

BEFORE

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

(United Nations, Human Rights Council)

In the Matter of

Call for submissions: The evolving forms, trends and manifestations of mercenaries and mercenary-related activities

And

In the Matter of

Written Observations

Submitted by Muhammad Muzahidul Islam

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Author

Muhammad Muzahidul Islam: Is a barrister, human rights activist and practicing advocate of the supreme court of Bangladesh. Obtained LL.B(Hons) from University of London. Completed Bar Vocational Course from Inns of Court School of Law, City University, London. Obtained LL.B(Hons), and LL.M from University of Rajshahi. Earned Barrister-at-Law from the Honourable Society of Lincoln's Inn, London. Has been practising law in Bangladesh since 1998. Is a member of Bangladesh Supreme Court Bar Association (From 2009 to date). Was cited by the Inter-American Court of Human Rights (IAcHR) as an Amicus Curiae in the judgment of V.R.P., V.P.C. and another Versus Nicaragua case (available at the webpage of the Court). Filed written observations (available at the webpage of the court) as an amicus curiae in a request for an Advisory Opinion submitted by the Republic of Colombia before the same Court (IAcHR). Is a member of the Roster of Experts [(United Nations Security Council Affairs Division, From March 2018 to date), and the areas of expertise are: International law and Human Rights], the details of the Roster of Experts are available at the webpage of Security Council (the highest diplomatic forum of the world)]. Has publications (articles) in the areas of international law. Has a chamber at the following address:

Chamber:

'The Liberty Law'

Nakshi Homes, Third Floor,

6/1/A Topkhana Road, Segunbagicha, Dhaka 1000

Bangladesh.

Please Note: The Observations expressed herein are his own and do not necessarily represent the observations of any institution.

A. Introduction

1. It is needless to mention here the mandate and background of this initiative¹ undertaken by the Working Group. To provide information and observations pertinent to the areas covered by the

¹Call for submissions

The Working Group invites all interested governments, civil society organizations, academics, international and inter-governmental organizations, national human rights institutions, activists, private companies and others to provide information and views in writing to support the preparation of its thematic report.

While the Working Group welcomes any information deemed pertinent to the issue, it is particularly interested in the following areas:

1. Regulatory frameworks and their application

- National legislative and regulatory frameworks, as elaborated in Military Codes or other instruments, on mercenaries and related issues (e.g. nationals engaged in military service abroad, foreign fighters etc.), including implementation of the 1989 International Mercenary Convention, Article 47 of the Additional Protocol I to the Geneva Conventions, and the 1977 OAU Convention for the Elimination of Mercenarism in Africa, as applicable.
- Information and recent figures on investigations, arrests, prosecutions, convictions and penalties imposed on mercenaries and mercenary-related actors;
- Observations on the level of implementation by States, regional and international bodies of the existing international legal framework on mercenaries, including impediments to regulate effectively the current forms, trends and manifestations of mercenaries and mercenary-related activities.

2. Current trends and developments

- The types of services provided by mercenaries and mercenary-related actors as well as information on who they are, where they operate, their clients, the reasons behind their recruitment and the modalities behind the use of their services;
- Trends and patterns regarding States of origin, motivational factors and professional backgrounds of mercenaries and mercenary-related actors;
- The role of non-State armed groups and organised criminal groups in either using or providing mercenary and mercenary-related services;
- Transnational, regional and national dynamics conducive to the use of mercenaries.

3. Human rights impacts of mercenaries and mercenary-related activities

- Specific allegations about the use of mercenaries and mercenary-related actors in recent and ongoing conflicts, including methods of recruitment, motivational factors, training and financing;
- Information on how the use of mercenaries and mercenary-related actors influence conflict dynamics;
- Examples of the access to and use of advanced technologies and weaponry by mercenaries and mercenary-related actors;

call of Working Group, I would, firstly, state the Mercenarism and its contemporary evolvement, secondly the international frameworks pertinent to the mercenary and their shortcomings, thirdly, the domestic laws and measures in various regions of the world with regard to the mercenary and mercenary related activities, the gaps and challenges and, finally, my humble recommendations to the Working Group.

B. Mercenarism and its contemporary evolvement

2. Mercenarism is a very ancient profession. There are six verses² in the Bible regarding mercenarism. For sure it has never been inspired, encouraged, loved and welcomed and always been condemned. Let me start by the year 1961³ when there were three resolutions adopted by the Security Council and General Assembly by which United Nations for the first time handled the issue of mercenarism by calling for the withdrawal of mercenaries from Congo. And since then there was almost no conflict where the mercenaries were not present and their activities led the international and regional community to form some legal frameworks to combat and condemn this shameful profession.
3. In the recent past the world has seen the activities of mercenaries in Yemen, Nigeria, Ukraine, Syria, Libya and Iraq. Allegedly some countries of the Middle East hired hundreds of mercenaries from Latin American and African countries to fight against Iranian-backed Houthis in Yemen. In Syria the mercenaries have been seen to capture the oil fields from the Islamic State (IS). Mercenaries were present in the Ukraine conflicts and Boko Haram Issues in Nigeria. They may, not surprisingly, be hired by the terrorists and one would name 'Malhama Tactical'⁴ for reference.
4. I would like to recourse to some selective information from a piece of news⁵ that was published in the Santiago Times in July 2007 and the following information would focus on the contemporary manifestation of the mercenary related activities:

'Hired Mercenaries Are Second Largest 'Coalition Force' in Iraq'

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- Specific allegations of human rights abuses committed or facilitated by mercenaries and mercenary-related actors, and violations of the right of peoples to self-determination linked to their use, including relevant gender-related and intersectional dimensions.

²Available at <https://bible.knowing-jesus.com/topics/Mercenaries>

³Security Council Resolutions 161A of 21 February 1961, and 169 of 24 November 1961, and General Assembly Resolution 1599 (XV) of 15 April 1961, calling for the withdrawal of mercenaries from the Congo;

⁴https://en.wikipedia.org/wiki/Malhama_Tactical

⁵Chile's Iraq Mercenaries Under Investigation by U.N. Group, Mike Hager, The Santiago Times Santiago, Chile, July 9, 2007

“In 2005, for example, the Your Solutions security firm sent 147 Chileans into conflict zones in Iraq; 28 of the recruits broke their contracts and returned home early, claiming they received inadequate training and poor equipment. In September of that same year, Honduras kicked Your Solutions and its 105 Chilean mercenary recruits out of the country for training foreign military in Honduran territory—in violation of national laws. When neighboring Nicaragua refused to allow the mercenary training to continue in their country, Honduras finally relented, allowing the mercenaries to complete 15 more days of training in Honduras before being shipped to Iraq. The Los Angeles Times recently reported that 180,000 mercenaries are working in Iraqi territory, outnumbering the 160,000 American troops on the ground. The mercenaries include 21,000 American citizens, 43,000 foreigners, and 118,000 Iraqis. One thousand of these privately contracted security personnel have died, reported the L.A. Times, and at least 10,000 have been injured. A Chilean guarding a ground facility such as an embassy earns \$3,000 a month, and can increase their income by taking on higher risk mobile security assignments that can net up to \$12,000 a month.”

5. The privatization of security is not very new. And to support this assertion I would add the following- ‘the end of the Cold War and the victory of liberalism brought with it the privatization of war. How this came about has been well documented by political scientists and journalists. Responding to the public sensitivities to fallen soldiers (Avant & Sigelman, 2010), pressure from the defense industry that identified opportunities for profit (Singer, 2011), and an emerging cultural belief that privatization can lead to better and more efficient security (e.g., Avant, 2004). American policy makers in the 1990s opened the door for private companies to step in. Contractors' achievements in Bosnia in 1995, where they operated mostly as consultants, and later with the staggering success of the South African Executive Outcomes in Sierra Leone in 1995 with the swift ending of the Revolutionary United Front reign of terror (Avant, 2004; Singer, 2007, 2011), signaled a new trend in privatizing warfare’⁶.
6. To substantiate my argument I would quote the relevant portion from an article authored by an Expert on Sudan where he wrote “the Hemeti and the RSF (Rapid Support Forces) are in some ways familiar figures from the history of the Nile Valley. In the 19th Century, mercenary freebooters ranged across what are now Sudan, South Sudan, Chad, and the Central African Republic, publicly swearing allegiance to the Khedive of Egypt but also setting up and ruling their own private empires. Yet in other ways Hemeti is a wholly 21st Century phenomenon: a military-political entrepreneur, whose paramilitary business empire transgresses territorial and legal boundaries. Today, this semi-lettered market trader and militiaman is more powerful than any

⁶Private security and military contractors: A troubling oversight, by OriSwed and Thomas Crosbie, available at https://www.researchgate.net/publication/319909240_Private_security_and_military_contractors_A_troubling_oversight

army general or civilian leader in Sudan. The political marketplace he commands is more dynamic than any fragile institutions of civilian government”⁷.

C. International frameworks pertinent to the mercenary and their shortcomings

7. The main international and regional instruments on mercenary are-1977 Additional Protocols to the Geneva Conventions of 1949, 1977 OAU/AU Convention on the Elimination of the Mercenarism in Africa and 1989 United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries. The definition of mercenary found in the 1977 OAU/AU Convention on the Elimination of the Mercenarism in Africa and the 1989 United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries was originated in article 47 of Additional Protocol I. Article 47 provides that:

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

2. A mercenary is any person who:

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

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

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

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

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

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

8. One’s argument, upon the analysis of these legal instruments, would justify the position that the Additional Protocol I only states the status that to be given to mercenaries and the protections that they would be offered to when captured during the armed conflict. It did not criminalize mercenarism. On the other hand both the OAU convention and UN convention sought to criminalize mercenarism. Additional Protocol I did not entitle the mercenaries to be combatants to fight enemies. Mercenarism and mercenary related activities are condemned by the OAU convention. However, these activities are not considered to be a ‘grave breach’ by Protocol I of 1977.

9. The ‘Grave breaches’⁸ that have been specifically mentioned in the Geneva Conventions and Additional Protocol I did not include the mercenarism or mercenary related activities. In absence

⁷Sudan crisis: The ruthless mercenaries who run the country for gold, by Alex de Waal, who is the executive director of the World Peace Foundation at the Fletcher School of Law and Diplomacy at Tufts University, available at <https://www.bbc.com/news/world-africa-48987901>

⁸GC I art 50, GC II art 51, GC III art 130, GC IV art 147, AP I art.11 and art 85

of any provision criminalizing mercenary activities as offence in the Additional Protocol I, the State Parties, arguably, did not undertake any legal obligation to take pertinent legislative, administrative or judicial measures to prohibit mercenarism domestically.

10. The UN Convention on mercenary (1989)⁹ has not been very welcomed; it has already been a long that the convention has come into force, however, only 36 States (till to date) have been party to it. The definition¹⁰ of mercenary that has been provided by this instrument is so narrow that it fails to bring, within its ambit, the contemporary mercenary-like activities performed by the non-state actors in the conflict zones. And the definition is not wide enough to cover the contemporary manifestations of Private Military and Security Companies (PMSCs) that have been seen at the battlefields in recent past conflicts. Therefore, the time necessitates a legally binding international instrument with a wide definition of mercenary covering the contemporary activities of PMSCs and other non-state actors to hold them accountable and to close the mouth of impunity.

D. Domestic laws and measures in various regions of the world with regard to the mercenary and mercenary related activities, the gaps and challenges

11. The States¹¹ that are parties to the UN Convention on mercenaries (1989) are - Azerbaijan (4 Dec 1997 a) Barbados (10 Jul 1992 a), Belarus (28 May 1997), Belgium (31 May 2002 a), Cameroon (26 Jan 1996), Costa Rica (20 Sep 2001 a), Croatia (27 Mar 2000 a), Cuba (9 Feb 2007 a), Cyprus (8 July 1993 a), Ecuador (7 Dec 2016 a), Equatorial Guinea (21 Jan 2019 a), Georgia (8 Jun 1995 a), Guinea (18 Jul 2003 a), Honduras (1 Apr 2008 a), Italy (21 Aug 1995), Liberia (16 Sep 2005 a), Libya (22 Sep 2000 a), Maldives (11 Sep 1991), Mali (12 Apr 2002 a), Mauritania (9 Feb 1998 a), New Zealand (22 Sep 2004 a), Peru (23 Mar 2007 a), Qatar(Mar 26 1999 a), Republic of Moldova (28 Feb 2006

⁹International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, New York, 4 December 1989

¹⁰ Article 1, For the purposes of the present Convention, 1. A mercenary is any person who: (a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) 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 rank and functions in the armed forces of that party; (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) Is not a member of the armed forces of a party to the conflict; and (e) 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. 2. A mercenary is also any person who, in any other situation: (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

¹¹Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-6&chapter=18&clang=_en

a), Saudi Arabia (14 Apr 1997 a), Senegal(9 Jun 1999 a), Serbia (14 Jan 2016), Seychelles (12 Mar 1990 a), Suriname (10 Aug 1990), Syrian Arab Republic(23 Oct 2008 a), Togo (25 Feb 1991 a), Turkmenistan (18 Sep 1996 a), Ukraine (13 Sep 1993), Uruguay (14 Jul 1999), Uzbekistan (19 Jan 1998 a), Venezuela (Bolivarian Republic of) (12 Nov 2013 a).

12. I would like to mention here some national legislations¹² that were enacted by States on mercenary or mercenary-related activities. Azerbaijan's Criminal Code (1999)¹³ defines a mercenary as "a person not being a citizen of a State party to an armed conflict or hostilities, not having permanent residence on the territory of the State, as well as not being sent to carry out official duties, who acts with a view to private gain". Azerbaijan's Criminal Code (1999) provides: "Participation of a mercenary in the armed conflict or in the hostilities, -is punished by deprivation of liberty for a period of 3 to 8 years."
13. Belarus's Criminal Code (1999)¹⁴ defines a mercenary as: a person who participates, on the territory of a foreign State, in armed conflict or hostilities and who does not belong to the armed forces of the parties to the conflict and who acts with a view to a material remuneration without being authorized by the State of his origin or by the State on whose territory he permanently resides. Under Belarus's Criminal Code (2000), the participation of a mercenary in an armed conflict is punished with imprisonment for a term of three to seven years with (facultative) confiscation of goods.
14. Belgium's Law of War Manual (1983)¹⁵ states: In order to be qualified as a mercenary, all the following conditions have to be fulfilled: a) being specially recruited locally or abroad in order to fight in an armed conflict; b) taking a direct part in the hostilities; c) being motivated to take part in the hostilities essentially by the desire for private gain and, in fact, being 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) being neither a national of a party to the conflict nor a resident of territory controlled by a Party to the conflict; e) not being a member of the armed forces of a Party to the conflict; and f) not having been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces. Belgium's Law of War Manual (1983) states: "Mercenaries do not have the right to be combatants or prisoners of war. They are therefore illegal combatants."

¹²Available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2>

¹³https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_az_rule108

¹⁴https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_by_rule108

¹⁵https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_be_rule108

15. Cameroon's Instructor's Manual (1992)¹⁶ defines mercenaries as "persons who are specially recruited at home or abroad to fight for pay during an armed conflict". Cameroon's Instructor's Manual (2006), under the heading "Non-Combatants", states: "A mercenary is a person who is specially recruited at home or abroad to fight for remuneration during an armed conflict." The manual also states: A mercenary refers to any person: a) who is specifically recruited in a State party to a conflict or abroad to fight in an armed conflict and who effectively and directly takes part in hostilities; b) who is not a national of a party to the conflict, nor resident of the territory controlled by a party to the conflict, nor a member of the armed forces of a party to the conflict. His essential motivation is personal gain which is generally superior to the remuneration granted to members of the armed forces of the State party which has recruited him who have a similar rank and fulfil similar functions.
16. Croatia's Criminal Code (1997)¹⁷, as amended to 2006, states: A *mercenary* is a specially recruited person in the country or abroad to fight in an armed conflict or to participate in a joint act of violence aimed at overthrowing the government or subverting in some other way the constitutional order or the territorial integrity of a country, who is neither a national of the parties to the conflict nor living in the territory controlled by a party to the conflict, who is not a member or the armed forces of a party to the conflict or of the party in whose territory an action is undertaken and who is not sent by a country which is not a party to the conflict as an official member of its armed forces but who is motivated to take part in the hostilities only for his personal gain significantly higher than the remuneration promised or paid to combatants of a similar rank or profession in the armed units of the party participating in the hostilities. Croatia's Criminal Code (1997), as amended to 2006, states: "Whoever, with an aim to acquire material gain, directly participates as a mercenary in an armed conflict or a joint act of violence shall be punished by imprisonment for six months to five years."
17. Georgia's Criminal Code (1999)¹⁸ defines a mercenary as: a specially recruited person who acts with the view to receive a remuneration and who is neither a national of a State party to the conflict or hostilities, nor its permanent resident and who is not sent by any other State on official duty as a member of its armed forces. Georgia's Criminal Code (1999) provides: "Participation of a mercenary in armed conflict or hostilities shall be punished by deprivation of liberty for a term of three to seven years."

¹⁶https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_cm_rule108

¹⁷https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_hr_rule108

¹⁸https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_ge_rule108

18. Italy's IHL Manual (1991)¹⁹ states: "In all cases, a mercenary who is not a member of the armed forces of a party to the conflict shall not have the right to combatant or prisoner-of-war status." At the CDDH, Italy stated: Mercenaries, though not entitled to prisoner-of-war status, were covered by Article 65 [now Article 75 of the 1977 Additional Protocol I], which contained the fundamental safeguards to be given to all persons not enjoying more favourable treatment, regardless of the gravity of the crimes with which they might be charged. In 1981, during a debate in the Sixth Committee of the UN General Assembly, Italy stated that Article 47 of the 1977 Additional Protocol I should be interpreted in parallel to Article 75 of the 1977 Additional Protocol I.
19. New Zealand's Military Manual (1992)²⁰ states: A mercenary is a 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. New Zealand's Military Manual (1992) states: 807(1). While no distinction may be drawn between regular troops and volunteers, conscripts or members of the militia embodied in the armed forces, mercenaries as defined in [the 1977 Additional Protocol I] are denied the status of combatants and, if captured, are not entitled to treatment as prisoners of war. 807(2). Prior to 1977 there was no restriction upon the use of mercenaries in armed conflict and, in accordance with the principles of humanitarian law, any form of discrimination among combatants was forbidden. By a series of resolutions in relation to specific anti-colonial conflicts in Africa, the United Nations recommended prohibition of the use of such personnel against national liberation movements. This did not affect their legal status, although the government of Angola instituted criminal proceedings against captured mercenaries. Insofar as countries accepting [the 1977 Additional Protocol I] are concerned mercenaries are not entitled to combatant rights, thus denying to this type of soldier the equal treatment otherwise prescribed by the Protocol. Nevertheless, they remain entitled to the provisions concerning humanitarian treatment contained in [the 1977 Additional Protocol I] Art. 75.
20. Peru's IHL Manual (2004)²¹ defines the term "mercenary" as: "Any person who voluntarily enrolls in the combatant armed forces of a belligerent State of which he is not a national, motivated by the desire for private gain." Peru's IHL and Human Rights Manual (2010) defines "mercenary" in

¹⁹https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_it_rule108

²⁰https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_nz_rule108

²¹https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_pe_rule108

its Glossary of Terms as: “Any person who voluntarily enrolls in the combatant armed forces of a belligerent State of which he is not a national, motivated by the desire for private gain.” Peru’s IHL Manual (2004) states that a mercenary “is not entitled to combatant status or, if captured by the enemy, to prisoner-of-war status.” Peru’s IHL and Human Rights Manual (2010) states in its Glossary of Terms that a mercenary “is not entitled to combatant status or, if captured by the enemy, to prisoner-of-war status”.

21. The Republic of Moldova’s Penal Code (2002)²² defines a mercenary as: a person acting in the territory of a state involved in an armed conflict or in military hostilities with the aim to receive material gains, while not being a national of the said state, not having a permanent residence on the territory of the latter and not being under the duty to exercise official obligations. The Republic of Moldova’s Criminal Code (2002) punishes “[p]articipation of a mercenary in an armed conflict or hostilities ... with imprisonment for a term of 5 to 15 years”.
22. Ukraine’s IHL Manual (2004)²³ states: Mercenaries are persons who are specially recruited and take part in the hostilities in the desire for private gain. They are neither nationals of a Party to the armed conflict nor residents of territory controlled by such a Party. Mercenaries are not members of the armed forces of the belligerent Parties. Military instructors and advisors officially sent by a State to assist in building armed forces of another State are not mercenaries provided they do not take part in hostilities personally. Ukraine’s Criminal Code (2001) defines mercenary activity as “participation in armed conflicts of other States for the purpose of pecuniary compensation without authorization obtained from appropriate government authorities”. Ukraine’s IHL Manual (2004) states: 1.2.25. ... [M]ercenaries are unlawful participants of the hostilities. ...1.2.25.2. ... [M]ercenaries shall not have the right to be prisoners of war and are subject to punishment for their actions. However, their punishment may only be imposed by a competent tribunal. Ukraine’s Criminal Code (2001) provides: Participation, without permission of government bodies in charge, in armed conflicts of other States with the purpose of gaining financial profit shall be punishable with deprivation of liberty for a term of five to ten years.
23. Uzbekistan’s Criminal Code (1994)²⁴ defines mercenary activity as: participation on the territory or side of a foreign State in an armed conflict or military actions by a person who is neither a citizen nor a member of the armed forces of a State in conflict, nor a permanent resident of the territory under its control, nor someone sent on official duty by any State to the armed forces of another State, with a view to receive a financial reward or other personal advantages.

²²https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_md_rule108

²³https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_ua_rule108

²⁴https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_uz_rule108

Uzbekistan's Criminal Code as amended (2001) provides that a mercenary "shall be punished with imprisonment for five to twelve years."

24. As per the World Court's Judgment in North Sea Continental Shelf case²⁵ two elements namely, the state practice and opinio juris are needed to be satisfied in order for a rule to attain the norm of customary international law. Having satisfied the required elements the following position on mercenary has attained the norm of customary international law: mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial (Rule 108, ICRC, IHL Data).

25. I would take an opportunity to share the initiative²⁶ undertaken by The Working Group in 2013 to study and identify national legislative approaches regarding the activities of PMSCs (private military and security companies) and to assess the effectiveness of such legislation in protecting human rights and promoting accountability for violations, more particularly to identify common points, good practices and regulatory gaps. As a part of this initiative some countries were chosen for the study from each region of the globe and the countries were: Burkina Faso, Cameroon, Côte d'Ivoire, the Democratic Republic of Congo, Mali, Morocco, Senegal, and Tunisia (African Countries); France, Hungary, Switzerland and the United Kingdom of Great Britain and Northern Ireland (European Countries); China, India, Malaysia, Pakistan, the Philippines, Singapore, Sri Lanka and the United Arab Emirates (Asian Countries); Bolivia, Brazil, Chile, Colombia, Ecuador, Peru, Uruguay and Argentina (South America); Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama (Central America), Cuba in the Caribbean and Mexico.

26. The study revealed²⁷ that amongst the analyzed legislations of Asian Countries all of the Acts always include the State's domestic jurisdiction. Only the 2005 Indian Act also governs, in addition to domestic security companies, *Indian companies' export activities (extraterritorial activities are prohibited without the permission of the Controlling Authority, which, in turn, requires the permission of the Central Government)*, which is a very good practice. Likewise, only the 2005 Indian Act governs foreign companies' import activities (*India does not allow foreign companies to engage in or provide private security services under its jurisdiction, unless their branches in the country fulfil certain requirements*). Indirectly, China also permits and limits the import activities of foreign companies. All the Acts cover private *security* or similar services, while none of them makes any mention of *military* services.

²⁵<http://www.icj-cij.org/files/case-related/51/5537.pdf>

²⁶ National Legislation Studies on PMSCs, available at <https://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalLegislationStudies.aspx>

²⁷ *ibid*

27. The research showed²⁸ that none of the legislation analyzed of African Countries covers the activities of private military companies and their provided services. The study showed that the analyzed laws focus on the domestic sphere without prohibiting the provision of military or security services abroad and without ruling on extraterritorial applicability. With regard to the legislation of European Countries the analysis showed²⁹ that in general States have rather detailed national legislation covering the activities of the private security industry that provides detailed rules on licensing and authorisation of private security services and on the necessity of providing training to PMSC personnel. At the same time the research revealed that, with the exception of Switzerland, none of the analysed legislation included international human rights and humanitarian law references in the criteria of authorisation of PMSC activities or any other related standards regarding the selection process and the training materials.
28. With regard to legislation of Central American countries the study showed³⁰ that the main gaps in this group of eight countries are in the requirements for reporting on the respect and protection of the rights of persons within the framework of private security functions. None of the special regulations establish mechanisms for compensating victims, and very little reference is made to victims. Another frequent absence is mention of irregular military activities and the activities of military and private security companies. Most regulations deal only with the provision of civilian services specific to the protection of persons and property within one country. Also, provision of services abroad—except in the case mentioned in the report—are not included and are not prohibited. There are no regulations that are applicable extraterritorially. Concerning mercenaries, only three of the eight countries have ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989). None of the countries incorporate human rights into regulations governing private security. It was also revealed by the study³¹ that in the seven countries of South America and the Province of Buenos Aires, regulations cover the provision of civilian private security within that country. There are no laws applicable beyond national borders and no mention of extraterritoriality. There is also no regulation of the export and import of private security services.
29. From the above it is clear that the definition of mercenary that has been given by international instrument is not wide enough to regulate the activities of contemporary non-state actors of the zones of conflict. The States that incorporated the spirit of that definition into national legislation fail to play an effective role to hold the perpetrators accountable through those laws. With regard to the PMSCs the countries analyzed above fail to bring proper human rights perspective in the

²⁸ *ibid*

²⁹ *ibid*

³⁰ *ibid*

³¹ *ibid*

territorial and extra-territorial activities of PMSCs. There are gaps in the laws regarding the regulation of PMSCs and if these continue in future, that would result the culture of impunity to exist leaving the perpetrators unaccountable.

E. Conclusion and Recommendations

30. The Working Group on mercenary may kindly consider the observations that I put here for its consideration to include those in its thematic reports to Human Rights Council and General Assembly or any other inter-governmental forums or organizations.
31. The definition of mercenary given in UN Convention on mercenary (1989) is needed to be amended to cover the activities of non-state actors including the PMSCs in the zones of conflict. More initiatives are needed to inspire the States to ratify the said UN Convention.
32. Alternatively, the States could consider creating a new legally binding instrument covering the contemporary activities of PMSCs by undertaking obligations in different settings namely home state, territorial state and contracting state etc and making provisions on internal and international monitoring mechanisms for effective implementation of the rules. And in order to do that, the States could get an idea from the following non-binding instruments and initiatives that are in existence now: the Montreux Document³² and its Forum³³, the International Code of Conduct for Private Security Service Providers (the Code)³⁴ and its Association (ICoCA)³⁵.
33. States should be specific, through their national laws, both on the territorial and extra territorial activities of PMSCs. States should take legislative, administrative and judicial measures to implement the international rules domestically and to hold the violators accountable.
34. In order to respond to the business-related adverse impacts in conflict contexts, the States should be encouraged to act in accordance with principle 7³⁶ of the UN Guiding Principles on Business

³²https://www.icrc.org/en/doc/assets/files/other/icrc_002_0996.pdf

³³<https://www.mdforum.ch/>

³⁴https://icoca.ch/en/the_icoc

³⁵<https://icoca.ch/en/association>

³⁶7. Because the risk of gross human rights abuses is heightened in conflict affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by: (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

and Human Rights that was endorsed by the resolution of Human Rights Council in 2011. And in such situations the business enterprises are also expected to exercise the 'enhanced' human rights due diligence; because this is what has been, impliedly and/or expressly, prescribed under commentaries to principles 12³⁷, 17³⁸ and principle 23³⁹ of the UN Guiding Principles on Business and Human Rights.

All of which is respectfully submitted,

A handwritten signature in black ink, consisting of a stylized capital letter 'M' above two horizontal lines.

Muhammad Muzahidul Islam, 26 February, 2020

³⁷ Available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

³⁸ ibid

³⁹ ibid

