



# General Assembly

Distr.: General  
28 July 2020

Original: English

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## Seventy-fifth session

Item 71 of the provisional agenda\*

### Right of peoples to self-determination

## Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

### Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report 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, in accordance with Assembly resolution [74/138](#) and Human Rights Council resolution [42/9](#).

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\* [A/75/150](#).



## **Report 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 evolving forms, trends and manifestations of mercenaries and mercenary-related activities**

#### *Summary*

In the present report, 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 examines the evolution of the use of mercenaries and related actors in the light of the considerable changes in the nature of contemporary armed conflicts, and the challenges this creates for the implementation of the relevant international and regional legal frameworks pertaining to mercenaries. The Working Group enumerates a broad range of actors and activities that may be considered mercenary-related and notes that special consideration should be paid to the specific context and conditions in which these actors operate.

In the report, the Working Group highlights the impact of current and emerging manifestations of mercenaries and related actors on the enjoyment of human rights. In some cases, these actors have allegedly committed violations of international humanitarian law and human rights abuses. In other cases, their use has contributed to the intensification and prolongation of hostilities and therefore to the human suffering borne by the civilian population. Their activities may also undermine the right of peoples to self-determination, including in non-conflict settings.

The Working Group sheds light on the pervasive secrecy and opacity surrounding mercenary and mercenary-related activities, which is particularly stark when such actors are employed as an instrument to remotely influence armed conflicts, while their patrons, including States, deny involvement and seek to avoid legal responsibilities. These dimensions represent a major obstacle to holding the perpetrators of violations and abuses accountable and providing victims with effective remedies, thus enabling perpetrators and those directing their actions to operate with impunity.

The report concludes with a call for urgent attention by States and other stakeholders to the new forms and manifestations of mercenary-related activities and sets out recommendations to stimulate thinking and discussion on ways to counter mercenary and mercenary-related activities more effectively.

During the preparation of the present report, the Working Group was composed of Chris Kwaja (Chair), Jelena Aparac, Lilian Bobea, Sorcha MacLeod and Saeed Mokbil.

## I. Introduction

1. The rapid development and deployment of new technologies, the proliferation and fragmentation of non-State armed groups and the influence exerted by third parties have contributed to considerable changes in the nature of armed conflict, including its increasingly asymmetric nature.<sup>1</sup> Unlike broader research and analysis into the evolving nature of warfare and related human rights and humanitarian challenges, there are considerable gaps with regard to understanding the ways mercenaries and mercenary-related actors have adapted to contemporary conflict realities, the manner in which they are used, how they interact with other actors and the human rights risks and impacts arising from their involvement in conflicts.

2. Mercenarism continues to threaten international peace and security, as well as respect for international human rights law and international humanitarian law, in the most serious ways. The right of peoples to self-determination in particular is affected. Since early 2019, the effects of mercenary and mercenary-related activities have again gained prominence in debates within the Security Council. Concerns have been raised regarding mercenaries as a source of insecurity and destabilization in Africa, with a particular focus on the Central African subregion, during a discussion initiated by Equatorial Guinea;<sup>2</sup> their use in the conflict in Libya and the related failure to respect the related arms embargo;<sup>3</sup> and their alleged involvement in the protracted crisis in the Bolivarian Republic of Venezuela.<sup>4</sup>

3. In the light of these developments, the Working Group considers the present report both timely and important. It sheds light on disturbing current and emerging manifestations and trends of mercenary and mercenary-related activities. Beginning with methodological considerations, the Working Group examines the difficulties in applying the relevant international legal frameworks. It then analyses challenges raised by the two main contexts in which mercenaries operate: first, situations of armed conflict, and second, situations comprising violent acts that aim to undermine the right to self-determination. International human rights law and international humanitarian law perspectives are addressed. In doing so, the Working Group broadens the focus from mercenaries *sensu stricto* to mercenary-related actors and more usefully captures the complexity and diversity of actors engaging in activities related to mercenarism, which have a negative impact on human rights and the protection of civilians. The report ends with the Working Group's conclusions and recommendations.

## II. Methodology

4. The present report builds on previous work undertaken by the Working Group, including studies on the phenomenon of foreign fighters and their linkages with mercenarism.<sup>5</sup> It relies on extensive desk research and contributions received from relevant stakeholders on the basis of a call for submissions issued by the Working

<sup>1</sup> See S/2019/373 and S/2020/366, and International Committee of the Red Cross (ICRC), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions* (Geneva, 2019).

<sup>2</sup> Meeting convened by Equatorial Guinea during its presidency of the Security Council in February 2019; see also S/2019/97.

<sup>3</sup> See <https://news.un.org/en/story/2020/02/1057311>.

<sup>4</sup> See [www.un.org/press/en/2020/sc14193.doc.htm](http://www.un.org/press/en/2020/sc14193.doc.htm).

<sup>5</sup> See A/70/330 and A/71/318.

Group in January 2020.<sup>6</sup> In April 2020, the Working Group convened an expert virtual consultation on the evolving forms, trends and manifestations of mercenaries and mercenary-related activities to feed into the report. The Working Group thanks all those who contributed to the preparation of the report by submitting information and participating in the expert consultation.

5. The inherent lack of transparency surrounding the recruitment, financing and use of mercenaries and related actors, and the difficulties in distinguishing such actors from the multitude of State and armed non-State actors involved in contemporary conflicts and other applicable contexts, represented key research challenges. The term “armed non-State actors” covers a broad range of actors, including armed opposition groups, insurgents, rebels, terrorists and militias. At the same time, this opacity is one of the main concerns prompting the Working Group to shine a light on the phenomenon. The Working Group is conscious that gaps in information remain, particularly with regard to some regions. Mindful that the contexts in which mercenaries operate have an impact on women, children, and other groups in differentiated and disproportionate ways, the Working Group sought to highlight particular examples where possible.

### III. International law and mercenary activities

#### A. International and regional legal instruments related to mercenaries

6. The international legal framework on mercenary activities reflects the specific historical context in which it was developed: namely a period characterized by decolonization, post-colonial wars and interventions in the internal affairs of newly independent States, especially in Africa. It is therefore rooted in fundamental principles that underpin the Charter of the United Nations, such as self-determination, territorial integrity and non-intervention. Two international legal instruments and one regional instrument define, regulate and/or prohibit mercenary activities.

7. Article 47 of Protocol I Additional to the Geneva Conventions of 1949 does not prohibit mercenarism, but it does define mercenaries and denies them the right to combatant or prisoner-of-war status.<sup>7</sup> This rule has been recognized as having customary status under international humanitarian law.<sup>8</sup> The Protocol applies to international armed conflicts, including self-determination struggles (art. 1 (4)), but not to non-international armed conflicts, which comprise the majority of modern conflicts. Given its quasi-universal applicability, with 174 States parties, article 47 is a key source of law in situations of international armed conflict.

8. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries applies beyond the context of international armed conflicts. While only 36 States have ratified it since its adoption in 1989, it nevertheless criminalizes: (a) “any person who recruits, uses, finances or trains mercenaries”; (b) direct participation “in hostilities or in a concerted act of violence” aimed at “overthrowing a Government or otherwise undermining the constitutional order of a

<sup>6</sup> See <https://ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/CallsubmissionsTheevolvingforms.aspx>.

<sup>7</sup> This provision is effectively inconsequential, as mercenaries would be in any case excluded from the combatant status by article 43, which confers that status to members of armed forces of a party to the conflict.

<sup>8</sup> See rule No. 108 in Jean-Marie Henckaerts, Louise Doswald-Beck and others, *Customary International Humanitarian Law*, vol. I, *Rules*, ICRC study (Cambridge, United Kingdom, Cambridge University Press, 2009).

State; or undermining the territorial integrity of a State”; and (c) any person who attempts or assists in committing these offences (see arts. 1–4). It creates obligations for State parties to, *inter alia*, criminalize these offences, mutually cooperate to implement the Convention and either initiate proceedings against suspects present on their territory or extradite them to another State with valid jurisdiction.

9. No specific body at the international level is tasked to monitor, oversee and guide the implementation of the International Convention. The International Court of Justice has, thus far, not had the opportunity to rule on a case concerning its application. At the time of writing, no international court has criminal jurisdiction over mercenary-related crimes. As of 2018, the International Criminal Court can, however, hear cases against individuals, including Heads of State or high-ranking officials, concerning the crime of aggression, whereby, according to article 8 bis (g) of the Rome Statute, “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State” may in some cases constitute an act of aggression.<sup>9</sup> The Court therefore does not have jurisdiction to investigate and prosecute mercenary activities *per se*, and can only intervene if States use mercenaries to wage aggressive war. Nevertheless, it can investigate and prosecute individuals involved in mercenary activities for committing or assisting in the commission of international crimes, as long as the conditions for exercising jurisdiction are fulfilled.

10. At the regional level, only the Organization of African Unity Convention for the elimination of mercenarism in Africa specifically tackles this issue and requires States to prohibit and punish mercenary-related activities. The “crime of mercenarism” covers an extended list of acts that can be attributed to individuals, groups, State representatives and States themselves (art. 1 (2)). Furthermore, States must make mercenary-related offences “punishable by the severest penalties under its laws, including capital punishment” (art. 7). Of the 55 member States of the African Union, 32 are parties to this regional Convention.

11. The proposed African Court of Justice and Human Rights could potentially become the first tribunal with international criminal jurisdiction over mercenary crimes. Article 28H, introduced by the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, is broadly similar to both the international and regional conventions but it expands the scope of mercenary offences to include “assisting a government to maintain power” and “assisting a group of persons to obtain power”. The establishment of the Court, however, remains uncertain given the limited number of ratifications of both the Statute and its amending Protocol, therefore leaving the implementation of this important provision in doubt.<sup>10</sup>

12. The above-mentioned instruments share a largely similar definition of a mercenary that contains several cumulative criteria that each have to be fulfilled in order for the definition to apply. These are: an individual who is specially recruited to fight in an armed conflict, mainly motivated by private gain, who is not a national of a party to the conflict or a resident of a territory controlled by a party to the conflict and is neither a member of the armed forces of a party to the conflict nor a member of the armed forces of a third State sent on official duty.

<sup>9</sup> The International Law Commission originally included the crime of “recruiting, use, financing and training of mercenaries” in its draft Code of Crimes against the Peace and Security of Mankind (1991), but it was not retained in the 1995 draft that formed the basis of the initial drafting of the Rome Statute.

<sup>10</sup> See <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights> and <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

13. Three differences can, however, be observed. First, while the definitions in Protocol I and the Organization of African Unity Convention require an individual to take a direct part in hostilities, the International Convention does not. Nevertheless, the International Convention still criminalizes mercenaries who participate directly in hostilities (art. 3 (1)). Second, the Organization of African Unity Convention requires a promise of material compensation but, unlike the two other instruments, not one that is significantly higher than what would be paid to combatants of similar ranks and functions. Most importantly, while all three instruments apply in situations of armed conflict, only the International Convention and the Organization of African Unity Convention specifically cover other contexts threatening the right to self-determination, such as overthrowing a Government or undermining the territorial integrity of a State. This is particularly critical, as those contexts can apply to a broad spectrum of situations that do not meet the threshold of armed conflict.

14. The definition of a mercenary in international law has been the subject of much analysis reflecting on its overly restrictive nature.<sup>11</sup> The Working Group recognizes that the scope of the definition is problematic and the criteria difficult to meet, especially with regard to contemporary forms of mercenary-related activities,<sup>12</sup> as avoiding the mercenary classification merely involves evading one of the qualifying criteria described above. This can be easily achieved by, for example, enrolling (even temporarily) in the formal armed forces or receiving wages similar to those of regular soldiers, at least on paper. In addition, the view of a mercenary as a “foreigner” does not encompass the complexities of the concept of nationality. In some contexts, nationality has little resonance among local populations where ethnic and religious affiliations may prevail as, for example, noted during the Working Group’s visit to Chad.<sup>13</sup> In other situations, States have reportedly offered nationality to those they recruited.

15. Some of the criteria raise particular challenges. The definition requires mercenaries to be driven mainly by private and material gain. The reality, however, is seldom that simple. Concurrent and overlapping motivations may explain why certain individuals engage in mercenary-related activities, which can include (but are not limited to) material gain, ideological and political factors, a belief in protecting national interests or a lack of other employment opportunities, but may also include coercion or extortion. Proving that private gain rather than other motivational factors is the main reason for an individual to become a mercenary is legally problematic. Moreover, receipt of material compensation can be difficult to prove, as it will normally be subject to confidential agreements.

16. The type of activities compatible with the definition of a mercenary, particularly in terms of what constitutes fighting in an armed conflict and direct participation in hostilities, raises another difficulty. Some actors resent and challenge any characterization of their activities as mercenary, arguing that they do not engage in offensive combat but rather in defensive services. That said, there is extensive guidance with regard to what may constitute direct participation in hostilities, including conduct that does not require physical presence at the theatre of operations, such as collecting and providing information of direct and immediate use in combat operations.<sup>14</sup> The Working Group has noted before the challenges in distinguishing between the offensive and defensive use of force in situations of armed conflict,

<sup>11</sup> See Katherine Fallah, “Corporate actors: the legal status of mercenaries in armed conflict”, *International Review of the Red Cross*, vol. 88, No. 863 (September 2006).

<sup>12</sup> A/71/318, paras. 5 and 10.

<sup>13</sup> A/HRC/42/42/Add.1, paras. 36 and 37.

<sup>14</sup> See [www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf](http://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf); national military manuals often provide further guidance.

where defending a legitimate military objective, such as providing security for a military base, may amount to direct participation in hostilities.<sup>15</sup>

17. Finally, with the exception of the Organization of African Unity Convention, the existing framework focuses on the individual, while neglecting the specific role of those organizing and directing mercenary activities. This poses a particular challenge when these individuals operate within a corporate structure, owing to the limited mechanisms for enforcing corporate responsibility, especially criminal liability.

## B. Implementation challenges

18. Ultimately, the international legal framework on mercenaries reflects what States were willing and able to agree on in the given context and the difficulties they had reaching agreement about a term more often than not used as a politically charged and derogatory label rather than as a legal concept. Moreover, the criminalization of mercenary activities is strongly linked to concerns over the right to self-determination,<sup>16</sup> reflecting the leading role of States from the global South, particularly Africa, in developing this framework.

19. The low level of ratifications of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries shows the reluctance of some States to ratify an instrument that criminalizes mercenary activities and applies to individuals who do not necessarily take direct part in hostilities. For example, none of the permanent members of the Security Council are parties to the International Convention. Moreover, the derogative connotations associated with the term “mercenary” may also be a factor in rendering implementation difficult, as States may not wish to be seen as either directly using or harbouring mercenaries in the territories under their jurisdiction, thus leaving potential mercenary activities unaddressed. The ardent opposition to being described as a mercenary and/or supporting mercenaries further reflects that the categorization remains as pejorative as in the past,<sup>17</sup> and is widely used in the public domain to express disapproval of a broad spectrum of actors that do not necessarily fit the criteria of the legal definitions described above.

20. Despite their limitations, the three legal instruments have merit in that they outline a legal definition of a mercenary, although one admittedly fraught with difficulties in its practical application. Interestingly, a number of States that are not party to the International Convention, such as the Russian Federation or France, have criminalized participation in mercenary activities in their national laws, in line with many of the criteria outlined in the international instruments.<sup>18</sup> Other States have adopted specific legislation more or less directly addressing mercenary and mercenary-related activities, including explicit prohibition of mercenary activities (South Africa)<sup>19</sup> or proscribing services related to direct participation in hostilities (Switzerland).<sup>20</sup> A study of the national legislations of 60 States from around the world, undertaken by the Working Group between 2012 and 2017, showed an overall

<sup>15</sup> See A/HRC/36/47.

<sup>16</sup> Christopher Kinsey and Hin-Yan Liu, “Challenging the strength of the anti-mercenary norm”, *Journal of Global Security Studies*, vol. 3, No. 1 (2018), p. 99.

<sup>17</sup> Sarah Percy, “The unimplemented norm: anti-mercenary law and the problems of institutionalization”, in *Implementation and World Politics: How International Norms Change Practice*, Alexander Betts and Phil Orchard, eds. (Oxford, Oxford University Press, 2014).

<sup>18</sup> See Article 359 of the Criminal Code of the Russian Federation and article 436-1 of the French Criminal Code. For more examples of how mercenarism is addressed in national legislations and military manuals see [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule108](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule108).

<sup>19</sup> Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006.

<sup>20</sup> Federal Act on Private Security Services Provided Abroad of 27 September 2013.

lack of rules with regard to the direct participation of private military and security personnel in hostilities, a scenario that in some cases could fall within the mercenary definition. This gap also increases the risk of human rights abuses.<sup>21</sup>

21. Information and statistics on national prosecutions of mercenary-related offences are not readily available. Data-gathering is further hindered by the different national practices described above. During its country visits, the Working Group has noted that persons suspected of mercenary-related activities may often be prosecuted for a number of offences, such as participation in a criminal organization, participation in a terrorist organization and terrorist acts, the organization of illegal paramilitary groups or joining foreign armed groups and armies.<sup>22</sup> In the Russian Federation, for example, there were 11 cases of mercenary crimes between 2017 and 2019, all related to the participation of Russian nationals in the armed conflict in Ukraine. In some of these cases, mercenarism was prosecuted jointly with other crimes such as incitement of hatred or enmity.<sup>23</sup> Further information shared with the Working Group also shows that different types of offences are used to prosecute those involved in mercenary-related activities.<sup>24</sup>

#### **IV. Mercenary-related activities in contemporary armed conflicts and contexts threatening the right to self-determination**

22. Characterizing new trends and manifestations of mercenaries requires a careful analysis of the contexts in which these actors operate. As noted above, the international legal framework recognizes that mercenaries operate in two scenarios: armed conflicts and “concerted act[s] of violence aimed at: overthrowing a Government or otherwise undermining the constitutional order of a State; or undermining the territorial integrity of a State”.<sup>25</sup> Both scenarios entail significant threats to the protection of human rights and, in the case of armed conflicts, to the protection of civilians as provided for by international humanitarian law. Mercenary activities have evolved in parallel with the considerable changes in the nature of the conduct of war since the international legal framework on mercenaries was developed.

##### **A. Demand for mercenary-related activities in contemporary armed conflicts**

23. Armed conflicts have become increasingly complex and marked by the involvement of a multitude of actors, including mercenaries and related actors. Several elements are of particular relevance: the substantial increase of non-international armed conflicts; the proliferation of armed non-State actors; the involvement of third States in supporting the parties to a conflict, which creates related challenges with regard to the attribution of responsibility; and disproportionate differences in the methods and means of warfare used by parties to a conflict.

<sup>21</sup> See [A/HRC/36/47](#).

<sup>22</sup> See [A/HRC/45/9/Add.1](#), [A/HRC/42/42/Add.2](#) and [A/HRC/33/43/Add.3](#)

<sup>23</sup> See submission by the Russian Federation.

<sup>24</sup> See submission by the Ukrainian Helsinki Human Rights Union.

<sup>25</sup> International Convention against the Recruitment, Use, Financing and Training of Mercenaries, art. 1 (2) (a).

### **Increase in non-international armed conflicts**

24. The international legal framework on mercenaries was developed at a time when inter-State conflicts were predominant, implying that mercenaries were perceived as auxiliaries of States. Protocol I is applicable only to such conflicts. The specificities and challenges related to mercenary activities in non-international armed conflicts were therefore not sufficiently considered.

25. Most recent and current armed conflicts are, however, of a non-international character, usually involving a State against an armed non-State actor or two or more armed non-State actors against each other.<sup>26</sup> Mercenaries can be engaged by both types of belligerents, which increases their prospective client base. Armed non-State actors must observe applicable rules of international humanitarian law. In comparison with States, however, international human rights law places fewer clearly defined obligations on armed non-State actors,<sup>27</sup> leading to the possibility of less strict requirements being placed on privately engaged mercenaries under their service.

### **Proliferation of armed non-State actors**

26. Contemporary armed conflicts are also marked by a proliferation of armed non-State actors that vary widely in size, structure, capabilities and the ability to exercise de facto control over territory. These groups evolve during a conflict, fragmenting and reconstituting themselves with different and sometimes overlapping objectives, hierarchies and allegiances.

27. This proliferation and diversity of armed non-State actors make it even more challenging to determine the facts and to ascribe their respective obligations under international human rights law and international humanitarian law, leading to uncertainty with regard to the scope of applicable protections and challenges when attributing responsibility. Adding mercenaries and related actors to this context further clouds the picture, as their recruitment, financing and integration within the chains of command of a non-State client will usually remain opaque.

28. The Working Group received information on cases in which mercenaries and related actors provided support to armed non-State actors with the objective of strengthening military capacities and capabilities. That said, significant information gaps make it difficult to establish who is responsible for their recruitment and payment and under what chains of commands these actors operate.

29. In one case brought to the attention of the Working Group, the use of well-trained and skilled Russian private military personnel in support of the Libyan National Army, engaged in a conflict against the Government of Libya, reportedly resulted in more precise offensive operations. While this could have arguably decreased harm to the civilian population, abuses against civilians by the private military personnel were also reported, including an allegation of extrajudicial killings.<sup>28</sup> The involvement of the private military personnel further contributed to the

<sup>26</sup> See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusan Tadić*, Case No. IT-94-1-I, 1995.

<sup>27</sup> See A/HRC/38/44 (English only), available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session38/Pages/ListReports.aspx>. It should also be recalled that attributing certain human rights obligations to armed non-State actors does not invalidate State responsibilities, as the latter remains under an obligation to take all appropriate diplomatic, economic, judicial and other measures to protect the human rights of the population living in the part of its territory that is outside its control.

<sup>28</sup> References are made throughout the present report to allegation letters sent by the special procedures of the Human Rights Council. All such communications are available at <https://spcommreports.ohchr.org/TmSearch/Results>. In the present case, see JAL RUS 1/2020, JAL LBY 1/2020 and JAL OTH 42/2020.

intensification and prolongation of the conflict at a tragic cost to the civilian population. Moreover, the opacity surrounding the conditions under which the personnel were deployed, including applicable command and control mechanisms, obscured the attribution of responsibility and enabled such actors to operate with apparent impunity.<sup>29</sup>

30. Furthermore, with regard to Libya, the engagement of fighters from Sudanese armed groups is another pertinent example. Seemingly not integrated within the command and control structure of Libyan factions, they have been described as coordinating and engaging in joint military operations with their Libyan patrons, while their alignment with particular factions is “usually based on convenience, and they have occasionally switched sides”.<sup>30</sup>

31. In other cases, the risk of violations of international humanitarian law and human rights abuses are heightened if well-trained contractors are engaged to strengthen the military capacities and capabilities of armed non-State actors that manifestly defy human rights, such as groups driven by extremist ideologies.<sup>31</sup> Their activities can, for example, include training in military tactics and weapons maintenance and use.

### **Involvement of third parties in situations of armed conflict**

32. To some extent, the proliferation of armed non-State actors can be linked to another key aspect of contemporary armed conflicts, namely the increasing involvement of third parties seeking to influence a conflict. This may include a State or a coalition of States, or missions deployed by international and regional organizations,<sup>32</sup> with each of these scenarios entailing specific legal implications. In some circumstances, the intervening actor may become party to a conflict and therefore subject to related obligations under international humanitarian law, for example if the support consists of military operations aimed at influencing the conduct of hostilities to the detriment of the other party.<sup>33</sup> This can take different forms, such as support in planning and coordinating military operations or the provision of intelligence for immediate use in the conduct of hostilities.

33. A third-party intervention can also include the provision of mercenary and mercenary-related personnel to one party to a conflict for the purpose of directly participating in hostilities to weaken the military capacities of the other party. Examples shared with the Working Group from recent armed conflicts indicate that this form of intervention is increasingly being used, particularly by States.

34. Furthermore, this form of support increases the factual and legal complexity in determining whether the intervening State can be classified as a party to the conflict, and therefore in classifying the conflict itself and identifying applicable rules of international humanitarian law. Providing support through an intermediary creates distance between the intervening State and the supported party, and may therefore obscure the actual role and responsibilities of the former. Reports shared with the Working Group suggest that, in some cases, this is done precisely with the ominous objective of providing “plausible deniability” of direct involvement in a conflict. Intervening States have deployed mercenaries and related actors to support an ally, while refuting knowledge or authority over those deployed in an attempt to evade

<sup>29</sup> Ibid.

<sup>30</sup> S/2020/36, para. 169.

<sup>31</sup> See, for example, <https://jamestown.org/program/malhama-tactical-threatens-put-china-crosshairs/>.

<sup>32</sup> Tristan Ferraro, “The ICRC’s legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict”, *International Review of the Red Cross*, vol. 97, No. 900 (2014).

<sup>33</sup> Ibid., p. 1,231.

international responsibility for the conduct of the auxiliaries, including in relation to alleged human rights abuses and violations of international humanitarian law. States also use these actors to hide the real human and financial costs of intervening in a conflict and thus mitigate negative domestic political consequences.

35. One example illustrating these challenges are the operations of the so-called “Wagner Group”, reportedly led by former personnel of the Russian armed forces. Difficulties already arise in defining this entity, which has been variously described as a private military company, a paramilitary group or semi-State security forces, highlighting the legal ambiguity regarding its formal registration and corporate identity.<sup>34</sup> This lack of transparency leads to major difficulties in identifying laws and regulations applicable to the Wagner Group, or even outright denials of its existence, thereby creating even more challenges to determining its clients and contracts. Moreover, the Working Group received allegations that, in 2018, several journalists researching the group and its activities in different parts of the world died under suspicious circumstances, raising serious concerns about the dangers and difficulties in investigating and reporting on the Wagner Group and contravening the rights to freedom of expression and to information.<sup>35</sup>

36. In itself, such ambiguity over the registration and regulation of private actors that offer combat and combat support services internationally could amount to violations of the positive obligations of States to protect against reasonably foreseen threats to human rights, including the right to life.<sup>36</sup> Opaque contracting arrangements through companies registered in offshore corporate havens that have loose regulatory frameworks enable companies and their clients, including States, to generate profits from private combat activities while evading regulation and legal accountability. Such arrangements also obscure ownership structures, particularly if State officials have stakes in these companies. Reportedly, in some cases, private combat services contracted by a State and provided through offshore companies have been presented as maritime security to create the appearance of the legal use of force in the context of anti-piracy operations.<sup>37</sup> Such practices contravene the positive State obligations to prevent human rights violations and abuses and the requirement for private businesses to exercise human rights due diligence.

37. Furthermore, the secrecy and opacity surrounding relationships between States and mercenary and mercenary-related actors frustrates the attribution of responsibility for abuses and therefore the provision of accountability and effective remedy. Attributing responsibility to States will depend on proving that sufficient control or direction was exercised by the State over hired mercenaries and related actors,<sup>38</sup> which inherently raises significant practical challenges.

38. Increasingly, the Security Council has included the provision of “armed mercenary personnel” in arms embargoes, particularly concerning the situations in

<sup>34</sup> Candace Rondeaux, *Decoding the Wagner Group: Analyzing the Role of Private Military Security Contractors in Russian Proxy Warfare*, Arizona State University Center on the Future of War (November 2019); Kimberley Marten, “Russia’s use of semi-state security forces: the case of the Wagner Group”, *Post-Soviet Affairs*, vol. 35, No. 3 (2019); Sergey Sukhankin, “Russian PMCs in the Syrian civil war: from Slavonic corps to Wagner Group and beyond”, December 2019, available at <https://jamestown.org/program/russian-pmc-in-the-syrian-civil-war-from-slavonic-corps-to-wagner-group-and-beyond/>.

<sup>35</sup> See JAL RUS 23/2018 and JAL RUS 10/2018.

<sup>36</sup> Human Rights Committee, general comment No. 36 (2018) on the right to life, para. 21.

<sup>37</sup> Candace Rondeaux, *Decoding the Wagner Group*.

<sup>38</sup> See the Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, particularly arts. 5 and 8.

South Sudan,<sup>39</sup> the Central African Republic<sup>40</sup> and Libya,<sup>41</sup> as well as through a targeted arms embargo on designated individuals and entities in Yemen.<sup>42</sup> In this way, the embargoes broaden the scope of restrictions beyond military materiel to also include human actors and emphasize a third party's responsibility not to intervene in the conflict through the provision of "armed mercenary personnel".<sup>43</sup> Moreover, the embargoes do not define "armed mercenary personnel", leaving the scope of the term open to interpretation. The Working Group takes the view that the term can be interpreted to cover a large area of activities beyond the restrictive definition in the international legal framework, as the embargoes include "technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel".<sup>44</sup>

### **Asymmetry between parties to a conflict, and military capabilities and strategies**

39. The prevalence of intra-State conflicts, the multitude and diversity of armed non-State actors and support provided to parties to a conflict by external powers all reflect the significant differences among belligerents engaged in contemporary armed conflicts, including their legal status, their military capabilities and the resources available to them. The term "asymmetric warfare" has been used to describe such situations, in which a largely superior military power, most commonly a State, opposes a weaker party, usually a non-State actor.<sup>45</sup> To counteract this imbalance, the weaker actor adapts its strategies, for example by avoiding direct confrontations and operating through decentralized structures. In turn, the stronger party adjusts its own strategies, for instance through counter-insurgency operations or the use of advanced technology to minimize physical danger to its personnel while weakening the military resources of its adversary.

40. Use of mercenary and mercenary-related activities represents one of the tools available to parties to the conflict to redress differences and develop strategies in asymmetric confrontations. As mentioned above, mercenary-related actors have provided support to armed non-State actors to build military skills, for example when planning operations or using and maintaining weapons and other equipment, as well as to supplement military resources and act as a force multiplier. States may also rely on mercenaries and related actors to complement limited personnel and a lack of specialist skill sets, for example, while at the same time limiting public scrutiny and accountability mechanisms that would usually be exercised over State security services.

41. In particular, new technologies have been leveraged to gain strategic and tactical advantages in asymmetric warfare. For example, commercial technology has been used by armed non-State actors to great military effect, including using drones for surveillance and to drop explosives.<sup>46</sup> States have also significantly bolstered technological capabilities to respond and engage in asymmetric confrontation. This

<sup>39</sup> See Security Council resolution [2428 \(2018\)](#).

<sup>40</sup> See Security Council resolution [2127 \(2013\)](#).

<sup>41</sup> See Security Council resolution [1970 \(2011\)](#) and subsequent resolutions on the same topic.

<sup>42</sup> See Security Council resolution [2216 \(2015\)](#).

<sup>43</sup> Hin-Yan Liu, "Mercenaries in Libya: ramifications of the treatment of 'armed mercenary personnel' under the arms embargo for private military company contractors", *Journal of Conflict and Security Law*, vol. 16, No. 2 (2011).

<sup>44</sup> Security Council resolution [1970 \(2011\)](#), para. 9.

<sup>45</sup> Toni Pfanner, "Asymmetrical warfare from the perspective of humanitarian law and humanitarian action", *International Review of the Red Cross*, vol. 87, No. 857 (March 2005).

<sup>46</sup> Ash Rossiter, "Drone usage by militant groups: exploring variation in adoption", *Defense & Security Analysis*, vol. 34, No. 2 (2018).

has benefited private actors, who profit from developing, maintaining and operating new technology, for example in the areas of information technologies, cyber capabilities and complex high-tech weapons systems.

42. Cyberwarfare has been recognized as a method of warfare that can not only infiltrate, disrupt, damage or even destroy military or civilian objects, but can also cause serious human harm. Similar to conventional warfare, it must comply with international humanitarian law.<sup>47</sup> This is all the more relevant as strategic capabilities increasingly depend on infrastructure and technology.

43. Moreover, in some States, private contractors provide significant support in maintaining and operating drones used in hostilities, although this does not necessarily mean making decisions to capture or kill.<sup>48</sup> Private actors have also been involved in inventing and producing autonomous systems for which they may be responsible in terms of maintenance and operation during the conduct of hostilities.<sup>49</sup> These trends entail significant challenges to the respect for international human rights law and international humanitarian law, as new combat technologies fragment and diffuse decision-making with regard to operating weapons systems, and therefore complicate the process of attributing responsibility for violations and abuses.

## **B. Mercenary-related activities undermining the right to self-determination**

44. In addition to armed conflicts, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and the Organization of African Unity Convention for the elimination of mercenarism in Africa encompass mercenary activity that engages in concerted acts of violence to undermine the right to self-determination. The right to self-determination is a key principle of the United Nations, in accordance with Article 1 (2) of its Charter, and as reinforced by resolutions of the General Assembly and the Human Rights Council. It is also a fundamental principle of international human rights law, found in common article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as a collective right entailing an external dimension, namely freedom from foreign domination, and an internal aspect providing a people the right to freely pursue its political, economic, social and cultural development. Mercenary activities are also specifically mentioned in instruments related to non-intervention and respect for territorial integrity, such as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.<sup>50</sup>

45. Nevertheless, determining which context does indeed undermine the right to self-determination is not always straightforward and is often eminently political. Contrary to the well-established rules applicable to armed conflicts, the right to self-determination and its scope and content have been subject to much less interpretation

<sup>47</sup> ICRC, “International humanitarian law and cyber operations during armed conflicts”, position paper, November 2019.

<sup>48</sup> Andreas Krieg, *Defining Remote Warfare: The Rise of the Private Military and Security Industry* (London, Oxford Research Group Remote Warfare Programme, March 2018).

<sup>49</sup> Laura Dickinson, “Drones, automated weapons, and private military contractors: challenges to domestic and international legal regimes governing armed conflict”, in *New Technologies for Human Rights Law and Practice*, Molly Land and Jay Aronson, eds. (Cambridge, United Kingdom, Cambridge University Press, 2018).

<sup>50</sup> See General Assembly resolution [2625 \(XXV\)](#).

and clarification.<sup>51</sup> Whereas States are required to promote the realization of the right to self-determination, any action taken towards this objective must be consistent with other obligations under international law, in particular non-interference in the internal affairs of other States.<sup>52</sup> At times, this creates a tension between legitimate support for the right to self-determination and internal interference, a distinction often viewed through a political and ideological lens, for example with regard to supporting insurgent groups that claim to seek political and cultural autonomy or independence in a context of repression and persecution.

46. Campaigns of violence that aim at undermining the right to self-determination can take many forms and can be instigated by another State or by private actors. Generally, third-party interventions consisting of supporting or initiating acts of violence and conducted for the purpose of advancing foreign policy or private interests run contrary to the right to self-determination and its corollary principles of non-intervention and respect for territorial integrity. If used for such objectives, the deployment of mercenaries and related actors to overthrow a government or to remotely influence an armed conflict contravenes the right to self-determination. The observation that this “lowers the thresholds ... to go to war as the costs for intervention are relatively low, both financially and politically”<sup>53</sup> is a source of concern in this respect.

47. The availability of mercenary and mercenary-related services creates the ability, for those who can afford it, to supplement lacking military capacity and to pursue policies and interests through aggressive means. As a result, the ability to intervene in an internal armed conflict or carry out aggressive acts against another State becomes available to the highest bidder, thereby threatening the right to self-determination. Moreover, by using mercenary and mercenary-related services, those responsible for such acts can hide or deny their involvement.

48. The heavy reliance on foreign combatants in some contemporary armed conflicts contributes to their escalation and prolongation, thus thwarting the prospects for a stable environment and peaceful resolution that would enable the local population to exercise the right to freely pursue its political, economic, social and cultural development. This is evident in the conflict in Libya, where mercenaries from different countries have at times significantly influenced the conduct of hostilities. Strikingly, Syrian mercenaries have reportedly been deployed on both sides of the Libyan conflict, thus exporting and continuing the conflict in the Syrian Arab Republic outside its borders.<sup>54</sup> Moreover, continuing to fight in another conflict in exchange for private gain undermines prospects for the reintegration of these fighters into civilian life.

49. Mercenaries and related actors can themselves have a direct interest in prolonging a conflict and fostering instability. In the Central African Republic, for example, the exploitation and trafficking of rich natural resources drew mercenaries and related actors, which took advantage of the security vacuum in the country. Their presence, alongside multiple armed groups, resulted in serious threats to the territorial

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<sup>51</sup> Matthew Saul, “The normative status of self-determination in international law: a formula for uncertainty in the scope and content of the right?”, *Human Rights Law Review*, vol. 11, No. 4 (2011).

<sup>52</sup> Human Rights Committee, general comment No. 12 (1984) on the right to self-determination, para. 6.

<sup>53</sup> Andreas Krieg and Jean-Marc Rickli, *Surrogate Warfare: The Transformation of War in the Twenty-First Century* (Washington, D.C., Georgetown University Press, 2019), p. 152.

<sup>54</sup> See [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25970&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25970&LangID=E).

integrity of the country and acted as a barrier to the exercise of the right to self-determination.<sup>55</sup>

## V. Mercenary-related actors and activities and their contemporary manifestations

50. It is clear that a range of mercenaries and related actors continue to influence the course of contemporary armed conflicts and to undermine the right to self-determination. While many of these actors may fall short of the strict definition of a mercenary under the applicable international legal framework, they nevertheless share many of the characteristics of mercenaries and engender similar risks and impacts. The Working Group therefore seeks to examine a broad range of mercenary-related actors and activities in order to stimulate a discussion on how to better frame and address them.

51. This builds on previous analyses by the Working Group that identified foreign fighters as mercenary-related actors on the basis of linkages with mercenaries, including similarities and differences in their respective definitions. At the time, the Working Group recalled the commonly accepted meaning of the term mercenary as being “primarily focused on the professional services of persons paid to intervene in an armed conflict in a country other than their own” and recalled that “mercenaries are necessarily non-nationals”.<sup>56</sup>

52. The Working Group wishes to stress that the categories below should not be taken to designate mercenary-related actors in general, but rather that each possible case from among these categories needs to be assessed in the light of its specific context and circumstances. Given the complexity and multitude of actors involved in contemporary conflicts, it should also be noted that some actors may engage in different activities simultaneously, or seamlessly move from one activity to another.

53. The Working Group recognizes that among these different categories there are individuals who live in particularly vulnerable security and socioeconomic situations and who may be subject to coercion, exploitation or abuse when carrying out mercenary-related activities. For example, in one case brought to the Working Group’s attention, a group of men from one of the least developed countries was allegedly recruited on the understanding that they would work as private security guards in a country that had one of the highest incomes per capita. On arrival, however, the men were reportedly given military training and told they would be deployed to conflict zones to undertake unspecified security tasks.

54. Children may be at particular risk of recruitment into mercenary-related activities,<sup>57</sup> and the Working Group received allegations of human rights violations in this connection. Specifically, Syrian boys, under the age of 18 and living in extremely vulnerable socioeconomic situations, were recruited through factions affiliated with the opposition Syrian National Army and deployed through Turkey to take part in the conflict in Libya.<sup>58</sup> There are, therefore, cases where those viewed as engaging in mercenary-related activities may in fact be victims of exploitation, trafficking or child recruitment. It is therefore important to carefully consider the root causes and contextual factors leading individuals to become involved in mercenary-related activities.

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<sup>55</sup> See [A/HRC/36/47/Add.1](#).

<sup>56</sup> See [A/70/330](#), paras. 10 and 87.

<sup>57</sup> See [A/HRC/39/49](#).

<sup>58</sup> See [JAL TUR 7/2020](#) and [JAL LBY 1/2020](#).

## **A. Fighters affiliated with armed non-State groups operating abroad**

55. Armed non-State groups and their fighters can engage in mercenary-related activities when they “export” their military resources and skills to the territory of another State in the pursuit of private gain. In such situations, commonalities with mercenaries include intervening as an external actor in an armed conflict and motivated, to a significant extent, by material and financial gain. However, several concurrent motivations may be at play for an armed group to move into the territory of another State and, in some cases, the group may be able to do so independently, instead of being “specially recruited” by another actor, as would be the case with mercenaries. This is particularly relevant in regions with porous borders and gaps in the rule of law and security. Moreover, in some contexts, it is difficult to qualify armed non-State groups and their fighters as “foreign” owing to the close cross-border links between communities, for example in the Sahel region of West Africa.

56. In some instances, armed non-State groups and their fighters may become involved in mercenary activities if they are faced with military setbacks in their territory of origin. This may also be the case if they do not perceive or do not have incentives to engage in a peace process, owing to the likelihood of facing prosecution or a lack of opportunity to either reintegrate into society or integrate into the regular armed forces, for example. Fighters may continue offering their skills to those willing to pay, making military capacity and capability a commodity subject to the rules of demand and supply. In addition, engaging in mercenary and other illicit activities in another State may constitute a tool to gain resources and maintain military capabilities. One such example is the alleged involvement of Sudanese armed groups from Darfur in mercenary and smuggling activities in Libya. These groups have reportedly received money, arms and equipment in exchange for military support offered to both sides of the conflict in Libya, and some have allegedly been involved in the trafficking of migrants, including the kidnapping of migrants for ransom.<sup>59</sup>

57. The conflict in Libya has also attracted fighters from armed non-State groups from farther afield. Since December 2019, thousands of fighters affiliated with the Syrian National Army, which encompasses a number of Syrian armed opposition factions, were reportedly deployed through Turkey to take part in hostilities in Libya alongside factions supporting the Libyan Government of National Accord. The fighters were allegedly motivated by significantly higher wages than they would have received in the Syrian Arab Republic, financial compensation to relatives in case of serious injury or death and the prospect of obtaining Turkish passports.<sup>60</sup>

## **B. Personnel of armed non-State actors operating domestically**

58. Similar to armed non-State groups operating abroad, a diverse range of armed non-State actors who are active domestically may attract recruits using the prospect of private gain. This category includes armed non-State actors, such as militias, paramilitary groups, organized criminal groups and vigilantes. In some cases, a number of similarities to mercenaries may be observed, such as financial motivation, distinction from State security forces and direct participation in hostilities or in activities that undermine the right to self-determination. For instance, these actors may control parts of a State’s territory through violence, intimidation and extortion, thus subverting the existing constitutional order and violating the right of peoples to self-determination. The situation in the Arco Minero del Orinoco region in the

<sup>59</sup> See [S/2020/36](#).

<sup>60</sup> See submissions by Maat for Peace, Development and Human Rights, by R. Ali and by Syrians for Truth and Justice.

Bolivarian Republic of Venezuela represents a stark example of organized criminal groups controlling a territory to extract natural resources while reportedly committing human rights abuses, including against indigenous peoples.<sup>61</sup>

59. Unlike mercenaries, however, these groups are domestic actors that may be driven by a number of overlapping motivations, such as control over territory or ethnic or religious affiliation. Some of their personnel may not be specially recruited to take part in hostilities or violent actions that threaten the right to self-determination but are rather engaged on a more general and long-term basis. Given the broad nature of this category, many of these actors may not qualify as conducting mercenary-related activities. Therefore, each case merits careful contextual and factual assessment to explore possible links to mercenarism.

60. In many cases, this set of actors operates outside international as well as domestic law. There are, however, situations in which such groups may be given some form of legal recognition and/or where a strict separation from State security forces is difficult to determine, for example when paramilitary groups operate in support of a national Government (or some parts of the Government). In several countries, such paramilitary groups have reportedly been involved in serious violations of international human rights law and international humanitarian law.<sup>62</sup>

61. In other cases, armed non-State actors may seek to establish legal entities, for example in the form of private security providers, in an effort to legitimize some of their activities and conceal the involvement of warlords and militia leaders. This issue was raised during the Working Group's visit to Somalia<sup>63</sup> and in a congressional investigation by the United States of America into private security subcontracting.<sup>64</sup> By transforming themselves into business entities, armed groups and militias may also seek to maintain their interests and power after the end of an armed conflict.

### C. Foreign fighters

62. Foreign nationals may join armed non-State actors for a number of reasons, including private gain. In this case, significant similarities exist between foreign fighters and mercenaries, including the role of intervening as an external actor in an armed conflict. Nevertheless, different motivations may be in play, as many foreign fighters are also driven by ideological, political or religious beliefs. The Working Group examined the phenomenon of foreign fighters during visits to Tunisia, Belgium, Ukraine, European Union institutions, the Central African Republic, Chad and Austria.<sup>65</sup> Concerning the situation in Ukraine, the Working Group found that the substantial presence of foreign fighters and mercenaries contributed to the exacerbation of the conflict in the eastern part of the country.<sup>66</sup> A deeper analysis of this phenomenon can be found in previous reports by the Working Group.<sup>67</sup>

<sup>61</sup> See A/HRC/44/54 (English and Spanish only). Available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Pages/ListReports.aspx>.

<sup>62</sup> Adam Day, *Hybrid Conflict, Hybrid Peace: How Militias and Paramilitary Groups Shape Post-conflict Transitions* (New York, United Nations University, 2020).

<sup>63</sup> See A/HRC/24/45/Add.2.

<sup>64</sup> See <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Warlord.pdf>.

<sup>65</sup> See A/HRC/33/43/Add.1, A/HRC/33/43/Add.2, A/HRC/33/43/Add.3, A/HRC/33/43/Add.4, A/HRC/36/47/Add.1, A/HRC/42/42/Add.1 and A/HRC/42/42/Add.2.

<sup>66</sup> See A/HRC/33/43/Add.3.

<sup>67</sup> See A/70/330 and A/71/318.

## **D. Foreign nationals contracted into State security services**

63. Many States recruit foreign nationals into their regular armed forces and security services and some have extensively relied on foreign nationals to build their military capacities and capabilities. In some cases, foreign personnel have reportedly been motivated to enrol into the security services of another country by the promise of comparatively high wages as well as by the prospect of receiving another nationality. However, such personnel more often appear to be recruited into State security structures on a long-term basis, rather than recruited to take part in a specific armed conflict or other context applicable to mercenary activities. Being a member of a State security service is another key difference compared with being a mercenary. Therefore, specific cases require attentive assessment to determine whether they can be considered a mercenary-related activity.

64. Some contexts, however, raise legitimate questions as to whether foreign personnel employed by State security services may be engaged in mercenary-related activities. In an armed conflict setting, for example, the recruitment of foreign soldiers at comparatively high wages to provide either specialized services, such as operating new military equipment, or to strengthen combat capacities on the ground, meets many of the criteria of the definition of a mercenary. In a different scenario brought to the Working Group's attention, foreigners were reportedly heavily recruited into a State's regular security services and used by the State to take part in violations against members of a particular religious group, while also helping to modify the State's demographic structure to the detriment of that group, which is a practice that could contravene the right to self-determination.

## **E. Private military and security companies and their personnel**

65. The nature of the relationship between mercenaries and private military and security companies has been a point of division among policymakers, scholars, civil society and the private military and security industry itself. The Working Group defines private military and security companies as corporate entities that provide, on a compensatory basis, military and/or security services by physical persons and/or legal entities.<sup>68</sup> The industry provides a broad spectrum of services ranging from static security to direct combat functions, the latter of which is believed to be a minor part of the sector. This observation is frequently made, including by industry representatives themselves, to dissociate private military and security companies from mercenaries.

66. Although this observation rightly puts the emphasis on the types of services provided, the distinction between offensive and defensive or support services is not always that straightforward.<sup>69</sup> Moreover, some State armies would arguably not be capable of undertaking the current extent of military operations worldwide without wide-ranging support from private contractors.<sup>70</sup> Most of these support services are, nevertheless, in the areas of logistics, security and protection, training, interpretation and general technological support, rather than direct combat functions.<sup>71</sup>

67. Some private military and security companies argue that they should be distinguished from mercenaries on the basis that they are integrated into formal armed forces. One private military contractor recently described this way of operating to the media, saying that "private" personnel become part of the hiring State's armed forces

<sup>68</sup> For the full definition, see [A/HRC/15/25](#), annex, art. 2.

<sup>69</sup> See submission by S. MacFate; see also para. 16 of the present document.

<sup>70</sup> See submission by C. Kinsey and H. Olsen.

<sup>71</sup> See submissions by O. Swed and D. Burland and by U. Petersohn.

for the duration of their contract.<sup>72</sup> Given the challenges in collecting information about State contracting of private military providers, it is difficult to say whether this is a common practice. At the same time, the full integration of private personnel into State armed forces unequivocally establishes State responsibility over their conduct.

68. In some instances, where particular private military services involve direct participation in hostilities, these would amount to mercenary activities in line with the international legal framework, as also recognized by the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict.<sup>73</sup> For example, it is alleged that mercenaries and foreign private military contractors were used to carry out targeted attacks during the armed conflict in Yemen.<sup>74</sup> In other cases, private military and security services could be described as a mercenary-related activity if clear linkages with the characteristics of mercenarism could be made.

69. Some private military and security companies have sought to obscure their legal personality and ownership by registering in States that have weak regulatory frameworks or by creating shell companies to obscure ownership and management structures. For companies operating in situations of armed conflict and contexts of widespread violence and weak rule of law, this raises questions about the legality of their operations, including their possible involvement in mercenary and mercenary-related activities. The significant differences and gaps in the national regulations of private military and security companies in different countries<sup>75</sup> allow ample scope for companies that seek to hide their operations to take advantage of these disparities. In addition, such practices may undermine achievements in raising standards within some parts of the private military and security industry, for example through initiatives such as the International Code of Conduct Association.<sup>76</sup>

70. Adequate regulation, monitoring and enforcement are paramount in the light of persistent concerns over the lack of accountability for human rights violations and abuses by private military and security companies and their personnel, especially when operating transnationally. In some cases, victims remain without an effective remedy decades after the alleged violations and abuses occurred. For example, a company run and staffed by British nationals but registered offshore was allegedly involved in human rights violations and abuses during the armed conflict in Sri Lanka between 1984 and 1988. At the time of writing, no investigations appear to have been conducted into the role of the company and its personnel in either the United Kingdom of Great Britain and Northern Ireland or Sri Lanka, leaving victims without effective remedies, and persons associated with the company continue to be active in providing private military and security services.<sup>77</sup>

## F. Cyber mercenaries

71. The distinctions between offensive and defensive services and between transparency and ambiguity over legal status can also be applied to military and security services provided in cyberspace. Private actors can be engaged by States and

<sup>72</sup> See [www.aljazeera.com/programmes/talktojazeera/2019/12/eeben-barlow-world-private-military-contractors-191229164548897.html](http://www.aljazeera.com/programmes/talktojazeera/2019/12/eeben-barlow-world-private-military-contractors-191229164548897.html).

<sup>73</sup> See [www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies](http://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies), p. 40.

<sup>74</sup> See A/HRC/42/CRP.1, paras. 270–272 (Arabic and English only), available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/session42/Pages/ListReports.aspx>; and S/2018/192, paras. 27 and 142.

<sup>75</sup> See A/HRC/36/47.

<sup>76</sup> See submission by J. Jezdimirovic Ranito and C.T. Mayer.

<sup>77</sup> See JAL GBR 4/2020, JAL LKA 3/2020 and JAL OTH 46/2020.

non-State actors not only to protect their own networks and infrastructure but also to carry out cyber operations to weaken the military capacities and capabilities of enemy armed forces, or to undermine the integrity of another State's territory. As such, individuals carrying out cyberattacks can be considered as undertaking a mercenary-related activity, or even a mercenary activity if all the qualifying criteria are met.

72. Studies suggest that States as well as non-State actors have started using hackers as proxies to project cyberpower, given the relatively low costs of such operations compared with conventional warfare and the possibility of hiding behind an attacker whose identity is very difficult to uncover. Therefore, attributing responsibility to the cyberattacker and their client is extremely challenging and raises significant concerns, owing to the potential of cyber operations to seriously undermine human rights. The possibility that cyber proxies may move across borders and thus escape regulatory control and accountability mechanisms is another cause for concern.<sup>78</sup>

73. The development of offensive cyber capabilities requires appropriate policy and regulatory responses from States in order to ensure that they conform to international human rights standards and international humanitarian law principles. Two groups have recently been established by the General Assembly to discuss broader issues of security in the information and communications technology field and could potentially provide guidance in this respect: the Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security,<sup>79</sup> and the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security.<sup>80</sup>

## VI. Conclusions and recommendations

**74. In recent years, a broad spectrum of activities has developed that, to a greater or lesser extent, share key characteristics of mercenarism. These activities have grown in parallel with changes marking contemporary armed conflicts, notably the rise of non-international armed conflicts, a proliferation of armed non-State actors, the involvement of third parties and asymmetric warfare that increasingly relies on new technologies. Taking into account this evolution and the corresponding consequences for the enjoyment of human rights, the Working Group examined the challenges of focusing solely on activities that meet the definition of a mercenary under the applicable international legal framework, and took a broader approach by examining a variety of actors that fit under a more adaptable concept of mercenary-related activities.**

**75. The diverse, opaque and profitable market for private combat and combat support services threatens human rights, the protection of civilians and peace and stability in general. In situations examined by the Working Group, the involvement of mercenaries and related actors frequently led to the intensification and prolongation of conflicts and thus contributed to the human suffering borne by the civilian population and undermined their right to self-determination. In some cases, these activities also resulted in human rights abuses, including violations of the right to life, the recruitment of children under the age of 18 to take part in armed conflict, the violation of the right to an**

<sup>78</sup> Tim Maurer, *Cyber Mercenaries: The State, Hackers, and Power* (Cambridge, United Kingdom, Cambridge University Press, 2018).

<sup>79</sup> See General Assembly resolution [73/27](#).

<sup>80</sup> See General Assembly resolution [73/266](#).

effective remedy and the violation of the right to freedom of expression, as well as violations of international humanitarian law.

76. Outsourcing the conduct of military operations to non-State actors, including to provide mercenary and mercenary-related activities, does not relieve States of their obligations under international law. It is therefore of particular concern that contemporary mercenary-related actors, characterized by opacity and ambiguity with regard to their identity, internal organization, the types of services they provide and their clients, provide an essential way for a number of States to influence the course of armed conflicts while denying doing so. This has led to a situation in which some States, either by commission or omission, obscure their involvement in an armed conflict, thus evading related responsibilities under international humanitarian and human rights laws, including for violations and abuses committed by their auxiliaries.

77. The new and evolving manifestations of mercenary-related activities therefore call for urgent attention from States and other relevant stakeholders. The present report provides elements to support discussions among States on ways to counter mercenary and related activities more effectively, with a view to respecting, protecting and fulfilling the right of peoples to self-determination, protecting civilians in situations of armed conflict and safeguarding the principles of non-intervention and territorial integrity. These discussions should be grounded in the international legal framework pertaining to mercenaries, notwithstanding its shortcomings, and in the broader framework of international humanitarian and human rights laws.

#### Recommendations

78. To prevent and mitigate the negative human rights impacts caused by mercenary activities, States should refrain from recruiting, using, financing and training mercenaries and should prohibit such conduct in domestic law, in line with the offences contained in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

79. States should not outsource activities that constitute direct participation in hostilities and should further prohibit the provision of for-profit services constituting direct participation in hostilities by private individuals and companies that are either registered or have their principal place of management in their territories. This prohibition should apply not only domestically but also with regard to exporting such services abroad, and should have commensurate monitoring and control mechanisms in place.

80. States should ensure transparency with regard to the contracting of military support services and make public information about the nature of services, procurement procedures, the terms of contracts and the names of services providers in a sufficiently detailed and timely manner. They should not invoke national security concerns as a general reason to restrict access to such information; rather, limitations on access to information must meet the test of legality, necessity and proportionality, in line with the right to freedom of expression.

81. States must investigate, prosecute and sanction alleged violations of international humanitarian law and human rights abuses by mercenaries and related actors and provide effective remedies to victims. Investigations, prosecutions and trials must respect and guarantee the right to a fair trial and due process of law.

82. In this context, due consideration must be given to the root causes behind mercenary and mercenary-related activities and the vulnerable situations in which some of the individuals involved may find themselves. Children recruited to take part in mercenary-related activities and victims of trafficking and of contemporary forms of slavery, including forced labour, should be treated primarily as victims and offered specific protections in line with international law.

83. At the international level, States should initiate dialogue on the new and evolving forms of mercenary and mercenary-related activities, the risks they pose to international humanitarian and human rights laws and ways to address and counter them more effectively. Any such dialogue should include international and regional organizations, civil society and experts, and consider existing tools and initiatives (see paras. 86–88 below).

84. Building on the inclusion of armed mercenary personnel in arms embargoes, the Security Council should assess the implementation of that provision and the challenges observed thus far, and draw lessons to clarify and strengthen its application.

85. States should reinvigorate discussions with the open-ended intergovernmental working group to elaborate the content of an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies,<sup>81</sup> and strive towards tangible progress in this respect. In particular, States should use this process to define the scope of permissible private military and security services and lay down the basis for registration and licensing regimes and monitoring, oversight and accountability mechanisms, taking into account the transnational character of many of these services. As a complementary step, States should also actively support international voluntary initiatives aimed at private military and security companies, such as the Montreux Document and the International Code of Conduct.

86. Discussions within the Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security and the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security should address human rights concerns arising from the involvement of mercenaries and related actors in developing and using offensive cyber capabilities.

87. With regard to mercenary-related activities associated with armed non-State actors, States should agree on and support international processes to identify, assess and further develop mechanisms to more clearly and formally recognize the international human rights obligations of armed non-State actors, including criteria to determine the latter's capacity to hold human rights obligations.

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<sup>81</sup> See Human Rights Council resolution [36/11](#).