



UNITED NATIONS HUMAN RIGHTS COUNCIL

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

INTERNATIONAL COMMISSION OF JURISTS: CONTRIBUTION IN RESPONSE TO THE WORKING GROUP'S CALL FOR INFORMATION FOR ITS THEMATIC REPORT CONCERNING THE HUMAN RIGHTS IMPACT OF PRIVATE MILITARY AND SECURITY COMPANIES (PMSCS) OPERATING IN THE EXTRACTIVE INDUSTRY

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Contribution by the ICJ on the issue of Private Military and Security Companies and extractive industries

The present contribution by the International Commission of Jurists (ICJ) is in response to the call for submissions issued 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 (Working Group on the use of Mercenaries).¹ It focuses on cases and facts that give rise to legal or policy issues of relevance for the mandate of the Working Group and its proposed report. It takes into account the Guiding questions provided by the Working Group, in particular the sections 3 and 4 of those questions. The ICJ has been monitoring some of the reported cases and situations in Guatemala and Tanzania.

I. Context

Prevalence and trends in the use of PSC in the extractive industry

1. Private Military and Security Companies (PMSCs) are frequently hired by companies engaged in extractive operations in all geographic regions of the world, but their activities or operations that give rise to allegations of human rights violations and abuses seem to be prevalent in Africa, Latin America and Asia regions where abundance of natural resources and the favourable environment for foreign investment are propitious to the establishment of extractive companies in, many times, fragile contexts.

2. The proliferation of PMSC's services in the African region has been explained by one commentator as motivated by the demand for specific security services not provided by the public sector in the context of the abundance of natural resources.² The extractive industries in Africa are among the main consumers of PMSCs' services. This is said to be due to the fact that they "require large and complex security networks to safeguard their activities and protect assets from regional threats including criminal piracy, trafficking cartels, guerrilla forces and expropriation efforts by corrupt government regimes".³ Another reason for hiring PMSCs is the perceived threat posed by informal large-scale and often unauthorized mining by villagers living around the mines, who sometimes engage in collecting mineral rocks in the waste dumps of a mine to make a living for themselves and their families.

3. In addition to the generalized practice in the Latin America region to create in-house security units within large companies [in all sectors],⁴ contracting PMSCs for

¹ UN Working Group on the Use of Mercenaries, Call for Submissions, <https://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/CallforsubmissionsPrivateMilitarySecurity.aspx>.

² Carlos Díaz Bodoque, 'PMSC'S and Extractive Industries in Southern Africa: a Good Business for Everyone?' (*Shock Monitor*, 2019), <http://shockmonitor.org/pmscs-extractive-industries-southern-africa-good-business-everyone/>.

³ *Ibid.*

⁴ The Geneva Centre for the Democratic Control of Armed Forces, The United Nations Regional Centre for Peace, Disarmament and Development in Latin America and the Caribbean, 'Armed Private Security in Latin America and the Caribbean: Oversight and Accountability in an Evolving Context' (2016) https://www.dcaf.ch/sites/default/files/publications/documents/COMPRESSED_DCAF%20UNLIREC_Armed-

addressing the particular security needs of extracting companies is also common. The reliance on informal security companies⁵ in the region creates additional challenges to accountability and compliance. The security needs are often predetermined by the location of the mining operations in the rural areas, populated by indigenous peoples, who have long-standing ties and claims to the lands at question.⁶

4. Among the reasons for contracting a PMSCs, some companies advance the need to ensure security for operations that are frequently located in remote areas of a country, frequently inhabited by traditional or indigenous groups living in the area. and where state institutions, including the security apparatus, are thinly if at all present. In those contexts, extractive companies sometimes find it more advantageous to conclude agreements with the army or police to provide specialized support to security arrangements around the operational sites, but such arrangements are typically also accompanied by the hiring of private security guards who will work in a coordinated fashion with police and army.

5. Recent reports document the potential continued expansion of private security services to extractive industries, in particular in Africa.⁷ There are also prospects at the expansion of security companies with substantive state ownership and linked to state supported projects.⁸

2. Alleged human rights abuses by private security actors in the extractive industry

PMSCs' involvement in the commission of human rights abuses, many of them of substantial gravity, is frequent in the context of services provided to private or publicly owned extractive industries (in particular, mining, oil and gas). The following paragraphs provide an overview of some instances of alleged abuse that have been publicly reported across continents and which raise important legal and policy issues. The prevalence of alleged abuse, especially those disclosing the occurrence of serious human rights abuses potentially constituting criminal offences, suggest a lack of, or failure in, the effective implementation of preventive legal frameworks and mechanisms as well as remediation systems.

In **Angola**, there have been reports of a number of human rights abuses by private security companies in the Angolan diamond mining industry, including at least 50 cases allegedly perpetrated by the security company Teleservice that had been hired to provide security services at the mining concessions.⁹ According to the report by Rafael Marques de Morais, when confronting with unauthorized diggers, the company did not contact the police but instead demanded bribes, subjected diggers to forced labour, or and in some cases are alleged to have unlawfully killed them.¹⁰ For instance, on 5 February 2010, Kito Eduardo Antonio was reportedly killed at the Dunge mine by a Teleservice guard, after failing to provide a requested bribe to the guards. The police were said to have blamed Kito Antonio for his own death as he was engaged in an unauthorized activity and failed to investigate any further.¹¹

[Private-Security-in-Latin-America-and-the-Caribbean_Oversight-and-Accountability-in-an-Evolving-Context-2016.pdf](#), p. 17.

⁵ *Ibid*, p. 17.

⁶ See for example *Garcia v Tahoe Resources Inc.* discussed below.

⁷ Antony Loewenstein, 'From Blackwater to Batteries' (Foreign Policy Magazine, 2019)

<https://foreignpolicy.com/2019/01/25/from-blackwater-to-batteries-erik-prince-congo-drc-minerals-cobalt-afghanistan-mercenaries/>.

⁸ See for example, United States Institute of Peace, 'Special Report: Securing China's Belt and Road Initiative' (2018), https://www.usip.org/sites/default/files/2018-11/sr_436_securing_chinas_belt_and_road_initiative_web.pdf.

⁹ Rafael Marques de Morais, *Blood Diamonds: Corruption and Torture in Angola* (2015)

<http://www.tintadachina.pt/pdfs/626c1154352f7b4f96324bf928831b86-insideENG.pdf>, p. 53.

¹⁰ *Ibid*, p. 71-72.

¹¹ *Ibid*, p. 71.

In South Africa a substantial number of cases human rights abuses have allegedly been committed by private security persons in the extracting industry over the last decade. Private security services providers are said to outnumber the members of the South African Police Service as well as the military, but are said to be subject to much less State control and oversight.¹² A Private Security Industry Regulation Amendment Bill considered by Parliament in 2014, would have set limits on foreign ownership in the local private security companies, and may well have put great strains on the future viability of private security companies in South Africa.¹³ The Bill met significant resistance from the security industry interests and has so far been not been enacted into law.

The record of submissions to the South African Human Rights Commission concerning violations committed by the PMSC include violations of the right to privacy resulting from searches, unlawful arrests and detentions, the use of illegal equipment, as well as resort to evictions, mainly performed by police, but sometimes by PMSCs.¹⁴ A number of Commission's investigations focus on the determination of whether a particular instance of use of lethal force has been perpetrated by police or by a PMSCs.

After the 2012 Marikana mine incidents, private security companies at mines have reportedly increased their use of firearms¹⁵ and are more willing to apply deadly force.¹⁶ Since that year there have been frequent reports of guards allegedly using lethal force, kidnapping, false arrest against picketing, striking, or unauthorized miners at chrome Rustenburg mine,¹⁷ Kimberley Ekapa Mining Joint Venture site,¹⁸ and mine in Benoni.¹⁹ In other recent incidents, a private security company guards shot and injured eight demonstrators outside the Glencore mine in Marikana (operated by Glencore Merafe Chrome Venture) in June 2018.²⁰ The guards fired rubber bullets at the group of protesters and claimed the protesters had been aggressive.²¹ There was no reported investigation of the incident.

In Tanzania, there have been reports of several incidents of human rights abuse at the North Mara Mining Company Ltd. Some of the cases gave raise to civil litigation before the UK High Court in 2013. Twelve claimants filed a suit at law for loss and damage against African Barrick Gold Plc (now Acacia Mining based in London), and North Mara Gold Mine Limited relating to incidents between 2010 and 2012.²² According to the Claimants, the company failed to prevent the use of excessive force by mine security and the police, who shot at and used tear gas and live ammunition

¹² The Danish Institute for Human Rights, 'Human Rights and Business Country Guide South Africa' (2015), <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/south-africa.pdf>, p. 91.

¹³ 'New Laws Could Mean the End of Private Security as we Know it in SA: Report' (<https://businesstech.co.za>, 2017) <https://businesstech.co.za/news/business/175651/new-laws-could-mean-the-end-of-private-security-as-we-know-it-in-sa-report/>.

¹⁴ See, Human Rights and Business Country Guide South Africa, *op. cit.* 12, p. 91.

¹⁵ *Ibid.*

¹⁶ Phillip De Wet, 'Mine Security Forces Ready to Open Fire' (*Mail&Guardian*, 2012) <https://mg.co.za/article/2012-09-07-00-mine-security-forces-ready-to-open-fire>.

¹⁷ 'Lanxess Strike: South African Miners Shot with Rubber Bullets' (*BBC News*, 2013) <https://www.bbc.com/news/world-africa-22607046>.

¹⁸ Murray Swart, 'Security Accused of Kidnapping Miner' (*DFA*, 2017) <https://www.dfa.co.za/news/security-accused-of-kidnapping-miner-11911060>.

¹⁹ Kimberly Mutandiro, 'Informal Gold Miner Shot Dead and Eight Arrested' (*GroundUp*, 2018) <https://www.groundup.org.za/article/informal-gold-miner-shot-dead-and-eight-arrested/>.

²⁰ Iavan Pijoos, 'Private Security Company Opens Fire on Protesters, Injuring Eight in Marikana' (*News24*, 2018) <https://www.news24.com/SouthAfrica/News/private-security-company-allegedly-opens-fire-on-protesters-injuring-five-in-marikana-20180626>.

²¹ *Ibid.*

²² The High Court of Justice, Queen's Bench Division, *Magige Ghati Kesabo & Ors v African Barrick Gold Plc & Anor* [2013] EWHC 4045 (QB), para. 3 (The High Court of Justice, Queen's Bench Division).

against the villagers.²³ The Defendants disclosed that the police formed an integral part of the security at the Mine under a Memorandum of Understanding,²⁴ in exchange for monetary compensation.²⁵ Six Claimants represented individuals who were killed in the shooting at the mine in May 2011,²⁶ and two claimed injuries allegedly sustained when security guards “pushed rocks down onto people in the open pit”.²⁷ The defendants argued that the security guards and police had acted in self-defence against trespassers at the mine property who they alleged intended to steal gold-bearing rocks.²⁸ It is a common occurrence in the area that villagers come into the mine in search of rocks to extract small amounts of gold to gain an income.²⁹ The claims were eventually settled out of court.³⁰

Another type of reported human rights abuses at the North Mara Mine is sexual violence against women. Several women claimed to have been subjected to rape and other sexual violence by the mine security guards or the police, employed for guarding the mine.³¹ Many of these women were later abandoned by their husbands and others acquired injuries or diseases that impair their ability to work.³²

In 2017 another group of claimants, again represented by UK lawyers, commenced claims in UK courts alleging that Acacia had been unwilling to properly compensate them for serious human rights abuses, including relatives killed by police or mine security, rape and violence. These cases are ongoing.

The North Mara mine management has a stated policy to report potential criminal conduct to the authorities. However, there is no evidence of effective investigations and prosecutions of the mine security guards and members of the police’s misconduct, and there is no information about the mine’s further action in that regard.³³ The local circumstances and actors beg the question of whether the police and local authorities are able and/or willing to carry out effective, thorough and impartial investigations into the serious allegations of abuse.

The company has attempted to address the instances of abuses and complaints, including by establishing a company-led grievance mechanism. Acacia’s Community Grievance Management and Resolution Procedure³⁴ requires its mines to put in place grievance procedures to “manage complaints and grievances from communities and other local stakeholders in a systematic, fair, timely and transparent manner.” It is in this context that Acacia developed its Community Grievance Process which aims to enable people to raise grievances regarding impacts they believe are associated with the mine. Acacia now also includes a section in its Annual Report and Accounts that

²³ 'African Barrick Gold Lawsuit (Re Tanzania)' (*Business and Human Rights Resource Centre*, 2015) <https://www.business-humanrights.org/en/african-barrick-gold-lawsuit-re-tanzania#c86302>.

²⁴ African Barrick Gold Plc., 'North Mara Update' (2011) <https://www.acaciamining.com/~media/Files/A/Acacia/press-release/2011/North-Mara-update-Sept-30>, p. 3.

²⁵ See, *Magige Ghati Kesabo & Ors v. African Barrick Gold Plc & Anor*, *op. cit.* 22, para. 4.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Trevor Snapp, 'Deadly Clashes Continue at African Barrick Gold Mine' (*The Globe and Mail*, 2018) <https://www.theglobeandmail.com/report-on-business/international-business/deadly-clashes-continue-at-african-barrick-gold-mine/article20216197/>.

³⁰ John Vidal, 'British Gold Mining Firm Agrees Settlement over Deaths of Tanzanian Villagers' (*The Guardian*, 2015) <https://www.theguardian.com/environment/2015/feb/10/british-gold-mining-settlement-deaths-tanzanian-villagers>.

³¹ Mining Watch Canada & Rights and Accountability in Development, 'Background Brief: Adding Insult to Injury at the North Mara Gold Mine, Tanzania' (2016) https://miningwatch.ca/sites/default/files/adding_insult_to_injury_north_mara_0.pdf, p. 2.

³² *Ibid.*, p. 6.

³³ *Ibid.*, p. 3.

³⁴ Acacia Mining, 'Community Grievance Management and Resolution Procedure' (2011) <https://www.acaciamining.com/~media/Files/A/Acacia/documents/acacia-community-grievance-management-201606.pdf>.

details the number and type of grievances received. But the system has been the target of strong criticism by several groups.³⁵

In **Zimbabwe**, there have been a number of cases of alleged human rights abuses security guards in the diamond and gold mining industry. These allegations include shooting and heavy beating of miners,³⁶ as well as unleashing dogs against them on a number of occasions.³⁷ Most of these cases remain unreported as miners, who many times operate without permission, are said to fear arrest.³⁸

There have been many cases reported at the Marange Resources mining area. In March 2013 Herbert Manhanga was reportedly shot dead by security guards employed by the company.³⁹ No official investigation was said to have been initiated. In 2015 an unauthorized miner was killed by security guards and two others injured.⁴⁰ In April 2013, another miner was reportedly beaten and shot dead by security guards at a gold mine operated by the Development Trust of Zimbabwe and OZGEO.⁴¹ After being chased by the guards the miner was reported missing, only to be found dead later, his body with signs of severe beating, dumped in the waters of Mutare River, located at the mine.⁴² In 2018 the director of the Centre of National Resources Governance, Farai Maguwu, reported the killing of 15 people by Zimbabwe Consolidated Diamond Company's (ZCDC) security guards in the period from 2016.⁴³ In May 2018 ZCDC was reported to have ordered an investigation into allegations of violence and human rights abuses.⁴⁴

In respect of activities in **Guatemala**, seven persons filed a lawsuit in June 2014 in Canada against **Tahoe Resources Inc.**, a Vancouver registered mining company, operating in Guatemala through its Guatemalan subsidiary - Minera San Rafael S.A (hereinafter - MSR).⁴⁵ They alleged that Tahoe security personnel shot at them while peacefully protesting outside the gates of Escobar mine, controlled by Tahoe, on 23 April 2013.⁴⁶ They also alleged that the security services, including personnel, at the Escobal mine were provided by the following companies: Grupo Golan (a.k.a. Alfa Uno) and Counter Risk S.A.⁴⁷ They also denounced intimidation and harassment by the mine management.⁴⁸

According to the plaintiffs, on April 27, 2013 the protesters, who had settled camp nearby, assembled in front of the mine gates.⁴⁹ The security guards allegedly opened fire against them using, among others, shotguns, rubber bullets and buck shots,

³⁵ See, 'Background Brief: Adding Insult to Injury at The North Mara Gold Mine, Tanzania, *op. cit.* 31.

³⁶ 'Zimbabwe: Rampant Abuses in Marange Diamond Fields' (*Human Rights Watch*, 2011)

<https://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Centre for Research and Development (2013)

http://archive.kubatana.net/docs/demgg/crd_update_on_marange_130402.pdf, p. 6.

⁴⁰ Carlos Díaz Bodoque, 'PMSC'S and Extractive Industries in Southern Africa: a Good Business for Everyone?' (*Shock Monitor*, 2019) <http://shockmonitor.org/pmscs-extractive-industries-southern-africa-good-business-everyone/>.

⁴¹ Centre for Research and Development (2013)

http://archive.kubatana.net/docs/demgg/crd_penhalonga_report_update_130424.pdf, p. 2.

⁴² *Ibid.*

⁴³ Shock Monitor, case 0277ZWE, <http://shockmonitor.org/shock-monitor/find-data/>.

⁴⁴ 'Probe into Marange Violence, Abuses Begin' (*NewsDay*, 2018) <https://www.newsday.co.zw/2018/05/probe-into-marange-violence-abuses-begins/>.

⁴⁵ Court of Appeal for British Columbia, *Garcia v Tahoe Resources Inc.* [2017], BCCA 39 (Court of Appeal for British Columbia), <https://www.cci.ca/content/uploads/2017/01/2017-BCCA-39-Garcia-v.-Tahoe-Resources-Inc.pdf>, para. 17.

⁴⁶ Notice of Civil Claim (Garcia V. Tahoe Resources Inc.) (*Business and Human Rights Resource Centre*, 2019) https://www.business-humanrights.org/sites/default/files/documents/Notice_Civil_Claim.pdf, para. 1, 3.

⁴⁷ *Ibid.*, para. 27.

⁴⁸ *Ibid.*, para. 32.

⁴⁹ *Ibid.*, para. 38.

causing injuries in their faces, legs and backs.⁵⁰ The lawsuit for damages alleges that Tahoe is directly and vicariously responsible for the events.

In other cases concerning Guatemala, three separate groups have sued **HudBay Minerals Inc.**, a mining company incorporated in Canada. The cases concern the Hudbay's Fenix Mining Project, located in El Estor, Guatemala, which HudBay owns and operates through its subsidiaries HMI Nickel Inc., registered in Canada, and Compañía Guatemalteca de Niquel S.A. (registered in Guatemala).⁵¹ The operation of the Fenix project has met with continuous opposition from local communities who allege lack of consultation regarding land that they claim as their ancestral homeland.⁵² To ensure the security of the project, CGN employed the security company Integracion Total S.A., whose employees were located with CGN.⁵³

In *Choc v Hudbay Minerals Inc., HMI Nickel Inc. and Compañía Guatemalteca de Niquel S.A.*, the plaintiff brought a claim on behalf of her deceased husband, a community leader and a schoolteacher opposed to the Fenix Mining Project, who allegedly was shot dead in September 2009 by security guards working for the project. It is alleged that the guards beat him, struck him with a machete and subsequently shot him on his head at a close range.⁵⁴ Hudbay is alleged to have direct responsibility for its own acts in the events on the grounds of negligence, for "failing to prevent the harms that they (the security guards) committed."⁵⁵ The case is ongoing.

In *Caal v Hudbay Minerals Inc. and HMI Nickel Inc.*, 11 Guatemalan women alleged HudBay and HMI's negligent omission when they were sexually assaulted by several Fenix Mining Project security guards that caused them physical and psychological harm.⁵⁶ In *Chub Choc v Hudbay Minerals Inc., and CGN* German Chub alleged gunshot wounds caused in an unprovoked attack by Hudbay's security personnel in September 2009.⁵⁷ These cases are ongoing.

In **Greece**, mining company Hellas Gold SA, majority owned by Canadian Eldorado Gold, has had since 2012 tensions with local communities around its operation of the mines in Halkidiki due to the "lack of adequate consultation, economic and environmental concerns as well as perceived social impact", in addition to possible impacts on access to water.⁵⁸ Police and private security of the mine are alleged to have subjected demonstrators to false "arrests" and excessive use of force.⁵⁹ In April 2012 six women reported harassment by security guards of Hellas Gold at a security pass.⁶⁰

⁵⁰ *Ibid*, para 5.

⁵¹ Statement of Claim (*Choc v Hudbay Minerals Inc., HMI Nickel Inc. and Compania Guatemalteca de Niquel S.A.*), Ontario Superior Court of Justice (2010), para. 10-11.

⁵² For the context see: International Commission of Jurists: Empresas y violaciones de los derechos humanos en Guatemala: Un desafío para la justicia, 2014, <https://www.icj.org/wp-content/uploads/2014/03/Guatemala-empresas-y-violaciones-a-los-derechos-humanos-report-2014-spa.pdf>, p. 62; also 'Hudbay Minerals Lawsuits (Re Guatemala)' (*Business and Human Rights Resource Centre*, 2017) <https://www.business-humanrights.org/en/hudbay-minerals-lawsuits-re-guatemala-0>.

⁵³ *Op. cit.* 51, para 17-18.

⁵⁴ *Ibid*, para. 39.

⁵⁵ *Ibid*, para. 69.

⁵⁶ Statement of Claim (*Caal v. Hudbay Minerals Inc., HMI Nickel Inc.*), Ontario Superior Court of Justice (2011).

⁵⁷ Statement of Claim (*German Chub Choc v. Hudbay Minerals Inc., Compania Guatemalteca de Niquel S.A.*), Ontario Superior Court of Justice (2013).

⁵⁸ 'Greece: Locals Continue to Protest Over Environmental & Social Impacts of Eldorado Gold's Mine in Halkidiki – Company Response Provided' (*Business and Human Rights Resource Centre*, 2013) <https://www.business-humanrights.org/en/documents/greece-locals-continue-to-protest-over-environmental-social-impacts-of-eldorado-golds-mine-in-halkidiki-%E2%80%93-company-response-provided>.

⁵⁹ Elia Apostolopoulou and Jose A. Cortes-Vazquez, 'Beyond Winning and Losing: The Use of the Social Movement Against Mega-Mining Projects in Northern Greece. Welcome to the Greek Eldorado', *The Right to Nature: Social Movements, Environmental Justice and Neoliberal Natures* (1st edn, Earthscan 2018).

⁶⁰ 'Demonstrations Repression' [2013] Soshalkidiki https://soshalkidiki.files.wordpress.com/2012/11/soshalkidiki_01_en.pdf, p. 17.

In **Taiwan**, the German wind power company InfraVest GmbH reportedly planned to build 14 wind turbines. The plan was opposed by local residents who staged public demonstrations and went on hunger strike.⁶¹ Some people expressed their fear that InfraVest employment of private security guards could result in surveillance and other activities that would interfere with the locals' rights to privacy, and freedom of movement. One instance of beatings against elder residents was reported.⁶² Furthermore, InfraVest prompted criminal proceedings against some of the local opponents to its projects alleging their use of violence, which could be seen as a form of intimidation.⁶³ The court of the first instance and the appellate court both acquitted the members of the local community.⁶⁴

One of the most notorious incidents concerning the role of private security in abuses committed in the context of mining operations relates to the Porgera mine in **Papua New Guinea**. Security guards at the Porgera Joint Venture gold mine (at that time Barrick Gold's majority ownership, now co-owned by Zijin Mining Group)⁶⁵ have been accused of sexual assault, including rape, against local women, and other abuses. The private security force monitors the mine site and the waste dumps, in coordination with the police.⁶⁶

The area surrounding the Porgera Mine has traditionally been populated by indigenous people, but the population has grown as a result of incoming migration attracted by the mine.⁶⁷ Due to lack of alternatives, many people enter the mine in search of waste rocks containing small amounts of gold.

Sexual violence against women perpetrated by the Porgera Mine security guards include gang rape in the nearby waste dumps where the women engage in unauthorized mining. Women have allegedly been threatened and some of them were given a choice by guards between being raped or going to prison. Most have been beaten too, but none have reported the incidents to the local police out of fear.⁶⁸

In 2012 Barrick Gold recognized the incidents of sexual violence at the Porgera Mine and created the Remediation Framework, a grievance mechanism to provide remedy to victims of sexual violence.⁶⁹ However, the Remediation Framework has been criticized by EarthRights International for its failure to provide effective remedies. Most compensation packages consist of business training, set up by Barrick, fees for children's education, and a small financial supplement in exchange for promises not to sue Barrick Gold.⁷⁰ It is feared that victims of rape would be stigmatized and ostracised in their community if the events are publicly known.⁷¹ In these cases, the

⁶¹ 'InfraVest Project of Improper Wind Turbines, Yuanli, Taiwan' (*Environmental Justice Atlas*, 2018) <https://ejatlas.org/conflict/infraVest-windenergy-taiwan>; Ketty Chen and J. Michael Cole, 'Wind Turbine Troubles' (*Taipei Times*, 2013) <http://www.taipetimes.com/News/feat/archives/2013/06/17/2003564971>.

⁶² Shock Monitor, case 0108TWN, <http://shockmonitor.org/shock-monitor/find-data/>.

⁶³ *Op. cit.* 61.

⁶⁴ *Ibid.*

⁶⁵ Barrick Gold Inc., 'Factsheet, February' (2019) <https://barrick.q4cdn.com/788666289/files/presentation/2019/Barrick-Fact-Sheet-Feb2019.pdf>, p. 5.

⁶⁶ EarthRights International, 'FACTSHEET: Abuse by Barrick Gold Corporation' (2018) https://earthrights.org/wp-content/uploads/documents/barrick_fact_sheet_-_earthrights_international_1.pdf, p. 2.

⁶⁷ Human Rights Watch, 'Gold's Costly Dividend Human Rights Impacts of Papua New Guinea's Porgera Gold Mine' (2011) <https://www.hrw.org/report/2011/02/01/golds-costly-dividend/human-rights-impacts-papua-new-guineas-porgera-gold-mine#e30405>.

⁶⁸ *Ibid.*

⁶⁹ Barrick Gold Inc., 'A Framework for Remediation Response to Violence Against Women in Porgera Valley' (2012) <https://barrick.q4cdn.com/788666289/files/porgera/Framework-of-remediation-initiatives.pdf>, p. 7.

⁷⁰ EarthRights International, 'Survivors of Rape by Barrick Gold Security Guards Offered "Business Grants" and "Training" in Exchange for Waiving Legal Rights' (2014) https://earthrights.org/wp-content/uploads/documents/barrick_press_release_-_earthrights_international.pdf, p. 1.

⁷¹ Susan M. Manning, 'Intersectionality in Resource Extraction: a Case Study of Sexual Violence at the Porgera Mine in Papua New Guinea' [2016] *International Feminist Journal of Politics*

Remediation Framework appeared to be the only way for the victims to get some limited "compensation".

Other allegations of human rights abuse at the Porgera Mine include instances of unlawful killings and violent physical assault.⁷² As the Remediation Framework's mandate is limited to the female victims of sexual violence, the claims of the victims of the other human rights abuses remained unaddressed.⁷³

3. International, national and company-level regulations, mechanisms and procedures

The case examples highlighted above of human rights abuses alleged to have been committed directly or with the participation of security companies working in or for extractive companies illustrate a range of issues of legal and policy significance that the Working Group should carefully consider to support the enhancement of legal and accountability frameworks for PMSCs. These issues include access to justice and effective remedies, including jurisdiction of domestic and foreign courts, State duties and action to investigate and sanction human rights violations and abuses, setting out applicable standards of civil and criminal liability, and good practices and policies of corporate social responsibility.

State duty to protect human rights

Under international human rights law, States have a general duty to protect human rights against potential violations, including abuses from private parties such as business enterprises. They are required to take appropriate measures to prevent abuses and, when they occur, to effectively investigate, hold those responsible to account and ensure access to remedy for those affected. This obligation to protect entails a series of steps and measures and applies to all human rights, civil and political as well as economic, social and cultural rights.⁷⁴ One key element of the duty to protect is the exercise of reasonable due diligence in taking measures to prevent, investigate and redress harm caused by third parties⁷⁵

The obligation to protect human rights and prevent their infringement by private parties also entail the adoption by states of legislative, administrative, educational and other appropriate measures, to ensure effective protection against violations linked to business activities,⁷⁶ and, under ICCPR Article 6, "an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from

https://www.researchgate.net/publication/304069722_Intersectionality_in_resource_extraction_a_case_study_of_sexual_violence_at_the_Porgera_mine_in_Papua_New_Guinea, p 16.

⁷² The Business of a Better World, 'In Search Of Justice: Pathways To Remedy At The Porgera Gold Mine' (2018) https://www.bsr.org/reports/BSR_In_Search_of_Justice_Porgera_Gold_Mine.pdf, p.20.

⁷³ *Ibid*, p. 23.

⁷⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, <https://www.refworld.org/docid/4538838c11.html>, para 15 ; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, <https://www.refworld.org/docid/4538838d11.html>, para 23-24.

⁷⁵ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, <https://www.refworld.org/docid/478b26ae2.html>, para. 8; *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrHR), 29 July 1988, https://www.refworld.org/cases_IACRTHR_40279a9e4.html, para 174-175.

⁷⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, <https://www.refworld.org/docid/5beaecba4.html>, para 14.

all reasonably foreseeable threats, including from threats emanating from private persons and entities.”⁷⁷

The UN Guiding Principles on Business and Human Rights restates these obligations in Principle 1: “States must protect against human rights abuse... by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”.

In certain cases, the state has a heightened duty to protect the rights of people with some form of disadvantage or in vulnerable position.⁷⁸ The review of cases above shows that in many cases the position or status of affected individual, often as marginalized or disadvantaged persons, affects their capacity to access the protection of the law by having recourse to law enforcement and judicial authorities. Clearly, many persons refrain from reporting the abuses for fear to face criminal charges themselves, such as in the cases of unauthorized miners, or face other forms of retaliation. In many cases, especially in the cases related to sexual violence, the alleged victims are afraid to make claims to local police and, all the more so, to file a case in a local court due to stigmas attached to the incidents of sexual violence. There are also cases of corruption of the police or other local authorities result in their unwillingness to fulfil their function to conduct thorough, prompt, impartial and effective investigations and, if there is enough grounds, to prosecute.

States have a duty to carry out prompt, impartial and effective investigations, leading to possible prosecutions when warranted, which in situations where people are in vulnerable position carry heightened importance.⁷⁹ Law enforcement, in particular prosecution services, should be more proactive, given the many factors that hinder victims’ ability to have recourse to legal protection. The information presented above shows that these duties are often disregarded.

Access to justice and jurisdiction

The right to an effective remedy is universally recognized and protected under all core international and regional human rights treaties.⁸⁰ Judicial remedies are required when serious human rights violations, in particular when those amounting to crimes defined in international law, are concerned. In a series of decisions, the UN Human Rights Committee has considered that “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights.”⁸¹

⁷⁷ UN Human Rights Committee (HRC), CCPR *General comment no. 36: Article 6 (Right to life)*, 30 October 2018, CCPR/C/GC/36, para. 18, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.

⁷⁸ *Ibid.*, para. 23 “The duty to protect the right to life requires States parties to take special measures of protection towards persons in situation of vulnerability whose lives have been placed at particular risk...”.

⁷⁹ *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, 2005; *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*, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 (*UN Basic Principles*); see generally ICJ, *Practitioners Guide 2 The right to effective remedy and reparation 2018*, <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

⁸⁰ In particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and articles 68 and 75 of the Rome Statute of the International Criminal Court. See *UN Basic Principles*.

⁸¹ *Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995), para 8.2. See also *Jose Vicente y Amado Villaña et al vs Colombia*, Communication No. 612/199, 5 para. 8.2, and the *UN Basic Principles, Ibid.*

Some of the cases concerning PMSCs that gave rise to transnational civil litigation illustrate the existing jurisdictional barriers that claimants must overcome to access effective remedies and find justice. Litigation in the home state of the investment or the parent company may be justified in a number of cases: where domestic judicial systems are unable to dispense justice in accordance with international standards, when the nature of the offence/tort or the perpetrators and accessories themselves warrant prosecution in other jurisdictions. In most cases, the claims are opposed through jurisdictional challenges in respect of foreign companies and facts that occurred abroad. In this regard, a number of grounds are used to challenge jurisdiction.

In some common law jurisdictions, defendant companies have requested the courts to decline jurisdiction and defer the case to another jurisdiction deemed to be a more convenient forum (in application of the *forum conveniens* doctrine). Defendant companies have claimed that the countries, where the subsidiaries are located are the appropriate forums for the consideration of the claims.⁸² This ground for barring jurisdiction of home-State courts constitutes a barrier to access to justice.

This issue impacts all kinds of cases across industry sectors, but the following paragraphs will focus on how some judicial decisions in cases concerning extractive industries and private security companies have addressed the doctrine of *forum non conveniens* among other considerations relating to access to justice.

In *Garcia v Tahoe Resources Inc.*, described above, a 2015 decision by the Supreme Court of British Columbia stayed proceedings in Canada at the defendant company's request, finding Guatemala to be the appropriate forum for the consideration of the case.⁸³ In overruling this judgment, the British Columbia Court of Appeal⁸⁴ clarified the standard to be applied in a motion of *forum non conveniens*. It indicated that alternative forum should be "clearly more appropriate" in resolving the dispute and in ensuring fairness to the parties. The party filing the motion bears the burden of showing another forum is clearly more appropriate. In its decision, the Court of Appeal assessed two factors that were decisive in the lower court's decision to stay proceedings: the existence of ongoing criminal proceedings in Guatemala, in the context of which the claimants might join as civil party and seek compensation, and the possibility for claimants to file a stand-alone civil suit to claim compensation. In both counts Guatemala was found lacking, and the Court of Appeal concluded that it was clearly not an appropriate forum for the claim.

In particular, in its examination of whether the possibility of filing a stand-alone civil suit for damages in Guatemala would make that jurisdiction the more appropriate forum, the Court of Appeal made a series of considerations which might be of relevance for the general discussion of when a given jurisdiction or justice system may be considered as capable of providing a fair trial. One of them is the issue of procedural fairness. The Court of Appeal looked at the inexistence in Guatemala of the procedural step of "discovery" that would allow claimants to have access to evidence in the power of Tahoe and its subsidiary in Guatemala (Minera San Rafael- MSR). Without such procedural tool at their disposal plaintiffs would find it difficult, if not impossible to have access to key evidence to make their case and have a fair trial.⁸⁵ The Court of Appeal also considered that the limitation period to commence a civil suit in Guatemala, one year under the Guatemalan Civil Code, had expired and was not waived by Tahoe, which would in practice mean that a possible civil suit would be barred. Finally, the Court found relevant that there was a risk that the claimants

⁸² See for example *Garcia v Tahoe Resources Inc.*; *Choc v Hudbay*; see generally: *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, CORE, ICAR, ECCJ, 2013, p. 34; Amnesty International, *Injustice Incorporated*, 2014, p. 127.

⁸³ Supreme Court of British Columbia, *Garcia v Tahoe Resources Inc.* [2015], BCSC 2045,

<https://www.cccj.ca/content/uploads/2017/01/2017-BCCA-39-Garcia-v.-Tahoe-Resources-Inc.pdf>, para 106.

⁸⁴ Court of Appeal for British Columbia, *Garcia v Tahoe Resources Inc.*, *op. cit.* 45, para. 54-55.

⁸⁵ *Ibid*, para. 76.

would have an unfair process in a context where they are confronting a powerful international company whose mining interests align with the political interests of the Guatemalan state, and the evidence of "endemic corruption in the Guatemalan judiciary".⁸⁶

International standards call for States to "remove substantive, procedural and practical barriers to remedies" including the use of *forum non convenience* doctrines.⁸⁷ The removal of this and other jurisdictional or access to justice barriers will also be beneficial in cases concerning extractive and security companies.

Legal liability of extractive and security companies

As stated above, states have a general duty to adopt measures to protect human rights against infringements by others, including private parties. The responsibility of states is in most cases one of due diligence, which means that the state is not responsible for the violation committed by the private actor but for its own conduct omitting to take appropriate measures to prevent certain human rights violations from occurring. The conduct of extractive and security companies may not be attributed to the state and engage state legal responsibility except in certain cases defined in international law. For instance, under Article 5 of the Articles of State Responsibility for Internationally Wrongful Acts (ARSIWA), a State is responsible for the conduct of private actors that are "empowered by the law of that State to exercise elements of the governmental authority". For purposes of attribution under the above article, the conduct of entity must concern governmental activity, not private or commercial activity.⁸⁸ As compared to attribution under Article 8, Article 5 presupposes that an entity is empowered to perform certain functions under domestic law.⁸⁹

Article 8 of the ARSIWA foresees the attribution of private conduct to a state "if the person or group of persons is in fact acting on the instructions of, or under the direction or control" of a State. This would require that a State "directed or controlled the specific operation and the conduct complained of was an integral part of that operation".⁹⁰

In practice, security personnel from one company providing services to other extractive companies are located within the latter's compounds and follow their instructions or are under their supervision, even in performing tasks of surveillance, arrest and others. But there may be situations in which those security personnel act in coordination or collaboration with the police or other public security forces, or eventually follow their instructions in joint specific operations. However, much will depend on the facts of each case. Looking at the situation from the state angle, action or omission by police or other public forces in joint operations with security personnel at the service of the extractive company may result in some form of State complicity.

As part of their obligation to protect human rights, states have an obligation to adopt legal frameworks necessary and appropriate to protect human rights against possible infringements by private actors, and provide access to effective remedy when abuses occur. In relation to the latter, the Committee on ESCR has emphasized that:

"States parties have the duty to take necessary steps to address these challenges in order to prevent a denial of justice and ensure the right to effective remedy and reparation. This requires States parties to remove

⁸⁶ *Ibid*, para. 127, 130.

⁸⁷ CESCR, General Comment No. 24, *op. cit.* 76, para 44; Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states, 'Business and Human Rights', (2016) https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4, para 34.

⁸⁸ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, November 2001, Supplement No. 10 (A/56/10), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, p. 43.

⁸⁹ *Ibid*.

⁹⁰ *Ibid*, p. 47.

substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes, providing legal aid and other funding schemes to claimants, enabling human rights-related class actions and public interest litigation, facilitating access to relevant information and the collection of evidence abroad, including witness testimony, and allowing such evidence to be presented in judicial proceedings.”⁹¹

According to the Working Group on Mercenaries and PMSCs’ studies and reports, there are important gaps in domestic legal frameworks concerning regulation and legal liability of business enterprises, especially in relation to holding companies responsible for the commission or participation in the commission of criminal offences.⁹² Due to the fact that very often the roles of security companies, extractive companies and State agents overlap or complement each other, and in some cases security companies may be attributable to the States. Domestic laws should establish grounds of legal liability in all those cases, with due regard to the risky nature of the extractive and security activities and the gravity of the abuses committed in these contexts.

The legal standard of responsibility of parent companies in relation to the harm caused by its subsidiaries has been one key issue in the discussion as well as the responsibility of the extractive industry for the conduct of security guards or police. In the case of *Magige Ghati Kesabo & others v. African Barrick Gold PLC & Anor.*, before the UK High Court of Justice, the central question was whether a parent company could be held liable for the acts or omissions of local police forces providing security services at the company’s mine on the basis of a Memorandum of Understanding foreseeing monetary payments for the services. The Claimants, first, referred to a vicarious liability of a parent company, claiming that the police had formed an integral part of the mine’s security and the parent company were thus vicariously responsible. However, on the later stage the plaintiffs withdrew this claim and focused rather in the acts and omissions of the Defendants in relation to the Tanzanian police, such as “the failure to prevent police abuse; failure to put in place safe systems of work; failure to supervise; failure to provide medical facilities; failure to investigate; and failure to review or supervise police conduct”.⁹³ The court accepted to proceed on this basis, but the case was later on settled out of court.

In *Choc v. Hudbay* the judge, in dealing with a motion to dismiss, seemed to open the real prospect of applying to the case various grounds of legal responsibility for Hudbay as parent company: direct responsibility for negligence, vicarious liability and also the possibility of piercing the corporate veil, by holding that CGN could be considered as an agent of Hudbay.⁹⁴ The key would be to demonstrate with the necessary evidence that CGN effectively acted as agent or that Hudbay had control over various aspects of CGN operations.

In *Tahoe Resources Inc.*, the claimants alleged that Tahoe carried direct responsibility for the instances of beatings of protesters because of its control of all significant aspects of the activities of the Guatemalan subsidiary (MSR) and has implicitly or expressly authorized the unlawful conduct of the security guards.⁹⁵ They also alleged that MSR implicitly or expressly authorized the unlawful conduct of the security guards and as a parent company of MSR, Tahoe was vicariously liable for the battery

⁹¹ CESCR, General Comment No. 24, *op. cit.* para. 44.

⁹² Annual Report by the Working Group on the Use of Mercenaries (A/HRC/30/34), July 2015, para. 62, 90, and 119; ICJ Oral Statement in the Interactive Dialogue with the Working Group on use of mercenaries, 16 September 2015, <https://www.icj.org/wp-content/uploads/2015/09/UN-Advocacy-HRC30-OralStatement-WGMercenaries-2015.pdf>.

⁹³ *The High Court of Justice, Queen’s Bench Division, Magige Ghati Kesabo & Ors v African Barrick Gold Plc & Anor* [2013] EWHC 4045 (QB), p. 12.

⁹⁴ Endorsement (*Choc v Hudbay Minerals Inc., HMI Nickel Inc. and Compania Guatemalteca de Niquel S.A.*), Ontario Superior Court of Justice (2013), para. 43. *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414 <https://www.canlii.org/en/on/onsc/doc/2013/2013onsc1414/2013onsc1414.pdf>, para. 49.

⁹⁵ Court of Appeal for British Columbia, *Garcia v Tahoe Resources Inc.*, *op. cit.* para. 45, para. 24.

or, alternatively, that Tahoe is vicariously liable for the battery, committed by the security personnel, as a parent company of MSR, which have contracted their services.⁹⁶

The plaintiffs also claimed that Tahoe owed them a duty of care due to the fact that it controlled all the significant aspects of the MSR's operation, including the security and community relations policies, as well as owing to the fact that Tahoe knew of the local opposition to the mine and the risk of harm to the protesters.⁹⁷ Moreover, according to the plaintiffs, Tahoe violated its duty to care "by failing to conduct adequate background checks on Rotondo [the security manager] and the security personnel, failing to establish and enforce clear rules of engagement for them, failing to adequately monitor them, and failing to ensure they adhered to Tahoe's CSR policies"⁹⁸

Recently, in *Vedanta Resources v Lungowe et al*, a landmark case concerning extractive companies, the Supreme Court of the United Kingdom has clarified the relevant legal standard of civil responsibility applicable to parent companies in relation to harm to third parties by their subsidiaries in other countries. In the Court's view

"[T]here is nothing special or conclusive about the bare parent/subsidiary relationship, it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all."⁹⁹

The Court made reference to *Dorset Yacht Co Ltd v Home Office [1970] AC 1004*, in which the negligent discharge by the Home Office of its responsibility to supervise boys in a youth detention centre led to seven of them escaping and causing serious damage to moored yachts in the vicinity. Claimants and interveners ICJ and CORE coalition had also argued in the same direction, making reference to the same jurisprudence and other comparative jurisprudence and international standards.

Company practices, compliance and reporting

Cases concerning PMSCs services to extractive companies also provide unique insights into the operation and effectiveness of companies' policies and mechanisms designed to address risks of human rights abuses or provide remediation to them.

Human rights due diligence and non-state based grievance mechanisms are policies and processes recommended under the UN Guiding Principles on Business and Human Rights and other similar instruments as a good company practice in order to comply with the business' responsibility to respect human rights. In relation to operational grievance mechanisms, an area that has recently received increased attention and is rapidly evolving, the ICJ started in 2017 an initiative¹⁰⁰ to analyse existing practice to assess the effectiveness of these mechanisms. The draft report and its attached draft performance standards will be shared with the Working Group as separate documents.

ICJ research and analysis on operational grievance mechanisms shows, among other problems, the limited publicly available information of quality and precision to be relevant. The few pieces of legislation that require reporting and transparency of company practices are still to show their effectiveness. For instance, under Switzerland Federal Act on Private Security Services Provided Abroad, the companies

⁹⁶ *Ibid*, para. 25.

⁹⁷ *Ibid*, para. 26.

⁹⁸ *Ibid*.

⁹⁹ Supreme Court of the United Kingdom, *Lungowe and Ors. V. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, <https://www.icj.org/wp-content/uploads/2019/04/uksc-2017-0185-judgment.pdf>, para. 54.

¹⁰⁰ <https://www.icj.org/themes/business-and-human-rights/initiative-on-grievance-mechanisms/>

that are intended to provide private security services from Switzerland abroad are subject to compulsory declaration of activity. Moreover, such companies must become signatories to the International Code of Conduct for Private Security Providers (ICoCA). In certain cases, when there are indications of the prohibited activities or bad faith on the part of a company, the competent authority must initiate a review procedure with a right to prohibit the provision of services. According to the activity report on the implementation of the above Act, in the reporting period of 2015/2016 34 companies have submitted 306 declarations, majority concerning the provision of the intelligence activities, espionage, and counterespionage (115) as well as protection of persons in complex environments (103).¹⁰¹ It was highlighted, that in principle the act is not seen as a prejudice by the security companies wishing to establish their offices in Switzerland.¹⁰² In the reporting period 2017, 24 companies submitted 459 declarations, with the majority concerning the provision of services on the protection of persons (231).¹⁰³

4. Conclusions and Recommendations to the Working Group

The relationship and respective roles of security companies and extractive industries has not received as much attention as it deserves in research and advocacy, partly due to the traditional concern about the role of PMSCs in war or conflict situations. Extractive industries may use private security companies to assist with security of their sites in conflict or post-conflict situations, and these can be the occasion for the commission of some of the most egregious human rights violations or abuses, some amounting to crimes under international law. However, those situations and abuses are not the rule. Rather, the use of security in non-conflict situations is far more common. Therefore, the ICJ welcomes the Working Group's increased attention on security services in the context of extractive industries' activities.

Domestic legal frameworks are in many cases weak or laws are unenforced due to limited state capacity or factors such as corruption. The Working Group on Mercenaries and PMSCs has already conducted surveys and studies about national legal frameworks on regulation and accountability of PMSCs and concluded that there is wide divergence of approaches and standards as well as serious gaps. For the ICJ, it is particularly worrying the weakness of domestic systems to provide remedy and reparations to the victims of abuse by PMSCs.

The many cases of abuses and confusion about the responsibilities of state and private actors are in part rooted in the poor governance prevailing in many countries with important democratic and rule of law deficits. In these contexts, consultation and participation of the population in decision-making concerning the exploitation of natural resources is frequently inadequate, which exacerbates the potential for social and political conflict in the context of which many abuses involving PMSCs occur. In this context, it is important to address recommendations to companies and states, each of which has a role to play and a level of responsibility in the possible improvement of the situation.

The Working Group's mandate on the issue of PMSC empowers it to carry out studies, missions and issue recommendations to States and other stakeholders regarding appropriate regulatory and accountability frameworks for PMSCs in order to improve the protection of human rights and guarantee access to justice. To that end, and with

¹⁰¹ Federal Department of Foreign Affairs, Directorate of Political Affairs, Division for Security Policy, 'Activity Report 2015/2016 on The Implementation of The Federal Act on Private Security Services Provided Abroad' (2017) https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/taetigkeitsbericht-2015-16_EN.pdf, p. 9.

¹⁰² *Ibid*, p. 10.

¹⁰³ Federal Department of Foreign Affairs, Directorate of Political Affairs, Division for Security Policy, '2017 Annual Report On the Implementation Of The Federal Act On Private Security Services Provided Abroad' (2017) https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/taetigkeitsbericht-2017_EN.pdf, p. 6.

a view to ensure the Working Group's report adds value to the existing reports and literature on the protection of human rights in the context of business activities, the ICJ suggests to the Working Group to consider the following recommendations:

In relation to states:

- States should be reminded of their international obligations to protect human rights, and as part of that, to promptly, thorough and impartially investigate and, where there is sufficient evidence of criminal conduct, prosecute allegations of abuses by PMSCs and extractive companies, or their responsible officers, and those who are complicit.
- States should also ensure that their domestic legal framework provides for real access to effective remedies for victims of human rights abuse by PMSCs and extractive companies, including adequate reparation.
- Bearing in mind the trends and nature of harm caused and the vulnerable position of those affected, including illiterate woman, poor farmers and indigenous groups living in remote places, law enforcement and prosecution services should be more proactive in starting effective investigations and prosecutions, and availability and accessibility of judicial offices improved.
- Provide guidance to States to establish effective legal accountability frameworks of criminal or civil nature that pay due consideration to the inherently dangerous nature of the mining activity and the security services operating in that context, streamlining standards of company responsibility and adequate expeditious judicial procedures.
- In relation to domestic regulatory and accountability frameworks, the Working Group may wish to build on its own findings and conclusions in past reports and recommend states to adopt laws or regulations requiring extractive companies to take into account human rights and humanitarian law considerations in hiring security companies, in particular in relation to human rights due diligence, training, vetting, monitoring and evaluation and periodic reporting. States themselves should incorporate human rights elements in their licensing and supervision procedures applicable to security companies.
- Recommend that States establish legal frameworks that require meaningful reporting/disclosure of company policies and practices in relation to human rights, including their use and effectiveness of grievance mechanisms at the operational level.

In relation to companies:

- Both extractive and security companies should respect all human rights in accordance with international standards, including the UN Guiding Principles on Business and Human Rights, the Voluntary Principles on Security and Human Rights and other sectorial guidance applicable to PMSCs.
- Security companies, whatever their structure or ownership, should carry out enhanced processes of due diligence consistent with international best practice, and participate in remediation schemes, including at the operational level, that are effective and do not hinder complainants' options to have recourse to judicial avenues for the protection of their rights.