

Mandates of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
AL SRB 4/2020

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Excellency,

We have the honour to address you in our capacities as 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; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the human rights of migrants and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 42/9, 42/16, 43/6 and 43/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the alleged ill-treatment and excessive use of force by private security guards on unaccompanied migrant children living in the Asylum Center in Bogovađa, which is under the overall responsibility of the Commissariat for Refugees and Migration of the Republic of Serbia (SCRM), in accordance with the Law on Asylum and Temporary Protection (2018).**

According to the information received:

In the night of 10 to 11 May 2020, two private security guards reportedly physically and verbally assaulted three unaccompanied migrant children being accommodated at the Asylum Center in Bogovađa, located in Lajkovac municipality, Kolubara District in Serbia, which is the primary accommodation facility for unaccompanied minors pending a final decision on their asylum application¹. The security guards are reportedly contracted by a private company called Dekapolit, which renders security services to the Asylum Centre, managed by SCRM.

The alleged misconduct took place in room number 20, where eight unaccompanied boys were being housed during the night of the incident. Reportedly, as the children were unwilling to go to sleep and lower their voices, one security guard slapped three of the children and hit them with a plastic baton, thereby using force when none was necessary or justified. The guard allegedly inflicted physical injuries on one 16-year-old boy's back and left arm, in addition to verbally abusing him. He also reportedly injured a second child on his left shoulder and a third on his face. The second guard present in the room witnessed the incident but did not intervene to stop and protect the children from

¹ See <http://www.unhcr.rs/media/docs/2018/LawOnAsylumAndTemporaryProtectionRS.pdf>.

being beaten by his colleague, thus becoming an accomplice to the alleged offenses.

On 13 May 2020, a local civil society organisation filed a criminal complaint against the two security guards involved in the incident, on behalf of the abused children, with the Principal Public Prosecutor's Office (Osnovno Javno Tuzilastvo) in the town of Ub. Reportedly, despite being informed about the complaint, the authorities of the Asylum Centre in Bogovađa did not take any action to request the immediate suspension of the alleged perpetrators from their functions, pending an investigation. The authorities also allegedly failed to take adequate protective or preventative measures towards the victims.

In the night between 14 and 15 May 2020, upon learning of the existence of video footage and pictures of the incident involving him, one of the two security guards reportedly intimidated and threatened the same group of children, warning them against filming any other videos of him or his colleagues.

On 15 May 2020, the same civil society organization representing the children informed the Public Prosecutor's Office of these new threats. Thereafter, representatives of the Protector of the Citizens visited the Asylum Centre in Bogovađa and the Social Welfare Centre in Lajkovac to conduct an investigation. The Protector of Citizens established that physical harm was inflicted on the children and that they had neither been provided with adequate medical care, nor with psychological or other kind of support. It also established that SCRM had failed to inform the competent authorities responsible for investigating claims of criminal activity in a timely manner, and to immediately suspend from duty the involved security guards, pending the conclusion of proceedings.

On 23 June 2020, the Protector of the Citizens issued recommendations to the SCRM and the Ministry of Labour, Employment, Veteran and Social Policy and requested to conduct an investigation to determine the reasons for the failures to act promptly in protecting the children. The Protector of Citizens issued recommendations to the SCRM and to the Ministry to investigate failures of the Asylum Centre in Bogovađa and the Social Welfare Centre respectively.

In response to the recommendations issued by the Protector of Citizens, the Commissariat for Refugees and Migration reportedly stated that after being informed about the incident at the Asylum Center in Bogovađa, it initiated protection procedures, including by informing the legal guardian of the concerned children. This appears to have had no immediate protective effect since no translator was provided and the legal guardian did not speak the same language as the children, thus compromising her ability to effectively conduct her duties. The Commissariat further stated that the children were instructed to seek medical treatment from medical personnel in the Center.

The Commissariat also allegedly claimed that security staff working at the Asylum Center in Bogovađa are not allowed to use batons or other similar objects. However, the video footage of the incident clearly showed the guard

beating the children with such an object. On his side, the manager of the Asylum Center confirmed that the staff use batons regularly to “discipline” children.

On 21 August 2020, another criminal complaint was submitted by a civil society organization against another security guard of the Asylum Center in Bogovađa for acts of violence against another unaccompanied migrant child. Despite the recommendation of the Protector of Citizen to the management of the Center to promptly inform the police or the competent public prosecutor in case of future acts of violence against unaccompanied children in their facility, they reportedly failed to do so once more.

Reportedly, the Ministry of Labor, Employment, Veteran and Social Policy reportedly failed to inform the Protector of Citizens on measures taken following its recommendations to conduct an investigation in order to establish all failures of the Center for Social Work.

On 2 September 2020, the Protector of Citizens informed the Ministry of Labor, Employment, Veteran and Social Policy of its legal obligation to cooperate with its office and requested the necessary information relevant for the proceedings on the specific case with a seven-day deadline. Reportedly, to date, the competent public prosecutor has yet to conclude the investigation.

While we do not wish to prejudge the accuracy of this information, we are gravely concerned about the physical and mental integrity of the unaccompanied migrant children residing at Asylum Center in Bogovađa and the apparent lack of measures taken by the responsible authorities to prevent further human rights abuses, ensure proper monitoring and take remedial action.

We express serious concern at the allegations of ill-treatment and excessive use of force against children in State care. We are particularly alarmed by the fact that the private security guards appear to have acted in a manner that does not justify the use of force in the given circumstances, including the requirements of necessity and proportionality. We also would like to stress that States have an obligation to investigate all instances of possible excessive or disproportionate use of force promptly and impartially. Where the use of excessive force is established, perpetrators must be prosecuted and punished with penalties appropriate to the gravity of the act, and the victims provided redress, including compensation.

In addition, the outsourcing of security services in asylum centers by nature is highly problematic with significant consequences for the well-being of migrants and especially children, as assessed in detail in the Working Group’s reports [A/HRC/45/9](#) and [A/72/286](#), the latter focusing on the impact of private military and security services on the enjoyment of the human rights of all migrants. We wish to further draw the attention of your Excellency’s Government on the findings of these reports stressing that outsourcing immigration management services to private service providers entails challenges as the profit motives of private security operators often override human rights considerations, leading to situations in which human rights violations are likely to be committed with impunity, with little or no recourse to effective remedies for victims. The outsourcing of security services does not preclude

States and companies from complying with their obligations regarding international and national human rights.

While we welcome the steps taken by the Protector of Citizens, we are concerned that they were not fully implemented and that relevant public authorities did not exercise sufficient oversight and remedial action. In this context, we wish to express our concern over a proper and effective monitoring and accountability mechanism for human rights violations committed in such facilities and by private corporations. This is underscored by the obligations under the international human rights framework for your Excellency's Government to protect against human rights abuses within its territory by business enterprises. Ultimately it is States that have the duty to protect, respect, promote and fulfil the human rights of all migrants within their jurisdiction or effective control, including extraterritorially, where applicable. These obligations remain regardless of whether States have outsourced certain immigration and border control functions to a private actor. Furthermore, it has been recognized that States have "horizontal" obligations to ensure respect of human rights between two non-state actors.

Moreover, your Excellency's Government should exercise adequate oversight when they contract business enterprises providing services that may impact upon the enjoyment of human rights. Your Excellency's Government should further ensure that a regulatory framework is in place to confirm that private security companies are human rights compliant, including in terms of recruiting and vetting personnel in addition to standards and procedures on the use of force.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for the observations of your Excellency's Government on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide detailed information on the measures taken by your Excellency's Government to ensure the effective protection of migrant children, safeguarding their physical and mental integrity, at the Asylum Center in Bogovađa and other similar facilities in Serbia, in line with national and international guidelines for the protection of children, child refugees and unaccompanied migrant children.
3. Please provide detailed information on the measures taken by your Excellency's Government to carry out prompt, impartial, independent, and effective investigations into the alleged cases of ill-treatment and excessive use of force against children at the Asylum Center in Bogovađa.

4. Please outline how does your Excellency's Government define and limit the use of force of private contractors carrying out public law enforcement functions.
5. Please provide detailed information on how and what security tasks does the State outsource in the context of immigration and what human rights safeguards are put in place in procurement and contracting of such services.
6. Please outline steps the Government of your Excellency has taken, or is considering to take, to set out clearly the expectation that all businesses, including private military and security companies respect human rights throughout their operations, including by conducting human rights due diligence and remedying adverse human rights abuses.
7. Please provide information regarding the national regulatory framework pertaining to private military and security companies, including inter alia licensing regimes, vetting procedures, human rights training, independent monitoring mechanisms and transparency measures.

We would appreciate receiving a response within 60 days. After this time, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please note that a letter expressing similar concerns was sent to the company Dekapolit.

Please accept, Excellency, the assurances of our highest consideration.

Jelena Aparac

Chair-Rapporteur of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Tlaleng Mofokeng

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Felipe González Morales

Special Rapporteur on the human rights of migrants

Nils Melzer

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Annex

Reference to international human rights law

In connection with the above-mentioned allegations, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

We would like to refer your Excellency's Government to article 7 of the International Covenant on Civil and Political Rights (ICCPR), which codifies the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Moreover, we would like to remind your Excellency's Government of the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment as an international norm of *jus cogens*, is reflected inter alia, in article 5 of the Universal Declaration of Human Rights (UDHR), as well as articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to which Serbia is a party since 12 March 2001.

We would like to refer to the Convention on the Rights of the Child, succeeded by Serbia on 12 March 2001. In particular, Article 20 reads: "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State." Moreover, we would like to refer to the Serbian Law on Asylum and Temporary Protection, Article 10 stipulating that the principle of the best interest of the minor shall be respected in the course of the implementation of the Law.

In addition, Article 24 of the Convention on the Rights of the Child stipulates that State parties recognize the right of the child to the 'enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'. State parties shall 'strive to ensure that no child is deprived of his or her right of access to such health care services'. This is further supported by article 24(2) that affirms the States obligation to 'pursue full implementation of this right, and in particular that States shall take appropriate measures' to 'ensure the provision of necessary medical assistance and health care to all children'. The right to health is also protected by article 12 of the International Covenant on Economic, Social and Cultural Rights succeeded to by Serbia on 12 March 2001. Accordingly, States have the obligation to protect the right to health by preventing third parties from infringing this right through coercing or exercising violence towards groups in vulnerable situation such as children. States also have the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including asylum-seekers and migrants, to preventive, curative and palliative health services

In its general comment No. 13, the Committee on the Rights of the Child expands on the State's obligations to protect children from violence (Article III). On the issue of institutional and system violations of child rights it highlights that authorities at all levels of the State responsible for the protection of children from all forms of violence may directly and indirectly cause harm by lacking effective means of

implementation of obligations under the Convention. Such omissions include the failure to adopt or revise legislation and other provisions, inadequate implementation of laws and other regulations and insufficient provision of material, technical and human resources and capacities to identify, prevent and react to violence against children. It is also an omission when measures and programmes are not equipped with sufficient means to assess, monitor and evaluate progress or shortcomings of the activities to end violence against children. Also, in the commission of certain acts, professionals may abuse children's right to freedom from violence, for example, when they execute their responsibilities in a way that disregards the best interests, the views and the developmental objectives of the child. It further stresses that securing and promoting children's fundamental rights to respect for their human dignity and physical and psychological integrity, through the prevention of all forms of violence, is essential for promoting the full set of child rights in the Convention.

With regards to the allegations on excessive use of force, we would like to draw your Excellency's Government's attention to Principle 4 of the UN Basic Principles on the Use of Force and Firearms by Law Officials, which provides that, "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms." Furthermore, Principle 5 provides that, "Whenever the use of force and firearms is unavoidable law enforcement officials shall, (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate object to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment and (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment."² The principle of necessity under international human rights law is interpreted to mean that lethal force may be used as a last resort, with the sole objective of saving life.

This is also supported in General Comment No. 37 (2020) of the Human Rights Committee on the right of peaceful assembly (article 21) where the issue of private security providers is examined in detail in CCPR/C/GC/37. The Human Rights Committee, in several of its concluding observations, has recommended that States establish independent oversight bodies with authority to receive and investigate complaints of excessive use of force and other abuses of power by law enforcement officials and others acting in an official capacity or under colour of law³. It has also called on national authorities to set out in national legislation the role and powers of private security providers in law enforcement, and their use of force and training should be strictly regulated. Furthermore, in order to fulfil its obligations, a State must take appropriate measures "to prevent, punish, investigate or redress the harm caused by ... acts of private persons or entities" (para. 8). It also finds that the duty of States to make reparations to individuals whose rights under the ICCPR have been violated is a component of effective domestic remedies. "A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an

² Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

³ See concluding observations by the Human Rights Committee with regard to Switzerland, A/57/40 vol. I, paras. 11, 13; Azerbaijan, A/49/40, para. 9; or Chile, A/54/40, para. 206. See also Basic Principles on the Use of Force and Firearms, principle 22, Committee Against Torture, general comment No. 2, para. 15.)

effective remedy.... Without reparation to individuals whose Covenant rights have been violated, the obligation to provide effective remedy ... is not discharged.” (General Comment No. 31, para. 15-16).

We would also like to highlight the International Code of Conduct for Private Security Service Providers, which regulates the use of force by private military security companies in its articles 30 to 32.

Moreover, we would like to refer your Excellency’s Government to the OHCHR Guidance on less lethal weapons in law enforcement⁴ and in particular the circumstances of potentially unlawful use of batons, noting that officials should avoid baton strikes to sensitive areas of the body, such as the head, neck and throat, spine, kidneys and abdomen. Batons shall not be used against a person who is neither engaged in nor threatening violent behaviour; such use is likely to amount to cruel, inhuman or degrading treatment, or even torture.

Furthermore, the Special Rapporteur on extrajudicial, summary or arbitrary executions noted in a report on the operational conduct of private security providers on the right to life and the use of force by private security providers in law enforcement contexts (A/HRC/32/39) that where States choose to devolve some of their responsibilities for the provision of security to private entities, it is clear that those actions are attributable to the State, and that at least the same restrictions apply to private security providers operating in such a context as would apply to State law enforcement personnel. He further cautioned on the two standards of necessity and proportionality generally applied at the instant of an operation. Necessity is a factual cause and effect assessment that evaluates whether force should be used at all, and if so, how much force is actually unavoidable in order to achieve the desired outcome. The requirement of necessity raises the question of whether the threat could not be averted by resort to less harmful means and, thus, implies a graduated approach to the use of force. Therefore, any use of force can be regarded as necessary only when it constitutes the least harmful means available at the time that can be expected to achieve the desired outcome. The proportionality requirement relates to the question of whether the benefit expected to result from the use of force, that is, neutralizing a threat, justifies the harm likely to be caused by it. While establishing necessity requires a factual cause-and-effect assessment, demanding that the least harmful means be used to achieve a desired effect, proportionality entails a value judgment that balances harm and benefit, demanding that the harm that might result from the use of force is proportionate and justifiable in relation to the expected benefit.

Where States directly contract security services from a private security provider, the standards and level of the State’s responsibility for the actions of its agents must remain unaffected. Where private corporations or individuals contract a private security provider, or where corporations provide their own security, the standards remain effectively the same, a fact that should be clarified by national legislation. States must impose on private security providers and their personnel a duty of precaution concerning recruitment, training, equipment, planning, command and control, and reporting. Moreover, in circumstances they assess as likely to require the use of force,

⁴ https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf

private security personnel have a responsibility to inform State law enforcement, and to follow any instructions they are given.

We would also like to highlight the UN Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously endorsed by the Human Rights Council in June 2011, are relevant to the impact of business activities on human rights. These Guiding Principles are grounded in recognition of:

- a. "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialized organs or society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c. The need for rights and obligations to be matched to appropriate and effective remedies when breached. "

According to the Guiding Principles, States have a duty to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises.

In this regard, the Republic of Serbia has a duty to ensure that private companies operating within its territory, such as Dekapolit, respect human rights by taking steps to prevent as well as investigate, punish, and redress abuses through legislation, regulations, policies, and adjudication.

Furthermore, Serbia has an obligation to ensure access to effective remedial mechanisms for persons whose rights have been violated by business activities within its territory. States are required to take appropriate steps to "prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication" (Guiding Principle 1). This requires States to "state clearly that all companies domiciled within their territory and/or jurisdiction are expected to respect human rights in all their activities" (Guiding Principle 2). In addition, States should "enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights. . . "(Guiding Principle 3). The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities occur.

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships [. . .] meaningful consultation with potentially affected groups and other relevant stakeholders (Guiding Principle 18).

Finally, we would also like to draw your Excellency's Government's attention to the provisions set out in the Global Compact for Safe, Orderly Migration and Regular (A/CONF.231/3) that His Excellency adopted on 10 December 2018, which sets out in its Objective 7 f) the commitment of States to protect unaccompanied and separated children at all stages of migration through the establishment of specialized procedures for their identification, referral, care and family reunification, and provide access to health care services, including mental health, education, legal assistance and the right

to be heard in administrative and judicial proceedings, including by swiftly appointing a competent and impartial legal guardian, as essential means to address their particular vulnerabilities and discrimination, protect them from all forms of violence, and provide access to sustainable solutions that are in their best interests.