

RUSSIAN MERCENARIES, STATE RESPONSIBILITY, AND CONFLICT IN SYRIA: EXAMINING THE WAGNER GROUP UNDER INTERNATIONAL LAW

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INTRODUCTION

Following President Trump's ordered withdrawal of US forces from Syria in early October 2019, the Kurdish-led Syrian Democratic Forces (SDF) struck a deal with President Bashar al-Assad's regime to help counter the existential threat posed by the Turkish military offensive into northeastern Syria.¹ To avoid further escalation of the Syrian conflict, Russia intervened and brokered a deal between Assad and Turkish President, Recep Erdogan. The deal requires Turkish and Russian troops to jointly patrol the Syrian-Turkish border.² With Russian troops now required to patrol such a vast stretch of borderland, the surreptitious deployment of Russian proxy forces seems likely. To that end, the Wagner Group, a Private Military Security Company (PMSC) with extensive experience in Syria and ties to the Kremlin, may soon have its marching orders.³

The continued use by the Kremlin of PMSCs in areas of conflict should be of little surprise. General Stephen Townsend, Commander of US Africa Command, previously discussed Russian PMSCs before the Senate Armed Services Committee (SASC) in April 2019. He opined they were a threat to US interests in Africa, second only to terrorist organizations.⁴ His observations suggest that Russia is pursuing its strategic goals using PMSCs while largely avoiding involvement of its

¹ Ben Hubbard, Charlie Savage, Eric Schmitt & Patrick Kingsley, *Abandoned by U.S. in Syria, Kurds Find New Ally in American Foe*, N.Y. TIMES (Oct. 13, 2019), <https://www.nytimes.com/2019/10/13/world/middleeast/syria-turkey-invasion-isis.html> [https://perma.cc/JN8Z-QTG8].

² Anton Troianovski & Patrick Kingsley, *Putin and Erdogan Announce Plan for Northeast Syria, Bolstering Russian Influence*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/2019/10/22/world/europe/erdogan-putin-syria-cease-fire.html> [https://perma.cc/659X-F2X2].

³ Larisa Brown, *The Insanity of Trump's Surrender in Syria*, DAILY MAIL (London) (Oct. 15, 2019), <https://www.dailymail.co.uk/news/article-7577299/The-insanity-Trumps-surrender-Syria-Russia-gleefully-moves-in.html> [https://perma.cc/K8AZ-EUZ9].

⁴ Daniel Lamothe, *U.S. Africa Command Nominee Cites Potential Russian and Chinese Threats to U.S. Interests in the Region*, WASH. POST (Apr. 2, 2019), <https://www.washingtonpost.com/national-security/2019/04/02/us-africa-command-nominee-cites-potential-russian-chinese-threats-us-interests-region/> [https://perma.cc/5DVE-JBQC].

armed forces.⁵ General Townsend specifically cited the Wagner Group as one such PMSC, noting his prior experience with the Group in Syria. He used the terms “mercenary” and “PMSC” interchangeably during the hearing to describe the Group’s current activities in Central Africa as well as its involvement in the Syrian conflagration.⁶

Fourteen months prior to the SASC hearing, in February 2018, a combined Syrian Army–Wagner Group unit attacked a US Special Operations–SDF combat outpost in Deir-ez-Zour, Syria. US firepower quickly repelled the attackers, resulting in approximately two hundred Wagner Group deaths. At the time, media outlets around the world reported on the battle (sometimes referred to as the Battle of Khasham) and the death of Russian citizens at the hands of the US military.⁷ Much like General Townsend’s testimony before the SASC, the press also labeled members of the Wagner Group Russian “mercenaries,” albeit without providing the background necessary to support a legal conclusion that the Group’s members qualified as such under international law.

The purpose of this article is not to assess the threat Russian PMSCs pose to US interests, or to international stability more generally, nor to assess the lawfulness of the US actions that resulted in the deaths of Wagner Group personnel in Syria. Rather, this article uses the involvement of the Group in the Syrian conflict as a case study to examine certain issues

⁵ Richard Sisk, *U.S. General Troubled by Russian Mercenaries in Africa*, MILITARY.COM (Apr. 3, 2019), <https://www.military.com/daily-news/2019/04/03/us-general-troubled-russian-mercenaries-africa.html> [<https://perma.cc/G8CK-J43G>]; Aaron Ross, *How Russia Moved into Central Africa*, REUTERS (Oct. 17, 2018), <https://www.reuters.com/article/us-africa-russia-insight/how-russia-moved-into-central-africa-idUSKCN1MR0KA> [<https://perma.cc/S9BD-ZQSC>].

⁶ *Hearing to Consider the Nominations of: General Tod D. Wolters, USAF for Reappointment to the Grade of General and to be Commander United States European Command and Supreme Allied Commander Europe; and General Stephen J. Townsend, USA for Reappointment to the Grade of General and to be Commander, United States Africa Command before the Sen. Armed Services Committee*, 116th Cong. 29–30 (2019), https://www.armed-services.senate.gov/imo/media/doc/19-31_04-02-19.pdf [<https://perma.cc/L75G-MW9F>].

⁷ See, e.g., Thomas Gibbons-Neff, *How a 4-Hour Battle between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html> [<https://perma.cc/RDV3-8GAN>]; Adam Taylor, *What We Know About the Shadowy Russian Mercenary Firm Behind an Attack on U.S. Troops in Syria*, WASH. POST (Feb. 23, 2018), <https://www.washingtonpost.com/news/worldviews/wp/2018/02/23/what-we-know-about-the-shadowy-russian-mercenary-firm-behind-the-attack-on-u-s-troops-in-syria/> [<https://perma.cc/W2UR-GVTR>]; Julian Borger & Marc Bennets, *Scores of Russian Mercenaries Reportedly Killed by U.S. Airstrikes in Syria*, GUARDIAN (Feb. 13, 2018), <https://www.theguardian.com/world/2018/feb/13/russian-mercenaries-killed-us-airstrikes-syria> [<https://perma.cc/B7CJ-JYHK>].

of legal significance raised by the use of PMSCs in armed conflict, namely mercenarism under International Humanitarian Law (IHL) and attribution under the Law of State Responsibility.

To set the inquiry in context, this article begins by examining the evolution of the Syrian civil war, the actors involved, and their interplay within the context of IHL. Of particular importance is the classification of the conflict as international or non-international in character under IHL, for states shoulder certain obligations only during conflicts of a particular character. The foundation laid, the article turns to two key legal issues that pervade the use of PMSCs by states during armed conflicts. First, it considers the legal status of members of the Wagner Group during the Syrian conflict to determine whether their characterization as mercenaries is legally sound. If not, the legal consequences attendant to that status, discussed below, do not attach. Second, it assesses whether Syria or Russia are responsible for any violations of IHL that might have been committed by the Group pursuant to the secondary rules of international law resident in the Law of State Responsibility.⁸ Both queries are designed not only to shed light on the legal character of the Group's activities in past, current, and future conflicts, but also those of other PMSCs in such conflicts. The article concludes PMSCs, like the Wagner Group, can significantly impact conflicts as state proxies while largely escaping accountability as mercenaries under IHL and attribution under the Law of State Responsibility.

I. THE SYRIAN CONFLICT AND THE WAGNER GROUP

A. CIVIL WAR IN SYRIA

The "Arab Spring" arrived in Syria in March of 2011.⁹ Peaceful protestors in Deraa and Damascus calling for the political reform of

⁸ See generally G.A. Res. 56/83, Annex, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (Dec. 12, 2001) [hereinafter Draft Articles].

⁹ The self-immolation of a Mohamed Bouazizi, a Tunisian street vendor, to protest the Tunisian government's oppressive tactics and corrupt practices sparked mass protest across North Africa and the Middle East. Consequently, Tunisia, Libya, and Egypt saw regime change, while protracted armed conflict continues in Yemen and Syria. Commentators quickly began referring to this period of political protest and civil unrest as the Arab Spring. See, e.g., Iyad El-Baghdadi, *The Story of the Arab Spring is Far from Over*, AL JAZEERA (Dec. 23, 2015), <http://america.aljazeera.com/opinions/2015/12/the-story-of-the-arab-spring-is-far-from-over.html> [<https://perma.cc/486L-HC69>].

Assad's regime were met with tear gas, machine gun and sniper fire, and mass arrests by the Syrian government. Soon the protests spread nationwide. In urban areas, the government's brutal response included major assaults by Syrian armed forces. This violent repression led some members of the civilian population to organize small, armed groups to defend both the protestors and affected neighborhoods. As the violence between government forces and armed groups intensified, Syrian soldiers began deserting rather than firing on their fellow Syrians. By March 2012, nearly 60,000 Syrian soldiers had done so. Many joined the opposition groups that were emerging to fight the government.¹⁰

These groups operated from a number of sometimes very different perspectives. Established in July 2011, the Free Syrian Army (FSA), for example, drew under a single command a number of pre-existing moderate groups.¹¹ Its primary goal was a more democratic Syria.¹² The FSA had early success against the Assad regime and grew to nearly 35,000 fighters.¹³ However, political rivalries, competition for resources, and the emergence of more radical groups, like the Islamic Front¹⁴ and *Hay'at*

¹⁰ Charles Lister, *The Free Syrian Army: A Decentralized Insurgent Brand*, BROOKINGS PROJECT ON U.S. REL. WITH ISLAMIC WORLD 4–5 (Nov. 2016), <https://www.brookings.edu/research/the-free-syrian-army-a-decentralized-insurgent-brand/> [<https://perma.cc/5NNH-XC3M>].

¹¹ *Id.* at 5; see also *Guide to the Syrian Rebels*, BBC NEWS (Dec. 13, 2013), <https://www.bbc.com/news/world-middle-east-24403003> [<https://perma.cc/V95V-GX6D>].

¹² *Free Syrian Army Forces*, FREE SYRIAN ARMY PLATFORM, <http://fsaplatform.org/fsa> (last accessed Nov. 1, 2019) [<https://perma.cc/B3ME-TEJJ>].

¹³ Mona Alami, *Can FSA Get Back on its Feet After Russian Intervention?*, AL MONITOR (Dec. 31, 2015), <http://www.al-monitor.com/pulse/originals/2015/12/free-syrian-army-morale-russia-strikes.html> [<https://perma.cc/KR33-PGZU>].

¹⁴ With as many as 70,000 members at one point, the Islamic Front unified seven disparate Islamist groups. Ideologically, it sits between the Free Syrian Army (FSA) and the more radical *jihadi* groups Islamic State in Iraq and Syria (ISIS) and *Hay'at Tahrir al-Sham (Hay'at)*. See Aron Lund, *A New Free Syrian Army Leadership*, DIWAN: MIDDLE EAST INSIGHTS FROM CARNEGIE, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 14, 2014), <http://carnegieendowment.org/syriaincrisis/?fa=55245> [<https://perma.cc/M49X-N2Y2>]; *Guide to the Syrian Rebels*, *supra* note 11; see also David Wallace, Amy McCarthy & Shane R. Reeves, *Trying to Make Sense of the Senseless: Classifying the Syrian War Under the Law of Armed Conflict*, 25 MICH. ST. INT'L L. REV. 555, 585–90 (2017).

Tahrir al-Sham (formerly *al-Nusra*),¹⁵ eventually stymied its momentum.¹⁶

The emergence of the Islamic State in Iraq and Syria (ISIS), also known as *Daesh*, materially changed the landscape of the Syrian conflict in 2013. ISIS, a radical jihadi group with al-Qaeda origins, sought the establishment of an Islamic caliphate. With an estimated 30,000 fighters at its peak, ISIS seized large swaths of Syrian and Iraqi territory. The Iraqi government initially requested assistance from the international community to combat the threat in June 2014.¹⁷ However, several months later, Iraq specifically requested the United States lead an international effort against ISIS.¹⁸

Formalized in October 2014, the US-led military operation against ISIS, Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR), started striking targets in both Syria and Iraq.¹⁹ In 2015, US forces also began to work with the SDF to further combat ISIS in Syria, which explains the presence of both SDF and US forces at the Battle of Khasham in February 2018.²⁰ While ISIS is now largely defeated in both Iraq and

¹⁵ Comprised of foreign fighters with *al Qaeda* roots, the extremist *jihadi* group *Hay'at* formed in 2012. Nearly 7,000 strong at one point, the group sought to overthrow the Assad regime and establish an Islamic state governed by *Sharia*. *Hay'at* primarily targets government forces and its allies, but clashed with the FSA, Kurdish People's Protection Forces (YPG), and ISIS. See *Hay'at Tahrir al-Sham (formerly Jabhat al-Nusra)*, CTR. FOR INT'L SECURITY AND COOPERATION, MAPPING MILITANT ORGS., <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/493> (last visited Mar. 27, 2017) [<https://perma.cc/S683-7VG5>].

¹⁶ Lister, *supra* note 10, at 7.

¹⁷ Permanent Rep. of Iraq to the U.N., Letter Dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2014/440 (June 25, 2014).

¹⁸ Permanent Rep. of Iraq to the U.N., Letter Dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 20, 2014). When the US agreed to assist Iraq, it articulated its legal bases for the use of force in Syria as defense of Iraq from ISIS, and both individual and collective self-defense under Article 51 of the U.N. Charter. The US specifically referred to Syria as unwilling or unable to counter the transnational threat ISIS posed while operating within Syrian territory. See Permanent Rep. of the U.S. to the U.N., Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

¹⁹ S.C. Res. 2170, (Aug. 15, 2014); S.C. Res. 2178, (Sept. 24, 2014); S.C. Res. 2199, (Feb. 12, 2015); see also KATHLEEN MCINNIS, CONG. RESEARCH SERV., R44135 COALITION CONTRIBUTIONS TO COUNTERING THE ISLAMIC STATE (2016).

²⁰ Ruby Mellen, *A Brief History of the Syrian Democratic Forces, the Kurdish-Led Alliance that Helped the U.S. Defeat the Islamic State*, WASH. POST (Oct. 7, 2019), <https://www.washingtonpost.com/world/2019/10/07/brief-history-syrian-democratic-forces-kurdish-led-alliance-that-helped-us-defeat-islamic-state/> [<https://perma.cc/5KP2-Q7LU>]. Prior to the establishment of the SDF in 2015, Syrian Kurds seized upon the power vacuum in northern

Syria, and the US has since ceased working with the SDF, CJTF-OIR strikes continue today.²¹

B. THE WAGNER GROUP

Syrian regular forces numbered approximately 250,000 at the outset of the conflict, but were decimated by defections, desertions, and casualties. Adding to the problems for the regime was the fact that the mass exodus of Syrian nationals out of the country to escape the violence made its compulsory service largely unenforceable.²² With only 125,000 soldiers in uniform by 2015, Syria turned to Russia, Iran, and Hezbollah for assistance in combatting ISIS and other rebel groups.²³ Iran deployed elements of the Islamic Revolutionary Guard Corps,²⁴ while Hezbollah, a Shia militant organization based in Lebanon and closely aligned with Iran, provided nearly 10,000 advisors and fighters to augment Syrian forces.²⁵ Finally, and most significant for the purposes of this article, Russia began sending combat troops to Syria in September 2015, after initially providing only logistical support.²⁶

Syria created by the conflict. The Syrian Kurdish faction known as the Democratic Union Party (PYD) and its military wing, the People's Protection Units (YPG), secured large swaths of territory and implemented a system of governance for three non-contiguous territories bordering Turkey called Rojava. See, e.g., *Flight of Icarus? The PYD's Precarious Rise in Syria*, INT'L CRISIS GROUP 1-3, 12-15 (2014), <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/flight-icarus-pyd-s-precarious-rise-syria> [<https://perma.cc/F96V-TLUF>].

²¹ *Id.*; see also *CJTF-OIR Strike Summary August 1–August 31, 2019*, COMBINED JOINT TASK FORCE–OPERATION INHERENT RESOLVE, Rel. 20190904-01 (2019), <https://www.inherentresolve.mil/Media-Library/Strike-Releases/> [<https://perma.cc/EMH6-FGM9>]; CHRISTOPHER BLANCHARD & CARLA HUMUD, CONG. RESEARCH SERV., R43612 THE ISLAMIC STATE AND U.S. POL'Y. (2018).

²² Sam Dagher, *Assad Is Desperate for Soldiers*, THE ATLANTIC (May 14, 2018), <https://www.theatlantic.com/international/archive/2018/05/syria-assad-conscription-refugees-lebanon/560282/> [<https://perma.cc/A3PL-UVXE>].

²³ Anne Barnard, Hwaida Saad & Eric Schmitt, *An Eroding Syrian Army Points to Strain*, N.Y. TIMES (Apr. 28, 2015), <https://www.nytimes.com/2015/04/29/world/middleeast/an-eroding-syrian-army-points-to-strain.html> [<https://perma.cc/7FLG-XQYK>].

²⁴ Sam Dagher & Asa Firth, *Iran Expands Role in Syria in Conjunction with Russia's Airstrikes*, WALL ST. J. (Oct. 2, 2015), <https://www.wsj.com/articles/iran-expands-role-in-syria-in-conjunction-with-russias-airstrikes-1443811030> [<https://perma.cc/P8E9-CPML>].

²⁵ Seth Jones & Maxwell Markusen, *The Escalating Conflict with Hezbollah in Syria*, CTR. FOR STRATEGIC & INT'L STUD., (June 20, 2018), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/180620_JonesMarkusen_EscalatingConflict_FINAL.pdf?hLyKL4vUoURgwuGdWH0oVx9Q6A_sKRta [<https://perma.cc/P48A-U6A3>].

²⁶ See *Russia Says 63,000 Troops Have Seen Combat in Syria*, BBC NEWS (Aug. 23, 2018), <https://www.bbc.com/news/world-middle-east-45284121> [<https://perma.cc/W2DN-GBTW>]. see also Alexander Pearson & Lewis Sanders IV, *Syria Conflict: What Do the US, Russia, Turkey and*

Soon after the arrival of Russian combat troops, the Wagner Group arrived and began providing support to the Assad regime in October 2015.²⁷ The Wagner Group's initial mission was to protect Syrian governmental infrastructure, including military bases, some of which housed the newly arrived Russian soldiers.²⁸ It remains unclear whether the Wagner Group went to Syria at the direction of the Russian government, or came under contract with the Assad regime to bolster Syrian government forces. In either case, its mission of static security morphed into offensive combat operations, which included a March 2016 offensive in the city of Palmyra against ISIS and the aforementioned 2018 attack on the Deir-ez-Zour outpost.²⁹

The Wagner Group was established in 2014 with Dmitry Utkin, a retired Russian military officer, in operational lead of the organization.³⁰ Utkin, a Russian nationalist, likely chose the name "Wagner" as a means to honor Adolf Hitler's favorite composer, Richard Wagner.³¹ The Group is presumably owned and funded by Yevgeny Prigozhin, a Russian oligarch and close associate of Russian President Vladimir Putin;³² however, details of his ownership and involvement are scant.³³ It is

Iran Want?, DEUTSCHE WELLE (Jan. 23, 2019), <https://www.dw.com/en/syria-conflict-what-do-the-us-russia-turkey-and-iran-want/a-41211604> [<https://perma.cc/TJ6F-VCTX>].

²⁷ See generally CONFLICT INTELLIGENCE TEAM, <https://citeam.org> [<https://perma.cc/UB3C-CNU9>] (last accessed Apr. 2, 2020). see also FONTANKA, www.fontanka.ru [<https://perma.cc/Y4UM-QXEZ>] (last accessed Mar. 7, 2020).

²⁸ See Thomas Grove, *Up to Nine Russian Contractors Die in Syria, Experts Say*, WALL ST. J. (Dec. 18, 2015), <https://www.wsj.com/articles/up-to-nine-russian-contractors-die-in-syria-experts-say-1450467757> [<https://perma.cc/7MJ6-C5LF>]; see also Taylor, *supra* note 7.

²⁹ Owen Matthews, *Putin's Army Waged War in Syria—Where will they Fight Next?*, NEWSWEEK (Jan. 17, 2018), <https://www.newsweek.com/2018/01/26/putin-secret-army-waged-war-syria-782762.html> [<https://perma.cc/HND6-LVJF>]; Mark Galeotti, *Moscow Mercenaries in Syria*, WAR ON ROCKS (Apr. 5, 2016), <https://warontherocks.com/2016/04/moscows-mercenaries-in-syria/> [<https://perma.cc/5E39-RHTD>]; see also Grove, *supra* note 28.

³⁰ Mark Galeotti, *Moscow's Mercenaries Reveal the Privatisation of Russian Geopolitics*, OPEN DEMOCRACY (Aug. 29, 2017), <https://www.opendemocracy.net/od-russia/mark-galeotti/chvk-wagner-and-privatisation-of-russian-geopolitics> [<https://perma.cc/P57K-HK5D>].

³¹ Michael Weiss, Catherine A. Fitzpatrick, & Andrew Bowen, *Did the U.S. Really Wipe Out 200 Russian Mercenaries?* DAILY BEAST (Feb. 13, 2018), <https://www.thedailybeast.com/did-the-us-really-kill-200-russians-in-syria-or-just-a-few> [<https://perma.cc/VL2D-J74Z>].

³² Sergey Sukhankin, *'Continuing War by Other Means': The Case of Wagner, Russia's Premier Private Military Company in the Middle East*, JAMESTOWN FOUND. (Jul. 13, 2018), <https://jamestown.org/program/continuing-war-by-other-means-the-case-of-wagner-russias-premier-private-military-company-in-the-middle-east/> [<https://perma.cc/2YY6-XCQX>].

³³ See *id.*

rumored to be legally registered in Argentina, rather than Russia,³⁴ and its operations appear to be run out of either Saint Petersburg³⁵ or Hong Kong,³⁶ or both.

With a mature and well-organized command and control structure modeled on the Russian military, the Wagner Group is staffed by experienced ex-soldiers.³⁷ Its members undertake training in southern Russia, near a recently modernized Russian military base in Molmino operated by the Russian military's Main Intelligence Directorate (commonly referred to as the GRU).³⁸ Approximately 6,000 strong at its peak,³⁹ members are trained in the use of advanced weaponry, including tanks, rocket launchers, artillery, and a myriad of small arms.⁴⁰ Although well compensated, salaries vary depending on location. For instance, its members receive \$1,300 per month during initial training in Russia, but when deployed to the Luhansk People's Republic—the occupied, separatist region of Ukraine—they earn \$2,900 per month.⁴¹ Those deployed to Syria earn even more, between \$4,000 and \$8,000 per month.⁴²

The Wagner Group was first deployed in 2014 to Ukraine. Initially, their duties involved assisting in the Russian annexation of the

³⁴ Allison Quinn, *Vladimir Putin Sent Russian Mercenaries to 'Fight in Syria and Ukraine,'* THE TELEGRAPH (Mar. 30, 2016), <https://www.telegraph.co.uk/news/2016/03/30/vladimir-putin-sent-russian-mercenaries-to-fight-in-syria-and-uk/> [https://perma.cc/S395-FKHE]. Kimberly Marten, *Russia's Use of Semi-State Security Forces: The Case of the Wagner Group*, 35 POST-SOVIET AFF. 181, 192 (2019).

³⁵ Galeotti, *supra* note 30.

³⁶ Joseph Trevithick, *Russian Mercenaries Take the Lead in Attacks on US and Allied Forces in Syria*, DRIVE (Feb. 15, 2018), <https://www.thedrive.com/the-war-zone/18533/russian-mercenaries-take-a-lead-in-attacks-on-us-and-allied-forces-in-syria> [https://perma.cc/77W6-NWSR].

³⁷ Sukhankin, *supra* note 32. See Mike Giglio, *Inside the Shadow War Fought by Russian Mercenaries*, BUZZFEED NEWS (Apr. 17, 2019), <https://www.buzzfeednews.com/article/mikegiglio/inside-wagner-mercenaries-russia-ukraine-syria-prigozhin> [https://perma.cc/Z3MT-SHRF].

³⁸ Quinn, *supra* note 34; Aleksandr Gostev & Robert Coalson, *Russia's Paramilitary Mercenaries Emerge from the Shadows*, RADIOFREEEUR. (Dec. 16, 2016), <https://www.rferl.org/a/russia-paramilitary-mercenaries-emerge-from-the-shadows-syria-ukraine/28180321.html> [https://perma.cc/9KMR-5CBH].

³⁹ Leonid Bershidsky, *Opinion, Putin Wants to Win, but Not at All Costs*, BLOOMBERG (Dec. 6, 2017), <https://www.bloomberg.com/opinion/articles/2017-12-06/putin-wants-to-win-but-not-at-all-costs> [https://perma.cc/WFZ9-QUXU].

⁴⁰ Sukhankin, *supra* note 32.

⁴¹ *Id.*

⁴² *Id.*

Crimea.⁴³ Shortly thereafter, the focus shifted to support of Ukrainian “separatists” in the Luhansk People’s Republic.⁴⁴ The sophistication of its operations, which included the assassination of high-ranking militants and participation in the January 2015 Battle of Debaltseve, fueled suspicion of GRU involvement in the Group’s success.⁴⁵ In December 2016, Utkin and other Wagner members appeared at a state dinner attended by President Putin. Utkin received a Russian state medal for courage in battle, presumably for his actions in Ukraine.⁴⁶ This and other factors heightened the impression that the Group was acting as a proxy force in areas where the Russian government wished to exert influence without committing its own military. While no tangible evidence in the form of contracts, agreements, or instructions from the Russian state has surfaced, the Group’s follow-on activities in Syria did little to dispel such theories.⁴⁷

Upon deployment to Syria at the request of President Assad in September 2015, Russian regular forces went into action against ISIS and other opposition targets.⁴⁸ Shortly thereafter, the Wagner Group arrived and began guarding Syrian infrastructure, including military bases where Russian troops were housed.⁴⁹ In Syria, the composition of the Group included Ukrainians, Serbians, and perhaps other nationalities, rather than mostly Russian nationals, as was the case in Ukraine.⁵⁰ Russia provided

⁴³ Weiss, et al., *supra* note 31.

⁴⁴ Sukhankin, *supra* note 32.

⁴⁵ *Id.*; Marten, *supra* note 34, at 192–93.

⁴⁶ Sukhankin, *supra* note 32.

⁴⁷ Giglio, *supra* note 37.

⁴⁸ Patrick McDonnell, W.J. Hennigan & Nabih Bulos, *Russia Launches Airstrikes in Syria amid U.S. Concerns About Targets*, L.A. TIMES (Sept. 30, 2015), <https://www.latimes.com/world/europe/la-fg-kremlin-oks-troops-20150930-story.html> [<https://perma.cc/AE99-ECHT>].

⁴⁹ Grove, *supra* note 28; Taylor, *supra* note 7. *But see* *Russia Spending \$150M Monthly on Syria Mercenaries*, MOSCOW TIMES, (Aug. 25, 2016), <https://www.themoscowtimes.com/2016/08/25/russia-spending-150m-monthly-on-syria-mercenaries-a55108> [<https://perma.cc/EY2B-2VEB>]; Kimberly Marten, *The Puzzle of Russian Behavior in Deir Al-Zour*, WAR ON THE ROCKS (July 5, 2018), <https://warontherocks.com/2018/07/the-puzzle-of-russian-behavior-in-deir-al-zour/> [<https://perma.cc/5WR9-9BVL>].

⁵⁰ Sukhankin, *supra* note 32, at 11; *see also* Pierre Vaux, *Fontanka Investigates Russian Mercenaries Dying for Putin in Syria and Ukraine*, INTERPRETER (Mar. 29, 2016), <http://www.interpretermag.com/fontanka-investigates-russian-mercenaries-dying-for-putin-in-syria-and-ukraine/> [<https://perma.cc/C2CH-9DH2>] (stating that the Wagner Group included individuals other than Russians).

support to the Group that included transport on Russian military aircraft, and later treatment of its wounded in Russian military hospitals.⁵¹

In late 2016, the Syrian Ministry of Oil and Natural Resources and the Russian Ministry of Energy reached a preliminary agreement with Evro Polis, a company that, like the Wagner Group, is owned by Prigozhin.⁵² As part of that agreement, Evro Polis agreed to regain control of oil fields in opposition and ISIS-controlled Syrian territory. One year later, a contract between Evro Polis and the Syrian General Petroleum Corporation (GPC) appeared in open-source reporting in draft form.⁵³ In it, Evro Polis agreed to free the oil fields and protect, store, transport, and sell the oil and gas produced from them in exchange for 25% of the profits.⁵⁴ It would use the Wagner Group to accomplish these tasks.⁵⁵ While the final contract remains confidential, it was likely executed in early 2018.⁵⁶

One month later, in February 2018, a combined force of Syrian regular soldiers, Syrian special operations forces (deemed “ISIS Hunters”),⁵⁷ and Wagner Group personnel attacked an outpost near an oil refinery on the outskirts of Deir-ez-Zour that housed US special operators and SDF personnel engaged in counter-ISIS operations.⁵⁸ Given the confusing array of armed groups active in Syria, the US military contacted the Russian high command in Syria to ensure there were no Russian soldiers in the area.⁵⁹ Once confirmed, US ground and air assets returned fire against the attackers, inflicting as many as 200 casualties and

⁵¹ Neil Hauer, *Russia's Favorite Mercenaries*, THE ATLANTIC (Aug. 27, 2018), <https://www.theatlantic.com/international/archive/2018/08/russian-mercenaries-wagner-africa/568435/> [<https://perma.cc/P98X-8AXJ>].

⁵² See Exec. Order No. 13660, 79 Fed. Reg. 13493 (Mar. 6, 2014); Exec. Order No. 13661, 79 Fed. Reg. 15535 (Mar. 16, 2014); Exec. Order No. 13662, 79 Fed. Reg. 16169 (Mar. 20, 2014); see also Marten, *supra* note 34, at 194.

⁵³ See Irina Malkova, Anastasia Stogney & Anastasia Yakoreva, *Russian Mercenary Army Financier Made an Oil Deal with Syria Just Before Clash with U.S. Troops*, BELL (Feb. 27, 2018), <https://thebell.io/en/russian-mercenary-army-financier-made-oil-deal-syria-just-clash-u-s-troops/> [<https://perma.cc/5Q5F-W9XV>].

⁵⁴ *Id.*

⁵⁵ Marten, *supra* note 34, at 194.

⁵⁶ Malkova, et al., *supra* note 53.

⁵⁷ Tom O'Connor, *Syria's 'ISIS Hunters' Offer 1 Million for Russian Hostages*, NEWSWEEK (Oct. 5, 2017), <https://www.newsweek.com/syrias-isis-hunters-offers-pay-1-million-russian-hostages-or-kill-100-679127> [<https://perma.cc/97KG-JP4N>].

⁵⁸ Gibbons-Neff, *supra* note 7.

⁵⁹ *Id.*

compelling their attackers' hasty retreat.⁶⁰ It soon became clear that in addition to Syrian regular and special operations forces, dozens of Wagner Group members were killed.⁶¹ When questioned about Russian deaths, Russia gave inconsistent accounts. Initially, the involvement of Russian nationals was denied. However, when the facts on the ground made that position untenable, Russia admitted, but downplayed, the number of Russians killed.⁶² To date, Russia has not confirmed the death count, nor acknowledged the presence of the Wagner Group in Deir-ez-Zour during this engagement.⁶³

The Wagner Group remains in Syria.⁶⁴ Moreover, it is believed to have expanded operations to South America, presently providing security for Venezuelan President Maduro,⁶⁵ and is active, as noted by General Townsend, in Africa. Specifically linked to Sudan, Libya, and the Democratic Republic of Congo,⁶⁶ it appears Prigozhin could also direct the Group to Madagascar, Angola, Guinea-Bissau, Mozambique, Zimbabwe, and the Central African Republic, as he cultivates relationships with each government (just as the Russian Ministry of Defense has done recently).⁶⁷

II. IHL & CLASSIFYING THE SYRIAN CONFLICT

In light of the complexity of the Syrian battlespace, legal analysis must begin with an examination of the nature of the armed conflict

⁶⁰ *Id.*

⁶¹ *Id.* While it is apparent that Russian members of the Wagner Group were killed, reporting on non-Russian members of the group, Syrian regular forces, and Syrian special operations forces killed in the attack are scant. See also *ISIS Hunters Reveal New Details About U.S. Attack on Syrian Army in Deir Ezzor*, SOUTH FRONT (Feb. 11, 2018), <https://southfront.org/isis-hunters-reveal-new-details-about-u-s-attack-on-syrian-army-in-deir-ezzor/> [<https://perma.cc/AGE4-KYNU>] (stating that many Wagner Group members were killed when engaging in attacks against US forces).

⁶² *ISIS Hunters Reveal New Details About U.S. Attack on Syrian Army in Deir Ezzor*, *supra* note 61.

⁶³ Gibbons-Neff, *supra* note 7.

⁶⁴ Brown, *supra* note 3.

⁶⁵ The Maduro regime has received significant financial and military support from the Russian government. See Andrew Roth, *Russian Mercenaries Reportedly in Venezuela to Protect Maduro*, THE GUARDIAN (Jan. 25, 2019), <https://www.theguardian.com/world/2019/jan/25/venezuela-maduro-russia-private-security-contractors> [<https://perma.cc/A4JB-7R7X>].

⁶⁶ Sergey Sukhankin, *Beyond Syria and Ukraine, Wagner PMC Expands Its Operations to Africa*, JAMESTOWN FOUND. (Apr. 30, 2018), <https://jamestown.org/program/beyond-syria-and-ukraine-wagner-pmc-expands-its-operations-to-africa/> [<https://perma.cc/7LMG-XYEJ>].

⁶⁷ Henry Meyer, Ilya Arkipov & Aina Rahagalala, *Putin's Notorious 'Chef' Is Now Meddling Across Africa*, BLOOMBERG (Nov. 19, 2018), <https://www.bloomberg.com/news/features/2018-11-20/putin-chef-yevgeny-prigozhin-is-now-meddling-in-africa> [<https://perma.cc/EM8L-7PEF>].

underway. IHL, often referred to as the law of armed conflict (LOAC) or the *jus in bello*, distinguishes two types of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC). This distinction determines the IHL rules that apply to a given conflict. It not only bears upon whether Wagner Group members qualify as mercenaries under international law, but also whether their actions or omissions are breaches of international law attributable to Russia or Syria under the Law of State Responsibility.

A. INTERNATIONAL & NON-INTERNATIONAL ARMED CONFLICTS

Common Article 2 to the four 1949 Geneva Conventions defines an IAC as “declared war or of any other armed conflict . . . between two or more . . . High Contracting Parties, even if the state of war is not recognized by one of them.”⁶⁸ This definition is commonly accepted by states as mirroring the customary international law standard.⁶⁹ In practice, the definition requires the existence of “hostilities” between two or more states.⁷⁰ When such hostilities exist, the customary IHL rules that apply in IACs govern the conflict. The 1977 Additional Protocol I to the 1949 Geneva Conventions (AP I) also applies in IACs for parties to the instrument. AP I broadened the scope of applicability of its provisions beyond the Common Article 2 threshold to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and

⁶⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

⁶⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 79, 82 (July 8). With 192 States party to the four Geneva Conventions, they are binding on nearly all states as a matter of treaty law. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, INT’L REV. RED CROSS (Mar. 2005), https://www.icrc.org/en/doc/assets/files/other/irrc_857_henckaerts.pdf [https://perma.cc/T9FP-S6SL].

⁷⁰ Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, 1, 53 (2016), <https://library.icrc.org/library/docs/DOC/icrc-002-4231.pdf> [https://perma.cc/3TMU-4W4D]. Tallinn Manual 2.0 on the International Law Applicable to Cyber Warfare 82 (Michael N. Schmitt & Liis Vihul eds., 2017) [hereinafter Tallinn Manual 2.0].

racist regimes in the exercise of their right of self-determination.”⁷¹ This broadening does not reflect customary international law, and therefore the instrument does not govern the activities of non-parties to the treaty during this type of conflict.⁷²

By contrast, Common Article 3 to the Geneva Conventions defines a NIAC as an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”⁷³ Customary IHL rules for NIACs apply to such conflicts. Unlike IACs, where any hostilities between states suffice for activation of the rules, NIACs have a more demanding threshold for the applicability of IHL.

NIACs do not encompass “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature,” a limitation drawn from Additional Protocol II to the 1949 Geneva Conventions (AP II)⁷⁴ but generally considered to apply in all NIACs.⁷⁵ This limitation was further developed by the International Court for the former Yugoslavia (ICTY) in its first case, *Prosecutor v. Dusko Tadić*, a case borne out of the Bosnian-Serb conflict, as well as subsequent case law. According to *Tadić*, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”⁷⁶ It articulated two criteria integral to determining the existence of a NIAC⁷⁷: intensity of the

⁷¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(4), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol I].

⁷² U.S. Army Judge Advocate General’s Legal Center & School, *Law of War Documentary Supplement 1*, 231 (2014), https://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Documentary-Supplement-2014.pdf [<https://perma.cc/L5RH-GPBB>]; Martin A. Dupuis, *The Sixth Annual American Red Cross Washington College of Law Conference on International Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. UNIV. J. INT’L L. & POL’Y 419, 421-22 (1987); Michael N. Schmitt, *Classification of Cyber Conflict*, 17 J. CONFLICT & SEC. L. 245, 249-50 (2012).

⁷³ Geneva Conventions I-IV, *supra* note 68, art. 3.

⁷⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8 1977, 1125 U.N.T.S. 609, art. 1(2) (entered into force 7 December 1978) [hereinafter Additional Protocol II].

⁷⁵ YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW, ¶ 65 (2014).

⁷⁶ *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<https://perma.cc/BY2L-D98G>].

⁷⁷ See INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (Mar. 2008),

conflict⁷⁸ and the level of organization of the armed groups.⁷⁹ As the ICTY notes, these requirements “distinguish[] an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”⁸⁰

AP II sets forth additional rules for parties to that instrument that apply in NIACs “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.”⁸¹ The difference between such conflicts and Common Article 3 NIACs is that, while the customary

<https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>
[<https://perma.cc/4KZN-NPAK>].

⁷⁸ A non-exhaustive list to consider when determining the intensity of the conflict includes “the gravity of attacks and their recurrence; the temporal and territorial expansion of violence and the collective character of hostilities; whether various parties were able to operate from a territory under their control; an increase in the number of government forces; the mobilization of volunteers and the distribution and type of weapons among both parties to the conflict; the displacement of a large number of people owing to the conflict; and whether the conflict is subject to any relevant scrutiny or action by the UN Security Council.” Louise Arimatsu & Mohbuba Choudhury, *The Legal Classification of the Armed Conflict in Syria, Yemen, and Libya* 4 (Chatham House, Int’l Law Working Paper 2014/01, Mar. 2014), https://www.chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf [<https://perma.cc/5FTF-4ALN>]. See *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber Opinion and Judgement, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <https://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf> [<https://perma.cc/VCX8-LA69>]; *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgement, ¶¶ 38-40, 90-99 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), <https://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf> [<https://perma.cc/NK57-ZRNN>]; *Prosecutor v. Limaj*, Case No. IT-03-66-T, Trial Chamber Judgement, ¶¶ 135-74 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005), <https://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf> [<https://perma.cc/NG42-54CD>] [hereinafter “Limaj”].

⁷⁹ A non-exhaustive list to consider when determining whether there is sufficient organization of an armed group includes “the organization and structure of the armed group; the adoption of internal regulations; the nomination of a spokesperson; the issuing of orders, political statements and communiqués; the establishment of headquarters; the capacity to launch coordinated action between the armed units; the establishment of a military police and disciplinary rules; the ability to recruit new members; the capacity to provide military training; the creation of weapons distribution channels; the use of uniforms and various other equipment; and the participation by members of the group in political negotiations.” Arimatsu & Choudhury, *supra* note 78, at 4; see *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber Opinion and Judgement, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <https://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf> [<https://perma.cc/VCX8-LA69>]; Limaj, *supra* note 78.

⁸⁰ See *Prosecutor v. Tadić*, IT-94-1-T, Trial Chamber Opinion and Judgement, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <https://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf> [<https://perma.cc/VCX8-LA69>].

⁸¹ Additional Protocol II, *supra* note 74, at art. 1(1).

rules applicable in NIACs apply in any NIAC, the AP II rules that are not reflective of customary law bind only parties to AP II, and apply only when non-state forces control territory. They do not apply in a NIAC entirely between organized armed groups.

B. CLASSIFICATION OF THE SYRIAN ARMED CONFLICT

Classification of the conflict in Syria as either international or non-international determines which IHL rules govern the activities of Syria and Russia, the key state actors in this assessment of the Wagner Group. It will also bear on whether the Wagner Group has engaged in any IHL violations. This will be an essential finding to determine if Syria or Russia are responsible for those violations based on any attribution of the Group's conduct to the states under the Law of State Responsibility, a topic explored below.

Syria has long been a party to five of the six foundational treaties in IHL, having ratified the four 1949 Geneva Conventions in 1953 and AP I in 1983.⁸² It must comply with these treaties, as well as customary international law, during IACs. As to NIACs, Syria is not party to AP II, thus leaving its actions on the battlefield governed primarily by Common Article 3 of the Geneva Conventions and that aspect of customary IHL that applies in those conflicts.⁸³ Meanwhile, Russia is a party to all six treaties, having become party to the Geneva Conventions in 1954 and both Additional Protocols in 1989.⁸⁴ It is also bound by the customary IHL rules applicable in both types of conflict.⁸⁵

⁸² INT'L COMM. OF THE RED CROSS, *Treaties, State Parties and Commentaries, Syrian Arab Republic*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY (last accessed Mar. 12, 2020) [https://perma.cc/4B24-EMKH].

⁸³ *See id.*

⁸⁴ INT'L COMM. OF THE RED CROSS, *Treaties, State Parties and Commentaries: Russian Federation*, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=RU (last accessed Mar. 12, 2020) [https://perma.cc/3A8V-X77D].

⁸⁵ *Id.*; Henckaerts, *supra* note 69, at 197. While the Soviet Union signed each of the foundational treaties prior to its dissolution and the establishment of the Russian Federation in 1991, Russia assumed the Soviet Union's international legal obligations, including its seat at the United Nations and position as a permanent member on the U.N. Security Council. *See* Yehuda Z. Blum, *Russia Takes Over the Soviet Union's Seat at the United Nations*, 3 EUR. J. INT'L L. 354 (1992), <http://www.ejil.org/pdfs/3/2/2045.pdf> [https://perma.cc/495B-A5A9].

The Syrian civil war does not qualify as an IAC because neither Syria nor Russia are engaged in hostilities with another state, the condition precedent to the existence of an IAC.⁸⁶ Moreover, Syrian opposition groups are not fighting against colonial domination, alien occupation, or a racist regime in the exercise of their right of self-determination, a situation to which AP I applies for parties to that instrument.⁸⁷

Thus, the conflict in Syria can only be qualified as a NIAC, assuming it meets the threshold for intensity and organization discussed in *Tadić*. Classifying the conflict as a NIAC depends on whether the groups against which Syria and Russia are fighting, including “dissident armed forces,” are sufficiently well-organized to qualify as “organized armed groups” under IHL. It also depends on whether the attendant violence is sufficiently intense to rise to the NIAC level, rather than constituting banditry, civil unrest, riots, and the like.

The Independent International Commission of Inquiry on the Syrian Arab Republic, appointed by the U.N. Human Rights Council in 2011 to consider human rights violations in Syria, addressed this question in August 2012, but only as it pertained to the FSA.⁸⁸ In its opinion “the intensity and duration of the conflict, combined with the increased organizational capabilities of the FSA, do, in fact, meet the legal threshold for a non-international armed conflict.”⁸⁹ Based on the background

⁸⁶ See Geneva Convention I, *supra* note 64. Some scholars believe the US-led coalition’s use of force against ISIS and the Syrian government and Turkish strikes against ISIS in Syria constitute an ongoing IAC, positions which Turkey, the US, and this author disagree with. This conclusion excludes the long-standing IAC between Syria and Israel regarding the occupation of the Golan Heights. Beth Van Schaak, *Mapping the Law That Applies to War Crimes in Syria*, JUST SECURITY (Feb. 1, 2016), <https://www.justsecurity.org/29083/mapping-law-applies-war-crimes-syria/> [<https://perma.cc/PM7S-8YKT>]; see also Jack Goldsmith & Oona Hathaway, *Bad Legal Arguments for the Syria Airstrikes*, JUST SECURITY (Apr. 14, 2018), <https://www.lawfareblog.com/bad-legal-arguments-syria-airstrikes> (discussing the 2018 US, U.K., and French strikes against Syrian chemical weapons program targets, and the justifications offered by each government for its use of force).

⁸⁷ The Syrian people are not exercising the right to self-determination against colonial domination, alien occupation, and racist regimes such that the use of force invokes an international armed conflict. Instead, they are “a people tak[ing] up arms against authorities which [they] contest,” which is not to be considered international for the purposes of an armed conflict. See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶¶ 111–113 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

⁸⁸ U.N. Human Rights Council, *About the Commission of Inquiry on the Syrian Arab Republic*, <https://www.ohchr.org/EN/HRBodies/HRC/LICISyria/Pages/AboutCoI.aspx> (last accessed Mar. 12, 2020) [<https://perma.cc/V9SQ-LVKA>].

⁸⁹ U.N. Human Rights Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic in Its Twenty-First Session, U.N. Doc. A/HRC/21/50, at 45 (Aug. 16, 2012),

regarding the FSA's involvement in the conflict set forth above, this is a correct conclusion.

Subsequent to the Commission's findings regarding the FSA, additional NIACs between Syria and a number of organized armed groups emerged. These include a NIAC with ISIS, whom the Commission found to be a "well-organized, dominant armed force in control of extensive territory in the Syrian Arab Republic and Iraq."⁹⁰ NIACs between Syria and the FSA and Syria and ISIS represent only two of more than a dozen NIACs that have emerged in Syria over the last nine years.⁹¹ However, it is unnecessary for the purposes of this article to discuss each NIAC in detail.⁹²

What is critical to this article and its assessment of the Wagner Group is whether Russia is a party to the conflict in Syria. Russian soldiers arrived in Syria at Assad's request in September 2015.⁹³ Their presence did not "internationalize" the conflicts taking place in Syria because Russia intervened with the consent of the Syrian government. Nonetheless, it made Russia a party to the Syrian NIAC once it began taking action in support of the regime against opposition targets in Syria.⁹⁴

https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf [<https://perma.cc/3STY-D7GC>].

⁹⁰ U.N. Human Rights Council, Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic in Its Twenty-Seventh Session, U.N. Doc. A/HRC/28/69, ¶ 33 (Feb. 5, 2015), <https://undocs.org/pdf?symbol=en/A/HRC/28/69> [<https://perma.cc/SG3Z-B5MW>]; see also Terry D. Gill, *Classifying the Conflict in Syria*, 92 U.S. NAVAL WAR COLLEGE INT'L L. STUD. 353, 359, 375–76 (2016), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1691&context=ils> [<https://perma.cc/8UF3-QYPE>].

⁹¹ *Non-International Armed Conflicts in Syria*, RULE OF L. IN ARMED CONFLICTS PROJECT (RULAC) OF THE GENEVA ACAD. OF INT'L HUMANITARIAN L. AND HUM. RTS., <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse3accord> (last updated Jan. 22, 2020) [<https://perma.cc/EE5E-C4CU>].

⁹² *Id.*

⁹³ Permanent Rep. of the Russian Federation to the U.N., Letter dated Oct. 15, 2015 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/792 (Oct. 15, 2015), <https://undocs.org/S/2015/792> [<https://perma.cc/5XUB-AXNJ>].

⁹⁴ See Tristan Ferraro, *The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict*, 97 INT'L REV. RED CROSS 1227, 1231, 1233–34 (2015), <https://international-review.icrc.org/articles/icrcs-legal-position-notion-armed-conflict-involving-foreign-intervention-and-determining> [<https://perma.cc/AGY5-JFLJ>]; Yoram Dinstein, *Concluding Remarks on Non-International Armed Conflicts*, 88 U.S. NAVAL WAR COLLEGE INT'L L. STUD. 399, 411–413 (2012), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1069&context=ils> [<https://perma.cc/PQ9D-6BZV>]; see also AMNESTY INT'L, 'CIVILIAN OBJECTS WERE NOT

Russia admitted as much to the U.N. Security Council on October 15, 2015, stating “the Russian Federation began launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic.”⁹⁵ More than 63,000 Russian troops now have combat experience in Syria fighting ISIS, the FSA, and other organized armed groups.⁹⁶ Accordingly, Russia, like Syria, may be regarded as a party to the conflict with the FSA, ISIS, and other groups fighting against the Assad regime.⁹⁷

III. WAGNER GROUP MERCENARIES IN SYRIA

While the news media repeatedly categorizes the Wagner Group as “Russian mercenaries,”⁹⁸ this assumption is typically devoid of any analysis under international law. As demonstrated below, an application of the facts to the law, at least as it pertains to the Wagner Group’s activities in Syria, produces a very different result. In fact, its members operating in Syria do *not* qualify as “Russian” mercenaries.

While no international treaties explicitly address the conduct of PMSCs like the Wagner Group, three do specifically address mercenaries: AP I,⁹⁹ the 1977 Convention of the Organization of the African Unity for

DAMAGED,’: RUSSIA’S STATEMENTS ON ITS ATTACKS IN SYRIA UNMASKED, (Dec. 23, 2015), <https://www.amnesty.org/en/documents/mde24/3113/2015/en/> [<https://perma.cc/9FZE-FS6N>].

⁹⁵ Permanent Rep. of the Russian Federation to the U.N., *supra* note 93.

⁹⁶ See *Russia Says 63,000 Troops Have Seen Combat in Syria*, BBC NEWS (Aug. 23, 2018), <https://www.bbc.com/news/world-middle-east-45284121> [<https://perma.cc/R4WB-PTMK>].

⁹⁷ See *Non-International Armed Conflicts in Syria*, *supra* note 91. Because Russia is a party to AP II, it must abide by its treaty obligations contained therein despite the fact the territorial state is only bound by Common Article 3 and those provisions in AP II considered customary international law. *Treaties, States Parties, and Commentaries: Russian Federation*, *supra* note 84.

⁹⁸ E.g., Thomas Gibbons-Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html> [<https://perma.cc/HVE7-ASNN>].

⁹⁹ Article 47 of Additional Protocol I is the only foundational IHL treaty that addresses mercenaries. Only applicable to international armed conflicts, it is not relevant to the Syrian civil war. However, even when all elements are satisfied under Article 47, mercenarism is not “criminalized” in IACs. Instead, it permits nations to deny combatant status and prisoner of war status from those deemed to be mercenaries (if they wish to do so), a rule which has evolved into a customary norm of IHL established by state practice. Regardless of this customary norm, prisoner of war status is inapplicable to NIACs. See Additional Protocol I, *supra* note 71, art. 47; see also INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW DATABASE RULE 108, (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2009), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule108 [<https://perma.cc/5Z5B-3YU6>] [hereinafter CIHL STUDY].

the Elimination of Mercenarism in Africa (OAU Convention),¹⁰⁰ and the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries (Mercenary Convention).¹⁰¹ Because AP I is only applicable to IACs and the OAU Convention is a regional convention relevant only to certain African States, those instruments are inapplicable to the case of the Wagner Group in Syria. In addition, the customary law governing mercenaries only applies in IACs.¹⁰² Thus, the Mercenary Convention is the only treaty potentially applicable to the Syrian NIAC and the Wagner Group's activities.¹⁰³

¹⁰⁰ The Convention of the Organization of the African Unity (OAU) for the Elimination of Mercenarism in Africa is a regional convention only, and was adopted in Libreville, Gabon on July 3, 1977. It criminalized the act of mercenarism on the African continent in the wake of the threat posed by mercenaries to the "independence, sovereignty, and territorial integrity and harmonious development of member states," and required each contracting state to make mercenarism punishable by the severest penalties under its national laws, including capital punishment. While this convention entered into force on April 22, 1985, only thirty-six of fifty-five African countries are signatories, with thirty-two having ratified the convention. *See* Convention of the OAU for the Elimination of Mercenarism in Africa, *adopted* July 3, 1977, O.A.U. Doc. CM/433/Rev. L. Annex. 1 (1972) (entered into force Apr. 22, 1985), <https://treaties.un.org/doc/Publication/UNTS/Volume%201490/volume-1490-I-25573-English.pdf> [<https://perma.cc/E7YD-D7ZR>].

¹⁰¹ *See generally* International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, *adopted* Dec. 4, 1989, 2163 U.N.T.S. 37789 (entered into force Oct. 20, 2001) [hereinafter Mercenary Convention].

¹⁰² CIHL STUDY, *supra* note 99, at 108.

¹⁰³ There are several "soft law" instruments that seek to inform the debate and regulation of PMSCs, the most influential being the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military Security Companies during Armed Conflict, dated 17 September 2008. Not a legally binding document, it contains a set of good practices designed to help states take measures nationally to fulfill their obligations under international law. Launched by the ICRC and the Swiss government, seventeen nations, including the United States, China, and the United Kingdom, came together over four meetings from 2006–09 to finalize it. A decade removed from its publication, fifty-five states, NATO, OSCE, and the EU have formally expressed support for it. Notably, neither Russia nor Syria have expressed support for the document. *See* Permanent Rep. of Switz. to the U.N., Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military Security Companies During Armed Conflict, U.N. Doc. A/63/467-S/2008/636 (Sept. 17, 2008) [hereinafter Montreux Document].

Prior to the Montreux Document, the U.N Commission on Human Rights established a Working Group (WG) on the use of mercenaries in 2005, which continued nearly two decades of work by special rapporteurs on the subject. In 2008, the WG's mandate was expanded to study the activities of PMSCs. The WG assessed a regulatory gap covering the activities of PMSCs at the international level in 2010, and proposed a draft convention "aimed at ensuring States take the necessary measures to promote transparency, responsibility, and accountability in their use of PMSCs and their personnel." Though the 2010 draft convention did not garner sufficient support from states, the study remains ongoing with the WG's mandate renewed in 2016. *See* U.N. Comm. on Human Rights Res. 2005/2, The Use of Mercenaries as a Means of Violating Human Rights and Impeding

The Mercenary Convention, which entered into force in 2001, applies during both IACs and NIACs.¹⁰⁴ Because Russia is not a party to the treaty, and as there is no customary law applicable to mercenaries in a NIAC, Russian employment of the Wagner Group in Syria would not run afoul of international law so far as mercenaries are concerned.¹⁰⁵ Syria, on the other hand, acceded to the Convention in October 2008, one of only thirty-six states to have done so.¹⁰⁶ As a result, the Convention and the obligations set forth therein, govern, in part, the relationship between Syria and the Wagner Group.¹⁰⁷

The Convention separately addresses the obligations of both individuals and states. Articles 2 and 3 both speak to the conduct of individuals. Under Article 2, any person who “recruits, uses, finances, or trains mercenaries” commits an offense for the purposes of the Convention.¹⁰⁸ Article 3 prohibits individuals who meet the definition of a mercenary (discussed below) from “participat[ing] directly in hostilities or in a concerted act of violence.”¹⁰⁹ Article 5 speaks to the conduct of states, which are prohibited from recruiting, using, financing, or training mercenaries.¹¹⁰ States are also required to prohibit such activities and

the Exercise of the Right of Peoples to Self-Determination, chap. V (Apr. 7, 2005). U.N. Human Rights Council Res. 7/21, Mandate 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 (Mar. 28, 2008); Human Rights Council, 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, U.N. Doc. A/HRC/15/25 (July 2, 2010); Human Rights Council Res. 33/4, 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, U.N. Doc. A/HRC/33/4 (Oct. 5, 2016).

¹⁰⁴ See Mercenary Convention, *supra* note 101, art. 3.

¹⁰⁵ See *Treaties, State Parties and Commentaries: Russian Federation*, *supra* note 84.

¹⁰⁶ *Id.* Syria’s decision to accede to the Mercenary Convention in October 2008, nearly twenty years after it was adopted, remains vexing. At the time Syria acceded to the Convention, it was seeking international aid despite being accused of massing troops on the border of Lebanon and hiding evidence of a nuclear weapons program. See Renee Dopplick, *Syria Accedes to the UN Mercenary Convention*, INSIDE JUSTICE (Jan. 28, 2009), http://www.insidejustice.com/intl/2009/01/28/syria_accedes_to_the_un_mercenary_conven/ [<https://perma.cc/3DK2-Z75U>].

¹⁰⁷ See Mercenary Convention, *supra* note 101, art. 2 (“Any person [or state] who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.”).

¹⁰⁸ Mercenary Convention, *supra* note 101, art. 2.

¹⁰⁹ *Id.* at art. 3, ¶ 1.

¹¹⁰ *Id.* at art. 5.

“make the offences set forth in the convention punishable by appropriate [domestic] penalties.”¹¹¹

Before an inquiry into violations of Article 2, 3, or 5 of the Convention may occur, a determination must be made as to whether individual members of the Wagner Group meet the five conditions necessary to qualify as a mercenary. Article 1 of the Convention defines a “mercenary” for the purposes of both international and non-international armed conflict as any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) 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 rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) 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.¹¹²

Paragraph (a) of Article 1 requires that an individual be “*specially recruited . . . to fight in an armed conflict*” to qualify as a mercenary.¹¹³ Having previously noted the existence of multiple ongoing NIACs in Syria, the “armed conflict” requirement is satisfied.¹¹⁴ However, members of the Group must also be specially recruited to fight, which is difficult to discern with limited access to the information and agreements that brought the Wagner Group to Syria.

Therefore, satisfying the “special recruitment” element requires focusing on the scope and purpose behind the PMSC’s involvement in the armed conflict.¹¹⁵ Although speculative, the Wagner Group’s scope and purpose are illuminated by its history. Composed, in part, with former soldiers, its members train on all manner of weaponry in close proximity

¹¹¹ *Id.* at art. 5, ¶ 3.

¹¹² *Id.* at art. 1.

¹¹³ *Id.* at art. 1, ¶ 1(a).

¹¹⁴ *Supra* section II.B, at NIAC conclusion.

¹¹⁵ HANNA TONKIN, STATE SECURITY OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 176 (2011).

to a Russian military base prior to deployment.¹¹⁶ These facts, in addition to their prior activities in Ukraine, make it likely they were “specially recruited” for their military capabilities.¹¹⁷ Moreover, the scope of their activities in Syria upon arrival confirms this, as they were immediately tasked to guard military objectives from opposition groups¹¹⁸ before conducting offensive combat operations to retake Palmyra in 2016 and later Deir-ez-Zour in 2018.¹¹⁹

Lastly, the question of whether they were “specially recruited” for the specific purpose of “fighting” must be satisfied. Some scholars interpret “fighting” in this context as analogous to “direct participation in hostilities.”¹²⁰ This is a reasonable approach.¹²¹ The consensus among states is that members of PMSCs are civilians, except in the rare circumstance they are incorporated into the armed forces of a state or form a group under a command responsible to a party to the conflict.¹²² As civilians, PMSC members remain protected from attack “unless and for such time as they directly participate in hostilities,” a customary law norm applicable in both IACs and NIACs.¹²³

“Direct participation” is first defined in the Commentary to the Additional Protocols as “acts of war by their nature and purpose [that] are likely to cause actual harm to the personnel and equipment of the enemy armed force.”¹²⁴ Nearly twenty years later, the ICRC undertook a comprehensive study of the phrase, which culminated in its publication of the 2009 *Interpretive Guidance on the Notion of Direct Participation in*

¹¹⁶ Sukhankin, *supra* note 32.

¹¹⁷ See Quinn, *supra* note 34.

¹¹⁸ Grove, *supra* note 28.

¹¹⁹ Hauer, *supra* note 51.

¹²⁰ *Id.*

¹²¹ This approach is reasonable when viewed through the lens of combatant and civilian status in armed conflict and the attendant loss of protection from attack in targeting when civilians directly participate in hostilities. Moreover, while members of a PMSC in a conflict zone may very well qualify as members of an organized armed group such that they may be targeted with lethal force under the membership approach of the US and other nations, or the continuous combat function approach of the ICRC, this determination is unnecessary for the purposes of this article. See OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL 222, ¶ 5.7.3 (2015) [hereinafter DOD LOW MANUAL]; INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 31–36 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE].

¹²² Montreaux Document, *supra* note 103, at 10–11, ¶ 26(b).

¹²³ Additional Protocol I, *supra* note 71, art. 51(3); Additional Protocol II, *supra* note 74, art. 13(3); CIHL STUDY, *supra* note 99, at 6.

¹²⁴ COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 87, ¶¶ 1944, 4762.

Hostilities under International Humanitarian Law.¹²⁵ Though not legally binding, it does provide a robust and largely persuasive deconstruction of this phrase.¹²⁶

According to the ICRC, direct participation in hostilities (DPH) requires satisfying three conditions. First, the individual's "act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm)."¹²⁷ Second, "there must be a direct causal link between the act and the harm likely to result either from the act, or from a coordinated military operation of which that act constitutes an integral part (direct causation)."¹²⁸ Finally, "the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)."¹²⁹

It is evident that the Wagner Group was brought to Syria to "cause actual harm to the personnel and equipment" of rebel groups opposing the Assad regime. The provision of security for Syrian military bases in 2015 and offensive operations against opposition groups in Palmyra in 2016 and Deir-ez-Zour in 2018 certainly qualify as "direct participation in hostilities," meeting the threshold of harm, direct causation, and belligerent nexus requirements articulated by the ICRC.¹³⁰ Consequently, employees of the Wagner Group in Syria may be considered "*specialty recruited . . . to fight in an armed conflict*" within the context of paragraph (a) of the mercenary definition.¹³¹

Next, paragraph (b) of Article 1 requires the individual be "*motivated to take part in the hostilities essentially by the desire for private*

¹²⁵ See generally ICRC INTERPRETIVE GUIDANCE, *supra* note 121.

¹²⁶ The ICRC's position on DPH is not without its critics, especially concerning the constitutive element of "direct causation." See generally Michael N. Schmitt, *Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2009–2010); Bill Boothby, "And for Such Time As": *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741 (2009–2010).

¹²⁷ ICRC INTERPRETIVE GUIDANCE, *supra* note 121, 46–50; see also TONKIN, *supra* note 115, at 177.

¹²⁸ ICRC INTERPRETIVE GUIDANCE, *supra* note 121, at 46, 51–58. see also TONKIN, *supra* note 115, at 177.

¹²⁹ ICRC INTERPRETIVE GUIDANCE, *supra* note 121, 46, 58–64; see also TONKIN, *supra* note 115, at 178.

¹³⁰ See Hauer, *supra* note 51.

¹³¹ Mercenary Convention, *supra* note 101, at art. 1, ¶1(a) (emphasis added); accord TONKIN, *supra* note 115, at 180. See ICRC INTERPRETIVE GUIDANCE, *supra* note 121, 31–35;

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 rank and functions in the armed forces of that party.”¹³² To the extent Wagner Group members have revealed their motive in joining the Group and deploying to Syria, it has been for private gain.¹³³ Moreover, Wagner members, should Syria have contracted for their services, would receive compensation by or on behalf of a party to the conflict which is substantially in excess of its own forces.¹³⁴ As noted, members received between \$4,000 and \$8,000 per month for deployment to Syria in 2017,¹³⁵ whereas the average Syrian soldier made approximately \$28.00 per month. Compensation, at a minimum, at nearly 150 times the average Syrian soldier, obviously qualifies as “substantially in excess.”¹³⁶

Set forth in Paragraph (c) of Article 1, the third requirement is that an individual be “neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict.”¹³⁷ The plain text of this element refers to the nationality of the individual, rather than an entity or corporation.¹³⁸ Because Russia is a party to the conflict, the Wagner Group’s Russian nationals operating in Syria *cannot* qualify as mercenaries under the Convention’s definition. Nonetheless, Ukrainian, Serbian, and other non-Russian members of the Group¹³⁹ operating in Syria would still meet the paragraph (c) criteria.¹⁴⁰

¹³² Mercenary Convention, *supra* note 101, at art. 1, ¶ 1(b) (emphasis added).

¹³³ See Nataliya Vasilyeva, *Thousands of Russian Private Contractors Fighting in Syria*, AP NEWS (Dec. 12, 2017), <https://apnews.com/7f9e63cb14a54dfa9148b6430d89e873> [<https://perma.cc/R53X-NVG8>].

¹³⁴ *Id.*; see also Malkova, et al., *supra* note 55; Sukhankin, *supra* note 32.

¹³⁵ Sukhankin, *supra* note 32.

¹³⁶ See Aron Lund, *A Fistful of Dollars: The Dwindling Value of Syrian State Salaries*, CENTURY FOUND. (May 13, 2016), <https://tcf.org/content/commentary/fistful-dollars-dwindling-value-syrian-state-salaries/?agreed=1> [<https://perma.cc/4CUF-KEV9>].

¹³⁷ Mercenary Convention, *supra* note 101, at art. 1, ¶ 1(c).

¹³⁸ TONKIN, *supra* note 115, at 182.

¹³⁹ Giglio, *supra* note 37.

¹⁴⁰ Paragraph (c) is considered problematic in meeting the mercenary definition in Article 1 because “the nationality criterion constitutes a loophole in the UN Convention as it permits the hiring state to evade its obligation not to hire mercenaries by taking action lying solely within its control.” TONKIN, *supra* note 115, at 183. For example, the Syrian government may choose to grant temporary citizenship to ensure non-Russian members of the Wagner Group don’t qualify as mercenaries. *Id.*; see Laura Visser, *Russia’s Intervention in Syria*, EUR. J. OF INT’L L. BLOG (Nov. 25, 2015), <https://www.ejiltalk.org/russias-intervention-in-syria/> [<https://perma.cc/R25E-Q6KS>].

Turning to the fourth and fifth requirements under Article 1, paragraphs (d) and (e), the individuals concerned may not be “member[s] of the armed forces of a party to the conflict,” nor may they be “sent by a State which is not a party to the conflict on official duty as [] member[s] of its armed forces.”¹⁴¹ Because Wagner Group employees are employees of a private company and not recognized as members of the Syrian, Russian, or other armed forces, and because they were not sent to Syria by a state that is not party to the Syrian conflict on official duty (as members of that state’s armed forces), these two conditions would also be met.

Russian members of the Group, as nationals of a party to the conflict, unequivocally do not qualify as mercenaries. Ukrainian and Serbian members do not suffer the same nationality prohibition, and should sufficient evidence of each mercenary element be available, it is likely these members “participated in hostilities” under Article 3 of the Convention.¹⁴² As a party to the Convention, Syria is obligated to ensure the Wagner Group members operating in its territory who qualify as mercenaries and participate in hostilities are taken into custody, such that criminal or extradition proceedings may commence.¹⁴³ Moreover, Syria is obligated under Article 5 of the Convention to refrain from hiring or using mercenaries.¹⁴⁴ However, because the Wagner Group is in Syria either acting pursuant to a contract with the Syrian state, or at the request of its closest ally, Russia, Syrian compliance with its obligations under the Convention appears extremely unlikely.

IV. STATE RESPONSIBILITY & THE WAGNER GROUP IN SYRIA

Turning to the Law of State Responsibility, this article now examines whether Russia or Syria is responsible for the actions of the Wagner Group for any alleged breaches of IHL in the Syrian conflict. Responsibility under this body of law hinges directly on whether such breaches are attributable to the state.¹⁴⁵

¹⁴¹ Mercenary Convention, *supra* note 101, at art. 1, ¶¶ 1(d–e).

¹⁴² *Id.* at art. 3.

¹⁴³ *Id.* at art. 10, ¶ 1.

¹⁴⁴ *Id.* at art. 5.

¹⁴⁵ See Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<https://perma.cc/BY2L-D98G>].

In 2017, graphic video evidence of the torture of a purported ISIS fighter emerged from Syria, though it is unclear whether members of the Wagner Group or other actors perpetrated this violation of IHL.¹⁴⁶ A similar video surfaced in 2019, wherein Russian-speaking men, believed to be members of the Wagner Group, beheaded, dismembered, and set fire to a Syrian man.¹⁴⁷ Assuming solely for the sake of analysis that Wagner Group members perpetrated these acts, the analysis below illustrates the challenges of attributing the conduct of a PMSC to the state under the Law of State Responsibility.

A. THE LAW OF STATE RESPONSIBILITY

The 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (“Draft Articles”) reflect the International Law Commission’s (ILC) efforts to capture the customary law of state responsibility.¹⁴⁸ In its decades of work on the Draft Articles, the ILC sought to identify secondary rules of international law that apply in “determining the legal consequences of [a state’s] failure to fulfil obligations established by the ‘primary’ rules.”¹⁴⁹ Adopted by the U.N. General Assembly in 2001, the Draft Articles provide “the general conditions under international law for the State to be considered responsible for wrongful acts or omissions and the legal consequences which flow therefrom.”¹⁵⁰

¹⁴⁶ Paul McLoughlin, *Syrian Man Filmed Being Bludgeoned with Hammer Blows by ‘Russian Mercenaries*, NEW ARAB (July 1, 2017), <https://www.alaraby.co.uk/english/blog/2017/7/1/syrian-man-bludgeoned-with-hammer-by-russian-mercenaries>; *but see Breaking: Terrifying Footage of Russians Torturing Prisoner With Sledge Hammer* (June 30, 2017), <https://www.funker530.com/prisoner-sledge-hammer/>; *Alleged Russian Fighters Torturing ISIS Member in Syrian Desert* (Feb. 7, 2017), <https://southfront.org/video-alleged-russian-fighters-torturing-isis-member-in-syrian-desert/#promo>.

¹⁴⁷ Andrew Roth, *Man Who Filmed Beheading of Syrian Identified as Russian Mercenary*, THE GUARDIAN (Nov. 21, 2019), <https://www.theguardian.com/world/2019/nov/21/man-filmed-killing-torture-syrian-identified-russian-mercenary-wagner> [<https://perma.cc/52WS-MDH4>].

¹⁴⁸ *See State Responsibility*, Summaries of Work, INT’L L. COMMISSION (July 15, 2015), http://legal.un.org/ilc/summaries/9_6.shtml [<https://perma.cc/9ZV5-5UXV>].

¹⁴⁹ *Id.*; *see* Draft Articles, *supra* note 8, at Commentary to Chapter III, ¶ 2; *see also* Eric David, *Primary and Secondary Rules*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 27, 29 (James Crawford, Alain Pellet & Simon Olleson, eds., 2010); *Report of the International Law Commission to the General Assembly on the Work of Its Thirty-Second Session*, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. Int’l L. Comm’n 27, ¶ 23, U.N. Doc. A/CN.4/SER.A/1980/Add.1.

¹⁵⁰ *Report of the International Law Commission to the General Assembly on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10, at 31 (2001), *reprinted in* [2001] 2 Y.B. Int’l L. Comm’n 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

Under the Draft Articles, an internationally wrongful act of a state is an act (whether an action or omission) that is “attributable to the State under international law” and “constitutes a breach of an international obligation of the State.”¹⁵¹ The first condition, attribution, “is the process by which international law establishes whether the conduct of a . . . person . . . can be considered an ‘act of State’ and thus be capable of giving rise to State responsibility.”¹⁵² Although attribution may occur in a variety of ways, this article will focus on attribution that occurs through the actions or omissions of an individual as an organ of the state (Article 4), when individuals are empowered by law to exercise elements of governmental authority (Article 5), and when individuals act pursuant to the instructions, direction, or control of a state (Article 8).¹⁵³

The second condition is breach of an international obligation.¹⁵⁴ An international obligation “may be established by a customary rule of international law, by a treaty, or by a general principle applicable within the legal order.”¹⁵⁵ Determining the existence of a breach is fact-specific, and “depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose.”¹⁵⁶ The fact that a state may be acting in conformity with its internal, domestic law has no bearing on whether there has been a breach of an international obligation.¹⁵⁷

¹⁵¹ Draft Articles, *supra* note 8, art. 2.

¹⁵² JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 113 (2013).

¹⁵³ See Draft Articles, *supra* note 8, commentary to art. 4, ¶ 1; commentary to art. 5, ¶ 2; commentary to art. 8, ¶ 2.

¹⁵⁴ *Id.* at commentary to art. 2, ¶ 4.

¹⁵⁵ *Id.* at commentary to art. 12, ¶ 3.

¹⁵⁶ *Id.* at commentary to art. 12, ¶ 1.

¹⁵⁷ *Id.* at commentary to art. 3 ¶ 1. The Draft Articles describe a series of actions the “responsible” state must take to resolve its commission of an internationally wrongful act to make an “injured” state whole. This article only deals with attribution; however, it is important to briefly describe actions the “responsible” state may take to account for its actions. First, “cessation of the wrongful conduct, and the offer of assurances and guarantees of non-repetition by the [responsible] State,” is likely to be appropriate. *Id.* at commentary to art. 30, ¶ 1. Second, reparations may be necessary to ensure that the *status quo ante*, if practicable, is achieved. *Id.* Reparations require the responsible state to “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29. Reparations may consist of one or all of the following: restitution (reestablishing the situation prior the wrongful act), compensation (payment for the damage caused by the wrongful act), and satisfaction (an acknowledgment of the breach and expression of regret or a formal apology by the responsible state). See Draft Articles, *supra* note 8, commentary to art. 35, ¶ 1–2; commentary to art. 36; art. 37, ¶ 2.

B. SYRIAN ATTRIBUTION FOR THE WAGNER GROUP'S BREACHES OF IHL

Turning first to whether a violation of IHL by a member of the Wagner Group would be attributable to Syria, it is helpful to separate the activities of the Group into three distinct time-periods: 2015, 2016–17, and 2018. Recall that the Group arrived in Syria in October 2015 to guard Syrian infrastructure, either under contract with the Assad regime or at the direction of the Russian government. Though this critical distinction remains unknown, this section of the article assumes a contract was first concluded with organs of the Syrian state.¹⁵⁸ By 2016, the Wagner Group shifted from static security to offensive combat operations in clearing the city of Palmyra from opposition control, and, in the absence of evidence to the contrary, this article will also assume the 2016–17 offensive activities were conducted pursuant to the same 2015 contract. Finally, the 2018 contract between Evro Polis and the state-owned, commercial entity Syrian GPC will be treated as an executed contract, despite its availability only in draft form.¹⁵⁹

1. Attribution Under Article 4

Under the Draft Articles, “the State, as a subject of international law, is held responsible for the conduct of all the organs, instrumentalities, and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.”¹⁶⁰ The term state organ “covers all the individual or collective entities which make up the organization of the State and act on its behalf.”¹⁶¹ The Draft Articles’ use of the term state organ is purposefully broad; it applies to all states regardless of their internal organization and domestic law. Therefore, when it comes to state organs under Article 4, “it is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of the government of whatever classification,

¹⁵⁸ Grove, *supra* note 28; *see also* Taylor, *supra* note 7. *But see* *Russia Spending \$150M Monthly on Syria Mercenaries*, MOSCOW TIMES (Aug. 25, 2016), <https://www.themoscowtimes.com/2016/08/25/russia-spending-150m-monthly-on-syria-mercenaries-a55108> [<https://perma.cc/ST6Z-E29H>].

¹⁵⁹ *See supra* Section II.B.

¹⁶⁰ Draft Articles, *supra* note 8, commentary to Chapter II, ¶ 7.

¹⁶¹ *Id.* at commentary to art. 4, ¶ 1.

exercising whatever functions, and at whatever level in the hierarchy, including those at the provincial or even local level.”¹⁶² Under Article 4, PMSCs can only qualify as a state organ in one of two ways, *de jure* or *de facto*.

To be a *de jure* state organ, a PMSC must be recognized by the internal law of the state. This is extremely unlikely, as it requires a pre-existing private entity to be incorporated into the state structure either through legislation or contract.¹⁶³ One of the only examples of a PMSC as a *de jure* state organ is Sandline International and its 1997 contract with Papua New Guinea. There the contract expressly provided Sandline employees status as Special Constables, a classification under the Papua New Guinea state police force.¹⁶⁴

The Wagner Group clearly does not qualify as a *de jure* state organ under Article 4. Open source research reveals no domestic legislation incorporating the Group into the Syrian state as an organ unto itself. Moreover, there is no evidence to suggest the Group was incorporated (via contract) at any time into a pre-existing Syrian state organ (e.g. Syrian military or police forces) or given a special status in their contract with the state like that of the Sandline Special Constables in Papua New Guinea.

An entity or group only qualifies as a *de facto* organ of the state where the relationship is one of “complete dependence on the State, of which they [the PMSC] are ultimately merely the instrument.”¹⁶⁵ The International Court of Justice (ICJ) used the term “complete dependence” in the *Nicaragua* and *Bosnian Genocide* cases when discussing *de facto* state organs under Article 4; however, the Court failed to provide a clear explanation of the term.¹⁶⁶ Nevertheless, *de facto* organs of the state are

¹⁶² *Id.* at commentary to art. 4, ¶ 6.

¹⁶³ LINDSEY CAMERON & VINCENT CHETAİL, *PRIVATIZING WAR: PRIVATE MILITARY SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* 138 (2013).

¹⁶⁴ Agreement for the Provision of Military Assistance, Papua N.G.–Sandline International, Jan. 31, 1997, http://psm.du.edu/media/documents/industry_initiatives/contracts/industry_contract_sandline-papua-new-guinea.pdf [https://perma.cc/AX6K-3HKE]; see also CAMERON & CHETAİL, *supra* note 163, at 140–41.

¹⁶⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 392 (Feb. 26); see also CAMERON & CHETAİL, *supra* note 163, at 144.

¹⁶⁶ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep. 14, ¶ 109–10 (June 27); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 392 (Feb. 26). In assessing a variety of cases, including the ICJ’s *Bosnian Genocide* and *Nicaragua* decisions, as well as the non-ICJ 1927 *Stephens* case, 1945 *Belsen* case,

extremely rare, as the ICJ has never “found an entity to be equated with a state organ” in its near seventy-five year existence.¹⁶⁷

The Wagner Group also fails to qualify as a *de facto* organ of Syria, as it is not “completely dependent” on the state. Founded by a retired Russian officer and funded by a Russian oligarch, the Wagner Group is a private corporation with no apparent ties to Syria prior to its arrival in 2015. In securing Syrian government infrastructure in 2015 and conducting offensive operations in 2016, the Group appears to have done so with very little Syrian assistance.¹⁶⁸ Moreover, the Group appears to have enjoyed considerable autonomy in conducting its activities pursuant to the 2018 Evro Polis contract with the Syrian GPC.¹⁶⁹ While at times accompanied by Syrian forces during operations, the Group trains in Russia, resources its own personnel, and operates in countries other than Syria, including Ukraine, Sudan, and the Central African Republic.¹⁷⁰ Weighing these facts against the requirement of “complete dependence,” it is clear the Wagner Group is not “merely an instrument” of the Syrian state.

2. Attribution Under Article 5

In that the Wagner Group does not qualify as an organ of the Syrian state under Article 4, an examination under Article 5 is necessary. Attribution under Article 5 requires that the Group must: exercise elements of Syrian governmental authority, be empowered to act under Syrian domestic law, and be acting in the exercise of Syrian governmental authority when the internationally wrongful act is committed. The Draft

1987 *Menten* case, and 1998 *Blake v. Guatemala* case, several scholars enumerate a number of criteria to assist in determining whether a PMSC is “completely dependent” on the state so as to conclude that it is a *de facto* state organ under Article 4. See CAMERON & CHETAIL, *supra* note 163, at 146–47 (citing *Stephens & Stephens (U.S.A.) v. United Mexican States* 4 R.I.A.A. 265 (Perm. Ct. Arb. 1927) (*Stephens Case*); *Trial of Joseph Kramer and 44 Others*, British Military Court, Luneberg, Sep. 17–Nov. 17, 1945, Law Reports of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by His Majesty’s Stationery Office, London, 1947 (UNWCC), Vol. 2, at 152 (*Kramer Case*); *Public Prosecutor v. Menten*, Dutch Supreme Court, decision of Apr. 10, 1986 (1987), 75 ILR at 47 (*Menten Case*); *Blake v. Guatemala*, Judgement, Inter-American Court of Human Rights, Series C, no. 36, Jan. 24, 1998, ¶ 75–76 (*Blake Case*)).

¹⁶⁷ CAMERON & CHETAIL, *supra* note 163, at 144.

¹⁶⁸ See Sukhankin, *supra* note 32; Marten, *supra* note 34, at 191.

¹⁶⁹ See Malkova, et al., *supra* note 53.

¹⁷⁰ Giglio, *supra* note 37.

Article's commentary to Article 5 confirms its applicability to private companies.¹⁷¹

a. Exercising Elements of Syrian Governmental Authority

Determining what is “governmental” is best accomplished by distinguishing purely commercial or private activities from those normally conducted by government entities, for “what is regarded as governmental depends on the particular society, its history and traditions.”¹⁷² States have a monopoly on the legitimate use of force, exemplified by the functions performed by a state’s military and police.¹⁷³ As it relates to PMSCs, “there is widespread agreement that certain . . . activities—such as offensive combat, policing, detention, and immigration—entail the exercise of governmental authority within the status of Article 5, especially in a conflict area.”¹⁷⁴ The provision of logistics lies at the opposite end of the spectrum and accordingly does not constitute the exercise of elements of governmental authority.¹⁷⁵

“Security” activities conducted by PMSCs, wherein members are guarding infrastructure, objects, or people, some of which are military in nature, are more difficult to characterize.¹⁷⁶ However, while each determination is fact-specific, it is reasonable to conclude the provision of “security for a military base in a conflict in fact entails guarding a military

¹⁷¹ Draft Articles, *supra* note 8, commentary to art. 5, ¶ 2.

¹⁷² *Id.* at commentary to art. 5, ¶ 6.

¹⁷³ See, e.g., Human Rights Council, 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, U.N. Doc. A/HRC/15/25, at ¶ 51 (July 2, 2010).

¹⁷⁴ TONKIN, *supra* note 115, at 101, n. 90; see also CRAWFORD, *supra* note 152, at 130; CARSTEN HOPPE, *Private Conduct, Public Service? State Responsibility for Violations of International Humanitarian Law Committed by Individuals Providing Coercive Services Under a Contract with a State*, in RULES AND INSTITUTIONS OF INTERNATIONAL HUMANITARIAN LAW PUT TO THE TEST OF RECENT ARMED CONFLICTS (Michael J. Matheson & Djamchid Momtaz, eds.) 411, 431–38 (2010); THE UNIV. CNTR. FOR INT’L HUMANITARIAN LAW, GENEVA, EXPERT MEETING ON PRIVATE MILITARY CONTRACTORS: STATUS AND STATE RESPONSIBILITY FOR THEIR ACTIONS 18 (Aug. 29–30, 2005), http://www.ucihl.org/communication/Private_Military_Companies_report.pdf; JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES (2010).

¹⁷⁵ CAMERON & CHETAIL, *supra* note 163, at 202.

¹⁷⁶ See Peter W. Singer, *The Dark Truth About Blackwater*, BROOKINGS (Oct. 2, 2007), <https://www.brookings.edu/articles/the-dark-truth-about-blackwater/> [<https://perma.cc/9BDK-LP8Y>]; see also ELSEA, *supra* note 174; Daniel Bergner, *The Other Army*, N.Y. TIMES MAG. (Aug. 14, 2005), <https://www.nytimes.com/2005/08/14/magazine/the-other-army.html> [<https://perma.cc/6SXX-9FTR>].

objective . . . regardless of whether . . . PMSCs engage in offensive combat operations, their regular task is itself direct participation in hostilities and therefore falls under Article 5.”¹⁷⁷

The Wagner Group’s activities in Syria in 2015 required the defense and security of government infrastructure, namely military bases, from armed opposition groups. Defending military objectives in an active conflict zone from the enemy clearly requires the use of force, and as a result is an exercise of Syrian governmental authority within the meaning of Article 5. The Wagner Group’s use of offensive combat in Palmyra in 2016 and again in Deir-ez-Zour in 2018 also qualify as exercises of Syrian governmental authority.

b. Empowered by Syrian Law

Because the Wagner Group exercised elements of Syrian governmental authority in 2015, 2016–17, and 2018, it is essential to determine whether the Group was empowered to act as it did under Syrian law. There is no evidence to suggest Syria enacted specific legislation permitting the Wagner Group to exercise the elements of governmental authority described above; however, such legislation is unnecessary. While debate remains as to whether a contract is sufficient to empower a person or entity under domestic law,¹⁷⁸ the Draft Articles, and more specifically the commentary to Article 5, contemplate PMSCs contracted to exercise public powers of detention and discipline.¹⁷⁹ And so, while a contract as “an instrument authorized by law, which has legal effect in the national legal order” cannot *per se* be considered the law of the state,¹⁸⁰ the requirement should be considered satisfied “if the state established general legislative or other legal framework empowering a government agency to delegate its powers to a private company, and the agency then contracted with a particular private military security company to perform its activities.”¹⁸¹

Assume a written contract, executed by the Syrian government, likely the Ministry of Defense (an agency authorized to contract and

¹⁷⁷ CAMERON & CHETAIL, *supra* note 163, at 203.

¹⁷⁸ See generally Jennifer Maddocks, *Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution*, 59 VA. J. INT’L LAW 47 (2019).

¹⁷⁹ Draft Articles, *supra* note 8, commentary to art. 5, ¶ 2.

¹⁸⁰ CAMERON & CHETAIL, *supra* note 163, at 169.

¹⁸¹ TONKIN, *supra* note 115, at 111.

delegate its powers), brought the Wagner Group to Syria. Such a contract obligated the Group to provide services, namely security for Syrian infrastructure, including military bases, during active hostilities in 2015, and then offensive combat in 2016–17.¹⁸² Consequently, such a contract would suffice to empower the Group to exercise elements of governmental authority under Syrian law.¹⁸³

Separate from the 2015 and 2016–17 actions of the Group, the 2018 attack on Deir-ez-Zour was executed by the Group on behalf of Evro Polis and its contract with the Syrian GPC.¹⁸⁴ Though the Syrian GPC is a state-owned oil and gas company responsible for the exploration and development of Syrian oil, it does not appear to be an organ of the Syrian state. Indeed, while it oversees the Syrian Petroleum Company (SPC) and Syrian Gas Company (SGC) and ensures certain oil rights and royalties are realized by the Syrian state vis-à-vis profit sharing agreements, these

¹⁸² Sukhankin, *supra* note 32; Hauer, *supra* note 51; Marten, *supra* note 34, at 192–93; Grove, *supra* note 28; Taylor, *supra* note 7.

¹⁸³ Assuming *arguendo* that the 2015 contractual relationship between the Wagner Group and the Syrian government did not meet the “empowered by the law of the state” requirement, the Iran-U.S. Claims Tribunal in *Yeager v. Iran* and the ICJ in the *Case Concerning Armed Activities on the Territory of the Congo* both provide an alternative viewpoint on the “empowered by the law of the state” requirement under Article 5. In *Yeager*, the Iran-U.S. Claims Tribunal heard the monetary claims of a US citizen unlawfully expelled from Iran by Revolutionary Guards. Though Iran argued the Guards were independent of the state and their conduct non-attributable, the Tribunal decided “mere knowledge and tolerance” of ongoing activities “to be sufficient for the purpose of attribution, without requiring the existence of a specific legal basis.” The Tribunal declared “Iran cannot on one hand tolerate the exercise of governmental authority . . . and at the same time deny responsibility for the wrongful acts committed by them.” See *Yeager v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92, 104, ¶ 45 (1987); see also CAMERON & CHETAIL, *supra* note 163, at 169. Nearly twenty years later, the ICJ, in *Armed Activities*, considered whether Uganda was responsible for the activities of the Movement de Liberation du Congo (MLC), a paramilitary organization in conflict with the DRC. The ICJ, in deciding against Ugandan responsibility for the MLC, referred only to the exercise of governmental authority (making no mention of the empowerment by the domestic legal order) in determining the applicability of Article 5. Both *Yeager* and *Armed Activities* and their focus on the exercise of governmental authority rather than empowered by domestic law suggest that the exercise of governmental authority is the critical element under Article 5. Because states like Syria might seek to avoid Article 5 responsibility by purposefully avoiding empowerment through legislative or contractual means, so long as there is an exercise of governmental authority, the need for formal empowerment under Syrian law is unnecessary. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 160 (Dec. 19); see also CAMERON & CHETAIL, *supra* note 163, at 169–70.

¹⁸⁴ Alexander Rabin, *Diplomacy and Dividends: Who Really Controls the Wagner Group?*, FOREIGN POL’Y RES. INST., (Oct. 4, 2019), <https://www.fpri.org/article/2019/10/diplomacy-and-dividends-who-really-controls-the-wagner-group/> [https://perma.cc/XE2C-6W33].

are largely commercial activities.¹⁸⁵ Unless exercising elements of governmental authority itself, “the mere fact a corporation is owned partially, or even entirely, by a state does not automatically permit the piercing of the corporate veil and the attribution of the conduct of the corporation to the state.”¹⁸⁶ Indeed, “where a company is founded by a state and run as an independent business, the “corporate veil” may not *prima facie* be lifted so as to attribute its acts to the state.”¹⁸⁷ The ICJ, in *Barcelona Traction*, considered this particular issue, finding that only in cases where the “corporate veil” is a mere device or a vehicle for fraud will the separateness of the corporate entity at the national level be undermined.¹⁸⁸ Here, there is little evidence to suggest the Syrian GPC itself exercised elements of government authority, such as detention, policing, or governance. Absent evidence the Syrian GPC exists as a “mere device or vehicle for fraud,” it may be considered a corporate entity conducting commercial activities and not an organ of the state.

While the Syrian GPC contracted with Evro Polis to, amongst other things, liberate oil fields and refineries, something which requires the offensive use force, the Syrian GPC did so as a corporate entity and not an organ of the Syrian state. While this may have infringed upon the purview of the state, it does not change the characterization of the Syrian GPC as a commercial entity. Consequently, the 2018 Evro Polis contract with the Syrian GPC, a purely commercial entity, albeit state-owned, does not engender Article 5 attribution for Syria.

¹⁸⁵ In 1964, Syria passed legislation that limited oil exploration and investment licenses to the Syrian government. As a result, the Ministry of Petroleum and Mineral Resources oversees the oil and natural gas sectors and sets the state’s policy priorities. The Syrian General Petroleum Company (GPC) oversees the strategy for exploration, development, and investment in Syria’s oil and gas sector, and supervises the Syrian Petroleum Company (SPC) and the Syrian Gas Company (SGC). The SPC is Syria’s largest state-owned oil company with a number of production sharing agreements split equally between the SPC and its partners, which helped ensure the Syrian government retained a certain percentage of the oil produced in its fields as royalties. The SPC operated through joint ventures, most notably the Al-Furat Petroleum Company (a joint venture between the SPC, Royal Dutch Shell, Chinese National Petroleum Company, and India’s Oil and Natural Gas Corporation). See *Syria*, U.S. ENERGY INFO. ADMIN. 2, https://www.eia.gov/beta/international/analysis_includes/countries_long/Syria/syria.pdf (last updated Jun. 24, 2015) [<https://perma.cc/Q63Q-KPHX>].

¹⁸⁶ CRAWFORD, *supra* note 152, at 161.

¹⁸⁷ *Id.* at 163.

¹⁸⁸ *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 56–58 (Feb. 5).

c. Commission of a Wrongful Act in the Exercise of Governmental Authority

Finally, for the actions of the Wagner Group to be attributable to Syria under Article 5, the breach (i.e., IHL violation) must be committed while in the exercise of governmental authority. In short, “misconduct will only be attributable to the hiring state [Syria] pursuant to Article 5 if the contractors [Wagner Group] are using the means and powers pertaining to the exercise of public power and are thus ‘cloaked with governmental authority’ at the relevant time.”¹⁸⁹ Therefore, so long as the Group is acting consistently with the provision of security for military objectives or conducting operations consistent with the 2015 contract, its conduct would be attributable to Syria under Article 5.¹⁹⁰

3. Attribution Under Article 8

Though members of the Wagner Group’s actions likely engender attribution under Article 5 via its contract with organs of the Syrian state, Article 8 still merits examination regarding the activities conducted by Wagner Group pursuant to the 2018 Evro Polis contract with the Syrian GPC. Article 8 is decidedly broader in its application than Article 4 or Article 5, in that it does not require the necessary “complete dependence” of a *de facto* organ of the state under Article 4, nor the empowerment by domestic law to exercise elements of governmental authority under Article 5. However, unlike Article 4 and 5, Article 8 does not generally encompass acts committed *ultra vires* the instructions, direction, or control of the state.¹⁹¹

Although the Wagner Group is a private company and generally “the conduct of private persons or entities is not attributable to the State under international law,”¹⁹² Article 8 is an exception to this rule and is “the central provision governing the attribution of the conduct of private or

¹⁸⁹ TONKIN, *supra* note 115, at 112; *Petrolane, Inc. v. Iran*, 27 Iran-US Cl. Trib. Rep. 64, ¶ 83 (1991).

¹⁹⁰ In simple terms, the Group’s activities, so long as they are acting within the scope of their duties, even though they exceed or contravene the terms of the contract, remain attributable to Syria—provided the Group is exercising governmental authority when the breach is committed. See TONKIN, *supra* note 115, at 112.

¹⁹¹ Compare Draft Articles, *supra* note 8, art. 4–5, with *id.* at commentary to art. 8, ¶ 8.

¹⁹² *Id.* at commentary to art. 8, ¶ 1.

non-State entities to States.”¹⁹³ Article 8 states “[t]he conduct of a person or group of persons shall be considered an act of a State . . . if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of that State in carrying out the conduct.”¹⁹⁴ Instructions, directions, and control are to be understood and analyzed in the disjunctive, whereby establishing any one of them is sufficient for attribution to the state.¹⁹⁵ Notably, the text of the Draft Articles and its commentary omit doctrinal definitions of instructions, directions, and control, which often results in conflation of the three terms and their interchangeable use today.¹⁹⁶

a. Instructions

In the context of Article 8, instructions are more straightforward than direction or control, though the Draft Article’s commentary provides very little guidance. It states that

[m]ost commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as “auxiliaries” while remaining outside the official structure of the state. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the state and not forming part of its police or armed forces, are employed as auxiliaries or are sent as “volunteers” to neighboring countries, or who are *instructed* to carry out particular missions abroad.¹⁹⁷

The ICJ attempted to provide some clarity regarding instructions in the *Bosnian Genocide* case. The Court stated that instructions must be “given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”¹⁹⁸ The ICJ’s use of the term “operation” is understood only to require general instructions given by the state to undertake an operation, leaving open the

¹⁹³ Kubo Mačák, *Decoding Article 8 of the International Law Commission’s Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors*, 21 J. CONFLICT & SEC. L. 405, 410 (2016).

¹⁹⁴ Draft Articles, *supra* note 8, art. 8.

¹⁹⁵ *Id.* at commentary to art. 8, ¶ 7.

¹⁹⁶ Mačák, *supra* note 193, at 411.

¹⁹⁷ Draft Articles, *supra* note 8, commentary to art. 8, ¶ 2 (emphasis added).

¹⁹⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 400 (Feb. 26).

manner in which the directive is completed.¹⁹⁹ Accordingly, should a PMSC be hired by the state to conduct an operation, the general terms of a contract will suffice under Article 8 as instructions.²⁰⁰

Neither shared goals between a state and a non-state actor without the requisite subordination and instructions, nor acts encouraged or instigated by the state, without more, suffice for the purposes of attribution under Article 8 instructions.²⁰¹ Importantly, and unlike Article 4 and Article 5 where *ultra vires* acts are attributable to the state, a state's "lawful instructions to persons not its organs does not assume the risk that the instructions will be carried out in an internationally unlawful way."²⁰²

Having previously established attribution under Article 5 for some of the Wagner Group's activities in Syria, it is important to recognize this same 2015 contract (and any subsequent verbal orders) would also meet the criteria for Article 8 instructions. However, for the same reason that the Group's actions taken pursuant to the 2018 contract between Evro Polis and the Syrian GPC did not merit attribution under Article 5, nor does it under Article 8. While the 2018 Evro Polis contract might suffice as "instructions," the fact remains they were instructions provided by a commercial entity and not an organ of the Syrian state.

b. Direction and/or Control

Distinct from instructions, conduct carried out under a state's direction or control is "attributable to the State only if it directed the specific operation and the conduct complained of was an integral part of that operation."²⁰³ Despite their purported application in the disjunctive, the commentary to the Draft Articles uses "direction" and "control" interchangeably, making their independent application challenging to conceptualize. Furthermore, there is little evidence in the literature on state responsibility or international jurisprudence to suggest a discernable difference.²⁰⁴ As such, and for the purposes of this article, direction and

¹⁹⁹ CRAWFORD, *supra* note 152, at 145.

²⁰⁰ *Id.*

²⁰¹ Mačák, *supra* note 193, at 415–16.

²⁰² Draft Articles, *supra* note 8, commentary to art. 8, ¶ 8.

²⁰³ Draft Articles, *supra* note 8, commentary to art. 8, ¶ 3.

²⁰⁴ *See, e.g.*, Mačák, *supra* note 193, at 417–18. Mačák attempts to make a novel delineation between direction and control, and their application in the disjunctive. In attempting to delineate the two, he explicitly acknowledges James Crawford's treatment of the two criteria as a single standard. *See also* CRAWFORD, *supra* note 31.

control is viewed through the same lens—the “effective control” test set forth by the ICJ in the 1986 *Nicaragua* case.²⁰⁵

To understand “effective control” as explained by the ICJ in *Nicaragua*, it is important to briefly set forth the facts of the case. Following the installment of a new Nicaraguan government, the United States terminated its economic aid to the country in 1981. Thereafter, the United States took to supporting the “Contras,” a term used to describe groups fighting the Nicaraguan government. In 1984, Nicaragua brought suit against the United States in the ICJ, alleging, amongst other things, that violations of IHL by the Contras in their conflict with the Nicaraguan government were attributable to the United States.²⁰⁶ In deciding the issue of attribution, the Court held that

United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying, and equipping of the Contras, the selection of its military or paramilitary targets, and the planning of the whole of its operations, is still insufficient in itself . . . for the purpose of attributing to the United States the acts committed by the Contras in the course of their military or paramilitary operations in Nicaragua.²⁰⁷

In finding the United States’ planning, direction, and support to the Contras insufficient for the purposes of attribution, the ICJ reasoned that

[a]ll the forms of the United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the Contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that *that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed*.²⁰⁸

Thus, the lasting impact of the *Nicaragua* case for the purposes of state responsibility is the requirement for “effective control” under Article

²⁰⁵ See generally *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. Rep. 14 (June 27).

²⁰⁶ *Id.* at ¶ 19–23.

²⁰⁷ *Id.* at ¶ 75–80; see also CRAWFORD, *supra* note 152, at 149.

²⁰⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. Rep. 14, ¶ 86 (June 27) (emphasis added).

8 direction and control. “Effective control,” in its most basic form, requires the state control the beginning of an operation, the way the operation is carried out, and its end.²⁰⁹ *Nicaragua’s* “effective control” test was not without its critics;²¹⁰ however, the ICJ’s subsequent decisions in *Armed Activities* in 2005²¹¹ and *Bosnian Genocide* in 2007²¹² confirmed its applicability. Still, as Mačák contends, “effective control” is “a very high bar . . . as evidenced by the fact that the two prominent cases in which the standard was applied by the ICJ [*Nicaragua* and *Bosnian Genocide*] have both resulted in a negative finding.”²¹³

It does not appear the Wagner Group was, at any time, under the “effective control” of the Syrian state while conducting operations in Syria. More specifically, the evidence available does not support the conclusion that the Syrian state controlled the planning, execution, and conclusion of the Wagner Group’s operations in Deir-ez-Zour in 2018, as those activities were conducted pursuant to the commercial contract between the Syrian GPC and Evro Polis. Accordingly, Syrian attribution under Article 8’s direction or control is doubtful.²¹⁴

C. RUSSIAN ATTRIBUTION FOR THE WAGNER GROUP’S BREACHES OF IHL

Despite President Putin’s support for PMSCs and their utility as “an instrument in the pursuit of national interests without the direct

²⁰⁹ Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT’L & COMP. LAW Q. 493, 503 (2009); Mačák, *supra* note 193, at 421.

²¹⁰ Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, (Int’l Crim. Trib. for the Former Yugoslavia, July 15, 1999).

²¹¹ *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 160 (Dec. 19).

²¹² *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, ¶ 399–400 (Feb. 26).

²¹³ Mačák, *supra* note 193, at 421; see *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, Merits, 1986 I.C.J. Rep. 14, ¶ 86 (June 27); *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, ¶ 399–400 (Feb. 26).

²¹⁴ Notably, where a PMSC engages in *ultra vires* acts while under the “effective control” of the state, an assessment must be made as to whether such acts were incidental to the mission or clearly exceeded its scope. Should the assessment be made that the conduct was “extraneous or unrelated to the purpose of the operation over which the State exercises effective control, they [the *ultra vires* acts] are not attributable to the controlling State.” See Tallinn Manual 2.0, *supra* note 70, at 98; See Draft Articles, *supra* note 8, commentary to art. 8, ¶ 8.

participation of the state,”²¹⁵ including his recent public acknowledgement of the Wagner Group and their “right to work and promote their business interest[s] wherever they like in the world,”²¹⁶ the details of the relationship between the Wagner Group and the Russian state remain elusive. While direct evidence of the relationship is lacking, the circumstantial evidence of the Group’s use as a proxy force is quite robust when taking into account Prigozhin’s relationship with President Putin, the history of the Wagner Group in the Crimea and Ukraine, the timing of the Group’s arrival in Syria to coincide with the arrival of Russian forces, and the actions the Group has taken in Syria. With the two entities so seemingly interconnected, the analysis on state responsibility must not stop with Syria. Thus, assuming once again members of the Wagner Group violated IHL in Syria, a similar examination regarding Russian attribution is appropriate.

1. *Organs of the Russian State*

Keeping in mind that Article 4 applies to “the conduct of any State organ . . . whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central government or of a territorial unit of the State,”²¹⁷ the Wagner Group is a private corporation. It does not exercise Russian legislative, executive, or judicial functions, it is not a recognized arm of the Russian armed forces, nor does it have a status unto itself under Russian domestic law. In fact, PMSCs are not legally permitted in Russia under Article 13, Part 5 of the Russian Constitution, which has been interpreted to prohibit the establishment of “armed formations.”²¹⁸ As a result, the Group fails to qualify as a *de jure* organ of the state.

²¹⁵ *Putin’s Private Army in Syria: Officially Illegal, the Kremlin Denies It, but the Evidence Is in the Numbers*, HAARETZ (Feb. 14, 2018), <https://www.haaretz.com/world-news/europe/putin-s-private-army-takes-center-stage-1.5821965> [<https://perma.cc/T9E6-KUV7>].

²¹⁶ *Putin Says Russian Military Contractors Can Work in Any Country*, REUTERS (Dec. 20, 2018), <https://www.reuters.com/article/us-russia-putin-military-contractors/putin-says-russian-military-contractors-can-work-in-any-country-idUSKCN1OJ1NS> [<https://perma.cc/P7QB-Y77V>].

²¹⁷ Draft Articles, *supra* note 8, art. 4.

²¹⁸ ÅSE GILJE ØSTENSEN & TOR BUKKVOLL, CHR. MICHELSENS INSTITUTT, *RUSSIAN USE OF PRIVATE MILITARY AND SECURITY COMPANIES: THE IMPLICATIONS FOR EUROPEAN AND NORWEGIAN SECURITY* 29 (2018), <https://www.cmi.no/publications/file/6637-russian-use-of-private-military-and-security.pdf> [<https://perma.cc/HF3V-H8KP>].

The Wagner Group also fails to qualify as a *de facto* organ, as it does not act in “complete dependence” on the Russian state. Although the Russian state provided transport for members to and from Syria, rendered medical care for those injured in Syria, and worked alongside members during some operations in Syria, the Group appears autonomous in its decision-making and the goals it pursued.²¹⁹ The 2018 US air strikes at the Deir-ez-Zour refinery were executed only after notification was made to the Russian high military command in Syria, and resulted in the death of several hundred members of the Group. This alone demonstrates the significant amount of autonomy enjoyed by the Group. Moreover, it shows a profound lack of coordination, planning, and communication (at least as it pertained to Deir-ez-Zour), that would be necessary for “complete dependence.” While there certainly appears to be collaboration and information sharing between the two, without more, the relationship does not engender attribution as a *de facto* organ under Article 4.

2. Empowered by Russian Law to Exercise Elements of Government Authority

The applicability of Article 5 attribution to the Russian state remains predicated on satisfying the three criteria discussed above.²²⁰ Recall the Group must be empowered to act pursuant to domestic law, whether through legislation or contract; they must exercise elements of governmental authority; and, finally, they must act in the exercise of governmental authority when the wrongful act is committed. Conceptually, this is challenging to navigate. Attributing the conduct of the Wagner Group in Syria to Russia vis-à-vis Article 5 requires the Group to be empowered by Russian law to exercise elements of Russian governmental authority (i.e., the use of force). Yet, Russian armed forces and the Wagner Group’s use of force in the Syrian conflict is ostensibly governed by Syria’s governmental authority based on the Assad regime’s request for and consent to Russian assistance in the Syrian NIAC. Russia has no independent authority to use force in Syria through which it could empower the Wagner Group. Russian responsibility under Article 5 likely fails for this reason.

²¹⁹ Hauer, *supra* note 51.

²²⁰ See *supra* Part IV.B.2 for a discussion of three constitutive elements of Article 5 attribution.

Moreover, there is no domestic legislation in Russia that empowers the Wagner Group to act. On the contrary, PMSCs under Russian domestic law are illegal, and numerous attempts by Russian politicians to legalize them, despite President Putin's support, have failed.²²¹ Nor is there evidence in open source reporting to suggest the Russian state contracted with the Wagner Group for its activities in Syria, particularly relating to offensive combat or base security. Even assuming solely for the sake of analysis that the Russian state did contract with the Group for its activities in Syria, the Group's activities would not be an exercise of elements of Russian governmental authority, but rather Syrian governmental authority, such that attribution would fail under Article 5.

3. Instructions, Direction, or Control

Article 8 remains the only avenue for an IHL violation of the Wagner Group to be attributed to Russia but requires members of the Group to act under the instructions, directions, or control of the Russian state in Syria. At this time, and despite the troves of conjecture on the topic, it appears there is insufficient evidence, either direct or circumstantial, to conclude the acts of the Wagner Group are attributable to the Russian state under Article 8.²²²

There is little evidence to suggest Russia contracted with the Wagner Group in 2015 for its services in Syria. Had the Group arrived in Syria in 2015 exclusively to protect Russian bases, this might be indicative of a Russian state contract; however, the Group commenced its activities in 2015 guarding Syrian government infrastructure, Syrian bases, and Russian bases. Because PMSCs are illegal in Russia, it seems unlikely the state would enter into a written contract specifying instructions for the Group in Syria and create a paper trail of its unlawful conduct. Without a written contract, verbal or other written instructions would suffice under Article 8, but again, there is no evidence of written or verbal instructions given to the Wagner Group by the Russian state to undertake specific operations in Syria.²²³

With insufficient evidence of instructions, direction and/or control remain the only viable manner of attribution, vis-à-vis *Nicaragua's*

²²¹ ØSTENSEN & BUKKVOLL, *supra* note 218, at 28–29.

²²² See Putin's Private Army in Syria, *supra* note 215.

²²³ See Draft Articles, *supra* note 8, commentary to art. 8, ¶ 2.

“effective control” test.²²⁴ Recalling that “effective control,” in its most basic form, requires the state control the beginning of an operation, the way the operation is carried out, and its end,²²⁵ there is insufficient evidence that Russia exerted “effective control” over the Wagner Group operations in Syria. While Russia may be linked to the Group, especially when looking at the support provided (e.g., military transport and medical support), the evidence available suggests a relationship more attenuated than the US relationship with the Contras in *Nicaragua*, which did not result in a finding of “effective control.” Moreover, the 2018 Deir-ez-Zour engagement and the seeming acquiescence of the Russian state to the deaths of several hundred members of the Group suggests a lack of “effective control” over the Group by the Russian state. Accordingly, Article 8 attribution fails for Russia altogether.

V. CONCLUSION

As this article demonstrates, it is difficult to determine the status of private actors and attribute conduct of PMSCs to states in armed conflict under international law, especially while hostilities are ongoing. The Wagner Group is no exception. While members of the Wagner Group are frequently mischaracterized as “Russian mercenaries” who act under the direction and control of the Russian government, such determinations are offered without consideration of the law. While the Mercenary Convention and the Law of State Responsibility impose obligations on states’ use of PMSCs in the Syrian NIACs, the Wagner Group’s operations in Syria remain largely unrestrained under IHL. Therefore, General Townsend’s concerns regarding PMSCs in Africa, especially the Wagner Group, appear warranted, particularly in the event a NIAC materializes in one of the countries they currently operate in.

Contrary to the media’s narrative, international law does not support the conclusion that members of the Wagner Group are “Russian mercenaries.” First, Russia is not a party to the Mercenary Convention and there is no customary law germane to mercenaries in NIACs. Second, while Syria is a party to the Mercenary Convention, satisfying all five elements to qualify as a mercenary is problematic. Indeed, Russian nationals of the Wagner Group do not qualify as mercenaries because they

²²⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, Merits, 1986 I.C.J. Rep. 14, ¶ 86 (June 27).

²²⁵ Talmon, *supra* note 209, at 503; *see also* Mačák, *supra* note 193, at 421.

are nationals of a party to the Syrian NIAC. While the Group's non-Russian members are not nationals of a party to the conflict, evidence of their recruitment to fight, motivation to fight for private gain, and compensation in excess of that paid to Syrian forces is still necessary. Consequently, it appears unlikely any member of the Group operating in Syria will qualify as a mercenary such that their direct participation in the conflict would qualify as an offense under the Mercenary Convention.

Turning to the Law of State Responsibility, should sufficient evidence surface regarding Syrian use or recruitment of mercenaries in breach of the Mercenary Convention, Syria will assuredly have committed an internationally wrongful act. Assuming additional evidence arises that confirms a member of the Wagner Group committed a violation of IHL, attribution of such conduct to Syria or Russia may also qualify as an internationally wrongful act. While attribution occurs in a variety of ways, evidence of the relationship between the state and the Group underpins them all.

The lack of evidence of the Wagner Group's relationship with either Russia or Syria illustrate the difficulty in attributing conduct of a PMSC to a state. It is clear the Group arrived in Syria in October 2015 to provide static military base security before conducting offensive operations in 2016–17. Whether these activities were contracted for or directed by Syria or Russia remains unclear; though it stands to reason that the Wagner Group's operations were undertaken in concert with one or both governments. Thereafter, the Group's 2018 offensive operations in Deir-ez-Zour were conducted on behalf of Evro Polis and its contract with the Syrian GPC.

Assuming Syria contracted for Wagner Group's services in October 2015, the Group's activities in Syria in subsequent years pursuant to the contract would likely engender attribution under Article 5 of the Law of State Responsibility. However, the Group's activities conducted pursuant to Evro Polis' 2018 contract with the Syrian GPC, including the attack in 2018 on the outpost in Deir-ez-Zour, are unlikely to result in attribution as the law presumes the Syrian GPC to be a purely commercial entity.

Alternatively, in the event Russia instructed the Wagner Group to commence operations in Syria in October 2015 (or any time thereafter), then a violation of IHL may be attributable to Russia, presumably under Article 8 (instructions, not direction or control). As a PMSC operating globally, the Wagner Group does not qualify as an organ of the Russian State under Article 4, nor is it empowered by law to exercise elements of

governmental authority under Article 5, as PMSCs are illegal under Russian domestic law. Presently, insufficient evidence of instructions exists with which to attribute the conduct of the Group to the state under Article 8.

The use of PMSCs as proxy forces to conduct traditional governmental functions in armed conflict is certain to continue. That there is no specific treaty or customary law to regulate their conduct in NIACs is problematic, as evidenced by the Wagner Group's offensive combat operations in Syria. Compounding the lack of regulation by treaty or custom is the fact-intensive analysis required for attribution under the Law of State Responsibility. And so, without further development of international law regarding PMSCs, states like Syria and Russia are likely to continue to escape accountability and promote the use of PMSCs either for tactical advantages at home or the pursuit of strategic goals abroad.