
De-Privatize War: The Wagner Group and the War in Ukraine

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I. INTRODUCTION: THE EVOLUTION FROM MERCENARIES TO PRIVATE MILITARY COMPANIES

Despite the 2014 annexation of Crimea, the world was shocked when Russia’s military launched an assault on Ukraine.¹ For the first time since World War II, two European nations were at war over claims to territory. With new wars come new ways of fighting; World War I

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1. See Garret M. Graff, “*Something Was Badly Wrong*”: *When Washington Realized Russia Was Actually Invading Ukraine*, POLITICO (Feb. 24, 2003), <https://www.politico.com/news/magazine/2023/02/24/russia-ukraine-war-oral-history-00083757>.

brought chemical warfare,² and World War II brought the atom bomb.³ The use of mercenaries is as old as warfare itself. What is novel, however, is the way in which mercenaries have been defined and employed since the Cold War.⁴ The modern era has seen the rise of so-called “Private Military Companies” (PMCs),⁵ who operate alongside state militaries in all aspects of warfare.⁶ The rise of the use of PMCs since the Cold War has coincided with efforts to outlaw the use of mercenaries internationally.⁷

The decolonization of Africa in the 1960s and 1970s created a market for mercenaries as Western powers hoped to exert control over financial assets as they handed political control over to nascent African nations.⁸ The continent was soon ravaged by non-state actors who operated outside of any formal or legal framework. These groups were often hired by minority governments that wished to retain military control over the majority-black African citizens of their countries.⁹ Together, the former European powers and the European descendants on the continent could afford to hire traditional mercenary-style groups to protect their interests.¹⁰ This came at great cost to the people of newly-formed African countries as they were responsible for many of the worst atrocities on the continent in the decolonization period.¹¹ This period both birthed the movement to outlaw the use of mercenaries on an international level and the evolution of the motivations for those participating in mercenary

2. CWC Review Conference, *Chemical Weapons*, U.N. OFF. FOR DISARMAMENT AFF., <https://www.un.org/disarmament/wmd/chemical/#:~:text=The%20modern%20use%20of%20chemical,to%20cause%20significant%20battlefield%20casualties>.

3. *Nuclear Weapons*, U.N. OFF. FOR DISARMAMENT AFF., <https://www.un.org/disarmament/wmd/nuclear/>.

4. Matthew Kincade II, *The Private Military Company Complex in Central and Southern Africa: The Problematic Application of International Humanitarian Law*, 12 WASH. U. GLOBAL STUD. L. REV. 205, 205 (2013).

5. *See id.*

6. CORINNA SEIBERTH, PRIVATE MILITARY AND SECURITY COMPANIES IN INTERNATIONAL LAW, 47 (2014).

7. *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47, 8 June 1977. [hereinafter *Protocol I*].

8. ANGELA MCINTYRE & TAYA WEISS, FROM MERCENARIES TO MARKET, 67 (Simon Chesterman & Chia Lehnardt, eds., 2007).

9. MERCENARIES AND LAW, 9 (M.P.W. Brouwers ed., 2d ed. 2013) [hereinafter *Brouwers*].

10. *See* Robin Moore, *The Soldiers of Fortune* N.Y. TIMES (July 28, 1978), <https://www.nytimes.com/1978/07/28/archives/the-soldiers-of-fortune.html>.

11. *See id.*

groups.¹² In an effort to attack the issue on an international level, the Organization of African Unity created the *Convention for the Elimination of Mercenarism in Africa* treaty.¹³ As Africa changed, the motivations of mercenaries shifted from purely economic purposes toward political aspirations.¹⁴ The role of mercenary groups began to shift as well, they responded to legal challenges on a changing international stage by refitting themselves as PMCs.¹⁵

Despite attempts by the international community to end the use of mercenaries, these non-state actors instead adapted to the times and to the new legal landscape as they developed into modern-day PMCs. Instead of being hired by small groups in developing countries, today PMCs are often utilized by global powers to intervene on a local level or to support their own troops.¹⁶ Blackwater, in particular, raised the issue of PMCs as mercenaries in the eyes of the world.¹⁷ Open questions remain as to the ability for states or international organizations to provide adequate oversight for such an industry. Even the United Nations (UN) has at least considered employing PMCs in different capacities.¹⁸ The period following the Cold War saw a greater use of PMCs in conflict areas by supervisory powers. Russia engaged in the use of PMCs that looked more like traditional mercenaries in the Yugoslav conflicts.¹⁹ The United States has outsourced many of the Iraq and Afghanistan war duties to PMCs leading to concerns about the effects of this outsourcing on the American

12. *See id.*

13. Organization of African Unity, Convention for the Elimination of Mercenarism in Africa, preamble, July 3, 1977, 16 I.L.M. 1384 (“[Considering] the grave threat which the activities of mercenaries present to the independence, sovereignty, territorial integrity and harmonious development of Member States of the Organization of African Unity . . . [we have determined] to take all necessary measures to eliminate from the African continent the scourge that mercenarism represents.”) [hereinafter *OAU Convention*].

14. Moore, *supra* note 10.

15. *See* McIntyre, *supra* note 8, at 69.

16. *See* Peter W. Singer, *The Dark Truth About Blackwater*, BROOKINGS (Oct. 2, 2007), <https://www.brookings.edu/articles/the-dark-truth-about-blackwater/> (The United States hired the firm Blackwater during the Iraq war leading to multiple investigations into the firm and the United States’s role in their deployment.)

17. *See id.*

18. Press Release, Secretary General, Secretary-General Reflects on ‘Intervention’ in Thirty-Fifth Annual Ditchley Foundation Lecture, U.N. Press Release SG/SM/6613 8 (June 26, 1998) (Secretary-General Kofi Annan considers using private security firms in refugee camps in Goma, “But the world may not be ready to privatize peace.”).

19. Bajina Basta, *Cold Cash Fuels Russian Fighting Spirit in Bosnia: Mercenaries*, L.A. TIMES (Apr. 12, 1993), <https://www.latimes.com/archives/la-xpm-1993-04-12-mn-22063-story.html>.

military's capabilities.²⁰ The reliance on such groups by the United States in foreign spheres tripled from 2009 to 2016.²¹ In 2016, there were three PMCs deployed for every American soldier.²² China, too, has recognized the value of PMCs to their security goals in the twenty-first century.²³ Primarily, China uses PMCs on the African continent to defend its native workers, who are engaged in infrastructure projects.²⁴ Moreover, because of the one-party system in China, the government maintains a stake in any Chinese PMC, making them more akin to traditional military. Whereas Russia's use of PMCs on the African continent looks more similar to traditional mercenary groups.²⁵ Overall, the use of mercenaries, the attempts to outlaw them, and their evolution into modern PMCs have laid the foundation for Russia's employment of the Wagner Group in the war in Ukraine and in other conflict areas around the world. The adaptation of mercenary groups at the end of the last century and the use of PMCs in the current century leave open questions as to how to regulate them and how to protect from the same problems that existed throughout the post-colonial era in Africa. It is under the cover of those open questions in which the Wagner Group operates today.

A. *Mercenarism in the War in Ukraine: The Wagner Group*

The Wagner Group has earned the designation of transnational criminal organization by the U.S. Treasury in 2023, but that is not where it began. Unraveling the nature of the Wagner Group is difficult because of Russia's tendency toward obfuscation on military issues.²⁶ In fact, true PMCs are illegal under Russian law, but the Wagner Group and others operate in legal loopholes with the blessing of the autocratic rule of the Kremlin.²⁷ The Russian State retains complete control over any issues of

20. Sean McFate, *America's Addiction to Mercenaries*, ATLANTIC (Aug. 12, 2016), <https://www.theatlantic.com/international/archive/2016/08/iraq-afghanistan-contractor-pentagon-obama/495731/>.

21. *Id.*

22. *Id.*

23. Kate Bartlett, *How Chinese Private Security Companies in Africa Differ from Russia's*, VOICE OF AM. (Mar. 31, 2023), <https://www.voanews.com/a/how-chinese-private-security-companies-in-africa-differ-from-russia-s-/7030946.html>.

24. *Id.*

25. *Id.*

26. See András Rácz, *Band of Brothers: The Wagner Group and the Russian State*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 21, 2020), <https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state>.

27. *Id.*

military or security province.²⁸ Notwithstanding, the Wagner Group has operated with license from the Kremlin since 2014, when it assisted in the annexation of Crimea.²⁹ Its true beginnings were as another PMC, the Slavonic Corps.³⁰ The Slavonic Corps were used by Russia in the Syrian civil war, but because of poor supplies and a massive defeat in Syria, the group was disbanded and restyled as the Wagner Group.³¹ The Wagner Group was created by Dmitry Utkin, and it espouses strict pro-Russian and far-right views.³² Much like the shift of motivations in mercenaries in post-colonial Africa, the Wagner Group is driven by ideology as much as profit.³³ Control of the group has also shifted to the Kremlin-friendly oligarch Yevgeny Prigozhin.³⁴

Under Prigozhin, the Wagner Group has not seen the failures of its predecessor organization. Rather, it has been extremely effective.³⁵ Headlines about the ongoing war in Ukraine often credit the Wagner Group for Russian progress instead of crediting the Russian military.³⁶ The utilization of the Wagner Group in the war in Ukraine is novel in the sheer size of influence the Wagner Group has over operations in Ukraine. As its influence on the war effort has grown, so have questions about Prigozhin's aspirations within Russia.³⁷ Putin has succeeded in snuffing out possible challengers to his power from within the military, but as he has leaned on the Wagner Group in the war effort, he has raised Prigozhin's profile as a likely successor or even challenger.³⁸ As political tensions have risen between Prigozhin and Putin, the Kremlin has been turning away from its dependence on the Wagner Group and relying more

28. RUSSIAN FEDERATION CONSTITUTION art. 114(e).

29. Monir Ghaedi, *Who Are Russia's Mercenary Wagner Group?* DEUTSCHE WELLE (Jan. 17, 2023).

30. Rácz, *supra* note 26.

31. *Id.*

32. Liam James, *Who Are the Wagner Mercenaries and Why Are They So Involved in Ukraine?* INDEPENDENT (Mar. 7, 2023), <https://www.independent.co.uk/news/world/europe/wagner-group-russia-ukraine-war-b2295482.html>.

33. *See id.*

34. *See* Ghaedi, *supra* note 29.

35. *See* Lidia Kelly, *Ukraine Says It Repels Attack around Blahodatne, Wagner Claims Control*, REUTERS (Jan. 29, 2023), <https://www.reuters.com/world/europe/ukraine-says-repels-attack-around-blahodatne-while-russias-wagner-claims-control-2023-01-29/>.

36. Guy Faulconbridge, *Kremlin Denies Conflict Between Wagner and Defence Ministry*, REUTERS (Jan. 16, 2023), <https://www.reuters.com/world/europe/kremlin-denies-conflict-between-wagner-defence-ministry-2023-01-16/> (The Kremlin and the Wagner Group argue over who should be credited with battlefield successes).

37. Mikhail Zygar, *The Man Who May Challenge Putin for Power*, N.Y. TIMES (Jan. 26, 2023), <https://www.nytimes.com/2023/01/26/opinion/russia-putin-ukraine-wagner.html>.

38. *Id.*

heavily on its own military.³⁹ Those in the world who see Putin as a bad actor ought not take any solace in the possibility of Prigozhin as his successor. Prigozhin's utilization of force in the Wagner Group has been successful, if success is measured by prominence, obtaining military objectives, and raising his own profile. However, Prigozhin's tactics to bolster the Wagner Group and his own profile in the world have come at a heavy cost to human rights and humanitarian law. Prigozhin has been the target of sanctions,⁴⁰ and the world has wondered at how to approach a quasi-mercenary, quasi-PMC group that is responsible for human rights transgressions on and off the battlefield.⁴¹

Among the Wagner Group's greatest successes is its recruitment.⁴² The Wagner Group has expanded its ranks to nearly fifty-thousands individuals over the course of the war in Ukraine.⁴³ Their aggressive battlefield tactics are echoed in their recruitment strategies. Typically, PMCs employ former soldiers.⁴⁴ Prigozhin's innovation has been to recruit broadly in the Russian public and with a special attention to prisoners from within Russia⁴⁵ and Belarus.⁴⁶ Recruitment has been as far-reaching as from prisons within the Central African Republic.⁴⁷ Prigozhin offers prisoners commutations of their sentences, cash

39. See *What is Russia's Wagner Group of Mercenaries in Ukraine?* BBC NEWS (Jan. 23, 2023), <https://www.bbc.com/news/world-60947877>.

40. Press Release, Sec'y of State Antony J. Blinken, U.S. Embassy & Consulates in Russ., *Countering the Wagner Group and Degrading Russia's War Efforts in Ukraine* (Jan. 26, 2023), <https://ru.usembassy.gov/countering-the-wagner-group-and-degrading-russias-war-efforts-in-ukraine/>.

41. Frédéric Koller, *Humanitarians Mull Over How to Deal with Wagner*, GENEVA SOLUTIONS (Mar. 7, 2023), <https://genevasolutions.news/peace-humanitarian/humanitarians-mull-over-how-to-deal-with-wagner>.

42. Jack Dutton, *Wagner Group Numbers Swell as Prigozhin Becomes Problem for Putin*, NEWSWEEK (Jan. 20, 2023), <https://www.newsweek.com/wagner-group-numbers-swell-prigozhin-becomes-problem-putin-1775231>.

43. *Id.*

44. See Emine Saner, *The Return of the Dogs of War: What's it Like to Be a Soldier for Hire?*, GUARDIAN (Feb. 6, 2016), <https://www.theguardian.com/uk-news/2016/feb/06/the-return-of-the-dogs-of-war-whats-it-like-to-be-a-soldier-for-hire>.

45. Simon Ostrovsky, *From Prison to the Frontlines: Thousands of Russian Convicts Sent to Fight in Ukraine*, PBS NEWS HOUR (Mar. 3, 2023), <https://www.pbs.org/newshour/show/from-prison-to-the-frontlines-thousands-of-russian-convicts-sent-to-fight-in-ukraine>.

46. Isabel Van Brugen, *Russia's Wagner Group Resorting to Recruiting Prisoners from Belarus*, NEWSWEEK (Jan. 3, 2023), <https://www.newsweek.com/russia-wagner-group-recruiting-prisoners-belarus-war-1770932> (escapees from a Wagner Group training facility in the Donbas are from Belarus, Kyrgyzstan, Uzbekistan, and Russia).

47. Philip Obaji Jr., *Putin's Prison Recruiting Scheme Takes a Big, Desperate Turn*, DAILY BEAST (Nov. 29, 2022), <https://www.thedailybeast.com/wagner-group-accused-of-recruiting-prisoners-from-the-central-african-republic-for-russias-war-in-ukraine>.

payments, and release from prison in exchange for serving in the Wagner Group in Ukraine.⁴⁸ Prigozhin, and Putin by proxy, have made good on the promise of commutation for those who have been able to survive the onslaught of the war in Ukraine.⁴⁹ In a press release on the practice of prisoner recruitment by the Wagner Group, the UN Working Group on the use of mercenaries questions the legitimacy of recruiting in prison, the use of intimidation, the impact on the guaranteed right to life, and the treatment of the recruits when they are on the battleground.⁵⁰

II. MERCENARIES, PMCs, OR PRIVATE SECURITY COMPANIES?

Legal consequences for mercenaries are obfuscated by the difficulty in defining mercenaries under international law, which is discussed later. Even more convoluted are the distinctions made between mercenaries, PMCs, and PSCs.⁵¹ PSCs are generally those that provide security during conflicts for private interests.⁵² PSCs traditionally were not involved with actual combat (and therefore would elude the Protocol I factor of actual participation) but only provided defensive protection.⁵³ PMCs, however, evolved to include a supportive role for militaries involved in conflicts (however when comprised of nationals of participating states also elude Protocol I).⁵⁴ Further, both PSCs and PMCs market themselves in ways that shy away from any mention of mercenarism.⁵⁵ The distinctions between PSCs and PMCs unravel once combat is engaged.⁵⁶ Both are typically armed (presumably for defense of themselves and that which is

48. Caitlin McFall, *Russia's Wagner Chief Frees First Round of Convicts Who Traded Jail Time for War in Ukraine*, FOX NEWS (Jan. 5, 2023), <https://www.foxnews.com/world/russias-wagner-chief-frees-first-round-convicts-traded-jail-time-war-ukraine> (Upon release Prigozhin joked with the surviving recruits “Don’t booze too much, don’t take drugs, don’t rape women”).

49. *Id.*

50. Press Release, Working Group on the use of mercenaries, Russ. Fed.: UN Experts Alarmed by Recruitment of Prisoners by “Wagner Group,” (Mar. 10, 2023), <https://www.ohchr.org/en/press-releases/2023/03/russian-federation-un-experts-alarmed-recruitment-prisoners-wagner-group#:~:text=They%20said%20the%20Wagner%20Group,out%20through%20threats%20or%20intimidation.>

51. KEVIN A. O'BRIEN, *What Should and What Should Not Be Regulated?*, FROM MERCENARIES TO MARKET 29, 34 (Simon Chesterman & Chia Lehnardt eds., 2007).

52. See Seiberth, *supra* note 6, at 38.

53. *Id.*

54. *Id.*

55. Joanna Brewis & Richard Godfrey, *'Never Call Me a Mercenary': Identity Work, Stigma Management and the Private Security Contractor*, 25 ORGANIZATION 335, 335 (2018).

56. Hin-Yan Liu, *Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company*, 15 J. CONFLICT & SEC. L. 141, 142-143 (2010).

to be secured against the conflict).⁵⁷ Due to the corporate nature of PSCs and PMCs in modern warfare, the difference is often one of branding only and gives rise to no substantive difference.⁵⁸ Given that the distinctions fade from day-to-day, contract-to-contract, and conflict-to-conflict, for the purposes of this article, both will be referred to as PMCs.

III. MERCENARIES UNDER INTERNATIONAL HUMANITARIAN LAW

Mercenarism has taken many forms over the centuries, from pirates on the high seas⁵⁹ to hired companies of foreigners in the famous battles of Ancient Greece.⁶⁰ The modern era has birthed new versions of this ancient tradition and new attempts to regulate the innovations. Attempts to regulate the modern innovations on mercenarism have struggled to accomplish what they set out to do.⁶¹ Mercenarism presents many unique challenges to legal oversight, and with every innovation in regulation comes an innovation in mercenarism.⁶² The first proposition that needs to be made is that mercenarism is, in fact, a problem. The argument that mercenarism should be curbed begins with Max Weber's claim that legitimate violence is the purview of the state alone.⁶³ Proponents of the use of mercenarism in the modern era would argue that weaker states ought to be able to hire military services to protect their security.⁶⁴ Opponents point to the violation of the right of self-determination among states as mercenaries have been used in the modern era to put a thumb on

57. *See id.*

58. *Former Blackwater Firm Renamed Again*, BBC NEWS (Dec. 12, 2011), <https://www.bbc.com/news/world-us-canada-16149971> (Following allegations that Blackwater guards murdered civilians in Iraq, the company changed its name to "Xe," later, it has been rebranded "Academi." The rebranding allowed the company to return to operations in Iraq despite the baggage of its predecessor; the guards were never tried.)

59. JANICE E. THOMSON, *MERCENARIES, PIRATES, & SOVEREIGNS* 21 (1994).

60. Sarah Kuta, *Mercenaries Were More Common in Greek Warfare than Ancient Historians Let on*, SMITHSONIAN MAG. (Oct. 6, 2022), <https://www.smithsonianmag.com/smart-news/mercenary-soldiers-were-more-common-in-greek-battles-than-historians-let-on-180980902/>.

61. *See* Benedict Sheehy & Jackson N. Maogoto, *Private Military Company—Unravelling the Theoretical, Legal & (and) Regulatory Mosaic*, 15 ILSA J. INT'L & COMP. L. 147, 149 (2008).

62. *See id.* at 157.

63. MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 78 (H.H. Gerth & C. Wright Mills eds., NY Oxford Univ. Press 1946).

64. *See* Benedict, *supra* note 53, at 160.

the scale of conflicts to deny people this right.⁶⁵ The experience of the African states in the post-colonial era has shown that mercenarism is a tool used to deny self-determination rather than to protect the security of states.⁶⁶

The first swipe at modern regulation of mercenarism took place in the post-colonial African context with the Organization of African Unity's Convention for the Elimination of Mercenaries in Africa in 1972.⁶⁷ The OAU Convention defined mercenaries as a non-national of "the state against which his actions are directed" with the intention of impeding a liberation movement or overthrowing an independent government of a member state.⁶⁸ The member states were tasked with preventing their nationals from such activities and to police the use of mercenaries between member states.⁶⁹ This definition is broad but does not address the modern innovation of PMCs, as it applies only to a few specific situations involving the nascent states of post-colonial Africa.⁷⁰ The requirement that a mercenary be foreign to the state involved was first introduced here and has complicated the application of international law to PMCs.⁷¹ The Wagner Group is made up of nationals from Russia, Kyrgyzstan, Belarus, and the Central African Republic (at least) and operates in an effort to overthrow the Ukrainian government.⁷² The Central African Republic is a member to the OAU Convention and the treaty is still in force and is implicated by the recruitment of its citizens into the Wagner Group.⁷³

The definition of mercenarism was revisited in Protocol I to the Geneva Convention in 1977.⁷⁴ Protocol I considers six factors in defining mercenaries, all targeted at individuals rather than encompassing organizations of mercenaries.⁷⁵ The test requires that individuals be

65. See Matthew Kincade II, *The Private Military Company Complex in Central and Southern Africa: The Problematic Application of International Humanitarian Law*, 12 WASH. U. GLOBAL STUD. L. REV. 205, 210 (2013).

66. See *id.* at 206.

67. OAU Convention, *supra* note 10.

68. *Id.*

69. See *id.*

70. See Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law*, 4 DEFENCE STUDIES 5 (Summer 2004), available at <https://www.icrc.org/en/doc/assets/files/other/pmc-article-a-faite.pdf>.

71. See Seiberth, *supra* note 6, at 60.

72. See generally Ostrovsky, *supra* note 45; Brugen, *supra* note 46; Obaji, *supra* note 47.

73. *Member States*, AFRICAN UNION, https://au.int/en/member_states/countryprofiles2 (last visited Jan. 19, 2024).

74. Protocol I, *supra* note 7.

75. *Id.*

recruited to take part in and in fact do participate in an armed conflict, but excludes members of the military of any party to the conflict.⁷⁶ The individuals must have been motivated by personal gain exceeding that which is paid to combatants in the militaries of belligerent countries who are party to the conflict.⁷⁷ However, nationals from belligerent parties are exempted from the definition in Protocol I.⁷⁸ What Protocol I succeeds in doing is creating an element of personal gain to the definition of mercenarism. This reinforces the Weberian idea that violence is the monopoly of the state. That a person is motivated solely by personal gain belies that their participation in a conflict does not arise from an interest in the sovereignty of the state but rather in material gain. The focus on the individual and their nationality misses two major issues with defining mercenaries in the modern era. Because of differing nationalities, two individuals enlisted by the same mercenary group are treated differently under Protocol I.⁷⁹ Mercenary groups are not addressed as an entity in Protocol I, and this leaves space for those who create such groups to be excluded by the definition here. Those who create companies of mercenaries are less implicated than those they hire. Finally, the requirement that a person not be a member of a state's military can easily be avoided by a nation proclaiming that, in fact, mercenaries were acting under the direction of their military.⁸⁰ The fact remains that modern innovations to mercenarism evade this definition. Instead of relying on an all-encompassing definition and regulation on all mercenarism, the world relies on international norms to avoid the problems of mercenarism.⁸¹ The International Convention against the Recruitment, Use, Financing, and Training of Mercenaries sought to combine the definitions of mercenaries in both the OAU and Protocol I in the UN General Assembly.⁸² However, PMCs have escaped scrutiny under this and all international measures and persist.

It is important to note that Protocol I to the Geneva Convention of 1949 performs three key tasks. The first is to define mercenaries, which it does with the six-part test discussed above.⁸³ Once a person is determined to be a mercenary, Protocol I disposes of their eligibility to be

76. *Id.*

77. *Id.*

78. *Id.*

79. *See* Brouwers, *supra* note 9, at 8.

80. *Id.*

81. *See International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, Dec. 4, 1989, 2168 U.N.T.S. 85 (preamble) [hereinafter *Int'l Convention of 1989*].

82. *Id.* at art. 1.

83. Protocol I, *supra* note 7.

provided status as a prisoner of war and it prohibits signatories from employing mercenaries to evade their responsibility under international law.⁸⁴ Protocol I makes a crime of mercenarism, but issues remain as to how they will be held accountable for such a crime.⁸⁵ Protocol I only prohibits members from using mercenaries and directs them to pass laws prohibiting their training and employ. Outside of armed conflicts, oversight is left to domestic governments.⁸⁶ However, within the context of an armed conflict the International Criminal Court (ICC) has jurisdiction to hear cases involving war crimes, per the Rome Statute.⁸⁷ Two important limitations remain to the use of the ICC. First, not all nations have ratified the Rome Statute.⁸⁸ Second, many of those who have ratified have maintained reservations to key provisions.⁸⁹ Russia signed the Rome Statute but withdrew from the treaty in 2016.⁹⁰ The United States did the same.⁹¹ The ICC did break ground in indicting Vladimir Putin for war crimes, but it is regarded in much of the world as a symbolic indictment given Russia's withdrawal from the treaty.⁹²

IV. DEPENDENCE ON PMCs IN MODERN CONFLICTS STOPS ENFORCEMENT BY DOMESTIC GOVERNMENTS

The nature of international law is that states remain responsible for enforcement.⁹³ States, however, have been shown to enjoy the use of PMCs in modern conflicts, which prevent states from being reliable enforcers against mercenarism. In the United States, torts claims against

84. *Id.*

85. Matt Apuzzo, *Trying to Salvage Remains of Blackwater Case*, N.Y. TIMES (May 11, 2014), <https://www.nytimes.com/2014/05/12/us/trying-to-salvage-remains-of-blackwater-case.html>.

86. Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L.J. 825, 832 (1999).

87. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*].

88. OHCHR, Human Rights Indicators, <https://indicators.ohchr.org/> (last visited Apr. 9, 2023).

89. *Id.*

90. *Russia Withdraws from International Criminal Court Treaty*, BBC NEWS (Nov. 16, 2016), <https://www.bbc.com/news/world-europe-38005282> (Russia joined the United States, Sudan, Israel, South Africa, Burundi, and The Gambia in withdrawing from the Rome Statute).

91. *Id.*

92. Mike Corder & Raf Casert, *International Court Issues War Crimes Warrant for Putin*, ASSOC. PRESS (Mar. 17, 2023), <https://apnews.com/article/icc-putin-war-crimes-ukraine-9857eb68d827340394960eccf0589253> (Vladimir Putin is the first ever leader from a permanent member of the UN Security Council to be indicted by the ICC).

93. Int'l Convention of 1989, *supra* note 81.

PMCs have evaded judgments for decades.⁹⁴ Due to the relationship between PMCs and the United States Military, the question as to justiciability of torts claims implicates the political question doctrine.⁹⁵ Though the Fourth Circuit Court of Appeals has determined that the allegation of torture is justiciable, the Supreme Court has not answered the question and the case remains in litigation today.⁹⁶ In another case involving the PMC Blackwater, the Fourth Circuit denied relief on jurisdictional grounds.⁹⁷

Further, the United States legislature took the step to assign PMCs with the same culpability that is required of the military under the Uniform Code of Military Justice.⁹⁸ Spearheaded by Representative Lindsay Graham, the 2007 Defense Bill was made to include a provision that placed civilians who aid in the war effort in conflict zones under the jurisdiction of the United States Military Code of Justice.⁹⁹ However, the government has been slow to rely on this to hold PMCs responsible.¹⁰⁰ PMCs do not want to be regulated like the military, and the United States needs PMCs to be more malleable in the theaters of conflict than the military. The United States relinquishes control over PMCs and, in turn, PMCs can supplement the military with tasks that are unpalatable to the public. Both eschew responsibility, and both profit from turning a blind eye. Effects of this change to the jurisdiction of the United States Code of Military Justice have yet to be applied to PMCs, and it remains an open question as to the constitutionality of such a measure.¹⁰¹ All in all, the government is unwilling to use the tools that it has at its disposal to regulate PMCs and this is seen around the world.¹⁰²

94. See *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 162 (4th Cir. 2016) (Alien-Tort Statute claim still unresolved as of Apr. 4, 2023).

95. *Id.* at 161.

96. See *id.*

97. *Nordan v. Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 595 (4th Cir. 2006) (A wrongful death suit brought against Blackwater; employees of the PMC were killed by insurgents in Iraq while performing duties for the PMC.).

98. Mitchell McNaylor, *Mind the Gap: Private Military Companies and the Rule of Law*, 5 YALE J. INT'L AFF. 44 (2010).

99. Peter W. Singer, *Frequently Asked Questions on the UCMJ Change and Its Applicability to Private Military Contractors*, BROOKINGS (Jan. 12, 2007), <https://www.brookings.edu/opinions/frequently-asked-questions-on-the-ucmj-change-and-its-applicability-to-private-military-contractors/>.

100. See McNaylor, *supra* note 79.

101. Jennifer S. Martin, *Contracting for Wartime Actors: The Limits of the Contract Paradigm*, 14 NEW ENG. J. INT'L & COMP. L. 11, 28-29 (2007).

102. Adam Abass, *Private Military Companies (PMCs) & How They Get Away with Murder*, PARADIGM SHIFT (July 1, 2022), <https://www.paradigmshift.com.pk/pmcs/>.

V. THE WAGNER GROUP'S RECRUITMENT STRATEGIES ARE INCOMPATIBLE WITH HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

The Wagner Group's activities raise many of the issues related to mercenarism under international law. They are a private firm that operates independent of the Russian army in direct combat in Ukraine.¹⁰³ Further, the Wagner Group has made efforts to assassinate the Ukrainian President throughout the duration of the war.¹⁰⁴ This satisfies the Protocol I requirement that mercenaries take actual part in the hostilities. The Wagner Group began as a covert hit squad that was deployed with the blessing of the Kremlin to conflicts around the world, particularly in Syria and Africa.¹⁰⁵ Given that the primary members of the Wagner Group, including Prigozhin, are of Russian nationality, this would satisfy the foreigner component of the Protocol I mercenary test.¹⁰⁶ This component is complicated by the war in Ukraine because Russia is a party to that war, therefore neutralizing this factor of the analysis. At least, that is true for the portion of Wagner Group recruits who are of Russian nationality. Those who are neither Russian nor Ukrainian would still fall under this component. Recent feuds between Prigozhin and Putin display the fact that the Wagner Group, though performing military duties, is separate from the Russian military.¹⁰⁷ There is no question that the primary recruitment benefit to those being hired by the Wagner Group is financial, satisfying the personal gain prong of the mercenary test. However, there is an even more grotesque incentive in recruitment—release from prison and commutation of one's sentence.¹⁰⁸

A video of Prigozhin in a prison yard was posted to the internet in September of 2022. This video portrays Prigozhin laying out the requirements for potential recruits who wish to exchange service in the Wagner Group's efforts in Ukraine with commutation of their

103. Hotaka Nakamura, *Russia's New Military: The Rise of Prigozhin and the Wagner Group*, MIDDLE E. INST. (Dec. 16, 2022), <https://www.mei.edu/publications/russias-new-military-rise-prigozhin-and-wagner-group>.

104. *Id.*

105. *Id.*

106. *Id.*

107. Ellie Cook, *Putin Eyes New Wagner Group as Prigozhin Feud Continues—U.K. Intel*, NEWSWEEK (Apr. 4, 2023), <https://www.newsweek.com/vladimir-putin-new-wagner-group-yevgeny-prigozhin-feud-russia-ukraine-1792371> (As losses mount in Putin's war effort, Prigozhin has risen to fame in Russia. Putin sees Prigozhin as a threat to his hold on power, and the reliance on the Wagner Group has displayed deep flaws in Russia's military capabilities.).

108. Ghaedi, *supra* note 29.

sentences.¹⁰⁹ After describing the deployment, Prigozhin gives prisoners five minutes to make their decision.¹¹⁰ He describes the deployment as being assigned to be “shock troops,” and declares that deserters or anyone who changes their mind once they leave the prison will be executed.¹¹¹ Executions of so-called deserters did, in fact, take place according to a former Wagner Group commander.¹¹² Another, who sought to surrender to Ukrainian forces, was castrated by senior leaders in the Wagner Group.¹¹³ The world has seen that the Russian government and the Wagner Group cooperated in this recruitment scheme as the first of the prison recruits were allowed to return from Ukraine and have had their sentences commuted as a result of their “service.”¹¹⁴ The implication of the Protocol I component of “personal gain” here is of a particularly morose nature. Perversely, it is those whose sentences are the longest and have been convicted of the most heinous crimes who are most eager to take advantage of Prigozhin’s deal.¹¹⁵ Those fighting with these individuals, those opposing these individuals, and those who await their eventual release back into Russian society all have reason to fear these recruits’ participation in the war in Ukraine.¹¹⁶

The conditions of service in the Wagner Group were greatly understated by Prigozhin’s speech in the prison yard.¹¹⁷ What was behind Prigozhin’s claim that the Wagner Group were “shock troops” was much more insidious than he let on, however some of those released who

109. Christiaan Triebert, *Video Reveals How Russian Mercenaries Recruit Inmates for Ukraine War*, N.Y. TIMES (Sept. 16, 2022), <https://www.nytimes.com/2022/09/16/world/europe/russia-wagner-ukraine-video.html> (Prigozhin declares that they are seeking twenty-two to fifty year-olds in the prison who are not sexual offenders and are in good health.).

110. *Id.*

111. *Id.*

112. Philipp Lebedev & Felix Light, *Wagner’s Convicts Tell of Horrors of Ukraine War and Loyalty to their Leader*, REUTERS (Mar. 16, 2023), <https://www.reuters.com/investigates/special-report/ukraine-crisis-russia-wagner/>.

113. Oli Smith, *Wagner Group Castrate Mercenary for Trying to Surrender as Brutal Tactics Exposed*, DAILY EXPRESS (Jan. 29, 2023), <https://www.express.co.uk/news/world/1727765/Wagner-Russia-Ukraine-punishment-castrate-surrender-mercenary-intelligence>.

114. Guy Falconbridge, *Russia Pardons 5,000 Former Criminals After Fighting in Ukraine, Prigozhin Says*, REUTERS (Mar. 25, 2023), <https://www.reuters.com/world/europe/russia-pardons-5000-former-criminals-after-fighting-ukraine-prigozhin-says-2023-03-25/>.

115. Andrew Roth & Pjotr Sauer, *‘He’s Really Dangerous’: Fear as Wagner Convict Soldiers Return from Ukraine*, GUARDIAN (Feb. 10, 2023), <https://www.theguardian.com/world/2023/feb/10/wagner-convict-soldiers-return-from-ukraine-russia-mercenary-group>.

116. See Jon Jackson, *Wagner Group to Release Thousands of Convict Troops into Society: U.K.*, NEWSWEEK (Mar. 21, 2023), <https://www.newsweek.com/wagner-group-releasing-thousands-convict-troops-uk-1789232>.

117. See Triebart, *supra* note 109.

survived battle see Prigozhin as a hero who gave them a second chance.¹¹⁸ Those conscripts who took Prigozhin up on his deal were found to be used essentially as bait for Ukrainian bullets.¹¹⁹ The prisoners-turned-soldiers were ill-equipped for the battlefield and received inadequate training.¹²⁰ As many as half of those recruited from prisons by Prigozhin's efforts died in combat.¹²¹ The Wagner Group has incentivized prisoners to exchange the possibility of a pardon for a fifty-percent survival rate on the battlefield.¹²² The novelty of offering pardon for service in a PMC despite the extreme risk of casualty, still raises the issue of personal gain as laid out in Protocol I.

VI. SOLUTIONS WITHIN EXISTING LEGAL FRAMEWORKS

Attempts by several governments to constrain the use of PMCs and their perversion into mercenarism have been made in the form of the Montreux Document.¹²³ This document serves as a restatement of a state's obligations in international law around the use of PMCs.¹²⁴ The Montreux Document is the most recent attempt to identify the responsibilities of states regarding PMCs, but is not in itself binding on states.¹²⁵ Further, the Montreux document does not contemplate the end of the use of PMCs, just reinforces standing international law.¹²⁶ As a result of such circular reasoning, in international law, the use of the Wagner Group in Ukraine may avoid any new scrutiny by the international community under such a document. The twenty-seven statements included in the document are just best practices and do not operate legally, other than as a clarifying tool.¹²⁷ The fact of the matter is that the use of PMCs is more akin to an arms race, the likes of inter-

118. See Lebedev, *supra* note 112.

119. Ostrovsky, *supra* note 45.

120. See Lebedev, *supra* note 112.

121. Jack Dutton, *Wagner Group's Convict Recruits Suffer 50% Casualties in Ukraine War: U.K.*, NEWSWEEK (Feb. 17, 2023), <https://www.newsweek.com/wagner-group-convict-recruits-casualties-ukraine-1781929>.

122. See *id.*

123. Marie-Louise Tougas, *Commentary on Part I of 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*, 96 INT'L REV. RED CROSS 305, 305-06 (2014).

124. *Id.* at 307.

125. *Id.*

126. *Id.*

127. *Id.*

continental ballistic missiles, or nuclear proliferation.¹²⁸ It has been shown that when regulation arises or when one PMC fails, another is ready to take its place. The art of modern war has become an arms race in the use of private militarization.¹²⁹

There are two possible pathways forward in attempting to regulate the PMC arms-race. The first is a retooling of international efforts to treat the use of PMCs like other arms-races. Under this approach, the international community would need to come together and lay out specific rules as to the training, employment, and recruitment practices of PMCs. Further, as in the nuclear arms control treaties, governments would need to exercise some sort of oversight over one another.¹³⁰ Attempts at nuclear non-proliferation through these means have had mixed results.¹³¹ The weaknesses in this approach begin with the amount of international trust and cooperation that must be exercised in its enforcement.¹³² Further, the weaknesses of non-proliferation of PMCs are exacerbated because of the capitalist roots of PMCs. The nations that would be effectively trusting one another to accomplish oversight would, in some cases, be the very nations with which each was deploying PMCs against in wartime. The very nature of the mercenary marketplace makes oversight of PMCs more troublesome.¹³³

Leander notes in *From Mercenaries to Market* that the abolitionist view has become greatly disfavored in regulating PMCs.¹³⁴ Rather, the community has embraced the realist approach of accepting the presence and operation of PMCs.¹³⁵ This leaves the question of how to regulate them in a manner that would dispose of the horrors imposed on warfare by the likes of the Wagner Group and others. The failure of the Montreux document to prevent the proliferation of the Wagner Group and other PMCs has only worked to expose the failures that existed before such

128. See Tara Law, *Gazprom is Launching a 'Private Military.' Could it Be the Next Wagner Group?*, TIME (Feb. 14, 2023), <https://time.com/6254708/gazprom-private-military-wagner-group-russia/> (As Wagner wanes in the eyes of the Kremlin, new organizations are already filling the gap left behind.).

129. See *id.*

130. Malcolm N. Shaw, *International Law, Nuclear Weapons and Nuclear Non-Proliferation*, 2004 INTER ALIA 2, 4 (2004).

131. See *id.*

132. See *id.*

133. See ANNA LEANDER, *FROM MERCENARIES TO MARKET*, 49, 64 (Simon Chesterman & Chia Lehnardt eds., 2007) [hereinafter *Leander Mercenaries to Market*].

134. See *id.*

135. *Id.*

attempts.¹³⁶ Even international law has yet to reach the Wagner Group or its contemporaries because of a lack of clarity and a lack of motivation from international parties.

The second and most practical option in the regulation of mercenarism in the vein of the Wagner Group is to increase punishment and to untangle existing international law from its rigidity.¹³⁷ In fact, it was Western nations that excluded any functional enforcement regime from Protocol I and other such regulatory measures.¹³⁸ Almost no meaningful proposals to actually circumscribe the behaviors of PMCs has reached consensus among international parties to such schemes.¹³⁹ Notably missing from each is an outright declaration against the use of private military forces and a criminalization of mercenarism.¹⁴⁰ The factor approach in Protocol I could be modified. Each of the factors laid out in Protocol I are necessary to label an actor as a mercenary.¹⁴¹ In the current climate, it would be more useful to remove the dispositive nature of the factors and replace it with a balancing test. A balancing test could be expanded to take into consideration the actual force used by a PMC. Further, a balancing test could include recruitment methods and the reach of the citizenship of any given company. International courts could include a view to the associations and purposes of a private force and could take each of the Protocol I factors into account, giving each an appropriate weight. Other workable remedies include sanctions for nations that employ such forces and denial of prisoner-of-war treatment to those who participate. At the very least, international consensus around the treatment of domestic prisoners, basic human rights, and a person's ability to bargain free from coercion, could be incorporated into the calculation against any nation and any actor hiring or deploying PMCs. Essentially, the recruitment of domestic prisoners in exchange for commutation of sentences, whether for service in a private military force

136. Anna Leander, *What do Codes of Conduct Do: Hybrid Constitutionalization and Militarization in Military Markets*, 1 GLOB. CON. 91, 97 (2012) [hereinafter *Leander Codes of Conduct*].

137. See E. L. Gaston, *Mercenarism 2.0—The Rise of the Modern Private Security Industry and its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L. J. 221, 232 (2008).

138. *Id.*

139. *See id.*

140. *See id.*

141. Protocol I *supra* note 7.

or service in a national military, should be banned outright on an international level.¹⁴²

VII. CONCLUSION

States would benefit from circumscribing and diminishing the use of PMCs because like it or not, the deploying state is often held accountable to its citizens and the world for the abuses permeated by PMCs.¹⁴³ States would benefit by taking control over the actions of PMCs and not being held out as the actors essentially responsible for PMCs' missteps. Further, it would benefit states to abstain from the use of PMCs for national security reasons.¹⁴⁴ Many examples of PMCs being the target or source of leaked confidential national security information have made the news throughout the wars in Iraq, Afghanistan, and Ukraine.¹⁴⁵ The benefits to states do not even come close to the benefits to those who live in conflict zones. Because PMCs have been the perpetrators of some of the worst atrocities in modern warfare, eliminating and regulating their use would make lives of those in conflict areas more palatable. Finally, ending the use of PMCs in warfare would return the world to a time where warfare was conducted only by those who could do so with their public military.

This Article argues that privatization of war has added to the occurrence of war and expands war as a tool to be used and misused by nations and private actors around the globe. Instead, smaller states and those without reaching public militaries could rely on coalition building and security treaties to accomplish their security goals. The arms race in the use of PMCs has only made war more costly and the acts of conflict more widespread. Benefits of the use of PMCs are difficult to find when the goal is peace and security.¹⁴⁶ Returning violence to the purview of the

142. See Universal Declaration of Human Rights art. 20(2), G.A. Res. 217A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("No one may be compelled to belong to an association." Viewed in a broad light, this provision of the Declaration excludes compelling into private military services a person who is doing so in exchange for a commutation of sentence.)

143. Mark D. Ramirez & Reed M. Wood, *Public Attitudes toward Private Military Companies: Insights from Principal-Agent Theory*, 55 INT'L STUD. Q. 389 (2011).

144. See David E. Sanger & Nicole Perlroth, *FireEye, a Top Cybersecurity Firm, Says It Was Hacked by a Nation-State*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/technology/fireeye-hacked-russians.html> (A cybersecurity firm lost sensitive information to a foreign government).

145. *Id.*

146. Alex Horton & Aaron Gregg, *Use of Military Contractors Shrouds True Costs of War. Washington Wants It that Way, Study Says*, WASH. POST (June 30, 2020), <https://www.washingtonpost.com/national-security/2020/06/30/military-contractor-study/>.

state would benefit the state and benefit the global citizen. Due to the atrocities committed in the war in Ukraine, Congress has sanctioned Prigozhin and is considering designating the Wagner Group as a terrorist organization.¹⁴⁷ These are significant steps toward condemning one group, but action must be expanded in an international context to regulate and condemn all acts of mercenarism and all mercenaristic actors. The expansion of the use of such PMCs was promulgated by the United States, and the United States is implicated in the rise of Prigozhin's forces. As seen in Ukraine, the Russian military is not as powerful as Putin or the world believed. Putin gambled when entering a land war in this arena, and Russia's strength is being falsely inflated by the likes of the Wagner Group. For the United States's wars in Iraq and Afghanistan, the same was true, leading the United States to believe that it was possible to open a second arena of war in Iraq while hostilities continued in Afghanistan. The result was a reliance on PMCs that harm national security, enable widespread leaks of sensitive information, and deflate the United States's standing in the world. The United States stands ready to be a leader on this issue if it so chooses. Seeing itself reflected in the actions of Putin and the creation and utilization of the Wagner Group should be a wake-up call to the United States and the West that the only way forward is to de-privatize military operations and de-privatize war.

147. Laura Kelly, *Congress Wants to Label Wagner Group as a Terrorist Organization. Why Is Biden Opposed?*, THE HILL (Mar. 12, 2023) <https://thehill.com/policy/international/3894376-congress-wants-to-label-wagner-group-as-a-terrorist-organization-why-is-biden-opposed/>.