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Committee on Legal Affairs and Human Rights

On private military companies, mercenaries, foreign fighters and their impact on human rights

Introductory memorandum

Rapporteur: Mr Andrea Orlando, Italy, Socialists, Democrats and Greens Group

1. Introduction

1. This introductory memorandum is based on a motion for a resolution, dated 11 May 2023. The Committee appointed me as rapporteur at its meeting in Strasbourg on 10 October 2023.

2. The motion for a resolution states that the lack of a robust monitoring and sanctioning mechanism means that private military and security companies (PMSCs) risk becoming powerful and potentially rogue actors that place profit and power over human rights[1]. PMSCs are often used by governments as means of foreign interference, as is the case of the Russian Wagner Group, undermining the right of peoples to self-determination. Transnational companies often use them for the repression of local civil populations and organisations acting in defence of their environment by opposing the exploitation of natural resources. The proposal calls for the Parliamentary Assembly to examine the challenges of holding foreign fighters, mercenaries, and private military companies accountable for human rights abuses, with a view to recommend to the Committee of Ministers to examine the feasibility of drawing up a legally binding instrument. This could include the clarification of the legal consequences of PMSCs actions, drawing clear lines between what is legally acceptable and illegal, as well as limiting their ability to cause harm around the world.

3. Notwithstanding the fact that matters relating to national defence do not fall within the mandate of the Council of Europe, I consider that the operation of PMSCs, mercenaries and foreign fighters raises important questions related to the rule of law and protection of human rights, which are at the core of the Council of Europe's activities.

4. In this introductory memorandum, I will summarise the history of "guns for hire" and the existing international legal framework; set out recent allegations of human rights violations by PMSCs, mercenaries and foreign fighters, based on information from existing public sources; and make proposals for further work on the final report.

2. Historical background

5. The phenomenon of hiring external forces to fight in conflicts has been known to humanity for millennia. Already in the fifth century BC, after the Peloponnesian wars in ancient Greece, the demand for such services was high, owing to extreme poverty and protracted warfare. Crusaders in the Holy Land often used the services of turcopoles – light cavalrymen paid to fight alongside the Christian invaders. The Hundred Years' War between France and England (1337–1453) saw the formation of "free companies" who would sell their services

* Document declassified by the Committee on 16 April 2024.
[1] Doc. 15771 ("On private military companies, mercenaries and foreign fighters and their impact on human rights")

to the highest bidder. The economic power of Italian city States was undermined by a shortage of manpower, resulting in the employment of *condottieri* – individuals who fought in exchange for money. In the 19th century, private armies of the East India Company hired regular regiments of the British Army, and funded its own navy, the Bombay Marine. The vast resources of the company allowed it to eventually employ over 250,000 well-trained and well-equipped fighting men. The French Revolution and subsequent victories of the Napoleonic armies consisting of conscripts halted the common use of mercenaries.

6. The phenomenon of foreign fighters became particularly relevant during the Russian Civil War (1917-1923), during which many experienced combat veterans from abroad joined the Red Army. A desire to secure greater national self-determination was important for some volunteers; but others, notably those from Europe, signed up to defend the Revolution[2]. Foreign fighters played a prominent role during the Spanish Civil War (1936-1939), when more than 35,000 men and women joined the fight against Francisco Franco and Spain's nationalists, by forming the International Brigades. In the last two decades of the 20th century, many foreign fighters participated in conflicts in Yugoslavia and Afghanistan. Between 2011 and 2016, more than 40,000 foreign fighters are believed to have travelled to Syria and Iraq[3] to participate on all sides of the conflict with Daesh. Many decided to support the Daesh terrorist agenda because of the radicalisation processes in their countries of origin, fuelled by messages spread on social media on an unprecedented scale. Undoubtedly, extremist Islamist fundamentalism has played a significant role in the emergence of the phenomenon of foreign (terrorist) fighters.

7. The problem of mercenarism resurfaced in the early 1960s, during the decolonisation of Africa, when Moïse Tshombe (the self-proclaimed president of a breakaway "State of Katanga") hired mercenaries to assist his Gendarmes. Among those hired by the Tshombe regime was Robert Denard – a French mercenary in command of his own group called "the awful ones" (*les affreux*), which was known to have operated in Biafra (a partially recognised republic which declared independence from Nigeria), Rhodesia, Iran, Zimbabwe, Angola, Zaire and the Comoros.

8. The end of the Cold War and the sudden global demilitarisation resulted in numerous well-trained and experienced combat veterans finding themselves out of jobs. Subsequent eruption of conflicts in Africa and elsewhere increased the demand for private military services. During that time, Sandline International and Executive Outcomes (PMSCs based in the United Kingdom and South Africa, respectively) developed a portfolio of clients interested in their services.

9. By far, the most popular PMSC of its time was Blackwater – an American entity founded in 1997 by two former US Navy SEAL's operators. In early 2000s, Blackwater engaged in assistance to US forces hunting for Osama Bin-Laden[4]. According to the New York Times, up until 2007 Blackwater had received over USD 1 billion in government contracts[5].

10. Since 2014, one particular private military company has become a constant threat to State sovereignty and human rights – the Russian PMC Wagner (also known as the Wagner Group, which has reportedly been restructured as Africa Corps in Africa[6]). Its fighters first appeared in Crimea during Russia's illegal attempts to annex this Ukrainian peninsula, fought against Ukrainian forces in eastern Ukraine and left their bloody footprints in Syria, Libya, the Central African Republic, Mali, Sudan and other African States. Its ability to provide the Russian regime with plausible deniability and help in circumventing economic sanctions proved extremely useful, particularly in order to evade consequences of Russia's violations of international law. Since the Russian illegal aggression against Ukraine in 2022, the Wagner Group has been engaged in multiple war crimes and the Assembly is currently assessing the need to designate it as a terrorist group, following the example of certain national parliaments and the Parliamentary Assembly of the OSCE[7]. Given that the Wagner Group and its engagement in multiple war crimes and possible acts of terror is being more specifically examined in Mr Stier's report, I will rather focus on other PMSCs in my work.

[2] Whitewood, Peter. "*Nationalities in a Class War: «Foreign» Soldiers in the Red Army during the Russian Civil War.*" Journal of Modern European History, vol. 14, no. 3, 2016, pp. 342–58.
[3] Institute for Economics and Peace 2016.
[4] https://www.theguardian.com/world/2009/aug/20/cia-blackwater-assassination-programme
[5] https://www.nytimes.com/2007/10/03/opinion/03iht-edblack.1.7733227.html
[6] https://foreignpolicy.com/2024/02/07/africa-corps-wagner-group-russia-africa-burkina-faso/
[7] Doc. 15720 ("The need to designate the Russian "Wagner Group" as a terrorist organisation"). This is being examined in the context of the report "Legal and human rights aspects of the Russian Federation's aggression against Ukraine" (Rapporteur: Mr Davor Ivo Stier).

3. PMSCs, mercenaries and foreign fighters – what is the difference?

11. Although the common understanding of the terms “private military companies”, “mercenaries” and “foreign fighters” might result in them being used interchangeably, there are significant differences between the three, which can be summarised as follows.

12. As regards the PMSCs, the only international instrument that articulates existing requirements for regulating their operation is the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict[8]. It defines PMSCs as “private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.”[9] Personnel of PMSCs are further defined as “persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers” [10].

13. The Collins English Dictionary and Merriam-Webster define a mercenary as someone who is "a person hired to fight for a foreign army" and "one that serves merely for wages, especially a soldier hired into foreign service"[11]. These two definitions refer to a common understanding of the term, however, the legal definition is much stricter. It was first included in Article 47(2) of the Additional Protocol I to the Geneva Conventions[12] and sets forth six criteria which have to be jointly fulfilled in order to classify someone as a mercenary. They require that such a person: “(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.” Definitions included in other treaties (discussed in detail in section 4.a) below) are quite similar to the one contained in Additional Protocol I. It is quite striking that whereas common understanding of the term “mercenary” is essentially “paid soldier”, its legal definition is far more complex (as I explain further in this memorandum).

14. The term "foreign fighter" has not been defined in any international legal instrument[13]. It commonly refers to individuals who leave their home countries to join and fight for or support militant groups in conflicts abroad. The phenomenon has gained significant attention, with many individuals from various countries, including Western European states, participating in conflicts abroad, such as the Syrian Civil War[14]. Academics defined “foreign fighter” as someone “who (1) has joined, and operates within the confines of, an insurgency, (2) lacks citizenship of the conflict state or kinship links to its warring factions, (3) lacks affiliation to an official military organization, and (4) is unpaid”[15] or (in less complex terms) “non-citizens of conflict states who join insurgencies during civil conflicts”[16]. The United Nations Security Council refers to the phenomenon of foreign fighters by making a direct connection with terrorism and using the term “foreign terrorist fighter”. The definition first appeared in the Security Council’s Resolution 2178 (2014) and related to “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with

[8] The Montreux Document is the result of an initiative launched by Switzerland and the ICRC in early 2006. A first draft of the Montreux Document was prepared during four intergovernmental meetings that took place between January 2006 and September 2008. The final document was adopted by consensus of the participating states at the fourth and last meeting, which took place in Montreux from 15 to 17 September 2008.
[9] The Montreux Document, p. 9.
[10] Ibid., p. 10.
[11] https://www.collinsdictionary.com/dictionary/english/mercenary; https://www.merriam-webster.com/dictionary/mercenary
[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 Article 47 https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and.
[13] See C, Forcese and L, Sherriff, ‘*Killing Citizens: Core Legal Dilemmas in the Targeted Killing of Canadian Foreign Terrorist Fighters*’ (2017) 54 Canadian Yearbook of International Law 134-139; M, Lloydd, ‘*Foreign Fighters under International Law and Beyond*’ (2017) 18 Melbourne Journal of International Law 95, 96.
[14] D. Malet, *Foreign Fighters: Transnational Identity in Civil Conflict*, (Oxford University Press 2013).
[15] T. Hegghammer, ‘*The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad’* (2011) 35 International Security, pp. 53, 57–8.
[16] D. Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts,* (Oxford University Press 2013), p. 9.

armed conflict"[17]. The Council of Europe reacted by adopting the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217), becoming the first international organisation to set up a regional legal instrument to implement the obligations imposed by the United Nations regarding foreign terrorist fighters. Although the Additional Protocol does not define the term "foreign fighter", it refers to "travelling abroad for the purpose of terrorism", which it defines as travelling to a State, which is not that of the traveller's nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism.[18]

15. While personnel of PMSCs and mercenaries are usually presumed to have a military background, foreign fighters are more similar to insurgents, who make up their lack of combat experience with ideological spur. The key factor distinguishing foreign fighters from mercenaries thus appears to be their motivation. While mercenaries are considered to be motivated essentially by a desire of private financial gain, foreign fighters usually fight out of a desire to defend a particular cause, be it religious or ideological[19]. The difference between mercenaries and PMSCs, depending on the circumstances, might be less obvious (in some cases, personnel of PMSCs could be even considered as mercenaries, especially under the law of armed conflicts). Mercenaries usually lack official affiliation and may be seen as operating outside the boundaries of conventional military and legal structures, whereas employees of legitimate PMSCs are often associated with recognised companies or organisations and may operate within the legal framework of their home country or the country where they are deployed. Furthermore, PMSCs may be involved in a wide range of activities, including logistics, training, and security, and their roles can extend beyond combat operations, unlike those of mercenaries, who are primarily hired for combat-related tasks[20].

4. Existing international legal framework

16. Unlike mercenaries and foreign fighters, PMSCs are a relatively new concept and the international legal framework related thereto is somewhat scarce. The issue of mercenarism has been addressed in several sources, although with limited practical effects. In this section, I will summarise the existing international legal framework and ongoing works on new legal instruments.

4.1. International Humanitarian Law

17. As stated in paragraph 13 above, Article 47(2) of Additional Protocol I to the Geneva Conventions[21] requires the cumulative fulfilment of six criteria in order to classify a person as a mercenary. Pursuant to Article 47(1) of Additional Protocol I "a mercenary shall not have the right to be a combatant or a prisoner of war". In consequence, mercenaries are not entitled to lawfully participate in hostilities and will not be accorded protection and privileges afforded by International Humanitarian Law to combatants and prisoners of war.

18. The effect of the denial of the status of combatant and prisoner of war in case of capture is to deprive the mercenary of the treatment of prisoner of war as laid down in the Third Geneva Convention, and to make him/her liable to criminal prosecution. Such prosecution can be instigated both for acts of violence which would be lawful if performed by a combatant, in the sense of the Protocol, and for the sole fact of having taken a direct part in hostilities[22].

19. Notably, International Humanitarian Law does not ban as such the use or recruitment of mercenaries. This does not come as a surprise, as the relevant provisions of Additional Protocol I focus on the treatment of prisoners of war. Hence, given that qualification as a mercenary results, essentially, in the loss of protection afforded to prisoners of war, it is understandable that the criteria contained therein are quite restrictive. Regrettably, as will be demonstrated below, similar criteria (for classification as a mercenary) were adopted in treaties whose aim was to eliminate the phenomenon of mercenarism, thus significantly limiting their impact.

[17] UNSC Resolution 2178 (24 September 2014), UN Doc S/RES/2178, preamble.
[18] The Explanatory Report states that individuals travelling abroad for the purposes of terrorism are often referred to as "foreign terrorist fighters".
[19] S. Chesterman, '*Dogs of War or Jackals of Terror? Foreign Fighters and Mercenaries in International Law*' (2016), International Community Law Review (Vol. 18), pp. 389, 390.
[20] https://www.trtworld.com/americas/are-private-military-contractors-any-different-from-mercenaries-20680
[21] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 Article 47, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and.
[22] Sandoz et al (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), p. 1796.

4.2. The Organisation of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa

20. The OAU Convention was adopted in July 1977[23]. Its definition of a mercenary is similar to the one used in Additional Protocol I to the Geneva Conventions, with an important difference being that an individual need only be motivated by the "desire for private gain" and there is no requirement for it to be substantially more than that offered to members of the armed forces of a State.

21. Most notably, in the preamble to the OAU Convention it is considered that the practice of States and international organisations is indicative of the development of new rules of international law making mercenarism an international crime. This approach was further reflected in Article 1(2) of the OAU Convention, which makes it a crime to shelter, organise, finance, assist, equip, train, promote, support or in any manner employ bands of mercenaries; to enrol, attempt to enrol or enlist in such bands; allow the mercenary activities to be carried out in any territory under the responsible entity's jurisdiction or in any place under its control or to afford facilities for transit, transport or other operations of the above mentioned forces.

22. The OAU Convention was ratified by 32 African countries. Among those who have still neither signed, nor ratified it are the Republic of South Africa, Morocco, Namibia, Mozambique, the Central African Republic and Botswana[24].

23. Unfortunately, the OAU Convention does not provide for the establishment of any oversight mechanism, limiting its overall effectiveness. This shortcoming, coupled with the lack of African-wide ratification of the OAU Convention and still narrow definition of the term "mercenary", results in this treaty not being sufficiently adapted to the reality[25].

4.3. The United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries

24. In 1989, the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries was adopted. It entered into force on 20 October 2001[26]. In its preamble it is acknowledged that the recruitment, use, financing and training of mercenaries is intended for activities which violate principles of international law, such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples.

25. The UN Convention also employs a list of criteria similar to those contained in Additional Protocol I to the Geneva Convention for a person to be considered a mercenary. One notable exception is that it does not require that a person directly participate in hostilities. However, its Article 3 criminalises mercenarism, understood as "direct participation in hostilities or in a concerted act of violence by a mercenary". The crime also covers those who recruit, use, finance, or train mercenaries. As such, the definition of a mercenary essentially replicates the one contained in Additional Protocol I to the Geneva Convention, significantly narrowing its scope of application.

26. As of January 2024, the convention has been ratified by 37 States, and signed but not ratified by further 9 States. No permanent member of the UN Security Council has either signed or ratified it. Only nine Council of Europe member States are parties to this Convention: Armenia, Azerbaijan, Belgium, Croatia, Cyprus, Italy, Republic of Moldova, Serbia and Ukraine. Additionally, Germany, Montenegro, Poland and Romania have signed, but not ratified it.

4.4. The Montreux Document

27. The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict is an intergovernmental document, intended to promote respect for international humanitarian law and human rights law in the context of PMSCs.[27] It is not legally binding but contains a compilation of relevant international legal obligations and

[23] Organization of African Unity (OAU), OAU Convention for the Elimination of Mercenarism in Africa, CM/817 (XXIX) Annex II Rev.1, 3 July 1977.
[24] https://ihl-databases.icrc.org/en/ihl-treaties/oau-mercenarism-1977/state-parties
[25] Arthur Boutellis, '*Are Mercenaries Friends or Foes of African Governments and the UN*?' IPI Global Observatory (7 Feb. 2019)
[26] UN General Assembly, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, A/RES/44/34, UN General Assembly, 4 December 1989.
[27] https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html

good practices. The document is divided into two parts: the first part reaffirms the international legal obligations of States related to PMSCs, while the second part outlines a series of best practices designed to help States take appropriate measures, such as introducing a licensing and control system for PMSCs, establishing requirements for the education and training of deployed security personnel, and imposing sanctions in case of misconduct. The Montreux Document was finalised by consensus on 17 September 2008 by 17 States (including Austria, Canada, China, France, Germany, Poland, South Africa, Sweden, Switzerland, United Kingdom, Ukraine and United States of America). It is currently supported by 59 States. Among Council of Europe member States, the Montreux Document is yet to be formally supported by Andorra, Armenia, Azerbaijan, Latvia, Republic of Moldova, San Marino, Serbia and Türkiye. The Montreux Document has also been endorsed by the European Union, OSCE and NATO[28]. Russia remains the only permanent member of the UN Security Council not to have supported the Montreux Document.

28. The Montreux Document contains some 70 statements recalling certain existing international legal obligations for States, as well as good practices related to the regulation of PMSCs. Part One identifies pertinent obligations under international human rights and humanitarian law for States, in particular for Contracting, Territorial and Home States[29]. The responsibilities of PMSCs and their personnel, and the liability of superiors are also addressed. Part Two outlines good practices for state regulation of PMSCs. This includes the establishment of transparent regulatory regimes, terms for granting licenses and measures to improve national oversight and accountability. To ensure that only PMSCs capable of complying with international human rights and humanitarian law provide services, good practices in the areas of training, appropriate internal procedures and oversight are proposed.

4.5. The International Code of Conduct for Private Security Service Providers (ICoC)

29. The ICoC is a result of a multi-stakeholder initiative formed in 2013 to ensure that providers of private security services respect human rights and humanitarian law. It requires its members and affiliate companies to endorse the principles of the Montreux Document and commit to the responsible provision of security services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients. It also provides for improved accountability of the industry by establishing an external independent governance and oversight mechanism. Since 2015, the International Code of Conduct Association has received only 33 complaints, none of which resulted in the determination that the ICoC has been breached by a member entity[30]. There are no details available as to the nature of complaints.

4.6. UN 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

30. The Working Group was established in July 2005 pursuant to the UN Commission on Human Rights resolution 2005/2[31]. It succeeded the mandate of the Special Rapporteur on the use of mercenaries, which had been in existence since 1987. In a 2018 overview of its activities, the Working Group noted that while traditional forms of mercenarism have waned due to the changing nature of armed conflict, the activities of foreign fighters remained on the rise. With regard to PMSCs, the Working Group observed that States mostly focused their regulations on private security companies and seldom regulated private military companies. In many situations PMSCs often engaged in direct participation in hostilities. The Working Group concluded that vetting of personnel, licensing and registration criteria, limitations on permissible functions, accountability for perpetrators of human rights violations and enforceable remedies for their victims could only be assured through strong regulatory measures established within domestic and international law[32].

31. In its latest report presented to the UN General Assembly in 2023, the Working Group stressed that violations at the hands of mercenaries and mercenary-related actors, including mass killings, torture, forced disappearances, arbitrary detention, sexual and gender-based violence, looting, harassment of human rights defenders, journalists, and victims, and indiscriminate targeting of civilians, were escalating in scale and intensity. At the same time, accountability remained mostly absent for perpetrators and remedy was rare for

[28] https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html
[29] The Montreux Document defines Contracting States as countries that hire PMSCs, Territorial states as countries on whose territory PMSCs operate, and Home states as countries in which PMSCs are headquartered or based.
[30] https://icoca.ch/registering-a-complaint/
[31] UN Commission on Human Rights, Human Rights Resolution 2005/2*: The Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, E/CN.4/RES/2005/2, 7 April 2005.
[32] https://www.ohchr.org/en/documents/tools-and-resources/mercenarism-and-private-military-and-security-companies-2018

victims[33]. Among the Working Group's latest recommendations was for States to take all measures necessary to ensure the legal liability of companies based in or managed from the State party's territory regarding human rights violations as a result of their activities conducted domestically and abroad, or the activities of their subsidiaries or business partners. National legislation should contain extraterritorial provisions, which can facilitate the prosecution of PMSCs and their personnel for abuses committed abroad[34].

4.7. Open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies

32. On 28 September 2017, the Human Rights Council in its resolution 36/11 decided to establish a new open-ended intergovernmental working group with a mandate to elaborate the content of an international regulatory framework, without prejudging the nature thereof, to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and security companies, to be informed by the discussion document on elements for an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, as prepared by the Chair-Rapporteur, and further inputs from Member States and other stakeholders[35].

33. In January 2024, the Chair-Rapporteur released the third draft instrument on an international regulatory framework on the regulation, monitoring of and oversight over the activities of private military and security companies[36]. Some of its provisions are obviously inspired by the Montreux Document, including definitions of PMSCs. The draft defines "military services" as specialised services that resemble or are related to military action, including strategic planning, intelligence, investigation, reconnaissance, flight operations, manned or unmanned, satellite surveillance, transfer of military technologies, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities, whether on land, in the air or at sea, or whether in cyberspace or space. It further introduces obligations and restrictions with regard to the operation of PMSCs, licensing mechanisms, vetting and access to justice for victims of human rights violations. The draft is still under discussion, and, at this point, it is hard to predict what will be its final outcome. I will monitor developments with regard thereto, hoping that the instrument will be adopted soon and become open to accession by States.

4.8. Council of Europe work:

4.8.1. PACE Recommendation 1858 (2009)

34. The Assembly, in its Recommendation 1858 (2009) (report by Mr Wolfgang Wodarg, Committee on Political Affairs and Democracy), noted the erosion of the States' monopoly on the use of force, caused by the increased demand for PMSCs' services. In consequence, the Assembly recommended that the Committee of Ministers draw up a Council of Europe instrument aimed at regulating the relations of its member States with PMSCs and laying down minimum standards for the activity of these private companies, listing 16 minimum elements to be included therein. It also recommended that the Committee of Ministers endorse, on behalf of the Council of Europe, the Montreux Document[37]. The Committee on Legal Affairs and Human Rights, in its Opinion (Rapporteur: Mr Kimmo Sasi), fully supported the proposal to draft a binding legal instrument on this subject.[38]

35. In its reply to the recommendation, the Committee of Ministers did not take any position on the issue of endorsing the Montreux Document. It informed the Assembly that it had communicated its recommendation to the Steering Committee for Human Rights (CDDH)[39] and to the European Committee on Crime Problems (CDPC), for information and possible comments, and to the European Commission for Democracy through Law (Venice Commission) for information and for it to be taken it into account in its future work. I find it

[33] A/HRC/51/25
[34] A/HRC/54/29
[35] UN Human Rights Council, Resolution A/HRC/RES/36/11: *Mandate of the open-ended intergovernmental working group to elaborate the content of an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies*, 9 October 2017.
[36] https://www.ohchr.org/en/hr-bodies/hrc/pms-cs/igwg-index/5th-session-igwg-military
[37] Recommendation 1858 (2009) "Private military and security firms and the erosion of the state monopoly on the use of force" of 29 January 2009.
[38] Committee Opinion, Doc. 11801, 27 January 2009.
[39] The CDDH adopted an Opinion at its 69th meeting 24-27 November 2009; Doc. CDDH(2009)019, and – while sharing the concerns expressed by the Assembly – observed that from an operational point of view, the Council of Europe was not the most appropriate body to deal with these questions.

regrettable, that despite its assurances to keep the Assembly informed about any further developments as regards the issues covered by the recommendation, the Committee of Ministers did not follow-up on the topic and did not take any measures for the Council of Europe to endorse the Montreux Document.

4.8.2. Venice Commission's report on private military and security firms and erosion of the state monopoly on the use of force

36. The report was adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009)[40]. It provided an extensive overview of the international legal framework applicable at that time and discussed the feasibility of drafting a treaty under the auspices of the Council of Europe. It considered the endorsement of the Montreux Document as highly advisable and found three additional subjects suitable for a Committee of Ministers recommendation to Council of Europe member States. The first was to recommend to States to review their national laws dealing with registration/licensing of PMSCs, to see if these provide a proper degree of regulation of the extraterritorial activities of PMSCs. The second was for States to review their laws, to determine whether there was criminal jurisdiction over serious offences committed by personnel of PMSCs, at least, where these personnel were nationals of the State in question. Finally, it recommended that States begin the process of reviewing their civil law systems to determine whether it was possible at all to make claims for damages for extraterritorial civil wrongdoing against PMSCs incorporated in the State, and possibly even their foreign-incorporated subsidiaries, and if not, to consider enacting appropriate legislation on the issue.

4.8.3. Opinion of CAHDI on the suggestions made in the Venice Commission's report

37. The CAHDI, in an opinion adopted at its 40th meeting (Tromsø, 16-17 September 2010), stated that it would not be appropriate at that time to engage into possible negotiations of a Council of Europe treaty regarding the PMSCs. The CAHDI observed that national provisions should be reviewed bearing in mind the key objectives of international humanitarian law and, as applicable, the findings of the Montreux Document[41].

4.9. The European Union

4.9.1. European Parliament resolution of 25 November 2021 on the human rights violations by private military and security companies, particularly the Wagner Group (2021/2982(RSP))

38. In its resolution of 25 November 2021, the European Parliament observed that the current regulatory situation in the PMSC sector comprises a series of inconsistent rules which vary enormously between countries; whereas the non-homogenous national legislation and the self-regulation adopted by some PMSCs were not sufficient to deter abuse, given the lack of penalties, and could have a major impact on how PMSCs operate in multilateral interventions and conflict regions. The resolution further states that a resolute action needs to be taken in order to address the accountability gap of PMSCs, including with regard to transparency oversight and monitoring, as well as the need to ensure judicial remedies, including criminal sanctions, for human rights violations resulting from the activities of PMSCs. The EP further demanded that unhindered access to justice and redress for all victims of violations be ensured, including for abuses committed by Russian mercenaries in Africa, the Middle East and Ukraine[42].

5. Foreigners in armed forces: the International Legion for the Defence of Ukraine, the French Foreign Legion and the British Royal Gurkha Rifles

39. When discussing the issue of foreign fighters, mercenaries and PMSCs, it is impossible not to address the wider topic of foreigners in the armed forces. By far, the most popular military unit to include foreigners is the French Foreign Legion. It was created in 1831 to allow foreign nationals into the French Army and has become one of the most elite military outfits in the world[43]. Another example of a military unit consisting of foreigners is the British Army's regiment "the Royal Gurkha Rifles", whose soldiers are recruited from Nepal, which is neither a dependent territory of the United Kingdom nor a member of the Commonwealth. They have

[40] Report CDL-AD(2009)038 on Private Military and Security Firms and Erosion of the State Monopoly On the Use of Force, Adopted by the European Commission for Democracy Through Law (Venice Commission), adopted at its 79th Plenary Session (Venice, 12-13 June 2009).
[41] Opinion of the Committee of Legal Advisers on Public International Law (CAHDI) on the suggestions made in the Venice Commission's report on Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force, adopted at the 40th meeting (Tromsø, 16-17 September 2010).
[42] European Parliament resolution of 25 November 2021 on the human rights violations by private military and security companies, particularly the Wagner Group (2021/2982(RSP)) (2022/C 224/11).
[43] https://www.legion-etrangere.com/mdl/page.php?id=81&titre=Un-statut-particulier

a reputation of being amongst the finest and most feared soldiers in the world[44]. As regards Ukraine, on 27 February 2022, the Ukrainian Foreign Minister announced the creation of the International Legion for the Defence of Ukraine to aid the fight against the Russian invaders[45]. Its creation was made possible by the Presidential Decree No. 248 of 10 June 2016[46], which allowed non-Ukrainian citizens to join the armed forces of Ukraine.

40. Given the emergence of groundless allegations put forward by Russian defence officials[47], I consider it imperative to address the topic of the Ukrainian International Legion, as well as other similar outfits, and clarify their legal status.

41. Volunteers joining the Ukrainian International Legion become fully legal servicemen of the Ukrainian Armed Forces and receive the standard pay of a Ukrainian soldier[48], similarly as members of the Foreign Legion in France and the Royal Gurkha Rifles in the United Kingdom. As such, it cannot be concluded that any of them are being promised "material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces". Furthermore, all of them formally become members of the host States' armed forces. Given the necessity to jointly fulfil the conditions stipulated in Article 47(2) of Additional Protocol I (see paragraph 13 above) in order to be qualified as mercenaries, none of these units can be considered as such. In consequence, members of the abovementioned units are to be considered regular soldiers.

6. Allegations of human rights violations by private military companies and their consequences

42. Over the past three decades, countless allegations of human rights violations committed by PMSCs have emerged. In this section, I will summarise some of the most relevant examples and, where possible, provide an overview of the consequences faced by their perpetrators, home States or contracting States.

43. In the aftermath of the terrorist attacks of 11 September 2001 and during the Global War on Terror, US authorities contracted numerous PMSCs to assist the coalition forces in logistics support, training of local military and police forces in Iraq and Afghanistan, weapons management and security of U.S. Army bases. PMSCs' contractors made up to 52% of the work force in Iraq and Afghanistan[49].

44. **CACI International Inc.** is a US-based company that provides a range of services, including software development, cybersecurity, intelligence support, military training and data analysis[50]. In late 2003, it was contracted, on behalf of the US Department of Defence, with eleven orders, valued at over USD 66 million. Of the 11 orders, 6 were for interrogation, screening, and other intelligence-related services, and 5 were for logistics support services[51]. In 2008, the Centre for Constitutional Rights (an American NGO) filed a lawsuit against CACI, acting on behalf of former detainees of the Abu Ghraib Prison in Iraq. This facility became notorious for grave human rights abuses, after a series of horrific photographs became public, depicting smiling U.S. soldiers posing in front of tortured or dead prisoners[52]. In the lawsuit, CACI employees who conducted interrogation and provided other services at Abu Ghraib were accused of directing or encouraging torture, in part to "soften up" detainees for questioning, while managers were accused of covering it up[53]. Plaintiffs claimed that they had endured physical and sexual violence during detention, such as being subjected to electric shocks; sensory, food, medical and oxygen deprivation; attacks of dogs. Despite arguments put forward by CACI's lawyers, that CACI could not be liable for the alleged acts, considering that it had acted at the U.S.'s government behest and, therefore, benefited from immunity, in 2023 a federal judge rejected these arguments, clearing the way for the jury trial, scheduled to start in April 2024[54].

45. Another PMC contracted by the US government to operate in Iraq was a telecommunications defence contractor, **Titan** (later acquired by **L-3**). Titan/L-3 was also implicated in the abuses perpetrated in the Abu

[44] https://www.army.mod.uk/who-we-are/corps-regiments-and-units/infantry/the-royal-gurkha-rifles/#:~:text=The%20Gurkhas%20are%20a%20unique,feared%20soldiers%20in%20the%20world.
[45] https://www.newsweek.com/ukraine-creates-foreign-legion-volunteers-abroad-join-fight-russia-1683024
[46] https://zakon.rada.gov.ua/laws/show/248/2016#Text
[47] https://www.newsweek.com/russia-vows-prosecution-foreign-fighters-after-16k-join-ukraine-1684671
[48] https://ildu.com.ua/#join-us
[49] Peters, "*Department of Defense Contractor and Troop Levels in Iraq and Afghanistan: 2007–2017*"
[50] https://www.caci.com/what-we-do
[51] United States Government Accountability Office, Report to Congressional Committees: "Problems with DOD's and Interior's Orders to Support Military Operations", April 2005, GAO-05-201, p. 2.
[52] https://web.archive.org/web/20080306020142/http://www.salon.com/news/abu_ghraib/2006/03/14/introduction/
[53] https://www.reuters.com/world/us/us-supreme-court-rebuffs-defense-contractors-abu-ghraib-torture-appeal-2021-06-28/
[54] https://apnews.com/article/abu-ghraib-lawsuit-caci-torture-virginia-iraq-7ea9c063161d204c2b35e9e05a4f0bf2

Ghraib and other Iraqi prisons under US control. *In Saleh et al v. Titan* case, more than 250 former detainees lodged a complaint against Titan for aiding torture and other acts of ill-treatment. Mr Saleh and the other plaintiffs alleged to have been physically assaulted, sleep deprived and forced to witness rape and mock executions. The case was dismissed by a federal court in 2009 and in 2011 the Supreme Court denied the appeal petition, ending 5 years of litigation[55]. In the case *Al-Quraishi, et al. v. Nakhla and L-3 Services*, 72 Iraqi plaintiffs claimed they had been subjected to torture at the hands of the contractors: beatings, electric shocks, prolonged hanging from the limbs, hooding, forced nudity. The litigation ended when a confidential settlement was reached in 2012, marking it the first positive outcome of a U.S. case challenging detainee treatment outside the USA in the "war on terror" context[56].

46. In 2007, a lawsuit was filed against **Blackwater** (later **Academi**) regarding the Nissor Square massacre, where Blackwater employees opened fire, killing 14 civilians (including 2 children) and injuring more than 20 others[57]. Four former Blackwater security agents were later convicted on multiple charges of voluntary and attempted manslaughter, however, in 2020, President Donald Trump pardoned them[58].

47. **DynCorp** was an American PMSC founded in 1946, which provided intelligence training and security services to the US military in several countries, such as Bosnia, Kosovo[59], Colombia, Somalia, Angola and Bolivia. In 2020, Dyncorp was acquired by **Amentum**, a government and commercial services contractor founded earlier that year. In early 2000's, DynCorp was described as the largest company contracted by the US government to outsource services in the so-called Drug War in Latin America. In 2001, Kathryn Bolkovac, an American policewoman, was hired by DynCorp to work for the UN International police task force in Bosnia and Herzegovina, which was set up in the aftermath of the Yugoslav Wars. She was supposed to crack down on sexual abuse and forced prostitution in Bosnia but after a few months of collecting evidence, she found out that her fellow employees (from DynCorp and the UN) were involved in the sex trafficking of Eastern European women[60]. She claimed that DynCorp employees forged documents for trafficked women, aided their illegal transport through border checkpoints into Bosnia and tipped off sex clubs' owners about raids. After reporting it to DynCorp, she was fired. Her colleague, Ben Johnson had been fired before her, after uncovering that DynCorp employees were involved in sexual slavery and weapons' trafficking in Bosnia. Ms Bolkovac sued DynCorp for wrongful termination but none of the employees implicated faced criminal prosecution. DynCorp continued to be contracted by the UN and the US government afterwards[61]. DynCorp has also operated in Afghanistan, contracted by the US government to provide security services in the US Embassy in Kabul. In 2010, Wikileaks revealed that DynCorp employees in Afghanistan paid child sex workers to entertain Afghan officials[62]. After this, DynCorp fired 4 senior managers and established a chief compliance officer position, focused on ethics, business conduct and regulatory compliance. Its successor (Amentum) established a Code of Conduct, according to which Amentum has a zero-tolerance policy with regard to the use of forced labour, child labour or human trafficking. Amentum asserts that it performs due diligence through third-party screenings to assure that partner entities are legitimate and trustworthy enterprises that respect human rights[63].

48. **Aegis Defence Services** is a British PMSC providing security, training and consulting services. It is known that the company has operated in 18 African countries. It is a founding member of ICoCA, as well as of the British Association of Private Security Companies (BAPSC)[64], a body lobbying for the regulation of the British PMSC sector. In 2016, Aegis' former director admitted that the firm had employed former child soldiers from Sierra Leone to help US forces in Iraq, because they were cheaper[65]. There was no due diligence process put in place to assess if new employees were in fact former child soldiers. Aegis, which in 2015 was taken over by the Canadian company **GardaWorld**, claimed that its agents were authorised by the relevant national

[55] https://ccrjustice.org/home/what-we-do/our-cases/saleh-et-al-v-titan-et-al
[56] https://ccrjustice.org/home/what-we-do/our-cases/al-quraishi-et-al-v-nakhla-and-l-3-services
[57] https://www.tidingsmedia.org/blog/nisour-square-massacre; https://ccrjustice.org/home/what-we-do/our-cases/abtan-et-al-v-prince-et-al-and-albazzaz-et-al-v-prince-et-al
[58] https://www.theguardian.com/world/2020/dec/23/trump-pardons-blackwater-contractors-jailed-for-massacre-of-iraq-civilians
[59] All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nations' Security Council Resolution 1244 and without prejudice to the status of Kosovo.
[60] https://www.theguardian.com/world/2001/jul/29/unitednations
[61] https://allthatsinteresting.com/kathryn-bolkovac; https://www.dw.com/en/bolkovac-un-tries-to-cover-up-peacekeeper-sex-abuse-scandal/a-19082815
[62] https://www.theguardian.com/world/2010/dec/02/foreign-contractors-hired-dancing-boys
[63] https://www.amentum.com/ethics-compliance
[64] https://www.devex.com/organizations/british-association-of-private-security-companies-bapsc-23301
[65] https://www.aljazeera.com/features/2022/4/28/white-hands-the-rise-of-private-militaries-in-african-conflict; https://www.theguardian.com/global-development/2016/apr/17/uk-firm-employed-former-child-soldiers-as-mercenaries-in-iraq

authorities of the countries where they recruited and that the company worked with experts to develop and implement procedures for the management of trauma risk.

49. **Dyck Advisory Group** is a South African PMSC, founded by an ex-colonel of the Zimbabwean Army Lionel Dyck, who had fought in the Mozambican civil war as part of the Zimbabwean intervention forces. In 2019, Dyck Advisory Group was contracted to support Mozambique's operations against the Islamic insurgent groups in Cabo Delgado, after the Wagner Group had left the country[66]. In 2021, Amnesty International published a report on alleged war crimes committed in Cabo Delgado in 2020. The report claims that during fighting against the jihadist group Al-Shabaab, employees of the Dyck Advisory Group conducted indiscriminate attacks resulting in deaths of hundreds of civilians. According to testimonies obtained by Amnesty International, Dyck's employees have fired machine guns from helicopters and dropped hand grenades indiscriminately into crowds of people, as well as repeatedly fired at civilian infrastructure, including hospitals, schools, and homes [67]. Dyck Advisory Group has denied the allegations, claiming that insurgents were using civilians as human shields. The company has also claimed that it had engaged with an independent law firm to investigate Amnesty International's allegations[68]. Despite the passage of time, I was not able to find any information regarding the outcome of that investigation. There is no public record of any employee of the Dyck Advisory Group being charged or otherwise investigated for the alleged violations of international humanitarian law.

50. **G4S** is a world-renowned British private security company founded in 2004, which has operated in more than 85 countries. In 2011, G4S became a signatory to the UN Global Compact – a voluntary corporate sustainability initiative that establishes an international standard to promote socially responsible business behaviour. G4S is also among the founding signatories of the already mentioned ICoC. It boasts a human rights policy based on the UN Guiding Principles on Business and Human Rights, and a number of measures aimed at combatting slavery and human trafficking[69]. Despite having one of the most robust human rights policies and reinforced code of conducts in the industry, G4S history is marred by allegations of human rights violations. Over the past 20 years, G4S has been repeatedly implicated in investigations concerning deaths and ill-treatment in children's prisons[70]. In 2010, a teenage girl claimed that she had been left locked in her room, alone, while experiencing a miscarriage[71]. In spite of the numerous reports to G4S and the relevant monitoring bodies, the abuses continued. In 2016, the company announced they would pull out of youth prisons. However, in 2021, a whistle-blower contacted an NGO – Article 39 – with a series of allegations relating to child protection in the Oakhill prison, managed by G4S[72]. The firm then announced an action plan to prevent new abuses[73].

51. In 2013, G4S was contracted by the Australian federal government to oversee management and security at an immigration detention centre on Manus Island in Papua New Guinea. The centre was criticised by NGOs and the UN High Commissioner for Refugees for breaching minimum standards of care[74]. A year later, a riot that broke out at this detention centre left one asylum seeker dead and 77 others injured[75]. In 2022, 15 former G4S employees were compensated by G4S and the Australian government for what they described as "catastrophic" failures in relation to the riots, including by inadequately training staff and not making personal protective equipment available to them[76].

52. In 2021 the company was struck by another human rights scandal with an investigation into G4S recruitment practices that discovered that migrant workers from south Asia and east Africa were being forced to pay a fee to recruitment agents working for G4S in the United Arab Emirates[77]. Workers claimed that G4S

[66] https://greydynamics.com/dyck-advisory-group-dag-from-south-africa-to-mozambique/
[67] https://www.amnesty.org/en/latest/news/2021/03/mozambique-civilians-killed-as-war-crimes-committed-by-armed-group-government-forces-and-private-military-contractors-new-report/
[68] https://edition.cnn.com/2021/03/30/africa/lionel-dyck-mozambique-insurgents-hold-palma-intl/index.html
[69] https://www.g4s.com/humanrights
[70] https://www.theguardian.com/commentisfree/2021/nov/03/violence-force4-abuse-childrens-prisons-report-oakhill-dominic-raab
[71] Ibid.
[72] G4S to continue running child prison despite serious child protection failings – Article 39
[73] https://www.bbc.com/news/uk-england-beds-bucks-herts-59418245
[74] https://www.unhcr.org/news/briefing-notes/update-humanitarian-situation-refugees-and-asylum-seekers-manus-island
[75] https://www.theguardian.com/world/2014/feb/18/manus-island-unrest-one-dead-dozens-injured-and-man-shot-in-buttock
[76] https://www.theguardian.com/australia-news/2022/sep/11/government-and-security-company-reach-multimillion-dollar-settlements-with-manus-island-guards
[77] https://www.theguardian.com/global-development/2021/jan/18/g4s-migrant-workers-forced-to-pay-millions-in-fees-for-jobs

was aware of these practices but turned a blind eye to the situation. In response to these allegations, G4S claimed that, since 2020, its migrant workers in the UAE no longer paid any recruitment fees.

7. Preliminary conclusions and proposal for further work

53. Examples of human rights violations presented herein show, in my view, that the existing international regulatory framework is insufficient to meet the challenges posed by PMSCs, mercenaries and foreign fighters. The most striking example, although not the only one, of the international community's failure to properly regulate this aspect is the continued operation of the Wagner Group and other Russian PMSCs. While in certain scenarios (such as the recent capture of Wagnerites in Sudan by Ukrainian Special Forces[78]) PMSCs might fulfil the criteria necessary to be considered mercenaries and fall under a strict legal regime, most PMSCs usually operate in a regulatory *lacuna*. In my opinion, urgent work is needed to ensure that PMSCs are properly regulated and victims of human rights violations perpetrated by their employees have proper access to justice and compensation mechanisms.

54. I welcome the fact that the United Nations is currently preparing a draft international instrument on that subject and I will closely monitor the ongoing work, with a possibility of making a working visit to ensure coordination. In order to finalise my work and complete the report, I would like to organise a hearing on the issue, with participation of experts. Given the specificity of the topic, I will strive to invite experts with a military background, so as to ensure proper understanding of challenges that States might face when regulating the operation of PMSCs, especially in the context of assisting humanitarian workers or NGOs.

55. Finally, I propose that this introductory memorandum be declassified immediately after its consideration by the Committee.

[78] https://www.kyivpost.com/post/27637