

WORKING GROUP ON THE USE OF MERCENARIES

Panel Event on Foreign Fighters

Conference Room 3 – Conference Building

United Nations Headquarters, New York

23 July 2015

Concept Note

Introduction

The 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 was established in July 2005 pursuant to Commission on Human Rights resolution 2005/2. The Working Group's mandate has primarily focused on monitoring mercenaries and mercenary related activities in different parts of the world as well as studying and identifying sources and causes, emerging issues, manifestations and trends relating to these activities. Additionally, the Working Group was also tasked with monitoring and studying the effects of the activities of private companies offering military assistance, consultancy and security services on the international market and to prepare draft international basic principles that encourage respect for human rights by these companies.

In its focus on mercenaries and PMSCs, the Working Group assesses the impacts of both on the enjoyment of human rights particularly the right of peoples to self-determination. Recently, resolution 27/10 of the Human Rights Council adopted during its 27th session in September 2014 reiterated the abovementioned objectives of the Working Group's mandate while noting the need to look into the evolving phenomenon of mercenaries and its related forms (paragraph 15). Paragraphs 17 and 18 further referred to the need to *continue monitoring mercenaries and mercenary activities in all their forms and manifestations and to continue 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.*

In the context of the foregoing, the Working Group will consider and examine the issue of foreign fighters, a phenomenon though not new, has recently occupied global discourse due to the increasing threat that it poses in the context of contemporary events such as the conflict in Syria and the recent insurgency in Iraq. Though many would argue foreign fighters as being distinctly different from mercenaries due to, inter alia, the primary motivation behind their engagement in armed conflict and warfare, the Working Group will explore any possible linkages between these phenomena and their impacts on human rights and the right of peoples to self-determination. The outcomes will inform the report of the Working Group to the 70th session of the General Assembly, including recommendations for steps to be taken by the relevant actors to ensure respect, protection, and fulfilment of human rights.

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Defining mercenaries and foreign fighters

The definition of a mercenary in the 1989 United Nations Convention on mercenaries is derived from Article 47 of Additional Protocol I of the Geneva Convention which states that 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 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;
- 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

The definition in the 1989 UN Convention goes further to say that a mercenary is one that is “specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or undermining the constitutional order of the State.” Defining mercenaries has not been without its challenges. The former Special Rapporteur on mercenaries as well as the Working Group has noted the need to revisit the definition of mercenarism to ensure that it encompasses the new and emerging forms and manifestations of mercenary related activities.¹ The threat of mercenarism has consistently been identified by the Working Group as posing substantial threats to peace, security and the self-determination and human rights of people.

There is currently no internationally agreed definition of a foreign fighter. However, the recently adopted Security Council resolution 2178 (2014) refers to foreign terrorist fighters as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.” The resolution does not purport to address all foreign fighters, only those with connections to terrorism for the purposes of construing Resolution 2178 and the scope of measures States are obligated to take pursuant to the Resolution. The resolution also expressed that foreign

¹ E/CN.4/2004/15

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terrorist fighters pose a threat to their State of origin, the States they transit and the States to which they travel, as well as States in neighbouring zones of armed conflict in which they are active.

Several writers² attempt to define a foreign fighter as a non-citizen of conflict states who join insurgencies during civil conflict and who:

- a. has joined and operates within the confines of an insurgency
- b. lacks citizenship of the conflict state or kinship links to its warring factions
- c. lacks affiliation to an official military organization and,
- d. is unpaid

Considering the foregoing, particularly criterion (d), a foreign fighter is thus set apart from mercenaries and soldiers who are salaried. Criterion (b) also excludes returning diaspora members or exiled rebels, who have a pre-existing stake in the conflict.³ Other writers define “jihadi foreign fighters” also known as mujahidin, as simply those who regard it their duty to participate in what they believe as a holy war against opposing individuals, regimes or groups⁴. It should be understood that such fighters do not necessarily engage in, or support, terrorism.

The mercenarism and foreign fighter phenomena

Mercenarism and foreign fighters, though arguably distinct in their definitions, have many commonalities particularly in the context of terrorist acts and the impacts of their activities on fundamental human rights. Both mercenaries and foreign fighters are often found in asymmetric conflicts in which at least one side of the conflict is a non-state actor, usually a guerrilla force or another irregular group.

Mercenarism has also evolved from its traditional form to assume forms and aspects which had not existed in the past. The new ways in which mercenaries are being used reveal that they can be recruited not only to take part in armed conflicts but also to participate actively in activities generally characterised by extreme violence, hatred and intolerance. The use of mercenaries in this context reflects endeavours to bring material harm and create situations conducive to terrorism. Mercenaries now participate in various illicit activities including organized crime and trafficking of persons, drugs and weapons.

The Special Rapporteur on the use of mercenaries often linked terrorism to mercenary activities stating that nothing prevents mercenaries, for payment, from taking part in the commission of a terrorist act even those understood to be acts committed for ideological

² David Malet in “Foreign Fighters” and Thomas Hegghammer in “The rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad.”

³ Ibid, Hegghammer

⁴ Edwin Bakker, Christophe Paulussen and Eva Entenmann in “Dealing with European Foreign Fighters in Syria: Governance Challenges and Legal Implications.”

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reasons with claims of political legitimacy and with the aim of promoting collective terror.⁵ Thus, the possibility of mercenary involvement for ideological causes should not be discarded in the context of terrorist activities.

Like mercenaries, foreign fighters are now engaging in activities ranging from guerrilla fighting, planning and carrying out terrorist attacks, training and recruitment. In both phenomena the issue of recruitment is critical particularly in attempting to understand the motivation behind a person's will and desire to participate in a conflict in which he or she is a foreigner. Whereas mercenaries are automatically seen as participating in warfare or armed conflict for financial or economic gains, the foreign fighter is often linked to diverse religious identifications, ethnic identifies and ideologies, hence the common association with jihadism. However, like mercenarism, recruitment has often focused on younger generations. Where mercenarism often targets youths that are vulnerable due to socio-economic situations such as poverty, recruiters for foreign fighters often engage youths who seek purpose and are excited by stories of glory and comradeship. Regarding the current conflict in Syria which was the basis for the upsurge of a new wave of foreign fighters, governments categorised some of those who travelled to Syria as individuals, mostly young, who were disaffected, aimless and lacked a sense of identity or purpose⁶. Indeed, the Islamist narrative of Syria as a land of "jihad" features prominently in the propaganda of extremist groups recruiting fighters on both sides of the war, be it the government or rebel groups.

It is worthwhile to note that the discussion on the significance of the foreign fighter problem also suffers from a tendency to bracket all foreign volunteers together and does not readily address the distinction between the foreign fighter who is in a local conflict that is not his own country's war and the one who comes back to carry out attacks elsewhere including in his own country. Hence, there is a need to disaggregate the problem of foreign fighter with a view to better understanding this phenomenon and to also better assess any possible linkages with the phenomenon of mercenarism.

Recruitment of Foreign Fighters

An imperative issue regarding the recruitment of foreign fighters is the financial element involved. Security Council resolution 2178 recognised the need to address the threat of foreign fighters by ensuring that underlying factors such as stemming recruitment and disrupting the financial support to foreign terrorist fighters were dealt with comprehensively. Recently, the Islamic State in Iraq and the Levant (ISIL) has been referred to as the best funded terrorist organization confronted by the U.S. Government, with the reported ability to bring in \$1 million per day.⁷ Funds are acquired mostly through the Group's control and sale

⁵ E/CN.4/2004/15

⁶ Richard Barrett in "Foreign Fighters in Syria"

⁷ Charles Lister, "Cutting off ISIS' Cash Flow", 24 October 2014

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of oil and additionally from criminal activities such as extortion and kidnap for ransom but also from donations from external individuals.

The amassing of this type of financial resources is an important factor in assessing whether there are individuals who are foreign fighters that may be participating in current conflicts such as in Syria or Iraq, purely for monetary or financial gain. It may well be possible that there are individuals who are attracted to fighting in the conflict initially for ideological reasons and then subsequently for financial reasons as a means of survival or possibly, vice versa. Recruitment through media advertisements for services such as doctors, press officers and chefs, has also been reportedly used by ISIS to draw in more fighters.⁸ Financial rewards are said to be used to attract fighters particularly from countries where the basic necessities are becoming less affordable.⁹ Hence, in impoverished regions with few jobs, the wages earned from fighting with ISIS can become a factor for joining the group.¹⁰

The need to gather more information on the motivational factors for these individuals joining the concerned conflicts is crucial to further clarify the possibility of foreign fighters who may possibly fit the criteria of a mercenary. In its study, the Working Group would also like to assess the concept of mercenary and whether it is outdated in modern conflicts, how it may or may not apply to non-State armed groups as opposed to State parties to armed conflict, and what, if anything, might take the place of the idea of mercenary.

Foreign fighters in recent or current conflicts

The Working Group's study of foreign fighters will include a general coverage of the history and genesis of the phenomenon and the current emerging trends and forms seen today while bearing in mind the linkages to mercenarism. Although the problem of foreign fighters is not new, the threat has become particularly grave, with an unprecedented flow of fighters and facilitation networks fuelling multiple conflicts worldwide, such as in the Horn of Africa, Afghanistan, Iraq, Libya, Syria, Yemen and elsewhere. A surge of foreign fighters in the Middle East has resulted in thousands of fighters from the region joining ISIL and the Al-Nusra Front.

The Working Group will give particular attention to the current conflict in Syria and insurgency in Iraq as the foreign fighter phenomenon and its impacts have been particularly acute in these contexts. Since the conflict in Syria erupted in 2011, authorities around the world have expressed strong concerns about the increasing numbers of their citizens fighting

⁸ <http://www.independent.co.uk/news/world/middle-east/isis-advertises-10-jobs-in-the-caliphate-including-press-officers-bomb-makers-and-teachers-10168485.html>

⁹ <http://www.independent.co.uk/news/world/middle-east/the-most-dangerous-isis-propaganda-yet-jihad-brides-wth-m5s-fighters-relaxing-and-children-playing-used-to-present-caliphate-as-a-utopia-10121653.html>

¹⁰ <http://www.independent.co.uk/news/world/middle-east/war-wth-isis-islamic-militants-have-army-of-200000-claims-kurdish-leader-9863418.html>

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alongside various armed groups in the civil war. The presence of foreign fighters is particularly troublesome given the possibility that some of those who come back from the conflict might engage in acts of politically motivated violence in their countries of origin or in third countries.

Reportedly, some 20,730 foreign fighters,¹¹ have gone to Syria to fight. Of these, almost 4,000 were residents or nationals of Western European countries, doubling since December 2013 with France, the UK, and Germany producing the largest numbers of fighters. Roughly, 11,000 are from the Middle East and 3,000 from countries of the former Soviet Union. Others are drawn from the United States, Somalia and Sudan. Most are fighting with rebel groups but some are also fighting with the government or with ethnic or faith communities that are trying to protect themselves from both sides. There are more fighters travelling to fight in Syria in the last 3 years than the number of fighters that travelled to Afghanistan during its ten year war and violent aftermath.

Allegations that there have been foreign mercenaries fighting for both government and rebel groups in Syria have also been noted and need to be further examined.

Impacts on human rights and the rights of people to self determination

Recent United Nations reports have provided ample information on the alleged human rights violations and atrocities committed by foreign fighters such as ISIL as well as by the authorities in Syria.¹² As mentioned above, allegations of mercenaries as perpetrators in this conflict need to be further examined. Additionally, the impacts of foreign fighters on the rights of people to self-determination, as required by the Working Group's mandate, also requires careful consideration.

The principle of self-determination is enshrined in the Charter of the United Nations, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which lays upon State parties the obligation to promote the realization of that right and respect it, in conformity with the provisions of the Charter. The right to self-determination entails the rights of peoples to determine their political status, and freely pursue their economic, social and cultural development. However, there is no recognised legal definition of "peoples" in international law. The Working Group will consider what is meant by "peoples", as any assumption that foreign fighters are necessarily an affront to the right to self-determination involves the false assumption that it is the State that enjoys this right when this is in fact not the case.

¹¹ Peter Neumann, ICSR Director, Department of War Studies, King's College London, "Foreign Fighters total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s," September 2014 <http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/>

¹² See reports: A/HRC/21/50; A/HRC/23/58; A/HRC/24/46; A/HRC/28/69 and "Rule of Terror: Living under ISIS in Syria" at <http://www.ohchr.org/EN/HRBodies/HRC/IIISyria/Pages/IndependentInternationalCommission.aspx>

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Apart from examining the human rights impacts and violations perpetrated by foreign fighters or mercenaries, it is important to assess the human rights impacts of laws and policies on people who are alleged to be foreign fighters, including the recently adopted Security Council resolution and national laws of countries adopting foreign fighter related legislation. The said resolution raises questions about its impacts on human rights particularly on restrictions of travel that may affect freedom of association, religion, and right to self-determination of peoples whose affinity is religious or cultural or ethnic rather than national.

The issue of impunity is also critical to consider hence the Working Group will assess the legal regimes (both national and international) where foreign fighters can be held accountable for human rights violations.

Measures taken by States and the international community against foreign fighters

Since the adoption of Security Council resolution 2178, there have been various approaches taken by States to address the foreign fighter phenomenon. These approaches have been both preventive and repressive, although most seem to focus on the latter.

The Working Group will assess these measures and their impacts on human rights, including on the following: the right to freedom of movement, deprivation of citizenship, right to privacy, right to freedom of expression, right to family and private life, prohibition against discrimination, freedom from arbitrary detention, right to fair trial, prohibition of torture and other cruel, inhuman and degrading treatment, *non-refoulement* and refugee law. It will make recommendations to emphasize the need to take a human rights based approach in addressing foreign fighters, including recommendations based on best practices that have been initiated in some countries.