

UN, Working Group on the use of Mercenaries: Preliminary Findings of Mission to Ukraine

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Preliminary findings of UN Working Group's Mission to Ukraine

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Office of the United Nations High Commissioner for Human Rights, "Preliminary findings by the UN Working Group on the use [of] mercenaries on [its] Mission to Ukraine", News, 18 March 2016, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18492&LangID=E>, footnotes partly omitted]

[1] KYIV, UKRAINE (18 March 2016) Ms Olga Patricia Arias Barriga, member of the Working Group: I would like to present the preliminary findings of the Working Group on the use of mercenaries' visit to Ukraine which took place from 14-18 March 2016. The Working Group wishes to thank the Government of Ukraine for extending an invitation to visit the country and also expresses its appreciation for the meetings held with various representatives from the executive, legislative and judicial branches of the State, as well as with members of the diplomatic corps, and civil society organisations. The delegation was also grateful to have met with the representatives of the self-proclaimed 'Donetsk people's republic'. The Working Group particularly appreciates the excellent support provided by the UN Human Rights Monitoring Mission in Ukraine in organizing and facilitating the visit.

[2] The Working Group is mandated by the UN Human Rights Council to monitor the activities of mercenaries, mercenary-related activity, and the activities of private military and security companies. In this

regard, it studies and identifies sources, causes, emerging issues, manifestations and trends not only concerning mercenaries as defined in international law, but also mercenary-related activities and their impacts on human rights, notably on the rights of peoples to self-determination. The subject of foreign fighters has thus become a topic of interest to the Working Group due to its linkages to the phenomenon of mercenaries, and Ukraine is the third country that the Working Group is visiting, to closely study the impacts of foreign fighters on human rights.

[3] From the outset, we wish to clarify that the recruitment and use of mercenaries is legally defined in international law, in the 1977 Additional Protocol I to the 1949 Geneva Conventions, as well as the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, to which Ukraine is a party. The criteria for a mercenary are taking part directly in hostilities, motivated primarily by the desire for private gain, being paid substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of the party to the conflict, and not being a national of the party to the conflict or a resident of the territory controlled by a party to the conflict. The recruitment and use of mercenaries is prohibited by international law.

[4] With regard to foreign fighters, there is no internationally agreed legal definition of foreign fighters, nor a specific regime governing them. A foreign fighter is generally understood to refer to individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. Foreign fighters are motivated by a range of factors, notably ideology, but can also be attracted [to] fight for financial reward. Foreign fighters are obliged to respect applicable rules of international human rights and humanitarian law during armed conflicts.

[5] The distinction between [a] mercenary and [a] foreign fighter is important in clarifying the situation of foreign armed actors in Ukraine, the self-proclaimed 'Donetsk people's republic' and the self-proclaimed 'Luhansk people's republic'. Ukraine presents a very specific context, marked by conflict and a corresponding complex array of actors, agendas and constituencies. In this environment a diverse spectrum of combatant engagement has developed, with significant impact on the human rights of the people of Ukraine, and limited accountability.

[6] The events of the 2014 Maidan protests in Kyiv and the 16 March 2014 'referendum' in the Autonomous Republic of Crimea [Footnote 2: Its status which is determined by the UN General Assembly resolution 68/262 on the territorial integrity of Ukraine. [...]] were followed by the outbreak of armed hostilities in eastern Ukraine. The declaration of the self-proclaimed 'Donetsk people's republic' and the self-proclaimed 'Luhansk people's republic' have not only precipitated the escalation of armed conflict in certain districts of Donetsk and Luhansk regions, but also brought in an influx of fighters from abroad that have had significant influence on human rights in Ukraine.

[7] The Working Group was informed that foreigners joined combat to support all parties to the conflict. These foreigners came from various countries, mostly in Europe, and joined volunteer battalions on the side of the Government and the armed groups of the self-proclaimed 'Donetsk people's republic' and the self-proclaimed 'Luhansk people's republic'. References to the use of mercenaries [are made] by all parties to the conflict, and these require further analysis by the delegation, in light of the specified definition of mercenary in

international law.

[8] The Working Group commends the Government for aligning the definition in its Criminal Code with the International Convention against the recruitment, use, financing and training of mercenaries. The Working Group also notes the amendments to the Ukrainian legislation of October 2015 and December 2015 that allow for the incorporation of foreign fighters into the regular army of Ukraine, and the National Guard of Ukraine, respectively. As such, most foreigners in principle can legitimately fight on the side of the Government.

[9] The Working Group was informed by the authorities of Ukraine of at least 176 identified foreigners serving in armed groups of the self-proclaimed 'Donetsk people's republic' and the self-proclaimed 'Luhansk people's republic'. These reportedly include large numbers from the Russian Federation, Serbia, Belarus, France and Italy, among others.

[10] Unfortunately, there was a lack of coherent information in our interactions with all parties to the conflict. This made it difficult for the Working Group to develop a comprehensive picture of the activities of foreigners fighting in the various armed formations. Moreover, it restricted their ability to make a determination as to whether certain fighters were legally mercenaries.

[11] Nonetheless, the Working Group believes that the information it has received points to several levels of foreigner engagement. These vary from volunteers to paid service men and women, and from independent militia members to professional military. The impact on human rights includes alleged cases of extrajudicial and summary executions, torture, arbitrary detention, and infringements of the rights to freedom of movement and of expression.

[12] The Working Group did not find any particular data on private military companies. It was informed that only private security companies operated in Ukraine, and that the Government oversees their activities. While a licensing regime regulates private security companies, the operation of private military companies is currently prohibited. The Working Group strongly recommends the regulation of this sector in the interest of preventing potential human rights violations.

[13] This is indeed the core preoccupation of the Working Group on this visit. Impunity for the human rights violations committed by the range of foreigners in armed formations is widespread and seemingly unquestioned, paving the way for a murky zone with negligible accountability. The Working Group learned that there have never been any prosecutions for the specific crime of mercenarism in Ukraine. Some foreign fighters have been charged for indirect offences such as trespassing of territorial integrity of Ukraine, participation in a terrorist groups or organization, participation in unlawful paramilitary or armed formations, but not for the human rights violations committed.

[14] The Working Group urges the Government and the armed groups to fulfil their obligations under international human rights law and ensure respect for all civil, political, economic, social and cultural rights related to the activities of foreigners in armed groups. It recommends for the Government of Ukraine to draw up a strategy and plan of action on foreign engagement in the armed conflict, within the framework of the Minsk Protocols.

Recruitment

[15] The Working Group learned that much of recruitment of foreigners into various armed groups was undertaken through social media and other online communications, where information on the conflict as well as contact information for follow-up enlistment was readily available. Recruiting offices, including allegedly in the Russian Federation, also allow for in-person informational sharing and processing of recruits.

Motivations

[16] The motivations of foreigners joining to participate in armed conflict in Ukraine reportedly vary. The Working Group was told that many were inspired to fight for ideological or political reasons and others for financial compensation. In addition, some foreigners were from a criminal background, and information shared also indicates that some convicts were offered the option of imprisonment or service in the conflict.

[17] The Working Group also received data that foreign women have also been combatants in the armed conflict, in much smaller numbers.

Conclusion

[18] The Working Group recommends full implementation of the Minsk Protocols. In particular, it supports provision 10 of Protocol I on the withdrawal of illegal armed formations and military equipment as well as fighters and mercenaries from Ukraine, provision 1 on ensuring an immediate bilateral ceasefire, and provision 7 on continuing inclusive national dialogue.

[19] In moving forward towards full accountability for violations of human rights by foreigners in armed groups in Ukraine, the Working Group urges advancing beyond recognition of the role of foreign combatants in the armed conflict, to addressing their impact. Concrete steps for monitoring, reporting, legislation and legal action will mean incremental achievement of justice for victims of violation, and the erosion of the harmful culture of impunity for acts committed during the armed conflict.

Discussion

Classification of the situation and applicable law

1. (*Paras 1; 5-7; 15*) Given the information in the document, how would you classify the situation in Ukraine? Does the participation of “foreign fighters” affect the classification of the conflict, if at all? What is the applicable law?
2. (*Para. 14*) Do armed groups have obligations under Human Rights Law?

Status of persons

3. (*Para. 3*) Under IHL, which are the characteristics that qualify a mercenary? Are these characteristics

cumulative or not? What are the differences between the definition given by IHL and that given by the International Convention against the Recruitment, Use, Financing and Training of Mercenaries? (P I, Art. 47; Convention on Mercenaries, Art. 1)

4. Are armed groups prohibited by international law to use mercenaries?
5. (*Para. 3*) Does IHL prohibit the recruitment and use of mercenaries? (P I, Art. 47)
6. (*Paras 3-5; 12*) What is the difference between a mercenary and a “foreign fighter”? Does this difference matter for IHL? Are these categories of persons applicable only in IAC? In NIAC as well? Can members of private military/security companies be considered mercenaries? What information would you need to make this determination? (CIHL, Rule 108)
7. Should mercenaries be considered combatants or civilians? If captured, are they entitled to prisoner of war status? Can they be targeted like combatants, or should they be considered as civilians directly participating in hostilities? (P I, Art. 47; GC III, Art. 4; GC IV, Art. 4; CIHL, Rule 108)
8. Does Art. 47 of Protocol I imply that mercenaries have no protection at all under IHL? Are there any protective rules that apply to such persons when they have fallen into the hands of the enemy?

Regulation

9. Does IHL contain a general prohibition against the involvement of foreigners in an armed conflict? Does it depend on whether they are volunteers, paid servicemen/women, militia members, or military professionals?
10. (*Para. 4*) Why are “foreign fighters” bound by IHL?
11. (*Para. 13*) What is the Working Group’s main concern about the involvement of “foreign fighters” in the Ukrainian context?
12. (*Para. 8*) According to the Working Group, the Ukrainian Government’s incorporation of “foreign fighters” into its armed forces means they can legitimately fight for the Government. Is such incorporation lawful under IHL? Does it confer combatant and prisoner-of-war status in case of an international armed conflict? Do you think a similar process is possible on the side of the other parties to the conflict? What challenges do you foresee? Would it result in greater accountability/regulation of “foreign fighters”? Why/Why not?

Enforcement

13. (*Para. 13*) Why is accountability for IHL violations more difficult to achieve for “foreign” than for other fighters?
14. (*Para. 19*) Should separate steps for monitoring, reporting, legislation and legal action be taken against violations of IHL and Human Rights by “foreign fighters”?

