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Accountability for Crimes of Personnel of the Wagner Group in Ukraine

November 2023

Executive Summary

This briefing paper discusses the status of personnel of the Wagner Group under international humanitarian law (IHL) and the implications of such status for their prosecution for crimes committed in Ukraine.

The briefing paper first considers the status of personnel of private military companies (sometimes also referred to as private military and security companies) and implications for their prosecutions under IHL. Second, it analyzes the status of personnel of the Wagner Group in Ukraine, including specifically by considering whether those individuals form part of Russia's armed forces. Finally, the briefing paper examines the implications of the status of Wagner Group personnel for the prospect of prosecuting them and holding them accountable for crimes committed in Ukraine.

Status of personnel of private military companies under international humanitarian law

The status of personnel of private military companies in an armed conflict is determined by IHL. Personnel of private military companies in an international armed conflict are either civilians or combatants. This primary status as a civilian or combatant determines: (a) whether the individual is entitled to directly participate in hostilities; (b) whether, upon capture, they are entitled to prisoner-of-war status; and (c) the basis upon which they can be prosecuted. The status of the personnel is a factual question which will be determined on a case-by-case basis.

Combatants are entitled to participate in hostilities and can be targeted directly at any time during an armed conflict. Upon capture, combatants are typically entitled to prisoner-of-war status. Private military companies, which are (a) organized and (b) under a command responsible to a State party to the conflict, are part of this State's armed forces. Personnel of private military companies which are part of the armed forces are combatants. The "organized" criterion is flexible and will cover different degrees of organization. The "responsible command" criterion is more unclear and has not yet been resolved by courts. It suggests that the State party to the conflict should exercise some degree of control and coordination over the activities of the group. Captured combatants are entitled to prisoner-of-war status if they distinguish themselves from the civilian population or if they always carry their arms openly during every military engagement and when deploying to prepare for an attack. Personnel who are

combatants and entitled to prisoner-of-war status are immune from prosecution for acts that are lawful under IHL and, thus, cannot be prosecuted merely for having participated in hostilities. Like other combatants, however, personnel of private military companies who qualify as combatants under IHL can be prosecuted for their individual criminal responsibility for specific international crimes.

Personnel of private military companies who are not combatants are **civilians**. As such, they are not entitled to participate in hostilities. They cannot be targeted directly, except at such times as they participate in hostilities. Upon capture, they are not entitled to prisoner-of-war status. Like other civilians, personnel of private military companies who are not combatants can be prosecuted for merely having participated in hostilities and for domestic crimes. Civilian personnel of private military companies can also be prosecuted for international crimes.

In addition to this core framework, additional rules may apply to two special categories of civilians: (1) mercenaries and (2) civilians who accompany the armed forces. There may be additional obligations to prosecute the small number of civilians who fit the extremely narrow definition of a **mercenary** under IHL. And, as an exception to the general rule that civilians are not entitled to prisoner-of-war status, those **civilians who accompany the armed forces** are entitled to prisoner-of-war status upon capture. The definition of a civilian accompanying the armed forces rules out any personnel who take part in military operations and hostilities.

Where there are **doubts as to the status of detained personnel of private military companies as either combatants or civilians**, these individuals must be given prisoner-of-war status until their status has been determined by a tribunal.

Status of Wagner Group personnel in Ukraine

Based on open-source information currently available, it may be difficult to make a definitive statement at this juncture that the Wagner Group forms part of Russia's armed forces. Some facts certainly suggest such a finding and, as such, captured Wagner Group fighters should be treated as combatants. It is quite apparent that the Wagner Group is very "**organized**," given its ability to conduct complex military missions, its sophisticated logistical coordination, its strict military discipline, and its ability to speak with one voice. But not much is publicly known about the Wagner Group's specific **command structure**.

And while there is much evidence that Russia has organized, coordinated, and planned the military actions of the Wagner Group, it is difficult to definitively

conclude that the Wagner Group is under a “**command responsible**” to Russia. Additionally, the opaqueness of the relationship may lead Russia to claim plausible deniability.

Implications for accountability

If an individual Wagner Group detainee qualifies as a combatant, they could be **prosecuted** for committing alleged international crimes in Ukraine. This individual could be prosecuted by the International Criminal Court, a special tribunal with appropriate jurisdiction, or by a third country under the principle of universal jurisdiction. States have an obligation to prosecute or extradite such individuals found on their territory.

There is also a question under international law as to whether Russia could bear **State responsibility** for the conduct of Wagner Group personnel in Ukraine, if Russia exercised “effective control” over the Wagner Group.

Finally, the **June 2023 mutiny** suggests that the Wagner Group’s relationship with Russia and the factual circumstances have changed, which may alter the analysis below. But it is too soon to tell.

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1. Introduction

The Wagner Group has been widely associated with international crimes and serious human rights violations in Ukraine since the launch of Russia’s full-scale military invasion in February 2022.¹ It has also been associated with international crimes and human rights violations in several other countries, including Syria, Mali, Sudan, Libya, and the Central African Republic. The connections of the Wagner Group to the Russian State have been widely discussed, notably in the run-up to and aftermath of what was widely referred to as the Wagner Group’s “rebellion” or “mutiny” in June 2023 (June 2023 mutiny).² On June 27, 2023, the Russian President, Vladimir Putin, notably declared that the Russian State had fully financed the Wagner Group.³

Personnel of the Wagner Group who commit crimes in Ukraine and in other countries must be held accountable. One key question to secure such accountability is the status of personnel of the Wagner Group under international humanitarian law (IHL) (also known as the law of war). The status of these individuals under IHL determines any protection they must be afforded during the armed conflict in Ukraine and the basis upon which they can be prosecuted when captured.

The Wagner Group is widely considered to be a private military company (sometimes known as a private military and security company or PMSC), even though it was not formally registered as a legal entity in Russia until recently. States around the world contract private military companies to provide a range of military and security services, from conducting military operations to providing military training, logistics and security details, and overseeing detention centers.

¹ E.g., Office of the United Nations High Commissioner for Human Rights, “Russian Federation: UN experts alarmed by recruitment of prisoners by ‘Wagner Group,’” March 10, 2023, <https://www.ohchr.org/en/press-releases/2023/03/russian-federation-un-experts-alarmed-recruitment-prisoners-wagner-group>.

² E.g., Andrew Roth and Julian Borger, “Wagner rebellion reveals ‘cracks’ in Putin government, says Blinken”, *Guardian*, June 25, 2023, <https://www.theguardian.com/us-news/2023/jun/25/antony-blinken-russia-ukraine-wagner-group>.

³ “Putin says Wagner group fully financed by Russian government,” TASS, June 27, 2023, <https://tass.com/defense/1639345>.

Before specifically examining the situation of Wagner Group personnel, it is necessary to more broadly analyze the status under IHL of personnel of private military companies in an armed conflict. The classification of these personnel as civilians or combatants affects the basis upon which detained individuals may be prosecuted under international law, including for having merely participated in hostilities. One important aspect to consider is the circumstances in which a private military company forms part of the armed forces of a State party to a conflict.

After reviewing the status of personnel of private military companies under IHL and identifying the relevant criteria, this briefing paper discusses specifically the status of Wagner Group personnel in Ukraine. The analysis includes looking into whether the Wagner Group forms part of Russia's armed forces in Ukraine, which involves assessing the role of Russia in organizing, coordinating, financing, training, equipping, providing operational support to, and planning the military actions of the Wagner Group.

If the Wagner Group forms part of Russia's armed forces, its personnel would be considered combatants. As combatants, Wagner Group personnel who are captured in Ukraine would be entitled to prisoner-of-war status. This is subject to such personnel complying with the requirement of visibility under IHL by distinguishing themselves from the civilian population. Prisoners of war cannot be prosecuted for domestic crimes or simply for having participated in hostilities; rather, they can only be prosecuted for violations of the laws of war.

If the Wagner Group does not form part of Russia's armed forces, its personnel would be considered civilians. As civilians, captured Wagner Group personnel are typically not entitled to prisoner-of-war status. This means that they may be prosecuted for domestic crimes, for having participated in hostilities, and for international crimes.

One should also examine whether Wagner Group personnel could fall into any of the two special categories of civilians: (1) mercenaries; or (2) civilians accompanying the armed forces.

Some preliminary matters and caveats should be noted at the onset:

- (a) On the applicable law, Ukraine and Russia are engaged in an international armed conflict, which is governed by the 1977 Additional Protocol I and the four 1949 Geneva Conventions (to which Ukraine and Russia are both parties), as well as customary international law. This briefing paper discusses the status of personnel of private military companies in an

international armed conflict under IHL. It does not consider the separate question of whether a non-international armed conflict may have arisen between Ukraine and the Wagner Group. To the extent that Russia exercises overall control of the Wagner Group, as will be considered in this briefing paper, this would confirm that there is an international armed conflict and that the non-international armed conflict paradigm is not relevant.

- (b) On the focus and scope, the Wagner Group is present in and has been associated with violations in several other contexts besides Ukraine, including notably the Central African Republic, Libya, Mali, Sudan, and Syria. This briefing paper, however, considers only the Wagner Group's activities in Ukraine and the status of its personnel in that country. Accordingly, there could be a different conclusion about the Wagner Group's status and possible liability for acts committed elsewhere based on the different specific circumstances.
- (c) On the timing, the briefing paper primarily focuses on the factual circumstances of the Wagner Group's presence in Ukraine since Russia's full-scale invasion in February 2022 until the Wagner Group's June 2023 mutiny (though it also refers to some activities in Ukraine from 2014 to early 2015). The briefing paper touches briefly on the potential implications of the June 2023 mutiny, but it is premature to draw any conclusions beyond that date given evolving factual circumstances.
- (d) On sources, this briefing paper relies exclusively on open-source information in relation to the Wagner Group's operations and activities in Ukraine. Closed-source information may provide additional or contrary evidence and would certainly form part of the evidence in the prosecution of any captured Wagner Group personnel in Ukraine.

2. Status of Personnel of Private Military Companies under International Humanitarian Law

The status of personnel of private military companies in an armed conflict is determined by IHL. This was notably recognized in the non-binding Montreux Document on Private Military and Security Companies, which states that “[t]he status of the personnel of PMSCs is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.”⁴

IHL draws a fundamental distinction between two categories of individuals in an international armed conflict: combatants and civilians.⁵ Any person in an international armed conflict has a **primary status** as either a combatant or a civilian. This primary status determines both the **protection the person has under international law** (e.g., whether they are protected from direct attacks) and **the legal consequences flowing from their conduct** (e.g., whether they can be prosecuted merely for having participated in hostilities). As will be discussed further below,

- (a) **Combatants** can be targeted directly during an armed conflict. Upon capture, combatants are typically entitled to a secondary status of prisoner-of-war. Combatants cannot be prosecuted merely for having directly participated in hostilities. Combatants can only be prosecuted for international crimes.
- (b) **Civilians** cannot be targeted directly during an armed conflict, except for such times as they directly participate in hostilities. Upon capture,

⁴ 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, September 17, 2008, Statement 24, p. 14, <https://www.montreuxdocument.org/pdf/document/en.pdf>.

⁵ The requirement for parties to an armed conflict to distinguish at all times between the civilian population and combatants, as well as between civilian objects and military objectives is enshrined in Art. 48 Additional Protocol I. For a detailed analysis of the distinction between combatants and civilians under IHL, see, e.g., Knut Ipsen, “Combatants and Non-Combatants” in D. Fleck (ed.) *The Handbook of International Humanitarian Law* (Oxford, 2013, 4th edition), pp. 79-114.

civilians are not entitled to prisoner-of-war status (except for the special category of civilians accompanying the armed forces). Civilians can be prosecuted for having directly participated in hostilities and for international crimes.

This section first outlines the circumstances in which personnel of private military companies will be combatants and analyzes the basis upon which detained combatants may be prosecuted. Second, this section considers the status of personnel of private military companies who are civilians, including the specific civilian categories of mercenaries and civilians accompanying the armed forces. Third, this section discusses the situation in which doubts persist as to whether personnel of private military companies are combatants or civilians.

2.1. Combatants

The first question when determining the status of personnel of private military companies is to consider whether such personnel are combatants under IHL. As will be seen, combatants are members of a State's armed forces: they have the right to participate directly in hostilities and can be directly targeted at any time in an armed conflict under IHL. When captured, combatants acquire a secondary status of prisoner-of-war, so long as they have distinguished themselves from the civilian population. A prisoner of war cannot be prosecuted merely for having directly participated in hostilities. They can only be prosecuted for crimes under international law.

2.1.1. Definition

Only members of a State's armed forces are combatants and have the right to participate directly in hostilities (Art. 43(2) Additional Protocol I).

2.1.1.1. Defining a State's armed forces

The armed forces of a State party to a conflict are defined as including "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates" (Art. 43(1) Additional Protocol I). Thus, **private military companies form part of the armed forces of a State if they are (a) organized and (b) under a command responsible to that State party.**

According to the International Committee of the Red Cross (ICRC),

[T]his definition of armed forces covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command. As a result, a combatant is any person who, under responsible command, engages in hostile acts in an armed conflict on behalf of a party to the conflict.⁶

Two points highlight the expansive nature of the definition of the armed forces in Additional Protocol I.

First, earlier definitions of the armed forces in the Hague Regulations and the Third Geneva Convention specified criteria for militia or volunteer corps (sometimes referred to as “irregular” armed forces) to be included in the armed forces. This included the requirements for these militia or volunteer corps to have a fixed distinctive emblem recognizable at a distance and to carry arms openly.⁷ However, **these criteria are not part of the definition of the armed forces in Additional Protocol I, which does not distinguish between regular and irregular armed forces.** As the ICRC Commentary of 1987 to the Additional Protocol I notes: “all armed forces are ‘regular,’ whether they are established by a State in pursuance of appropriate laws, or by another Party to the conflict using its own methods, or even if they have risen spontaneously.”⁸

Second, the definition of the armed forces in Additional Protocol I does not require that the organized group or unit be formally incorporated into the armed forces.⁹ The definition refers expressly to “all” organized forces, groups, and

⁶ ICRC, Rule 4: Definition of Armed Forces, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule4>.

⁷ Regulations Concerning the Laws and Customs of War on Land, October 18, 1907 (Hague Regulations), Art. 1; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949 (Third Geneva Convention), Art. 4.

⁸ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 43, ICRC Commentary of 1987, para. 1672.

⁹ Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers, 2013), pp. 267–8; Knut Ipsen, “Combatants and Non-Combatants” in D. Fleck (ed.) *The Handbook of International Humanitarian Law* (Oxford, 2013, 4th edition), p. 85; Louise Doswald-Beck, “Private Military Companies Under International Humanitarian Law” in Simon Chesterman and Chia Lehnardt (eds.) *From*

units. Thus, **private military companies can be part of the armed forces irrespective of whether they are formally incorporated into the armed forces of the State or kept separate from them.**

With this background in mind, we can analyze the two requirements of the definition of the armed forces in Additional Protocol I: that the group be (a) “organized” and (b) “under a command responsible” to a State party to the conflict.

2.1.1.2. The “organized” requirement

The first requirement that the unit be “**organized**” does not present significant difficulty. The ICRC Commentary to Additional Protocol I notes that “[t]he term ‘organized’ ... is obviously rather flexible, as there are a large number of degrees of organization.”¹⁰ The fighting must present a “collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training.”¹¹ An individual acting on their own and fighting a private war will not meet the “organized” requirement.¹²

The Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Boškoski* identified different factors when assessing the organization of an armed group for the purposes of classifying a conflict as non-international under IHL.¹³ The threshold of organization of a non-State armed group for the purposes of conflict-classification may differ from the threshold of organization for the purposes of whether a unit forms part of a State’s armed forces. However, the factors indicating levels of organization for conflict

Mercenaries to Market: The Rise and Regulation of Private Military Companies (Oxford University Press, 2007), pp. 6-7.

¹⁰ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 43, ICRC Commentary of 1987, para. 1672.

¹¹ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 43, ICRC Commentary of 1987, para. 1672.

¹² Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers, 2013), p. 271.

¹³ *Boškoski*, ICTY Judgment of July 10, 2008 (IT-04-82-T), paras. 199–203.

classification could, nonetheless, provide useful guidance as to the factors which could be considered by a court when determining whether a unit forms part of a State's armed forces.

According to the ICTY Trial Chamber II in *Boškoski*, the factors of organizational structure include:

- (a) The **presence of a command structure**, including the establishment of a general staff or high command giving directions and orders, as well as communication through an official spokesperson and communiqués.
- (b) The **ability to carry out military operations in an organized manner**, including the ability to determine a unified military strategy, conduct large-scale military operations, and the capacity to control part of a territory.
- (c) The **level of logistics**, including the ability to recruit new members, provide military training, supply weapons, and supply and use uniforms.
- (d) The **level of discipline**, including the establishment of disciplinary rules, a code of conduct, proper training, and the existence of internal regulations that are disseminated to members.
- (e) The **ability to speak with one voice**, including by negotiating and concluding agreements or engaging in political negotiations with representatives of States and international organizations.

2.1.1.3. The “responsible command” requirement

The second requirement that the unit be “**under a command responsible to that Party for the conduct of its subordinates**” presents more ambiguity. The ICRC Commentary to Additional Protocol I notes that all armed forces, groups, and units “are necessarily structured and have a hierarchy, as they are subordinate to a command which is responsible to one of the Parties to the conflict for their operations.”¹⁴

The expression “responsible command” suggests **some degree of control and coordination** by the State party to the conflict over the activities of the group.

¹⁴ ICRC, 1987 Commentary on the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 43, para. 1672.

Yet, the exact degree of control and coordination which must be established to demonstrate the existence of a responsible command is unclear.

The ICRC Commentary to Additional Protocol I describes that one condition to participate directly in hostilities is “a responsible command exercising *effective control* over the members of the organization” (emphasis added).¹⁵ However, it is suggested that “effective control” is not the correct test when assessing whether a unit operates under a command responsible to a State party to the conflict. The test of effective control is a test which has been endorsed by the International Court of Justice (ICJ) in the context of the international law of State responsibility. In the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, the ICJ found that there was insufficient evidence to attribute acts of the *contras* (Nicaraguan rebels) to the United States. The ICJ held that attribution for the purposes of State responsibility turns on whether a country “direct[s] or enforce[s] the perpetration of the acts contrary to human rights and humanitarian law.”¹⁶ Thus, the “effective control” test implies that the group **lacks autonomy** from the State concerned.

Conversely, international criminal tribunals have used a different **test of “overall control”** to consider whether an armed group acts on behalf of another State for the classification of an international armed conflict under IHL. In *Tadić*, the ICTY’s Appeals Chamber assessed whether Bosnian Serb paramilitary units were acting on behalf of the Federal Republic of Serbia for purposes of determining whether the conflict was international. As part of its analysis, the Appeals Chamber stated that the test of overall control does not require that the State issue specific orders or direct individual operations.¹⁷ The Appeals Chamber specified that the control required by international law exists when a State party to the conflict “has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training, and equipping or providing operational support to that group.”¹⁸

¹⁵ ICRC, 1987 Commentary on the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 43, para. 1681.

¹⁶ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Merits Judgment of June 27, 1986, para. 115.

¹⁷ *Tadić*, ICTY Judgment of July 15, 1999 (IT-94-1-A), paras. 131 and 137.

¹⁸ *Tadić*, ICTY Judgment of July 15, 1999 (IT-94-1-A), para. 137.

In a later judgment in 2007, in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the ICJ carefully distinguished the two tests of effective control and overall control and differentiated the test of overall control, which could be applicable and suitable to the qualification of an armed conflict under international humanitarian law, and the test of effective control, which is applicable to the international law of State responsibility.¹⁹ It noted that the logic between the two issues was distinct. Further, it emphasized the narrow scope of State responsibility, to which the effective control test applies: “a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.”²⁰

Considering the reasoning of the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro*, **it would be inappropriate to extend the test of “effective control,” which applies to the law of State responsibility, to the test under international humanitarian law as to whether a group or unit is under a command responsible to a State party to the conflict for the purposes of the definition of that State’s armed forces.** The applicable test may be that of “overall control,” as was articulated for the purposes of conflict classification under IHL, or another test or standard of control may be applicable altogether. For instance, Louise Doswald-Beck, then deputy head of the ICRC Legal Division, suggested that if the State which hires a private military company can exercise jurisdiction (whether civil or criminal) over the company, it is more likely that the company will be deemed as being under command responsible to the State party to the conflict.²¹

The Hague District Court in its verdict in the downing of the Malaysia Airlines Flight 17 (MH17) in eastern Ukraine considered whether the so-called Donetsk People’s Republic (DPR) was part of the armed forces of Russia and, thus,

¹⁹ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Judgment of February 26, 2007, paras. 404-405.

²⁰ *Ibid.*, paras. 404-406.

²¹ Louise Doswald-Beck, “Private Military Companies Under International Humanitarian Law” in Simon Chesterman and Chia Lehnardt (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007), p. 7.

whether DPR members were combatants under IHL.²² The court held that the DPR members were not part of the armed forces for two reasons. First, the court stated that it was required for Russia to “accept the DPR as belonging to it and take responsibility for the behavior and actions of the fighters (under the command) of the DPR.”²³ In this case, the court found that Russia had “denied any control over and involvement with the DPR during that period.”²⁴ Second, the court stated that the suspects had also publicly denied that they were part of the armed forces of Russia at the time.²⁵

The reasoning of the Hague District Court is open to criticism.²⁶ The definition of the armed forces in Additional Protocol I does not require that the State party to the conflict publicly recognize the group as a member of its armed forces. Formal incorporation into the armed forces is not required, as noted in Section 2.1.1.1 above. Instead, when assessing the relationship between the group and the State party to the conflict, the key criterion is whether the unit is under a command responsible to that State, which requires a factual assessment of the degree of control and coordination. Further, **whether individual members of a group recognize or deny being part of a State’s armed forces is irrelevant** for the purposes of the definition of the armed forces under Additional Protocol I.

Therefore, personnel of private military companies that are (a) organized and (b) subject to a chain of command responsible to a State party to the conflict can be considered combatants. Whether the private military company is under a command responsible to a State party to the conflict is a factual question to be assessed on a case-by-case basis.

²² MH17 Plane Crash Case, Hague District Court Judgment of November 17, 2022 (ECLI:NL:RBDHA:2022:12219), section 4.4.3.1.4.

²³ *Ibid.*, section 4.4.3.1.4.

²⁴ *Ibid.*, section 4.4.3.1.4.

²⁵ *Ibid.*, section 4.4.3.1.4.

²⁶ See, e.g., Lachezar Yanev, “Jurisdiction and Combatant’s Privilege in the MH17 Trial: Treading the Line Between Domestic and International Criminal Justice,” 68 *NETHERLANDS INTERNATIONAL LAW REVIEW* 163, pp. 177–81 (2021); Lachezar Yanev, “The MH17 Judgment: An Interesting Take on the Nature of the Armed Conflict in Eastern Ukraine,” *EJIL:Talk!*, December 7, 2022, <https://www.ejiltalk.org/the-mh17-judgment-an-interesting-take-on-the-nature-of-the-armed-conflict-in-eastern-ukraine/>.

2.1.2. Legal consequences

Combatants are ordinarily entitled to prisoner-of-war status when they are captured (Art. 44(1) Additional Protocol I). This is subject to individual combatants having adhered to their obligation to distinguish themselves from the civilian population. As prisoners of war, they benefit from the protection of the Third Geneva Convention.²⁷

2.1.2.1. The requirement of visibility

Prisoner-of-war status is conditional upon a specific **requirement of visibility**, which may be particularly relevant in the context of personnel of private military companies. All members of the armed forces (which as discussed in Section 2.1.1 above, include both regular and irregular forces) must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack (Art. 44(3) Additional Protocol I).

Combatants can distinguish themselves from civilians through **uniforms or distinguishing emblems** making them recognizable at a distance. A captured combatant who has failed to distinguish themselves from the civilian population forfeits their entitlement to the status of prisoner-of-war (Art. 44(4) Additional Protocol I).

The only circumstance in which a captured combatant will retain their prisoner of war status after failing to distinguish themselves is where the combatant **carries their arms openly** (a) during each military engagement and (b) during such time as they are visible to the adversary while they are engaged in a military deployment preceding the launching of an attack in which they are to participate (Art. 44(3) Additional Protocol I).²⁸

This analysis suggests that the personnel of private military companies that are combatants because their company is part of the armed forces will be entitled to prisoner-of-war status only if they distinguish themselves from the civilian population in an attack or when deploying to prepare an attack.

²⁷ Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949 (Third Geneva Convention).

²⁸ The ICRC has noted that many States limit this exception to situations where there are armed resistance movements, namely in occupied territories or in wars of national liberation. ICRC, Rule 106: Conditions for Prisoner-of-War Status, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule106>.

Accordingly, personnel of private military companies that do not wear uniforms or distinctive signs and cannot be distinguished from civilians are not entitled to prisoner of war status. Personnel who do not wear distinctive signs will be entitled to prisoner-of-war status only if they always carry their arms openly during every military engagement and when deploying to prepare for an attack. In other circumstances, the State which detains such personnel can deny them prisoner of war status.

Where personnel of private military companies who are combatants fail to distinguish themselves from the civilian population, they may also be violating the prohibition of perfidy (Art. 37(1) Additional Protocol I) and could be prosecuted on that basis.

2.1.2.2. Prosecuting prisoners of war

Prisoners of war cannot be prosecuted for belligerent acts which are lawful under IHL. This stems from the fact that, as already noted, combatants “have the right to participate directly in hostilities” (Art. 43(2) Additional Protocol I). As a result, combatants enjoy what is referred to as “combatant immunity”: they cannot be prosecuted for acts which are lawful under IHL, and which otherwise would constitute serious crimes under domestic law (e.g., murder or destruction of property). Thus, **personnel of private military companies who are combatants entitled to prisoner-of-war status may not be prosecuted merely for having participated in hostilities.**

Prisoners of war can only be prosecuted for acts which violate IHL. For example, personnel of private military companies who qualify as combatants entitled to prisoner-of-war status, can be prosecuted for crimes under international law. Prisoners of war who have committed acts contrary to international law before capture, retain the broad protections guaranteed in the Third Geneva Convention even if they are convicted (Art. 85 Third Geneva Convention).

States are under an obligation to search for persons alleged to have committed, or ordered to have committed, grave breaches of the Geneva Conventions and to prosecute or extradite them (Art. 129 Third Geneva Convention). Similar obligations to investigate and prosecute alleged perpetrators of international crimes are found in other treaties.²⁹

²⁹ See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, Art. VI; Convention Against Torture and Other Cruel, Inhuman or Degrading

Where the personnel of private military companies commit crimes under international law, one question is whether a superior within the company could also be prosecuted under the principle of command responsibility under international criminal law.³⁰ Under the principle of command responsibility, the superior could be prosecuted for the crimes where they knew or had reason to know their subordinates were about to commit or were committing such crimes, and where they did not take all necessary and reasonable measures to prevent them. It is also debatable whether individuals who contracted the military company could be held criminally responsible for crimes committed by personnel of the company. This would be subject to the hiring of individuals satisfying the stringent test of having effective command and control over the personnel.

2.2. Civilians

Under IHL, the notion of “civilian” is defined in negative terms: civilians are persons who are not members of the armed forces (Art. 50(1) Additional Protocol I). Therefore, **where private military companies are not part of the armed forces of a State party to an international armed conflict, their personnel are not combatants and, instead, have the primary status of civilians.**

Personnel of private military companies who are civilians must not be the object of direct attacks. This reflects the principle of distinction, which requires State parties to an armed conflict to distinguish between civilians and combatants (Art. 48 Additional Protocol I). As will be analyzed below, the only exception to the prohibition on targeting civilians is where civilians directly participate in hostilities.

When captured, civilians are not entitled to prisoner-of-war status. Thus, they can be prosecuted merely for having participated in hostilities.

Treatment or Punishment, December 10, 1984, Art. 7; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, January 13, 1993, Art. VII(1); Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, Art. 28.

³⁰ See, e.g., Louise Doswald-Beck, “Private Military Companies Under International Humanitarian Law” in Simon Chesterman and Chia Lehnardt (eds.) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007), p. 22-23.

This sub-section also discusses two types of civilian categories which may be relevant to personnel of private military companies: (a) mercenaries and (b) civilians accompanying the armed forces.

2.2.1. Direct participation in hostilities

Where civilians participate directly in hostilities, they lose their protection against direct attack for the duration of each act amounting to direct participation in hostilities (Art. 51(3) Additional Protocol I). Thus, civilian personnel of private military companies can be targeted only while they directly participate in hostilities.

One can briefly consider the activities which may amount to “direct participation in hostilities” in the context of personnel of private military companies. According to the ICRC, an individual directly participates in hostilities if they conduct a specific act which meets three cumulative criteria:

- Threshold of harm—a threshold regarding the harm likely to result from the act;
- Direct causation—a relationship of direct causation between the act and the expected harm; and
- Belligerent nexus—a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.³¹

The direct causation criterion, in particular, may be at issue when considering personnel of private military companies. Activities which are part of the **general war effort** are too indirect and thus, do not constitute direct participation in hostilities. The ICRC finds that the following activities, which could all be conducted by personnel of private military companies, are too indirect to constitute participation: provision of supplies and services (such as electricity, fuel, construction material, food, finances and financial services); construction and repair of military infrastructure; scientific research and design; production and transportation of weapons and equipment, including driving ammunition trucks, “unless carried out as an integral part of a specific military operation

³¹ ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>, p. 46.

designed to directly cause the required threshold of harm”; and the general recruitment and training of personnel, unless for a specific hostile act.³²

This analysis illustrates that civilian personnel of private military companies will not be deemed to take direct part in hostilities if their specific acts cannot be shown to **directly cause harm**.

2.2.2. Prosecuting civilians

Civilians who have taken direct part in hostilities are not entitled to prisoner-of-war status upon capture. Civilians do not enjoy any immunity from prosecution. They can be prosecuted for acts which would be lawful for combatants under IHL. **Accordingly, civilian personnel of private military companies can be prosecuted for their mere participation in hostilities** under the national law of the State detaining them.

Where civilian personnel of private military companies have committed international crimes, they can be prosecuted for international crimes. As seen in Section 2.1.2.2 above, the State of capture may be under an obligation to prosecute or extradite them.

Civilians who have directly participated in hostilities and are captured are protected by the Fourth Geneva Convention.³³ The Fourth Geneva Convention lays down minimum standards applicable to the deprivation of liberty and criminal proceedings. Civilians who are captured by their own State of nationality are not protected by the Fourth Geneva Convention (Art. 4(1) Fourth Geneva Convention). Civilians who are captured by their own State will, nonetheless, benefit from fundamental guarantees that extend to minimum due process guarantees (Art. 75 Additional Protocol I).

2.2.3. A special civilian category: mercenaries

In narrow circumstances, personnel of private military companies may also qualify as mercenaries. As will be seen, mercenaries are civilians under IHL and, thus, enjoy the same rights and entitlements as other civilians. However, there

³² Ibid., pp. 51-53.

³³ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (Fourth Geneva Convention).

may be additional obligations to prosecute detained mercenaries under the 1989 Mercenary Convention.³⁴

2.2.3.1. Definition

The **definition of a mercenary under IHL is very restrictive**. A person will be deemed a mercenary only if they meet six cumulative criteria (Art. 47(2) Additional Protocol I):

- (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.

There are several points to underscore about this definition of a mercenary under IHL and how it applies to personnel of private military companies.

First, and foremost, as already noted, the definition is very restrictive. A member of a private military company will only be considered a mercenary if they meet all six cumulative requirements. As a result, it is likely that **most personnel who work for private military companies will not meet the legal definition of a mercenary**.

³⁴ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, December 4, 1989.

Second, this definition **excludes** three categories of individuals from qualifying as mercenaries:

- (a) **A mercenary must have been specially recruited to fight in a particular armed conflict** (Art. 47(2)(a) Additional Protocol I). An individual who has been recruited as a general employee to fight in any conflict is not a mercenary.³⁵ Of note, however, the expression “to fight” does not mean that the individual must necessarily have been recruited to engage in offensive attacks; IHL defines “attacks” as “acts of violence against the adversary [that are committed] in offence *or in defense*” [emphasis added] (Art. 49(1) Additional Protocol I). Thus, an individual who has been hired by a private military company to engage only in defensive combat, rather than offensive operations, can meet this requirement.
- (b) **A mercenary cannot be a national of any of the State parties to the conflict** (Art. 47(2)(d) Additional Protocol I). In the international armed conflict between Ukraine and Russia, this definition means that any Russian or Ukrainian national who works for a private military company is not a mercenary.
- (c) **A mercenary cannot be a member of the armed forces** (Art. 47(2)(e) Additional Protocol I). This follows logically from the fact that members of the armed forces are combatants (as discussed above in Section 2.1.1 above). Personnel of private military companies that are part of the armed forces are combatants, not mercenaries.

Third, a mercenary must **directly participate in hostilities** (Art. 47(2)(b) Additional Protocol I). Thus, personnel from private military companies cannot be mercenaries so long as they do not, in fact, directly participate in hostilities (see the discussion on direct participation in hostilities in Section 2.2.1 above). Personnel who have been hired but have not, in fact, participated in hostilities, are not mercenaries. This excludes personnel of private military companies who act as advisers or military technicians and do not take direct part in hostilities, for

³⁵ See George H. Aldrich, “Guerrilla Combatants and Prisoner of War Status,” *31 AMERICAN UNIVERSITY LAW REVIEW* 871, p. 881 (1982); Lindsey Cameron, “Private Military Companies: Their Status Under International Humanitarian Law and its Impact on Their Regulation,” *88 INTERNATIONAL REVIEW OF THE RED CROSS* 573, p. 581 (2006).

instance because they are responsible for selecting and training military personnel or maintaining weaponry.³⁶

Fourth, the definition requires that a mercenary is not merely **motivated by private gain**, but also has been offered **substantially higher compensation than combatants** of similar ranks and functions (Art. 47(2)(c) Additional Protocol I). Thus, establishing that personnel of private military companies are mercenaries requires both proof of motive and proof of the offer of substantial remuneration.

2.2.3.2. Legal consequences

Personnel of private military companies who meet all six of the above-mentioned criteria are deemed mercenaries. **Mercenaries have the same rights and entitlements as other civilians.** They are not entitled to participate directly in hostilities and can only be targeted when they directly participate in hostilities. The treatment of captured mercenaries as civilians is summarized by the ICRC's Commentary to Additional Protocol I: "Deprived of the status of combatant and prisoner of war, a mercenary is a civilian who could fall under Article 5 of the Fourth Convention."³⁷

Thus, when captured, **mercenaries (like other civilians) are not entitled to prisoner-of-war status**, as expressly stated in Additional Protocol I, Art. 47(1). Nevertheless, a State may still choose to give mercenaries prisoner-of-war status.

As mercenaries are not entitled to prisoner-of-war status, **captured mercenaries, like other civilians, can be tried** under the national laws of the State of capture, **merely for having participated in hostilities.** When mercenaries have committed crimes under international law, specific obligations to prosecute may apply (see Section 2.2.2 above).

In detention, mercenaries benefit from the same guarantees applicable to civilians under the Fourth Geneva Convention on the rights of fair and regular trial and the minimum guarantees of Additional Protocol I (see Section 2.2.2. above).

³⁶ ICRC, 1987 Commentary on the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Art. 47, para. 1806.

³⁷ *Ibid.*, Art. 47, para. 1797.

Additionally, States parties to the UN Mercenary Convention have an obligation to prosecute mercenaries.³⁸ Ukraine has ratified the UN Mercenary Convention but, on October 20, 2015, sent a communication to the UN secretary general noting that its application and implementation of the obligations under that Convention “is limited and is not guaranteed” in occupied and uncontrolled areas of Ukraine (such as Crimea and certain districts of Donetsk and Luhansk).³⁹

2.2.4. A special civilian category: civilians accompanying the armed forces

Civilians accompanying the armed forces are the exception to the general rule that civilians do not become prisoners of war upon capture. Civilians accompanying the armed forces are entitled to prisoner-of-war status when they are captured.

2.2.4.1. Definition

Civilians accompanying the armed forces are defined as:

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. (Art. 4(A)(4) Third Geneva Convention)

The definition’s non-exhaustive list of persons who may accompany the armed forces without being members of the armed forces through their various activities illustrates that civilians accompanying the armed forces do not take part in combat and thus, do not take a direct part in hostilities.

³⁸ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, December 4, 1989, Art. 12.

³⁹ Ukraine Communication of October 20, 2015, Reference C.N.614.2015.TREATIES-XVIII.6, <https://treaties.un.org/doc/Publication/CN/2015/CN.614.2015-Eng.pdf>.

Some personnel of private military companies may meet the definition of civilians accompanying the armed forces if they conduct support functions for the armed forces. Personnel who act as civilian contractors to the armed forces by fulfilling supply and support roles may qualify as civilians accompanying the armed forces.

Whether specific personnel qualify as a civilian accompanying the armed forces is a factual question to be determined on a case-by-case basis depending on the exact nature of the functions of the personnel. **However, the definition also makes clear that the following personnel are not civilians accompanying the armed forces: (a) personnel who take part in military operations and hostilities and (b) personnel who are members of the armed forces.** Indeed, as discussed above in Section 2.1.1.1, some private military companies form part of the armed forces of a State party to the conflict—if so, their personnel are combatants and cannot be civilians accompanying the armed forces.

Of note, the definition of civilians accompanying the armed forces provides that **the armed forces they accompany must provide such persons with identity cards that clearly identify them.** However, as will be discussed further below in Section 2.3, where there are doubts as to whether a captured person is a civilian accompanying the armed forces, this person must be treated as a prisoner of war until such time as their status is determined. Accordingly, the fact that a person accompanying the armed forces does not have an identity card clearly identifying them as such, will not strip the person of their status. Therefore, it is suggested that **personnel of private military companies may be classified as civilians accompanying the armed forces even if they do not carry identification to that effect.**

2.2.4.2. Legal consequences

Persons who meet the definition of civilians accompanying the armed forces are entitled to prisoner-of-war status upon capture, even if they are not members of the armed forces and are civilians (Art. 4(A)(4) Third Geneva Convention). **As a result, personnel of private military companies who are civilians accompanying the armed forces become prisoners of war upon capture** and are thus protected by the Third Geneva Convention (see Section 2.1.2.2 above).

As prisoners of war, civilians accompanying the armed forces cannot be prosecuted for lawful belligerent acts under IHL. However, as discussed and by definition, civilians accompanying the armed forces do not take part in hostilities. Thus, if a civilian who was accompanying the armed forces directly participates

in hostilities, they will be excluded from the definition of civilians accompanying the armed forces and will not be entitled to prisoner-of-war status upon capture. Therefore, as any other civilian who has engaged in direct participation in hostilities, they could be prosecuted for having participated in hostilities (see Section 2.2.1 above).

2.3. When doubts persist between combatants and civilians

IHL provides that when a person who has taken part in hostilities is captured, that person shall be **presumed to be a prisoner of war** if they (a) claim prisoner-of-war status, (b) appear entitled to the prisoner-of-war status, or (c) where the State party to the conflict⁴⁰ on which they would depend sends a notification to the State of capture (Art. 45(1) Additional Protocol 1). Further, under IHL, **if there is any doubt as to whether a person is entitled to prisoner-of-war status, they must be treated as a prisoner of war until such time as a competent tribunal (with jurisdiction) has determined their status.**

The status of captured personnel of private military companies as either combatants or civilians may at times be unclear and the status determination is deferred until a judicial decision, such as when:

- (a) the existence of a chain of command between the private military company and a State party to the conflict is debatable so that there are doubts as to whether the personnel of such a company is in fact a member of the armed forces of that State and, thus, a combatant;
- (b) it is not clear whether the individual personnel of the private military company has adhered to the requirement of visibility by distinguishing themselves from the civilian population through uniforms and distinctive signs, or by bearing their arms openly; and

⁴⁰ So as to ensure the broadest possible application of international humanitarian law, the 1949 Geneva Conventions and their 1977 Additional Protocols use the neutral term *parties to the conflict* to refer to both State and non-state actors taking part in hostilities. See, e.g., Médecins Sans Frontières, “The Practical Guide to Humanitarian Law,” <https://guide-humanitarian-law.org/content/article/3/parties-to-the-conflict>.

- (c) the personnel of a private military company fails to present an identity card clearly identifying them as a civilian accompanying the armed forces and exact functions of the personnel are debated.

Additionally, if a person who has been detained and is not being held as a prisoner of war is to be tried for an offense arising out of the hostilities, that person has the right to assert their entitlement to a prisoner-of-war status before a judicial tribunal (Art. 45(2) Additional Protocol 1). That question of their status should be adjudicated before the trial for the offense “[w]henever possible under the applicable procedure.” Thus, **the personnel of a private military company who is detained and is set to be tried for activities that may be lawful under IHL, such as mere participation in hostilities, has the right to assert that they are entitled to prisoner-of-war status before a judicial tribunal—and, thus, that they cannot be prosecuted for merely participating in hostilities until their status is resolved.**

3. Status of personnel of the Wagner Group in Ukraine

Having analyzed the status of personnel of private military companies under IHL and the relevant criteria, we can now consider the status of personnel of the Wagner Group in Ukraine—namely, whether they can be considered civilians or combatants under IHL. This turns on the important question of whether the Wagner Group forms part of Russia’s armed forces in Ukraine.

If so, personnel of the Wagner Group are members of Russia’s armed forces and hence ought to be considered combatants. It would then require a case-by-case assessment to determine whether an individual member of the Wagner Group would be entitled to prisoner-of-war status when captured in Ukraine.

If the Wagner Group is not part of Russia’s armed forces, its personnel would be considered civilians. One should consider whether Wagner group personnel, as civilians, could be classified as either mercenaries or civilians accompanying the armed forces.

The classification of Wagner Group personnel in Ukraine as either combatants or civilians informs the options for individual prosecutions of Wagner Group personnel.

3.1. Is the Wagner Group part of Russia’s armed forces?

The first question is whether the Wagner Group forms part of the armed forces of Russia in Ukraine. As described in Section 2.1.1 above, a private military company forms part of the armed forces of a State party to a conflict if it is (a) organized and (b) under a command responsible to that State regardless of whether it is an irregular military corps and is formally incorporated into the armed forces. Thus, the key question is whether the Wagner Group meets the requirements of organization and of being under a responsible command to Russia. These requirements will be considered in turn.

3.1.1. The “organized” requirement

The first requirement of “organization,” detailed in Section 2.1.1.2 above, is flexible. The operations of the group must present a **collective character which evidences coordination, proper control, and rules**. The group must not be composed of individuals operating in isolation from one another without preparation or training. Here we apply the factors of organizational structure identified by the ICTY Trial Chamber II in *Boškoski* (see Section 2.1.1.2): (a) the presence of a command structure, (b) the ability to carry out military operations in an organized manner, (c) the level of logistics, (d) the level of discipline, and (e) the ability to speak with one voice. These factors will be considered in turn to assess the level of organization of the Wagner Group in Ukraine.

3.1.1.1. The presence of a command structure

Indicators of the presence of a command structure could include the establishment of a general staff or high command giving directions and orders and the issuing of communications through an official spokesperson or communiqués.⁴¹

The structure of the Wagner Group is opaque and complex. However, it appears to have been established and run by Russian businessman Yevgeny V. Prigozhin until his reported death in a plane crash in August 2023.⁴² In September 2022, Prigozhin admitted to having founded the Wagner Group in 2014.⁴³ According to the *Financial Times*:

Wagner does not exist as a single incorporated entity, but instead as a sprawling network of interacting companies with varying degrees of proximity to [Prigozhin’s] Concord group. One of the most important entities is called Concord Management and Consulting; another is Concord Catering.⁴⁴

⁴¹ *Boškoski*, , ICTY Judgment of July 10, 2008 (IT-04-82-T), para. 199.

⁴² Guy Faulconbridge, “Kremlin says Prigozhin plane may have been downed on purpose,” Reuters, August 30, 2023, <https://www.reuters.com/world/europe/kremlin-says-prigozhin-plane-crash-may-have-been-caused-deliberately-2023-08-30>.

⁴³ Pjotr Sauer, “Putin ally Yevgeny Prigozhin admits founding Wagner mercenary group,” *Guardian*, September 26, 2022, <https://www.theguardian.com/world/2022/sep/26/putin-ally-yevgeny-prigozhin-admits-founding-wagner-mercenary-group>.

⁴⁴ Miles Johnson, “Horses, art and private jets: the charmed life of Russian warlord’s family,” *Financial Times*, April 26, 2023, <https://www.ft.com/content/03137d7f-6ea0-45eb-9284-d8957a650ba4>.

Prior to his death, Prigozhin had issued communications to and on behalf of the Wagner Group in relation to its operations in Ukraine. For example, he issued various broadcasts and communications through the Telegram messaging platform about the conflict, including complaints against the lack of support by the Russian Ministry of Defense for the Wagner Group's operations.⁴⁵

While the above merely suggests that Prigozhin was a figurehead and spokesperson, new evidence suggesting a command structure came to light following the June 2023 mutiny (discussed in Section 4.4 below) with a leaked document that has been characterized as the founding document of the Wagner Group. The document commits Prigozhin and commander Dmitry Utkin to follow a set of rules for the Group's participation in Ukraine. It outlines Prigozhin's role as group director, which included providing weapons, funding, and guarantees for those killed or injured in combat. The document reiterates that Wagner's founding principles are to fight Russia's war in Ukraine in loyal service to Russian President Vladimir Putin and "the Russian nation".⁴⁶

Following the reported deaths of Prigozhin and Utkin, a Russian news aggregator claims that a Wagner "council of commanders" met to prepare a joint statement about Wagner's future, suggesting internal coordination among leadership.⁴⁷ Putin reportedly met with Prigozhin and 35 Wagner commanders to discuss the future

⁴⁵ Charlie Warzel, "The World's Most Important App (For Now)," *Atlantic*, June 28, 2023, <https://www.theatlantic.com/technology/archive/2023/06/telegram-app-encrypted-messaging-russia/674558/>.

⁴⁶ Brendan Cole, "Putin in Awkward Position After Leak of Wagner Document," *Newsweek*, July 10, 2023, <https://www.newsweek.com/putin-russia-ukraine-wagner-leak-document-1811833>; Institute for the Study of War, Ukraine Conflict Updates, "Russian Offensive Campaign Assessment", July 9, 2023, <https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-july-9-2023>.

⁴⁷ Institute for the Study of War, "Russian Offensive Campaign Assessment," August 23, 2023, <https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-august-23-2023>; *see also* Ukrainska Pravda, "Kremlin's efforts to disband Wagner Group partially succeed—ISW," August 21, 2023, <https://www.pravda.com.ua/eng/news/2023/08/21/7416375> (referring to membership in the "Wagner Council of Commanders").

of Wagner, with his stated intention of keeping the group as a cohesive fighting force.⁴⁸

Details about the Wagner Group's exact structure deployed in Ukraine are limited. However, there have been widespread reports of waves of attacks and assaults by Wagner Group forces in Ukraine, whereby recruits, notably convicts, formed the first wave of attack and were followed by more experienced Wagner Group personnel in successive waves,⁴⁹ suggesting some level of coordination. This implies that the Wagner Group is divided into separate groups and units, and some reports suggest a division between administrative, combat, and management elements.⁵⁰

One *New Yorker* investigation describes Wagner Group as having "its own hierarchy" and confirms reports of sequential assault waves:

Higher-ranking commanders were situated in bunkers within radio range, often a few miles from the front, issuing orders to assault teams on the ground. Professional mercenaries were given the letter "A" and held back, entering the battle only once Ukrainian defenses had been softened. Recruited prisoners, who made up roughly 80 percent of Wagner's manpower, were given the letter "K" and deployed in waves, in intervals of 15 or 20 minutes. "One group follows the other at a pre-planned distance," the intelligence officer explained. "Even if you destroy the first, you have very little time to rest. The second is already advancing." Moreover, the first

⁴⁸ Institute for the Study of War, "Russian Offensive Campaign Assessment," July 14, 2023, <https://www.understandingwar.org/sites/default/files/July%2014%20Russian%20Offensive%20Campaign%20Assessment%20PDF.pdf>.

⁴⁹ Tim Lister, Frederik Pleitgen, and Victoria Butenko, "Deadly and disposable: Wagner's brutal tactics in Ukraine revealed by intelligence report," CNN, January 26, 2023, <https://edition.cnn.com/2023/01/23/europe/russia-wagner-tactics-report-ukraine-intl/index.html>; ACLED, "Moving out of the shadows: Shifts in Wagner Group operations around the world," August 2023, https://acleddata.com/acleddatanew/wp-content/uploads/2023/08/ACLED_Report_Shifts-in-Wagner-Group-Operations-Around-the-World_2023.pdf, p. 20.

⁵⁰ Alec Bertina, "The Wagner Group: The World's Most Infamous PMC", Grey Dynamics, June 26, 2023, <https://greodynamics.com/the-wagner-group-the-worlds-most-infamous-pmc>.

wave was often used simply to draw fire, in order to identify Ukrainian positions, which were then targeted by artillery.⁵¹

Wagner Group’s “assault detachment” strategy seems to have even influenced the Russian Army to adopt it in its newest manual.⁵²

Notwithstanding the foregoing, the opaqueness and lack of available public information on the Wagner Group make it difficult to determine the specific outlines of its command structure, although new evidence of Wagner Group’s founding document and the existence of its council of commanders strengthens the conclusion that the Wagner Group follows specific rules and has identifiable leadership.

3.1.1.2. The ability to conduct military operations

Factors evidencing the ability to conduct military operations in an organized manner could include the ability to determine a unified military strategy and conduct large-scale military operations and the capacity to control territory.⁵³

The Wagner Group has clearly demonstrated these abilities in Ukraine, beginning during Russia’s invasion of the country in 2014 until 2015, and again following Russia’s invasion in 2022.

Research from the Transnational Threats Project of the Center for Strategic & International Studies (CSIS) documents the Wagner Group’s ability to conduct complex military operations beginning in 2014.⁵⁴ Wagner Group personnel took direct combat roles in the ground assault that was launched in response to Ukraine’s August 2014 counteroffensive in Donbas and led to the strategic

⁵¹ Joshua Yaffa, “Inside the Wagner Group’s Armed Uprising”, *New Yorker*, July 31, 2023, <https://www.newyorker.com/magazine/2023/08/07/inside-the-wagner-uprising>. (I’m finding this article in the New Yorker, Not NYT)

⁵² Sebastien Roblin, “Captured Manual Reveals Russia’s New ‘Assault Detachment’ Doctrine,” *Forbes*, February 28, 2023, <https://www.forbes.com/sites/sebastienroblin/2023/02/28/captured-manual-reveals-russias-new-assault-detachment-doctrine/?sh=7e5275654bb3> (“the new Russian doctrine reflects the influence of the Wagner mercenary group”).

⁵³ *Bošković*, ICTY Judgment of 10 July 2008 (IT-04-82-T), para. 200.

⁵⁴ Seth G. Jones, Catrina Doxsee, Brian Katz, Eric McQueen, and Joe Moye, “Russia’s Corporate Soldiers: The Global Expansion of Russia’s Private Military Companies”, CSIS Transnational Threats Project, July 2021, <https://www.csis.org/analysis/russias-corporate-soldiers-global-expansion-russias-private-military-companies>.

seizure of the city of Debaltseve in early 2015.⁵⁵ The Wagner Group also conducted specialized missions by spearheading raids, ambushes, and diversionary attacks on Ukrainian armed forces.⁵⁶ The Wagner Group has reportedly been responsible for coordinated assassinations of separatist rebel leaders who refused to follow directives from the Russian State, and for disarming uncooperative separatist forces.⁵⁷

The Wagner Group has also exhibited its ability to conduct military operations in an organized manner since Russia's full-scale invasion in 2022, including large-scale military operations resulting in the capture of parts of Ukrainian territory. For instance, in May 2022, the Wagner Group played a significant combat role in leading offensive assaults in capturing the city of Popasna and entering the outskirts of Bakhmut.⁵⁸ Significantly, according to the Minister of Defense of

⁵⁵ Marten, "Russia's Use of Semi-State Security Forces: The Case of the Wagner Group," 35 *Post-Soviet Affairs* (2019) 181-204; Sergey Sukhankin, "Unleashing the PMCs and Irregulars in Ukraine: Crimea and Donbas," Jamestown Foundation, September 3, 2019, <https://jamestown.org/program/unleashing-the-pmcs-and-irregulars-in-ukraine-crimea-and-donbas/>; Presentation by the Representative of the Ministry of Defense of Ukraine Major General Vadym Skibitskyi on "Private Military Companies and Their Role in Modern Regional Conflicts," 949th Meeting of the OSCE Forum for Security Co-operation, June 17, 2020, <https://www.osce.org/files/f/documents/b/1/456016.pdf>.

⁵⁶ Seth G. Jones, Catrina Doxsee, Brian Katz, Eric McQueen, and Joe Moyer, "Russia's Corporate Soldiers: The Global Expansion of Russia's Private Military Companies," CSIS Transnational Threats Project, July 2021, pp. 25-26, <https://www.csis.org/analysis/russias-corporate-soldiers-global-expansion-russias-private-military-companies>; Presentation by the Representative of the Ministry of Defense of Ukraine Major General Vadym Skibitskyi on "Private Military Companies and Their Role in Modern Regional Conflicts," 949th Meeting of the OSCE Forum for Security Co-operation, June 17, 2020, <https://www.osce.org/files/f/documents/b/1/456016.pdf>.

⁵⁷ Seth G. Jones, Catrina Doxsee, Brian Katz, Eric McQueen, and Joe Moyer, "Russia's Corporate Soldiers: The Global Expansion of Russia's Private Military Companies," CSIS Transnational Threats Project, July 2021, <https://www.csis.org/analysis/russias-corporate-soldiers-global-expansion-russias-private-military-companies>; Sergey Sukhankin, "Unleashing the PMCs and Irregulars in Ukraine: Crimea and Donbas," Jamestown Foundation, September 3, 2019, <https://jamestown.org/program/unleashing-the-pmcs-and-irregulars-in-ukraine-crimea-and-donbas/>

⁵⁸ Jakub Ber, "From Popasna to Bakhmut. The Wagner Group in the Russia-Ukraine War," OSW Commentary, Centre for Eastern Studies, April 28, 2023, p. 4, https://www.osw.waw.pl/sites/default/files/OSW_Commentary_511.pdf; *see also* Kateryna

Ukraine, the Wagner Group was deployed in the “most difficult and important missions” in Ukraine and played a key role in Russia’s capture of Mariupol and Kherson.⁵⁹

Starting in summer 2022 and through January 2023, the Wagner Group showed a unified military strategy of focusing its offensive operations towards the cities of Soledar and Bakhmut. The Wagner Group’s role in those operations was expressly acknowledged by the Russian Ministry of Defense:

- (a) The Russian Ministry of Defense publicly stated on January 13, 2023 that the capture of the city of Soledar was “conducted by a mixed grouping of Russian troops under a common plan, which envisaged the resolution of a range of combat tasks.” The statement noted that the Wagner Group completed one of these combat tasks: “for the storming of Soledar’s quarters occupied by Ukrainian troops, this combat task was successfully attained thanks to the courageous and selfless actions of the volunteers from Wagner PMC units.”⁶⁰
- (b) The Russian Ministry of Defense publicly stated on May 21, 2023 that the capture of the city of Bakhmut was achieved thanks to “assault teams of the Wagner private military company with the support of artillery and aviation of the southern battlegroup”.⁶¹ Thus, this illustrates a specific example of coordinated action between the Wagner Group and the Russian

Stepanenko, “The Kremlin’s Pyrrhic Victory in Bakhmut: A Retrospective on the Battle for Bakhmut,” Institute for the Study of War, May 24, 2023, <https://www.understandingwar.org/backgrounder/kremlin’s-pyrrhic-victory-bakhmut-retrospective-battle-bakhmut> (describing Wagner’s role in Bakhmut).

⁵⁹ Saskya Vandoorne, Melissa Bell, Joseph Ataman, and Renee Bertini, “Morale is plummeting in Putin’s private army as Russia’s war in Ukraine falters,” CNN, 7 October 2022, <https://edition.cnn.com/2022/10/06/europe/wagner-ukraine-struggles-marat-gabidullin-cmd-intl/index.html>.

⁶⁰ “Russian defense ministry clarifies tasks of Russian units during liberation of Soledar,” TASS, January 13, 2023, <https://tass.com/politics/1562113>; *see also* Institute for the Study of War, “Russian Offensive Campaign Assessment”, January 13, 2023, <https://www.understandingwar.org/backgrounder/russian-offensive-campaign-assessment-january-13-2023> (describing how the Ministry of Defense issued a follow-up announcement after initially not recognizing Wagner Group’s role in Soledar, justifying the omission by claiming that a Russian “heterogenous grouping of troops” executed a “joint plan”).

⁶¹ TASS, “City of Artyomovsk completely liberated—Russian Defense Ministry,” May 20, 2023, <https://tass.com/defense/1620643>.

armed forces where the Wagner Group conducted ground assaults and Russian armed forces provided artillery and aviation support.

Accordingly, based on the non-exhaustive examples above, the Wagner Group clearly has the ability to conduct military operations.

3.1.1.3. The level of logistics

Factors evidencing the level of logistics could include the ability to recruit new members, provide military training, supply weapons, use communications equipment, and supply and use uniforms.⁶²

The Wagner Group has shown its recruitment capabilities. For example, it launched a recruitment campaign directed primarily at former personnel in March 2022⁶³ and a mass recruitment campaign in July 2022.⁶⁴

Footage of Prigozhin inviting convicts in a Russian prison to join the Wagner Group in Ukraine circulated in September 2022.⁶⁵ Prisoners agreeing to join the Wagner Group were promised freedom after their service, and President Putin later confirmed that he was “signing pardon decrees” for convicts fighting in Ukraine.⁶⁶ As many as 50,000 conscripts were estimated to have joined the Wagner Group by mid-January 2023.⁶⁷ According to an estimate by the United States shared in February 2023, the Wagner Group had suffered more than 30,000 casualties from the start of the invasion in February 2022, of which about 9,000

⁶² *Bošković*, ICTY Judgment of July 10, 2008 (IT-04-82-T), para. 201.

⁶³ Jakub Ber, “From Popasna to Bakhmut. The Wagner Group in the Russia-Ukraine War,” OSW Commentary, Centre for Eastern Studies, April 28, 2023, p. 3, https://www.osw.waw.pl/sites/default/files/OSW_Commentary_511.pdf.

⁶⁴ Pjotr Sauer, “Russia’s private military contractor Wagner comes out of the shadows in Ukraine war,” *Guardian*, August 7, 2022, <https://www.theguardian.com/world/2022/aug/07/russias-private-military-contractor-wagner-comes-out-of-the-shadows-in-ukraine-war>.

⁶⁵ Christiaan Triebert, “Video Reveals How Russian Mercenaries Recruit Inmates for Ukraine War,” *New York Times*, September 16, 2022, <https://www.nytimes.com/2022/09/16/world/europe/russia-wagner-ukraine-video.html>.

⁶⁶ Dasha Litvinova, “A Wagner ex-convict returned from war and a Russian village lived in fear. Then he killed again,” Associated Press, June 27, 2023, <https://apnews.com/article/russia-ukraine-war-convict-wagner-crime-108e410835e4bf27ac3192cd7f945b39#>.

⁶⁷ Jakub Ber, “From Popasna to Bakhmut. The Wagner Group in the Russia-Ukraine War,” OSW Commentary, Centre for Eastern Studies, April 28, 2023, p. 5, https://www.osw.waw.pl/sites/default/files/OSW_Commentary_511.pdf.

were fighters killed in action, a large percentage of which appear to have been recruited convicts.⁶⁸

The Wagner Group also launched another recruitment campaign among Russia's general population in 2023.⁶⁹

Regarding the provision of military training, the Wagner Group assumed a key role of training, organizing, and advising separatist militias in Eastern Ukraine in 2015.⁷⁰ The Wagner Group also deployed specialized personnel to train and equip these militias on different equipment systems, combat engineering, and logistics.⁷¹ There have also been widespread reports that Wagner Group fighters, including young recruits, were trained and deployed from a base in Molkino, Krasnodar Krai, during 2022 and 2023.⁷² In November 2022, Prigozhin publicly declared that

⁶⁸ United States, White House, "Press Briefing by Press Secretary Karine Jean-Pierre and NSC Coordinator for Strategic Communications John Kirby," February 17, 2023, <https://www.whitehouse.gov/briefing-room/press-briefings/2023/02/17/press-briefing-by-press-secretary-karine-jean-pierre-and-nsc-coordinator-for-strategic-communications-john-kirby-9/>.

⁶⁹ Joshua Askew, "Ukraine war: Wagner 'recruiting in Moscow high schools for young warriors'," Euronews, March 13, 2023, <https://www.euronews.com/2023/03/13/ukraine-war-wagner-recruiting-in-moscow-high-schools-for-young-warriors>; Daria Talano and Nikita Kondratyev, "Military ad campaigns reach Russian schools, metro stations, and kindergartens," *Novaya Gazeta Europe*, April 19, 2023, <https://novayagazeta.eu/articles/2023/04/19/military-ad-campaigns-reach-russian-schools-metro-stations-and-kindergartens-en>.

⁷⁰ Randy Noorman, "The Battle of Debaltseve: A Hybrid Army in a Classic Battle of Encirclement," July 17, 2020, Small Wars Journal, <https://smallwarsjournal.com/jrnl/art/battle-debaltseve-hybrid-army-classic-battle-encirclement>; Sergey Sukhankin, "Unleashing the PMCs and Irregulars in Ukraine: Crimea and Donbas," Jamestown Foundation, September 3, 2019, <https://jamestown.org/program/unleashing-the-pmcs-and-irregulars-in-ukraine-crimea-and-donbas/>.

⁷¹ Seth G. Jones, Catrina Doxsee, Brian Katz, Eric McQueen, and Joe Moye, "Russia's Corporate Soldiers: The Global Expansion of Russia's Private Military Companies," CSIS Transnational Threats Project, July 2021, p. 26, <https://www.csis.org/analysis/russias-corporate-soldiers-global-expansion-russias-private-military-companies>.

⁷² Candace Rondeaux, "Building the Wagner Group Brand," New America, February 16, 2023, <https://www.newamerica.org/future-frontlines/reports/building-wagner-group-brand/>; *Moscow Times*, "Russia Spending \$150M Monthly on Syria Mercenaries—Report," August 25, 2016, <https://www.themoscowtimes.com/2016/08/25/russia-spending-150m-monthly-on-syria-mercenaries-a55108>.

the Wagner Group was training Russian civilians in regions bordering Ukraine to build fortifications and to form militias to “defend their land.”⁷³

Regarding the supply of weapons and equipment, since 2014, the Wagner Group has deployed a range of munitions systems such as armor, rockets, and heavy artillery to support separatist forces in Donbas.⁷⁴ This included specialist equipment such as man-portable air defense systems (MANPADs).⁷⁵ In the 2022 invasion, the Wagner Group has deployed a range of munitions and heavy weaponry in Ukraine, including artillery, thermobaric rocket launchers,⁷⁶ and Main Battle Tanks (MBTs).⁷⁷ The Belarusian Hajun project documented convoys of Wagner Group vehicles, including armored vehicles and various types of trucks, moving into Belarus July 2023.⁷⁸ Wagner Group pilots have also reportedly flown multiple Sukhoi fighter jets in Ukrainian airspace.⁷⁹ There have also been reports of the Wagner Group relocating some of its equipment and supplies from Libya and Syria to Ukraine, including artillery, air defenses, and

⁷³ *Moscow Times*, “Russia’s Wagner Mercenary Group Announces Border Militia Plan,” November 11, 2022, <https://www.themoscowtimes.com/2022/11/11/russias-wagner-mercenary-group-announces-border-militia-plan-a79355>.

⁷⁴ Marten, “Russia’s Use of Semi-State Security Forces: The Case of the Wagner Group,” 35 *Post-Soviet Affairs* (2019) 181-204; Sergey Sukhankin, “Unleashing the PMCs and Irregulars in Ukraine: Crimea and Donbas,” Jamestown Foundation, September 3, 2019, <https://jamestown.org/program/unleashing-the-pmcs-and-irregulars-in-ukraine-crimea-and-donbas/>.

⁷⁵ Seth G. Jones, Catrina Doxsee, Brian Katz, Eric McQueen, and Joe Moyer, “Russia’s Corporate Soldiers: The Global Expansion of Russia’s Private Military Companies,” CSIS Transnational Threats Project, July 2021, p. 26, <https://www.csis.org/analysis/russias-corporate-soldiers-global-expansion-russias-private-military-companies>.

⁷⁶ *Telegraph*, “Mercenaries deploy thermobaric weapons in Ukraine,” November 17, 2022, <https://www.telegraph.co.uk/world-news/2022/11/17/ukraine-news-russia-nato-latest-missile-poland-g20/>.

⁷⁷ David Axe, “Why Are Mercenaries Driving Russia’s Best T-90 Tanks?” *Forbes*, December 28, 2022, <https://www.forbes.com/sites/davidaxe/2022/12/28/why-are-mercenaries-driving-russias-best-t-90-tank/>.

⁷⁸ E.g., Belarusian Hajun project, *Telegram*, July 25, 2023, https://t.me/Hajun_BY/7153.

⁷⁹ David Axe, “Russia’s Shadowy Mercenary Air Force Is Losing More And More Jets in Ukraine”, *Forbes*, December 17, 2022, <https://www.forbes.com/sites/davidaxe/2022/12/17/russias-shadowy-mercenary-air-force-is-losing-more-and-more-jets-in-ukraine/>.

radar that the Wagner Group was using in Libya.⁸⁰ And there is also evidence of armored vehicles and transport helicopters transiting from Russia to end destinations in Africa all along Prigozhin-controlled supply chains.⁸¹

Finally, on the provision and use of uniforms, the Wagner Group has been recognized for its use of distinctive mottos, symbols, and patches.⁸² There is widespread evidence of Wagner Group personnel in Ukraine wearing green camouflage fatigues.⁸³ Personnel also wear the distinctive emblem of the Wagner Group—a white skull insignia against a black and red backdrop⁸⁴—as well as sledgehammers and images of orchestras, with the words “PMC Wagner Group” or in some cases “Most Loved Musical Collective” on the outer layer of their distinctive badges.⁸⁵

3.1.1.4. The level of discipline

Factors evidencing the level of discipline could include establishment of disciplinary rules and codes of conduct, proper training, and the existence of internal regulations, including whether these are effectively disseminated to members.⁸⁶

⁸⁰ Eric Schmitt, “More Russian Mercenaries Deploying to Ukraine to Take on Greater Role in War,” *New York Times*, March 25, 2022, <https://www.nytimes.com/2022/03/25/us/politics/russian-mercenaries-ukraine-wagner-group.html>.

⁸¹ Jack Margolin, “Paper Trails: How a Russia-based logistics network ties together Russian mining companies and military contractors in Africa,” C4ADS, June 13, 2019, <https://c4ads.org/commentary/2019-6-13-paper-trails>.

⁸² Alec Bertina, “The Wagner Group: The World’s Most Infamous PMC,” Grey Dynamics, June 26, 2023, <https://greydynamics.com/the-wagner-group-the-worlds-most-infamous-pmc>.

⁸³ Ibid.

⁸⁴ Al Jazeera, “Wagner mercenary ‘merch’ prices jump online after Russia mutiny,” June 30, 2023, <https://www.aljazeera.com/news/2023/6/30/wagner-mercenary-merch-prices-jump-online-after-russia-mutiny>; Tom Ball, “Wagner Group’s hardened mercenaries pictured in eastern Ukraine,” *The Times*, April 4, 2022, <https://www.thetimes.co.uk/article/wagner-groups-hardened-mercenaries-pictured-in-eastern-ukraine-td9jnwwsm>.

⁸⁵ Alec Bertina, “The Wagner Group: The World’s Most Infamous PMC,” Grey Dynamics, June 26, 2023, <https://greydynamics.com/the-wagner-group-the-worlds-most-infamous-pmc>, citing for e.g., *Telegram*, Wagner Group, May 25, 2023, <https://t.me/wagnernew/7866>.

⁸⁶ *Bošković*, ICTY Judgment of July 10, 2008 (IT-04-82-T), para. 202.

The Wagner Group allegedly operates strict military discipline among its recruits based on “the sense of fear of punishment,”⁸⁷ Such discipline has included reports that personnel of the Wagner Group caught retreating or surrendering are executed.⁸⁸ An insider source has also stated that conscripts are disciplined through an induction of watching video executions, and those who show weakness or are lightly wounded risk being shot in the legs or left behind.⁸⁹ Prigozhin also hired a man dubbed “The Teacher” to inflict severe beatings in a basement on those employees who had defied him.⁹⁰

3.1.1.5. The ability to speak with one voice

Factors evidencing the ability to speak with one voice could include the ability to negotiate and conclude agreements or to engage in political negotiations with representatives of States.⁹¹

The Wagner Group has demonstrated some ability to negotiate and to conclude agreements with State representatives. Vladimir Putin’s declarations that the Russian State had fully financed the Wagner Group between May 2022 and May 2023 suggest that an agreement was concluded between the Wagner Group and Russia.⁹² A classified intelligence report from the United States stated that the Wagner Group made a direct request for munitions and equipment to China in

⁸⁷ Dina Temple-Raston and Sean Powers, “Q&A with a former member of Wagner Group: ‘They were like little kings or czars,’” *The Record*, June 6, 2023, <https://therecord.media/wagner-group-recruiting-russia-ukraine-click-here>.

⁸⁸ Stefan Korshak, “New Accounts Emerge of Wagner Soldiers Shot for Retreating,” *Kyiv Post*, January 13, 2023, <https://www.kyivpost.com/post/11077>.

⁸⁹ James Reynolds, “Inside Wagner’s ‘human wave’ death squads: Insider reveals the details of horrifying tactics that see convicts sent to their doom in groups of eight after being shown deserters being executed on video,” *Daily Mail*, February 4, 2023, <https://www.dailymail.co.uk/news/article-11712611/Wagner-Group-insider-reveals-desperate-tactics-convicted-prisoners-sent-die-waves.html>.

⁹⁰ Sinéad Baker, “Prigozhin outsources violent beatings of those who angered him to a man dubbed ‘The Teacher,’ who’d then send him photos: report,” *Business Insider*, July 13, 2023, <https://www.businessinsider.com/prigozhin-outsourced-beatings-to-man-called-the-teacher-report-2023-7>.

⁹¹ *Boškoski*, ICTY Judgment of July 10, 2008 (IT-04-82-T), para. 203.

⁹² TASS, “Putin says Wagner group fully financed by Russian government,” June 27, 2023, <https://tass.com/defense/1639345>.

early 2023, which was refused.⁹³ However, according to the same intelligence report, the Wagner Group was successful in buying munitions from Belarus and Syria, and had contact with Turkey regarding weapons sales.

3.1.1.6. Preliminary assessment on “organization” requirement

In sum, multiple factors indicate a high level of organization of the Wagner Group in Ukraine. This includes notably the Wagner Group’s capacity to conduct complex, large, and sustained military operations, and its demonstrated high level of logistics, including the deployment of specialized equipment and large recruitment campaigns. While few details are publicly available concerning the structure of the Wagner Group in Ukraine, including the exact command structure, the scale of its military operations and logistics suggests that the Wagner Group has a collective and coordinated character, and recently available evidence points to a council of commanders, some clear rules to be followed, as well as organizing around assault detachment units. It is possible, therefore, that the Wagner Group satisfied the “organized” requirement, at least prior to the June 2023 mutiny (see below).

3.1.2. The “responsible command” requirement

The second requirement that a group be “under a command responsible” to a State party to the conflict for the conduct of its subordinates is more ambiguous, as discussed in Section 2.1.1.3 above. This requirement implies that the State possesses some degree of coordination over the activities of the group. However, the precise degree of control which should be exercised to fulfil this requirement is debated. This paper has argued that the relevant test is not the strict test of “effective control,” applicable to the international law of State responsibility. Instead, the “overall control” test or another standard of control may be applicable. Thus, one must consider the degree of control which the State of Russia exercises over the Wagner Group in Ukraine.

⁹³ Mehul Srivastava, Max Seddon, and Felicia Schwartz, “China snubbed Wagner arms request, says US intelligence leak,” *Financial Times*, April 20, 2023, <https://www.ft.com/content/755b7302-6f69-4790-a143-d75dd2ad8aef>.

Such control could take various forms, including (a) organizing, coordinating, and planning the military actions of the group, (b) financing, training, and equipping the group, and (c) providing operational support to that group. These different indicators of control will be considered in turn in the context of the Wagner Group.

Before analyzing the different indicators of control, one must acknowledge that the nature of the relationship between the State of Russia and the Wagner Group has been widely discussed and debated. It is a complex relationship, made up of informal and formal links. Although PMCs are unlawful under Russian law and the Wagner Group was not registered as a legal entity either in Russia or anywhere else until recently,⁹⁴ there is a permissive legal environment in Russia that allows state-run enterprises to have private armed forces and security foundations.⁹⁵ Some authors have argued that the murkiness of the relationship between the Wagner Group and the Russian State may allow Russia to claim plausible deniability for any serious international crimes its forces might commit.⁹⁶

⁹⁴ *Moscow Times*, “Wagner Group Becomes Legal Entity in Russia–BBC,” January 17, 2023, <https://www.themoscowtimes.com/2023/01/17/wagner-group-becomes-legal-entity-in-russia-bbc-a79967>.

⁹⁵ CSIS, “Band of Brothers: The Wagner Group and the Russian State,” September 21, 2020, <https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state>; Candace Rondeaux, “Decoding the Wagner Group: Analyzing the Role of Private Military Security Contractors in Russian Proxy Warfare,” *New America*, November 5, 2019, <https://www.newamerica.org/future-security/reports/decoding-wagner-group-analyzing-role-private-military-security-contractors-russian-proxy-warfare/executive-summary-key-findings> (“The majority state ownership of many of the Russian firms that do business with PMSC contingents . . . means the Russian state is the chief contracting party, and therefore, responsible for their conduct”).

⁹⁶ See, e.g., Marten, “Russia’s Use of Semi-State Security Forces: The Case of the Wagner Group,” 35 *Post-Soviet Affairs* (2019) 181-204; Alastair Munro, “Plausible Deniability: Russia’s Modern International Strategy,” *Observer*, July 22, 2020, <https://theobserver-qiaa.org/plausible-deniability-russias-modern-international-strategy>; Catrina Doxsee, Congressional Testimony, CSIS, “Putin’s Proxies: Examining Russia’s Use of Private Military Companies,” September 15, 2022, <https://www.csis.org/analysis/putins-proxies-examining-russias-use-private-military-companies>; CSIS, “Band of Brothers: The Wagner Group and the Russian State,” September 21, 2020, <https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state>; Amy MacKinnon, “What Is Russia’s Wagner Group?” *Foreign Policy*, July 6, 2021, <https://foreignpolicy.com/2021/07/06/what-is-wagner>

One expert, Dr. Kimberly Marten, has described the Wagner Group as a “semi-State security” force, noting that:

[W]hile Wagner’s leaders have contracted for profit and its members have fought for money, its members believed that they were simultaneously working on behalf of the Russian state (even though the identity of their actual employers has sometimes been murky). Wagner and its antecedents are also not fly-by-night, and have not worked for just anyone. They have been reliable providers of contract violence abroad, across years and across conflicts, for the Russian state, for Russia’s leading business interests, and for Russia’s allies. Yet Wagner’s relationship to state command and control has varied, inasmuch as sometimes they have clearly worked directly alongside regular Russian military forces, and other times not.⁹⁷

Similarly, according to another commentator, Jack Margolin, who has monitored the activities of the Wagner Group in multiple countries, “Wagner is not wholly a project of the [Russian] security services, nor is it a truly private enterprise.”⁹⁸

Both the United States and United Kingdom governments have described the Wagner Group as a “Russian proxy.”⁹⁹ Other experts have likewise argued that, based on evidence that Wagner “is closely, often directly connected to the Russian state,” Wagner should not be characterized as a private military company, but rather “be viewed as a classic proxy organization and handled accordingly.”¹⁰⁰

group-russia-mercenaries-military-contractor; Nathaniel Reynolds, “Putin’s Not-So-Secret Mercenaries: Patronage, Geopolitics, and the Wagner Group,” Carnegie Endowment for International Peace, July 18, 2019, <https://carnegieendowment.org/2019/07/08/putin-s-not-so-secret-mercenaries-patronage-geopolitics-and-wagner-group-pub-79442>.

⁹⁷ Marten, “Russia’s Use of Semi-State Security Forces: The Case of the Wagner Group,” 35 *Post-Soviet Affairs* (2019) 181-204.

⁹⁸ Jack Margolin, Twitter, February 21, 2023, https://twitter.com/Jack_Mrgln/status/1628037129124052994?s=20.

⁹⁹ United States Department of the Treasury, Press Release, “Treasury Sanctions Russian Proxy Wagner Group as a Transnational Criminal Organization,” January 26, 2023, <https://home.treasury.gov/news/press-releases/jy1220>; United Kingdom Home Office, “Russian Wagner Group declared terrorists,” September 6, 2023, <https://www.gov.uk/government/news/russian-wagner-group-declared-terrorists>.

¹⁰⁰ CSIS, “Band of Brothers: The Wagner Group and the Russian State,” September 21, 2020, <https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state>.

3.1.2.1. Organizing, coordinating, and planning military actions

Several facts suggest that Russia organized, coordinated, and planned the military actions of the Wagner Group in Ukraine.

First, as discussed in Section 3.1.1.2 above, the Wagner Group has conducted complex, large, and sustained military operations in support of Russia's invasions of Ukraine in 2014 and in 2022. As already noted, the Russian Ministry of Defense has openly acknowledged the role of the Wagner Group in capturing both Soledar and Bakhmut.

Second, there have been several reports that the main base of the Wagner Group since 2015 (until after the mutiny) for operations inside and outside Ukraine was in Molmino. That base was adjacent to that of the 10th Separate Special Purpose Brigade of Russia's Main Directorate of the General Staff of the Armed Forces of the Russian Federation (commonly known as the GRU)—the military intelligence agency of Russia's Ministry of Defense.¹⁰¹ This would suggest a very high level of organization and coordination.

Third, an investigation by Bellingcat, The Insider, and *Der Spiegel*, published in 2020, suggests tight integration between the Wagner Group and Russia's Ministry of Defense, including the GRU.¹⁰² Prigozhin's telephone records for an eight-month period spanning late 2013 and early 2014, together with hacked emails of Prigozhin's personal assistant leaked in 2015, reveal that Prigozhin was in contact with the "entire leadership of the Presidential Administration Office, along with a number of senior figures at the FSB, in the Federal Protective Service (FSO), and the Ministry of Defense."¹⁰³ The FSB is Russia's counterintelligence service.

This investigation also described the integration of the Wagner Group in an overall chain of command under the contract of the GRU. Phone intercepts published by Ukraine's Security Service presented Dmitry Utkin, then the front man of the Wagner Group, reporting to senior Russian officials on the operations in Eastern Ukraine in 2015. One intercept from early 2015 shows "Utkin taking

¹⁰¹ Ibid.

¹⁰² Bellingcat, "Putin Chef's Kisses of Death: Russia's Shadow Army's State-Run Structure Exposed," August 14, 2020, <https://www.bellingcat.com/news/uk-and-europe/2020/08/14/pmc-structure-exposed/>.

¹⁰³ Ibid.

instructions and coordinating the mercenaries' work directly with Maj. General Evgeniy Nikiforov, then chief of staff of the 58th Western Army."¹⁰⁴

Bellingcat has also reportedly identified joint airline bookings between members of the Wagner Group, including Utkin, and active GRU officers.¹⁰⁵ According to Bellingcat, one recording of Utkin and Andrey Nikolaevich Troshev suggests that Troshev, a former police colonel from St. Petersburg, was in fact Utkin's superior within the Wagner Group. On March 17, 2016, Andrey Troshev was awarded the title of "Hero of the Russian Federation," which comes with a Gold Star medal, for his role as a commander of the Wagner Group in Syria. A picture depicts President Putin with Troshev wearing his medal and Utkin wearing four Bravery orders.¹⁰⁶

Politico has also reviewed documents that allegedly "show the group is directly linked to the Russian state—that it communicates and strategizes with senior Russian officials on some of its most sensitive operations."¹⁰⁷

3.1.2.2. Financing, training, and equipping

On June 27, 2023, Russian President Vladimir Putin declared that the "financing of the entire Wagner group was fully ensured by the State" (emphasis added).¹⁰⁸ President Putin stated that the financing came "from the Defense Ministry, from the State budget." Further, he declared that, from May 2022 to May 2023, the Russian State had allocated 86.2 billion rubles (about 1 billion USD) to the Wagner Group in the form of salary to fighters and incentive rewards alone. This suggests that a significant portion of the financing of the Wagner Group comes from the Russian State budget.

¹⁰⁴ Bellingcat, "Putin Chef's Kisses of Death: Russia's Shadow Army's State-Run Structure Exposed," August 14, 2020, <https://www.bellingcat.com/news/uk-and-europe/2020/08/14/pmc-structure-exposed/>.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Erin Banco, Sarah Anne Aarup, and Anastasiia Carrier, "Inside the stunning growth of Russia's Wagner Group," Politico, February 18, 2023, <https://www.politico.com/news/2023/02/18/russia-wagner-group-ukraine-paramilitary-00083553>.

¹⁰⁸ TASS, "Putin says Wagner group fully financed by Russian government," June 27, 2023, <https://tass.com/defense/1639345>.

Photographs of Wagner Group personnel bearing Russian State decorations, such as “for courage,” “for bravery,” and “hero of Russia” have also circulated.¹⁰⁹

Russia also appears to be equipping the Wagner Group, as some of the equipment the Wagner Group has used in Ukraine also reportedly belongs to the Russian State.¹¹⁰ This includes Sukhoi Su-24 and Su-25 fighter jets belonging to the Russian Air Force and T-90M tanks—Russia’s highly valuable and newest tanks—that Wagner Group personnel have deployed.

3.1.2.3. Providing operational support

A clear example of Russia providing operational support to the Wagner Group is the recruitment drive that the Wagner Group was able to conduct in Russia’s prisons, beginning in the summer of 2022 as described in Section 3.1.1.1 above. Prisons in Russia are overseen by the Federal Penitentiary Service, a Russian federal executive body.¹¹¹

There have also been several documented occasions where Wagner operatives used transport infrastructure related to Russia’s Ministry of Defense.¹¹²

President Putin even personally intervened following Belarus’s arrest of Wagner Group operatives during the 2020 presidential election campaign in Belarus, raising the issue at least twice in bilateral phone conversations with Belarus President Lukashenko.¹¹³

¹⁰⁹ Jack Margolin, Twitter, July 17, 2023, https://twitter.com/Jack_Mrgln/status/1681036854928318480?s=20.

¹¹⁰ David Axe, “Why Are Mercenaries Driving Russia’s Best T-90 Tanks?” *Forbes*, December 28, 2022, <https://www.forbes.com/sites/davidaxe/2022/12/28/why-are-mercenaries-driving-russias-best-t-90-tank/>.

¹¹¹ The Russian Government, “Federal Penitentiary Service,” <http://government.ru/en/department/100/>.

¹¹² CSIS, “Band of Brothers: The Wagner Group and the Russian State,” September 21, 2020, <https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state>.

¹¹³ *Ibid.*

Finally, multiple reports confirm that Wagner Group operatives are treated and rehabilitated in Russian military hospitals and that they have used passports sequentially issued by a special passport desk in Moscow that issues passports almost exclusively to people linked to Russia’s Ministry of Defense.¹¹⁴

3.1.2.4. Preliminary assessment on “responsible command”

In summary, some indicators of control between the Russian State and the Wagner Group in Ukraine do exist. There are notably signs of coordination in the military operations conducted by the Wagner Group to support Russia’s invasions of Ukraine in 2014 and 2022. Further, the Russian president has openly acknowledged that the activities of the Wagner Group have been “fully” ensured by Russia. However, the exact contours of how the Russian State exercises control over the activities of the Wagner Group remain somewhat undefined. This lack of detail, coupled with the imprecision of the definition of the requirement of “responsible command” in the case law, prevents a definitive finding as to whether the Wagner Group operates—or ever operated—under a command responsible to Russia in Ukraine.

3.2. Implications for the status of Wagner Group personnel

3.2.1. If the Wagner Group personnel are combatants...

If the Wagner Group forms part of the Russian armed forces, its personnel would be combatants. Upon capture, a member of the Wagner Group in Ukraine would become a prisoner of war, subject to this individual member having complied with the requirement of visibility under IHL (see Section 2.1.2.1 above).

If this specific member was wearing a uniform or a distinguishing emblem, which distinguished them from Ukrainian civilians, they would be entitled to prisoner-of-war status. That is, even though evidence suggests that members of the Wagner Group usually wear camouflage and a white skull emblem, the status of each

¹¹⁴ Ibid. Bellingcat, “Wagner Mercenaries With GRU-issued Passports: Validating SBU’s Allegation,” January 30, 2019, <https://www.bellingcat.com/news/uk-and-europe/2019/01/30/wagner-mercenaries-with-gru-issued-passports-validating-sbus-allegation>.

individual detained Wagner Group member should be subject to an *individual* determination.

As discussed in Section 2.1.2.2 above, Wagner Group personnel who are prisoners of war could not be prosecuted for domestic crimes under Ukrainian law. They could only be prosecuted for having committed international crimes.

3.2.2. If the Wagner Group personnel are civilians...

If the Wagner Group does not form part of the Russian armed forces, its personnel would be civilians. As civilians, detained Wagner Group personnel would not be entitled to prisoner-of-war status. Section 2.2.2 above analyzed the ability to prosecute civilians under IHL. Civilian personnel of the Wagner Group could be prosecuted for domestic crimes, including for having directly participated in hostilities. They could also be prosecuted for their individual responsibility in international crimes.

Detained personnel of the Wagner Group who meet an extremely narrow definition under IHL would be deemed mercenaries (see Section 2.2.3.1 above). Of note, the definition rules out any member of the Wagner Group who has Ukrainian or Russian nationality (see Section 2.2.3.1 above).¹¹⁵ Ukraine could be under additional obligations to prosecute these detained mercenaries (see Section 2.2.3.2). Mercenaries are civilians and, thus, do not become prisoners of war upon capture.

¹¹⁵ Robert Weeks, Jason Cowan, and Kyle Duehring, “Wagner and Its Convolved Legal Status,” *Santa Clara Business Law Chronicle*, April 27, 2023, <https://www.scbc-law.org/post/wagner-and-its-convoluted-legal-status> (“[S]ubsection (d) of Additional Protocol I, Art. 47 seems to largely disqualify many Wagner members as a “mercenary,” since a vast majority are of Russian nationality. Granted, there is a presence of foreign nationals who fight on behalf of Wagner, however, the vast majority of Wagner soldiers fighting in Ukraine are seemingly Russian”); Abhinand Siddharth Srinivas, “Regulation of The Wagner Group under International Humanitarian Law,” OSINT for Ukraine, March 13, 2023, <https://www.osintforukraine.com/wagner-and-ihl> (“in the case of Ukraine, members of Wagner may not be termed mercenaries because most have Russian nationality”); Kuzi Charamba and Frédéric Mégret, “Wagner, PMSCs, and the Limits of Transnational Governance,” *Lawfare*, April 13, 2023, <https://www.lawfaremedia.org/article/wagner-pmscs-and-limits-transnational-governance> (“the requirement that one not be “a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict” would, for example, exclude Wagner from the definition of mercenarism in Ukraine, albeit not in Africa”).

The only exception to this general rule is the case of civilians accompanying the armed forces. Unusually, these civilians are in fact entitled to prisoner-of-war status upon capture. The definition of civilians accompanying the armed forces rules out any individual directly taking part in military operations and hostilities (see Section 2.2.3.1 above). As described at length in Section 3.1.1.2 above, the Wagner Group has conducted large-scale military operations in Ukraine. Many of its members thus engage in hostilities.

However, if some Wagner Group personnel did not take part in military operations and hostilities and, instead, exclusively provided support functions to the Russian armed forces in Ukraine, for instance by acting as civilian contractors, it is possible that these individual Wagner Group personnel could be classified as civilians accompanying the armed forces. Again, this would be an individual assessment to be conducted on a case-by-case basis. Best practice under IHL would demand that these Wagner Group personnel carry identification, issued by Russia, identifying them as civilians accompanying the armed forces. However, as suggested in Section 2.2.4.1, even if they lacked identification, these specific members of the Wagner Group could still qualify as civilians accompanying the armed forces. As detained civilians accompanying the Russian armed forces, they would be entitled to prisoner-of-war status upon capture (see Section 2.2.4.2 above). By definition, these members of the Wagner Group must not have taken part in hostilities.

3.2.3. If the status of Wagner Group personnel is unclear...

As we have seen, open questions remain as to whether the Wagner Group forms part of Russia's armed forces, and therefore, whether personnel of the Wagner Group in Ukraine are either civilians or combatants. Under IHL, when the status of a detainee who has taken part in hostilities as a civilian or a combatant is unclear, this person should be treated as a prisoner of war until such time as a competent tribunal has determined their status (see Section 2.3 above). Further, a detainee who is not held as a prisoner of war can request that their status be decided by a judicial tribunal. Therefore, to the extent there are doubts as to the status of Wagner Group personnel, detained Wagner Group personnel should be treated as prisoners of war until a tribunal has determined their status.

4. Conclusions and Implications for Accountability

4.1. Status of Wagner Group under international humanitarian law

As we have seen, open questions remain as to whether the Wagner Group forms part of Russia’s armed forces. It may be impossible to make a definitive assessment at this juncture based solely on the open-source information available.¹¹⁶

Nevertheless, factors weigh in favor of finding that Wagner Group personnel should generally be treated as combatants (although subject to a case-by-case determination). The Wagner Group may meet the “**organized**” requirement, since it has demonstrated an ability to conduct large-scale and complex military operations, including in the strategic seizure of several cities in Ukraine. Its key military role in “important missions” has been expressly recognized and endorsed by the Russian Ministry of Defense.

The Wagner Group also has a high level of logistical coordination, evidenced by:

- Its large recruitment campaigns (including a coordinated strategy in recruiting convicts);
- Its key role in training separatist militias and Russian civilians;
- Its supply of sophisticated, specialized weapons and equipment; and
- Its distinctive uniforms that include green camouflage fatigues patched with the symbol of a white skull.

There also appears to be some level of military discipline among recruits. And the Wagner Group speaks with one voice in negotiating agreements whether with Russian and other foreign State representatives, including in negotiating the supply of munitions and equipment.

While the opaqueness of the Wagner Group’s structure makes it difficult to determine the specific outlines of its command structure, several reports conclude

¹¹⁶ This desk research was focused on English sources, although further research into Russian sources may provide additional evidence.

that the Wagner Group is well-organized and coordinated, with specific units reporting through a unified command, a leadership made up of a council of commanders, and certain rules according to which the Group is intended to operate. Further, the Wagner Group has the ability to give directions, orders, and communications through to its personnel.

It is possible, therefore, that the Wagner Group satisfied the “organized” requirement, at least prior to the June 2023 mutiny.

Whether the Wagner Group meets the “**responsible command**” requirement is more uncertain. Many experts argue that the Wagner Group is a “semi-State security” force. Several facts suggest that Russia has organized, coordinated, and planned the military actions of the Wagner Group in Ukraine:

- The Russian Ministry of Defense’s open acknowledgment of the Wagner Group’s role in capturing several Ukrainian cities;
- Joint operation of the Molkino military base;
- Consistent and repeated telephonic interactions between Prigozhin and Russian leadership; and
- Integration of the Wagner Group in the overall chain of command of the GRU.

Significantly, President Putin has expressly admitted that Russia has financed the Wagner Group. This admission could be significant to the issue of control (especially if the test of “overall control” governs as opposed to “effective control”) as well as attribution (further discussed below). According to one commentator:

Putin’s recent announcement is significant because it acknowledges for the first time the Wagner Group’s high degree of dependence on Russia. Putin stated that the Kremlin ‘fully funds’ and ‘fully supplies’ the PMC, thereby indicating that the Wagner Group is completely dependent on Russia for the conduct of its military operations.¹¹⁷

However, there are still few details publicly available on the exact contours of the Russian State’s exercise of control over the activities of the Wagner Group, which

¹¹⁷ Jennifer Maddocks, “Putin Admits to Funding the Wagner Group: Implications for Russia’s State Responsibility,” Lieber Institute at West Point, June 30, 2023, <https://lieber.westpoint.edu/putin-admits-funding-wagner-group-implications-russias-state-responsibility>.

complicates a definitive finding.¹¹⁸ Some authors have argued that the murkiness of the relationship between the Wagner Group and the Russian State allows Russia to claim plausible deniability.¹¹⁹

In addition to the limited publicly available information on Wagner Group's command structure, the definition of the "responsible command" requirement under IHL is unclear. While the "effective control" test may not be met and a court may prefer adopting a test similar to the "overall control" test, there is no relevant jurisprudence on this point.

Nevertheless, because the totality of the evidence leans more toward treating Wagner Group personnel as combatants and given the presumption under IHL that a person whose status is unclear is entitled to prisoner-of-war status subject to that status being determined by a judicial tribunal, it may be most appropriate to treat any Wagner Group personnel captured before July 2023 as combatants, subject to an individual determination as to each detained Wagner Group member.

¹¹⁸ See, e.g., Camilla Cooper, "Ukraine Symposium—A Wagner Group Fighter in Norway," Lieber Institute at West Point, February 1, 2023, <https://lieber.westpoint.edu/wagner-group-fighter-norway/> ("Although the Wagner Group is clearly using Russian military equipment and training facilities and it operates alongside Russia's regular armed forces in Ukraine, at this point, there is not enough information to reach a conclusion regarding the group's status. The challenge is that we may never know the exact nature of the connections between the Wagner Group and the Russian authorities, and in the meantime, cases like that unfolding in Norway will continue"); Robert Weeks, Jason Cowan, and Kyle Duehring, "Wagner and Its Convoluted Legal Status," *Santa Clara Business Law Chronicle*, April 27, 2023, <https://www.scbc-law.org/post/wagner-and-its-convoluted-legal-status> ("At this point, it is purely speculative that Wagner is operating under the control of Russia. The power structure within Wagner is far from transparent, making it difficult to ascertain whether Wagner is an autonomous entity or merely being operated by Putin as a way for Russia to avoid international scrutiny. Solid evidence which demonstrates the relationship between Wagner and Russian leaders is required in order to make the determination as to whether Wagner is directly controlled by Russia"); Abhinand Siddharth Srinivas, "Regulation of The Wagner Group under International Humanitarian Law," OSINT for Ukraine, March 13, 2023, <https://www.osintforukraine.com/wagner-and-ihl> ("categorising members of the Wagner group as either combatants or civilians is a complex task. This is because the nature, conduct and activities of such PMSCs often fall within the grey zone of international law, as rules and obligations regarding the PMSCs are yet to be developed. Therefore, due consideration should be given to the functions performed by the group and whether such operations can be attributed to Russia").

¹¹⁹ Cormac and Aldrich, "Grey is the new black: covert action and implausible deniability," 94 *International Affairs* (2018) 477-494.

4.2. Implications for individual criminal responsibility

As described above, if an individual detained Wagner Group member does in fact qualify as a combatant, in addition to being entitled to prisoner-of-war status, they could be prosecuted for the commission of alleged international crimes. There have been reports that Wagner Group personnel have committed numerous war crimes during the conflict, including the willful killing of civilians in Bucha (although other Russian paratrooper units may also be responsible for some abuses),¹²⁰ the targeting of Ukrainian prisoners of war¹²¹ and children.¹²² Individual fighters could be prosecuted for such crimes in Ukraine, before the International

¹²⁰ See, e.g., Brendan Cole, “Russia’s Wagner Group Soldiers Behind Bucha Killings, German Intel Claims,” *Newsweek*, June 4, 2022, <https://www.newsweek.com/der-spiegel-russia-ukraine-troops-bucha-wagner-putin-1695974>; Sean McFate, “The Mercenaries Behind the Bucha Massacre,” *Wall Street Journal*, April 12, 2022, <https://www.wsj.com/articles/mercenaries-behind-bucha-massacre-russia-ukraine-putin-attack-terror-brutality-wagner-group-moscow-geneva-convention-war-crimes-atrocities-11649797041>; Lorenzo Tondo, Isobel Koshiw, Emma Graham-Harrison, and Pjotr Sauer, “Alleged Wagner Group fighters accused of murdering civilians in Ukraine,” *Guardian*, May 25, 2022, <https://www.theguardian.com/world/2022/may/25/wagner-group-fighters-accused-murdering-civilians-ukraine-war-crimes-belarus>; *but cf.* Human Rights Watch, “Ukraine: Russian Forces’ Trail of Death in Bucha,” April 21, 2022, <https://www.hrw.org/news/2022/04/21/ukraine-russian-forces-trail-death-bucha>; *New York Times*, “Caught on Camera, Traced by Phone: The Russian Military Unit That Killed Dozens in Bucha,” December 23, 2022, <https://www.nytimes.com/2022/12/22/video/russia-ukraine-bucha-massacre-takeaways.html> (concluding that “the perpetrators of the massacre along Yablunska Street were Russian paratroopers from the 234th Air Assault Regiment led by Lt. Col. Artyom Gorodilov”).

¹²¹ Luke Harding, “Blast that killed Ukraine PoWs was Kremlin operation, Kyiv claims,” *Guardian*, August 3, 2022, <https://www.theguardian.com/world/2022/aug/03/blast-that-killed-ukraine-pows-was-kremlin-operation-kyiv-claims>; Pjotr Sauer, “Wagner mercenary admits ‘tossing grenades’ at injured Ukrainian PoWs,” *Guardian*, April 18, 2023, <https://www.theguardian.com/world/2023/apr/18/wagner-mercenary-admits-tossing-grenades-at-injured-ukrainian-pows>.

¹²² Veronika Melkozerova, “We killed Ukrainian children, ex-Wagner soldiers say in apparent confession,” *Politico*, April 18, 2023, <https://www.politico.eu/article/former-wagner-group-commanders-azmat-uldarov-alexey-savichev-confess-murder-ukraine-civilians-including-children>.

Criminal Court (ICC) or in another State with jurisdiction, for instance under the principles of universal jurisdiction or active personality.¹²³

States are under an obligation to search for persons alleged to have committed or ordered to have committed grave breaches of the Geneva Conventions and to prosecute or extradite them (Art. 129, Third Geneva Convention).¹²⁴ As such, if a Wagner Group member alleged to have committed international crimes were found in a State with jurisdiction over this individual, the State ought to prosecute the suspect for those alleged crimes. If this State did not have jurisdiction over the individual, it would be required to extradite that individual upon a request made by another country.

It is generally accepted that military leaders who order such crimes or allow them to be perpetrated by their subordinates in the chain of command can be held to account based on the doctrine of command responsibility.¹²⁵ However, where the personnel of private military companies commit crimes under international law, a question remains as to whether a superior within the company could be prosecuted under the principle of command responsibility in international criminal law if they knew or should have known that their subordinates were committing crimes and did not prevent them, and they had effective control over company personnel.¹²⁶

¹²³ See, generally, Winston Williams and Jennifer Maddocks, “Ukraine Symposium–The Wagner Group: Status and Accountability”, Lieber Institute at West Point, February 23, 2023, <https://lieber.westpoint.edu/wagner-group-status-accountability>; Abhinand Siddharth Srinivas, “Regulation of The Wagner Group under International Humanitarian Law,” OSINT for Ukraine, March 13, 2023, <https://www.osintforukraine.com/wagner-and-ihl>.

¹²⁴ See also, among others, Art. VI, Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948; Art. 7, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984; Art. VII(1), Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, January 13, 1993; Art. 28, Convention for the Protection of Cultural Property in the Event of Armed Conflict.

¹²⁵ Winston Williams and Jennifer Maddocks, “Ukraine Symposium–The Wagner Group: Status and Accountability,” Lieber Institute at West Point, February 23, 2023, <https://lieber.westpoint.edu/wagner-group-status-accountability>.

¹²⁶ See, e.g., the discussion in L. Doswald-Beck, then deputy head of the ICRC Legal Division, in “Private military companies under international humanitarian law,” in Simon Chesterman and Chia Lehnhardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007), pp. 22-23.

Whether a Russian military commander could be held responsible for ordering crimes committed by a member of a private military company is also complicated by the ambiguity of plausible deniability. A gap persists in international criminal law where commanders use implicit means to communicate encouragement or toleration for war crimes by subordinates or where commanders' carelessness or incompetence put the lives of civilians at risk.¹²⁷ As noted by one author, "[s]ome paramilitary units act as the violent arm of governments, deployed covertly, to pursue the states' political goals through illegitimate means while at the same time shielding the state of any responsibility for crimes the units commit."¹²⁸ Plausible deniability ultimately works to shield high-ranking officials (including government officials in the context of private military companies) from criminal responsibility, stemming from the covert nature of the ties of high officials to paramilitary units.¹²⁹ Looking at the jurisprudence of the ICTY, the author notes that no high-level Serbian official was ever convicted for the violence committed by paramilitaries in Croatia and Bosnia, with judges holding that defendants did not "specifically direct" actions to commit crimes, suggesting that plausible deniability worked as intended.¹³⁰

Other modes of liability, including complicity, may also be applicable, but they are beyond the scope of this paper.

4.3. Implications for state responsibility

A separate question is whether Russia could bear State responsibility for the Wagner Group's conduct in Ukraine. The issue turns on the complex analysis of attribution under the international law of State responsibility, which is separate from IHL.

¹²⁷ Aaron Fellmeth and Emily Crawford, "'Reasons to know' in the international law of command responsibility," *International Review of the Red Cross*, IRRC No. 919, June 2022, <http://international-review.icrc.org/articles/reason-to-know-in-the-international-law-of-command-responsibility-919>.

¹²⁸ I. Vukušić, "Plausible Deniability: The Challenges in Prosecuting Paramilitary Violence in the Former Yugoslavia," in Smeulers, Weerdesteijn, and Holá (eds) *Perpetrators of International Crimes: Theories, Methods, and Evidence* (Oxford, 2019).

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

There cannot be attribution based on domestic law here (that is, the formal legal relationship between the Wagner Group and Russia), given that Russian law still does not authorize or recognize the activities of private military companies, such as the Wagner Group, nor has it officially empowered Wagner to perform government functions (even if it arguably undertakes combat functions, possibly on Russia's behalf, which are governmental in character).¹³¹

The strategy of plausible deniability further enables Russia to increase its distance from the conduct of Wagner fighters. The use of proxies allows states to skirt international responsibility, particularly in the context of illegal use of force.¹³²

The question thus turns on the factual relationship between Russia and the Wagner Group, and whether fighters responsible for specific violations acted under Russia's instructions, direction, or control (Article 8, International Law Commission's Draft Articles on State Responsibility). This is the "effective control" test described above and adopted by the ICJ. The "effective control" test is more stringent than the test of "overall control" articulated by the ICTY, as discussed in Section 2.1.1.3, which could govern the definition of the armed forces under IHL.¹³³ Some have found that there may be sufficient evidence that the "overall control" test would be satisfied.¹³⁴

¹³¹ See, generally, Winston Williams and Jennifer Maddocks, "Ukraine Symposium—The Wagner Group: Status and Accountability," Lieber Institute at West Point, February 23, 2023, <https://lieber.westpoint.edu/wagner-group-status-accountability>.

¹³² Kuzi Charamba and Frédéric Mégret, "Wagner, PMSCs, and the Limits of Transnational Governance," *Lawfare*, April 13, 2023, <https://www.lawfaremedia.org/article/wagner-pmscs-and-limits-transnational-governance>.

¹³³ See also, Jennifer Maddocks, "Does Russia Exercise Overall Control over the Wagner Group? Expert Q&A from Stockton Center's Russia-Ukraine Conference," *Just Security*, April 5, 2023, <https://www.justsecurity.org/85819/does-russia-exercise-overall-control-over-the-wagner-group-expert-qa-from-stockton-centers-russia-ukraine-conference>. As highlighted in the article, the ICRC and the ICC have also approved of the lower threshold.

¹³⁴ *Ibid*; Abhinand Siddharth Srinivas, "Regulation of The Wagner Group under International Humanitarian Law," OSINT for Ukraine, March 13, 2023, <https://www.osintforukraine.com/wagner-and-ihl> ("In the case of Wagner, sufficient evidence exists to establish that Russia has overall control over the activities of Wagner"); Kuzi Charamba and Frédéric Mégret, "Wagner, PMSCs, and the Limits of Transnational Governance," *Lawfare*, April 13, 2023, <https://www.lawfaremedia.org/article/wagner-pmscs-and-limits-transnational-governance> ("In Ukraine, ... there is certainly an argument that the

One particular challenge in the attribution analysis is “the lack of evidence to prove that Russia’s control extended to tactical-level decisions on the battlefield.”¹³⁵ As discussed in Section 2.1.1.3 above, satisfying the “effective control” test would require showing that Russia directed or enforced the perpetration of human rights violations and international crimes by Wagner Group personnel.

The most relevant and recent factual development would seem to be President Putin’s admission that Russia has funded the Wagner Group. This may still fall short of a finding that the Wagner Group is a *de facto* state organ. Some observers, however, have argued the admission could make it easier for a court to conclude that Russia authorized the Wagner Group to perform governmental functions or, at a minimum, that the Wagner Group’s conduct in violation of international law was performed under Russia’s instruction, direction or control, either of which might lead to attribution under the law of state responsibility.¹³⁶

To the extent state responsibility were found, it would create an obligation on Russia to cease any harmful conduct by the Wagner Group and to make reparations for any damage or injury caused.¹³⁷

4.4. Implications of the June 2023 mutiny

Questions over the relationship between the Russian State and the Wagner Group intensified in the run-up to and aftermath of events in June 2023. The June 2023 mutiny has further complicated what was already an intentionally opaque relationship between the Wagner Group and the Russian State apparatus.

Wagner Group is ultimately under the *de facto* “effective control” of the Russian state, as per the rules of international attribution of responsibility”)

¹³⁵ Jennifer Maddocks, “Does Russia Exercise Overall Control over the Wagner Group? Expert Q&A from Stockton Center’s Russia-Ukraine Conference,” *Just Security*, April 5, 2023, <https://www.justsecurity.org/85819/does-russia-exercise-overall-control-over-the-wagner-group-expert-qa-from-stockton-centers-russia-ukraine-conference>.

¹³⁶ Jennifer Maddocks, “Putin Admits to Funding the Wagner Group: Implications for Russia’s State Responsibility,” Lieber Institute at West Point, June 30, 2023, <https://lieber.westpoint.edu/putin-admits-funding-wagner-group-implications-russias-state-responsibility>.

¹³⁷ *Ibid.*

On June 10, 2023, the Russian Ministry of Defense ordered that all “volunteer formations” conclude contracts with the Ministry by July 1, 2023.¹³⁸ This could have suggested the beginning of a formal incorporation of the Wagner Group into Russia’s armed forces. Putin reportedly met with Prigozhin and the Wagner Group’s “council of commanders” to discuss the possibility of entering into formal contracts. Putin stated he had offered them several “employment options,” including continued service under the command of a senior Wagner Group commander known by his nom de guerre Sedoi, Grey Hair (real name, Andrey Troshev), but the Wagner Group declined.¹³⁹ However, this offer of incorporation triggered what was described as a “rebellion” or “mutiny” by the Wagner Group in Russia on June 23–24.¹⁴⁰ By mid-July, according to President Putin, Prigozhin had rejected an offer for his fighters to serve as a unit in Russia’s army.¹⁴¹

This “rebellion” cast doubt on the extent of control currently exercised by the Russian State over the Wagner Group. The reported death of Prigozhin and other senior Wagner Group leaders has also led to many questions on the Wagner Group’s role in the future.¹⁴² Events are still unfolding, and it is too early to determinatively assess the implications of the rebellion or Prigozhin’s reported death on the relationship between the Wagner Group and Russian armed forces. Redut and other private military companies close to the Kremlin are moving to recruit Wagner Group soldiers who fought in Ukraine, thus acting as a recruitment vehicle for the Ministry of Defense to attract those would not sign

¹³⁸ Ministry of Defense of the Russian Federation, “Deputy Minister of Defense of Russia Nikolai Pankov held a conference call on recruiting contract servicemen for the RF Armed Forces,” June 10, 2023, https://function.mil.ru/news_page/person/more.htm?id=12470053@egNews.

¹³⁹ Jaroslav Lukiv, “Wagner head Prigozhin rejected offer to join Russia’s army–Putin,” BBC, July 14, 2023, <https://www.bbc.com/news/world-europe-66194549>.

¹⁴⁰ ACLED, “Moving out of the shadows: Shifts in Wagner Group operations around the world,” August 2023, p. 21, https://acleddata.com/acleddatanew/wp-content/uploads/2023/08/ACLED_Report_Shifts-in-Wagner-Group-Operations-Around-the-World_2023.pdf.

¹⁴¹ Jaroslav Lukiv, “Wagner head Prigozhin rejected offer to join Russia’s army–Putin”, BBC, July 14, 2023, <https://www.bbc.com/news/world-europe-66194549>.

¹⁴² Catrina Doxsee, “What Does the Death of Yevgeny Prigozhin Mean for Russia and the Wagner Group?” CSIS, August 23, 2023, <https://www.csis.org/analysis/what-does-death-yevgeny-prigozhin-mean-russia-and-wagner-group>.

contracts with the regular army.¹⁴³ There are reports from a senior Ukrainian military official that Wagner Group fighters are back on the front line in Ukraine.¹⁴⁴

As the situation continues to evolve, the Russian State appears to have engaged in a concerted effort to distance itself from the Wagner Group, which would suggest that many of the factual elements described above may no longer apply post-mutiny. This could impact whether the Wagner Group is seen to be under Russia’s “responsible command” to Russia, and thus, whether personnel of the Wagner Group qualify as combatants under IHL going forward. This could also impact the issue of State responsibility.

As stated earlier, the analysis in this paper primarily focuses on the Wagner Group’s relationship with the Russian armed forces before June 2023. The mutiny or Prigozhin’s reported death would not affect the analysis on the status of Wagner Group personnel in relation to any crimes allegedly committed by them prior to June 2023. Determinations as to the relevant level of control will need to be made based on the nature of the relationship surrounding the conduct at issue at the relevant time.¹⁴⁵

The very fact that there has been an effort to unwind whatever such relationship may have previously existed seems to confirm how close the relationship between the Wagner Group and Russia may have been *before* the mutiny.

If anything, any stated intention to “create” a separation between the Wagner Group and Russia—or a refusal to formally merge them, as in Prigozhin’s statement that he would not sign any contracts with the Ministry of Defense, despite the June order—suggests that the relationship was in fact previously quite close. Prigozhin claimed that the Wagner Group was already “organically” integrated into the overall Russian system, “with experienced unit commanders

¹⁴³ Matthew Luxmoore, “Russian Private Military Companies Move to Take Over Wagner Fighters,” *Wall Street Journal*, September 5, 2023, <https://www.wsj.com/world/russia/russian-private-military-companies-move-to-take-over-wagner-fighters-a568f938>.

¹⁴⁴ Veronika Melkozerova, “Russia’s Wagner troops are back on the battlefield, Ukraine says,” *Politico*, September 27, 2023, <https://www.politico.eu/article/russian-wagner-group-back-war-front-in-ukraine-kyiv-forces-say>.

¹⁴⁵ Jennifer Maddocks, “Putin Admits to Funding the Wagner Group: Implications for Russia’s State Responsibility,” Lieber Institute at West Point, June 30, 2023, <https://lieber.westpoint.edu/putin-admits-funding-wagner-group-implications-russias-state-responsibility>.

from his forces coordinating with Russian generals in a highly effective structure.” He contended that this efficient command structure would be damaged if Wagner Group forces were required to report to Sergei Shoigu, the Russian Minister of Defense, asserting that “Shoigu cannot properly manage military formations.”¹⁴⁶

As discussed in Section 3.1.1.1, a document leaked after the June 2023 mutiny, purporting to be the Wagner Group’s founding document, outlines the role of Wagner Group leaders, the rules the Group was meant to follow, and confirms that the Group’s founding principle was to fight Russia’s war in Ukraine.

President Putin also admitted that Russia has funded the Wagner Group in the wake of the June 2023 mutiny, which would be an important factor for a court to consider in deciding whether the Wagner Group was under Russia’s control (effective or overall).

In sum, regardless of the shape of this relationship moving forward, key developments surrounding the mutiny—namely President Putin’s admission that Russia funded the Wagner Group and Prigozhin’s claims of coordination and overlap in command structures—could strengthen the case for responsible command during earlier actions. The current effort to disentangle the prior opaque relationship might only confirm its previous existence.

¹⁴⁶ Jennifer Maddocks, “Contracts Between the Wagner Group and Russia’s Defense Ministry: International Law Implications,” Lieber Institute at West Point, June 16, 2023, <https://lieber.westpoint.edu/contracts-wagner-group-russias-defense-ministry-international-law-implications> (citing Paul Sonne, “Wagner Founder Rebuffs Order Over Fight Contracts with Russian Military,” *New York Times*, June 11, 2023, <https://www.nytimes.com/2023/06/11/world/europe/wagner-russia-defense-ministry-contract.html>).

5. Recommendations

Based on the above analysis, and given what the facts and law currently suggest, the Open Society Justice Initiative encourages all states with potential jurisdiction over the Wagner Group's crimes in Ukraine, as well as the ICC or any special tribunal still to be established with appropriate jurisdiction, to conduct further examination of the legal and factual issues presented in this paper. Such an examination will help provide a more definitive conclusion as to the applicability of IHL to the Wagner Group's crimes in Ukraine.

Depending on that further examination, states, the ICC, and any special tribunals still to be established with appropriate jurisdiction should:

- Prosecute those Wagner Group detainees most responsible for the commission of international crimes in Ukraine; and
- Pursue any appropriate legal options to determine state responsibility for the conduct of Wagner Group personnel in Ukraine.



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