

## **Access to Justice and Remedies for Victims of Violations and Abuses Linked to the Activities of PMSCs**

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Chairperson-Rapporteur, excellencies, distinguished delegates, ladies and gentlemen,

It is an honour for me to participate in the 5<sup>th</sup> session of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies (PMSCs). I would like to thank the Madam Chair for inviting the UN Working Group on Business and Human Rights to participate in this session.

On behalf of the Working Group on Business and Human Rights, I will take this opportunity to share our views about the relevance of the UN Guiding Principles on Business and Human Rights (UNGPs) to access to justice and remedies for the victims of human rights abuses linked to the activities of PMSCs.

The UNGPs rest on three pillars: the state duty to protect human rights, the responsibility of business to respect human rights, and the access to an effective remedy. As I will try to show, all three pillars have relevance to the ongoing work of the intergovernmental working group on PMSCs. In the context of the theme of this panel on access to justice and remedies for victims, a special attention will be given to the Remedy Pillar of the UNGPs.

As the distinguished delegates may recall, the UNGPs were unanimously endorsed by the Human Rights Council in June 2011. Since their endorsement just over five years ago, the UNGPs have received impressive uptake by states, intergovernmental organisations, national human rights institutions, business enterprises, and civil society organisations. The UNGPs cover all internationally recognised human rights and apply to all types of business enterprises, including PMSCs.

The first pillar of the UNGPs reiterates the obligation of states under international law to protect against human rights abuses within their territory or jurisdiction by business enterprises. So, even if states expressly authorise or implicitly allow PMSCs to operate in or from their territory, they must take appropriate steps not only to prevent PMSCs from violating human rights, but also investigate, punish and redress violations which could not be prevented. In other words, states cannot outsource their responsibility under international human rights law as well as international humanitarian law, more so when PMSCs in certain situations perform what are essentially state functions.

This normative expectation from states, however, faces several challenges in practice because of the context in which PMSCs often operate, that is, in conflict zones with weak governance, at a transnational level, and on the high seas. The temptation on the part of PMSCs to earn large profit from a high-risk activity may also result in human rights considerations taking a back seat. Then there are well-known legal and practical barriers in holding corporations accountable for human rights violations. There is, therefore, a need to clarify or develop additional standards for specific sectors as well as strengthen cooperation amongst states to enforce existing norms to ensure that PMSCs are not able to exploit regulatory gaps. The Montreux Document and the draft of a possible Convention on PMSCs prepared by the UN Working Group on the Use of Mercenaries contribute to this objective.

The National Action Plans to implement the UNGPs also provide states an opportunity to lay down a clear expectation for business enterprises, including PMSCs, to respect all relevant national and international human rights norms. Moreover, states should consider embedding all relevant human rights and humanitarian law standards into contracts with PMSCs.

Madam Chair, let me now briefly talk about the relevance of the second pillar of the UNGPs to what we have been deliberating upon in this panel. PMSCs – like other business enterprises – have a responsibility to respect all “internationally recognised human rights”, that is, the International Bill of Rights and the ILO Declaration on Fundamental Principles and Rights at Work. The Commentary on Principle 12 of the UNGPs provides that depending upon circumstances, this minimum responsibility should be boosted with reference to other relevant “additional standards”. Because of their nature of activities and areas of

operations, PMSCs would, for example, need to consider international humanitarian law and international criminal law.

In order to “know and show” that PMSCs respect human rights, they should (i) make a public policy commitment to respect human rights, (ii) establish human rights due diligence processes to identify, prevent, mitigate and account for how they address their impacts on human rights, and (iii) put in place processes to enable the remediation of any adverse human rights impacts they cause or contribute to. It is crucial to note that the “remediation” of human rights harm is an integral component of the responsibility of PMSCs to respect human rights under the second pillar. Hardly anyone would disagree that PMSCs and their personnel should be held accountable for violating human rights.

While the corporate responsibility to respect human rights is independent of the state duty to protect human rights, we should not see these two pillars as watertight compartments. Rather, there is a dynamic relationship between the two pillars. The proposed international instrument may, for example, obligate states to require PMSCs to conduct mandatory human rights due diligence in accordance with the UNGPs. Even in the absence of such an instrument, states on their own can introduce legislation requiring PMSCs to conduct human rights due diligence as a condition of doing business.

Madam Chair, excellencies and distinguished delegates, I will finally turn my attention to the Remedy Pillar of the UNGPs, which is perhaps most relevant to the issue of access to justice and remedies for victims of human rights violations linked to the activities of PMSCs.

It is trite that rights without effective remedies do not really mean much in practice. The third pillar of the UNGPs contemplates three broad types of remedy mechanisms: state-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state based grievance mechanisms. All these three types of mechanisms have a potential to provide remedy to victims and in turn hold PMSCs accountable for human rights abuses.

States have a key role to play in taking appropriate legislative, judicial and administrative steps to provide victims effective, adequate and prompt remedies against PMSCs as well as

their personnel. The importance of effective judicial remedies cannot be over-emphasised, because non-judicial and other non-state-based mechanisms tend to work better if robust judicial mechanisms are present. Moreover, certain human rights abuses linked to the activities of PMSCs may be so serious that judicial remedies (including criminal sanctions) will be the only appropriate remedies.

One important tool for states to strengthen access to effective remedy is by removing legal, practical and other relevant barriers in accessing or enforcing judicial remedies. Such barriers include lack of independent or adequately resourced courts, difficulties in collecting evidence from across borders, incapacity or unwillingness of state agencies to prosecute, judicial delays, high cost of legal proceedings, non-availability of relevant information to victims, lack of competent legal representation, complex corporate structures, and transnational nature of business operations. The OHCHR's Accountability and Remedy Project provides important recommendations on how some of these barriers could be removed. The intergovernmental working group should consider using these recommendations in its work of developing a legally binding instrument.

In terms of state-based non-judicial grievance mechanisms, the potential of national human rights institutions and National Contract Points established under the OECD Guidelines for Multinational Enterprises could be harnessed to address at least certain types of human rights abuses linked to the activities of PMSCs.

Finally, the UNGPs envisage a role for non-state-based grievance mechanisms which can be administered by business enterprises, an industry association, or a multi-stakeholder body. Operational-level grievance mechanisms, if designed in compliance with the effectiveness criteria laid down in Principle 31 of the UNGPs, could provide an early and cost-effective remedy to the affected individuals in certain situations.

The International Code of Conduct for Private Security Service Providers, in fact, establishes an operational-level grievance mechanism. The Code requires signatory companies to establish grievance procedures to address claims alleging failure to respect the principles contained therein. The Code requires the signatory companies to ensure that the grievance

procedures are “fair, accessible and offer effective remedies”. The signatory companies should also “publish details of their grievance mechanism on a publicly accessible website”, and “investigate allegations promptly, impartially and with due consideration to confidentiality”. There is scope for improving this mechanism and make it fully compliant with Principle 31 of the UNGPs. Care should also be taken that operational-level grievance mechanisms should never be used to exclude access to judicial mechanisms.

It should be acknowledged that considering the nature of PMSCs’ activities, out of the three types of remedial mechanisms contemplated by the UNGPs, the state-based judicial remedies are likely to be the most relevant in addressing many serious human rights abuses linked to the activities of PMSCs. This again reaffirms the pivotal role that states, both acting individually and collectively, have in regulating the activities of PMSCs.

Madam Chair, let me conclude by saying that this intergovernmental working group should draw inspiration from various provisions of the UNGPs in discharging its mandate to develop a binding international regulatory framework to regulate effectively the activities of PMSCs and to hold them accountable for human rights violations. Needless to say that it will also be critical to build on the Montreux Document and pay attention to the work of other relevant processes such as the open-ended intergovernmental working group on TNCs. The Working Group on Business and Human Rights looks forward to engage constructively with this process during this session and in future.

Thank you very much for your kind attention.