be better ensured through territorial and universal jurisdiction. The extraterritorial provisions in the draft convention are accordingly strengthened, applying the following hierarchy of principles:

a) Active person  
b) Passive person  
c) Territoriality  
d) Universal jurisdiction

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\(^6\) **Note** Buenos Aires requires that the implementing authority undertake registration of persons authorized to provide private security services\(^6\) and also established a register of those disqualified for violations of the Law 12,297\(^6\). This last record is good practice … as it would maintain control over those who have committed offenses in the private security system from continuing to provide private security services company despite changing itself or its city of operation, as often happens today.
8. A mechanism should be established pursuant to the Convention, for the purposes of oversight and ensuring remedy and reparations for victims - this may be a committee, ombudsperson or other modality

In the Working Group study of national legislation in South America, major gaps were observed with regard to accountability concerning the protection of human rights by private security personnel. No crimes are associated with the violation of human rights in the special regulations of the activities of private security companies. None of the laws examined establishes mechanisms for reparations to victims, and only a few make reference to reparations.

For Europe, the analysis indicates that the relevant legislation lacks specific rules on the content of monitoring activities and inspections. The legislation also does not make reference to the company’s or its personnel’s compliance with the standards of international human rights law and humanitarian law, and to effective remedies to victims.

In light of this, the Working Group proposes to establish a framework for oversight, and for reparation and remedy for victims (Draft Art. 13 on” Judicially enforceable remedies for victims”). Such a framework is also in keeping with the “Protect, Respect, Remedy” approach of the UN Guiding Principles on Business and Human Rights. Part V of the first possible draft convention (Articles 29 to 39) is thus retained.

Much of the rest of the original draft convention is also retained, including all but one of the pre-ambular paragraphs, Articles 5 and 11, and all of Part VI (Articles 40 to 49).

Conclusion

The Working Group trusts that these proposed revisions constitute a current, focused, streamlined, and realistic option for consideration as the OEIGWG proceeds with its deliberations.