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Progress report on the third session of the open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and security companies*

*Chair-Rapporteur: Mxolisi Sizo **Nkosi** (South Africa)*

* The annex is reproduced as received, in the language of submission only.

I. Introduction

1. In its resolution 45/16, the Human Rights Council decided to renew for a period of three years the open-ended intergovernmental working group with a mandate to continue elaborating the content of an international regulatory framework, without prejudging the nature thereof, in efforts to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and security companies. The third session of the working group, held from 9 to 13 May 2022,[1] was opened by the United Nations Deputy High Commissioner for Human Rights. She noted that the release of a zero-draft instrument[2] and subsequently of a revised version[3] marked a key milestone in the process and hoped that it would serve as a catalyst to move the process forward. She stressed the need to place prevention and redress of human rights abuses involving private military and security companies and accountability and remedy for victims of such abuses at the core of any framework considered by the working group. As such companies are business enterprises, the Deputy High Commissioner drew attention to the Guiding Principles on Business and Human Rights that firmly establish their responsibility to comply with and respect applicable legislation and internationally recognized human rights standards.

II. Organization of the session

A. Election of the Chair-Rapporteur

2. At its 1st meeting, the working group elected the Permanent Representative of South Africa to the United Nations Office at Geneva, Mxolisi Sizo Nkosi, as Chair-Rapporteur by acclamation, following his nomination by the delegation of Côte d'Ivoire on behalf of the African Group of States. The working group then adopted the provisional agenda,[4] timetable and programme of work.

B. Attendance

3. The list of participants is contained in the annex to the present report.

C. Introductory remarks by the Chair-Rapporteur

4. The Chair-Rapporteur provided some information about the genesis of the revised zero draft instrument, which draws on the past reports of the working group, the non-exhaustive list of elements of a discussion document based on inputs received at the first and second sessions, held in 2019 and 2021 respectively, and a number of existing non-binding regulatory documents, such as the International Code of Conduct for Private Security Service Providers, the Montreux Document on Pertinent International Legal Obligations relating to Private Military and Security Companies, the Guiding Principles and the draft of a possible convention on private military and security companies for consideration and action by the Human Rights Council.[5] The approach followed was to enumerate the international undertakings or obligations that signatory States/States parties would ascribe to in terms of international law, while avoiding detailed prescriptions. It is submitted that this "treaty" rather than "model law" approach will not only enhance effective negotiations but also make it easier for States to consent to be bound by its provisions. In order to move the process forward, the revised draft instrument was cast in a format that could form the basis for both

[1] The session took place in a hybrid format. Oral statements are available at www.ohchr.org/EN/HRBodies/HRC/IGWG_PMSCs/Pages/Session3.aspx.
[2] https://www.ohchr.org/sites/default/files/2022-03/zero-draft-international-regulatory-framework-regulation-monitoring-the-activities.pdf.
[3] https://www.ohchr.org/sites/default/files/2022-04/revised-zero-draft-instrument.pdf.
[4] A/HRC/WG.17/3/1.
[5] A/HRC/15/25.

a legally and a non-legally binding outcome, with language options to reflect both approaches. The neutral term "instrument" reinforces its open-ended nature, without detracting from the objective of creating an international regulatory framework.

D. General statements

5. The representative of the European Union expressed concern at the lack of reflection in the revised draft of the concerns and comments put forward during the informal consultations. Any instrument should cover all businesses in a non-discriminatory manner to ensure a level playing field for companies globally. While noting that the use of private military and security companies was legitimate and advisable in certain circumstances, the European Union was deeply concerned about the increasingly destabilizing role of some unregulated private military entities that did not comply with international standards and international humanitarian law. It has been documented that such entities have been involved in serious human rights abuses, including in conflict-affected areas. The European Union reiterated its doubts regarding the opportunity to adopt a legally binding instrument, primarily from the perspective of international human rights law, as it did not sufficiently take into account other crucial areas, such as international humanitarian law, international criminal law and State responsibility. The European Union inquired as to the intended timeline of the Chair-Rapporteur's decision about the legal nature of the potential future framework. It also reiterated the position that private military and security companies did not operate in a legal vacuum and that an international legal framework already existed. The Montreux Document, which was supported by 58 States and 3 international organizations, including the European Union itself and 25 of its member States, played an important role in reaffirming the existing and well-established international legal obligations for contracting States, territorial States, home States and other States relating to the activities of private military and security companies during armed conflict. The European Union would continue to engage constructively and carefully assess the content and added value of any possible proposal of a non-binding international regulatory framework to regulate the activities of private military and security companies, but its content would need to be in line with applicable international law, in particular international human rights law and international humanitarian law.

6. The representative of Panama noted with concern the proliferation of private military and security companies engaged in armed conflicts and post-conflict contexts, natural disasters, epidemics and other crises, as well as in peace operations, immigration and border controls, the extractive industries, maritime security and cyberspace. Such activities were shrouded in secrecy, resulting in almost total impunity and posing significant challenges to compliance with the norms of international law, particularly the Charter of the United Nations, international humanitarian law, international human rights law and international criminal law. Allegations linking the personnel of such companies to enforced disappearances, torture, human trafficking, summary executions, forced displacement, sexual exploitation and abuse, particularly of women and children, forced labour and gender-based violence made the regulation and monitoring of private military and security companies indispensable. Panama, being firmly committed to the progressive codification of international law, favoured the development of a legally binding instrument aimed at protecting human rights, ensuring access to justice and accountability for violations and abuses related to the activities of private military and security companies, whether or not they operated in a complex environment. Such an instrument should complement and reinforce existing standards in that area, including the Guiding Principles, the Montreux Document and the International Code of Conduct. The provisions of the instrument should be applicable to cyberspace, incorporate a gender approach and cover the differential impact on certain groups of people, as well as the protection of the environment and the management of weapons and ammunition. It must also take into account existing and emerging technologies, from drones to biometric systems, facial recognition and autonomous weapons systems.

7. The representative of Pakistan expressed appreciation for the zero draft, which constituted an important milestone in the implementation of the working group's mandate and provided a solid baseline for further deliberations. He welcomed the broader framing of the draft around one of the central principles of international law, namely that States bore the

primary responsibility to prevent and address human rights violations and abuses. Self-regulation of private military and security companies had failed to stand the test of time and such companies had often sidestepped fundamental human rights principles and responsibilities. It was now time for States to act in accordance with their human rights obligations. Pakistan strongly supported draft provisions that unequivocally prohibited private military and security companies from carrying out State functions. Outsourcing of State functions, combined with the unilateral deployment of such companies in other States, without their express consent or through exerting political leverage, had been another aggravating factor in that regard. Such actions clearly negated the basic principles of the Charter of the United Nations, namely non-interference in the domestic affairs of States, non-use of force and respect for the territorial integrity and sovereignty of States and must be outlawed. Pakistan also expressed support for a focus on regulating the acquisition and use of arms by private military and security companies. The guidance in the proposed text on issues related to jurisdiction and the attribution of responsibility was deemed very relevant and appropriate to advance accountability and open avenues of justice and remedies for victims.

8. The representative of Switzerland, as Co-Chair with the International Committee of the Red Cross (ICRC), of the Montreux Document Forum reiterated appreciation of the inclusivity of the work conducted under Human Rights Council resolution 45/16. Such work was complementary to the work to develop and implement the Montreux Document. He recalled that the Montreux Document was an intergovernmental document intended to promote respect for international humanitarian law and human rights law, supported by 58 States and 3 international organizations. It recalled the obligations that States, private military and security companies and their personnel already had under international law when such companies were present during armed conflict, and presented good practices and practical guidance in complying with those obligations. The Co-Chairs of the Montreux Document Forum were pleased to see the contribution of the Montreux Document recognized in the draft instrument and the inspiration drawn from it for some of its draft provisions. While the Montreux Document was a voluntary initiative, the legal obligations reflected in it were already binding on States and, in the case of international humanitarian law, on the personnel of private military and security companies in situations of armed conflict. While it might be necessary for States to take further measures at the national level to give effect to their international obligations, such companies and their personnel did not operate in a legal vacuum at the international level, at least in situations of armed conflict. States already had obligations under existing international law to ensure that such persons complied with international humanitarian law and to repress and punish violations when they occurred. For those reasons, the discussion and the draft instrument should strictly avoid any implication that States and the individuals who acted on behalf of private military and security companies did not already have a range of relevant obligations under international humanitarian law.

9. The representative of Brazil appreciated the efforts on the zero draft and the inclusion of some comments made during the intersessional consultations. According to the mandate of the working group, the scope of the instrument should include the activities of private military and security companies in armed conflict and humanitarian situations. Existing regulatory frameworks could serve as a starting point, but remaining gaps on prevention and accountability should be addressed. Brazil acknowledged the expansion of the scope of action of private military and security companies in conflict scenarios, especially in the field of advances in military technology. An international convention could provide greater legal certainty across the spectrum of actions of such companies and the necessary means of reparation to victims, and serve as a reference for national legislation. Brazil encouraged all parties to engage constructively in negotiations and expected that many States could adhere to a final text.

10. The representative of Turkey highlighted four key points:

(a) There should be no shadow cast on already applicable rules of international law. Given the extraterritorial application of their human rights obligations, States were already under the obligation to protect human rights, conduct investigations and provide victims with remedy and reparation. Thus, the added value of a legally binding instrument was highly questionable;

(b) The question of the nature of the instrument had yet to be answered and Turkey called upon the working group not to wait any longer but to advance on a non-binding regulatory framework;

(c) The working group should keep clear of controversial issues and the draft text should accord with existing obligations. References to the Additional Protocols to the Geneva Conventions should be deleted or additional language considered;

(d) Some provisions needed further clarification, such as those on jurisdiction, and some imprecise language clarified, such as [paragraph][article] 11 on international standards of arms control.

11. The representative of the Russian Federation noted the still wide range of positions within the international community regarding the legitimacy and permissible parameters for the involvement of private military and security companies. The zero draft contained a number of valuable provisions that could serve as a starting point for more detailed discussions (for example, definitions of several key terms, licensing issues, jurisdiction of States over private military and security companies, regulation of the acquisition and use of weapons by such companies and State responsibility). However, it was premature to discuss the detailed issues related to the legal regulation of private military and security companies before participants managed to reach a mutual understanding on such fundamental issues as the legality of such companies from the point of view of international law and the status of their personnel in the context of international humanitarian law, namely whether they were combatants, mercenaries, civilians or a new category of persons. The Russian Federation maintained its reservations to the Montreux Document, which were referenced in the zero draft. While the Montreux Document had clarified some issues, it did not take into account the views of a significant number of States, was not universal and was not legally binding. Moreover, it had some points of contention regarding the status of the personnel of private military and security companies under international humanitarian law, their responsibility for crimes committed and other aspects. That applied equally to the International Code of Conduct. There were currently insufficient prerequisites for adopting a legally binding document on private military and security companies.

12. The representative of Ecuador expressed support for the working group and for the Chair-Rapporteur's efforts to present a zero draft. She stressed the importance of ensuring access to justice for persons affected by the activities of private military and security companies, which would enable adequate and effective accountability mechanisms for abuses and violations perpetrated in the framework of such activities, with full respect for international law, including the protection of human rights, conventional and customary provisions of international humanitarian law and the protection of persons in a situation of mobility, such as refugees or asylum seekers. She further stressed the importance of an inclusive process and of ensuring participation and dialogue between States and other relevant stakeholders.

13. The representative of Mexico recognized the importance of taking measures to prevent human rights violations and abuses in private sector operations, but expressed some recurring reservations regarding whether the process would lead to the development of a legally binding instrument, insofar as there were rules in international law applicable to States in their relations with private military and security companies from both conventional and customary sources. Under international human rights law, States were not only obliged to ensure that their agents did not violate human rights, but also bore responsibility for the acts of private persons that had been carried out with the tolerance, acquiescence, omission, negligence, support or authorization of State actors. That had been further reinforced by the adoption of the Guiding Principles. With regard to international humanitarian law, under article 1 of the Geneva Conventions States had an obligation to respect and ensure respect for the rules of international humanitarian law. On that basis, States were constrained to ensure respect not only by their agents but also by other persons or groups of persons acting under their instructions, direction or control. In addition, throughout the text, concepts were identified that were not defined in international law and therefore required greater precision. Likewise, the draft referred to terms or obligations that were already defined in international instruments and it was important to avoid giving rise to their reinterpretation. It was also

important that the proposed regulatory framework be clearer with regard to jurisdiction, scope of application and scope of obligations.

14. The representative of the Bolivarian Republic of Venezuela expressed the view that the various initiatives at the international level, including self-regulation and national regulation of private military and security companies, had been insufficient to effectively address impunity for abuses committed by such companies, especially in the extraterritorial sphere. Such activities took place in a kind of legal vacuum, in which the norms and actions expressly prohibited under the Geneva Conventions were set aside. There was therefore a clear need for an international legal framework to regulate the activities of such companies in accordance with international standards for the promotion and protection of human rights.

15. The representative of India noted the unprecedented proliferation of private military and security companies and their provision of a wide range of services to States and non-State actors, including the United Nations and other international organizations. The scope of their activities had developed in a context which was broad and complex, including the risk of involving civilians in hostilities. While "private military" and "private security" were two distinct concepts, the State was the sole legitimate authority for providing security to the people and their property. While the sector needed to be made accountable to the State, there were limitations on the ability of national legislation to address the activities of private military and security companies that were transnational in character. At the international level, there were gaps in establishing proper mechanisms for accountability and effective remedies for victims. As to the Montreux Document, the point of departure was that regulations were needed to ensure that the principles of international human rights and international humanitarian law were applied by private military and security companies in their activities, which might extend beyond normal protection and security tasks. Similarly, the International Code of Conduct attested to the need for standards in the industry. A number of issues would require further clarification and better understanding of gaps in international law relating to accountability, redress of grievances and compensation for victims. India shared the working group's common goal of protecting human rights in the context of the activities of private military and security companies and ensuring accountability for abuses wherever they occurred.

16. The representative of the Islamic Republic of Iran expressed the view that the mandate of the working group was very important in ensuring accountability for violations and abuses of human rights committed by private military and security companies. There had been a huge proliferation of such companies in western Asia that were unrestrained, particularly when deployed by States during armed conflicts. The representative noted the need to address the issue in international legal instruments such that private military and security companies respected the requirements of national law, including criminal law and human rights law, and applicable international humanitarian law, and that an international legal framework would help to fill the existing accountability gaps.

17. The representative of China welcomed the zero draft as a sound basis for discussion and provided some key points for consideration, including the need to ensure implementation and to distinguish private military companies from private civilian ones, with strict regulations regarding military companies. China supported the implementation of a classified management system of different types of companies and believed that regulation through the categorization of companies was necessary to improve supervision. For example, [paragraph][article] 9 required States of nationality to adopt legislation to regulate the recruitment of their nationals by private military and security companies to serve abroad. That would be very difficult to implement in practice, since with mobility, many citizens lived permanently abroad. The working group should work with other relevant processes to ensure complementarity with the Montreux Document and the International Code of Conduct.

18. The representative of Japan, while understanding the necessity to take appropriate action for private military and security companies, expressed support for the Montreux Document. He further expressed concern that the current draft contained language typical of international treaties and advised that it be modified to make clear that the document was not legally binding.

19. The representative of Switzerland reiterated the view that the Working Group process was complementary to the Montreux Document and the International Code of Conduct. He shared three preliminary comments:

(a) Some objectives or goals were formulated through prohibition (for example, on State functions or on direct participation in hostilities). The question therefore arose as to whether those objectives could only be achieved by a binding instrument and whether the discussion was not already about a partially binding instrument;

(b) The definition of State functions was very broad, while the scope of application was very narrow (namely transnational);

(c) The draft instrument should be based on existing international law and not weaken it.

20. The representative of South Africa stated that the draft text confirmed norms of international humanitarian law and its applicability to all actors in armed conflicts. The commitment to protecting the rights of victims, who might find themselves at the short end of the activities of private military and security companies, should be at the core of the discussion. South Africa hoped that the development of an internationally agreed legal instrument would strengthen the domestic legislative process and related measures to ensure effective regulation and control of the activities and actions of such companies. The advancement of mutual legal assistance and extradition was crucial for successful investigation and prosecution.

21. The representative of Iraq stressed the importance of regulating the work of private military and security companies in accordance with international and national standards that maintained State sovereignty and ensured accountability and remedy. He highlighted some points, such as the need for the working group to abide by its mandate and to clarify all definitions in the draft text. The personnel of private military and security companies must be subject to the jurisdiction of the States they operated in. A distinction needed to be made between military companies and security companies in terms of their work and competencies. Iraq had adopted national legislation on the work of private security companies without mention of military companies. The legal age for personnel to work for private military and security companies was also important.

22. The representative of the United Kingdom of Great Britain and Northern Ireland recalled well-established rules of international law vis-à-vis private military and security companies. States had the primary responsibility to protect human rights and ensure accountability and remedy for the activities of such companies and for adherence to international human rights law, which could be strengthened through enhanced implementation of existing standards, as reflected in the Montreux Document, the International Code of Conduct and associated initiatives. Consideration should be given to what could be done within existing initiatives or on how to better incorporate them into the draft text.

23. The representative of Centre Europe-tiers monde shared some key points on the draft instrument:

(a) It put responsibilities on States, when private military and security companies should be held directly accountable;

(b) It should incorporate the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the Rome Statute and the Convention for the Elimination of Mercenarism in Africa;

(c) Binding rules for private military and security companies were needed, given that voluntary codes of conduct were not effective in practice. There should be obligations for private military and security companies in human rights law, in addition to the obligations of States;

(d) The issue of contracts between private military and security companies and transnational corporations should be addressed, as a number of such companies had been used by enterprises in repressive activities towards social movements;

(e) The draft should be more inspired by the draft convention on private military and security companies submitted in 2010 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.

24. The representative of ICRC expressed the support of the organization for the goal of effective regulation of the activities of private military and security companies to ensure they complied with international humanitarian law and other relevant obligations. Under existing international humanitarian law, the personnel of such companies operating in armed conflicts were already obligated to comply with it. States already had obligations to ensure that the personnel of private military and security companies complied with international humanitarian law and to prevent, repress and punish violations that nevertheless occurred. The Montreux Document summarized those obligations, which should not be undermined in the draft instrument. Any new instrument should build on existing international law and the Montreux Document, with a view to improving implementation of existing obligations and addressing key humanitarian concerns. ICRC saw particular potential in the draft provisions whereby States would agree not to employ private military and security companies and their personnel in any function that would result in such personnel directly participating in hostilities ([paragraphs][articles] 4 (4) and 6 (1) (b)). ICRC would welcome in principle the adoption by States of new commitments on regulatory oversight in national law ([paragraph][article] 5), although more detail should be added on monitoring, compliance and standards, and new commitments to provide victims of violations of international humanitarian law with access to remedy and reparations ([paragraph][article]13). The instrument should contain effective provisions that were capable of wide acceptance by States, particularly home, contracting and territorial States.

25. The representative of the International Commission of Jurists welcomed the draft text, which could provide legal certainty for private military and security companies and enhance the protection of individuals, including the personnel of such companies, by providing clearer and specific rules for States and private military and security companies to respect and enhance access to remedy. It should improve the clarity and effectiveness of existing non-binding instruments, making them enforceable. Regardless of its nature, it should provide for national and international oversight monitoring and accountability. A legally binding instrument was necessary in the long run, should be based on international law and international human rights law norms and principles and be coordinated with other processes. Inclusive and broader participation should be sought.

26. The representative of the International Code of Conduct Association explained that 7 governments, more than 45 non-governmental organizations and more than 100 security providers were members of the association. It was established in 2013 to ensure implementation of the International Code of Conduct, which had been amended the previous year to better reflect the evolution of the security industry and make it broader in its application, including contexts beyond complex environments. The code articulated the responsibilities of private military and security companies under human rights law and international humanitarian law, including when operating in high-risk or conflict areas. The Association conducted due diligence, provided capacity-building, handled complaints against security providers, conducted field missions and could help States to implement international obligations. The draft should include a clear understanding of and delineation between the various types of non-State actors operating in conflict or high-risk environments. Actors included mercenaries, private military contractors and private security companies, and while there might be some overlap between certain actors, in most contexts there was a clear/evident operational distinction between entities providing security services and those providing military services, and such differentiation should be taken into account in the draft text. The Association supported national and international efforts to improve accountability and access to remedy which was critical to closing the impunity gap.

27. The Chair of the Working Group on the use of mercenaries welcomed the revised draft and shared four key concerns:

(a) It was advisable to take a decision soon on the form/nature of the instrument and the Working Group was in favour of a binding instrument. An insufficient number of States had committed to the Montreux Document, the International Code of Conduct and the

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. National laws on private military and security companies contained few human rights safeguards and lacked adequate provisions on licensing, training, scope of permissible activities, use of force and accountability;

(b) The scope of the instrument should include domestic activities. National legislation should contain extraterritorial provisions to facilitate prosecution of the personnel of private military and security companies and prohibit the conduct of hostilities;

(c) The draft text lacked broad and detailed provisions of applicable human rights and international humanitarian law. It could mirror provisions from the draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises,[6] such as on the scope. A gender-sensitive perspective was also lacking and the report on the gender dimensions of private military and security companies should inform the draft text.[7] The instrument should expressly acknowledge that private military and security companies could negatively impact groups in vulnerable situations such as migrants, indigenous persons, elder persons, persons with disabilities, and the lesbian, gay, bisexual, transgender and intersex + community;

(d) The draft text must include detailed guidance on increased accountability and address the lack of accountability of private military and security companies, especially in transnational cases. The system needed to be accessible to vulnerable groups, be able to address mass human rights abuses and be accompanied by complementary support measures (for example, medical and financial assistance).

28. The representative of the Working Group on the issue of human rights and transnational corporations and other business enterprises reiterated the relevance of the Guiding Principles. The draft instrument should be aligned with the Guiding Principles. After one decade of their implementation, the Working Group had released a stocktaking report[8] and a road map.[9] It had also worked closely with States, civil society and business to address issues relating to business, human rights and conflict-affected areas.[10] It had actively engaged with the International Code of Conduct Association, the Geneva Centre for Security Sector Governance (DCAF) and the Voluntary Principles on Security and Human Rights, and relevant country visit reports containing observations concerning the connection between private military and security companies and human rights abuses. The Working Group shared four key observations:

(a) The need to consider the key processes and concepts of the Guiding Principles to ensure coherence in terms of requirements and norms. Human rights due diligence should be used by private military and security companies to address and identify their connection to salient human rights abuses. Looking at direct linkage was critical to addressing issues of parent and subsidiary businesses, as well as business partners. The International Code of Conduct Association guidance on human rights impact assessments for security providers was an example of a tool that embedded and operationalized the Guiding Principles for the sector. The alignment with the Guiding Principles could also been see in other binding initiatives, from the draft European Union directive, which might also apply to security companies, to the draft legally binding instrument under consideration in the Human Rights Council;

(b) The Working Group agreed that binding initiatives were important and critical at the present stage and had urged States in its 2021 road map to recalibrate the “smart mix” of measures with more focus on hard law;

[6] https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf.
[7] A/74/244.
[8] A/HRC/47/39.
[9] https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf.
[10] See A/HRC/35/33.

(c) The Working Group supported the clear elaboration of rules relating to accountability in the area of criminal law and had issued a report on the issue of cross-border cooperation to address issues of violations of international criminal law;

(d) The Working Group recommended that companies be subject to the same rules, whether operating domestically or transnationally and whether State-owned or private.

29. The representative of Fondation pour un centre pour le développement socio-economique proposed that an article be added to suggest a regular monitoring process through reporting by States.

30. One member of the Working Group on the use of mercenaries pointed to the global study of national legislation on private military and security companies in more than 60 jurisdictions conducted between 2013 and 2016.[11] The findings were that the approach of States was ad hoc and inconsistent, and numerous regulatory gaps existed. Only a few States had national legislation to cover the acts of private military and security companies abroad and when such laws did exist, they lacked provisions on mutual legal assistance.

31. The representative of Maat for Peace, Development and Human Rights Association noted the need to consider the Arms Trade Treaty, which prohibited illicit transfers of weapons and the export of weapons to certain non-State groups.

III. Consideration of the revised zero draft instrument

32. In conformity with its programme of work, the working group engaged in a first reading of the revised zero draft instrument. Comments and suggestions made by States and non-State stakeholders are reflected in the present section of the report, while concrete textual suggestions by States and non-stakeholders delivered during the session have been compiled and are available on the web page of the working group.

A. Preamble

33. On the first preambular paragraph, Argentina proposed the removal of selective references to the principles and objectives of the Charter of the United Nations. Panama agreed with the proposal, stressing that some key principles were missing, noting specifically the absence of any reference to non-intervention and to the obligation of States to promote respect for human rights and fundamental freedoms. Panama also proposed a first preambular paragraph bis to refer to other relevant international instruments and general principles of international law. The Russian Federation reaffirmed that it was premature to develop a specific instrument until the lawfulness of private military and security companies and the status of their personnel had been universally defined under international law and suggested introducing the words “in particular” after the words “United Nations” in the first preambular paragraph. Ecuador indicated that the revised text could be interpreted in a way that, indirectly, suggested that it would exclude armed conflicts that were not international under international law, the possible participation of international organizations in military affairs and a situation where private military and security companies were operating outside an armed conflict.

34. On the second preambular paragraph, Argentina recommended using the word “regulation” instead of “registration”. The International Commission of Jurists recommended merging the second and third preambular paragraphs.

35. Panama recommended the introduction of three additional subparagraphs: preambular paragraph 4 bis, ter and quater. Ecuador stated that the fourth preambular paragraph should also refer to customary international humanitarian law. Turkey noted that some States were not parties to the Additional Protocols to the Geneva Conventions and recommended either the deletion of the reference to them or the addition of an expression “as applicable” after “Additional Protocols of 1977” or deleting the words “Additional Protocols of 1977”. Turkey

[11] A/HRC/36/47.

noted that the same comment applied to the other parts of the text where the same reference was made. DCAF suggested that currently it could be read as not covering the international human rights law obligations of States, but only those of non-State actors and suggested a corresponding revision. The International Commission of Jurists recommended splitting the paragraph into two to differentiate between a reference to international binding instruments and key substantive content.

36. The European Union was of the view that the text of the document was typical of treaty language and could easily be transferred into a binding document, as it contained legal obligations for States. The European Union representative recommended adding the word "international" before human rights law in the fifth preambular paragraph and using the expression "international human rights law" consistently throughout the text. He also recommended replacing "equal and effective access to justice and judicial and other remedies and reparation" with "equal access to judicial and other effective remedies", noting that this language was more consistent with the Guiding Principles. Ecuador stated that "access to justice" was an all-encompassing notion recognized in human rights law and in target 16.3 of the Sustainable Development Goals. The International Commission of Jurists recommended splitting the fifth preambular paragraphs into two paragraphs, one recognizing the duty to protect human rights in the context of the activities of private military and security companies and the other recognizing the duty to provide effective remedies.

37. The Russian Federation proposed rewording the sixth preambular paragraph or removing it altogether, in light of the lack of support by some States for the Montreux Document and the inclusion of controversial points. It was also noted that the eighth preambular paragraph, which was inherently related to the sixth, would therefore also require corresponding adjustments.

38. On the seventh preambular paragraph, DCAF noted that the terminology "self-regulation" was contradictory, because regulation was a State function. Its representative also noted an overlap between the seventh and eighth preambular paragraphs, recommending that they be merged. The International Commission of Jurists suggested that "voluntary initiatives" be used instead of "self-regulation" to be consistent with the eighth preambular paragraph.

39. On the eighth preambular paragraph, the European Union recommended replacing the words "these existing voluntary regimes" with the words "the existing regimes". Ecuador recalled that the whole purpose of elaborating international legal standards was not to strengthen the existing voluntary regimes, but rather to ensure that there was a common binding standard. The representative of Japan expressed the view that the document was not legally binding and that this should be qualified in the preamble.

40. On the ninth preambular paragraph, the European Union suggested replacing the term "inter alia" with the words "public or private", adding "when it respects international humanitarian law and international human rights law" and removing the remainder of the paragraph without mentioning specific entities or actors. The Working Group on the use of mercenaries recommended the inclusion of business actors, including those that were State-owned, as they were an important client base for private military and security companies. The International Code of Conduct Association suggested that the ninth preambular paragraph dealt with two ideas: the first being so-called legitimate activities and the second being the recognition of the responsibility of clients. Panama recommended adding a reference to international organizations and Ecuador recommended including peacemaking and peacebuilding operations.

41. Panama recommended making a point about disproportionate impacts and noted that some affected groups were missing from the wording of the tenth preambular paragraph, including indigenous peoples, human rights and environmental defenders, migrants and asylum seekers. Panama also recommended adding two subparagraphs (tenth preambular paragraph bis and ter): one on mainstreaming a gender perspective and another one on the interests of the child, as children were among the most affected.

42. On the eleventh preambular paragraph, DCAF noted that it encapsulated the concept of the regulation of private military and security companies, which made it the "cornerstone" of the document, and suggested that the paragraph be moved up. Panama expressed doubts

about the possibility of providing for criminal responsibility for legal entities, as its national legislation did not allow for this.

43. The International Commission of Jurists suggested adding a new preambular paragraph to reflect the general principle that "States retain their obligations under international law even if they contract private military and security companies to perform certain activities".

B. [Paragraph][Article] 1

44. On subparagraph (a), Switzerland raised some questions with regard to the second part. Private military and security companies could also subcontract to companies not regarded as such, hence the need to consider whether a broader term such as "company" could be used. Switzerland provided the example of a private military and security company that offered logistical support and subcontracted a part of it to another company that might not be such a company. With regard to the last sentence in subparagraph (a), Switzerland suggested a more logical sequencing, starting with the mention of a private military and security company operating through its subsidiary bodies, since subsidiaries were usually closer to parent companies than subcontractors. Ecuador supported the Swiss views and perspective with regard to encompassing all situations, including subcontracting.

45. On subparagraph (b), the European Union requested clarification regarding the meaning of "centre of activity" and suggested using "principal place of management" instead. ICRC pointed out that such terminology was used in the Montreux Document definition and illustrated the possible merits of seeking to harmonize certain definitions in the new instrument with existing ones, to have clarity in implementation for those participating in both.

46. On subparagraph (c), the European Union stated that the definition of military services was too broad and vague and that legal uncertainty must be avoided. Panama suggested adding the term "transfer of military technologies" in the definition of military services. DCAF, commenting on subparagraph (c), linked to subparagraphs (d) and (f), explained that subparagraph (d) contained the general definition taken from the Montreux Document, which captured the evolving nature of private military and security companies, while in subparagraphs (c) and (f), there was a specific definition of such companies. Focus should be placed on subparagraph (d) to capture the definition and the evolving nature of the industry. Switzerland echoed this point and commented that in subparagraph (c), the terminology "any kind of knowledge transfer with military applications" was too broad and might overlap with domestic export control regulations. Brazil, commenting on subparagraphs (c) and (f), wondered whether it was relevant to have a definition of private military and security companies, since there might be a need to readjust the listing and scope of the treaty in the short term. Clarification of the nature and relevance of both definitions were sought.

47. The International Code of Conduct Association expressed the view that if the purpose of the document was to provide greater guidance to States for regulating military entities or entities providing military and security services, it was against using those labels as a catch-all. While the Montreux Document used such labels, the security industry had evolved differently from the military industry, making a distinction between them necessary. With regard to the definition of security services, the Association suggested using a definition from the International Code of Conduct, as amended the previous year. The Working Group on the use of mercenaries expressed the view that there was no clear-cut distinction between military and security services. The companies that had been violating human rights often had a dual function, providing security but also military services and participating in hostilities when required. Iraq stated that it would be preferable to separate the definitions in subparagraph (d).

48. Panama suggested that instead of type of company, the definition should be based on services, such as military and security, and noted that the Working Group on the use of mercenaries had provided good examples of such a definition. Brazil suggested rearranging the paragraphs in the following order: (c) military services; (f) security services; (d) private military and/or security companies; and (e) personnel.

49. On subparagraph (d), the European Union requested clarification on why the paragraph referred to "private military and/or security company", while "private military and security company" is an established term used in the Montreux Document, which should be used consistently throughout the text. In subparagraph (f), the European Union recalled its earlier comment on subparagraph (c) with regard to the legal uncertainty in the definition of "security services" and the need for consistency. The Working Group on the use of mercenaries also called for the terminology used in subparagraphs (d) and (e) to be aligned.

50. On subparagraph (g), the European Union expressed some concerns regarding the definition of "State functions", which raised complex legal difficulties and required further clarification and textual improvement. The International Commission of Jurists explained that the concept of "State functions" was evolving over time and differed from one society to another, and thus the concept should be redefined to provide a minimum threshold of activities that should be considered as "State functions". DCAF echoed that comment, adding that rather than citing broad State functions, the draft text should mention services that could not be provided by private military and security companies.

51. Brazil suggested moving the definitions in subparagraphs (h) and (i) up in order to have them close to those of contracting States and home States. The International Commission of Jurists suggested referring to "personnel" instead of "employees" in subparagraph (h), in order to be consistent with subparagraph (e), and including a reference to contracting and subcontracting phenomena, following the comment made earlier by Switzerland.

52. The Russian Federation welcomed the inclusion of concrete definitions which could serve as a basis for further discussion but stated that some definitions required more elaboration. Definitions such as "contracting State", "home State", "State of nationality" and "territorial State" could give rise to conflicts of legal norms, taking into account that the staff of private military and security companies might be of different nationalities. Moreover, the definition of "territorial State" in the zero draft implied that such States might be held liable with regard to the activities of private military and security companies that were present and acting illegally on the territory of such a State. Taking into account the different views concerning the definitions of such terms as "military services" and "State functions", the delegation suggested that those definitions be made shorter.

53. On subparagraph (j), the International Code of Conduct Association suggested that the concept of "victims" under international humanitarian law be reflected. The Working Group on the use of mercenaries suggested using the definition of victims found in article 1.1 of the draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises,[12] which provides for the inclusion of collective victims or communities, not only individual victims. The Working Group further suggested using the definition of human rights abuses from the same source (article 1.2) and, as proposed by the Association, adding a definition of violations of international humanitarian law in a separate paragraph. Panama concurred with the suggestions made on the definition of "victim" and proposed some language in line with the Basic Principles and Guidelines. The Russian Federation indicated that the language in the draft legally binding instrument did not enjoy consensus.

C. [Paragraph][Article] 2

54. The European Union stated that the text of subparagraph (a) was confusing with regard to the applicability of international human rights law and international humanitarian law, and made a textual suggestion to that effect. Brazil suggested using "according to international law" rather than "according to minimum standards in international law". Panama echoed that suggestion and suggested adding the word "respect" before "protection", and proposed a new paragraph before subparagraph (a) that would focus on the people most affected by private military and security companies. Ecuador welcomed the reference to subcontractors who provided technical inputs to private military and security companies,

[12] https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf.

including the duty for them to establish and monitor the application of human rights due diligence standards throughout the value chain, in line with the Guiding Principles, and requested that this apply to other parts of the text when the same expression was used. The Working Group on business and human rights encouraged further alignment of the text with the draft legally binding instrument and the Guiding Principles, and with expectations stemming from the latter in terms of State duty and human rights due diligence requirements. Brazil suggested using "human rights violations and abuses and violations of international humanitarian law", which was agreed language in different legal texts.

55. On subparagraph (c), Panama suggested adding access to information. The Working Group on business and human rights suggested including an explicit reference to judicial and non-judicial mechanisms to access justice.

56. On subparagraph (d), the European Union indicated that it was an example of a provision not necessarily consistent with the Montreux Document and would seem to go beyond the rules of applicable international humanitarian law and human rights law. For example, subparagraph (d) would "prohibit private military and security companies and their personnel from exercising State functions". That was not consistent with the Montreux Document, which saw a much more limited prohibition based on existing norms of international humanitarian law. The problem with the prohibition of "State functions" was also related to the link between the definition of, on the one hand, "State functions" and, on the other hand, "military services" and "security services". If private military and security companies were prohibited from exercising "State functions", it was hard to understand why, in [paragraph][article] 3 (2), such companies could nevertheless exercise military and security services which would be prohibited under "State functions". There seemed to be some contradiction between the respective definitions. ICRC reiterated that its support for measures on direct participation in hostilities referred to [paragraphs][articles] 4 (4) and 6 (1) (b), which should be treated separately from the broader question of "State functions", on which it took no position. Panama saw value in keeping this prohibition and expressed support for subparagraph (d) as it stood.

57. On subparagraph (e), the Russian Federation drew attention to footnote 7, which stated that the status of the personnel of private military and security companies was covered by international humanitarian law. The representative of the Russian Federation reaffirmed that in fact international humanitarian law distinguished between civilians, combatants and mercenaries, but contained neither special provisions as to the status of private military and security companies and their personnel, nor the criteria for classifying them in one of the above-mentioned categories. That was one of the serious obstacles to discussion of the detailed legal regulation of such companies.

58. On subparagraph (f), the International Code of Conduct Association suggested including a reference to the responsibility of non-State clients.

59. On subparagraph (g), the Working Group on the use of mercenaries suggested adding "punishment" after "prosecution" and bringing subparagraphs (c) and (g) closer. The Working Group on business and human rights supported that point and stated that it would prepare some suggestions to integrate business and human rights in subparagraph (g).

D. [Paragraph][Article] 3

60. On subparagraph (1), the European Union shared the view that any instrument should cover all businesses in a non-discriminatory manner, should be consistent with the Guiding Principles and be realistically implementable and enforceable. The International Commission of Jurists suggested an additional paragraph at the beginning that would make clear that the scope of the instrument applied to all private military and all security companies in all circumstances. It also suggested using the language of the draft convention on private military and security companies, which had some useful language on scope of application (art. 3) and which included international organizations using security services. The Working Group on the use of mercenaries concurred with this approach, as did Panama, Switzerland and the Working Group on business and human rights, which added that the instrument should apply to all national and transnational business entities. DCAF suggested adding a paragraph to the

effect that the instrument would apply to all situations, including situations of conflict, where private military and security services were provided by private military and security companies, their personnel and their subcontractors. Subparagraph (2) could cover the whole scope of application so there was no need for a specific paragraph on home States.

61. On subparagraph (2), the International Commission of Jurists suggested using the term "armed conflict" instead of "conflict". Brazil requested some clarification on that aspect. Maat for Peace suggested adding another paragraph referring to private security services operating on land and sea and in the air.

E. [Paragraph][Article] 4

62. On subparagraph (1), the International Commission of Jurists noted that it recognized the obligations of States under international law and recommended inserting the current [paragraph][article] 5 (1) after subparagraph (1).

63. China noted that domestic laws already criminalized the act of killing, so it should not be necessary to establish specific provisions with regard to the acts of private military and security companies. Argentina suggested replacing "steps" by "measures". The Russian Federation drew attention to the fact that not all legal systems provided for the criminal liability of legal persons, which might require some textual amendments. The International Commission of Jurists suggested specifying grave breaches of the Geneva Conventions of 1949 and Additional Protocol 1 of 1977.

64. On subparagraph (3), the International Commission of Jurists recommended reflecting the prohibition, under international human rights law, of delegating incarceration and arrest to private military and security companies, given that this must always take place under the supervision of State officials.

65. On subparagraph (4), the International Commission of Jurists stated that it was in agreement with national laws prohibiting the contracting of services that entailed the direct participation in hostilities of the personnel of private military and security companies and suggested that criminal sanctions should be attached to the breach of such a provision. The contracting parties should be obliged not to put the staff of such companies in ambiguous situations, in order to maintain a clear distinction between civilians and combatants and prevent the staff of such companies from losing their status and their protection in armed conflict.

F. [Paragraph][Article] 5

66. On subparagraph (1), China recommended replacing the word "legislation" with "instrument". DCAF noted that merely disposing of or adopting legislation would not add any meaningful value to the current state of affairs.

67. On subparagraphs (1) and (2), DCAF noted that the mere existence of a law on private military and security companies or a licensing system did not mean that it was adequate or sufficient. Switzerland recalled that the meaning of "effective" was not clear and recommended adding the words "or similar system" after "effective licensing". The International Commission of Jurists recalled that not every country had a licensing system and suggested keeping subparagraph (2) as it was.

68. DCAF recommended making subparagraph (3) about State obligations, with an explanation of what those obligations were. The Working Group on business and human rights said that it was not enough for States to require private military and security companies to have policies but that such companies should be required to demonstrate they had processes in place, following a due diligence approach in line with the Guiding Principles.

69. On subparagraph (3) (a), the European Union noted that when private military and security companies operated in times of armed conflict they must integrate the entire body of international humanitarian law and not only the principles. In the spirit of harmonization with

the Montreux Document, the European Union representative recommended that the Chair-Rapporteur consider adding adequate internal policies and training in the text.

70. The Russian Federation recommended deleting subparagraph 3 (b), as "gender" was not agreed language. Panama, the European Union, the International Commission of Jurists and the Working Group on the use of mercenaries expressed their disagreement, noting that the term had been used in numerous General Assembly resolutions and in the 2030 Agenda for Sustainable Development. The Working Group on the use of mercenaries acknowledged that private military and security companies were a highly gendered industry, which had numerous internal and external ramifications.

71. On subparagraph (3) (d), Panama recommended adding the prevention of employment of persons suspected or convicted of violence against children. The International Commission of Jurists agreed with Panama.

72. On subparagraph (3) (e), Panama noted that the text should say international human rights law instead of human rights law. The International Commission of Jurists recommended that the text include external, and not just internal, public oversight and accountability. The European Union asked for clarification of the subparagraph and in particular its relationship with the principle of the presumption of innocence.

73. On subparagraph (3) (f), Panama recommended adding the words "and environmental" after the word "labour". The Working Group on business and human rights and the Working Group on the use of mercenaries agreed with Panama. The European Union required additional clarification on which standards were referred to in subparagraph (3) (f), suggesting the inclusion of such a clarification in a footnote.

74. On subparagraph (4), China indicated that States already had laws or administrative means to achieve the purposes stated. China noted that subparagraph (4) required domestic legislation to ensure criminal responsibility for legal entities, which was not in line with the domestic legal systems of a number of States. DCAF stated that if the provisions in subparagraphs (1) to (3) were adequately implemented, there would be no need to stipulate that their non-respect was criminal. Subparagraph (4) should therefore rather be focused on ensuring the adequate human and financial resources required in public regulatory bodies to adequately implement, monitor and oversee subparagraphs (1) to (3).

75. On subparagraph (5), China proposed adjustments in order to reflect the distinction between private military and private security companies. The Working Group on business and human rights recommended that companies should be required to have grievance mechanisms and accountability systems. The Working Group on the use of mercenaries recommended including a provision that acknowledged that certified members of the International Code of Conduct Association were already required to do so as part of demonstrating their conformity with the International Code of Conduct. DCAF expressed concern about how effective subparagraph (5) would be in practice.

76. The International Commission of Jurists proposed the addition of a subparagraph (6), which would establish independent competent authorities to provide for monitoring, accountability and oversight of private military and security companies.

G. [Paragraph][Article] 6

77. On subparagraph (1) (a), the European Union asked the Chair for a further elaboration on its meaning.

78. On subparagraph (1) (b), Panama recommended replacing the word "prevent" with "prohibit". Panama also recommended adding two new paragraphs: one including a requirement for human rights due diligence in line with the Guiding Principles and the draft binding legal instrument and another including a requirement to provide information to interested parties, which was very important for victims' access to remedy. The Working Group on business and human rights expressed support for those recommendations, noting that heightened human rights due diligence was critical. Ecuador also expressed support for heightened human rights due diligence.

79. On subparagraph (1) (c), the International Commission of Jurists noted that government contracts were not concluded with private military and security companies that were not registered and licensed, so the point should possibly be treated as a separate paragraph.

H. [Paragraph][Article] 8

80. China, noting a potential overlap with other articles that already regulated imports and exports, recommended the elimination of the article.

I. [Paragraph][Article] 9

81. Argentina proposed that, for the sake of consistency with previous articles, the heading of [paragraph][article] 9 be modified to read “Obligations of States of Nationality”. China noted the difficulties of rendering [paragraph][article] 9 effective and recommended eliminating it.

J. [Paragraph][Article] 10

82. On subparagraph (1), the International Commission of Jurists requested clarification that it referred to jurisdiction over civil claims against private military and security companies and that subparagraph (2) referred to jurisdiction over crimes, with a reference to the crimes provided for under [paragraph][article] 4 (2).

83. On subparagraph (2), Turkey noted that having such a wide array of types of jurisdiction established in one article might create legal uncertainty and recommended reconsidering the necessity of establishing a link between residency and jurisdiction. Turkey further proposed a reference to “specific offences”, as opposed to “applicable offences”. Argentina agreed and recommended clarifying the scope of the term “applicable offences” by either referencing [paragraph][article] 2 (4) or including a definition of the term in [paragraph][article] 1. Ecuador recalled that preambular paragraph 11 mentioned not only criminal but administrative and civil consequences for acts and omissions of private military and security companies. It therefore recommended that, for consistency, [paragraph][article]10 also refer to civil and administrative consequences. Brazil supported Ecuador and recommended looking deeper into how to link [paragraph][article] 10 with [paragraph][article] 13. The European Union noted that [paragraph][article] 10 (2) referred to “offences”, while other parts of the text referred to “violations”.

84. Argentina expressed a reservation with respect to subparagraph (2) (a) and (e), regarding the term “territory under control” and provided a textual suggestion for the inclusion of a footnote It also provided a textual suggestion for subparagraph (2) (e) and further suggested introducing a reference to the jurisdiction of States over their territorial seas, in conformity with the United Nations Convention on the Law of the Sea and in particular article 27. Argentina also proposed the inclusion of a rule for the resolution of conflicts related to jurisdiction.

85. The European Union asked for clarification regarding the term “ordinarily resident” in subparagraph (2) (c).

86. On subparagraph (2) (e), China, Turkey and the European Union requested a clarification as to whether it provided for universal jurisdiction. China appealed for prudence and recommended eliminating subparagraph 2 (e). Argentina requested clarification of the term “crime under international law”.

K. [Paragraph][Article] 11

87. Panama recalled that [paragraph][article] 11 was of extreme importance and recommended that its title include the transfer of weapons. The European Union expressed agreement. DCAF proposed that it also cover the storage and transport of weapons.

88. DCAF recommended including in subparagraph (1) (a), or as a separate letter, the need for States to adopt specific legislation on requirements on the use of force by private military and security companies. DCAF noted that such companies and regulators tended to apply by analogy the rules for the use of force by public officials to private security personnel, even when the conditions on the use of force were fundamentally different. DCAF recommended that the legal basis for the use of force for such companies be guided exclusively by the personal right to self-defence.

89. Panama suggested including a subparagraph between subparagraphs (1) (a) and (b) that would expressly mention the prohibition of certain weapons and proposed rewording paragraph 2 and an additional paragraph in order to regulate the transfer of weapons. The European Union made a textual suggestion.

L. [Paragraph][Article] 13

90. On subparagraph (2), the Working Group on business and human rights said that it would provide some language in order to fully align with the Guiding Principles. Panama recommended including a reference to "child-friendly" and "gender-sensitive" access to remedy, as well as adding two paragraphs.

M. [Paragraph][Article] 14

91. On subparagraph (1), Argentina recommended defining the scope of "applicable offences" used in [paragraph][article] 10 and "applicable crimes" used in [paragraph][article] 14, to make clear that the two definitions were different, and clarify what each entailed. The International Commission of Jurists agreed and recommended merging [paragraphs][articles] 14 and 13 because the obligation to investigate in [paragraph][article] 14 was the procedural side to the right to an effective remedy derived from [paragraph][article] 13. The Working Group on business and human rights agreed with the International Commission of Jurists and sought confirmation that the prosecution of persons would include legal persons.

N. [Paragraph][Article] 15

92. China noted that participating States should provide legal assistance in the process of investigation and prosecution, in compliance with international law.

93. On subparagraph (1), the European Union requested a clarification of what the term "crimes" referred to. Argentina echoed that concern and stressed the importance of determining the scope of the crimes, requesting that the language should be as precise as possible. Argentina proposed cutting down the reference to specific crimes in [paragraph][article] 4 (2). Brazil emphasized that some provisions concerned violations, offences and crimes but did not make a clear distinction between civil and criminal issues. Brazil stated that its understanding was that mutual legal assistance could be extended to civil assistance, so it should be clarified whether subparagraph (1) included mutual legal assistance in both civil and criminal matters.

94. Panama suggested a new subparagraph (1) bis to take into account mutual legal assistance where a State was not a signatory to the instrument.

95. On subparagraph (2), China suggested replacing the wording "in terms of" with "in accordance with".

96. On subparagraph (3), Brazil recommended some language to reflect the instances in which constitutional law prohibited the extradition of nationals.

O. [Paragraph][Article] 16

97. DCAF noted that subparagraph (1) was very specific, since national contact points were very specific measures. In contrast, subparagraph (2) was rather vague in nature. DCAF

suggested a reflection on which needs the information contained in the provision should respond to.

P. [Paragraph][Article] 17

98. The European Union noted that the provision was formulated in a restrictive way, only mentioning international humanitarian law, while other parts of the text referred to international human rights law. The European Union asked for clarification in relation to the reference to the Geneva Conventions and the Additional Protocols, noting that not all States were High Contracting Parties to the Additional Protocols, and made a textual suggestion.

99. ICRC emphasized that it was essential to avoid any misinterpretation or misuse of the instrument that could undermine the implementation of existing obligations under international humanitarian law. ICRC accordingly preferred the precision and specificity of the existing language, which resembled a provision in the International Convention for the Protection of All Persons from Enforced Disappearance. ICRC suggested that any reference to international human rights law should be noted in a separate provision, to preserve the current language of [paragraph][article] 17.

Q. [Paragraph][Article] 21

100. On subparagraph (1), Argentina noted that it referred to “all States parties” and “other United Nations Member States”. Argentina claimed that States that were not party to the instrument and that would not necessarily be taking any decision on the proposed amendments, in compliance with subparagraph (2), would have access to the amendments and requested clarification.

IV. Way forward

101. Following discussions held during the third session and acknowledging the comments and concrete textual suggestions received on the revised zero draft instrument, the Chair-Rapporteur outlined the way forward by announcing that:

(a) The Chair-Rapporteur would invite States and other relevant stakeholders to submit the concrete textual suggestions presented during the session no later than 31 May 2022. They would then be compiled and made available online on the web page of the working group.

(b) The Chair-Rapporteur would prepare a second draft of the instrument on the basis of the discussions and concrete textual suggestions presented at the third session of the working group, no later than the end of September 2022;

(c) Acknowledging the importance of providing the working group with the expertise and expert advice necessary to fulfill its mandate and in line with paragraph 3 of Human Rights Council resolution 45/16, the Chair-Rapporteur would establish a group of experts to advise on facilitating and advancing the work on the draft text during the intersessional period;

(d) The Chair-Rapporteur would invite, in line with paragraph 4 of resolution 45/16 and within eight weeks of the online publication of the second draft, written contributions from governments, relevant special procedure mandate holders and mechanisms of the Human Rights Council, the treaty bodies, regional groups, intergovernmental organizations, civil society, the industry and other stakeholders with relevant expertise, including the Co-Chairs of the Montreux Document Forum and the International Code of Conduct Association;

(e) The Chair-Rapporteur would then convene intersessional consultations on the second draft no later than mid-February 2023;

(f) The Chair-Rapporteur, on the basis of inputs received during the intersessional consultations, would update the second draft of the instrument and circulate a revised second draft before the fourth session, but no later than the beginning of March 2023.

V. Adoption of the summary report and way forward

102. On 13 May 2022, the working group adopted *ad referendum* the way forward proposed by the Chair-Rapporteur in section IV and the draft summary report on its third session and decided to entrust the Chair-Rapporteur with finalization and submission of the report to the Human Rights Council for consideration at its fifty-first session.

Annex

List of participants

States Members of the United Nations

Algeria, Argentina, Armenia, Azerbaijan, Belgium, Brazil, Burkina Faso, Burundi, Cameroon, Chile, China, Côte d'Ivoire, Columbia, Cuba, Cyprus, Djibouti, Denmark, Ecuador, Egypt, Ethiopia, Finland, France, India, Indonesia, Iraq, Iran (Islamic Republic of), Ireland, Japan, Libya, Mauritania, Mexico, Namibia, Nepal, Pakistan, Panama, Peru, Portugal, Qatar, Romania, Republic of Korea, Russian Federation, Saudi Arabia, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Switzerland, Syrian Arab Republic, Togo, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, Venezuela (Bolivarian Republic of) and Zimbabwe.

International organizations

European Union, the International Code of Conduct Association (ICoCA).

Observer organization

International Committee of the Red Cross (ICRC)

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

African Heritage And Global Peace Initiative, Association "Paix" pour la lutte contre la Contrainte et l'injustice, Association nationale de promotion et de protection des droits de l'homme, Association Points-Cœur, Bureau Pour la Croissance Intégrale et la Dignité de L'enfant, Campaign for Innocent Victims in Conflict (CIVIC), Campus Watch, Centre Europe – tiers monde (CETIM), Centre for Human Rights and Peace Advocacy, Conscience and Peace Tax International (CPTI), Convention pour le bien-être social Fondation des Oeuvres pour la Solidarité et le Bien Etre Social – FOSBES ONG, Fondation pour un Centre pour le Développement Socio-Eco-Nomique, Genève pour les droits de l'homme: formation internationale, Initiative d'opposition contre les discours extrémistes, International Commission of Jurists (ICJ), International Human Rights Council, International Service for Human Rights, Ligue Marocaine de la citoyenneté et des droits de l'homme, Maat for Peace, Development and Human Rights Association, Organisation Attawassoul pour la Santé, la Femme et l'Enfant, Organisation pour la Communication en Afrique et de Promotion de la Cooperation Economique Internationale-OCAPROCE Internationale, Pakistan Rural Workers Social Welfare Organization (PRWSWO), Siracusa International Institute for Criminal Justice and Human Rights, Village Suisse ONG, Regroupement des Jeunes Africains pour la Démocratie et le Développement – Section Togo.

Other stakeholders

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 issue of human rights and transnational corporations and other business enterprises, Geneva Centre for Security Sector Governance (DCAF), International Committee of the Red Cross (ICRC) and Switzerland as Co-chairs of the Montreux Document, CEREM Business School, University of Copenhagen, Iran National Team for Inventions and Innovation / Sustainable Development Program, Atem Foundation, CyberPeace Institute, Justice House, Swisspeace, World Vision India UNITE To Act.