NGO = Human Right First

Thank you, Mr. President for the opportunity to address the Working Group. We've learned a good deal about the complexities of the subject at hand in these last few days and understand there is much more to be learned.

Thus, Human Rights First takes no present position on the adviseability of a convention, or of the draft that has been put forward.

But we would note that there is something quite wrong with a State claiming that the normative framework is adequate and that the problem is one of enforcement, while at the same time, that State uses legal process to shield the industry and thwart the reasonable expectations of society. The problem of remedy is a case in point.

Let me take the example of the United States, because it is a State with a sophisticated web of legal frameworks.

The ICCPR and the CAT both require States to provide mechanisms by which victims of violations can achieve effective, enforceable remedies. And yet, in case after case of gross violations of human rights asserted against contractors performing outsourced government functions related to extraordinary rendition and detainee treatment, victims' efforts to obtain redress have been thwarted by the government's assertion of "state secret" claims. Is this lack of law? lack of implementation? violation of law? The only certainty is that to the extent human rights instruments do apply, victims are denied the remedy to which they are entitled.

Application of human rights law is problematic for several more reasons. First, its application to non-state entities is controversial. Second, human rights law is not generally self-executing - not enforceable absent implementing legislation that establishes criminal and civil responsibility. Such legislation does not per se exist in the US, with the exception of the criminal statute implementing accountability obligations under the Torture Convention. Third, the U.S. has been unclear about its acceptance of the so-called *lex generalis* that is human rights law during situations of armed conflict, when the *lex specialis* of IHL applies. Fourth, the U.S. has consistently denied the application of human rights law to its extraterritorial conduct. Other states that do accept application of human rights law to their extraterritorial conduct, as well as in and to armed conflict, nevertheless deny its application to contexts in which the state operates but does not exercise effective control. Is this lack of law? Lack of implementation? Violation of law?

Immunity is another obstacle. The US Supreme is considering whether to take up an appeal of a lower court decision that granted PMCs the same immunity from civil damage claims that military personnel enjoy. The US government is not a party to that lawsuit, but the court has invited the government to express its position. The government has not yet replied to the court's invitation, and we don't know if it will. If it does reply, we don't know what position it will take on this lower court decision that does such violence to the IHL principle of distinction between combatants and civilians, as well as to the right of remedy. If this decision stands – if the victims of horrendous abuses at the hands of contractors in Abu Ghraib are left with no recourse - will we call it a lack of law, a failure of implementation or a failure to respect applicable law? I don't know. But I do know that not one victim of official torture by the US or its agents has had their day in court.

For all the domestic criminal law, military law, human rights law and IHL regimes applicable in the United States, this perfect record of uncompensated victims raises serious questions about the sufficiency of norms, AND the sufficiency of implementation AND the sufficiency of compliance. Assertion of the responsibility to protect and the law regulating the recourse to use of force in international relations – jus ad bellum, both mentioned yesterday – get the victim no further to achieving justice.

I don't know if the solution is a convention. Perhaps the solution is in the elucidation of accountability and remedy measures in the Code of Conduct. Perhaps it is in the elaboration of a draft model law. And certainly, it is also in the need for better implementation and compliance.

Whatever the solution, States cannot have it both ways. They cannot be heard to complain that the normative framework is adequate while they make expert use of that framework to deny remedies. If the law is adequate but the victim is nonetheless denied a remedy, then the only possible conclusion is that the State is in violation of its obligation to provide a remedy. And if the State denies that it is in violation of the law while victims go without remedies, then the only possible conclusion is that the legal framework is, indeed inadequate.

Thank you.