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Progress report 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 on its first session*

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

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I. Introduction

1. The Human Rights Council, in its resolution 36/11, decided to establish, for a period of three years, an open-ended intergovernmental working group with the mandate 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, to be informed by the discussion document on elements for an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies (A/HRC/36/36, para. 10), as prepared by the Chair-Rapporteur, and further inputs from Member States and other stakeholders.

2. The present working group succeeds the open-ended intergovernmental working group established by the Council in its resolution 15/26 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. The mandate of that working group was renewed twice, once in resolution 22/33 and a second time in resolution 28/7. Under the former mandate, the working group held six sessions between 2011 and 2017.[1]

3. The first session of the present working group,[2] held from 20 to 23 May 2019, was opened by the Deputy United Nations High Commissioner for Human Rights. She noted the importance of building on the conclusions and recommendations of the former working group to identify the means for more efficiently preventing human rights abuses relating to the activities of private military and security companies; to more effectively protect and ensure access to justice and remedies for victims of such abuses; and to strengthen accountability for perpetrators of abuse, something that to date had been largely elusive across the world.

4. The Deputy High Commissioner commended the leadership provided thus far by the Chair-Rapporteur for the next phase of the work, and noted that the discussions during the six sessions of the previous working group had provided a solid basis on which to anchor the present working group's future efforts towards the elaboration of a draft regulatory framework for the activities of private military and security companies.

II. Organization of the session

A. Election of the Chair-Rapporteur

5. At its 1st meeting, held on 20 May 2019, the working group elected by acclamation 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 the provisional agenda (A/HRC/WG.17/1/Rev.1) and programme of work.

B. Attendance

6. Representatives of the following States were present at the first session: Afghanistan, Algeria, Angola, Australia, Azerbaijan, Belgium, Brazil, Burkina Faso, Burundi, Cambodia, Canada, Chad, Chile, China, Croatia, Cuba, Ecuador, Egypt, Ethiopia, Gambia, Germany, Greece, India, Iraq, Iran (Islamic Republic of), Israel, Italy, Japan,

[1] All relevant information and documents concerning the six sessions of the former intergovernmental working group can be found at www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitaryIndex.aspx.

[2] All relevant information and documents concerning the first session of the new intergovernmental working group, including the text of oral statements, can be found at www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/IGWG.aspx.

Kazakhstan, Lebanon, Mexico, Myanmar, Nepal, Pakistan, Panama, Poland, Qatar, Republic of Korea, Romania, Russian Federation, South Africa, Spain, Switzerland, Syrian Arab Republic, Togo, Ukraine, United Kingdom of Great Britain and Northern Ireland, Venezuela (Bolivarian Republic of), Zambia and Zimbabwe. Representatives of the State of Palestine, the European Union, 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 International Committee of the Red Cross (ICRC), the International Code of Conduct Association, the International Commission of Jurists, Centre Europe-tiers monde, the Centre for Socio-Eco-Nomic Development, the Independent National Commission on Human Rights of Burundi, the National Human Rights Commission of Côte d'Ivoire and Open Society Foundations were also present.

C. Introductory remarks of the Chair-Rapporteur

7. In her introductory remarks, the Chair-Rapporteur stressed that the draft programme of work had been developed in line with paragraph 1 of resolution 36/11, which indicated that the working group should be informed by the discussion document on elements for an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies. That document was the outcome of extensive negotiations among delegations and regional groupings, and delegations had reiterated their support for it prior to the adoption of the resolution.

8. She recalled that notifications of the holding of the first session had been sent to all Member States to ensure their participation and that the Secretariat had widely disseminated information about the session to all stakeholders mentioned in the resolution. She expressed the hope that the working group would make progress in elaborating the regulatory framework in an open and transparent manner, with a view to better promoting and protecting the human rights of those who engaged with and were affected by the activities of private military and security companies.

9. In that context, the Chair-Rapporteur extended her sincere thanks to the regional coordinators who had engaged with her on the preparation of the draft programme of work. She thanked all delegations for their continued active engagement in the process and looked forward to a fruitful first session.

III. Plenary discussion

10. During the plenary discussion, the representatives of Angola (on behalf of the African Group and in its national capacity), Algeria, Brazil, China, Cuba, Ecuador, Egypt, India, Pakistan, the Russian Federation, South Africa, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Venezuela (Bolivarian Republic of) and the European Union delivered statements, which are available online.[3] A member of the Working Group on the use of mercenaries took the floor, as did representatives of ICRC, the International Commission of Jurists and Centre Europe-tiers monde. Their statements are also available online.

11. Subsequent to the plenary discussion, the representatives of Iraq and the Islamic Republic of Iran made general statements, which are also available online.

12. The representative of Angola, on behalf of the African Group, congratulated South Africa for its leading role in the process of establishing the working group, and in particular Ambassador Mxakato-Diseko's commitment throughout the years. The African Group had followed the work of the various mechanisms related to private military and security companies with great interest and appreciated the methodology chosen for the session, which enabled the sharing of views and opinions collaboratively and transparently. The representative reiterated the need to protect human rights and ensure accountability and responsibility for violations and abuses related to the activities of private military and

[3] See www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/IGWG.aspx.

security companies, which threatened the peace and security of countries and destabilized societies.

13. The representative of Algeria stressed the importance of preventing human rights and humanitarian law abuses by private military and security companies. Furthermore, the representative emphasized the need to hold the perpetrators of such abuses accountable before the law. Algeria believed that victims of such abuses by military and security companies should have access to an appropriate remedy, notably by receiving adequate compensation.

14. The representative of Brazil asserted that private military and security companies did not operate in a legal vacuum and that 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 provided a compilation of international norms relevant to the work of private military and security companies. Brazil recognized, however, that gaps related to the prevention and accountability for abuses of human rights and international humanitarian law remained. The representative also noted that a clear definition of functions that may not be delegated to non-State actors was necessary.

15. The representative of China highlighted that private military and security companies should be regulated under international humanitarian law, international human rights law and the domestic laws of relevant States. It was also underscored that those activities should be monitored by international mechanisms. The representative also stressed that States should bear primary responsibility for ensuring that private military and security companies acted within the law, and also reported on the country's efforts to improve national legislation to enhance regulation of domestic security companies.

16. The representative of Cuba supported the elaboration of a broad, binding and universal international instrument. In addition, the representative thanked the Working Group on the use of mercenaries for its work over the last 15 years, especially for elaborating a draft binding document that would be very useful for the deliberations of the present intergovernmental working group.

17. The representative of Ecuador reiterated that it was important that the intergovernmental working group begin to implement its mandate, building upon the work of the previous working group, the relevant work of other special procedure mandate holders, mechanisms and working groups and other related initiatives, with the objective of establishing a legally binding regulatory framework to ensure effective protection of human rights, access to justice, and accountability for violations and abuses relating to the activities of private military and security companies.

18. The representative of Egypt stressed the need to take into account the differences in national legislation related to the establishment and organization of private military and security companies. It was also pointed out that Egypt was one of several countries that allowed the establishment of private security companies to guard people and private property. Additionally, the representative underscored that Egypt did not allow the establishment of private military companies, in accordance with article 200 of the Egyptian Constitution. The representative also pointed out that not all countries supported ongoing initiatives related to the private military and security companies such as the Montreux Document; Egypt was one of those countries.

19. The representative of the European Union asserted the importance of a predictable environment in which to operate, in respect of international human rights law and international humanitarian law. The European Union hoped to continue to work in the direction of further complementing and strengthening existing initiatives such as the Montreux Document Forum and the International Code of Conduct for Private Security Service Providers.

20. The representative of India was of the view that the Montreux Document and the International Code of Conduct for Private Security Service Providers were basically soft law instruments adopted at the international level to regulate the activities of private military and security companies. Those instruments did not adequately address the accountability of private military and security companies for human rights violations and

abuses. Realizing the importance of transparency and accountability as core security functions, India had enacted national legislation to control, monitor and regulate the activities of private military and security companies.

21. The representative of Pakistan stated that private military and security companies needed to be regulated through an international framework. The concept of mercenaries and the protection of the right to self-determination of the people must be reflected in the future instrument. The concepts of effective vetting; mutual legal assistance; remedial measures; responsibility of States of nationality and contracting, territorial and host States; and responsibility within the chain of command of the private military and security companies were important.

22. The representative of the Russian Federation recognized the importance of the topic under discussion and stated that it would take an active part in the work of the working group. At the same time, the Russian Federation would restrict itself to providing advisory opinions during the first session because not enough time had been provided for the competent authorities to analyse the documents. The Russian Federation insisted that the working group should focus on discussing controversial issues such as legitimacy of private military and security companies, status of private military and security personnel under international humanitarian law, functions that could be delegated by the State to private military and security companies and responsibility for illegal acts committed by private military and security companies' personnel. Only after States came to an understanding of those issues would they be able to discuss respect for human rights by private military and security companies and the transparent use of private military and security companies, among other items.

23. The representative of South Africa indicated that the country was flexible with regard to the modalities of establishing a regulatory framework. The representative also reaffirmed the importance of that framework in preventing and curtailing the destabilization of constitutional democracies and Governments and the promotion of social and political instability by private military and security companies, which had long-term consequences for the victims. Recognizing the urgency of the matter, the African Union had also been seized of the issue. South Africa remained concerned with levelling the playing field for private military and security companies and ensuring that there were universal rules to which all private military and security companies must adhere. This was a hotly debated issue in South Africa, particularly since it had private military and security companies that operated in various parts of the globe, and it was well known for its involvement with conflict prevention on the continent. South Africa appreciated that it must buttress its national legislation; however, it considered the Montreux Document to be only a critical first step in that regard.

24. The representative of the United Kingdom agreed that open, transparent and robust standards were required for private military and security companies as well as mechanisms for monitoring adherence to those standards. The representative also expressed the view that the existing framework of the Montreux Document and the International Code of Conduct for Private Security Service Providers already provided those standards and sufficient regulation.

25. The representative of Switzerland reiterated the country's strong engagement in ensuring respect for international humanitarian law and human rights by private military and security companies. Delegations were reminded that Switzerland considered the processes linked to the Montreux Document and Code of Conduct as complementary to the activities in the context of the United Nations. As a Co-Chair of the Montreux Document Forum and the International Code of Conduct Association, Switzerland looked forward to contributing to the discussions in the working group and hoped that those discussions would lead to a constructive dialogue on the challenges facing the regulation of private military and security companies, including on issues of jurisdiction and mutual legal assistance. Switzerland had also adopted the Federal Act on Private Security Services Provided Abroad to satisfy its responsibilities regarding private military and security companies.

26. The representative of the Bolivarian Republic of Venezuela recognized that the various initiatives that had been carried out in the international arena – as well as the self-regulation and national regulation of private military and security companies – could help to control their activities. The representative also observed that those initiatives had been insufficient to effectively address the impunity of private military and security companies, especially in the extraterritorial field.

27. The representative of the Islamic Republic of Iran considered that it was necessary to learn from past cases of massive violations of human rights and international humanitarian law in Iraq, Afghanistan and elsewhere where innocent civilians had been massacred, tortured and abused in cold blood by personnel of military companies. Unfortunately, those atrocities were almost never prosecuted by any court of law or human rights mechanism. Therefore, States needed to work together to develop an international legal framework to regulate the activities of private military companies and ensure the responsibility of relevant States for misconduct and crimes committed by members of those companies. International humanitarian law and human rights law were two basic sources for developing the international legal framework.

28. According to the representative of Iraq, the discussion document and its elements constituted an important and constructive pillar to guarantee full respect for human rights. Iraq, as a party to the Montreux Document, had adopted legislation in 2017 regulating the work of security companies. Iraq affirmed the objective of ensuring that individuals' rights were not negatively impacted by the activities of military and security companies, by means of a mechanism to monitor the work of those companies in order to ensure accountability for violations and reparation. It also supported a legal framework that deterred breaches by military and security companies.

29. The member of the Working Group on the use of mercenaries, which also has a mandate to examine private military and security companies, expressed support for a legally binding instrument that would complement the existing regulatory framework set forth in the Montreux Document and the International Code of Conduct for Private Security Service Providers. She suggested that a way to overcome historical challenges in defining private military and security companies would be to focus on regulating the "services" they provided. She also called for the scope of any regulatory mechanism to go beyond "complex situations" in order to capture the variety of environments where private military and security companies were used and human rights abuses could occur. She noted that any future regulatory mechanism should extend to subcontractors and should include effective vetting of private military and security companies and their personnel; adequate and effective training, including on human rights and international humanitarian law; and transparent and effective State accountability mechanisms that could ensure access to justice and remedies for victims. She added that it was essential to take jurisdictional issues and mutual legal assistance into account for effective vetting and accountability processes.

30. The representative of ICRC (as Co-Chair of the Montreux Document Forum) recalled the nature and scope of the Montreux Document. It is a legally non-binding document that lists, in one place, existing international law obligations relating to operations of private military and security companies in armed conflicts and comparable situations, in particular those stemming from international humanitarian law and human rights law. The Forum has also compiled a set of good practices for the regulation of private military and security companies. The representative recalled that if private military and security companies were contracted to operate in armed conflicts, international humanitarian law would apply and set out pertinent obligations for States and private military and security companies. ICRC would be ready to engage with States on questions relating to international law applicable when private military and security companies were used in armed conflicts, in particular as regards international humanitarian law.

31. The representative of the International Commission of Jurists welcomed the convening of the working group and stated that there was a clear need for an international regulatory framework for private military and security companies. It should be built on the most recent development of standards at the international level and count on the participation of all relevant stakeholders. The Commission intended to participate in the process, as it had in the previous working group.

32. The representative of Centre Europe-tiers monde underlined that it was crucial to hold responsible not only the States but also the private military and security companies, within their supply chains, by establishing binding regulations. The importance of establishing a follow-up implementation mechanism for the binding instrument was stressed.

33. In the debate following general statements, some delegations expressed the view that it would be important for any new regulatory framework to draw from and complement existing processes, mechanisms, legislation and initiatives such as the International Code of Conduct for Private Security Service Providers and the International Code of Conduct Association, the Montreux Document and the Montreux Document Forum. Other delegations indicated that they viewed those mechanisms less favourably, and a few underscored that they did not support them at all. It was pointed out that a new regulatory framework should be attractive and compelling in order to encourage States to subscribe to and support it.

34. Some delegations suggested that the new regulatory framework should build on the findings of the Working Group on the use of mercenaries, including its draft proposal for a possible new international legal instrument regulating private military and security companies (A/HRC/15/25, annex). The representative of one State proposed uncoupling the issue of mercenaries from the discussion on private military and security companies.

35. Delegations considered the importance of implementing national legislation that would incorporate international law regulating the activities of private military and security companies. The representatives of several States provided examples of national legislation they had adopted in that regard.

36. Several delegations discussed gaps in international law related to private military and security companies. The representative of one State, for example, highlighted the need to define the status under international law of individual contractors employed by private military and security companies. The member of the Working Group on the use of mercenaries responded by suggesting that any new regulatory framework should avoid defining the contractors themselves and focus instead on regulating services, as was done under Swiss law.

37. Several delegations noted that any regulatory framework should clearly list the activities that States may not delegate to private military and security companies. Other delegations agreed that a new framework should also regulate more complex issues, such as the behaviour of private military and security subcontractors and the use of new tactics and technologies such as cyberwarfare, unmanned aerial vehicles and autonomous weapons systems.

38. Several delegations highlighted the need to regulate private military and security companies given the fact that they had been used to destabilize democracies in the past.

IV. Discussion on the elements for an international regulatory framework

39. In line with resolution 36/11, the working group considered the following elements of an international regulatory framework as drawn from the discussion documents adopted at the sixth session of the former working group, in the order set forth in its programme of work: objectives and principles of the regulatory framework (elements 2 and 3); contracting States and territorial States (elements 4 and 5); home States and States of nationality (elements 6 and 7); private military and security companies (element 8); and definitions and interpretations (element 1). These elements and their corresponding numbering are drawn from the discussion document.

Objectives of the regulatory framework (element 2)

2 (a) Ensure respect for human rights by the private military and security industry operating in complex situations;

2 (b) Ensure the transparent use of the private military and security industry;

2 (c) Ensure that the rights of individuals are not negatively impacted upon by the activities carried out by such private military and security companies.

40. Many participants agreed that the main objective of a regulatory framework should be to ensure that private military and security companies respected international human rights law, international humanitarian law and other relevant international instruments. One delegation stressed the need to start by examining the compliance of the use of private military and security companies with international law before looking at human rights factors. Some delegations insisted on the need to refer explicitly to the Charter of the United Nations and its principles of sovereignty and territorial integrity. Some delegations questioned why the scope of the regulatory framework was limited to private military and security companies "operating in complex situations", as that concept was difficult to define and might not cover all situations. Some participants insisted as well on the need to include subcontractors of private military and security companies in the scope of the regulatory framework.

41. One delegation suggested merging objectives 2 (a) and 2 (c). In response, it was pointed out that the two objectives were redundant and could be merged in a preambular text that would also refer to accountability, redress for victims, transparency and gender perspectives.

42. One delegation suggested adding in objective 2 (a) respect for international law, in particular international humanitarian law, as applicable, by private military and security industry in complex situations.

Principles of the regulatory framework (element 3)

3 (a) Effectiveness, in that they must have a genuine, significant and positive impact on performance, rather than just offering process without substantive change and, to that end, must be based on third-party rather than self-regulation;

3 (b) Inclusiveness, in that they must impact on the performance of all companies and not just those companies that are already achieving appropriate standards, although perhaps not in a fully measurable and independently verifiable manner;

3 (c) Transparency, through robust, independent processes which address broader concerns about the integrity of voluntary or self-regulatory systems;

3 (d) Affordability, in that regulation must be proportionate to operational need, and companies should only have to demonstrate conformity with one accepted and recognized standard.

43. Many delegations emphasized accountability as both an objective and a principle that should guide the regulatory framework. However, delegations did not question the distinction between "objectives" and "principles" in the discussion document, with one delegation supporting the distinction. A participant insisted that coherence between international and national regulations be included as a principle. In addition, a delegation suggested including the principle of complementarity of international law in the list of principles.

44. Regarding the principle of effectiveness, some participants pointed out the practical difficulty in making a certification process by a third party acceptable to all stakeholders. A participant expressed concern that reference to "concerns about the integrity of voluntary or

self-regulatory systems" in the discussion document might discourage States from establishing such systems. Another participant suggested replacing the end of 3 (c) with "concern about the effectiveness of existing regulatory systems".

45. It was pointed out that the principles of transparency and integrity should be delinked from the question of integrity of voluntary or self-regulatory systems. The principle of transparency should be applied to the whole supply chain, including subcontractors, and not only to private military and security companies.

46. Several participants also questioned the inclusion of affordability in the list of principles. A participant insisted that certification requirements must be proportionate to operational need in order to attract small and medium-size enterprises, which were often concerned about the cost implications of joining an international certification process. Another participant, while agreeing that the term "affordability" should be removed, highlighted that it was important to reach out to small and medium-size companies as they represented a substantial proportion of the private security industry. Both participants were invited to propose a formulation that would address the concerns expressed about small and medium-size enterprises.

47. One delegation stressed that the regulatory framework should remain as attractive as possible by not creating further responsibilities for States. It also pointed out that in conflict situations, international humanitarian law applies pursuant to the *lex specialis* principle. Yet, international humanitarian law does not refer to private military and security companies but rather to organized armed groups. That was a question that should be taken into consideration in the preparation of the international regulatory framework.

Contracting States (element 4)

4 (a) Determine which military/security services the State may not contract for;

4 (b) Establish a private security company and private military company procurement process that incorporates an assessment of a company's capacity to perform services in conformity with the law, including robust criteria for the selection of the company;

4 (c) Incorporate requirements into government contracts to ensure respect for national law, human rights law and applicable international humanitarian law, including providing relevant guidance;

4 (d) Monitor and ensure accountability, including by addressing issues of jurisdiction and immunities, for companies operating under a government contract.

48. One delegation stressed that private military and security companies should not be used for military activities and should focus on performing auxiliary security activities instead. A participant recalled that international humanitarian law prohibits States from contracting out a number of functions to private military and security companies, including the management of prisoner of war camps. Another delegation referred to its national legislation, which specifies which tasks State authorities can subcontract and what requirements subcontractors should meet in terms of recruitment and training of personnel.

49. A delegation suggested that there was a need to distinguish between situations of armed conflict and situations where there was no armed conflict. In response, it was suggested that separate bullet points for each of those scenarios be included. That delegation further proposed defining the services first, followed by language distinguishing what services a State may not contract for in situations of armed conflict and situations without an armed conflict.

50. Many delegations noted the importance of differentiating between companies that provided military and security services. Other delegations, however, supported an approach

that focused on the nature of the services being provided in a particular case, rather than permanent categorization of companies.

51. A participant supported a service-based approach and recalled that all non-State actors, including armed groups, must respect international humanitarian law in conflict situations. Therefore, adopting a service-based approach did not create the risk that a private military and security company would not be covered by international humanitarian law as a non-State actor operating in conflict situations. Another participant added that it was very difficult to categorize larger companies since they offered a wide variety of military, security and support services.

52. A participant welcomed element 4 (b) of the discussion document and stressed the need for Governments to introduce the appropriate level of due diligence and risk management as part of their procurement policies. The standards applied in such policies should also be reviewed regularly and shared with government personnel in charge of procurement. It was suggested that the inputs provided by the different stakeholders in that regard should be combined.

53. A participant proposed that government procurement processes should refer to criteria such as companies' past human rights records and internal procedures for selection and training, including internal policies and mechanisms for safeguarding human rights. Such requirements should extend to subcontracting services to ensure that the contracting State did not circumvent its obligations by subcontracting services to a third party. A delegation agreed on the need to include language ensuring that subcontractors could be held accountable.

54. A delegation asked for clarification concerning the term "robust criteria".

55. A participant proposed the inclusion of language that would preclude contracting States from including any form of immunity from prosecution for their security contractors operating abroad, and territorial States from granting such immunities. A delegation questioned why, in element 4 (c), requirements in government contracts were limited to "national law, human rights law and applicable international law" when refugee law and instruments dealing with internationally displaced persons were also relevant.

56. Another delegation proposed including a reference to mutual legal assistance as an issue that needed to be addressed to ensure further accountability.

57. A delegation suggested adding another point to element 4 that would ensure that contracting States would bear full responsibility for the acts of their contracting agents and any third party, including the payment of damages to victims of abuses.

58. A delegation expressed concern about possible tension between command responsibility on the part of contracting States and individual criminal responsibility on the part of the perpetrators themselves, and suggested that it was the responsibility of the contracting State to include all necessary safeguards in the contract. A participant stated that under international humanitarian law the State normally bears responsibility for actions committed by a private company that is acting as an agent of the State.

59. A delegation also asked for clarification regarding the term "jurisdiction".

Territorial States (element 5)

5 (a) Ensure that the private security industry within their jurisdiction is effectively controlled and regulated;

5 (b) Determine which services may not be carried out by private security companies and private military companies in their territory;

5 (c) Establish a process to grant authorization for the performance of military and security services with robust criteria for licensing;

5 (d) Monitor private security companies and private military companies that operate on the State's territory.

60. A participant highlighted the importance of looking at how companies treat their personnel. The speaker also underscored the need to consider whether there were jurisdictional issues unique to maritime security companies, such as the matter of flag State jurisdiction.

61. A delegation questioned the use of the term "private security industry" in 5 (a) and then "private security companies and private military companies" in 5 (b). It also mentioned that 5 (a) refers to control and regulation whereas 5 (d) only refers to monitoring.

62. Another delegation suggested amending the language in 5 (a) to read: "Ensure that the private security industry within their jurisdiction is effectively controlled and regulated in order to ensure respect for international human rights law and international humanitarian law, as applicable."

63. A delegation expressed concern that the existence of a regulatory framework for private military and security companies might presume, and might in effect legitimize, the presence and activities of private military and security companies worldwide. Therefore, it suggested adding language to the framework emphasizing that States and regions have the ultimate discretion to decide whether private military and security companies may operate within their territory. Other delegations noted that it might not be necessary to add such language given that it is the sovereign right of a State to decide whether a company can operate within its territory. It was proposed that the discussion be set aside for the time being since the language requested by one delegation could potentially be included in the preamble to the framework.

Home States (element 6)

6 (a) Determine which military/security services may not be exported;

6 (b) Establish a process to grant authorization for the export of military and security services with robust criteria for licensing;

6 (c) Regulate the conduct of private military and security companies and personnel;

6 (d) Monitor and ensure accountability.

64. A delegation suggested amending the language in 6 (c) to read: "Regulate the conduct of private military and security companies and personnel in order to ensure respect for international human rights law and international humanitarian law, as applicable." Another delegation emphasized that in the context of international humanitarian law there was still a problem with determining the legal status of private military and security companies and their personnel, and questioned whether an employee of a private military and security company was a combatant, mercenary, civilian or part of a new special category.

65. A participant proposed making it clear that home States would extend the jurisdiction of their national civil courts to companies domiciled in the home State which committed violations in other countries. The speaker also noted the importance of ensuring adequate liability for those companies within national legislation.

66. A delegation reiterated its concern that the existence of a regulatory framework for private military and security companies might presume and, in effect, legitimize the presence and activities of private military and security companies worldwide, thereby circumventing the prerogative of States and regions to determine whether they should be allowed within their territories. Another delegation agreed that there was no rationale for entering into a discussion about the raison d'être of private military and security companies. It was noted that States, on the basis of their national sovereignty, had the power to

proscribe private military and security companies so that they did not harm human rights. Participants agreed, but noted that the draft regulatory framework could consider clarifying that it was not intended to circumvent the prerogative of States to determine the legality of private military and security companies within their borders. It was pointed out that the discussion highlighted the relevance of having a guidance framework that could be used universally.

States of nationality (element 7)

7 (a) Determine which military/security services may not be performed abroad by nationals of the State;

7 (b) Establish a process to grant authorization for nationals to perform military and security services abroad, including criteria for licensing;

7 (c) Regulate the conduct of private military and security companies' personnel;

7 (d) Monitor and ensure accountability;

7 (e) Ensure access to remedy for victims where violations have occurred.

7 (f) The recruitment of its citizens and permanent residents to work for private military and security companies without a transparent and fair authorization process from a designated regulatory authority.

67. Several delegations sought clarification of the terms "contracting State", "territorial State", "home State" and "State of nationality". Speaking as Co-Chair-Rapporteur of the Montreux Document Forum, the representative of Switzerland suggested looking for guidance at the definitions of the terms "contracting State", "territorial State" and "home State" contained in the Montreux Document. A delegation expressed its appreciation for the efforts that had led to the Montreux Document, but stated for the record that it could not be bound by the Document as it was not a signatory.

68. A delegation suggested adding the following language to element 7 (e): "The responsibility of ensuring access to remedy for victims is not limited to States of nationality. Other regulatory actors and private military and security companies should also have such responsibility."

Private military and security companies (element 8)

8 (a) Establish and implement compliance mechanisms to ensure compliance with national and international law, selection, vetting and training of personnel performing military/security services;

8 (b) Establish a grievance mechanism;

8 (c) Supervise and hold accountable private military and security companies' personnel that engage in misconduct.

69. A delegation expressed concern about the possible characterization of private military and security companies as an armed group under customary international humanitarian law, as that did not reflect current understanding of the law. Another delegation argued that private military and security companies could not be considered armed groups because they provided a business service and did not claim to be a party to a conflict. It further asked what would be required from private military and security companies and whether they would be invited to ratify the instrument. In its view, that would be problematic considering that the public international law of treaties covers the relationship between States and not between States and private entities. With regard to

accountability, a delegation questioned whether compliance mechanisms would be national or international and, in the event of an international mechanism, whether it would then be necessary for private military and security companies to ratify the treaty giving rise to the mechanism.

70. A delegation shared its understanding that private military and security companies would be bound by international humanitarian law in instances where they qualified as parties to a conflict, and noted that there was an ongoing debate on whether private military and security companies, as non-State actors, have human rights obligations under international law. It further stated that it understood element 8 as setting forth guidelines on the requirements that private military and security companies themselves needed to fulfil.

71. A delegation stressed the importance of training programmes for private military and security companies' personnel. In that regard, it suggested that international humanitarian law training should be mandatory as well as the passing of examinations before receiving government certification. It urged States to consider limiting the number of private military and security company personnel in the territory of a party to a conflict in order to prevent States from using contracts with private military and security companies to enhance their combat potential or hide their military presence in the territory of another State. One participant, seconded by another, stated that all training should be adapted to the environment in which companies would operate and that it should be ongoing to allow for the continuous improvement of the conduct of private military and security companies.

72. On the issue of compliance mechanisms, a participant stressed that they needed to be robust and completed with human rights indicators and metrics that could assist in identifying gaps and areas where improvement was needed. Three delegations emphasized that the working group should resist the temptation to discuss in detail the internal regulations of private military and security companies in order to avoid giving the impression that it intended to involve itself too deeply in the internal affairs of businesses.

73. A participant stressed the need to ensure that grievance mechanisms were accessible and provided effective remedies for victims. To that end, it was essential to state clearly where those mechanisms were situated in the supply chain and who had the responsibility to ensure that victims could access a mechanism at the appropriate level to have their grievances effectively addressed. A delegation suggested that the working group look at the accountability and remedy project of the Office of the United Nations High Commissioner for Human Rights,[4] which provides examples of State and non-State accountability processes compiled as a result of a multi-stakeholder process. A delegation expressed support for the idea of establishing a grievance mechanism and proposed that the language establishing it reflect the international human rights language adopted by the Human Rights Council, which traditionally refers to "review" or "monitoring" mechanisms. It considered that such an approach would better reflect the way the mechanisms would work, with the State being reviewed for compliance rather than the private military and security companies. It also requested the deletion of the word "compliance" and requested language more in line with what had already been used by the treaty bodies, such as "review/follow-up".

74. A delegation suggested that the working group should discuss whether to restrict the activities of private military and security companies' personnel within certain territories under element 8.

Definitions and interpretations (element 1)

1 (a) Private military and security companies;

1 (b) Private security companies;

1 (c) Private military companies;

[4] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx.

1 (d) Complex environments.

75. Three delegations proposed reverting to existing definitions in the Montreux Document and the definitions contained in the draft proposal by the Working Group on the use of mercenaries for a possible new international legal instrument regulating private military and security companies. One delegation specified that the Montreux Document definitions, which are services-based and deal with private business entities that provide military and security services irrespective of how they perceive themselves, could serve as a basis for discussion.

76. The Montreux Document provides the following definitions:

(a) "Private military and security companies" are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel;

(b) "Personnel of a private military and security company" are persons employed by, through direct hire or under a contract with, a private military and security company, including its employees and managers;

(c) "Contracting States" are States that directly contract for the services of private military and security companies, including, as appropriate, where such a private military and security company subcontracts with another private military and security company;

(d) "Territorial States" are States on whose territory private military and security companies operate;

(e) "Home States" are States of nationality of a private military and security company, i.e. where a private military and security company is registered or incorporated; if the State where the private military and security company is incorporated is not the one where it has its principal place of management, then the State where the private military and security company has its principal place of management is the "home State".[5]

77. A participant also supported a services approach as included in the International Code of Conduct for Private Security Service Providers. A delegation proposed language from the Montreux Document, referring to the fact that private security and military companies provided services in exchange for financial compensation. It suggested the following definition of private military and security companies: "A private military and security company is that company, and its branches or subsidiaries, that provides private paid military or security services to any moral or natural body that requires these services."

78. Two delegations further underlined the need to harmonize the use of terms throughout the discussion document. For example, the term "industry" was used in some places instead of "companies". One delegation further stressed the need to differentiate between military and security companies and to provide definitions for both, as both were referred to in the discussion document. It also emphasized the need to refer to a nexus with situations of conflict in order to trigger the application of international humanitarian law. A participant questioned whether there was a need to define private military and security companies if private military companies and private security companies were to be defined separately. It was noted that the need for separate definitions of private military companies and private security companies required further discussion. A delegation expressed doubts about how to define private military companies and private security companies separately as there was no precedent for separate definitions. Another delegation indicated that it

[5] *The Montreux Document on Pertinent Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies During Armed Conflict*, International Committee of the Red Cross and Federal Department of Foreign Affairs of Switzerland (2008), preface, para. 9.

would submit its views on the proposed definitions to the working group at its next meeting.

79. It was recalled that a definition of "complex environments" was no longer needed because it had been agreed that the framework would apply in all situations where human rights were at risk. Nevertheless, a delegation stressed the need to define "complex situations" as they were referred to in item 2 (b), while two other delegations expressed the need for the definition to be deleted.

80. At the end of the consideration of the elements for a regulatory framework, appreciation was expressed for the consensual and constructive nature of the discussion and the progress made towards fleshing out the elements as contained in the discussion document.

Sideline discussion on the applicability of international humanitarian law to non-State actors

81. The question of whether international humanitarian law binds non-State actors arose on several occasions during the session.

V. The way forward

82. The Chair-Rapporteur outlined the way forward by announcing that she would invite, in line with paragraph 4 of resolution 36/11 and within eight weeks after the online publication of the advance unedited version of the present summary report, 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.

VI. Concluding remarks

83. The Chair-Rapporteur concluded the meeting by expressing appreciation for the constructive spirit displayed by all participants as well as the collaborative manner in which discussions had taken place during the first session of the working group. This was in her view a reflection that multilateralism could work, despite the challenging times. She thanked civil society organizations for their participation, as well as the Working Group on the use of mercenaries, the Co-Chairs of the Montreux Document Forum, ICRC and the International Code of Conduct Association.