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|  | United Nations | A/78/535 | |
| _unlogo | **General Assembly** | | Distr.: General  9 October 2023  Original: English |

**Seventy-eighth session**

Item 69 of the provisional agenda

**Right of peoples to self-determination**

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

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, submitted in accordance with General Assembly Resolution 77/206 and Human Rights Council Resolution [51/](https://undocs.org/en/A/HRC/RES/44/10)13.

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 Regulatory Environment for Mercenaries, Mercenary-related actors, and PMSC: A Call to Action

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| *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 aims to fill a knowledge gap amongst States and other relevant stakeholders, by providing a stocktaking of the current legal, human rights, and international humanitarian law frameworks in relation to mercenaries, mercenary-related actors, and private military and security companies.  In doing so, the present report maps the trends around the contemporary use of mercenaries, and violations of human rights and international humanitarian law.  Furthermore, the report provides a comprehensive overview and analysis of the international and regional legal frameworks regulating the recruitment, financing, training, and use of mercenaries, with a view to strengthening the applicability and enforceability of international law.  During the preparation of the present report, the Working Group was composed of Ravindran Daniel (Chair), Sorcha MacLeod, Chris Kwaja and Carlos Salazar Couto. Sorcha MacLeod acted as the main drafter of the report.  The Working Group thanks those individuals and organisations who contributed to and assisted with the writing of this report. |
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I. Introduction

1. Increasingly, the members of the Working Group on mercenaries are being invited to brief States and other stakeholders on the trends and legal frameworks around mercenaries, mercenary-related actors, and private military and security companies (PMSC). In particular, their involvement in the widespread commission of violations of human rights and international humanitarian law, and whether they can be held accountable for them. What has become clear to the members of the Working Group is that there is a substantial knowledge gap among many of these actors. The aim of the present report, therefore, is to fill that gap by providing a stocktaking of the current legal, human rights, and international humanitarian law frameworks in relation to mercenaries, mercenary-related actors, and private military and security companies, with a two-fold purpose. First, to map the trends around the contemporary use of mercenaries, and violations of human rights and international humanitarian law, in particular.  Second, the report provides a comprehensive overview and analysis of the international and regional legal frameworks regulating the recruitment, financing, training, and use of mercenaries including Article 47 of Additional Protocol 1 of the Geneva Conventions[[1]](#footnote-1), the Convention for the Elimination of Mercenarism in Africa[[2]](#footnote-2), and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.[[3]](#footnote-3) It further appraises the key soft law regulatory frameworks governing private military and security companies, specifically the Montreux Document[[4]](#footnote-4) and the International Code of Conduct for Private Security Providers.[[5]](#footnote-5) Finally, it examines the most recent efforts of the Open-Ended Intergovernmental Working Group on private military and security companies to draft an instrument regulating the activities of PMSC and points forward to its new iteration.[[6]](#footnote-6) Ultimately, the Working Group again concludes that many States are failing to effectively engage with and implement the regulatory frameworks applicable to mercenaries, mercenary-related actors, and private military and security companies to the severe detriment of human rights and international humanitarian law.

II. Context

2. What is clear to the Working Group on mercenaries is that the recruitment, training, financing, and use of mercenaries and mercenary-related actors remains a systemic and growing problem that cuts across regions, individual countries, and multiple armed conflicts. The Working Group has repeatedly warned that their use prolongs armed conflicts, undermines peace processes, destabilises regions, and most concerningly results in and exacerbates the commission of grave human rights abuses, war crimes, and crimes against humanity on civilian populations. The sheer scale of the use of mercenaries and mercenary-related actors, and the atrocities they commit around the world, has increased to levels not seen before.

3. The members of the Working Group take seriously their role of providing early warning of mercenary and mercenary-related trends that give rise to, or are likely to give rise to, imminent risk of atrocities. This is something that the Working Group does via Communications, Thematic Reports, and Country Visits. Nevertheless, the Working Group suffers the negative effects of the ‘UN system’s siloed approach to issues of human rights, peace and security and atrocity prevention’ which often impedes it from ‘briefing essential UN bodies, including the Security Council and General Assembly’ beyond annual Interactive Dialogues. To address this effectively, the international community must ‘better utilize the precise, unique and action-oriented information’ from the Working Group on mercenaries ‘to ensure timely and effective action to prevent atrocities.’[[7]](#footnote-7) Thematic reports, including this one, and the information they contain form a crucial part of that early warning system which States would do well to heed. In the absence of State attention and engagement, gross human rights and IHL violations by mercenaries and related actors continue apace and largely with impunity.

4. In 2020 the Working Group presented a report to the United Nations General Assembly (UNGA) on the Evolving forms, trends and manifestations of mercenaries and mercenary-related activities.[[8]](#footnote-8) At that time the Working Group issued a call for States and other stakeholders to pay “urgent attention” to “the new forms and manifestations of mercenary-related activities” and their negative impacts on human rights and IHL around the world.

5. Specifically, the Working Group highlighted that mercenaries and mercenary-related actors were manifesting in new and problematic ways in numerous international and non-international armed conflicts. Of particular concern to the Working Group was the phenomenon of third-party states, not involved in armed conflicts, increasingly inserting themselves into conflicts by recruiting, training, financing, and using mercenaries or mercenary-related actors in so-called ‘proxy wars.’ Such actions drive predatory recruitment practices, and give rise to asymmetric warfare, as well as grave human rights violations and war crimes. In March 2022, the Working Group reiterated its concerns in a public statement urging States to “implement effective international and national regulation” and restating that “human rights abuses and humanitarian law violations by mercenaries must not be allowed to go unpunished by States and the international community. Violations must be investigated, prosecuted and sanctioned, and effective remedies provided to victims.”[[9]](#footnote-9) In the eighteen months since that public statement human rights abuses committed by mercenaries and related actors have continued to escalate without accountability or access to justice for the many victims.

6. Predatory recruitment has been a determining factor in the substantial increase in the numbers of mercenaries and mercenary-related actors, and the Working Group has elaborated on and addressed its concerns in its report on *Recruitment, including predatory recruitment, of mercenaries and mercenary-related actors* to the 54th Session of the Human Rights Council.[[10]](#footnote-10) Whereas historically, mercenaries were used in relatively small numbers and tended to comprise ex-military personnel,[[11]](#footnote-11) the Working Group has observed that more recently mercenaries are being drawn from the general population of conflict-affected countries, from countries at the lower end of the development and socio-economic scale, as well as from prison populations.[[12]](#footnote-12) This has resulted in a significant escalation in the scale of the use of mercenaries, with tens of thousands of individual mercenaries being recruited to fight in multiple armed conflicts which results in intensified harms for civilian populations in conflict-affected countries. This form of recruitment also gives rise to additional human rights challenges by creating additional layers of victims, for example via the act of recruiting persons for the purposes of exploitation, perhaps under duress.

7. Furthermore, in its recent communications, the Working Group has drawn attention to allegations of widespread violations of human rights and international humanitarian law, in numerous international and non-international armed conflicts.[[13]](#footnote-13) Violations at the hands of mercenaries and mercenary-related actors, including mass killings, torture, forced disappearances, arbitrary detention, sexual and gender-based violence, looting, harassment of human rights defenders, journalists, and victims, and indiscriminate targeting of civilians, are escalating in scale and intensity. The impacts on persons in vulnerable situations are pervasive and disproportionate, including those on women, children, religious minorities, older persons, and persons with disabilities. In some cases, the atrocities committed against civilian populations rise to the level of war crimes and crimes against humanity. At the same time, accountability remains absent for perpetrators and remedy is rare for victims, both of which were highlighted by the Working Group in its 2022 report to the Human Rights Council on *Access to justice, accountability and remedies for victims of mercenaries, mercenary-related actors and private military and security companies*.[[14]](#footnote-14) Nor are third-party States that are using mercenaries and mercenary-related actors as proxies in armed conflicts being held responsible for their violations of human rights and international humanitarian law.

8. In the publishing of such thematic reports, and the issuing of communications and public statements, the Working Group has sought to fulfil an important aspect of its mandate by providing early warnings of gross human rights abuses to the international community. Regrettably, and at the expense of thousands of victims, these early warnings have not been heeded.

III. International Legal Framework

A. International Humanitarian Law

9. The definition of mercenary is found in Article 47 of Additional Protocol I to the Geneva Convention.[[15]](#footnote-15) States contested and debated the contents of Article 47 AP1 for several years leading up to its 1977 adoption as countries attempted to create a fine distinction between those classified as mercenaries and other actors, essentially with the aim of retaining the right to recruit, train, finance, and use mercenaries with impunity.

10. Article 47(2) defines a mercenary via six cumulative criteria. All six criteria must be met for a person to be classified as a mercenary. Thus a mercenary is an individual who:

1. is specially recruited locally or abroad in order to fight in an armed conflict;
2. does, in fact, take a direct part in the hostilities;
3. 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;
4. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
5. is not a member of the armed forces of a Party to the conflict; and
6. 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.

11. At the outset, it is important to note that Article 47 AP1 does not ban the recruitment, training, financing, or use of mercenaries. Nor does it criminalise a person for being a mercenary, nor a state for contracting them during an armed conflict. AP1 is focused on the treatment of prisoners of war and to that end, Article 47 merely sets out the criteria for classifying an individual as a mercenary. If it is established that an individual meets all six criteria of mercenarism they are denied combatant status and are excluded from receiving automatic prisoner of war status.[5] The consequence of non-combatant status is that an individual will alternatively be designated as a Civilian Directly Participating in Hostilities (DPH). The classification of DPH has several implications regarding state response, for instance, DPH persons are not automatically afforded Prisoner of War status under Article 4(a)(2) of Geneva Convention III. Additionally, where combatants are classified by their status (whether they are a member of a given force), DPH persons are classified by their conduct, meaning they fluctuate between civilian and DPH based on their actions at any given time. This classification means that a person is only a mercenary for the time they are directly participating in hostile acts, but once those actions stop, they are classified as a civilian and afforded all the protections of humanitarian and human rights law given under Article 75 of the Additional Protocol.

12. Article 47 is characterized by its narrowness. Due to the cumulative and subjective nature of the elements, it is a difficult definition to fulfil. The first three criteria set out in Article 47 are ‘inclusive’ in nature, meaning that a person must fulfil all three criteria.

13. The first element of Article 47, that is that "a person be specifically recruited to fight in a given armed conflict," was intended to distinguish between mercenaries and other non-State armed groups.[[16]](#footnote-16)

14. The second element "taking direct part in hostilities," means that even a mercenary is not a mercenary until they are involved in fighting in combat and is interpreted as excluding advisers or military technicians. The International Committee of the Red Cross (ICRC) has laid out three conditions that must be met for a person to directly be participating in hostilities:

* The act must be likely to adversely affect the military operations or military capacity of a Party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
* There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
* The act must be specifically designed to directly cause the required threshold of harm in support of a Party to the conflict and to the detriment of another (belligerent nexus).[[17]](#footnote-17)

15. As previously mentioned, this definition of direct participation excludes many roles that mercenaries and mercenary-related actors may fill, such as advising, planning operations, maintaining equipment and weapons, technicians, and suppliers.

16. Third, to be defined as a mercenary the individual must be "motivated by private financial gain," qualified only by the fact that compensation must be substantially in excess to the combatants of the parties of the conflict. This requirement relies heavily on an individual’s motive to define their classification. The intent was to highlight one of mercenarism's main objectionable aspects: that it is in principle an endeavour driven by greed, where armed conflicts are exploited for profit.[[18]](#footnote-18) Via the adoption of Article 47, the international community has determined it to be morally reprehensible to fight for money rather than cause or country. However, this then requires proving that a person's motives for partaking in a conflict is purely financially motivated. Something that is entirely subjective and very difficult to prove. In recent years, the Working Group has received information that mercenaries and mercenary-related actors are also being motivated and induced by non-pecuniary incentives such as offers of citizenship or reduction of prison terms which creates additional definitional difficulties. Still others are being coerced into mercenarism under threat of harm to themselves or their family members. Article 47 tries to account for the unworkable nature of proving this motivation for money and indifference to others by suggesting that paying a person substantially more than a regular soldier serves as adequate evidence of mercenarism, but it only closes the gap marginally.It does not address non-pecuniary motivations.

17. The final three criteria of Article 47 are ‘excluding’ in nature, meaning that if an individual falls within the ambit of any one of them, they will not meet the definition of mercenary.

18. Element four, provides that an individual cannot be classified as a mercenary if they are “a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict.” Such a formulation results in irrationalities, whereby different individuals recruited, trained, financed, and deployed by the same entity, and who fight alongside each other in the same armed conflict, may or may not be defined as a mercenary depending on their nationality. The Working Group has observed this specific problem in recent and ongoing armed conflicts.

19. Element five provides that "the person is not a member of the armed forces of a party to the conflict." This formulation leaves it open for States to circumvent Article 47 by incorporating troops hired abroad into its own armed forces without them being classified as mercenaries, and the Working Group has received information highlighting this as an ongoing issue. A State can thus integrate private fighters into its own forces and use them with impunity. Like the first point regarding the specifics of recruitment, this element also provides additional insulation for individuals and groups, who are not citizens or residents of a state but nonetheless make their living from fighting for that state.

20. Finally, the criteria for mercenary are not fulfilled if the individual has been “sent by a third-party state on official duty of that state's armed forces" Additional Protocol I had to take account of situations where members armed forces are deployed as part of peacekeeping missions.[[19]](#footnote-19) This part of Article 47 was meant to highlight the private, non-governmental nature of mercenaries, yet it provides another backdoor for mercenaries and mercenary-related actors to be deployed as proxies to fight in armed conflicts by 3rd party states under cover of status as ‘advisers’, ‘instructors’, or ‘trainers.’Such an approach means that States are ensured a level of plausible deniability when these actors engage in fighting.

21. Amongst the problematic definition of a mercenary, there are also several overarching structural issues as well. First, Additional Protocol I applies only to conflicts of an international nature, and it does not apply to non-international armed conflicts (NIACs). This oversight can lead to results antithetical to the purpose of Article 47, as the majority of conflicts today are classified as NIACs. For example, countries hire mercenaries to help quell dissidence within their own borders or to combat groups it designates as terrorist organisations. This leads to grave human rights abuses and violations of international humanitarian law including war crimes and crimes against humanity. Civilians find themselves at a particularly vicious intersection of violence perpetrated by multiple actors namely State armed forces, non-State armed groups, mercenary-related actors.

22. Finally, it should be noted that Article 47 is inconsistent with the rest of Protocol I. The essence of the Protocol is to ensure that there is no discrimination of treatment of fighters based on cause, motivation, or side of the armed conflict. Yet the definition of mercenary relies entirely on a person's subjective motivation for joining a conflict.

23. Article 47 as adopted by States deliberately establishes a complex and hard to meet definition of mercenary, allowing for easy circumvention by States, mercenaries, and mercenary-related actors, and does not criminalize the phenomenon. The intricate definition has been largely incorporated with some tweaks into both the African Convention and the International Convention on Mercenarism.

B. OAU Convention for the Elimination of Mercenarism in Africa

24. The Organisation of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa, was drafted by its members and adopted in July 1977.[[20]](#footnote-20) In the Preamble the Convention sets out its purpose as combating mercenaries' threat to "the independence, sovereignty, territorial integrity, and harmonious development" of its member states. The Article 1(1) definition of mercenary largely mirrors the definition outlined in GC Additional Protocol I Article 47, in that it does not apply to non-international armed conflicts (NIACs). The key difference is that an individual need only be motivated by the “desire for private gain” and there is no requirement for it be substantially more than that offered to members of the armed forces of a State. As such, the same loopholes and shortcomings laid out in relation to the definition set out in GC AP1 also apply to the African Convention. The Working Group understands that the African Union is currently reviewing the Convention and urges member states to urgently address the highlighted gaps.

25. In one important aspect, the African Convention on Mercenarism diverges substantively from Additional Protocol 1 by criminalising the recruitment, training, financing and use of mercenaries by individuals, groups or associations, representatives of a State and States themselves in Article 1(2) and 1(3). Article 1(2) provides that:

26. The crime of mercenarism is committed by the individual, group or association, representative of a State and the State itself who with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State, that practises any of the following acts:

1. Shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;
2. Enlists, enrols or tries to enrol in the said bands;
3. Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above-mentioned forces.

27. This Article extends mercenarism from an act undertaken by participants during an armed conflict to those on a group or state level that partake, finance, or facilitate the use or action of mercenaries in any way.

28. Article 1(3) states that "’[a]ny person, natural or juridical who commits the crime of mercenarism… commits an offence considered as a crime against peace and security in Africa and shall be punished as such."

29. The Working Group notes that currently only thirty out of fifty-five African Union member states are party to the Convention which gives rise to problems with enforceability. One way to effectively address mercenarism, therefore, is for all members of the African Union to become a party to the Convention. Given the transnational nature of mercenarism, AU member states must work together to strengthen border security and thwart the movement of mercenaries transnationally.

30. Although state parties to the African Convention on Mercenarism are required to incorporate its provisions at the domestic level, the rights afforded to a state are of course confined to its borders. In that sense, the failure of all AU member states to ratify the Convention, and the region-wide inability to secure borders has led states to a sense of helplessness when the nature of mercenaries is transnational.[[21]](#footnote-21)  Given the persisting flow of weapons and foreign armed actors, cooperation on border management is one way to reduce mercenaries' ability to operate unabated.

31. Finally, two additional flaws include the lack of an enforcement mechanism and the failure to update the Convention to reflect the growing trend towards the use of actors that fall short of the definition of mercenary, such as Private Military and Security Contractors (PMSC).[[22]](#footnote-22) Regarding the first point, without a treaty body designed to monitor member states and their implementation of the Convention, ratifying the Convention has not equated to enforcement of it. Given that only a little over half of African States have ratified the Convention in the first instance, the large number of State Parties who then are unable or unwilling to implement it demonstrates the need for additional work to be done in this area politically, and via technical cooperation and capacity-building.

32. The use of PMSC further complicates this. Given the variety and overlapping nature of services these actors perform, from the provision of security services at one end to full-blown combat services in military operations at the other, the classification as a mercenary falls on a sliding scale, heavily reliant on context.[[23]](#footnote-23) PMSC are prevalent throughout Africa, yet the Convention still needs to be updated to account for the advancement of the industry.

C. International Convention against the Recruitment, Use, Financing and Training of Mercenaries

33. The International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries was adopted in 1989 and entered into force on 20 October 2001.[[24]](#footnote-24) Like the African Convention on Mercenarism, the International Convention on Mercenarism criminalises mercenarism, and includes those who recruit, use, finance, or train mercenaries—making the Convention more than simply a tool for defining participants in a conflict. The International Convention on Mercenarism also encompasses NIACs as well as international conflicts.

34. The definition of Mercenary in the International Convention on Mercenarism again largely mirrors that of Additional Protocol I with one notable exception. It does not include the requirement that a person directly participate in hostilities. However, Article 3 states, "A mercenary, as defined in Article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence… commits an offence…" Therefore, it appears that Article 3 supplements the requirement that a person directly participates in hostilities, as seen in other definitions of mercenary. As such, given the identical nature of the definition of a mercenary in Additional Protocol 1 and the Mercenary Convention, the same loopholes and gaps within the definition apply.

35. Notably, the definition of mercenary in the International Convention on Mercenarism represents a missed opportunity to remove the problematic elements of GC AP1 Article 47 that, even in 1989, already felt irrelevant or a significant barrier to having a workable definition. Just 12 years after Additional Protocol 1, the international perception of what was driving the practice of mercenarism had already shifted. For instance, in drafting the International Convention on Mercenarism States missed the opportunity to exclude the motivation of financial gain as a necessary factor in being a mercenary.[[25]](#footnote-25)  Motive is subjective and difficult to prove, and why it is so integral to being a mercenary is unclear. After all, there are many actors within state forces primarily driven by financial gain, and the actions of a mercenary are not problematic due to the motivations driving their action but instead because mercenaries are unique conflict actors who leave at the end of an armed conflict. This creates a perfect storm for violations of human rights and international humanitarian law abuses without accountability as noted by the Working Group in its 2022 Report to the HRC. Mercenaries and mercenary-related actors are unaccountable for their devastating impacts on civilians in situations that include high numbers of persons with vulnerabilities. Similarly in relation to nationality, the actions of private actors are no more or less harmful to the international community because they are a non-national or non-resident of a state party to a conflict. The danger comes from a person's ability to avoid accountability in an armed conflict as a private actor, not their motivation or nationality.

36. Article 5of the International Convention on Mercenarism creates an important obligation for States themselves to refrain from recruiting, training, financing, or using mercenaries and further requires State Parties to establish domestic frameworks to prosecute and punish anyone committing a crime defined in the Convention.

37. Article 9 and its jurisdictional components raise particular issues. The International Convention on Mercenarism establishes jurisdiction for states if an act of mercenarism is committed on its land, by a national of its state, or a person who has committed an act of mercenarism is known to be within its territory.[[26]](#footnote-26) In contrast to other crimes such as genocide, where jurisdiction is universal, and states have a more positive duty to ensure the crime is not taking place, jurisdiction over crimes of mercenarism is far more passive and restrictive, and only requires states to ensure that mercenarism is not taking place on its territory or by its nationals. If the international community is to eradicate mercenarism, states must be more empowered to enforce the Convention wherever infringements occur.

38. Finally, like the African Convention, the International Convention on Mercenarism lacks a monitoring body. Therefore, State failure to adhere to duties under the Convention remains largely unscrutinised.

39. Unfortunately, the International Convention on Mercenarism suffers from an even worse lack of State engagement than the African Convention, with only thirty-seven State Parties currently. No permanent member of the UN Security Council is a party to the Convention. There are few if any prosecutions of mercenaries and remedy is rare for victims.[[27]](#footnote-27) The limited support given by States to the international Convention on Mercenarism demonstrates their lack of commitment to engage with an issue of growing global concern. The Working Group on mercenaries has repeatedly and consistently urged States to ratify the Convention. At minimum, if States feel unable to ratify the Convention, they should ensure that the key provisions of the Convention are enshrined in their domestic law, specifically, the criminalization of the act of mercenarism, and the recruitment, training, financing, and use of mercenaries, and the establishment of national legal frameworks around it, including remedies for victims. States should also publicly commit to refrain from recruiting, training, financing, and using mercenaries themselves.

IV. Private Military and Security Companies

Definitions

40. While there is no universally accepted, legally binding, standard definition of a ‘military company’ or a ‘security company,’ the Working Group on mercenaries uses the term “private military and security companies” to refer to corporate entities providing, on a compensatory basis, military and/or security services by physical persons and/or legal entities.[[28]](#footnote-28) This definition focuses on the activities performed by corporate entities rather than the way a company or entity may self-identify. As the Working Group has previously noted frequently, focus on the types of services carried out by such private companies is essential, given the mutable nature of their operations, the complex corporate structures employed by the industry and the potential risks to human rights posed by their operations.

41. Services include, for example: knowledge transfer with security, policing and military applications; development and implementation of informational security measures; land, sea or air reconnaissance; satellite surveillance; and manned or unmanned flight operations of any type. In line with this definition, the thematic report focuses on companies that provide private military and security services, including not only private military and security companies, but also defence companies, corporations specialized in information and advanced technologies, and airlines which provide such services. PMSC are also major providers of security-related services for immigration and border management purposes.[[29]](#footnote-29)

Regulatory Developments

42. Private Military and Security Companies do not operate entirely in a regulatory vacuum, but they *are* underregulated. Several soft law initiatives have emerged in the past fifteen years that endeavour to regulate PMSC, including the Montreux Document and the International Code of Conduct for Private Security Providers, with varying levels of success. Additionally, two successive UN Open-Ended Intergovernmental Working Groups on Private Military and Security Companies have convened since 2010.

1. Montreux Document

43. The Swiss Federal Department of Foreign Affairs and the International Committee of the Red Cross spearheaded an international effort that led to the adoption of the Montreux Document in September 2008.[[30]](#footnote-30) The Montreux Document is aimed at States and “articulates how international law applies to the activities of private military and security companies during armed conflict and sets out good regulatory practices.”[[31]](#footnote-31) It is divided into lex lata (law as it exists) and lex ferenda (law as it ought to be) sections: Part 1 distinguishes between Contracting States, Territorial States, and Home States, giving an overview of existing obligations states have under international law, international human rights law, and international humanitarian law, while Part 2 contains a list of ‘Good Practices Relating to Private and Military Security Companies’ that States should adhere to if contracting out services to PMSC.These Good Practices are designed “to provide guidance and assistance to States inensuring respect for international humanitarian law and human rights law and otherwise promoting responsibleconduct in their relationships with PMSCs operating in areas of armed conflict.”

44. The application of the Montreux Document primarily to armed conflicts is a major weakness considering the rapid and extensive expansion of PMSC into new spheres outside armed conflicts such as migration and border control, as well as humanitarian operations, pandemic responses, and cyber operations.[[32]](#footnote-32) An important, and often overlooked provision, however, is that the Montreux Document explicitly provides that States may also find the Good Practices useful when contracting PMSC “outside of areas of armed conflict.” States therefore ought to be applying these Good Practices more broadly, a point that was noted on the occasion of the 10th anniversary of the Montreux Document.[[33]](#footnote-33)

45. The Montreux Document is not legally binding and does not create any new legal rules or obligations for states or PMSC.[[34]](#footnote-34) It envisages implementation of its provisions through signatory countries' domestic systems, leaving them responsible for realizing the Good Practices in relation to private military and security companies domiciled within their territory. A total of 59 countries, as well as three regional organisations, have signed the Montreux Document.

46. To that end, the Montreux Document provides that both Home and Territorial States should ‘evaluate’ the adequacy of their domestic legal framework for regulating PMSC and engage in “Good Practices” as follows:[[35]](#footnote-35)

B. Good Practices for Territorial States

*“Territorial States should evaluate whether their domestic legal framework is adequate to ensure that the conduct of PMSCs and their personnel is in conformity with relevant national law, international humanitarian law and human rights law or whether it needs to establish further arrangements to regulate the activities of PMSCs.”*

C. Good Practices for Home States

*“…Home States should evaluate whether their domestic legal framework, be it central or federal, is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel, or whether, given the size and nature of their national private military and security industry, additional measures should be adopted to encourage such respect and to regulate the activities of PMSCs. When considering the scope and nature of any licensing or regulatory regime, Home States should take particular notice of regulatory regimes by relevant Contracting and Territorial States, in order to minimise the potential for duplicative or overlapping regimes and to focus efforts on areas of specific concern for Home States.”*

47. While the Montreux Document is a significant step forward, there are limitations.[[36]](#footnote-36) Despite an increase in signatories from seventeen to fifty-eight since its creation, lack of State engagement and support for the Montreux Document is evidenced by the limited number of State Signatories in context. If capacity is a barrier to participation for certain States, then this must be addressed by the international community as a whole.

48. One key omission from the Montreux Document is in relation to certain recruitment practices. It does address “States’ obligations with regards to companies” but recruitment where individuals are recruited by companies based in other countries is not addressed.[[37]](#footnote-37) As the Working Group has noted previously, this gives rise to multiple issues.

49. Part 2 *Good Practices* does not articulate which “services may or may not be contracted out to PMSCs” rather it is left up to individual States to determine “which services may not be contracted out.” In so doing, Contracting States should “take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.” If a State chooses to contract out services to PMSC, the Montreux Document makes clear per Part A Paragraph 1 that the responsibility for regulating such services lies with the State, and in all circumstances: “Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities”. The discretion left to each State to determine which services can and cannot be provided has led to different approaches. For example, some States set out permissible services which PMSC may perform, while others list services they cannot.[[38]](#footnote-38) For instance, a state may limit a PMSCs work to “support services” while others may state a company can never “directly participate in hostilities, take prisoners… espionage, intelligence analysis, etc.”[71]

50. Several of the Good Practices relate to the use of force by PMSC, and States are expected to ensure that domestic legislation effectively regulates elements around the use of force e.g. self-defence, incident reporting, types of weapons, registration and management of weapons.[[39]](#footnote-39) Nevertheless, and problematically, the Montreux Document lacks “specific guidance on how PMSCs can use force.”[[40]](#footnote-40)

51. While it has been noted that both the Montreux Document [and ICoCA discussed below] “have compiled a body of norms and good practices that have proven their effectiveness” this is only “*when implemented*” - an important caveat.[[41]](#footnote-41) The systemic lack of effective implementation of regulation at the domestic level is alarming. There are two problems in particular. First, there is a clear and ongoing lack of political will on the part of many States to implement effective regulation, oversight and accountability of PMSC. Second, many States, particularly those that are conflict-affected and fragile, lack the resources and technical capacities to implement effective regulatory regimes. Effective regulation, oversight, and accountability requires States, both individually and together, (a) to develop and/or review regulatory frameworks on PMSC as a matter of urgency; and at the same time (b) to “make resources available for regulatory bodies, and empower accountability mechanisms such as national judicial institutions, Human Rights Institutions, or regional and international courts.”[[42]](#footnote-42)

52. Some signatories to the Montreux Document have gone to significant lengths to develop legal structures that ensure PMSCs respect human rights and humanitarian law domestically.[[43]](#footnote-43) Yet, limitations are evident when it comes to ensuring that companies domiciled in a given state also respect human rights and humanitarian law abroad.[[44]](#footnote-44) This issue has led to a need for laws regarding PMSCs to either clarify that they apply domestically and internationally or for states to create separate laws regulating PMSCs operating abroad.

53. Despite the limitations and flaws of the Montreux Document, in the fifteen years since its adoption positive outcomes have been observed when States regulate PMSC domestically. For example, an academic study undertaken in 2022 examining State contracting practices around PMSC services determined that “if governments were involved in the Montreux process…the incidence rate of civilian victimization decreased by 72 percent”[[45]](#footnote-45) Such research emphasizes the urgent need for more States to ensure the implementation of effective regulation and oversight of PMSC for the better protection of human rights and humanitarian standards in *all* contexts.

2. International Code of Conduct for Private Security Providers

54. The Montreux Document laid the foundations for the creation of the International Code of Conduct for Private Security Providers (ICoC). Whereas the Montreux Document is addressed primarily to States, ICoC is addressed to “private security providers” with the goal of regulating them with a particular focus on ensuring that they adhere to human rights andhumanitarian standards. During the development of the Code, the industry itself recognised that effective oversight and accountability is a cornerstone of the ICoC.[[46]](#footnote-46)

55. The Code opened for signature on 9 November 2010 and was amended in 2021 to reflect developments since the Code was drafted.[[47]](#footnote-47) Currently seven States, 130 companies, and 51 Civil Society Organizations, are members (or affiliate members) of the International Code of Conduct Association (ICoCA) which was established as the “governance and oversight mechanism” of the ICoC.[[48]](#footnote-48) While good progress has been made in terms of increasing company and civil society membership of ICoCA, States lag significantly behind in their support for ICoCA.

56. In contrast to the Montreux Document, the ICoC addresses companies directly and articulates the human rights and humanitarian obligations they submit to in order to comply with the Code, as well as standards around vetting, training and good governance practices. At the same time, the ICoC emphasizes the primary responsibility of States to protect human rights[[49]](#footnote-49) and that a state’s international legal obligations do not transfer to contractors through the contractual relationship. As with the Montreux Document, the ICoC “does not limit or alter applicable international law or relevant national law” nor are any legal obligations or liabilities created for member companies.[[50]](#footnote-50) Companies are, however, required to affirm their responsibility to respect human rights and to establish fair and accessible grievance procedures that offer effective remedies for human rights violations.[[51]](#footnote-51)

57. Member companies are required to adhere to specific Code provisions on human rights and corporate governance, including on the use of force, human rights risk and impact assessments, vetting, training, weapons management, incident reporting, health and safety and, grievances. The Code requirements are not set out in detail and the management standards referenced below elaborate in substantial detail on the elements set out in the Code and what member companies must do in order to conform to the standards. Nevertheless, the use of auditing to determine compliance with human rights and humanitarian standards remains controversial and open to criticism.[[52]](#footnote-52)

58. In order to satisfy the membership requirements of ICoCA, companies must obtain certification from ICoCA as confirmation that they are in compliance with the Code. Compliance may be partially achieved via a member company’s successful certification to management standards such as PSC.1 or ISO 18788 by a third-party auditor.[[53]](#footnote-53) Audits include on-site visits. A member company that that is certified to one of these standards will then receive ICoCA certification subject to the fulfilment of some additional requirements, due to gaps between the management standards and the ICoC. Member companies must furnish ICoCA with supplementary information such as corrective action plans and human rights risk and impact assessments (HRRIA) to address the gaps identified by ICoCA. ICoCA notes that clients contracting security services are increasingly requiring ICoCA certification as part of their human rights due diligence.

59. The original narrow definition of “security services” in the Code and the limitation of its scope to “complex environments” were the subject of criticism during the drafting process and the first few years of ICoCA. Both terms were amended and expanded in 2021 to reflect the “range of services offered by security providers in line with current practice and future trends” and “current ICoCA activities and footprint” respectively.[[54]](#footnote-54) The broadening of the scope of the Code is to be welcomed and applies to the provision of security services “where there is a risk of human rights abuses and/or violations of international humanitarian law and/or civilian harm.”[[55]](#footnote-55)

60. In addition to certifying member companies, ICoCA also acts as an oversight and governance mechanism. It monitors member companies for compliance with the Code, and all companies are required to submit an annual self-assessment as part of a mandatory reporting process.[[56]](#footnote-56) ICoCA also retains a complaints function [[57]](#footnote-57) It has registered zero violations of the Code since 2015. Complaints relate primarily to ‘apprehension’ by member companies, with a fewer number of complaint submitted in relation to modern slavery and protection from sexual exploitation and abuse (PSEA). If a member company is found to be in violation of the Code, it may be suspended from ICoCA.

61. In recent years ICoCA has seen an increase in membership among companies and civil society organisations, but States lag significantly behind. States and other stakeholders should be engaging with and supporting ICoCA in its efforts to regulate the industry, as well as requiring ICoCA certification from those they contract with to provide security services.

3. Moving Forward: the Open-ended Intergovernmental Working Group on PMSC

62. In 2010, the UN set up the open-ended intergovernmental working group (OEIWG I) to debate “the possibility of elaborating an international regulatory framework on the regulation, monitoring, and oversight of the activities of private military and security companies.” Unable to reach agreement, a second working group (OEIWG II) was established in 2017, a with a different, broader, and compromise mandate to “elaborate the content of an international regulatory framework, *without prejudging the nature thereof*, relating to the activities of private military and security companies.”This working group has met three times, resulting in a draft and a revised draft of an instrument setting out an international regulatory framework on the Regulation, Monitoring of, and Oversight over the Activities of Private Military and Security Companies.[[58]](#footnote-58) Three drafts of an instrument have formed the basis for discussions during 2022 and 2023: a Zero Draft, a Revised Zero Draft, and a Revised Second Draft.[[59]](#footnote-59) The Working Group on mercenaries has participated extensively in the drafting sessions and inter-sessional consultations, making statements and commenting on the drafts.

63. Four main issues arose throughout the discussions on the Revised Draft: 1. Form; 2. Scope; 3. Human rights provisions; and 4. Accountability and remedies.

Form

64. Reflecting the long-standing political schism on the issue, States currently remain unable to agree on whether the Instrument should be binding or non-binding. The consequence of this is that the Revised Second Draft continues to reflect language applicable to both a binding instrument and a non-binding instrument. A decision about the form and nature of the instrument is long overdue. A compromise proposal put forward at the Third Session of the Working Group in April 2023, which suggested moving forward with a non-binding draft of the instrument but inserting language which would guarantee that a binding instrument would emerge from it in the longer term did not receive widespread support in the room. The Working Group on mercenaries has long supported a binding instrument on PMSC, and notes that whatever the form of the instrument, it *must* add value to the regulatory environment, especially on accountability for violations of human rights and humanitarian standards, and not simply reproduce the provisions of the Montreux Document. The Working Group urges States to work together to adopt a HRC resolution for the new iteration of the OEIGWG that will enable the creation of an effective and long-overdue regulatory instrument.

Scope

65. The range of services provided by PMSC has expanded to cover a plethora of activities, and, as such, the scope of the instrument must encompass the provision of domestic *and* extraterritorial services.[63]  States should take all measures necessary to ensure the legal liability of companies based in or managed from the State party’s territory regarding human rights violations as a result of their activities conducted domestically and abroad, or the activities of their subsidiaries or business partners. National legislation should contain extraterritorial provisions, which can facilitate the prosecution of PMSC and their personnel for abuses.

66. States should not only prohibit the outsourcing of activities that constitute direct participation in hostilities, they should also 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 also apply to the export of such services abroad.

67. It should be noted that while there are ongoing and significant efforts to create a binding treaty on business and human rights, “there must be acknowledgement of the specificities that differentiate the PMSC industry from other business sectors, such as the right to use force or detain persons.”[[60]](#footnote-60) Any PMSC instrument must complement, and not conflict with, overlapping provisions of the draft business and human rights treaty.

Human Rights Provisions

68. The Revised Second Draft still lacks a broad and detailed articulation of applicable human rights and IHL. For example, it could mirror PP2 of the Third Revised Draft Business and Human Rights treaty and refer to the nine core international human rights instruments and the eight fundamental Conventions adopted by the International Labour Organization, and other relevant parts of the Preamble.

69. During the Second Session of the IGWG, the Working Group on mercenaries highlighted the importance of the inclusion of gender-sensitive and gender-transformative approaches within any instrument. It is disappointing to note that the Revised Second Draft remains lacking in this regard. The provisions on this should be strengthened in line with the Working Group on mercenaries 2019 report on the gendered human rights impacts of PMSC, to ensure, among other things, that states gather gender-disaggregated data, conduct a gender analysis before legislating or regulating, and investigate and prosecute SGBV, while PMSC must develop and implement gender-transformative approaches in their operations.

70. Additionally, it is important that the instrument expressly acknowledges that PMSC are in a position to particularly negatively impact groups in vulnerable situations such as migrants, indigenous persons, racialised persons, elder persons, persons with disabilities, and the LGBTI+ community. Furthermore, the instrument must take account of the fact that barriers are likely to be higher for these groups when seeking redress for violations by PMSC.

Accountability and Remedies

71. While there have been some improvements in the approach to accountability and remedy for victims, the instrument must go further and include detailed guidance to ensure comprehensive accountability, and in particular effective redress and remedies for victims.

72. Adequate domestic regulation, monitoring and enforcement are paramount in light of persistent concerns over the lack of accountability for human rights violations and abuses by PMSC, especially when operating transnationally.

73. In some cases, victims remain without effective remedy decades after the alleged violations and abuses occurred. In its various country visits, and thematic reports the Working Group has noted the severe challenges to victims seeking access to justice posed by the lack of judicial infrastructure, lack of qualified members of the judiciary and of judicial independence, and threats of reprisals against members of the judiciary, victims, and witnesses. Corruption within legal systems and a lack of trained of investigators also pose major challenges.

74. In addition to ensuring an effective legal system, it is important to ensure that local populations that have been adversely impacted by armed conflict or violence have trust and confidence in the system. For that reason, the system itself needs to be easily accessible to vulnerable groups, including women and children. It needs to be able to address mass human rights abuses and provide the necessary protections. In order to do so, it should also ensure that complementary support measures are set up, as appropriate, including medical assistance, free legal assistance and psychosocial care.

V. Conclusions

75. **Mercenarism has become a systemic issue significantly impacting multiple states and conflicts around the world. In recent years, a wide range of activities during and outside conflict settings, has emerged that display fundamental characteristics resembling those of mercenarism. These activities have increasingly been reported to the Working Group, in response to changes seen in modern armed conflicts, particularly the surge in non-international armed conflicts, the proliferation of armed non-State entities, the participation of proxy actors, and the rise of asymmetric warfare reliant on new technologies; themes the Working Group has examined in detail in previous thematic reports. Considering this shift and its implications for human rights and international humanitarian law, this report offers the Working Group’s perspective on the application and limitations of the existing international and national legal framework. The Working Group notes that while potentially effective international and regional legal frameworks for mercenaries and mercenary-related activities exist, there is substantial lack of engagement and implementation by Member States, posing significant challenges.**

76. **The evolving and emerging forms of mercenary-related activities demand immediate attention from States and all involved stakeholders. This report offers insights to facilitate deliberations among States regarding more efficient approaches to combat mercenary activities and their counterparts. The objective is to uphold and strengthen the right to self-determination for peoples, safeguard civilians during armed conflicts, and uphold the principles of non-intervention and territorial integrity. These deliberations should be firmly anchored in the international legal framework concerning mercenaries, acknowledging its limitations, and within the broader context of international humanitarian and human rights laws.**

77. **With regard to PMSCs, while the Working Group welcomes the continued development of multistakeholder regulatory initiatives such as the Montreux Document, the International Code of Conduct for Private Security Providers, and the Voluntary Principles on Security and Human Rights, insufficient numbers of states have committed to them. In addition, while the Working Group acknowledges the importance of ongoing efforts to create a binding treaty on Business and Human Rights, there must be acknowledgement of the specificities that differentiate the PMSC industry from other business sectors. There is a need, therefore, to strengthen the existing frameworks and to fill the normative gaps.**

78. **Any attempt to prevent recruitment, training, financing, and use of mercenaries and the consequent human rights abuses and violations must be complemented by national and international development efforts to address the root causes of mercenarism. Such root causes often intersect with structural causes of exclusion, poverty and inequality. The report therefore compels Member States to focus on the structural causes of discrimination and inequalities (often multiple and intersecting) that undermine the agency of people as holders of rights and contribute to human rights abuses. Numerous obstacles that people encounter in accessing services, resources and equal opportunities are not simply due to a lack of availability of resources, but rather the result of discriminatory laws, policies and social practices that leave particular groups of people further and further behind with no viable options, especially in conflict settings.**

VI. Recommendations

79. **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.**

80. **States should take all measures necessary to ensure the legal liability of companies based in or managed from the State party’s territory regarding human rights violations as a result of their activities conducted domestically and abroad, or the activities of their subsidiaries or business partners. National legislation should contain extraterritorial provisions, which can facilitate the prosecution of PMSC and their personnel for abuses.**

81. **In line with the Sustainable Development Goals agenda, States will need to look behind symptoms such as mercenarism to tackle the structural causes or drivers of poverty, inequality and social injustice in order to create conditions for a free, just and socially sustainable future.**

82. **States should not only prohibit the outsourcing of activities that constitute direct participation in hostilities, they should also 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 also apply to the export of such services abroad.**

83. **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.**

84. **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.**

85. **States should consider the renewal of the mandate of the OIEGWG on PMSCs and actively engage in the development of a globally applicable instrument on PMSCs.**

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57. <https://icoca.ch/registering-a-complaint/> [↑](#footnote-ref-57)
58. OHCHR, Open-ended intergovernmental working group to elaborate the content of an inter- national regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies, ‘Revised Zero Draft Instrument on an International Regulatory Framework on the Regulation, Monitoring of and Oversight Over the Activities of Private Military and Security Companies’, 14 Apr. 2022. [↑](#footnote-ref-58)
59. <https://www.ohchr.org/en/hr-bodies/hrc/pms-cs/igwg-index/4th-session-igwg-military> [↑](#footnote-ref-59)
60. Sorcha MacLeod (2023), 'Private military and security companies in armed conflict: The current regulatory landscape for Private Military and Security Companies' SIPRI Yearbook 2023, Stockholm International Peace Research Institute, (OUP, 2023) <https://sipri.org/yearbook/2023/04> [↑](#footnote-ref-60)