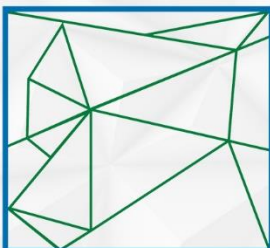


# The Dilemma of Mercenarism and Volunteering During Armed Conflicts



سوريون  
من أجل  
الحقيقة  
والعدالة  
Syrians  
For Truth  
& Justice



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# **The Dilemma of Mercenarism and Volunteering During Armed Conflicts**

*A Critical Reading into Law and Practice*

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## Executive Summary

The operative legal framework, related to the criminalization of all aspects and consequences of mercenarism, remains largely, if not entirely, inadequate. This shortcoming does not stem only from the limited and restrictive definition adopted in international humanitarian law and public international law, but also from the margins available to all parties to circumvent this concept and render it legally malleable.

The International Convention Against the Recruitment, Use, Financing and Training of Mercenaries addressed the gap that pertained to non-international armed conflicts. The convention brought under its mantle conflicts which it had previously excluded. However, the convention continues to adopt the same definition, hinged on cases of international armed conflict. This poses major challenges, notably mercenarism-related forms of intervention that States in non-international armed conflicts can opt for, and the responsibilities of these States, as well as non-government armed groups.

Indeed, the desire for private gain is at the core of the definition of the mercenary. Nevertheless, private gain is conditioned in the sense that a mercenary should be promised material compensation that substantially exceeds compensation that fighters of the country recruiting mercenaries may be promised. This condition is unprovable in most cases, especially when gain intermeshes with the stated motives of foreign individuals or groups, as they intervene in armed conflicts. Such motives include defending “rightful causes” and “freedom wars”, among other ideological or political impetus. Gain also might be shadowed by the ethnic or societal ties between those intervening from the outside and the components of the State concerned.

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 (referred to as the Working Group on the Use of Mercenaries) is the only mechanism available to address the subject of mercenarism and mercenaries. The Working Group on the Use of Mercenaries is a thematic special procedure overseen by the United Nations Human Rights Council and, by its nature, does not enjoy binding legal powers over States. For its activities, the Working Group derives cues primarily from The International Convention against the Recruitment, Use, Financing and Training of Mercenaries and related instruments, which will be discussed below. However, all these instruments are largely deficient in terms of the response they entail to the challenges emerging from the issue of mercenarism under contemporary violence and conflicts.

Prospective accountability against involving in mercenarism remains confined to national laws and judicial mechanisms of the States that willingly integrated necessary accountability measures into their legislative bodies. Because the legal frame governing mercenarism remains of a tight and lax scope, the International Criminal Court (ICC), for instance, does not exercise any jurisdiction over mercenaries or those who fund them as mercenaries. The only room available for the ICC to initiate legal action would be in the context of the crime of aggression established by Article 8bis (G) of the Rome Statute. The article states that: “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

## Introduction

Compared to the large number of States who signed treaties such as the Protocol Additional to the Geneva Conventions of 12 August 1949,<sup>1</sup> the number of States Parties to the [International Convention](#) against the Recruitment, Use, Financing and Training of Mercenaries of 1989 (International Convention against Mercenaries) remains little.<sup>2</sup> This is an indicator of the international reluctance to activate and develop the legal frame regarding mercenarism, which would be binding both in theory and practice. Refrain from membership in the International Convention against Mercenaries is a critical issue, which can be particularly noted among the permanent member States of the Security Council, none of which had signed up to the convention, while other States members had been involved in mercenary recruitments, such as Turkey.

The reassessment of the limited legal framework regulating mercenarism has become an urgent need. This need arises from several reasons, mainly because mercenarism continues to predominate several current conflicts, and due to the radical changes and developments affecting contemporary armed conflicts in terms of classification - international, non-international, internationalized,<sup>3</sup> or in terms of methods and means of war, as well as the influence of technological progress and means of communication. Moreover, the legal framework must be re-validated considering the great diversity of parties and sides playing a role in these conflicts.

Relatively recent and currently active armed conflicts in Mali, Syria, [Libya](#), Armenia/[Azerbaijan](#), and [Ukraine](#)/Russia, among others, have brought “volunteer fighters” into the spotlight. The upsurge in interest in these fighters, also labeled as “foreign fighters” or “freedom defenders”, followed a similar interest in private security and military companies, which not long ago preoccupied legal debate. Based on this, this study poses fundamental questions related to the phenomenon of mercenarism, as well as the approaches used to circumvent its implications through masking recruitment of mercenaries as volunteering and calling it an act of countering aggression or advocating the causes of oppressed peoples. The potential for maneuvering the imports of mercenarism are increasing, especially because these approaches are sponsored and propagated not merely on an unofficial level, but also on the official level of States.

This study aims to provide a critical analysis of the concept and definition of mercenarism within the framework of international law. As it does so, the study seeks to shed light on the shortcomings of international legal frameworks, which fail to criminalize mercenarism and those involved in the practice at all levels, and thus indirectly contribute to creating a large margin for intensifying and exploiting the phenomenon of mercenarism, especially in

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<sup>1</sup> Additional Protocol I is one of the most acceded and/or ratified international treaties, and the majority of its provisions are now considered as a reflection of customary international humanitarian law. The status of signature, accession, and ratification can be viewed via the following link:

<https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f3586>

<sup>2</sup> According to the UN Treaty Collection, only 37 States joined the Convention up to 23 March 2022:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-6&chapter=18&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-6&chapter=18&clang=en)

<sup>3</sup> It is a relatively new concept that addresses non-international conflicts in which States intervene in favor of either of the Parties in a conflict. While the term does not entail a new legal type of armed conflict, it is used to describe such complex situations.

contemporary armed conflicts, instead of acting as a deterring factor for States and other parties.

It is worth noting that this study does not provide practical recommendations on dealing with the phenomenon. Instead, the study attempts to provide a contextual critique and begin a realistic discussion of the phenomenon from a legal standpoint.

## Mercenarism's Historical Background and Legal Framework

Mercenarism is not a recent phenomenon and instead deeply rooted in history. Some of its manifestations can be traced back to Teutonic tribesmen who were recruited to serve within the Roman legions. Mercenarism was, to a certain extent, a trendy and "routine" profession, and mercenaries were, thus, overtly utilized by various kingdoms, states, and armies. Mercenarism became so large in scale that the practice developed into a source of income for certain kingdoms, who offered to "rent out" the services of their citizens and deployed them to fight for other kingdoms.<sup>4</sup> However, the large scale use of mercenaries declined with the turn of the 18th century, which marked the crystallization of concepts such as "nationalism" and the "soldier citizen".<sup>5</sup>

By the mid-20th century, and with the recognition of peoples' right to self-determination, the use of mercenaries turned into an effective colonialist tool. Colonial powers hired mercenaries to suppress national liberation movements. Unlike earlier forms of colonialism, current colonialists attempt to "save face" through "modern mercenaries". These mercenaries spare the colonialist State direct involvement in the activities of recruitment and financing, contrary to the situation over past centuries.<sup>6</sup> The "modern mercenary" was the real turning point because it created shifts in legal perspectives on mercenarism, a practice that today is sometimes classified as amounting to a crime against humanity.<sup>7</sup>

These historical transformations have a direct bearing on the legal framework governing the phenomenon of mercenarism. The effects of the historical development of the phenomenon can be traced in the development of the relevant provisions of international law. Legal framework changes can be detected starting from the [Hague Convention \(V\) of 1907](#), relevant to respecting the rights and duties of neutral powers and persons in case of war on land, which is considered today a reflection of the customary international law. The Convention did not address the criminalization of mercenarism *per se*, but, in Article 4, it imposed on neutral States

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<sup>4</sup> Among many others, those mercenaries are well known in history: the pikemen of Switzerland, the *landsnechts* of Germany, the arquebusiers of Spain, and the *condottieri* of Italy, see for example: <https://www.warhistoryonline.com/war-articles/swiss-pikemen.html?safari=1>

<sup>5</sup> James L. Taulbee, *Myths, Mercenaries and Contemporary International Law*, 15 California Western International Law Journal 339 (1985).

<sup>6</sup> Congo witnessed several incidents of mercenary use by colonial powers or during its armed conflicts. For example, Portugal was accused of facilitating the recruitment, transport and operation of mercenaries on the Portuguese colonial territory of Angola during the 1960s, who were hired to conduct military operations against Congo. For more:

S. J. G. Clarke, *The Congo Mercenary, A History and Analysis*, The South African Institute of International Affairs, 1968 (Available at: [https://media.africaportal.org/documents/SAIIA\\_THE\\_CONGO\\_MERCENARY\\_-\\_A\\_HISTORY\\_AND\\_ANALYSIS.pdf](https://media.africaportal.org/documents/SAIIA_THE_CONGO_MERCENARY_-_A_HISTORY_AND_ANALYSIS.pdf)).

<sup>7</sup> L. C. Green, *The Status of Mercenaries in International Law*, 9 Manitoba Law Journal 201, 224 (1979).

the duty not to “form combatant corps nor open recruitment agencies on the territory of a neutral state to assist belligerents.”

In other words, mercenarism at that time was not a crime from an international point of view, but this restriction on neutral powers aimed at limiting the expansion of the war, establishing respect for the principle of state sovereignty, and maintaining international peace. Therefore, individuals could practice mercenarism without any legal responsibility, for them as individuals or for their sponsors if these sponsors were not neutral countries.

After the Convention, neither the concept nor the legal framework of mercenarism were addressed until 1977, through the [Additional Protocol \(I\) to the Geneva Conventions for the Protection of Victims of International Armed Conflict](#). Notably, the four Geneva Conventions of 1949 did not approach mercenarism or mercenaries, to the extent that the categories, which classify detainees during international armed conflict as prisoners of war, did not explicitly exclude mercenaries.<sup>8</sup> In this context, the status of mercenaries is usually analyzed based on the provisions of Additional Protocol I, to both establish and clarify the reasons for not including them in these categories.

This legal first-time, represented by the [1977 Additional Protocol \(I\)](#)'s detailed definition of a mercenary, demonstrates the impact the international historical and contextual developments had on the legal framework. Even though Article 47, encompassing this definition, did not prohibit mercenarism, it, however, provided this detailed definition to fill the gap in the aforementioned Article 4 of the Geneva Convention (III), and to reiterate the ban on mercenaries from the right to enjoy the status of combatant or prisoner-of-war during international armed conflicts. Article 47 puts forward a multi-condition definition, which must be collectively met for the description of a mercenary to apply to a person. The article proceeds:

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.

The [Convention of the Organization of African Unity for the elimination of mercenarism in Africa](#), concluded in 1977, despite being regional, not international, was the most progressive in terms of criminalizing mercenarism and providing a more realistic definition of the practice. The Convention's advanced stance reflects the historical impact of the rise of liberation movements in Africa at the time in the face of colonial powers and their use of mercenarism as

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<sup>8</sup> Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Article 4.

an effective weapon. It is also a response to the international community's inability to unanimously criminalize mercenarism in the provisions it reached in the Additional Protocol (I) to the Geneva Conventions the same year.

The African Convention criminalizes mercenaries and mercenarism per se, whether committed by an individual, a group of individuals, a State, or a representative of a State. The Convention also criminalized sheltering, organizing, financing, assisting, equipping, training, promoting, supporting, employing, or recruiting mercenaries by any party. This Convention preceded the definition of a mercenary in the Additional Protocol I, as it did not require that the private gain be material and significantly more than the gain obtained by fighters in the armed forces of the party in whose favor the mercenary is fighting. One of the key aspects that put this Convention ahead of the existing international legal framework at the time is the concept and criminalization remain in force and apply to all armed conflicts, whether international or non-international.

The [Convention on Mercenaries](#) was put in place in 1989, and it came to be the only international legal instrument that criminalizes mercenarism, mercenaries, and their supporters, without limiting criminalization to a specific type of armed conflict. The Convention went beyond that, addressing mercenarism in other cases, such as acts of violence aimed at overthrowing a government, undermining the constitutional order of a state, or undermining the territorial integrity of a State.<sup>9</sup>

In fact, reaching this agreement, after over nine years of negotiation,<sup>10</sup> was also a reflection of the historical and contextual developments associated with the phenomenon of mercenarism, particularly following a series of coup and secession attempts spearheaded by mercenary groups and the escalation of repression and violence by mercenaries recruited by colonial powers against liberation movements across several continents, including the case of the Congo during the 1960s, which prompted the United Nations General Assembly to issue Resolution 2465 in 1968. The resolution criminalized the use of mercenaries against national liberation and independence movements.<sup>11</sup>

## A Critical Reading into the Legal Framework of Mercenarism

### Political Use and the Obligations of the State

Given the limited legal framework criminalizing mercenarism, and more importantly its supporters, the Mercenary Convention still falls short of reflecting binding customary provisions in international law. The term mercenarism is often used as a derogatory political connotation. This usually prompts States to avoid addressing mercenarism, or even denying that it is being practiced, so as not to be stigmatized for employing mercenaries. However,

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<sup>9</sup> International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989, Article 1(2).

<sup>10</sup> In 1979, the United Nations General Assembly set up a temporary committee to draft the Convention in accordance with Resolution No. 34/140.

<sup>11</sup> UN General Assembly, Twenty-third Session, A/RES/2465(XXIII), Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 20 December 1968 (Available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/244/25/IMG/NR024425.pdf?OpenElement>).



many of these countries use these tendencies, avoidance/denial, to intensify the use of mercenarism for their political and military interests, especially considering the contemporary nature of cross-border conflicts. Under this cover, there is a significant "privilege" that manifests as reducing the potential for corroborating the legal responsibility of these States' legal responsibility for the actions that mercenaries may perpetrate or render the extent of their responsibility ambiguous.

Under international law, only the State is responsible for the act or behavior attributed to it.<sup>12</sup> Because the State is an abstract entity that cannot carry out actions, the actions of the State organs are supposed to be the actions of the State.<sup>13</sup> This legal rule would serve those countries that avoid/deny the issue of mercenarism directly through a simple argument, which is denying that mercenaries, or those who recruit, finance, or transport them, etc. represent any of the State organs. Accordingly, except for the 37 States that are parties to the Mercenary Convention, the margin of responsibility of other States regarding preventing the recruitment of mercenaries remains very limited within the scope of Article 4 of the Hague Convention (V) of 1907. The article applies only to States that declare neutrality regarding an international armed conflict that they are not a party in. This rule poses a more complex question as to whether the actions or behavior of private actors - who do not officially represent the State - might be attributable to the State, as in the case of the Russian Wagner Group.<sup>14</sup>

To establish the responsibility of the State for the actions of private actors, an investigation must be carried out into whether these actors have been authorized to perform governmental tasks or roles, or whether the State directed, controlled, or instructed the actions of those actors.

In the case of authorization, apart from the context, that is immediately denying delegation, expected from States, judicial precedents have proven the difficulty and complexity of corroborating such an authorization. The difficulty arises because the interpretation of the authorization is based mainly on the fact that the tasks, assigned to private actors, are related to the public interest or State sovereignty, such as those related to administering prisons, transferring detainees, or participating in missions during an armed conflict in which the State is a party.<sup>15</sup> Authorization to hold States accountable for the wrong acts committed by private actors, mercenaries in our case, is becoming increasingly complicated in the context of the contemporary forms of cross-border armed conflicts. For example, it is legally ambiguous how and whether the state of Lebanon, as a private State, can be held accountable for any violations committed by the Lebanese Hezbollah in the Syrian conflict, given that Hezbollah has parliamentary representation in the Lebanese government.

In the case of conduct directed or controlled by a State, addressed in Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the International Law Commission puts forward the following condition: "The conduct of a person or group of

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<sup>12</sup> The International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2002, Article 2(a).

[https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)

<sup>13</sup> International Court of Justice (ICJ), *LaGrand (Germany v. United States)*, Judgment, 27 June 2001, ICJ Reports 2001, para. 81.

<sup>14</sup> Further details on this issue are provided in the sections below.

<sup>15</sup> See for instance: *Rankin v. Iran*, 17 Iran-USCTR 135 (1987-IV); *Yeager v. Iran*, 17 Iran-USCTR 92, 101 (1987-IV); and *Hyatt International Corporation v Iran*, 9 Iran-USCTR 72 (1985-II).

persons shall be considered an act of a State under international- law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” However, considering the denial, ambiguity, and lack of transparency characterizing cases of mercenary recruitment, it may be nearly impossible to prove the effective control condition required by the International Court of Justice to establish, in this context, the responsibility of the State for the internationally wrongful acts of a private non-State actor.<sup>16</sup> Even in the case of some countries, which legalize the export of military services, such as the United States and South Africa, the entities carrying out these services are often outside the military command hierarchy, as was the case of “security companies” in Iraq, which makes establishing formal control, instructing, or directing orders to those entities complicated.

Notably, some of the countries who have been reported to most frequently employ and facilitate the use of mercenaries, such as Russia, have criminalized participation in the activities of mercenaries in their national legislation.<sup>17</sup> However, such legislation is usually used as a preventive weapon against others. This applies to the instant when the spokesperson for the Russian Ministry of Defense declared that foreigners fighting on the side of Ukraine would not have access to the status of prisoners of war and would be held criminally accountable according to Russian laws.<sup>18</sup> Practice has shown that these laws were indeed applied in Russia in cases between 2017 and 2019, but against Russian citizens who were involved in mercenarism on the side of Ukraine in the conflict since 2014.<sup>19</sup>

## The Definition of the Mercenary and the Legalization of Mercenarism

The definition of a mercenary established in Article 47 of the Additional Protocol I to the Geneva Conventions of 1949, is largely the most adopted by many States worldwide – except for States parties to the Mercenary Convention. This definition is considered a reflection of customary international humanitarian law, even though the United States rejects it.<sup>20</sup> The definition entails a set of considerations and effects that likely enhance the legitimacy of mercenarism, and even regulate the work of mercenaries:

*Firstly*, as stated above, Article 47 did not aim to criminalize or prohibit mercenarism, but rather to specify the collective conditions under which the mercenary description applies exclusively during international armed conflict, and as result of which the mercenary does not have the right to combatant status, hence the prisoner-of-war status when detained by one of

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<sup>16</sup> ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment (Merits), 27 June 1986, ICJ Reports 1986, paras. 109-115.

<sup>17</sup> Article 13(5) of the Russian Constitution prohibits the establishment of associations whose objectives include the formation of armed units; Article 359 of the Criminal Code of the Russian Federation.

<sup>18</sup> Russian News Agency, Foreign mercenaries in Ukraine will not have POW status – Russian military, 03 March 2022 (Available at:

[https://tass.com/politics/1416131?utm\\_source=ejiltalk.org&utm\\_medium=referral&utm\\_campaign=ejiltalk.org&utm\\_referrer=ejiltalk.org](https://tass.com/politics/1416131?utm_source=ejiltalk.org&utm_medium=referral&utm_campaign=ejiltalk.org&utm_referrer=ejiltalk.org)).

<sup>19</sup> Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: *The evolving forms, trends and manifestations of mercenaries and mercenary-related activities*, 28 July 2020, UN Doc: A/75/259, para. 21, p. 9.

<sup>20</sup> ICRC, *IHL Database: Customary IHL*, Rule 108. Mercenaries: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule108](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule108)

the parties in the conflict. This "regulatory" framework for the status of mercenaries has led to the decriminalization of mercenarism in the Rome Statute, which establishes the International Criminal Court (ICC), because the Statute grounds its description of international crimes during armed conflict in the legal framework regulating international humanitarian law. Additionally, the text of this article does not obligate States to deny a detained mercenary the prisoner-of-war status, but it only permits them to do so. That is, States can still decide to grant the detained mercenary the prisoner-of-war status without this being considered a violation of the provisions of the Protocol.<sup>21</sup> Refraining from establishing the ban and maintaining the right of States to granting the prisoner-of-war status to mercenaries may be considered as two essential factors in encouraging individuals and States to practice and support mercenarism.

Secondly, the failure to address the issue of mercenarism in Additional Protocol II on Non-International Armed Conflicts is self-evident insofar as its regulation in the context of international armed conflict aims to establish or deny the mercenaries access to the prisoner-of-war status, which primarily does not apply during non-international armed conflicts. Therefore, in the context of a non-international armed conflict, if an individual who meets the definition of a mercenary is detained, and the detaining authority decides to prosecute him, only the provisions governing participation in hostilities will apply to him. The trial would not be based on his capacity as a mercenary unless the national laws of the detaining State criminalize mercenarism. Because contemporary armed conflicts are mostly non-international, nothing would prevent the intensification of this practice of recruitment and use of mercenaries, if this limitation is not even considered a factor encouraging this practice ([as is the case in the Libyan conflict](#)).

Thirdly, the definition presents a problematic comparison between mercenaries on the one hand and militia groups or volunteers, belonging to a Party to an international armed conflict, on the other, and who are among the combatant categories that have access to the prisoner-of-war status when detained, under Article 4(a)(2) of the Geneva Convention relative to the Treatment of Prisoners of War. With this article, international humanitarian law recognizes the right of Parties to the conflict to use irregular forces, which are not an integral part of their regular armed forces. Based on this, the article establishes the right to the prisoner-of-war status for individuals within irregular forces if the group they are affiliated with meets the following five conditions:<sup>22</sup>

1. **Belonging to a Party to the conflict:** This is necessary to distinguish this category from the members of the regular armed forces covered in Article 4(a) (1). Two requirements govern the fulfillment of affiliation: First, the group must fight on behalf of that Party. Second, the Party must accept both the group's combative role and the fact that the fighting is being done on its behalf. Acceptance can be through an explicit statement by the State, or implicit, demonstrated by the actual fighting of those groups on the side of the regular armed forces, or through the level of State control over those groups. It should be noted that the fact that an individual is national of a third country and not a national of the armed forces in which they serve is irrelevant when it comes to determining combatant or prisoner-of-war status.

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<sup>21</sup> ICRC, *Commentary of 1987 on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, p. 575, para. 1795.

<sup>22</sup> ICRC, *Commentary of 2020 on Convention III relative to the Treatment of Prisoners of War of 12 August 1949*, paras. 1001-1027.

2. **Responsible command:** The group, within this category, must have a responsible command that oversees individuals and actions of the group. This requirement has been established for the purposes of enhancing protection to ensure the highest possible level of respect for international humanitarian law by the group, and, therefore, accountability against individuals involved in violations through command.
3. **Having a fixed distinctive sign or emblem recognizable at a distance:** The requirement ensures that members of this group abide by the principle of distinction from civilians, and this applies to the group's individuals and objects.
4. **Carrying arms openly:** This condition is also related to ensuring compliance with the principle of distinction from civilians.
5. **Conducting operations in accordance with the laws and customs of war:** In order for members of these groups to enjoy combatant and prisoner-of-war status when they are not members of the regular armed forces, they must abide by the provisions of international humanitarian law.

## Analysis and Conclusions

Comparing these conditions with those underlying the definition of a mercenary, the following conclusions can be drawn:

### **A mercenary is an individual recruited locally or abroad specifically to participate in an armed conflict**

The ICRC argues that this condition is intended to distinguish mercenaries - if all other conditions are met simultaneously- from volunteers covered in Article 4(a)(2) of the Geneva Convention (III), given that volunteers are usually join armies on a long-term basis rather than exclusively for participation in a particular armed conflict.<sup>23</sup> This argument raises several fundamental questions. What if a country recruits volunteers on a long-term basis, and these volunteers fulfill all remaining conditions of mercenarism? A real and persistent example of this is the "French Foreign Legion" which the ICRC uses in its argument as an example of volunteerism and its difference from mercenarism. On a careful review of the requirements and details of joining this legion, it can easily be argued that many those who might be admitted into its ranks would fulfil the conditions for mercenarism, the most important of which is material gain (discussed below).<sup>24</sup> Does the mere fact that these individuals are long-term recruits exclude them from the definition of a mercenary? Can the State not exploit such groups in several simultaneous or successive conflicts, which is exactly what France has done/is doing with the Foreign Legion? The other question transpires through the Ukrainian president's recent call for volunteers to fight against Russia in the international armed conflict

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<sup>23</sup> ICRC, *Commentary of 1987 on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, pp. 578-9, para. 1805.

<sup>24</sup> See e.g.: Foreign Legion Info (Available at: <http://foreignlegion.info/joining/>).

that has been going on since February 2022.<sup>25</sup> Does not this call amount to recruitment to participate in a particular armed conflict, which would bring recruits within the scope of the definition if the remaining conditions were met?

The more complex question, which arises from the nature of contemporary conflicts, is the phenomenon of the use of non-State armed groups that are Party to a non-international armed conflict by a State that is not a Party to that conflict to fight for its benefit or its interests in another international or non-international armed conflict. The recent case of Turkey and its apparent role in this context might be a vivid example of this hypothesis. Turkey is involved in three different international and non-international conflicts even though it is not a Party to any of them: Syria, Libya, and Azerbaijan/Armenia.

For example, Turkey has, for years, been supporting Syrian opposition factions, including Islamist organizations, which identify themselves as the "Syrian National Army". This group has repeatedly participated alongside the Turkish regular armed forces in their military operations in Syria, especially against the Kurds within the Syrian territories. The Turkish authorities also deployed fighters from the group's various formations to participate in the non-international armed conflict in Libya for the benefit of their ally - the Government of National Accord,<sup>26</sup> and later on the side of Azerbaijan in its conflict with Armenia. Given the extreme limitations of the legal framework, the first condition in the definition of Additional Protocol I, and the opinion of the ICRC regarding enlisting recruits specifically to fight in a particular armed conflict are incapable of precisely offering a precise legal characterization these fighters on the grounds that they were not, in fact, specifically recruited to fight in Libya, on the ground they were not, in fact, recruited specifically to fight in Libya, while they are not members of the regular Turkish armed forces, nor are they officially volunteers in it, but they can be considered as belonging to Turkish armed forces according to the criteria of Article 4(a) (2) of the Geneva Convention (III) as stated above.

However, affiliation with the Turkish armed forces- if we assume the affiliation's accuracy- was not used in an armed conflict in which Turkey is a Party, not to mention that the conflict in Libya is primarily a non-international armed conflict, which excludes the applicability of the two articles under consideration of the Geneva Convention (III) and Additional Protocol I.

### **A mercenary takes part directly in hostilities**

Limiting the expected roles of mercenaries to actual or direct participation in hostilities actually contributes to excluding all other supporting roles that mercenaries may play during armed conflict, especially since the ICRC - in terms of strengthening the maximum level of protection - emphasizes this role to the point of excluding military experts and advisors.<sup>27</sup> The

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<sup>25</sup> CNN, Ukraine's Zelensky calls on "citizens of world" to join in fight against Russia, 27 February 2022 (Available at: [https://edition.cnn.com/europe/live-news/ukraine-russia-news-02-27-22/h\\_9ffa23d19f5bde298a75a3e2be13e13d](https://edition.cnn.com/europe/live-news/ukraine-russia-news-02-27-22/h_9ffa23d19f5bde298a75a3e2be13e13d)).

<sup>26</sup> See: STJ, "Turkey's Recruitment of Syrian Mercenaries to Fight in Libya: Process and Legal Consequences", 11 May 2020, <https://stj-sy.org/en/turkeys-recruitment-of-syrian-mercenaries-to-fight-in-libya-process-and-legal-consequences/>

"Syria/Libya: Complaint to the UN Working Group on the Use of Mercenaries", 25 March 2022, <https://stj-sy.org/en/syria-libya-complaint-to-the-un-working-group-on-the-use-of-mercenaries/>

<sup>27</sup> ICRC, Commentary of 1987 on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), p. 579, para. 1806.

ICRC governed this with three cumulative conditions that must be met for an individual to be considered a direct participant in hostilities:<sup>28</sup>

1. 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
2. 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
3. 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).

This restriction would remove many parties related to mercenaries from the scope of the definition because they provide support to one of the parties to the conflict that does not amount to direct participation in hostilities such as “building military skills, when planning operations or using and maintaining weapons and other equipment, as well as to supplement military resources and act as a force multiplier.”<sup>29</sup>

### **A mercenary is motivated to take part in the hostilities by the desire for private gain**

and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially more than that promised or paid to combatants of similar ranks and functions in the armed forces of that Party. This condition is considered the crux of the matter and the subject of controversy or basic complexity in the definition, and the reason for this is that it is a condition that depends on the measurement of motivation which cannot be verified objectively. On this, a 1976 report of the United Kingdom’s Committee on the involvement of British mercenaries in Angola noted the following: “[A]ny definition of mercenaries which requires positive proof of motivation would either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.”<sup>30</sup>

This condition poses two main problems: Is the motive always monetary material gain, and is obtaining gains higher than what fighters in the armed forces obtain a condition for mercenaries to accept fighting? Some Nigerians who recently expressed their desire to fight alongside Ukraine asserted that their primary motive was “to escape the existential problems of living in Nigeria”.<sup>31</sup> Others are motivated by the desire to fight because they are ex-soldiers who know nothing but fighting and want to employ their fighting skills.<sup>32</sup> Additionally, could not the gain be private, but not material/monetary? An example of this is the promise

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<sup>28</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, March 2010, p. 46.

<sup>29</sup> Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: *The evolving forms, trends and manifestations of mercenaries and mercenary-related activities*, 28 July 2020, UN Doc: A/75/259, para. 40, p. 23.

<sup>30</sup> *Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries*, Cmnd. 6569, para. 7 (August 1976).

<sup>31</sup> Ajibola Amzat, International Centre for Investigative Reporting, *Why we volunteer to fight in Ukraine?*, 04 March 2022 (Available at: <https://www.icirnigeria.org/why-we-volunteer-to-fight-in-ukraine/>).

<sup>32</sup> *Ibid.*

mercenaries are offered of citizenship of the state for which they will fight, as in the Ukrainian context, and the president's invitation to the citizens of the world to fight in his country.<sup>33</sup> Other factors are also at play in shaping the subjective motivation and the concept of gain among individuals. Ideological or political factors or the belief in protecting national interests may be a subjective motive, as indicated by the Working Group on the Use of Mercenaries.<sup>34</sup>

The nature of the work of actors in the field of mercenaries requires secrecy and lack of transparency, whether these actors are States, private companies, or individuals. Therefore, it is extremely difficult to prove that the material gain exceeds what the fighters in the armed forces obtain. Consequently, the Party recruiting mercenaries has only to document that recruits receive the same material compensation as its regular fighters, in order to avoid the legal and political stigma of recruiting or financing mercenaries.

This issue is further complicated in situations, where the provisions of international humanitarian law related to international armed conflicts do not apply, such as in non-international armed conflicts, attempts to overthrow the regime, or incite instability. The Mercenary Convention applies to these situations, and only to State parties. The biggest challenge arises when non-State armed groups are involved in mercenary cases, which is witnessing a great development, because, in this, mercenarism is no longer confined to use in the armed conflict in which these groups are a party, but rather the involvement of these groups in recruitment and transfer of fighters from their ranks to other cross-border conflicts.<sup>35</sup>

### **A mercenary is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict**

This condition adds an extra layer of complexity pertaining to determining the criterion to distinguish between a mercenary and a volunteer within the connotations implied by Article 4 (1) (2) of the Geneva Convention (III), which does not require that the volunteers be of the nationality of the State party to the conflict or reside in the territory under its control. The fact that several countries regulate the recruitment of non-citizen residents, or even non-citizens who are not residents, in their armed forces within their national legislation,<sup>36</sup> increases the ambiguity of classification and gives countries a large margin that enables them to adapt the concept of volunteering on a wide scale. For example, some Ukrainian laws and decrees have regulated the recruitment/volunteering of foreigners into the ranks of the Ukrainian Armed Forces since 2015.<sup>37</sup>

On the other hand, a different challenge arises, related to individuals not residing in a territory controlled by one of the Parties to the conflict. Turkey refuses to recognize its control over

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<sup>33</sup> *Supra* note 20.

<sup>34</sup> Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: *The evolving forms, trends and manifestations of mercenaries and mercenary-related activities*, 28 July 2020, UN Doc: A/75/259, para. 15, p. 17.

<sup>35</sup> See previous note for example: Paras 55-57, pp. 17-18.

<sup>36</sup> ICRC, *Commentary of 1987 on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, p. 580, para. 1812.

<sup>37</sup> Such as Law No. 2389 of 2015 and Presidential Decree No. 248 of 2016.

areas in northern Syria,<sup>38</sup> but it has recruited and sent fighters to Libya from armed groups operating within those areas, whether these groups are affiliated with or directly supported by it.<sup>39</sup>

### **A mercenary is not a member of the armed forces of a Party to the conflict**

This definition is described as having made the definition of mercenaries completely meaningless.<sup>40</sup> Simply, it is sufficient for countries to include mercenaries in their armed forces through temporary or long-term contracts to bypass this condition, as is the case with the "French Foreign Legion". States can easily argue that the affiliation requirement under Article 4(a)(2) of the Geneva Convention (III) applies to them as members of the armed forces.

### **A mercenary 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**

That is, the individual is recruited in his personal capacity, not as a representative of a third country. The development and change of the nature and form of contemporary conflicts, the emergence of security and military companies, and the rapid progress of technology is enabling forces to circumvent this condition, including the notorious Wagner Group. The group enjoys the immunity of confidential information if it is considered a party cooperating with the foreign intelligence of the Russian Federation without its members being official employees, according to the decree signed by President Putin in September 2018. Additionally, Article 359 of the Russian Criminal Code provides a mercenary definition that includes a controversial reference. The reference is considered a vital means for circumventing this condition: "A mercenary shall be deemed to mean a person who acts for the purpose of getting a material reward, and who is not a citizen of the state in whose armed conflict or hostilities he participates, who does not reside on a permanent basis on its territory, and also who is not a person fulfilling official duties."<sup>41</sup> Applied to the activities of Wagner Group and other companies described as private, the Russian State can spare the group the label of mercenarism if the group admits that it performs official duties like those it does in Russia, or evade its responsibilities by simply denying these duties, the way Russia responded to the special procedures correspondence regarding allegations that the Russian authorities did not investigate violations attributed to the Wagner Group against a Syrian citizen in Syria.<sup>42</sup> The response included: "Moreover, if any citizens of the Russian Federation are under private contracts abroad with non-State set-ups,

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<sup>38</sup> See for instance, Turkey's Information Note to the Joint Communication from Special Procedures, regrading denying 600,000 persons in northeastern Syria access to potable water due to recurrent Aluk Water Station interruptions, dated 2 December 2020:

<https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=35760>

<sup>39</sup> Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: *The evolving forms, trends and manifestations of mercenaries and mercenary-related activities*, 28 July 2020, UN Doc: A/75/259, para. 57, p. 18.

<sup>40</sup> ICRC, *Commentary of 1987 on the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, p. 581, para. 1813.

<sup>41</sup> The Criminal Code of the Russian Federation, No. 63-FZ of June 13, 1996 (Available at: [https://www.wto.org/english/thewto\\_e/acc\\_e/rus\\_e/WTACCRUS48\\_LEG\\_6.pdf](https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS48_LEG_6.pdf)).

<sup>42</sup> Human Rights Council, Special Procedures, Ref.: AL RUS 14/2021, 13 December 2021 (Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26701>).



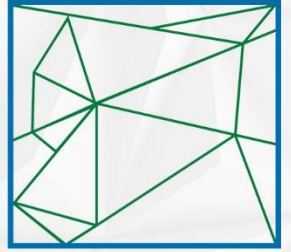
including foreign ones, that cannot serve as a reason for identifying their activities with the State policy of the Russian authorities.”<sup>43</sup>

The last three terms are tightly related. The Russian-Ukrainian conflict is experiencing many precedents regarding the dialectic of mercenarism and volunteerism. For example, it has been documented that services affiliated with Syrian authorities were involved in preparatory operations to send personnel to fight alongside Russian forces in Ukraine. An analysis of the situation would demonstrate that a State that is not a Party to the conflict - Syria - is recruiting fighters for another State party to the conflict - Russia - which performs various manifestations of control over large sectors of the armed forces of the first state (Syria) and its territory as well and is also supporting them in the non-international armed conflict in which it is involved. A restrictive reading of the terms of the definition of a mercenary in accordance with Additional Protocol I, as well as the corresponding International Convention against the Recruitment, Use, Financing and Training of Mercenaries, will enable all parties to this process to avoid allegations of recruitment or support of mercenaries. Syria can claim that it is sending fighters in an official capacity, thus dropping the last condition. Russia can claim that it does not exercise control over the territory in which conscription takes place, thus, dropping the fourth condition. Russia and Syria can invoke formal contracting with these conscripts and their service in the ranks of the Russian armed forces, especially since the conditions for conscription, as stated in a report by Syrians for Truth and Justice,<sup>44</sup> stipulate the preference for having previous experience working under the command of Russian officers, and, thus dropping the fifth condition. As is known, if any of the six conditions of the mercenary definition is not met, the classification would not apply as meant in the Additional Protocol (I), nor would the involved State be held responsible assuming the applicability of the Mercenary Convention.

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<sup>43</sup> The Russian Federation reply to the Special Procedures communication (Ref.: AL RUS 14/2021), 25 February 2022 (Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=36828>).

<sup>44</sup> STJ, “Syria: Has the Recruitment of Syrian Fighters Towards Ukraine Begun?” 4 march 2022, <https://stj-sy.org/en/syria-has-the-recruitment-of-syrian-fighters-towards-ukraine-begun/>



## About Us:

Syrians for Truth and Justice (STJ) is a nonprofit, nongovernmental organization monitoring human rights violations in Syria. Founded in 2015, STJ has been based in France since 2019.

STJ is an impartial and independent Syrian human rights organization operating across Syria. Our network of field researchers monitor and report human rights violations occurring on the ground in Syria, while our international team of human rights experts, lawyers, and journalists gather evidence, examine emerging patterns of violations, and analyze how violations break domestic Syrian and international law.

We are committed to documenting violations of human rights committed by all parties in the Syrian conflict and elevating the voices of all Syrians victimized by human rights violations, regardless of their ethnicity, religion, political affiliation, class, and/or gender. Our commitment to human rights monitoring is founded on the idea that professional human rights documentation meeting international standards is the first step to uncovering the truth and achieving justice in Syria.



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