

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

**PANEL ON
“FOREIGN FIGHTERS AND NEW FORMS OF MERCENARISM”**

**Thursday 14 April 2015
Room XXIII, Palais des Nations, Geneva**

Concept Note

Introduction

The Working Group convenes this panel in light of its mandate to monitor mercenaries and mercenary-related activities in all their forms and manifestations, as well as to identify sources and causes, emerging issues, manifestations and trends regarding mercenaries and mercenary-related activities and their impact on human rights, particularly on the right of peoples to self-determination.

The Working Group considers it necessary, in fulfilling its mandate, to explore how its mandate corresponds to evolving phenomena that may be considered as contemporary forms of mercenarism or mercenary-related activities. The phenomenon of foreign fighters presents such an opportunity.

The panel is part of the Working Group’s ongoing study on foreign fighters, which began in 2015. This study has involved country visits to Tunisia and Belgium, a panel at the UN in New York in July 2015, and a thematic report to the General Assembly in November 2015.

But how did these actors evolve? What conditions give rise to change? And what core criteria allow us to identify their activities across the centuries as mercenary or mercenary-related? Do foreign fighters meet these criteria? And what difference does such a classification mean for accountability and remedy?

The Working Group hopes that its study will contribute to useful guidance for Member States as they address the growing issue of foreign fighters and their impact on human rights.

The evolution of mercenarism

As noted in the Working Group’s 2015 report to the UN General Assembly (A/70/330), under the mandate of the Special Rapporteur on the use of mercenaries, who served from 1987 to 2004, it was recognized that mercenary activities assumed new forms and aspects that had not existed in the past. The discussion of the difference between traditional forms of mercenarism and new modalities of mercenary activity was a recurrent topic in his reports, in two of which he reiterated the need to address new forms of mercenary activities and highlighted the

linkage between mercenarism and terrorism, citing the existence of actors who are not only recruited to take part in armed conflict but also to participate actively in other activities characterized by extreme violence, hatred and intolerance, and who operate by creating situations conducive to terrorism.

Panel to cover, inter alia:

- How has mercenarism evolved?
- What conditions give rise to changes in mercenarism?

Motivations among foreign fighters and mercenaries

The legal definition of a mercenary is given in Article 47 of the 1977 Additional Protocol I to the 1949 Geneva Conventions.¹ The 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries derives its definition from that used in the Additional Protocol. According to the Convention, in addition to fighting in an armed conflict, persons who are recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State, or undermining the territorial integrity of States, are also mercenaries, provided that the other elements are fulfilled. Both the Special Rapporteur on mercenaries and the Working Group have highlighted the need to encompass the new and emerging manifestations of mercenary-like activities.

Also in its report, the Working Group has determined that, while there is no legal definition of foreign fighters, there are similarities and differences between foreign fighters and mercenaries that may be observed. In terms of similarities, both mercenaries and foreign fighters are external actors that intervene in an armed conflict. Mercenaries are neither nationals of a party to the conflict nor residents of a territory controlled by a party to the conflict. Similarly, foreign fighters, while they may or may not be nationals of a party to the conflict, do not reside in the State affected by the conflict and have travelled from abroad to

¹ United Nations, *Treaty Series*, vol. 1125, No. 17512; article 47:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

join the insurgency. Both mercenaries and foreign fighters may also be recruited abroad or locally. Foreign fighters are motivated by a range of factors, notably ideology, and salaries or promises of financial rewards may also be an incentive to travel abroad.

In terms of differences, mercenaries, by definition, are neither nationals of a party to the conflict nor residents of territory controlled by a party to the conflict. However, foreign fighters, while they may be nationals of a party to the conflict, such as from the diaspora, do not reside in the conflict-affected State and have travelled from abroad to join the insurgency.

Given the above considerations, the Working Group makes the tentative assertion that some foreign fighters may represent a contemporary form of mercenarism or mercenary-related activity.

Panel to cover, inter alia:

- What core criteria allow us to identify mercenaries?
- Do these criteria, notably motivation, apply to today's foreign fighters?

Implications for accountability and remedy

Foreign fighters have been documented as perpetrators of a range of human rights violations, in a context where non-State armed groups that exercise effective control over territory, such as the Islamic State in Iraq and the Levant (ISIL), are increasingly considered to be bound by international human rights obligations in relation to all people within that territory. Whether or not human rights law applies, all parties to armed conflict are bound by international humanitarian law. Violations of human rights and international humanitarian law include executions, sexual slavery, rape and other forms of sexual and gender-based violence, torture, mutilation, forcible displacement, enforced disappearance, the wanton destruction of cultural property and the enlistment and forced recruitment of children.

The United Nations High Commissioner for Human Rights has stressed the need to combat impunity and ensure accountability for gross violations of human rights law and serious violations of international humanitarian law in the context of terrorism, through effective investigations and prosecutions to ensure justice, provide redress to victims and prevent further violations. The countries of nationality of foreign fighters, as well as the countries in whose territory violations are committed, should effectively investigate and prosecute those responsible for such violations whenever they can do so.² In some cases, human rights and humanitarian law violations may also be subject to universal jurisdiction.

² A/HRC/28/28, para. 44.

As the Working Group has noted, there have been few reported investigations for such acts committed by foreign fighters, with the large majority of reported investigations and prosecutions focusing on domestic terrorism offences.

Panel to cover, inter alia:

- What does the classification of mercenarism mean for accountability?
- What does the classification of mercenarism mean for access to remedy for victims or related human rights violations?

Conclusions

Discussions at the panel will contribute to greater understanding of the validity and relevance of the Working Group's assertion of foreign fighters as forms of mercenary-related actors. It will guide legal and policy considerations among States, such as the possible revision of the legal definition of mercenary, the development of an international legal definition for terrorism, as well as the most effective measures for preventing and addressing root causes of the foreign fighter phenomenon.