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LEGAL ANALYTICS

Status of the so-called Wagner PMC under international humanitarian law

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TRUTH HOUNDS

Ukrainian civil society organization specializing in documenting and investigating international crimes and serious human rights violations in Ukraine and other conflict-affected regions of Eastern Europe, the Caucasus, and Central Asia.

Problem statement

1. Ever since the beginning of the armed conflict in Ukraine and, especially, after the full-scale aggression of the Russian Federation, which began on February 24, 2022, the so-called Wagner private military company (PMC) has been taking a significant part in the armed hostilities. Its participation in the armed conflict raises several interrelated issues of international humanitarian law (IHL):
 - Can the members of Wagner PMC be qualified as mercenaries?
 - Is the Wagner PMC an armed force of the Russian Federation within the meaning of the Hague Convention IV (**HC IV**), Geneva Convention III (**GC III**) and Additional Protocol I (**AP I**)?
 - Do the members of the Wagner PMC have combatant status and, are they therefore subject to combatant privilege and prisoner of war status?
 - What does the political recognition of the Wagner PMC as an international criminal organisation engaged in terrorist activities mean and whether it deprive a combatant of his/her privilege?

The status of the Wagner PMC in the light of the international legal regulation of mercenaries

2. The concept of “mercenary” is defined in two treaties ratified by Ukraine: AP I (also ratified by the Russian Federation) and the UN Mercenary Convention (UN Convention).
3. Article 47 of the AP I stipulates that a mercenary may be considered a person who meets all of the following cumulative criteria. Thus, it is stated that a mercenary is a person who:
 - a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - b) does, in fact, take a direct part in the hostilities;
 - c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict
 - e) is not a member of the armed forces of a Party to the conflict;

- f) has not been sent by the State which is not a Party to the conflict on official duty as a member of its armed forces.
4. The first part of this Article states that the recognition of a person as a mercenary means that he or she is not entitled to the status of a combatant (and, accordingly, cannot enjoy combatant privilege) or of a prisoner of war.
 5. A similar definition is given in the mentioned UN Convention through a list of certain characteristics. It can also be seen, with minor differences, in the note to Article 447 of the Criminal Code of Ukraine (**CCU**), which criminalizes mercenarism.
 6. Members of the Wagner PMC do not meet at least some of these characteristics (only the compliance of the Wagner PMC members with the first two criteria from the list above doesn't raise doubts). The most obvious discrepancy is that most of the Wagner PMC members have Russian citizenship, i.e., citizenship of a "Party to the conflict". This inherently precludes the application of the term "mercenary" in the sense of IHL to the majority of Wagner PMC members.
 7. Persons not holding Russian citizenship who may participate in the armed conflict on the territory of Ukraine meet the criteria of different citizenship from the parties to the conflict. Accordingly, the application of the term "mercenaries" to them cannot be disqualified because of their citizenship. This does not mean, however, that such persons meet other characteristics of mercenaries. For example, some of the foreigners who fought for the Wagner PMC were recruited while in prison with the promise of release from serving their sentences for participation in the armed conflict (such as Tanzanian citizen Tarimo Nemes).¹ This motivation for joining the Wagner PMC differs from the one stated in international (and Ukrainian national) legal instruments, as it is not an indication of motivation for material gain.
 8. Other foreigners (i.e. those not recruited in prisons) may not have been receiving significantly higher material remuneration than members of the Russian armed forces while fighting for the Wagner PMC. It seems that most of the countries from which foreigners come to PMC Wagner have lower average incomes than in Russia, so it is plausible that they were not offered much more money. It is difficult to prove the true amount of wages of such soldiers, and especially whether it is higher than in the Russian Armed Forces.
 9. Another possible difficulty in qualifying a non-Russian citizen as a mercenary may be the fact of his or her affiliation with the Russian armed forces. Unlike the one mentioned in the previous paragraph, this difficulty seems to be more

¹ Budrin A., (2023). *The Armed Forces of Ukraine eliminated a Tanzanian citizen who fought in the Wagner PMC near Bakhmut*. UNIAN, [URL](#).

surmountable at first glance due to some reports of *de facto* and *de jure* non-integration of Wagner PMC into the Russian Armed Forces. However, as will be demonstrated in the following paragraphs on the definition of armed forces in IHL, this impression is misleading and does not have a firm ground in the current IHL.

10. Without prejudice to the foregoing, the same individuals who participated in the armed conflict in Ukraine and, say, in Libya or the Central African Republic (**CAR**) are not mercenaries in the Ukrainian context but may acquire this status through their participation in the conflict in Libya or the CAR.
11. In this sense, Ukraine may have a window of opportunity to prosecute members of the Wagner PMC for the mere fact of their participation in armed conflicts where Russia is not a party. However, as noted by the representatives of the UN Working Group on Mercenaries, there is often a lack of information even in the context of participation of PMC Wagner representatives in armed conflicts in African states or Syria, to unambiguously qualify the members of this group as mercenaries.² For example, regarding the remuneration for such service or whether there was a request from the authority of the host country to send PMC Wagner.
12. Notwithstanding the above mentioned, if it is established that Wagner PMC members participating in the armed conflict in Ukraine also participated in the armed conflict in, for example, the CAR and meet the characteristics of mercenaries under the AP I and the UN Convention, they may be prosecuted in Ukraine as mercenaries in the context of the armed conflict in the CAR. At the same time, they would not be considered mercenaries for their participation in the armed conflict in Ukraine and, in line with Article 47 of the AP I, would enjoy combatant privilege for actions committed in Ukraine.
13. The legal basis for prosecution in Ukraine for the participation of Wagner PMC representatives in armed conflicts outside Russia and Ukraine may be Article 3 of the UN Convention, which makes it an offence for persons to participate in armed hostilities as mercenaries. Article 4 of the Convention also criminalises attempted participation in armed hostilities as a mercenary and accomplice of a person who commits or attempts to commit any of the offences outlined in the Convention. In addition, Article 5 of the same Convention provides that States must establish appropriate penalties at the national level for the offences referred to in the previous articles of the Convention. Article 9(2) of the Convention authorises the State in whose territory the mercenary is located to take appropriate measures to establish its own jurisdiction over the offences set forth in articles 2, 3 and 4 of the present Convention if this State does not

² The Geneva Academy of International Humanitarian Law and Human Rights. *The Wagner Group: Options for Justice*, timecode: 17:50 - 25:00, [URL](#).

plan to extradite the mercenary to his State of nationality or the State where the alleged offences were committed. In turn, Article 447 of the CCU criminalises mercenarism and does not limit it to cases of this crime committed by Ukrainian citizens or against Ukraine. Article 8 of the CCU provides for the possibility of extending the jurisdiction of Ukraine to crimes committed outside Ukraine if it is provided for by international treaties ratified by Ukraine. The UN Mercenary Convention is the very treaty that provides Ukraine with the legal ground to establish jurisdiction in such cases. The fact that Russia is not a party to this treaty does not change the legal reality for Ukraine.

Is Wagner PMC part of the Russian Armed Forces?

14. The definition of the armed forces in IHL is provided by Article 43 of the AP I. This article states that the armed forces "consist of all organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."
15. The same article notes that persons who are members of the armed forces are combatants (except medical and religious personnel), they have the right to participate in armed conflict, have immunity from prosecution in any jurisdiction in the world and can count on the status of a prisoner of war if captured.
16. Article 43 of the AP I refers not only to regular armed forces but also to irregular armed forces, i.e., organised armed groups that do not necessarily have a specific status prescribed in the domestic legislation of a Party to the conflict. Thus, volunteer units, territorial defence units, and units formed by non-state actors can be considered part of the armed forces in the sense of the AP I.
17. Article 43 of the AP I sets out four requirements for armed groups to be covered by it:
 - a) The military nature of the group;
 - b) Subordination to a party to the conflict;
 - c) The existence of a responsible command organisation;
 - d) Compliance with IHL.

(a) Military nature of the group

18. The Wagner PMC is a military group in nature, as it was formed to conduct military operations, its actions involve the use of weapons, and it has participated in armed conflicts around the world.³

(b) Subordination to a party to the conflict

19. The subordination to a party to the conflict is explained in the ICRC Commentary to Article 43 of the AP I through a quick mention of the presence of an armed group command that would be responsible to a party to the conflict. The antonym to a situation where the command is subordinate to a party to the conflict is a private war, which is waged by the group on its own initiative and does not correspond in any way to the parallel activities of the State. The Commentary also states that armed forces can be formed in accordance with the laws of the State or by other methods.⁴
20. It is known that the top leadership of the Russian Federation has long denied any connection with the activities of Wagner PMC and the existence of the company as such – PMCs are prohibited by Russian criminal law.⁵ However, against the backdrop of the so-called "Wagner PMC rebellion" against the Russian central government, Russian President Vladimir Putin has for the first time acknowledged that the Wagner PMC is state-funded. According to him, over the past year alone, the Wagner PMC received payments of 86.3 billion rubles for its participation in the armed conflict in Ukraine.⁶ A little later, one of Russia's key propagandists, Dmitry Kiselev, confirmed that Prigozhin's PMC received more than 858 billion rubles under government contracts (without specifying the period for which the amount was received).⁷ In addition, it is noted that Russian President Vladimir Putin directly signed pardon decrees for future

³ *Syria cracked down on Wagner after mutiny in Russia: Report*, (2023). Al Jazeera, [URL](#); *Mali: Army, Wagner Group Atrocities Against Civilians*, (2024). Human Rights Watch, [URL](#).

⁴ Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). International Committee of the Red Cross, Article 43, para. 1672

⁵ Portnikov V., (2023). *Putin reveals 'state secret': Wagner PMC never existed*. Radio Svoboda, [URL](#).

⁶ *Putin said that PMC Wagner was fully financed by the state - 86 billion roubles were spent on it in a year*, (2023). Meduza, [URL](#).

⁷ TV propagandist Dmitry Kiselyov has claimed that PMC Wagner has received more than 858 billion rubles from the Russian authorities, (2023). *Nastoyascheye Vremya*, [URL](#).

members of the Wagner PMC and personally handed state awards to its fighters⁸.

21. It is also worth paying attention to the close cooperation of the Wagner PMC with the Main Directorate of the General Staff of the Russian Armed Forces, which is confirmed, in particular, by the existence of their joint base in the town of Molkindo, which was directly under the guard of the Russian Ministry of Defence, and the issuance of special “passports” to members of the Wagner PMC, which, as a general rule, are issued exclusively to people associated with the Russian Ministry of Defence.⁹ There is also evidence of joint coordination of Wagner PMC’s military operations with the regular armed forces of the Russian Federation, such as in the battle of Sievierodonetsk¹⁰.
22. Given the low level of subordination requirements in Article 43 of the AP I, Wagner PMC should be recognized as a group that meets this subordination criterion.

(c) The existence of a responsible command organisation

23. Wagner PMC is also organised and under the responsible command. The ICRC’s Commentary to Article 43 of the AP I notes that organisation may mean different levels of cooperation. However, at a minimum, the AP I requires that groups engage in armed hostilities together, as opposed to individuals operating in isolation with no corresponding preparation or training.¹¹ Responsible command implies the ability to direct group members for specific operations, a hierarchical structure within the group and designated leaders. According to this criterion, it seems that Wagner PMC also meets the requirements of the AP I.

(d) Compliance with IHL

24. The ICRC’s Commentary to Article 44 of the AP I, concerning combatants and POW, notes that the requirement to adhere to IHL does not necessarily entail

⁸ Kovalenko O, (2023). *The ICC may issue new arrest warrants for Putin for the crimes of the Wagner Group*. Radio Svoboda, [URL](#).

⁹ *Band of Brothers: The Wagner Group and the Russian State*, (2020). CSIS, [URL](#).

¹⁰ *Does Russia Exercise Overall Control over the Wagner Group?*, (2023). Just Security, [URL](#).

¹¹ Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). International Committee of the Red Cross, Article 43, para. 1672

full compliance with every provision of IHL.¹² Rather, it means compliance with at least a minimum set of norms on distinction with civilians, prohibition of killing protected persons, prohibition of torture, etc. In general, compliance with IHL cannot be lower than required by Article 85 of the AP I.¹³ At the same time, individual cases of non-compliance with IHL do not deprive the group of protection and do not disqualify it as part of the armed forces. The ICRC Commentary, quoting the positions of the State Parties to the AP I, notes that an example of depriving a group of the status of a part of the armed forces (and, as a result, of the protection of its members as combatants and POW) may be a situation where the group declares that it is not going to comply with IHL and constantly confirms this by its actions. The same Commentary recalls the position of other States, which pointed out the unlikelihood of this scenario and additionally, the fact that there are better ways to punish a group for non-compliance with IHL than depriving its members of the status of combatants, such as criminal responsibility for war crimes.¹⁴ Given the above, even despite numerous known violations of IHL by the Wagner PMC, including the key role of its fighters in the massacres of children, women and the elderly in Bakhmut and Soledar in March 2023 and the repeated cases of brutal individual reprisals against prisoners of war,¹⁵ this group can hardly be reasonably considered as not meeting this requirement of compliance to the IHL provisions by the armed forces.

25. Article 43(3) of the AP I further states that a party to the conflict may engage in armed conflict "a paramilitary or armed organization providing law enforcement". In doing so, such a party undertakes to notify the other Parties of the conflict.
26. Despite the reference to a paramilitary organisation, which may be associated with groups such as the Wagner PMC, this part of the article actually and historically refers to police forces.¹⁶ The term "paramilitary organization" was chosen to better reflect the different institutional organisations of law enforcement in the participating states of the AP I.

¹² *Ibid*, para. 1688

¹³ *Ibid*, para. 1688

¹⁴ *Ibid*, para. 1688

¹⁵ Sobenko N., (2023). *Ex-prisoners from Wagner PMC confess to mass shootings of civilians in Bakhmut*. Suspilne News, [URL](#).

¹⁶ Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). International Committee of the Red Cross, Article 43, para. 1682

27. Summarising the above, the Wagner PMC in the context of the armed conflict in Ukraine can most likely be considered as a part of the Russian armed forces.

Are the representatives of the Wagner PMC entitled to the status of a prisoner of war when they are captured?

28. The fact that a unit belongs to the armed forces of a State within the meaning of Article 43 of the AP I automatically means that the status of a prisoner of war is extended to the members of such a unit. In addition, part two of Article 44 of the AP I states that "while all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war". The only exception to this rule is the situation described in Article 44(3) and (4) of the AP I. This exception refers to a situation in which a combatant does not distinguish himself from the civilian population even when he is in full view of the belligerent party or during an armed conflict. In this case, the captured person will not be entitled to the status of a prisoner of war.

29. If we focus not only on the AP I but also on the GC III, which deals with prisoners of war, then the requirements outlined in Article 4 of this Convention should be taken into account to decide whether the status of a prisoner of war is extended to the particular person. Thus, among all the categories of prisoners of war defined by this Article, the most suitable one for qualifying the members of the Wagner PMC is "members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- a) that of being commanded by a person responsible for his subordinates;
- b) that of having a fixed distinctive sign recognizable at a distance;
- c) that of carrying arms openly;
- d) that of conducting their operations in accordance with the laws and customs of war."

30. The conditions to be met by volunteer units and resistance movements are in line with those mentioned in Article 43 of the AP I. Therefore, we will not further elaborate on them here. It is worth mentioning only that wearing a permanent insignia and carrying weapons are individual requirements (unlike the other two), which means that each member of the unit must meet them in order to be eligible for POW status. According to open-source information, there is no particular reason to doubt that the Wagner PMC representatives comply with such requirements.

31. However, Article 4 of the GC III additionally requires that the aforementioned groups belong to one of the parties to the conflict. Affiliation with a party to the conflict historically occurred when there was written authorization for the participation of any armed groups in an armed conflict on the side of a particular State.¹⁷ However, such written authorisation has not been mandatory for a long time. Instead, affiliation can take many forms. For example, Article 4 of the GC III was drafted against the backdrop of the memory of resistance movements during World War II, when some units acted either completely separately from the State authorities that *de jure* represented a particular territory or without recognizing their connection with the State. As a result, Article 4 was intended to cover all of these cases.
32. The ICRC Commentary to Article 4 of the GC III identifies two requirements that must be cumulatively met by the group in order for it to be considered as belonging to a Party to the conflict:
- a) The group must engage in armed hostilities in favour of a Party to the armed conflict;
 - b) The Party to the conflict must recognize both the group's participation in the armed hostilities and that this participation is in its favour.
33. The first requirement is quite obvious. At least in the context of the activities of the Wagner PMC in Ukraine. This group is indeed involved in armed hostilities and openly declares and confirms by its actions that it is doing so in favour of the Russian Federation. This is evidenced, in particular, by the appearance of the Wagner PMC personnel in Crimea in the spring of 2014,¹⁸ the group's participation in the battles for Debaltseve in 2015,¹⁹ and the involvement of units in the armed conflict since the full-scale aggression – the most illustrative example is probably the key role of the Wagner PMC in the battle for Bakhmut in Donetsk region.²⁰
34. This opinion is also confirmed by the recently published constituent documents of the Wagner PMC, which define the basic principles of the formation's activities. One of them is the as, among other things, support for Russia's

¹⁷ Commentary of 2020 to Geneva Convention (III) relative to the Treatment of Prisoners of War. International Committee of the Red Cross, Article 4, para. 1002

¹⁸ Vinogradov O, (2023). *Prigozhin participated in the invasion of Crimea in 2014 - Open*. Krym.Realii, [URL](#).

¹⁹ *Video shows the role of the Wagner PMC in the fighting in eastern Ukraine*, (2018). Bellingcat, [URL](#).

²⁰ Farrell F., (2023). *Ukraine strikes back around Bakhmut as Wagner reaches last streets in the city*. Kyiv Independent, [URL](#).

military operations on the territory of Ukraine and service to Russian President Vladimir Putin and the Russian people.²¹

35. As for the second requirement, recognition as a Party to the conflict can take 2 forms:
- a) Explicit – when the State explicitly declares its support for the group or its actions and thus provides official governmental approval.
 - b) Tacit – when the State, for example, contacts the group to ensure that it fulfils certain military tasks²².
36. The connection between Wagner PMC and the Russian Federation is much closer than the minimum level implied in the GC III when it comes to belonging to a Party to the conflict. Thus, Wagner PMC receives weapons, training opportunities, recruitment, space for its own operations, intelligence and other support from the Russian Federation. This far outweighs the ICRC's example of tacit recognition of the group's involvement in the conflict.
37. It is worth noting that in numerous messages regarding the “shell famine” made by the head of the Wagner PMC, Yevgeny Prigozhin, in May 2023, the targets of such appeals, were representatives of the senior military leadership of the Russian Federation – Shoigu and Gerasimov who, according to Prigozhin, were responsible for the lack of shells on the positions of the PMC. Thus, the Russian authorities are a direct supplier not only of heavy weapons, which are on the account of the Wagner PMC, but also of conventional artillery shells. This leads to the conclusion that the Wagner PMC is thoroughly (if not completely) supplied by the Russian leadership. Additional evidence of Russia’s operational control over the military tasks of the Wagner PMC is Yevgeny Prigozhin’s report of an alleged combat order received from the Russian Ministry of Defence, according to which the withdrawal of the Wagner PMC members from their positions near Bakhmut “will be regarded by the Russian top leadership as ‘treason’.²³
38. As can be seen from the text of the recently published charter of the Wagner PMC, as well as from the comments of the Russian authorities on the practical implementation of military tasks by the group at the front – the Ministry of Defence of the Russian Federation praises members of the Wagner PMC]for the

²¹ *Russian Offensive Campaign Assessment, July 9, 2023*. ISW, [URL](#)

²² Commentary of 2020 to Geneva Convention (III) relative to the Treatment of Prisoners of War. International Committee of the Red Cross, Article 4, para. 1002

²³ *Pryhozhyn complains about the cowardice of the occupiers in Bakhmut. Are they running away?.* (2023). Donbas.Realii, [URL](#).

strategic victory near Soledar.²⁴ In addition, Putin approves the actions of the fighters on the battlefield.²⁵ Thus, the objectives of the Wagner PMC are solely focused on accomplishing the military objectives of the Russian Federation.

39. All of the above gives grounds to believe that Wagner PMC belongs to a Party to the conflict within the meaning of Article 4 of the GC III. As this group most likely also meets the conditions mentioned in Article 4 of the GC III (as discussed in the previous subsection), the members of the group should be subject to the status of prisoners of war when captured by Ukraine.

Wagner PMC as an International Criminal Organization Involved in Terrorist Activities from the Perspective of IHL

40. The Verkhovna Rada of Ukraine (**VRU**) recognized the Wagner PMC as an international criminal organisation by its resolution. Several other parliaments and international organisations, such as the Parliamentary Assembly of the Organisation for Security and Co-operation in Europe, have done the same *mutatis mutandis*.²⁶ The VRU resolution mentions that Ukrainian law enforcement agencies investigate the group's activities, "in particular under articles on terrorism".²⁷ A logical question arises as to what this recognition means and whether members of the Wagner PMC can be prosecuted in Ukraine for terrorism-related crimes (for example, under Article 258-3 of the CCU).
41. First of all, the VRU Resolution is a political act of a declarative nature, which, despite its importance, should not affect the qualification of participants in the armed conflict and their actions. Thus, the recognition by the Ukrainian parliament of the Wagner PMC as a criminal organisation does not eliminate the

²⁴ *The Ministry of Defence assessed the role of PMC Wagner in the capture of Soledar* (2023). RBK, [URL](#)

²⁵ Kolesnikov. A. (2023) *Putin told 'Kommersant' details of the meeting with PMC 'Wagner' fighters*. Kommersant, [URL](#)

²⁶ Vancouver declaration and resolutions adopted by the OSCE Parliamentary Assembly at the thirtieth annual session, (2023). OSCE, pp. 31 - 33; Latschan T., (2023). *Is the Wagner Group a terrorist organization?*. DW, [URL](#).

²⁷ Resolution of the Verkhovna Rada of Ukraine on the recognition of the Russian criminal organisation known as the Wagner Private Military Company or the Wagner Group as a criminal organisation and condemnation of the activities of its members. Official web portal of the Verkhovna Rada of Ukraine, [URL](#).

need to actually assess the status of this group under IHL to determine whether its members are covered by combatant privilege.

42. As analysed above, the Wagner PMC is likely to be part of the Russian armed forces belonging to a Party to the conflict, and its members meet the conditions under which they would qualify for POW status. This in itself is sufficient to conclude that criminal prosecution for crimes other than international crimes committed during the armed conflict is impossible.
43. UN Security Council Resolution 2462 notes “that all States shall, in a manner consistent with their obligations under international law, including international humanitarian law”.²⁸ Acts that are not prohibited by IHL, such as attacks on military objectives, should not be qualified as ‘terrorist’ at either the international or national level. Such attacks on legitimate military targets are at the very core of the armed conflict, and their parallel qualification under anti-terrorism law by countries in their national criminal legislation would create conflicting obligations for States to qualify such actions that are perfectly lawful under IHL.²⁹ In its turn, the ICRC encourages countries to adopt special “IHL saving clauses” in their anti-terrorism legislation, which, in addition to the general definition of terrorism, would emphasise that such an anti-terrorism regime “cannot derogate from IHL”.³⁰
44. However, it is worth briefly mentioning that international anti-terrorism law does not necessarily cease to apply when IHL is in force. Certain provisions of the anti-terrorism treaties continue to operate with certain limitations during armed conflicts. The provisions of these treaties are transposed into national law in such a way as to enable a criminal response by the State to terrorist threats. This translation is not always done in a way that aligns international law with national law in a qualitative way.
45. However, there are positive examples of such successful “transposition” into national criminal law. For example, the Swiss Criminal Code contains separate reservations to Art. 260 quinquies, which prohibits the financing of terrorism.³¹ According to paragraph 4, the provisions of this article do not apply “if the

²⁸ *Resolution 2462*. United Nations Security Council, para. 5

²⁹ Committee of Experts on Terrorism, *Application of International Humanitarian Law and Criminal Law to Terrorism Cases in Connection with Armed Conflicts*, Discussion Paper, (2017). Council of Europe

³⁰ *ICRC Report, Bringing IHL Home Through Domestic Law and Policy*, (2021). Fifth Universal Meeting of National Committees and Similar Entities on International Humanitarian Law, p. 35

³¹ *Swiss Criminal Code of 21 December 1937 (Status as of 1 January 2024)* (Art. 260 quinquies). The Federal Assembly the Swiss Confederation, Art. 260 quinquies, [URL](#).

financing is intended to support acts that do not violate the rules of international law on the conduct of armed conflicts". The updated criminal law in Chad also contains a modernised definition of an act of terrorism with a special note that this law should not be interpreted as derogating from international humanitarian law, but rather should be applied in preference to the IHL regime.³²

46. Sometimes, domestic law ignores the possible context of an armed conflict altogether and does not provide guidance to law enforcement agencies on the prohibition of qualifying actions as terrorists when they are carried out within the framework of lawful actions during an armed conflict. Unfortunately, this approach is still widespread. As noted by the ICRC in 2021, only a small number of countries have implemented the clauses on the specifics of the application of anti-terrorism legislation during armed conflict.³³ These countries include Belgium, Canada, Ireland, New Zealand, South Africa, Switzerland, the United States and the United Kingdom.
47. In particular, the CCU is an example of a criminal law that does not provide for exceptions during armed conflict. Thus, the list of circumstances specified in Article 258 of the CCU that could exempt a person from liability for committing a terrorist act does not contain any references to international humanitarian law as *lex specialis* in relation to the anti-terrorist regime. Instead, the national legislator has included in the circumstances exempting from liability only voluntary reporting of a crime if the danger to human life and health, property damage or other grave consequences were averted. At the same time, the actual legal regime arising during the armed conflict in which the act was directly committed was left out of consideration.
48. In the practice of countries around the world, there are examples where the actions of persons who, according to certain characteristics, could be considered combatants, are classified as terrorism. However, despite the diversity of practice and its occasional disregard for the requirements of international humanitarian law, it can generally be stated that cases, where potential participants in armed hostilities were accused of terrorism, are markedly different from the Ukrainian situation.

³² ICRC Report, *Bringing IHL Home Through Domestic Law and Policy*, (2021). Fifth Universal Meeting of National Committees and Similar Entities on International Humanitarian Law, p. 37

³³ Poecke V.T., Verbruggen F., Yperman W., (2021). *Terrorist offences and international humanitarian law: The armed conflict exclusion clause*. International Review of the Red Cross, p. 297, [URL](#).

49. For example, national courts have noted that acts that are distant from an armed conflict could be considered as the terrorist ones in line with the following characteristics³⁴:
- a) Material – the activity for which a person is held liable for terrorism should not be the usual actions of a combatant in an armed conflict. For example, creating a bomb to cause damage to a civilian object would be clearly different from participating in armed hostilities. This, in turn, would make it possible to qualify actions as terrorist acts because of the material distance of the act from the activities that are normally characteristic of a combatant.
 - b) Geographical (spatial) – the activity for which a person is held liable for terrorism must be geographically remote from the place of armed conflict. For example, the creation of poison gas in one State for use in another State in support of armed hostilities in a third State cannot be considered covered by the combatant's privilege.
50. The absence of 'linking' provisions in the Criminal Code of Ukraine that would harmonise Ukraine's obligations under international humanitarian law with the provisions on counter-terrorism in national legislation creates the possibility of punishing members of the Wagner PMC for the mere fact of their participation in this group. However, such an application of the criminal law seems undesirable, given the existing case law in other jurisdictions regarding the use of terrorist qualifications in relation to combatants.³⁵ It looks equally undesirable from the perspective of IHL.

Conclusions

51. From the point of view of international humanitarian law, it is unlikely that PMC Wagner can be considered mercenaries in the context of the armed conflict between Russia and Ukraine. This is due to the fact that the characteristics of this paramilitary group do not meet the criteria for defining a mercenary. The most obvious inconsistencies are that the majority of PMC fighters are citizens of the Russian Federation, i.e. a party to the conflict and that there is no evidence that foreigners recruited to this armed group receive significantly higher financial rewards than members of the Russian Armed Forces or Wagner fighters with Russian citizenship. A more detailed analysis of the nature of the group leads to the conclusion that Wagner PMCs are so deeply integrated, including financially and subordinately, into the Russian state military

³⁴ *Ibid*, p. 310, [URL](#).

³⁵ *Ibid*, p. 310, [URL](#).

apparatus that they can be considered part of the Russian armed forces. This also means that PMC Wagner can be recognised as a party to the conflict under Article 4 of Geneva Convention III, and thus its members are entitled to the POW status in the event of capture.

52. Instead, Ukraine has at its disposal the criminal prosecution tools provided for by the UN Convention on Mercenaries. In particular, this Convention obliges to prosecute persons involved in mercenarism, regardless of whether the act is linked to the prosecuting state. Thus, Ukrainian courts may consider cases of Wagner PMC members for their participation in mercenary activities in other states, such as Sudan or the Central African Republic. At the same time, although Ukrainian prosecutors have opened some proceedings against Wagner PMC members under articles on terrorism, this approach does not comply with international law, as international humanitarian law takes precedence over counter-terrorism norms. Therefore, such fighters cannot be convicted for the mere fact of participation in the conflict.