

III. The current regulatory landscape for private military and security companies

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Russia's invasion of Ukraine in February 2022, and the utilization of the Wagner Group in that conflict, as well as in other ongoing armed conflicts, has firmly refocused international attention on the regulatory gaps around both mercenaries and private military and security companies (PMSCs).¹ While many of the regulatory developments during 2022 are associated with or are a response to the actions of the Wagner Group, it is important to note that other mercenary groups and PMSCs have also been active in armed conflicts, which points to broader systemic issues. In particular, ongoing atrocities by mercenaries and related actors, including grave human rights violations, war crimes and crimes against humanity, with a lack of concomitant accountability, continue to raise significant concerns.² Moreover, the increasing trend towards deploying mercenaries and related actors in armed conflicts serves to highlight the fundamental lack of agreement among the international community on how to characterize such actors, and consequently impedes international regulatory and accountability processes and mechanisms.³ This section briefly examines three main areas of regulatory challenges and developments that emerged or were consolidated during 2022: (a) proxy actors in armed conflicts; (b) the regulation of PMSCs at the United Nations; and (c) case law involving mercenaries or PMSCs.

International humanitarian law and proxy actors

The opaque legal status of some PMSCs has enabled states, particularly Russia and Türkiye, to use them as agents of proxy warfare. It is a relatively recent phenomenon that presents specific regulatory challenges.⁴ The

¹ See e.g. Rondeaux, C., 'Chasing the Wagner Group: Why it's so hard to get a handle on Putin's ghost army', *New America*, 13 Feb. 2023; United Nations working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right to peoples of self-determination, 'Mali', JAL MLI 3/2022, 30 Dec. 2022 (in French); and UN working group on the use of mercenaries, 'Russian Federation', JAL RUS 17/2022, 20 Jan. 2023. See also sections I and II in this chapter.

² UN General Assembly, Human Rights Council, Report of the working group on the use of mercenaries, 'Access to justice, accountability and remedies for victims of mercenaries, mercenary-related actors and private military and security companies', A/HRC/51/25, 5 July 2022; and Office of the UN High Commissioner for Human Rights (OHCHR), 'Statement by the UN working group on the use of mercenaries warns about the dangers of the growing use of mercenaries around the globe', 4 Mar. 2022.

³ On the discussion of definitions of PMSCs and mercenaries see also section I in this chapter.

⁴ See e.g. UN, "Legitimacy crisis" in Libya must be overcome ahead of elections, Special Representative says, briefing Security Council', 15 Nov. 2022; UN General Assembly, Report of the working group on the use of mercenaries, 'The evolving forms, trends and manifestations of mercenaries and mercenary-related activities', A/75/259, 28 July 2020, paras 32–38; and Rondeaux, C., 'Decoding the Wagner Group: Analyzing the role of private military security contractors in Russian proxy warfare', *New America*, 7 Nov. 2019.

Wagner Group is probably the most well-known proxy actor and, despite denials from the Russian government, its operatives are participating in multiple armed conflicts, including in the Central African Republic (CAR), the Democratic Republic of the Congo, Libya, Mali, Sudan and Ukraine. Similarly, SADAT International Defense Consultancy, a Turkish-registered company, has sent recruits to conflicts in Libya and Nagorno-Karabakh.⁵ Both SADAT and the Wagner Group engage in predatory recruitment practices by recruiting individuals from conflict-affected areas, which in some cases could meet the definition of human trafficking due to their coercive and fraudulent character.⁶ Additionally, the Wagner Group is recruiting from correctional facilities in Russia. While some prisoners may be willing recruits, others are being recruited ‘under threat of punishment or intimidation’ and forced to take part in hostilities in Ukraine.⁷ Furthermore, these actors are committing human rights abuses—including violations of the right to life, torture, arbitrary detention, and sexual and gender-based violence (SGBV)—which in some instances reach the level of war crimes and crimes against humanity, such as in the widespread and systemic killing of civilian populations.⁸

The presence of mercenaries, and the Wagner Group in particular, is prolonging conflicts and further destabilizing the regions in which they operate. The international community has struggled to react to the challenges presented by such actors and states have applied a multitude of disparate labels, including ‘mercenaries’ and ‘PMSCs’, as well as ‘terrorists’ and ‘transnational criminal organizations’.⁹ This disjointed response is unsurprising given that there have long been substantial disagreements among states regarding the characterization of these types of actors. Moreover, these reactions make sense when examined within the context of the international legal framework.

Unlike the term PMSC, and others such as private military company (PMC), the term mercenary is legally defined under international humanitarian law

⁵ See e.g. Syrians for Truth and Justice (STJ), ‘Libya: Syrian mercenaries played a key role in recent Tripoli clashes’, 14 Sep. 2022; UN working group on the use of mercenaries, ‘Türkiye’, JAL TUR 7/2020, 10 June 2020; and UN working group on the use of mercenaries, ‘Türkiye’, JAL TUR 21/2020, 6 Nov. 2020.

⁶ STJ and the Syria Justice and Accountability Center (SJAC), ‘Mercenarism in Syria: Predatory recruitment and the enrichment of criminal militias’, 28 May 2021.

⁷ See e.g. OHCHR, ‘Russian Federation: UN experts alarmed by recruitment of prisoners by “Wagner Group”’, Press release, 10 Mar. 2023; and UN working group on the use of mercenaries, ‘Russian Federation’ (note 1).

⁸ See e.g. UN working group on the use of mercenaries, ‘Mali’ (note 1).

⁹ See e.g. British Ministry of Defence, ‘Latest Defence Intelligence update on the situation in Ukraine—09 March 2022’, 10 Mar. 2022; US Department of the Treasury, ‘Treasury sanctions Russian proxy Wagner Group as a Transnational Criminal Organization’, 23 Jan. 2023; and Ross, D. G., Chace-Donahue, E. and Clarke, C. P., ‘Understanding the US designation of the Wagner Group as a transnational criminal organisation’, International Centre for Counter-Terrorism, 25 Jan. 2023.

(IHL) in Article 47 of Additional Protocol I to the Geneva Conventions.¹⁰ Article 47(1) does not criminalize mercenarism, rather it provides that a person who meets the definition of a mercenary is not a combatant and is therefore not automatically entitled to prisoner of war status and protections. This is one reason why accountability for mercenarism is hard to achieve. It is also generally acknowledged that the cumulative and subjective criteria that form the basis of the definition of a mercenary set out in Article 47(2) are very difficult to fulfil. Article 47(2) provides that:

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.¹¹

Russia's use of the Wagner Group in armed conflicts, for example, appears to be a clear attempt to circumvent the provisions of Article 47(2). By concluding bilateral agreements with numerous states to provide 'trainers' or 'instructors' for military and security forces, the Russian government has been able to claim that it has sent Russian security personnel on 'official duty' (see Article 47(2)(f)) and that they therefore do not meet the international legal definition of mercenary. For example, it has stated: 'Some 500 instructors from the Russian Federation are currently in the Central African Republic, at the request of its lawful central leadership, to assist in the training of local military and security forces of the host country. They are unarmed and do not take part in hostilities.'¹² Nevertheless, extensive reports from CAR and other conflict areas do not support this contention, rather they confirm that Wagner operatives are engaged in combat and would appear to meet the Article 47 definition of mercenary.¹³ Wagner Group operations in Ukraine

¹⁰ Protocol I Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 Dec. 1977, entered into force 7 Dec. 1978, Article 47, 'Mercenaries'.

¹¹ Protocol I (note 10), Article 47(2).

¹² UN working group on the use of mercenaries, 'Information from the Russian Federation in response to the joint enquiry of the special procedures of the Human Rights Council on the alleged activities of Russian private military and security companies in the Central African Republic, JAL RUS 5/2021, 24 March 2021', 28 Apr. 2021.

¹³ See e.g. UN Security Council, 'Final Report of the panel of experts on the Central African Republic extended pursuant to Security Council Resolution 2536 (2020)', S/2021/569, 25 June 2021, which reported that the Russian instructors conducted very limited, if any, training of the CAR armed forces.

present a different problem. Russian nationals deployed by Wagner to fight in Ukraine would not meet the definition set out in Article 47, specifically paragraph (2)(c), as they are nationals of a party to the conflict. Conversely, any non-Russian nationals deployed by the Wagner Group in Ukraine would meet the definition.¹⁴

The definitional challenges around Article 47 partially explain why some states and regional organizations are turning to counterterrorism approaches to counter the activities of the Wagner Group, including imposing terrorist designations and sanctions.¹⁵ Another reason is that only 37 states are party to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries that criminalizes mercenarism.¹⁶ This means that many states do not have specific provisions at the national level to deal with mercenarism, including the requirement to investigate, powers of extradition, and established mechanisms for accountability and remedy. It remains to be seen whether a counterterrorism approach will be effective, not least in dealing with the Wagner Group, but particularly in addressing some of the bigger systemic issues associated with the use of proxy actors.

It should be noted that Article 359 of the Russian Criminal Code broadly reflects IHL, as well as the International Convention on mercenarism, and thus defines a mercenary as ‘a person acting with the aim of receiving material remuneration and not being a citizen of the state participating in an armed conflict or hostilities, not permanently residing on its territory, or being a person sent in fulfilment of official duties’.¹⁷ Article 359 further designates mercenarism as a crime punishable by imprisonment, fines and other sanctions, the extent of which were increased in 2022.¹⁸

The Russian government has consistently denied that the Wagner Group exists, or indeed that it has any link to the organization, citing Article 359 as confirmation.¹⁹ Moreover, the government insists that Russian law does not permit the registration of PMSCs and that ‘the unified State register of legal entities maintained by the Federal Tax Service of the Russian Federation does not and, by definition, cannot list such entities, including . . . the Wagner

¹⁴ On the Wagner Group’s activities in Ukraine, see section I in this chapter.

¹⁵ See e.g. US Department of the Treasury (note 9); and Ross, Chace-Donahue and Clarke (note 9). The European Union (EU) has also imposed a number of measures, see e.g. Council of the EU, ‘EU imposes restrictive measures against the Wagner Group’, Press release, 13 Dec. 2022.

¹⁶ OHCHR, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted 4 Dec. 1989 by General Assembly Resolution 44/34.

¹⁷ Criminal Code of the Russian Federation no. 63-FZ, 13 June 1996 (as amended on 14 July 2022), Article 359, ‘Mercenary’ (in Russian), accessed 24 Apr. 2023.

¹⁸ Criminal Code of the Russian Federation (note 17), Article 359.

¹⁹ See e.g. UN working group on the use of mercenaries, ‘Information from the Russian Federation regarding the joint enquiry of the special procedures of the Human Rights Council concerning the extrajudicial execution of (REDACTED) a citizen of the Syrian Arab Republic’, JAL RUS 14/2021 of 13 Dec. 2021, 25 Feb. 2022.

Group'.²⁰ In late 2022, however, a business and management consultancy using the name 'PMC Wagner Centre' registered as a joint-stock company in St Petersburg.²¹ In light of this development, it is yet to be determined whether the Russian government will acknowledge the legal existence of, and its connections to, the Wagner Group.

Regulation at the United Nations

The conflict in Ukraine and the escalating operations of the Wagner Group during 2022, particularly in the Sahel region, have reinvigorated regulatory endeavours at the UN. Attempts to address the gaps between the international legal provisions addressing mercenaries and the softer regulatory approaches of multistakeholder initiatives addressing PMSCs, such as the Montreux Document and the International Code of Conduct for Private Security Providers, have a long, chequered and ultimately unfruitful history at the UN.²² Between 2010 and 2017, states met annually at an open-ended intergovernmental working group (OEIWG I) to consider 'the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies', but were unable to reach consensus on the necessity of a legally binding instrument, let alone substantive content.²³ A second open-ended intergovernmental working group (OEIWG II), established in 2017, has what could be described as a compromise mandate, 'to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies'.²⁴ It met in May 2022 for its third session to discuss a Revised Zero Draft Instrument on an International Regulatory Framework on the Regulation, Monitoring of and Oversight over the Activities of Private Military and Security

²⁰ UN working group on the use of mercenaries (note 12).

²¹ Rusprofile, [JOINT STOCK COMPANY 'PMC Wagner Centre', Date of registration 27.12.2022], accessed 17 Apr. 2023 (in Russian).

²² International Committee of the Red Cross (ICRC) and Swiss Federal Department of Foreign Affairs (FDFA), *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of PMSCs during Armed Conflict* (ICRC/FDFA: Aug. 2009), preface, para. 9; International Code of Conduct Association, *International Code of Conduct for Private Security Providers*, as amended 10 Dec. 2021; and UN Human Rights Council, 'Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies relating to the activities', accessed 24 Apr. 2023.

²³ United Nations, General Assembly, Human Rights Council, Report of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies on its sixth session, A/HRC/36/36, 4 Aug. 2017.

²⁴ United Nations, General Assembly, Human Rights Council, Resolution adopted by the Human Rights Council on 28 September 2017, Mandate of the open-ended intergovernmental working group to elaborate the content of an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, A/HRC/RES/36/11, 9 Oct. 2017.

Companies.²⁵ A revised second draft is expected to be issued in early 2023 based on the discussions at that session. Four key issues arose in the Revised Zero Draft Instrument discussions from a human rights and accountability perspective, as discussed below.

Form and nature

States have been unable to agree on whether the Revised Zero Draft Instrument should be binding or non-binding. The consequence of this is that it contains language applicable to both a binding instrument and a non-binding instrument, making it a sort of Schrödinger's instrument that reflects the complex and highly politicized mandate of the OEIWG II. Yet a decision about the form and nature of the instrument must be taken sooner rather than later because the duality of the current situation is confusing and untenable. Whether a binding or non-binding instrument is adopted, it must add value to the regulatory environment, especially on accountability, and not simply reproduce the provisions of the Montreux Document.

While the continued development of multistakeholder regulatory initiatives such as the Montreux Document, the International Code of Conduct for Private Security Providers and the Voluntary Principles on Security and Human Rights are positive, insufficient numbers of states have committed to them: 58 to the Montreux Document, 7 to the Code of Conduct and 10 to the Voluntary Principles.²⁶ In addition, while there are important ongoing efforts at the UN to create a binding treaty on business and human rights, there must be acknowledgement of the specificities that differentiate the PMSC industry from other business sectors, such as the right to use force or detain persons.²⁷ There is a need, therefore, to strengthen the existing frameworks and to fill the normative gaps. At the same time, it is desirable that a PMSC instrument complements, and does not conflict with, overlapping provisions of the draft business and human rights treaty.

Legislative and regulatory frameworks pertaining to PMSCs differ considerably from one country to another, but national laws and regulations often seem to contain few human rights safeguards. In many instances, national laws on PMSCs contain inadequate provisions on licensing, registration, vetting of personnel, training (specifically on human rights and IHL), the scope of permissible and prohibited activities, the use of force, firearms and other weapons, reporting obligations for infractions or violations of

²⁵ OHCHR, Open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies, 'Revised Zero Draft Instrument on an International Regulatory Framework on the Regulation, Monitoring of and Oversight Over the Activities of Private Military and Security Companies', 14 Apr. 2022.

²⁶ Voluntary Principles Initiative, 'The Voluntary Principles on Security and Human Rights', 2000, accessed 24 Apr. 2023.

²⁷ OHCHR, 'BHR treaty process: OHCHR and business and human rights', accessed 24 Apr. 2023.

domestic and/or human rights law, accountability, including penal and civil sanctions for human rights abuses, and remedies for victims. Clear legal norms emphasizing national implementation and enforcement can help to prevent violations or, failing that, ensure accountability and provide effective remedies for victims.

Scope

While the scope of the Revised Zero Draft Instrument extends to the extra-territorial provision of PMSC services, it ought to be expanded to include the domestic provision of services given the increase in PMSCs generally and their wide-ranging activities.²⁸ States will need to take all measures necessary to ensure the legal liability of companies based in or managed from a state party's territory regarding human rights violations as a result of their activities conducted domestically and abroad, or the activities of their subsidiaries or business partners. National legislation will need to contain extraterritorial provisions, which can facilitate the prosecution of PMSCs and their personnel for abuses. For the instrument to be effective, states will need to not only prohibit the outsourcing of activities that constitute direct participation in hostilities or a continuing combat function (CCF), but also further prohibit the provision of for-profit services constituting direct participation in hostilities or CCF by private individuals and companies that are either registered or have their principal place of management in their territories.²⁹ This prohibition will also need to apply to the export of such services abroad.

Human rights provisions

The Revised Zero Draft Instrument lacks a broad and detailed articulation of applicable human rights and IHL. For example, it could mirror PP2 and other relevant parts of the preamble of the third revised draft of the business and human rights treaty and refer to the nine core international human rights instruments and the eight fundamental conventions adopted by the International Labour Organization.³⁰ During the second session of the OEIWG II, states and civil society highlighted the importance of the inclusion of gender-responsive and gender-transformative approaches within any

²⁸ Remarks of Dr Sorcha MacLeod, Chair-Rapporteur of the working group on the use of mercenaries, Third session of the open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies, 9 May 2022.

²⁹ ICRC, 'Interpretive guidance on the notion of direct participation in hostilities', *How Does Law Protect in War?* (online casebook), accessed 24 Apr. 2023.

³⁰ United Nations, General Assembly, Human Rights Council, Text of the third revised draft legally binding instrument with textual proposals submitted by States during the seventh and the eighth sessions of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, A/HRC/52/41/Add.1, 23 Jan. 2023.

instrument.³¹ Essential and concrete gender-transformative provisions are lacking in the Revised Zero Draft Instrument, however. By including them, the instrument would help to ensure, among other things, that states gather gender-disaggregated data, conduct a gender analysis before legislating or regulating, and investigate and prosecute SGBV, while PMSCs would be required to develop and implement gender-transformative approaches in their operations.³² Additionally, it is important that the instrument adopts inclusive language to expressly acknowledge that PMSCs are in a position to negatively impact persons in vulnerable situations, such as migrants, indigenous persons, racialized persons, older persons, persons with disabilities and the LGBTI+ community. Furthermore, the instrument must take account of the fact that barriers are likely to be higher for these groups when seeking redress for violations by PMSCs.

Accountability and remedies

The Revised Zero Draft Instrument does not include adequate and detailed guidance that will ensure comprehensive accountability, and effective redress and remedies for victims in particular.³³ Adequate regulation, monitoring and enforcement are paramount in light of persistent concerns over the lack of accountability for human rights violations and abuses by PMSCs, especially when operating transnationally. In some cases, victims remain without effective remedy decades after the alleged violations and abuses occurred. Severe challenges to victims seeking access to justice are posed by the lack of judicial infrastructure, qualified members of the judiciary and judicial independence, and by threats of reprisals against members of the judiciary, victims and witnesses. Corruption within legal systems and a lack of trained investigators also pose major challenges. In addition to ensuring an effective legal system, it is important to ensure that local populations that have been adversely impacted by armed conflict or violence have trust and confidence in the system. For that reason, the system itself needs to be easily accessible to vulnerable groups, including women and children. It needs to be able to address mass human rights abuses and provide the necessary protections. In

³¹ United Nations, General Assembly, Human Rights Council, 'Progress report on the second session of the open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and security companies', A/HRC/48/65, 6 July 2021.

³² MacLeod, S. and Van Amstel, N., 'Private military and security companies and gendered human rights challenges: Oversight or blatant disregard?', *Business and Human Rights Journal*, vol. 7, no. 1 (2022), pp. 181-7; MacLeod, S. and Van Amstel, N., 'Gendered human rights impacts in the private military and security sector', SSRN, 3 Sep. 2020; and United Nations, General Assembly, Report of the working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: The gendered human rights impacts of private military and security companies, A/74/244, 29 July 2019.

³³ For a comprehensive discussion on accountability see United Nations, General Assembly (note 2).

order to do so, it should also ensure that complementary support measures are set up, as appropriate, including medical assistance, free legal assistance and psychosocial care.

The OEIWG II will meet again in 2023 to discuss the expected revised second draft of the instrument and has another opportunity to address the gaps around scope, accountability and a victim-centred approach. If states continue to find themselves unable to agree on key provisions that are crucial for an effective regulatory framework, not least whether it ought to be binding or non-binding, the outlook for a credible instrument is gloomy.

Recent case law

Cases attempting to hold mercenaries to account under criminal justice regimes are rare, but in 2022 a judgment was delivered in a complaint lodged in the Russian courts relating to alleged atrocities committed by Wagner Group operatives. In that case, the family of Mohammed Elismail, a Syrian national purportedly tortured, murdered and mutilated in Homs in 2017 by suspected Wagner Group personnel, sought to initiate a criminal investigation into his death with the Investigative Committee of the Russian Federation. The claim was based on multiple alleged violations of the Russian Criminal Code, specifically murder (Article 105(2)), war crimes (Article 356) and mercenarism (Article 359).³⁴ In February 2022 the Moscow City Court upheld the decision of the Basmany District Court in not addressing the inaction of the Investigative Committee in relation to the complaint and no investigation took place.³⁵ The case clearly illustrates the problem of lack of accountability and impunity for such actors, as the family encountered delays, inaction and other difficulties at every stage of the process.³⁶ Now that domestic remedies have been exhausted, an application has been made to the European Court of Human Rights, which is still outstanding.³⁷ In any event, even if the case is accepted, the outcome may be moot given Russia's decision to leave the Council of Europe in 2022.³⁸

Another case in 2022 illustrates the emerging phenomenon of the instrumentalization of the term 'mercenary' to justify the prosecution and conviction of individuals who do not fulfil the criteria to be defined

³⁴ Criminal Code of the Russian Federation (note 17), Article 359.

³⁵ International Federation for Human Rights (FIDH), 'Wagner in Syria: Moscow court upholds decision in murder case, obstructing accountability', 9 Feb. 2022; and FIDH, 'Wagner in Syria: Ruling by Russian court entrenches impunity for brutal murder', 18 Jan. 2022.

³⁶ UN working group on the use of mercenaries, 'Russian Federation', JAL RUS 14/2021, 13 Dec. 2021.

³⁷ FIDH, 'Wagner in Syria: Appeal to European Court of Human Rights after case dismissed in Russia', Press release, 9 June 2022.

³⁸ Council of Europe, 'Russia ceases to be a party to the European Convention on Human Rights on 16 Sep. 2022', 23 Mar. 2022.

as a mercenary under IHL.³⁹ At the same time, it illustrates that suspected mercenaries are entitled to human rights protections, in this particular instance the right to a fair trial and opposition to the imposition of capital punishment. The case involved two British nationals (Shaun Pinner and Aiden Aslin) and a Moroccan national (Brahim Saadoune), who had been officially recruited into the Ukrainian armed forces prior to the Russian invasion of Ukraine in February 2022. They were subsequently captured by Russian forces and held as prisoners of war, and then handed over to the authorities in Donetsk. In June 2022 all three were prosecuted and convicted in Donetsk of: (a) forcible seizure of power or retention of power; (b) participation in an armed conflict or hostilities as a mercenary; and (c) the promotion of training in terrorist activities.

Death sentences were imposed in relation to the attempted seizure of power, and prison terms were imposed for the remaining offences, including mercenarism. Concerns were raised that the tribunal was neither impartial nor independent, and that the trial was expedited (given that it took place over only three days and included sentencing). The lack of both a public hearing and the presumption of innocence raised further concerns. Allegations were also made that the defendants gave coerced testimony, had inadequate legal representation and were denied a right of review by an independent higher tribunal. Given that all three individuals were members of the Ukrainian armed forces, a party to the conflict, the definition of mercenary under Article 47 of Additional Protocol I was not satisfied, and they ought not to have been tried for mercenarism. Furthermore, as combatants they were entitled to the privilege of belligerency and appropriate treatment as prisoners of war.⁴⁰ Their convictions were therefore a probable violation of IHL. All three men were subsequently released as part of a prisoner exchange between Ukraine and Russia.⁴¹

Despite the exponential increase in the use of mercenaries as proxy actors, there has not yet been a corresponding increase in the number of cases brought by victims of their human rights violations or in prosecutions of suspected mercenaries. This is almost certainly due to the difficulty of identifying such actors in conflict and post-conflict environments, combined with the absence of effective investigation and prosecution by states and the lack of routes to accountability for victims.

³⁹ UN working group on the use of mercenaries, 'Mr Denis Vladimirovich Pushilin', JUA OTH 73/2022, 7 July 2022.

⁴⁰ ICRC, 'Immunities', *How Does Law Protect in War?* (online casebook), accessed 25 Apr. 2023; and ICRC, 'Unprivileged belligerent', *How Does Law Protect in War?* (online casebook), accessed 25 Apr. 2023.

⁴¹ Sabbagh, D., 'Aiden Aslin among 10 international "prisoners of war" released by Russian authorities', *The Guardian*, 22 Sep. 2022.

Conclusions

In 2022, the atrocities committed by mercenaries and PMSCs received significantly more international attention than in recent years. This is due largely to the international community's belated realization of the dangers posed by mercenaries and PMSCs deployed in armed conflicts as proxy actors, with the threats presented by the Wagner Group being a prominent example. The presence of such actors is prolonging armed conflicts around the world, acting as a destabilizing factor and undermining peace efforts. While some states have responded with counterterrorism approaches, others seem to have been galvanized into paying more attention to the regulatory frameworks around mercenaries and PMSCs. Whether this will translate into concrete and credible regulatory change via the OEIWG II, for example, remains to be seen but it is clear that robust conversations will be had at the UN in the near future. The absence of cases holding mercenary and PMSC personnel criminally liable for atrocities is of particular concern, as is the complete lack of accountability and remedy available to their victims. States must step up and fully realize their obligations to respect, protect and fulfil human rights when mercenaries and PMSCs commit atrocities. Above all, this requires states ensuring that victims have effective routes to accountability and remedy at national and international levels.