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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

Fifth session

12-16 December 2016

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

Chair-Rapporteur: Nozipho Joyce Mxakato-Diseko (South Africa)

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I. Introduction

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

2. In its resolutions 22/3 and 28/7, the Human Rights Council decided to extend the mandate of the open-ended intergovernmental working group in order for it to undertake and fulfil its mandate.

3. The fifth session, held from 12 to 16 December 2016, was opened by the Director of the Thematic Engagement, Special Procedures and Right to Development Division of the Office of the United Nations High Commissioner for Human Rights (OHCHR).¹ She stressed the importance of ensuring that victims' rights were protected and that the wrongs caused to them by private military and security companies, whether operating at the national or the transnational level, were not left with impunity. This could require the establishment of grievance procedures to deal with cases of alleged abuses and regular monitoring to ensure oversight, immediate cessation of abuses and accountability. In cases where human rights abuses had been committed, States had the obligation to investigate, prosecute and provide reparation to victims.

4. The Director also referred to the reports of the Working Group on mercenaries, in which it assessed national laws regarding private military and security companies to their effectiveness in protecting human rights and promoting accountability for violations, identifying any good practices and regulatory gaps that may exist (A/HRC/30/34 and A/HRC/33/43). Furthermore, the Special Rapporteur on extrajudicial, summary or arbitrary executions had prepared a report on the right to life and the use of force by private security providers in law enforcement contexts (A/HRC/32/39), in which he included detailed recommendations for the United Nations, regional human rights mechanisms, States, private security providers, corporations contracting private security providers, civil society and academia. In June 2016, the High Commissioner had presented a report to the Human Rights Council on improving accountability and access to remedy for victims of business-related human rights abuse (A/HRC/32/19), containing normative and practical guidance for States on how to enhance the effectiveness of domestic judicial systems in providing legal accountability and remedy in cases involving human rights abuse by business, including private military and security companies. Furthermore, the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, established by the Council in resolution 26/9, had held its second session in October 2016 and would report to the Council at its thirty-fourth session.

¹ For presentations and interventions see www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitarySession5.aspx.

II. Organization of the fifth session

A. Election of the Chairperson-Rapporteur

5. At its first meeting, on 12 December 2016, the intergovernmental working group elected the Permanent Representative of South Africa to the United Nations Office at Geneva, Nozipho Joyce Mxakato-Diseko, as its Chair-Rapporteur. The working group then adopted its agenda (A/HRC/WG.10/5/1) and programme of work.

B. Attendance

6. Representatives of the following States attended the meetings of the fifth session: Algeria, Argentina, Australia, Austria, Azerbaijan, Belgium, Brazil, Colombia, China, Cuba, Egypt, Georgia, Greece, Guatemala, Honduras, India, Iran (Islamic Republic of), Iraq, Ireland, Japan, Kazakhstan, Kuwait, Mexico, Morocco, Nicaragua, Norway, Pakistan, Peru, the Philippines, the Russian Federation, Saudi Arabia, Slovakia, South Africa, Spain, Switzerland, the Syrian Arab Republic, Tajikistan, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe. Representatives of the European Union and the United Nations Educational, Scientific and Cultural Organization also attended the meetings. Furthermore, members of Cercle de recherche sur les droits et les devoirs de la personne humaine and the European Law Students' Association participated in the meetings.

7. The following experts were invited to give presentations and to participate as resource persons of the fifth session: member 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, Elżbieta Karska; Legal Officer at the International Committee of the Red Cross (ICRC), Helen Obregón Gieseken; Programme Manager at the Geneva Centre for the Democratic Control of Armed Forces (DCAF), Alice McGrath-Crégut; Programme Manager at DCAF, Jean-Michel Rousseau; interim Executive Director of the International Code of Conduct Association (ICoCA), Anne-Marie Buzatu; Adviser on business and human rights at OHCHR, Lene Wendland; Member of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Surya Deva; Senior Legal Adviser at the International Commission of Jurists, Carlos Lopez; President of Lumière synergie pour le développement (Senegal), Aly Marie Sagne; Coordinator of the Somalia Initiative at the African Centre for the Constructive Resolution of Disputes (ACCORD), Kwezi Mngqibisa; researcher at the University of Basel, Anna Petrig; and Director at Security in Complex Environments Group (SCEG), Paul Gibson.

C. Introductory remarks of the Chair-Rapporteur

8. In her introductory remarks, the Chair-Rapporteur paid tribute to her predecessor, Ambassador Abdul S. Minty, and to the constructive discussions on the regulation, monitoring and oversight of the activities of private military and security companies during the previous four sessions of the working group. She noted that some valuable initiatives had been taken and that progress in the areas of developing more concrete initiatives around the globe – most of which were, however, voluntary codes and principles – had been made. She stressed the importance of building on this earlier work and of continuing to engage in constructive interaction with a view to making further progress.

9. The Chair-Rapporteur noted that the programme of work had been developed on the basis of discussions with regional coordinators. She thanked all speakers for sharing their

expertise and experiences during the fifth session, and announced that the sixth session of the working group would be held from 22 to 26 May 2017, with a view to presenting the recommendations to the Human Rights Council for its consideration at its thirty-sixth session. She thanked all delegations for their continued active engagement in this process, and looked forward to a fruitful session.

D. General statements

10. In their general statements at the beginning of the fifth session of the intergovernmental working group, some delegations expressed concern at the increase and proliferation of private military and security companies worldwide and at the outsourcing by States to private companies of a wide range of security and military services. They stressed that certain functions should be the sole responsibility of States, including direct participation in hostilities, and detention and interrogation of prisoners of war. In view of the continuing serious violations of human rights and international humanitarian law with impunity, the delegations suggested elaborating a legally binding international convention in order to complement existing national mechanisms and voluntary initiatives with regard to private military and security companies. In this context, these delegations suggested streamlining the elements that had been presented during the fourth session of the working group (A/HRC/30/47), based on human rights instruments, the International Code of Conduct for Private Security Service Providers, 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, and the draft convention prepared by the Working Group on mercenaries (A/HRC/15/25, annex). According to these delegations, the new instrument should ensure that penalties are imposed and that remedies are commensurate with the scale of violations committed. Furthermore, they suggested establishing mechanisms for recourse in cases of violations, including a committee on the regulation, oversight and monitoring of private military and security companies; an enquiry procedure and complaint procedure; and reporting mechanisms on compliance by private military and security companies with new norms and standards in international human rights law and international humanitarian law.

11. Other delegations recalled from previous presentations to the intergovernmental working group that private military and security companies had long existed, and that their activities had since evolved, with large parts of their services now being provided outside of armed conflict. These delegations were pleased that the programme of work of the fifth session allowed for updates on the Montreux Document, the International Code of Conduct for Private Security Service Providers, the Guiding Principles on Business and Human Rights (A/HRC/17/31, annex) and the report of the High Commissioner on improving accountability and access to remedy for victims of business-related human rights abuse. Although they appreciated the considerable work undertaken in various forums, they were unconvinced of the need for a legally binding convention on private military and security companies at this stage. They furthermore quoted one of the consensual recommendations from the second session of the working group, namely, to consider the possibility of an international regulatory framework, including the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, and other approaches and strategies, including international standards, and the way in which they might interact to protect human rights (A/HRC/22/41, para. 77). These delegations also reiterated their proposal made during the fourth session, namely, to consider the range of options to be explored to further develop an international regulatory framework, including international standards setting, the development of guidelines, possibly actions plans or model laws, contract templates based on the Montreux Document, good practices and mutual legal assistance programmes (A/HRC/30/47, annex

II). They also stressed that any international regulatory framework should focus on compliance and accountability, urging a continued focus on national regulation and enhanced international and multi-stakeholder collaboration and coordination.

III. Discussion on specific topics

A. Substantive report of the Working Group on mercenaries

12. In her presentation, on 12 December 2016, Ms. Karska pointed out that the Working Group on mercenaries had been requested by the Commission on Human Rights, in its resolution 2005/2, to prepare draft international basic principles that encourage private military and security companies to respect human rights in their activities. In this regard, the Working Group had presented a draft of a possible international convention thereon in 2010. Recognizing that the draft text needed further refining, she stated that the Working Group on mercenaries had engaged in various consultations and expert meetings to produce a concept note incorporating the main elements that would assist in informing a legally binding instrument on private military and security companies.

13. Since 2013, the Working Group on mercenaries had reviewed national legislation on private military and security companies in 54 States in Africa, Asia, Latin America and the Caribbean and Europe in order to identify trends, gaps and good practices in various regions. In 2017, the study would conclude with a global analysis, which the Working Group would present to the Human Rights Council. Ms. Karska noted some good practices in the reviewed States, including the inclusion of international human rights and humanitarian law references in legislation on private military and security companies; 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 activities of private military and security companies; the requirement to maintain a centralized registry of companies; the requirement to have an accountability structure and security management system in place; the liability of legal persons and private security companies; and the prohibition of personnel of private security companies exercising powers reserved for public security officers.

14. Considering the diverse activities and transnational nature of private military and security companies, Ms. Karska observed worrying trends and gaps in national legislation. For example, most national laws lacked specific rules on the content of monitoring and inspections of private military and security companies, and there were very few provisions requiring a rights-based vetting mechanism to ensure that personnel of private security companies were appropriately trained and complied with international human rights and humanitarian law standards. There were also significant gaps in penal accountability, and in the civil liability of individuals and corporate actors. Despite existing provisions on permitted and prohibited activities for these companies, there were still regulatory gaps concerning the acquisition of weapons and trafficking in arms by company personnel. There were 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 private military and security companies was regulated during potential events of unrest and armed conflict. She stressed the clear lack of references to effective remedies for victims of human rights violations committed by personnel of private military and security companies. Furthermore, the issue of extra-territoriality was not addressed in the majority of national laws, which constituted a significant protection gap for local populations where those companies operated.

15. Given the regulatory gaps in domestic law, the Working Group was pleased with the development of such initiatives as the Montreux Document and voluntary initiatives, such as the Montreux Document Forum and the International Code of Conduct for Private Security Service Providers, which had clearly led to improved standards across the industry. In Ms. Karska's view, it was encouraging that many companies had become members of ICoCA since its establishment, and that the Montreux Document was also gaining a growing number of supporters. The Working Group had considered the objectives of the International Code and the Montreux Document as important complementary initiatives to its own work in advocating for more robust regulations of private military and security companies. It appreciated the close cooperation it had had over the years in sharing information and engaging in regular dialogue with ICoCA and DCAF.

16. The Working Group recognized the important steps that had been taken by both the Montreux Document Forum and ICoCA in building constituencies among States, private military and security companies, civil society organizations and international organizations, and in developing best practices, regulations and procedures (for example, the certification and complaints mechanisms for the International Code in particular). In Ms. Karska's view, an analysis of these initiatives and existing national legislation had confirmed the need for an international legally binding instrument to plug gaps in accountability and the availability of effective remedies for victims of human rights violations. In this context, the Montreux Document and the International Code could not by themselves ensure comprehensive accountability for human rights violations and remedies for victims. Furthermore, the Montreux Document referred to existing international humanitarian law standards, and therefore applied only to situations of armed conflict. Private military and security companies, however, performed many activities outside of armed conflicts, for example by protecting mines and oil refineries, working extensively within the extractive industry and participating in drug eradication efforts, or operating in detention centres, such as those for migrants in various parts of the world.

17. While the compilation of good practices in the Montreux Document provided valuable guidance, Ms. Karska noted its voluntary and non-binding nature. Furthermore, the Geneva Convention standards incorporated into the Montreux Document required only prosecution and extradition if violations were defined as grave breaches, which applied only to international armed conflicts, whereas the vast majority of modern armed conflicts were not international. Given the lack of a strong accountability framework and of mechanisms for effective remedies, the Working Group on mercenaries supported an international binding instrument to regulate the activities of private military and security companies.

18. With regard to a legally binding instrument, Ms. Karska outlined the main elements that could inform the existing draft of a possible convention on private military and security companies. The concept note presented to the intergovernmental working group at its fourth session provided guidance on such issues as inherent State functions that may not be outsourced, including direct participation in hostilities in armed conflict, detention and interrogation of prisoners of war. The classification of service activity looked into whether services were military in nature, whether service providers were armed, and the different contexts in which these services were offered. Furthermore, intergovernmental organizations could also be party to a convention on private military and security companies, which would reinforce the notion of accountability and support the growing trend of such organizations becoming party to international instruments. The concept note included a proposed framework for regulating jurisdiction that would strengthen accountability and extraterritorial provisions, notably to cover complex environments in which companies operated. Ms. Karska also stressed the importance of establishing an oversight mechanism to ensure remedy and reparations for victims. The concept note covered other elements, such as a coherent provision to regulate licensing of companies, the

vetting of personnel, the licensing of services, the possession of arms and a requirement for company registration, which would assist in monitoring company personnel and activities. The Working Group on mercenaries continued to call for an international legally binding instrument on private military and security companies, which would complement national legislation and voluntary initiatives in providing effective and robust regulation of such companies. In its view, an international binding instrument was the best option forward in ensuring that human rights, particularly of those belonging to vulnerable groups, were fully protected wherever private contractors operated.

19. In the ensuing discussion, some delegations noted that the concept note by the Working Group and other elements presented during the fourth session of the intergovernmental working group would be a good way forward for drafting a legally binding convention on private military and security companies. While appreciating the references made by the Working Group to the Montreux Document and the International Code of Conduct for Private Security Service Providers, other delegations argued that some additional options had not yet been considered, such as the legislative guidance provided by DCAF, and that it would be important to reach consensus on the way forward.

20. Ms. Karska stated that she understood the difficult political situation for the existing draft convention as presented in 2010, and that the Working Group on mercenaries stood ready to present a revised draft if mandated to do so by the Human Rights Council. She stressed that every regulation needed effective implementation, noting the complementarity between soft law and hard law. Furthermore, the issue of extra-territoriality had been identified by the Working Group as a significant protection gap, because an analysis of more than 50 national regulations on private military and security companies had shown that they failed to provide for effective laws and institutions concerning the issue of extra-territoriality.

B. Updates from relevant organizations and processes

21. On 12 December 2016, Ms. Obregón Gieseken provided an update on the Montreux Document and the recently established Montreux Document Forum. She explained that in order to address increasing concerns about the possible serious implications for the protection of the civilian population due to the use of private military and security companies in armed conflicts, Switzerland and ICRC had launched a joint initiative to promote respect for international law, which resulted in 2008 in the adoption of the Montreux Document. It reaffirmed and clarified the existing obligations of States under international law with regard to private military and security companies, and also identified good practices to guide and assist States in promoting respect for the law. While the Montreux Document was specifically developed to address the involvement of private military and security companies in situations of armed conflict, its preface expressly mentioned that “existing obligations and good practices may also be instructive for post-conflict situations and for other, comparable situations”.

22. Ms. Obregón Gieseken noted that the Montreux Document had helped to clarify and raise awareness of States’ obligations with respect to the operations of private military and security companies. From an initial 17 States, the Montreux Document was supported, as at December 2016, by 54 States and three international organizations. It had also raised awareness of the importance of adopting and implementing adequate domestic legislation and regulatory frameworks, and had provided guidance on how to do so; however, much remained to be done to ensure adequate regulation of private military and security companies. While several States had enacted related national legislation, more States should do so, while others should update existing national laws and corresponding regulatory frameworks to ensure that they were clearer and more robust. In particular,

States should take action to clearly delimit the services that may or may not be contracted out to private military and security companies. Another area requiring further work was to ensure the accountability of and oversight over such companies and their personnel for violations of international and national law.

23. With regard to recent developments, Ms. Obregón Gieseken referred to the Montreux Document Forum, which had been established in December 2014 as a platform to discuss and exchange information on good practices and challenges relating to the regulation of private military and security companies. During its second plenary meeting in January 2016, the Forum had held, for example, a thematic discussion on the use of such companies in maritime security and an exchange on the implementation of the first set of good practices provided in the Montreux Document relating to the determination of services that may or may not be outsourced to them, the procedures and criteria for the selection and contracting of private military and security companies, and also for authorizing them to provide military and security services. Ms. Obregón Gieseken announced that the Forum would hold its third plenary meeting in April 2017. She pointed out that ICRC had, together with the Government of Switzerland and DCAF, organized six regional seminars to raise awareness of the Montreux Document.

24. Ms. McGrath-Crégut presented the initiatives taken by DCAF to support the implementation of the Montreux Document. To assist States in their implementation efforts, DCAF had developed a practical guidance tool for lawmakers on developing national legislation that were in line with international law obligations. In the process, DCAF had consulted representatives from the private industry and lawmakers across the world in order to better understand current barriers to the formulation of effective regulation and oversight systems. Sharing good practices and lessons learned by regional and global partners was fundamental to build better national frameworks. Thus, the DCAF tool was also aimed at capturing the processes that States have adopted to draft or update legislative frameworks, for example where chambers of commerce and leading industry representatives had participated in consultative processes to ensure that legislation reflected operational realities on the ground. Ms. McGrath-Crégut stressed that DCAF was mindful that one-size-does-not-fit-all in terms of domestic legislation because of the different needs that private military and security companies may have. For this reason, the DCAF tool was non-prescriptive in nature and attempted to adapt to the diverse needs and capacities of States.

25. In addition to the guidance tool for lawmakers, Ms. McGrath-Crégut referred to a new tool that would be aimed at providing simple, concise and practical guidance for States, international organizations and non-governmental organizations on structuring their contracts and contracting procedures, drawing on international norms, standards and good practices. She pointed out that the draft tool was open for consultation until 13 January 2017, and invited interested States, non-governmental and international organizations to contribute to the process.

26. Mr. Rousseau presented the work of DCAF in supporting the implementation of international norms and good practices in Latin American and the Caribbean, focusing on the activities of private security companies. It was estimated that approximately 2.45 million private security guards were officially registered with regulating authorities in 16,174 companies across 30 countries in the Latin-American and Caribbean region.² Mr. Rousseau pointed out that these figures were minimal numbers: in some countries, they might not cover security structures, such as in-house security or watchman associations,

² DCAF and the United Nations Regional Centre for Peace, Disarmament and Development in Latin America and the Caribbean, *Armed Private Security in Latin America and the Caribbean: Oversight and accountability in an evolving context*, United Nations, 2016.

which are not required to register with the national regulator, and in any case they did not encompass informal private security services. Nevertheless, they could give an insight into the challenges posed by private security governance. He noted that the number of legally registered private security guards exceeded the number of public security forces in the region. Furthermore, in 17 countries of the region, about 660,000 small and light weapons were registered to private security companies.³

27. With regard to the main challenges relating to legal and regulatory frameworks, Mr. Rousseau pointed out that current laws in Latin American and Caribbean countries focused on administrative and technical requirements. The laws did not necessarily require private security companies to take into account human rights aspects, internal control mechanisms, training of personnel or clear use of force policies. Mr. Rousseau raised the question of physical security and management of weapons by private security companies; a credible number of instances had been reported where one of the ways to import small arms and light weapons into the region was to create a private security company and subsequently divert legally imported weapons towards the black market.

28. Mr. Rousseau also provided an overview of the three forms of support designed to strengthen private security governance that DCAF was providing to Governments and other actors in Latin America and the Caribbean. Firstly, support related to strengthening laws on private security companies in the light of international norms, standards and good practices. Secondly, the support concerned the strengthening of the work of national regulatory authorities, notably regarding the certification and monitoring process for private security companies. This included the strengthening of public procurement processes to introduce economic incentives, at the national level, for companies to respect legislation and regulation. The third area of DCAF work related to industry associations, exploring how they could foster self-regulatory aspects in their work and by their members. Mr. Rousseau concluded that the strengthening of legislation should go hand in hand with strengthening the national capacity, since international norms and good practices – be they binding or not – are incorporated into national legislation and regulation, thereby becoming part of the binding national legal framework and thus enforceable within the national judicial system. He stressed that, for national legislation and regulation to be enforced and thus foster respect for human rights, key public institutions – the regulator, the judiciary, and prosecutors – should be able to carry out their mandates. Furthermore, victims of abuses required easy and safe access not only to the justice system but to additional, non-judicial remedy procedures as well.

29. Ms. Buzatu provided an overview of ICoCA, including information on the latest developments on the association's oversight mechanism. She reiterated that there was no conflict between international binding instruments and the International Code of Conduct for Private Security Service Providers as such; rather, ICoCA took the approach of helping the development of standards to ensure that private military and security companies provided services in a manner compliant with human rights standards. Ms. Buzatu recalled that ICoCA was a multi-stakeholder oversight and governance mechanism for the private security sector that promoted respect for human rights.

30. Ms. Buzatu reiterated that the objective of ICoCA was to oversee the implementation of the International Code of Conduct by private security service providers. Article 11 of the ICoCA articles of association involved certification, which had the aim of ensuring that a company's systems and policies met principles and standards of the International Code and that a company was undergoing monitoring, auditing and verification, including in the field. During certification, a company first underwent an

³ Ibid.

independent audit to one of the accepted standards of certification. Subsequently, companies that had obtained third-party certification to a board-recognized standard were encouraged to seek ICoCA certification by submitting proofs of their third-party certification and their additional information packages to the ICoCA secretariat. Ms. Buzatu pointed out that, under its current regulation, all companies were required to obtain certification by 2018, and that a number of ongoing studies were examining the efficacy of certification, while ICoCA was exploring ways to make certification more readily available to companies.

31. Ms. Buzatu then referred to article 12 of the ICoCA articles of association, relating to reporting, monitoring and assessing performance. In this context, she mentioned the various sources of information necessary for performing the monitoring function, including a company's self-assessment reporting, an annual tool that was expected to go online in 2017, and field-based reviews. Ms. Buzatu recalled that the main objective of the ICoCA was to prevent human rights violations as far as possible. She stated that ICoCA was not intended to be a purely reactive entity but rather a rapid response mechanism designed to prevent and intervene where there is evidence indicating that serious abuses are being committed. In serious cases, a confidential dialogue was conducted with a company to try to identify the problem, address it and improve the performance of the company in the region. A growing number of Governments either required that a private military or security company had membership of ICoCA, or would favourably consider such membership in the procurement process.

32. During the ensuing discussion, one delegation asked Mr. Rousseau to expand on the issue of remedies in the context of his work in Latin America. Another delegation solicited views on the importance of a legally binding instrument, including whether or not it could provide an enhanced context for DCAF activities. Another delegation requested elaboration on existing challenges to implementation. Given the differences between private military companies and private security companies (and the diversity within those two categories), another delegation asked the panellists to elaborate on the ways this diversity was reflected in the tools to meet the needs of different companies. Some delegations asked how a legally binding instrument would help victims, and how self-regulation fostered accountability in an extraterritorial context, soliciting references to good practices and specific examples of challenges posed by the extraterritorial dimension of accountability. In this context, another delegation sought views on ways to devise effective incentives for companies to abide by international and national standards.

33. One delegation enquired whether it would be helpful for the intergovernmental working group to focus on developing a plan of action to guide home, contracting and territorial States in improving national regulation of private military and security companies, and whether the working group could make use of the DCAF contracting tool as a starting point for developing a set of best practices for national regulation of the said companies. Another delegation highlighted the need for the uniformity and objectivity of international standards, and thus noted the need for a universal legally binding framework that complemented and completed current efforts. Another delegation stressed that a legally binding instrument would fill existing gaps and would oblige private military and security companies to abide by international standards. One delegation noted that information about the real impact of such companies from a human rights perspective was not available, and pointed out that a better understanding of the negative impact on human rights could help when devising an adequate response to challenges like those highlighted in the presentations.

34. In their responses, the panellists from DCAF underlined the difficulties related to accessing information on judicial mechanisms when trying to construe a set of best practices on remedies; DCAF therefore appreciated States' contributions of examples of

good practices. With regard to the challenges of implementation, DCAF emphasized that private military and security companies had the same challenges as the security sector overall, including weak integration of international norms and good practices and lack of financial and human resources for regulation and monitoring. With regard to the extraterritorial nature of the activities conducted by the said companies, DCAF indicated the vital role played by civil society in drawing attention to the voice of victims and contributing to social dialogue in this area. Referring to the complementarity of the various initiatives to improve protection, Ms. Obregón Gieseken pointed out that ICRC had already provided comments in 2009 to the Working Group on mercenaries during the formulation of its first draft convention, and that ICRC would be available to provide substantive and legal advice on issues relating to international humanitarian law if States decided to work on the text of an international convention. DCAF emphasized that the existence of international norms and good practices, such as the Montreux Document, helped to sensitize national stakeholders to the need for good private security governance, and incentivized them to strengthen national legislation and regulation. In this regard, DCAF noted that the different international norms and good practices should not be seen as exclusive, but rather as mutually reinforcing.

C. Updates by participants on developments since the fourth session

35. The representative of Switzerland pointed out that the Federal Act on Private Security Services provided Abroad (PSSA) had entered into force on 1 September 2015. The Act prohibited any participation of private military and security companies in the conduct of hostilities abroad and the use of their services in the connection with the commission of serious human rights violations. It was applicable to companies and individuals providing from Switzerland private security services abroad, or who exercised control from Switzerland over a company providing private security services abroad or services in connection therewith in Switzerland or abroad. Such companies had to obtain authorization by the competent authority, and their activities could be prohibited if not in compliance with the law. Sanctions were envisaged for private military and security companies that did not respect their legal obligations. The Act also provided that companies subject to its article 2 had to become signatories to the International Code of Conduct for Private Security Service Providers.

36. The representative of the United States of America referred to, as an example of ensuring accountability for crimes committed by private military and security companies, the prosecution by the Department of Justice of four Blackwater employees for the killing of 14 unarmed civilians and the wounding of many others in Nisour Square, in Baghdad, on 16 September 2007. The defendants were serving in Iraq as contractors for the Department of State. In 2015, following a trial in the Federal District Court in Washington, D.C., the defendants were convicted of charges that included murder, manslaughter and weapons offences; one defendant was sentenced to life imprisonment and three defendants to 30 years of prison, respectively.

D. Access to justice and remedies for victims of violations and abuses linked to the activities of private military and security companies

1. Implementation of the Guiding Principles on Business and Human Rights

37. On 13 December 2016, the Adviser on business and human rights at OHCHR, Ms. Wendland, presented the OHCHR accountability and remedy project. The first part of the project, which focused on judicial mechanisms, was aimed at improving the effectiveness of domestic legal systems to provide accountability and remedy in cases of business-related

human rights abuse, including in cross-border cases. Pillar III of the Guiding Principles on Business and Human Rights, which was itself built on human rights law standards in this area, established that States must provide effective accountability and remedy in business-related human rights cases. The OHCHR project addressed six separate but interrelated work streams addressing legal, practical and financial barriers. The project included an extensive multi-stakeholder process, with several public and expert consultations, collecting evidence from more than 60 jurisdictions, and detailed research on representative jurisdictions and selected topics. The result was the development of guidance for States on strengthening accountability and access to remedy at the national level.

38. The guidance set out the steps that could be taken to achieve accountability and access to justice both with regard to public and private law regimes. It recognized the diversity of contexts and legal systems, and therefore aimed to provide purpose-built solutions that were flexible and adaptable to different legal traditions, structures and needs. The guidance elaborated on the complexities and specific challenges arising from cross-border cases, and sought to provide information on overcoming them. In addition to the report submitted to the Human Rights Council (A/HRC/32/19), OHCHR published a paper that includes additional illustrative examples of implementation of the different elements, allowing States to see how these steps have been implemented concretely.⁴

39. Ms. Wendland also explained that the guidance enabled States to review and identify ways of improving the effectiveness of their legal systems in holding companies to account for abuses and providing remedy for victims, including in cross-border cases. Since the guidance was instrument-neutral, it could be implemented through national processes, for example, in the context of national plans of action or other legal review processes; be incorporated or inform policy and standard-setting processes at the subregional, regional or international levels; and could be used by civil society and national human rights institutions in advocacy and advice to States. OHCHR was given the mandate by the Human Rights Council in its resolution 32/10 to begin work on the second part of the guidance, which is intended to address State-based non-judicial mechanisms. In this context, OHCHR would look specifically at mechanisms dedicated to examine complaints against private security providers. The results would be presented to the Human Rights Council at its thirty-eighth session.

40. In the subsequent presentation, Mr. Deva addressed the relevance of the Guiding Principles on Business and Human Rights for ensuring access to justice and remedies for the victims of human rights abuses linked to the activities of private military and security companies. The Guiding Principles covered all internationally recognized human rights, and applied to all types of business enterprises, including the said companies. The first pillar of the Guiding Principles focused on the obligation of States to protect against human rights abuses within their territory or jurisdiction by business enterprises. States were therefore required to take appropriate steps not only to prevent the said companies from violating human rights, but also to investigate, punish and redress violations. Several challenges arose owing to the context in which the companies often operated, including conflict zones with weak governance or on the high seas. Mr. Deva suggested that this required a clarification or the development of additional standards and strengthening of cooperation among States to enforce existing norms to ensure that the companies were not able to exploit regulatory gaps. In his view, the Montreux Document and the draft convention prepared by the Working Group on mercenaries contributed to this objective. An additional practical option would be for States to consider embedding all relevant

⁴ OHCHR, the OHCHR Accountability and Remedy Project, available from www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARP_illustrative_examples_July2016.docx.

human rights and humanitarian law standards into their contracts with private military and security companies.

41. Mr. Deva emphasized that, under the second pillar of the Guiding Principles, private military and security companies, like other business enterprises, had a responsibility to respect all “internationally recognized human rights”. Because of their nature of activities and areas of operations, private military and security companies would need to also consider international humanitarian law and international criminal law. Mr. Deva suggested that they should (a) make a public policy commitment to respect human rights; (b) establish human rights due diligence processes to identify, prevent, mitigate and account for how they address their impact on human rights; and (c) set up processes to enable the remediation of any adverse human rights impact they cause or to which they have contributed.

42. With regard to the third pillar of the Guiding Principles, Mr. Deva emphasized the importance of effective judicial remedies, given that non-judicial and other non-State-based mechanisms tended to work better if robust judicial mechanisms were present. Moreover, certain human rights abuses linked to the activities of private military and security companies could be so serious that only judicial remedies, including criminal sanctions, would be appropriate. Access to effective remedy could be strengthened by removing legal, practical and other relevant barriers. On the role of non-State based mechanisms, Mr. Deva pointed out that, while the International Code of Conduct for Private Security Service Providers established an operational-level grievance mechanism, improvements were required to make it fully compliant with principle 31 of the Guiding Principles. He concluded by highlighting the importance of taking into account provisions of the Guiding Principles, the Montreux Document and various other processes in the development of a binding international regulatory framework to regulate effectively the activities of private military and security companies.

2. Views of civil society

43. Mr. Lopez opened his presentation by setting out the basis for the right to a remedy in international human rights law. This right implied the right to access to justice, which must be guaranteed in law and practice. On the one hand, legislation must clearly define the competence of courts and establish fair procedures; on the other, practical barriers, such as lack of legal assistance, should not hinder the right to the extent of making it null and void.

44. Mr. Lopez noted that the right of access to justice was undermined in the context of global operations of private military and security companies. He provided examples to illustrate the challenges faced, such as the use of the “political question” argument to negate the competence of courts on certain issues; gaps in legislation that complicated the jurisdiction of domestic courts for crimes committed abroad; the absence in legislation of criminal responsibility for legal persons; and the lack of independence and impartiality of courts in the State in which violations were committed.

45. Mr. Lopez pointed out that, in order to ensure access to justice, it was important to guarantee that (a) the judiciary – including the prosecutor – were independent, impartial and adequately resourced; (b) legislation clearly defined the right of claimants to file their claims and who may be liable, including the possible criminal liability of corporations; (c) practical obstacles, such as immunities of liability, were removed since they could deprive individuals of their access to justice; (d) courts had wide-reaching jurisdiction, including for crimes committed abroad; and (e) international mechanisms, such as tribunals and expert committees, existed in order to guide, assist and encourage States to take the necessary steps to ensure access to justice.

46. Mr. Lopez concluded by noting that a legally binding international instrument on private military and security companies would be useful to ensure accountability. While it would not solve all problems, since implementation through national law and courts was essential, it could help to underpin and promote the necessary changes at the national level.

47. Mr. Sagne focused his presentation on the challenges to access to remedies for human rights violations linked to the activities of private military and security companies in Africa. He noted that the growing trend to privatize security and war seemed irreversible owing to regional conflicts, insecurity surrounding mining activities and maritime activities in the gulf of Guinea. While private military and security companies did not operate in a legal void with regard to applicable international human rights and humanitarian law, Mr. Sagne argued that there was no international consensus on how to make this framework effective. In the majority of African countries, regulations on private military and security companies were obsolete, inadequate or very limited in terms of human rights protection. National legislation remained silent on a number of issues such as transparency, status and moral standards of agents, contracting, training, due diligence, rules on excessive use of force, relations with local communities and civil society, areas of activities, employment conditions, accountability mechanisms and access to justice for victims.

48. In a context of weak legal frameworks and lack of knowledge of international human rights and humanitarian law, any bad behaviour by private military and security companies or their personnel was inadequately addressed. Mr. Sagne highlighted the large number of cases of violations by multinationals linked to the extracting sector in Africa that have gone unpunished, mainly owing to the lack of access to the judiciary by local communities. Clients, States and the United Nations had an important role to play in improving governance and oversight mechanisms of these companies. In his opinion, self-regulation instruments were significant steps, but overall insufficient.

49. Mr. Sagne subsequently presented the project for a civil society observatory of the governance of private military and security companies in Western Africa. The main objectives were to raise awareness of decision makers and the public of the governance and regulation of private security, to establish a portal on research and information on the activities of these companies, and to facilitate training and the sharing of experience. From a civil society perspective, Mr. Sagne supported the idea of a legally binding instrument on private military and security companies, which should guarantee access to remedies and effective reparation for victims of violations, in accordance with international law.

50. Several delegations asked the panellists for their views on the complementarity of judicial and non-judicial redress mechanisms. Ms. Wendland responded that the full range of remedy mechanisms should be available to victims, and stressed the importance of ensuring that the victims had access to the most appropriate type of mechanism, including in a cross-border setting. Mr. Deva responded that private military and security companies could be involved in minor violations, for which non-judicial mechanisms would be more suitable; when dealing with gross human rights violations, however, judicial remedy mechanisms were more appropriate. In some contexts, non-judicial mechanisms remained important, given that judicial mechanisms could exist only on paper and not be implemented. The Chair-Rapporteur and some delegations raised the question of the need for a legally binding instrument. One delegation noted that the Montreux Document and the Guiding Principles on Business and Human Rights were not incompatible with a legally binding instrument, and argued that the latter was necessary for the protection of victims. Ms. Wendland replied that nothing in the Guiding Principles precluded further legal developments. Mr. Deva noted that the relationship between soft law instruments and binding norms should not be seen as mutually exclusive, but rather that implementation was the key. Furthermore, Mr. Deva noted the lack of consistency by some States wishing to address the activities of private military and security companies with non-binding

instruments, whereas they would have a different position on the regulation of issues such as trade and investment.

51. One delegation asked the panellists about the type of measures that could be taken to incentivize companies to provide remedies. Mr. Deva stressed the need to be creative, proposing such ideas as tax incentives to corporations that cooperate and were proactive in providing non-judicial grievance mechanisms. At the same time, companies that did not cooperate could be placed on a list excluding them from public markets or from obtaining bank loans.

52. One delegation raised the issue of the costs of legal proceedings, which limited the possibility of access to justice, especially in foreign jurisdictions. Ms. Wendland responded that this issue was further compounded by the shrinking space for legal aid in many States. Mr. Sagne suggested that reducing the time frames and deadlines for dealing with cases could indeed help to mitigate costs, and it could be useful to reduce travel costs either by centralizing meetings between the companies and victims or by holding the meetings locally instead of in the company's country of origin. Mr. Deva noted that, when fines were imposed on corporations in criminal cases, States could decide to use an amount from that fine to finance civil claims not supported by legal aid.

E. Operation of private security companies in maritime and other contexts

53. On 14 December 2016, Mr. Mngqibisa presented the perspective of a civil society organization working on conflict management across Africa and that had used private military and security companies in order to be able to do its capacity-building work. He noted that there are continued instances of instability and fragility on the African continent, for which dialogue and problem-solving were critically needed, in view also of internal conflicts, interconnected regional conflicts, humanitarian disasters, human rights violations and abuses. The situation was characterized by a multiplicity of actors, including non-traditional actors such as private military and security companies, which operated in an environment of diminished civil authority, dysfunctional public service, distorted economies, competing identity groups, irregular population movements and the presence of intergovernmental and international non-governmental organizations.

54. Mr. Mngqibisa stressed the importance of looking at the reasons behind the decision by many States to resort to the use of private military and security companies for defence and protection purposes. The advantage of these companies was that they had a unique ability to mobilize resources quickly. Since they acted for commercial gain, however, they did not address the pressing issues of peace and security, for which dialogue, problem-solving and multilateral and collective action were the only answers.

55. Mr. Mngqibisa pointed out that private military and security companies largely resorted to military solutions, and had only limited resources for non-military processes. They also lacked a strategy for peacebuilding and conflict management beyond supporting peace. The High-Level Independent Panel on Peace Operations, in its report (A/70/95-S/2015/446), stressed the primacy of politics beyond technical engagement, the need for actions responsive to the context, stronger partnerships and for operations to become more field-focused and people-centred. The Secretary-General had outlined a vision in his report on the future of United Nations peace operations (A/70/357-S/2015/682) that focused on increasing capacity for prevention and mediation. Mr. Mngqibisa stated that these aspects were most important for ensuring peace and security in Africa, but were not areas in which private military and security companies could play a role. He called upon stakeholders to rethink their reliance upon such companies. He stressed the need in Africa for relationship-building with a focus on long-term engagement. He argued that private military and

security companies had not proven that they had the orientation or experience to build peace, which instead required a comprehensive approach.

56. In the subsequent presentation, Ms. Petrig looked at issues related to the prevalent use of private military and security companies in the maritime setting, including the protection of merchant vessels from criminal threats, such as piracy. The use of these companies in the maritime context differed quite considerably from their use on dry land. In terms of operational specificities, they operated on board a ship, and often in areas distant from law enforcement authorities. Furthermore, there were legal specificities that resulted from the applicability of the international law of the sea.

57. Ms. Petrig highlighted two issues that exemplified these specificities. The first concerned jurisdiction at sea, namely, how the law of the sea informed the question of which State could be the addressee of specific obligations. Legal instruments related to private military and security companies usually addressed different categories of States; for example, the Montreux Document and the draft convention of the Working Group on mercenaries made a distinction between territorial, contracting, home and third States. The concepts of territorial State and contracting State, however, should be interpreted and refined specifically for the maritime context. In that context, “territorial State” meant a State “under whose jurisdiction private military and security companies operate”. Therefore, if a ship was passing the territorial or internal waters of a third State or made a port of call there, the “territorial State” could be the flag State, the coastal State and/or the port State. Unlike on land or the high seas, there was not just one State qualifying as the “territorial State”, but, potentially, three different States. Referring to States’ obligations under instruments relevant to private military and security companies to regulate arms on board ships and to establish criminal jurisdiction, Ms. Petrig noted that the law of the sea contained rules allocating jurisdiction between the three States in situations of concurrent jurisdiction. She explained the concept of “contracting State”, which was used in various instruments relating to private military and security companies. This concept was based on the assumption that a State contracted the services of private military and security companies; however, in the maritime context, it was most common for private entities to hire them to protect private commercial vessels. Ms. Petrig argued that the concept of jurisdiction and the notions of territorial State and contracting State should be analysed and interpreted in the light of the maritime context specifically, taking into account the requirements of the law of the sea and the actual situation at sea.

58. Ms. Petrig also addressed the issue of deprivation of liberty at sea by private military and security company personnel, and related it to the concept of “inherently State functions” (such as articles 9 and 19 of the draft convention of the Working Group on mercenaries). Under current national and international law, it was unclear under which circumstances private military and security companies were allowed to deprive a criminal suspect, who has been overpowered in self-defence, of his or her liberty at sea, and in what capacity (as law enforcement officials or private persons) they were acting when doing so. As a consequence, it is unclear which cases of deprivation of liberty at sea by the said companies amounted to arrest and detention qualifying as an inherently State function, which, according to the draft convention of the Working Group on mercenaries, was not only prohibited but should amount to a criminal offence. In the case of private arrest, the issue was often not clearly regulated by flag State law and, if regulated, there were various approaches. Ms. Petrig therefore stressed the importance of further exploring under which circumstances private military and security companies were allowed to hold a person on board and of clearly drawing the line between lawful acts of deprivation of liberty by those companies and situations where they engaged in arrest and detention qualifying as an inherently State function, which was prohibited. Ms. Petrig concluded that, in the light of the various operational and legal specificities applying to the at-sea use of private military and security companies, it was necessary to look at relevant rules from a specifically

maritime perspective in relation to both the clarification and development of the existing legal framework and a possible new legal instrument on them.

59. In the ensuing discussion, one delegation asked Mr. Mngqibisa whether ACCORD operated in situations where it had to directly hire private military and security companies to carry out its functions. He replied that, when ACCORD had begun to operate in Somalia in 2004, it had to rely on “local service providers”, who were locals without any standardized training; Today, however, ACCORD worked with companies that were subject to some government regulation and had undergone training.

60. One delegation stressed the need to look at the diversity of situations in which private military and security companies operated, and to acknowledge the important work done by the International Maritime Organization (IMO) and the Contact Group on Piracy off the Coast of Somalia. Ms. Petrig responded that while the related IMO guidance was commendable, its geographical scope of application was limited to the High Risk Area and was specific to piracy. She noted that the guidance often made reference to relevant national law, without setting a minimum standard itself, while various important issues were not or not comprehensively regulated, such as criminal accountability, the use of force or the deprivation of liberty.

61. Another delegation asked about the challenges in ensuring accountability for human rights violations. Ms. Petrig highlighted the accountability gap posed by “flags of convenience” (namely, when a merchant ship is registered in a State with a low regulatory standard). She stressed the importance of focusing on home, coastal, territorial and third States, which together constituted a dense jurisdictional network that could limit the impact of any possible gap resulting from flags of convenience.

62. A civil society representative asked what arrangements should be put in place to monitor the activities of private military and security companies. Ms. Petrig replied that monitoring and surveillance were much more difficult at sea than on land, and that the most promising way seemed to be obliging shipmasters and team leaders to report human rights violations and to provide for appropriate reporting mechanisms, as various rules of self-regulation and national law required. Another civil society representative asked whether there was a need for separate land-specific and maritime-specific regulations. Ms. Petrig suggested that it would be possible to regulate both in the same instrument; however, it seemed necessary to introduce a distinction between the obligations of the flag, coastal and port States, or at least to include a caveat that the obligations set forth in an instrument applicable to private military and security companies did not derogate from the jurisdictional rules of the law of the sea.

F. Discussion with private military and security companies

63. In his presentation on 15 December 2016, Mr. Gibson indicated that SCEG had been established to provide professional standards across the British private security industry by sharing best practices and providing for third-party accreditation against exacting standards. Companies based outside the United Kingdom were also invited to join the organization on a case-by-case basis. SCEG therefore represented companies in the private security sector that embraced standards and regulations to ensure that their operations were transparent, accountable and compliant with international law, including human rights, and national legislation. With regard to the scope of activities conducted by companies belonging to SCEG, Mr. Gibson clarified that they provided armed or unarmed protective services to a broad range of clients in a variety of environments where threats were such that armed protection may be required. He stressed that SCEG companies did not conduct offensive military operations but rather a range of risk management and protective services that were

defensive in nature. The main client groups for these services were Governments, and in particular diplomatic missions, international organizations, non-governmental organizations, extractive and maritime industries and those involved in reconstruction and development work.

64. By providing some examples of the diversity represented in the security industry, including in the size, nature, composition, range and scope of activities offered by companies, Mr. Gibson wished to illustrate the difficulty of imposing a one-size-fits-all regulatory framework. For example, the regulatory framework of a single State was unlikely to be effective for companies operating internationally with corporate entities overseas, as they could easily move their headquarters to a different legal jurisdiction. The companies that he represented did not employ mercenaries – a term Mr. Gibson described as an emotive and misleading characterization of the industry – and applied rigorous vetting, training and contractual arrangements in order to ensure that they operated in an open and transparent manner.

65. Mr. Gibson also recommended that, for the purpose of taking a practical approach to the regulation of private security companies, particular attention should be paid to situations where clients and service providers were headquartered outside the areas where services were delivered; this was particularly important in States where the rule of law, the criminal justice system and governance were weak. Mr. Gibson provided an overview of the situation in Iraq in 2003, and explained that the operations of some security companies that disregarded the rule of law and best industry practice, combined with the lack of any regulatory framework, had led to a number of incidents involving civilians. He also explained that such an example pointed to the very essence of the mandate of the intergovernmental working group and of the complexities in which many private security companies operated on a daily basis.

66. Mr. Gibson then gave an overview of initiatives and developments that had had a positive impact on the private security industry, including the Montreux Document, the “Protect, Respect and Remedy” Framework of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises,⁵ and the multi-stakeholder process that had led to the development of the International Code of Conduct for Private Security Service Providers. He highlighted the key functions of ICoCA, namely the certification of member companies, the monitoring and assessment of their performance and the handling of complaints and grievances. He stressed, however, that it had not yet been able to provide for a robust mechanism to call private security companies to account.

67. By asserting the importance of third-party auditing for creating a regulatory framework, Mr. Gibson highlighted the role of the PSC.1 standard (also developed as international standard ISO-18788) for companies delivering security services in complex land environments, and a comparable standard (ISO-28007), developed to cover security arrangements for the protection of commercial shipping from piracy in the High Risk Area in the Indian Ocean. He noted that companies were being independently audited and certified against these standards.

68. Mr. Gibson also referred to the fate of men on board the Seaman Guard Ohio, which was operating in October 2013 as a floating armoury by an American private maritime security company and had drifted into Indian territorial waters. All 35 men, including ship cooks, had been arrested for the illegal importation of weapons on board, and were sentenced to five years imprisonment. Mr. Gibson explained that none of them would argue

⁵ See A/HRC/17/31, annex.

against the need for international regulations for the private security industry. While acknowledging that existing international standards with accredited certification processes formed the foundation for the respect of human rights across the industry, Mr. Gibson suggested that the development of complementary national and international regulatory frameworks would contribute to the promotion of even greater respect for human rights.

69. One delegation asked whether States might increasingly resort to private military and security companies in order to avoid liability for violations committed by members of their armed forces. Mr. Gibson observed that the said companies reacted to market forces, which had been particularly visible in 2003 in relation to Iraq and in 2007 and 2008 following the rise of piracy off the coast of Somalia. Mr. Gibson noted a global trend of reduction in defence spending, which could encourage some States to look to seek the services of private companies for defence purposes.

70. Noting the progress made through the Montreux Document and the International Code of Conduct for Private Security Service Providers, as well as the remaining gaps, the Chair-Rapporteur asked Mr. Gibson whether private military and security companies saw merit in using the existing regulatory framework to create a universally applicable document that would level out the playing field. Mr. Gibson replied that audit and certification processes cost several thousand dollars and that, from the perspective of the companies that SCEG represented there was no resistance to a truly global and fair regulatory framework that took into account the circumstances in which private companies operated and that would make the playing field even.

71. One delegation asked about the protection currently in place for those working in private military and security companies, including the responsibilities of parent companies and the protection of whistle-blowers. Mr. Gibson responded that many employees were subcontractors who had employment rights included in their contracts. A poorly regulated company would not invest in training and support of its contractors, while responsible companies would do so and also provide insurance cover.

72. Another delegation stated that that much work was needed to develop a binding instrument, and that the regulation of private military and security companies should not be conflated with the broader process of transnational corporations and other business enterprises. The intergovernmental working group should not be bogged down with the details of the differences and definitions between private security companies and private military companies, which could be elaborated in the instrument itself. The delegation had been encouraged to hear that industry did not seem opposed to a binding instrument, and it also shared the view that such an instrument would be of benefit to the industry. The delegation proposed that the intergovernmental working group should examine at its next session the options available to take the mandate forward, a proposal that was supported by another delegation. Mr. Gibson replied that while the solution was not a binary approach of either having a legally binding instrument or not, in the interim, much could be done to encourage good practices and initiatives, such as ICoCA or self-regulation.

IV. Concluding remarks

73. **On 16 December 2016, the Chair-Rapporteur concluded that the discussions during the fifth session of the intergovernmental working group had been enriched, as in prior sessions, by the presentations delivered by experts. Throughout the fifth session, the working group had heard a rich tapestry of inputs and views. The Chair-Rapporteur noted that At the centre of this endeavour was an effort to contribute to the mainstreaming of human rights.**

74. The Chair-Rapporteur noted that a range of substantive issues had been discussed, including access to justice and remedies for victims of violations and abuses linked to the activities of private military and security companies; the operation of those companies in maritime and other contexts; the initiatives taken at the national and international levels; other measures taken concerning the regulation and oversight of the activities of private military and security companies; existing regulatory frameworks; and problems, challenges, and suggestions from delegations to move forward. The Chair-Rapporteur stressed that finding appropriate solutions in this regard continued to be one of the key challenges for the intergovernmental working group.

75. The Chair-Rapporteur reiterated that the working group had already held five sessions; the sixth would be held from 22 to 26 May 2017, in order to prepare a report for submission to the Human Rights Council at its thirty-sixth session. The Chair-Rapporteur raised the questions of how close the delegations were to converging on recommendations to be made to the Council, and whether it would ever be possible for delegations to find a common ground on this issue. She invited delegations to reflect upon these questions as the working group prepared for its sixth session.
