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

Summary of the first session

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

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I. Introduction

1. The Human Rights Council decided, in its resolution 15/26 of 1 October 2010 to establish an open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including, *inter alia*, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies (PMSCs), including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

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

3. The session was opened by Ms. Kyung-wha Kang, Deputy High Commissioner for Human Rights, who recalled that over the past two decades, there has been a significant increase in the number of private military and security companies around the world. She explained that these companies provide services to governments, national and transnational corporations, non-governmental organisations, the media and international organisations. Ms. Kang noted that private military and security companies engage in a broad range of different services in a wide variety of contexts. The Deputy High Commissioner pointed out that while initially the majority of these services related to logistical and administrative support and certain guard functions, over the past years, there has been a growing involvement of private companies in functions traditionally performed by the military and other state security institutions, including in conflict and post-conflict situations. She emphasized that there is no doubt that the increase in outsourcing of security-related state functions to private companies has brought about human rights challenges and has helped fuel the important discussion on the extent to which private actors can be held accountable for human rights violations, and in what way. Ms. Kang underlined that from a human rights perspective, it is important that there is no protection gap that allows for impunity. She pointed out that it is necessary to ensure that the rights of individuals are not negatively impacted upon by the activities carried out by such private military and security companies. Mr. Kang recalled that States are duty-bound to protect individuals against human rights abuses by third parties, including private military and security companies. She added that the companies themselves also have a responsibility to respect human rights. The Deputy High Commissioner concluded that where violations occur, victims must have the right to an effective remedy, including the right to appropriate reparation for the harm suffered.

II. Organization of the session

A. Election of the Chairperson-Rapporteur

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

B. Attendance

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

6. The following intergovernmental organizations were represented at the meetings of the working group: African Union, European Union.

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

8. The following non-governmental organizations (NGOs) in consultative status with the Economic and Social Council were represented: Agence Suisse de Cooperation Development Economique Nord-sud, Al-Hakim Foundation, Association of World Citizens, International Commission of Jurists, International Peace Bureau, and the World Federation of Trade Unions.

9. Pursuant to paragraph 7 of Human Rights Council resolution 15/26, the following experts of the working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (Working Group on the use of mercenaries) attended the session as resource persons: Chairperson-Rapporteur, Mr. José Luis Gómez del Prado (Spain), Mr. Alexander Nikitin (Russian Federation), Ms. Najat Al-Hajjaji (Libyan Arab Jamahirija), Ms. Amada Benavides de Pérez (Colombia), and Ms. Faiza Patel (Pakistan). The other invited resource persons were: Ms. Anne-Marie Buzatu, Programme Coordinator, Geneva Centre for the Democratic Control of Armed Forces; Mr. Nils Melzer, Legal Adviser, International Committee of the Red Cross; and Mr. Gerald Pachoud, Special Adviser to Mr. John Ruggie, Special Representative of the Secretary General for Business and Human Rights.

C. Documentation

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

- Provisional agenda (A/HRC/WG.10/1/1)
- Programme of Work
- Draft of a possible Convention on Private Military and Security Companies (PMSCs), prepared by the Working Group on the use of mercenaries (A/HRC/WG.10/1/2)
- Submission by the Working Group on the use of mercenaries (A/HRC/WG.10/1/CRP.1)

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

- Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (A/HRC/15/25).
- Note of the Secretary-General, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (A/63/325).
- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, on 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (A/HRC/17/31).
- Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (A/63/467-S/2008/636).

D. Organization of the session

12. In his opening statement, the Chairperson-Rapporteur recalled that, following the mandate given to the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, the Working Group on the use of mercenaries elaborated a draft text of a possible convention to regulate the activities of PMSCs, further to various multi-stakeholder consultations. While recognizing the initiative pertaining to the elaboration of the Code of Conduct for Private Security Service Providers (hereafter referred to as "Code of Conduct"), which attests to the need for standards in the industry, the Chairperson-Rapporteur stated that the Code of Conduct does not address the issue of accountability for human rights violations committed by PMSCs. He added that regulation at the national level also has its own limitations due to the transnational nature of the activities of PMSCs, which impacts on the ability of victims to exercise their right to an effective remedy. In recognition of the fact that there are concerns related to the elaboration of a legally binding framework to regulate the activities of PMSCs provided for in the draft convention, the Chairperson-Rapporteur explained that the intergovernmental working group was established to give an appraisal of the situation, to discuss the draft convention prepared by the Working Group on the use of mercenaries, and to chart the way forward.

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

III. Introductory remarks

14. Delegations exchanged views on how expertise may be brought in from different regional and professional backgrounds for the second session of the intergovernmental working group, with some States highlighting the need for additional expertise for the future process.

15. Furthermore, some delegations recalled the mandate of the intergovernmental working group which is to consider the possibility of elaborating an international regulatory

framework, including, *inter alia*, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. Some delegations cautioned against discussing matters exclusively related to the draft convention proposed by the Working Group on the use of mercenaries and suggested to the intergovernmental working group to consider other ways of regulating the activities of PMSCs.

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

17. Some delegations noted that other fora such as the Sixth Committee of the General Assembly of the United Nations and the International Law Commission are also concerned with questions related to some legal aspects pertinent to the regulation of the activities of private military and security companies.

IV. Discussions on specific topics

A. Law and practice in relation to PMSCs

18. The topic was introduced by three experts on 23 May 2011, followed by two experts presentations held on 24 and 25 May 2011.

19. Mr. José Luis Gomez del Prado highlighted the reasons to support the adoption of an international binding instrument to regulate PMSCs. Referring to the right of effective remedy of victims of human rights violations, he pointed out that neither self-regulation nor national regulation can effectively address the problem of impunity of abuses caused by activities of PMSCs. In addition, existing international law does not sufficiently address the issue of PMSCs. Mr. del Prado noted the potential negative impact of the activities of PMSCs on human rights in general and pointed more specifically to the examples of summary and extrajudicial executions, torture, arbitrary detention, human trafficking, violation of peoples' right to self-determination as well as the violations of the rights of the employees of PMSCs. In addition, he made reference to recent positions proposing legally binding solutions from the United Kingdom House of Commons, the Parliamentary Assembly of the Council of Europe and recommendations made by the European University Institute following a study recently commissioned by the European Commission on possible European Union regulations of PMSCs.

20. Ms. Faiza Patel explained the legal and political reasons for which international regulation of the activities of PMSCs is needed. She pointed out that the Code of Conduct is an important instrument. However, it remains insufficient in cases in which serious human rights violations occur, as its grievance mechanism is focused on reporting to the client of the PMSCs rather than to State authorities. Moreover, the Code of Conduct is voluntary and as a result, will not cover all PMSCs. Furthermore, Ms. Patel mentioned that comprehensive national legislation is still a rarity and in general lacks efficacy when it comes to cases of human rights abuses for a variety of reasons. She added that due to the transnational nature of their work, PMSCs can easily escape to States where no or less domestic regulation exists. Ms. Patel pointed out that to date PMSCs are not direct subjects

of international humanitarian or human rights instruments. Therefore, they can only be regulated through States that have the obligation to ensure that their contractors respect these rules. She recalled that the Montreux document on the pertinent international legal obligations and good practices for States related to operations of PMSCs during armed conflict (hereafter referred to as "Montreux document") only covers armed conflict situations and that the specific rules contained in the good practices part of the document do not represent legal obligations. She concluded by referring to the key issue of an effective remedy that should be available to the victims. In view of the absence or insufficiency of remedy mechanisms at the domestic level in a great number of cases, international regulation is needed.

21. Ms. Anne-Marie Buzatu identified the key challenges to the regulation of the activities of private security companies (PSCs). Among those, she mentioned the lack of coherent international standards, democratic and state responsibility deficits and lack of independent oversight and effective accountability mechanisms. Ms. Buzatu noted that the Code of Conduct is the result of a multi-stakeholder process that sets out obligations and operational standards for private security service providers based on international human rights law. She explained that in the Code of Conduct international law standards have been "translated" into specific principles for conduct of personnel and specific principles for management and governance. Ms. Buzatu pointed out that until the adoption of effective oversight and compliance mechanisms, the process is in an interim stage where companies can declare unilaterally to be obliged by the standards of the Code of Conduct. She also mentioned that the oversight and compliance mechanism will include a system of certification, which is a form of third party independent oversight and a complaints resolution process. However, this mechanism will not substitute criminal law as it is meant to only complement national and international regulation. Finally, Ms. Buzatu pointed to the role of States in dual capacity, as client and as regulator. As clients, States can include the standards of the Code of Conduct in their contracts with PSCs, whereas as regulators, they can implement procedures and policies so that PSCs in their jurisdiction have to comply with the standards required by the Code of Conduct.

22. Mr. Nils Melzer pointed to the increased presence of PMSCs in conflict situations. He stated that the Montreux document compiles the existing legal obligations and good practices of States with regard to PMSCs, with a focus on operable law and State responsibility. As the Montreux document, the objective of the Code of Conduct is to strengthen the protection of individuals affected by armed conflicts and other situations of violence. He mentioned however that the Code of Conduct has not yet developed proper governance and oversight mechanism. The lack of a proper accountability system renders it difficult to ensure respect of the Code's provisions. Mr. Melzer pointed out that self-regulation is in itself not sufficient to regulate the activities of PMSCs and that States remain responsible for ensuring respect for international humanitarian law and other international legal obligations in situations of armed violence. However, he pointed to the added value of the Code of Conduct in that the industry commits itself to abide to a set of standards. In relation to the draft convention, Mr. Melzer stressed that this is one initiative among others that aim at strengthening the protection of victims of armed conflicts and other situations of violence. Mr. Melzer argued that the Montreux document, the Code of Conduct and the possible draft convention are both competitive and complementary in their nature. He pointed out that each of the initiatives approach the issue from a different perspective while all aim at the same goal, which is to strengthen the protection of those affected by armed violence and to ensure the rule of law.

23. Mr. Gerald Pachoud introduced relevant aspects of the mandate of the Special Representative on Business and Human Rights, Mr. John Ruggie, to clarify standards of responsibility and accountability for business enterprises. He referred to the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect,

Respect and Remedy" Framework, which have been elaborated by the Special Representative and which are centred around three main pillars: first, the State duty to protect from human rights abuses by third parties, including business enterprises, second, the corporate responsibility to respect human rights and third, the need for improved grievance mechanisms. Regarding the second pillar, Mr. Pachoud underlined the responsibility of business enterprises to act with due diligence to avoid infringing on the rights of others and to assess and address adverse impacts which with they are involved. Regarding the grievance mechanisms, he underlined that those mechanisms should be established by the business enterprises themselves to provide early on for avenues for remedy. However, he pointed out that these grievance mechanisms should not replace domestic judicial avenues, but should constitute a complementary instrument. Mr. Pachoud pointed out that the Guiding Principles would be applicable to PMSCs as they constitute business enterprises. Mr. Pachoud noted that the Guiding Principles are a risk management tool for business enterprises. He pointed out that business enterprises, including PMSCs, acting in situations of conflict must adhere to a higher threshold of due diligence as the risk of gross human rights abuses is heightened in conflict-affected areas. He pointed out that while business enterprises should respect human rights standards, States are obliged to protect human rights standards and should therefore provide business enterprises with relevant guidance. Mr. Pachoud concluded that such guidance may take many forms and adopting a convention is one of the possibilities.

24. In the ensuing discussion, some delegations pointed out the need to first gain a full understanding of the private military and security company (PMSC) industry, the nature of its work, the factors that led to its growth as well as the reasons for which this industry poses challenges to the international community. Some delegations pointed to the difficulties that the activities of transnational PMSCs create for States in terms of management, overview, control, as well as in relation to the complex regulation of the applicable law and jurisdiction.

25. Delegations noted that the work of the intergovernmental working group should start by taking stock of the already existing national and international legal frameworks, in particular those relating to international human rights and humanitarian law. In addition, it was pointed out that emphasis should be placed on the analysis of the implementation and enforcement of those existing frameworks.

26. In this connection, some delegations mentioned the value of recent initiatives, such as the Montreux document and the Code of Conduct. A large number of States supported both the Montreux document and the Code of Conduct as initiatives to be welcomed. Some delegations mentioned that time should be given to both of these most recent mechanisms to actually operate and prove their impact in practice.

27. Some States pointed to the fact that they were not part of the process of elaboration of the Montreux document and raised questions as to the absence of provisions providing for accountability of States that recruit personnel of PMSCs. It was also noted that the Code of Conduct contains certain principles that stem from human rights standards, which can be included in contracts with PMSCs as contractual obligations. However, doubts were raised as to the enforceability of these obligations. Furthermore, it was questioned whether the grievance procedure to be established by Signatory Companies is an appropriate mechanism to ensure accountability. One State mentioned its policy on government use of PMSCs, according to which the government would only sign contracts with PMSCs that subscribed to the Code of Conduct. In this connection, the suggestion was made that the mechanism of an independent ombudsman operating in the corporate world to enforce the Code of Conduct could be an efficient solution.

28. Some States underlined that there is a need for the regulation of the activities of PMSCs. However, differing views were expressed as to the form such regulation should

take. In this context, some delegations noted that self-regulatory measures are not sufficient to regulate the activities of PMSCs. Part of those delegations suggested that national legislation needs to be strengthened in order to provide for a robust framework, in particular regarding the extraterritorial activities of PMSCs. Others argued for international regulation, pointing to the increasing number and growing power and impact of PMSCs in the area of inherently state functions, the cases of serious human rights violations caused by the activities of these companies, and the importance of the State's role to hold individuals accountable for human rights violations.

29. Some delegations raised doubts as to the appropriateness of an international convention, taking into account that such an instrument will primarily create obligations for States, while having no direct impact on the activities of PMSCs. Others emphasised that if universal protection of rights of individuals is to be achieved, a voluntary instrument would not be the appropriate way forward. In this connection, it was also mentioned that the intention to create legally binding provisions for the regulation of PMSCs should not necessarily imply that the instrument take the form of the draft convention as proposed by the Working Group on the use of mercenaries. A non-governmental organisation underlined that the consideration of the feasibility of an international instrument should be anchored on the assessment of needs, taking into account the scope and nature of the human rights problems arising from activities of PMSCs and the existing gaps in the international legal framework.

30. Several delegations expressed support for the Guiding Principles on Business and Human Rights elaborated by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Mr. John Ruggie, and underlined the usefulness of this approach for the subject matter. It was noted that the Guiding Principles should be implemented by all relevant stakeholders. When discussing questions raised by delegations and experts, Mr. Pachoud pointed out that the Special Representative's mandate was to focus on business enterprise and as such did not examine PMSCs specifically. Furthermore, he drew a difference between the means and the aim and recalled that while the aim is to avoid human rights violations by PMSCs, the means can take a variety of forms, including a convention.

B. National legislation and practices

31. Mr. Alexander Nikitin referred to the fact that regulation of PMSCs activities is multi-layered, including regulations at the national, the regional and the international levels. He referred to national regulation in a number of countries, including the United States of America, the United Kingdom, South Africa, France, the Russian Federation and Afghanistan. At the regional level, he mentioned, among others, the Organization of African States Convention on the Elimination of Mercenarism in Africa, as well as the model law adopted in the context of the Commonwealth of Independent States, and recommendations on the democratic control of security forces in the context of the Council of Europe. He concluded that the existing regulation of PMSCs at the national, regional and international levels remains insufficient and inadequate. Specific regulations for PMSCs exist only in a handful of countries, and mostly not in a form of a comprehensive law. Moreover, regional regulations apply to PMSCs only marginally. He therefore stated that the draft convention prepared by the Working Group on the use of mercenaries seeks to overcome most of these gaps in legal regulation of PMSCs by strengthening both international and national regulation.

32. Ms. Amada Benavides de Perez indicated in her presentation that there has been a sustained increase in the security industry, in particular in Latin America. That increase refers both to companies working in the military sector, as well as those working in security

activities. In the Latin American context, the growth in the number of security companies has led to an increase in the use of lethal force, the number of weapons in circulation, and the number of private security officers in comparison to national police officers. In that respect, private security companies have begun to replace national police, border police, management of prison facilities and other national security services. They are also extensively used in the extractive industries. The Working Group on the use of mercenaries examined the possibility of having both international and national regulation of PMSCs. In the draft convention, the Working Group referred to some of the elements to be included in national legislation, *inter alia*, a definition of the type of services that PMSCs can offer; the clarification of the relationship between PMSCs and national policy and military forces; the obligation for PMSCs to respect human rights; the obligation to undertake a vetting process and to provide adequate training of private security guards, in particular on human rights issues; the establishment of a national oversight authority over the activities of PMSCS and the licencing of firearms; and the establishment of a system of accountability for the activities of PMSCs and their personnel. A convention on the activities of PMSCs would be complementary to national legislation.

33. In the ensuing general discussion, South Africa indicated that its domestic legislation attempts to regulate the activities of PMSCS. However, because of the impact of these companies abroad, legislation also seeks to regulate companies when operating in third States. There are challenges, however, because legislation only covers situations of armed conflict. Companies try to circumvent legislation by involving themselves in situations under the cover of humanitarian goals. Moreover, the extraterritorial application of national legislation remains a challenge. Similarly, the country has faced considerable difficulties trying individuals for alleged violations due to the fact that its requests for the extradition of suspects have been unsuccessful. In that respect, an international binding legal instrument would be useful to assist countries facing similar challenges.

34. Spain stated that its national legislation provides that public security is to be exercised by public authorities, but that in view of the fact that other actors are becoming increasingly involved in certain aspects of security, new legislation has been adopted to regulate in detail all aspects related to security services. As a result, the provision of private security services has been functionally integrated in the States monopoly of the use of force, recognizing that certain areas cannot be adequately dealt with by national security forces. Thus, national legislation establishes that private security services are complementary and subordinated to public security services and provides for strict controls and administrative interventions to regulate the provision of private security. Moreover, private security companies are not allowed to provide services extra-territorially. Similarly, private security services cannot be contracted abroad. National legislation also provides for the ethical requirements applicable to all personnel working for a private security company, including its administrators and managers. The use of firearms should be in accordance with the law and should previously be authorized by the relevant government authority. Finally, national legislation also provides for accountability mechanisms, including administrative and criminal sanctions.

35. Switzerland pointed out that the country is in the process of adopting new national legislation to regulate PMSCs' activities when they are exercised abroad. The main principle of the new legislation is that these companies should inform the government in advance of their activities abroad and that such activities should be carried out in strict compliance with the national constitution and the law, and in accordance with the principle of neutrality.

36. The United States of America mentioned that its national courts have applied its criminal law extra-territorially in cases involving government contractors. Moreover, its parliament is considering enacting further legislation to expand and clarify such extra-

territorial application. Furthermore, it indicated that its national authorities have prosecuted individuals for alleged violations and sanctions have been imposed. As a home State for a number of PMSCs, it imposes strict export licencing requirements that cover a range of activities. Such licencing is necessary for the performance of a number of activities, including the export of certain material and equipment involved in security services. In the delegation's view, experience shows that there are significant challenges that are relevant for all countries. One is the importance of oversight mechanisms within a government when interacting with its own contractors. Another challenge is the practical difficulties of enforcing criminal law extra-territorially, in particular the gathering of evidence. It was pointed out that these challenges will remain relevant for all countries even with the adoption of a convention.

37. Finally, the Russian Federation indicated that its national legislation on this matter was significantly strengthened last year, and that it now does not allow for the possibility of establishing private military companies on its territory. In that respect, it stated that all military activity belongs exclusively to the state and only security companies are allowed to operate.

38. It was also mentioned that the European Union has taken various steps concerning PMSCs. A 2006 Communication of the European Commission on the security sector reform referred to non-statutory forces, as part of the security system. This means that non-statutory forces are also subject to the basic rules of good governance, transparency, accountability, rule of law and democratic control. Reference was also made to the EU Guidelines on the compliance with international humanitarian law as well as to the independent research that has been financed by the European Commission and coordinated by the European University Institute named PRIV-WAR Project, which has just been finalized and issued a set of recommendations.

C. Elements of an international regulatory framework of activities of PMSCs

39. Mr. del Prado referred to the main elements of the draft convention prepared by the Working Group on the use of mercenaries. He explained the structure of the draft convention and recalled that it takes as main principles the United Nations Charter, existing *erga omnes* obligations, and the principle of sovereign equality of States. Furthermore, the legal sources are international human rights law and international humanitarian law, as well as the Statute of the International Criminal Court. Among other things, the draft convention defines those inherently State functions that cannot be outsourced and recalls that applicable principles of international law include state responsibility for the legitimate use of force; the principles of sovereignty, equality and territorial integrity; the prohibition of outsourcing inherent State functions to PMSCs; the prohibition of outsourcing the use of certain firearms; the obligation to respect international human rights and humanitarian law and to ensure accountability for violations; the liability of superior of PMSCs personnel for crimes under international law committed by PMSC personnel under their effective authority and control ; the obligation to prevent PMSCs from trafficking and illicitly manufacturing firearms; and the obligation to observe rule of law principles. He recalled that States have an international legal obligation to impose criminal, civil and/or administrative sanctions to offenders and to provide remedies for victims. Finally, he explained the rationale and functioning of an international committee on the regulation, oversight and monitoring of PMSCs.

40. Mr. Nikitin explained that the main principles and elements underlying the draft convention were that States should establish a system of registration for PMSCs that is separate from regular businesses and that they should prohibit the registration of PMSCs in

off-shore zones. The proposed convention would also create a United Nations based international register for PMSCs and would seek to apply the experience acquired in the context of the UN Register for Conventional Arms. Other principles would include the obligation to be transparent, responsible and accountable. The draft convention also proposes the creation of a reporting obligation for States concerning the main State contracts with PMSCs, as well as information on registration and licensing. It also seeks to enable territorial States to possess entry control over companies and personnel, the right to expel misbehaving companies, and the right to check entering personnel. Furthermore, the draft convention provides that PMSCs can only employ legitimate ways of acquiring, importing and transporting weapons. It also imposes certain limitations on the use of force and the use of weapons by PMSCs and obliges companies to provide appropriate training in international humanitarian law and in international human rights law, as well as in the national law of a country of operation. The draft convention reinforces the principle of state monopoly on use of force and requires from each State to define legislatively military and security functions which are in principle not subject to outsourcing. Mr. Nikitin pointed out that the set of proposed elements and principles could be used in different proportions in different instruments at different levels, including national laws, regional agreements, model laws and the draft convention.

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

42. Some delegations also insisted on the fact that one of the premises in the preparation of the draft convention by the Working Group on the use of mercenaries was that current international law does not sufficiently address PMSCs and indicated their view that as non-state actors are not bound by international law, States rarely address PMSCs violations. Other delegations recalled that discussions during the first session of the intergovernmental working group show that there is a considerable amount of law that applies to PMSCs, including international humanitarian law, international human rights law, international criminal law, and public international law on the use of force. Therefore, more discussions are required in order to clarify how existing law covers PMSCs, as well as to identify potential gaps and possible avenues to close those gaps.

43. In relation to legal considerations relating to the elements in the draft convention, some delegations expressed concerns about the fact that some of the principles incorporated in the draft convention seem to run counter to existing legal principles, or principles that have been identified or are on the agenda of other fora, in particular the International Law Commission. Some delegations pointed out that it is problematic that the draft convention attempts to solve legal problems that remain under discussion by Member States, including in areas such as State responsibility, the implementation of the principle of the responsibility to protect, the regulation of the notion of legitimate self-defence and the use of force in international law. One delegation pointed out that the draft convention may prevent States from contracting out certain core State functions, the scope of which remains unclear and may vary from State to State. In addition, it was noted that the creation of a new treaty monitoring mechanism was inopportune at a time when the whole system of treaty

bodies was being reviewed. Finally, it was mentioned that the draft convention did not take fully into account other legal frameworks that are currently being negotiated, such as the draft arms trade treaty.

44. Other delegations welcomed the discussion on the elements of the draft convention and indicated that an international legally binding instrument was required to address current problems, which have proved to be highly complex and, thus, requiring international regulation to create a homogenous approach by the international community. It was reiterated by these delegations that the current framework for the regulation of the activities of PMSCS, including the Montreux document and the Code of Conduct, fail to adequately address the complexity of the problems raised by the operation of these companies and, in particular, do not establish proper mechanisms for accountability and for effective remedies for the victims. In this respect, some delegations considered that the rights of the victims should be at the core of any regulatory framework. It was stated that the elements contained in the draft convention as proposed by the Working Group on the use of mercenaries are crucial for a possible regulation of PMSCs and should therefore be further considered in the second session of this working group.

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

46. UNICEF recalled that since June 2010 it has been leading an initiative to develop a set of principles for business on children's rights. The representative of UNICEF explained that these principles call on businesses to respect and support children's rights and to avoid complicity in children's rights abuses. It was pointed out that the principles are also relevant to the activities of private security companies, especially with regard to how companies understand, prevent and address any negative impact of their activities on children; how companies address children's rights in the workplace, including the use of child labour; how companies can take action to protect children during emergencies, including through applying conflict sensitive business practices; and the essential role of companies in supporting communities and in reinforcing government efforts to fulfil children's rights. The representative of UNICEF concluded by stating that the principles build on the Convention on the Rights of the Child, its optional protocols, the ILO convention, the Guiding Principles on business and human rights, as well as the Global Compact principles.

D. Accountability and right to an effective remedy for victims

47. In her presentation, Ms. Amada Benavides elaborated on individual cases that had been brought to the attention of the Working Group on the use of mercenaries in relation to accountability of PMSCs. She also discussed how the Montreux document, the Code of Conduct and the draft convention address the issues of accountability and remedy for victims of human rights violations. In her view, the Montreux document requires that contracting, territorial and home States enact legislation to sanction violations of international humanitarian law and bring to justice members of the PMSCs that committed other crimes under international law. Ms. Benavides pointed out that the Montreux document only mentions the right of victims for reparations with regard to contracting States, but not in relation to territorial and home States. She explained that the Code of Conduct contains principles on companies' obligations to establish grievance mechanisms and to ensure that they have sufficient financial capacity in place to compensate victims. Ms. Benavides noted that the draft convention provides for the obligation of the State to impose criminal, civil and/or administrative sanctions to offenders. She highlighted that, according to the provisions of the draft convention, States should also provide remedies for

victims, more particularly with regard to criminal, civil and/or administrative offences, liability of legal persons and entities; should prosecute or extradite alleged offenders; should transfer criminal proceedings; and should notify the outcome of proceedings to victims. Ms. Benavides underlined that the draft convention also provides for the establishment of an International Fund for the rehabilitation of victims and for the establishment of a Committee on the Regulation, Oversight and Monitoring of PMSCs and the International Register of PMSCs. She concluded that due to the difficulties in establishing proper jurisdiction, national legislation is not sufficient to address transnational operations of PMSCs and that the draft convention is one possibility to provide more effective remedies for victims.

48. Ms. Najat Al-Hajjaji noted that the concept of accountability of States for human rights violations was established for a variety of situations in a number of international human rights instruments. She indicated that former Special Rapporteur Theo van Boven recommended to include in new human rights instruments relevant parts on compensation and reparation for the victims of serious violations of human rights and suggested human rights treaty bodies to include in their work the monitoring of these aspects. Ms. Al-Hajjaji stated that the draft convention confirms these steps and obliges States to take measures not only to hold accountable personnel of PMSCs for their acts, but to provide effective remedies for victims. She pointed out that compensation must meet the needs of the victims, must be proportional to the damage caused, must include rehabilitation, reconciliation elements and should provide guarantees of non-repetition. Concerning the definition of impunity, Ms. Al-Hajjaji indicated that this means a situation in which the victims have no legal ability to ensure that those responsible for certain crimes are held accountable. In relation to the importance of reparations, the draft convention envisages the possibility of an international fund managed by the Secretary General to pay compensation to victims of human rights violations. Ms. Al-Hajjaji finally recalled that personnel of PMSCs are also affected by human rights violations, in which case the contractors would need to be provided with appropriate legal ways to ensure justice and to get compensated for their losses.

49. In the general discussion, the continued work related to redress, guarantees of non-repetition of human rights violations and the importance of ensuring accountability for all human rights violations committed by PMSC personnel were underlined. Accountability was considered a key issue both in general terms and in relation to the subject matter. In this regard, it was highlighted that States need to take all necessary measures to this end.

50. During the discussion, the question was raised whether the adverse impact of PMSCs is a worldwide problem. It was noted that, in fact, there are a number of such cases that have been identified in all regions of the world.

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

V. General observations

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

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

54. The United Kingdom emphasized the principle of the rule of law, PMSCs' obligation to respect the applicable laws in challenging environments and pointed to the importance of accountability. While it acknowledged the work of the Working Group on the use of mercenaries to assess different mechanisms of regulation, it particularly pointed to the Code of Conduct, which it considered the most effective way of regulating PMSCs. It noted that the Temporary Steering Committee of the Code of Conduct is working on issues of international oversight and governance and the resolution of third party grievances and should establish an International Governance and Oversight Mechanism for the Code of Conduct in early 2012. The United Kingdom stated that this might usefully feed into a needs assessment of any existing gaps in the international legal framework before any further work is carried out on a draft convention or alternative regulatory measures.

55. Switzerland pointed out that the discussion of the first session demonstrated that before considering a new convention to regulate the activities of PMSCs it is appropriate to benefit from the experience acquired from existing instruments, such as the Montreux document and the Code of Conduct and their development, as well as from additional expertise available within the United Nations.

56. Honduras concluded that there are legislative gaps on national and international levels that allow for impunity in cases of human rights violations of PMSCs and supported the elaboration of an international legally binding document. It suggested for the next session of the intergovernmental working group to focus not only on the activities of PMSCs in armed conflicts, but also in other situations.

57. Algeria reiterated the risks PMSCs pose to the sovereignty of States in terms of security, defence and responsibility for human rights. It recalled the challenges States face regarding PMSCs owing to their complexity in terms of legal status, human resources, transnational nature and the possible human rights violations related to their activities. In addition, it pointed to the fact that the Montreux document does not cover all relevant aspects in a comprehensive manner and supported the idea of an international legally binding instrument. Algeria suggested for the second session to continue discussions related to the proposed draft convention.

58. Nigeria, on behalf of the African Group, noted that PMSCs escape the effective control and monitoring of both national legislation and the existing international instruments and pointed to the fact that an enforceable international legally binding instrument with a deterring effect is needed to ensure that the rule of law is respected by PMSCs.

59. The United States of America noted an area of agreement among delegations that the activities of PMSCs can pose challenges in terms of accountability and oversight. It pointed, however, to the different views expressed regarding the question of whether an international convention is needed and appropriate. The delegation recalled its position not to support the

notion of pursuing a convention for various reasons, including many that were shared with other delegations at the meeting, such as the possible overlaps with other areas of international law that have not been considered, and the proposed convention's attempt to tackle issues on which no international consensus has yet been achieved. In addition, it noted the possible, but unintended negative consequences for the training of UN peacekeepers. The delegation emphasized that the main challenge in this area is implementation of existing laws, and that the development of new international treaty law will not address this main challenge. Instead, it encouraged States to review and consider steps to update their national legislation relevant to PMSCs, and to engage in robust collaborative efforts among States, industry and civil society to raise standards within the industry. The delegation stated that the United States of America remained open for a dialogue at the second session on gaining a better understanding of the factual and legal issues involved in PMSC activities and for a discussion on ways that the intergovernmental working group might proceed other than a convention.

60. South Africa recalled the operative paragraph 4 of HRC Resolution 15/26 and confirmed its support for the proposed draft convention. It recalled that the complementary initiatives do not substitute for accountability and remedy mechanisms of a convention.

61. Spain confirmed its willingness to continue the discussion about an international binding regulatory framework for PMSCs in order to avoid impunity for human rights violations committed by PMSCs. It noted, however, that there is no consensus among States on whether an international convention is needed. Therefore, Spain called upon States to use effectively and broaden the scope of the existing initiatives of the Montreux document and the Code of Conduct.

62. Zimbabwe supported the idea of an international instrument to hold companies and States of origin accountable for human rights violations of PMSCs and reminded States that the Code of Conduct is insufficient in regulating the subject matter.

VI. Concluding remarks

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