

Guns for hire: the privatization of modern wars

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Introduction

In the context of the confrontation between Western powers and the Russian Federation which followed the breakout of the conflict with Ukraine, Moscow is pictured - and perceived by the public opinion - as 'rule breaker'. In this mass of information, the Russians are 'the bad guys', *i.e.*, those who spread false news, purposely target civilians, and employ mercenaries, private individuals who fight for personal profit – money or other forms of payment, rather than for political interests – and is not a member of any other official military.

Information manipulation happens on both fronts, and perhaps Ukraine and its Western sponsors are more successful than the Russians, who suffer from the censorship imposed on their State *media*¹. It is not only a question of points of view, but also of terms, and of the manipulation of the lexicon - the much criticized 'disinformation' activity of the Kremlin² is rooted in Western tradition as 'propaganda'³. Therefore, when you come to talk about

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² Marco Marsili, «The Russian Influence Strategy in Its Contested Neighbourhood», in Holger Mölder, - Vladimir Sazonov - Archil Chochia - Tanel Kerikmäe (eds.), *The Russian Federation in Global Information Warfare. Influence Operations in Europe and Its Neighborhood*, Cham, Springer, 2021, p. 156, https://doi.org/10.1007/978-3-030-73955-3_8.

³ Marco Marsili, *Propaganda and International Relations: An Outlook in Wartime*, in «ArtCiencia.com», 2015, no. 19, pp. 1-26.

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campaigns aimed to manipulate and influence the public opinion by presenting facts through biased communication, the US is second to none – think about no weapons of mass destruction which gained the favor of the public opinion to support the (illegal) invasion of Iraq. Washington has a long tradition in manipulating terms and lexicon and creating neologisms to cover dirty operations⁴. Nothing that Moscow does not do by portraying the war with Ukraine as a «special military operation»⁵.

Legal framework overview

The relationships among the international community are regulated by public international law. Natural law provides the basis of the law of nations (*ius gentium* or *jus gentium*), a set of rules that has its source in the *naturalis ratio* and is observed equally among all *gentes* (peoples or nations) as customary law, in «reasoned compliance with standards of international conduct»⁶. Customary law emerges from traditional practice, establishing an instant *opinio iuris*⁷. International law is made up of two components: general practice and ‘accepted as law’ (*opinio iuris*)⁸. Part of these norms are recognized as fundamental principles of international law from which no derogation is allowed (*ius cogens* or *jus cogens*). The prohibitions of genocide, maritime piracy, slaving, torture, refoulement and wars of aggression and territorial aggrandizement are generally considered *ius cogens*⁹.

Bouvier explains that, according to Vattel, international law is generally divided into two branches: the natural law of nations, consisting of the rules of justice applicable to the conduct of States, and the positive law of nations¹⁰. The latter consists: of the voluntary law of nations, derived from

⁴ PACE, *Alleged secret detentions in Council of Europe member states. Information Memorandum II*, AS/Jur (2006) 03 rev of January 22nd 2006, rapporteur Dick Marty, par. 4.

⁵ Marsili, *Inside and Beyond the Russo-Ukrainian War*, cit., pp. 2; 6.

⁶ David J. Bederman, *International Law in Antiquity*, Cambridge, Cambridge University Press, 2004, p. 85.

⁷ Bruno Simma - Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, in «Australian Yearbook of International Law», 1988, vol. 12, pp. 82-108.

⁸ *Ibidem*.

⁹ Mahmoud Cherif Bassiouni, *International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes’*, in «Law and Contemporary Problems», 1996, vol. 59, no. 4, p. 68, <https://doi.org/10.2307/1192190>.

¹⁰ John Bouvier, «Law of Nations», in VV. AA., *A law dictionary: adapted to the Constitution and laws of the United States of America, and of the several states of the American union; with references to the civil and other systems of foreign law*, 3rd ed. 1839], Philadelphia, PA, T. & J.W. Johnson, 1848.

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the presumed consent of nations, arising out of their general usage; the conventional law of nations, derived from the express consent of nations, as evidenced in treaties and other international compacts; of the customary law of nations, derived from the express consent of nations, as evidenced in treaties and other international compacts between themselves¹¹.

The nature of war has remained unchanged over time¹². Despite far too much rhetoric on the extension of the term ‘war’ or ‘warfare’, armed conflict is regulated by the legal framework provided by the Geneva Conventions, which define the perimeter of international humanitarian law (IHL)¹³. A branch of public international law, IHL, also known as ‘the law of war’ or ‘the law of armed conflict’, is a *lex specialis* which regulates the conduct of war (*ius in bello*), and applies to states and non-state armed groups during an armed conflict. IHL restricts and regulates the means and methods of warfare available to combatants and sets out the responsibility to protect persons who are not taking part in hostilities.

The standard-setting of international law for humanitarian treatment in wartime is provided by the Geneva Conventions, which comprise four treaties (1864, 1906, 1929, 1949) and three Additional Protocols (Protocol I and II of 1977 and Protocol III of 2005). The first three Geneva Conventions were revised, expanded, and replaced, and the fourth one was added, in 1949¹⁴. The Geneva Law, which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities, can be considered part of this system of rules.

The Geneva Law ended up for embodying the Hague Conventions of 1899 and 1907, the first multilateral treaties that addressed the conduct of warfare. These two branches of international law applicable in armed conflict are so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the two Additional Protocols of 1977¹⁵ attest to the unity and complexity of that law.

¹¹ *Ibidem*.

¹² Marco Marsili, *Guerre à la Carte: Cyber, Information, Cognitive Warfare and the Metaverse*, in «Applied Cybersecurity & Internet Governance», 2023, vol. 2, no. 1, p. 1, doi: 10.5604/01.3001.0053.7402.

¹³ *Ibidem*.

¹⁴ Dietrich Schindler - Jiří Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, Leiden, Martinus Nijhoff Publisher, 1988, p. 367.

¹⁵ Protocol Additional to the Geneva Conventions of August 12th 1949 for the protection of victims of war (Protocol I and II), 1125 UNTS 17512-17513.

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With three Geneva Conventions revised and adopted, and the fourth added, in 1949 the whole set is referred to as the Geneva Conventions¹⁶ of 1949 or simply the Geneva Conventions.

The 1949 Conventions have been changed by three amendment protocols: Protocol I (1977) relating to the *Protection of Victims of International Armed Conflicts*¹⁷; Protocol II (1977) relating to the *Protection of Victims of Non-International Armed Conflicts*¹⁸; and Protocol III (2005) relating to the *Adoption of an Additional Distinctive Emblem*¹⁹.

The Geneva Conventions apply at times of war and armed conflict to governments who have ratified them. The details of applicability are spelled out in Common Articles 2 and 3²⁰. Common Article 2 (or simply ‘Article 2’) relating to international armed conflicts states that the Conventions apply to all cases of declared war between signatory nations²¹. This is the original sense of applicability, which predates the 1949 version. The Conventions apply to all cases of armed conflict between two or more signatory nations, even in the absence of a declaration of war. This language was added in 1949 to accommodate situations in which a State commits a hostile act against another State, pretending that it is not making war, such as police action or legitimate self-defence²². The Conventions apply to a signatory nation even if the opposing nation is not a signatory, but only if the opposing nation accepts and applies the provisions of the Conventions²³. When the criteria of international conflict have been met, the full protections of the Geneva Conventions are considered to apply.

In the commentary published in 1952, the director for general affairs of the International Committee of the Red Cross, Jean S. Pictet, argues that

¹⁶ Geneva Conventions of 1949, 75 UNTS 970.

¹⁷ Protocol Additional to the Geneva Conventions of August 12th 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, June 8th 1977. CDDH, Official Records, Vol. VI, CDDH/SR.41, May 26th 1977, p. 156. 1125 UNTS 3.

¹⁸ Protocol Additional to the Geneva Conventions of August 12th 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, June 8th 1977, 1125 UNTS 609.

¹⁹ Protocol Additional to the Geneva Conventions of August 12th 1949 and relating to the Adoption of an Additional Distinctive Emblem (Protocol III). Geneva, December 8th 2005, 2404 UNTS 261.

²⁰ Article 3 applies in non-international armed conflicts.

²¹ The procedure for a state making a declaration of war is set up in Convention (III) relating to the Opening of Hostilities, adopted at the Second Hague Conference in 1907.

²² Jean S. Pictet, ed., *Geneva Conventions of August 12th 1949: Commentary. Volume I: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, ICRC, 1952, p. 33.

²³ Art. 2 of 1949 Geneva Convention (I).

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the non-recognition by one party of the government of the other party had been invoked as a pretext for not observing one or other of the Geneva Conventions. Pictet concludes that the development in the whole concept of humanitarian conventions points the same way, towards the respect for human beings, which is connected to the concrete fact of recognition of a State of war²⁴. Pictet argues that life and compliance with the principles on which civilisation is based are too important to be limited by strict rules²⁵. He considers that the principle of respect for human personality, which is at the root of all the Geneva Conventions, «is concerned with persons, not as soldiers but as human beings, without regard to their uniform, their allegiance, their race, or their religious or other beliefs, without regard even to any obligations the authority on which they depend may have assumed in their name or in their behalf»²⁶.

Mercenaries in International Humanitarian Law

International law virtually prohibits governments from hiring professional soldiers to serve in a foreign army. Despite they were traditionally treated as prisoners²⁷, according to Art. 47 of Protocol I, mercenaries do not have the right to be treated as combatants or prisoners of war (POWs). Article 47(2) of the Protocol I, adopted by consensus, defines mercenaries as any person who:

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

²⁴ Pictet, *Op. cit.*, pp. 8, 29.

²⁵ *Idem*, p. 30.

²⁶ *Idem*, p. 39.

²⁷ Herbert C. Fooks, *Prisoners of War*, Federalsburg, MA, J.W. Stowell Printing Co., 1924, p. 28-29.

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At the time of its accession to Protocol I (1989), Algeria declared that the definition of ‘mercenary’ contained in Article 47(2) was «restrictive»²⁸, thus triggering the problem of terminology and its legal meaning. Similar definitions are provided by Art. 1 of the Convention for the Elimination of Mercenarism in Africa, adopted by the Organization of African Unity (OAU) in 1977²⁹, and by the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries³⁰. Other definitions are set forth in military manuals that are not relevant for the purpose and within the scope of this contribution. What is of interest, here, is the behavior of the major competitors, the US and the Russian Federation—virtually the only two countries that simultaneously provide services and make use of mercenaries.

The US and Russian approach to mercenarism

We can draw the US and Russian definitions of ‘mercenary’ from different primary sources. The Russian Federation’s Regulations on the application of customary rules of international humanitarian law applicable in international and non-international armed conflict States³¹:

[...] mercenaries means persons specially recruited and taking a direct part in hostilities with the purpose of obtaining private gain. While doing so, they are neither nationals of a party to the conflict, nor residents of the territory controlled by a party to the conflict. Mercenaries are not members of the armed forces of the belligerent parties and they have not been sent by a state which is not a party to the conflict on official duty as members of its armed forces. Military instructors or advisers who have been officially sent by one state to another state in order to render assistance in the development of its armed forces shall not be considered mercenaries unless they take a direct part in hostilities³².

²⁸ *The Algerian government declaration concerning the accession to Protocol I*, printed in «International Review of the Red Cross», October 1989, vol. 272, pp. 489-490.

²⁹ *Convention for the Elimination of Mercenarism in Africa*, adopted by the OAU Council of Ministers at its 29th Session, Res. 817 (XXIX), Libreville, 3 July 1977, OAU Doc. CM/817 (XXIX) Annex II Rev.3 (1977).

³⁰ *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, adopted by UNGA Resolution 44/341 on December 4th 1989, entry into force October 20th 2001, 2163 UNTS 75.

³¹ *Rules. Introduction*, in «International Humanitarian Law Databases, International Committee of the Red Cross (ICRC)», <https://ihl-databases.icrc.org/en/customary-ihl/v1/in>.

³² Russian Federation, *Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation*, Moscow, Ministry of Defense of the Russian Federation, August 8th 2001, par. 1.

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The Russian Federation's *Criminal Code* defines a mercenary as: «a person who acts for the purpose of getting a material reward and is not a citizen of the State that participates in the armed conflict or hostilities, who does not reside on a permanent basis on its territory, and who is not fulfilling official duties»³³. Article 359(3) of the *Criminal Code* provides: «Participation of a mercenary in an armed conflict or in hostilities shall be punished by imprisonment for a term of three to seven years». The Report on the Practice of the Russian Federation says:

As far as mercenaries are concerned, it must be said that they participate in nearly all the conflicts in the CIS countries. In connection with various political considerations, however, their legal status is made equal to the *status* of «volunteers». Once Georgians brought down a plane and captured a mercenary – an officer of the Russian armed forces who fought for Abkhazia. Georgia demonstrated goodwill: it released the man and handed him over to Russia³⁴.

In 1980, in a memorandum concerning the international legal rights of captured mercenaries, the US Department of State concludes:

The act of being a mercenary is not a crime under international law. An individual who is accused of being a mercenary and who is captured during an armed conflict is entitled to the basic humanitarian protections of the international law applicable in armed conflict, including those specified in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The specific rights which such an individual would be entitled to vary depending on whether the conflict is an international conflict or an internal one and, in the case of international armed conflicts, on whether the person is entitled to prisoner-of-war status [...]. The protections of [common] article 3 [of the 1949 Geneva Conventions] would also apply to any captured individual accused of being a mercenary during a civil war. [Common Article 3] does not provide any immunity from prosecution to individuals for engaging in combatant acts. The provisions of the Geneva Conventions dealing with prisoners of war do not apply in civil wars, and combatants captured during civil wars are not prisoners of war within the meaning of international law³⁵.

In 1987, the Deputy Legal Adviser of the US Department of State, Michael J. Matheson, affirms: «We do not favor the provisions of article

³³ Russian Federation, *Criminal Code* No. 63-Fz of June 13th 1996 (consolidated as amended), Art. 359, note, http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=45514.

³⁴ *Report on the Practice of the Russian Federation*, 1997, Chapter 5.3,

³⁵ Attorney-Adviser in the Office of the Assistant Legal Adviser for African Affairs, *International Legal Rights of Captured Mercenaries*, Washington, DC, US Department of State, October 17th 1980, reprinted in Marian Nash (Leich), ed., *Cumulative Digest of United States Practice in International Law, 1981-1988*, Washington, DC, US Department of State, 1993-1995, pp. 3457; 3463-3464.

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47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of article 47 to be part of current customary law»³⁶. In 1987, the Legal Adviser of the U.S. Department of State, Judge Abraham D. Sofaer, wrote:

For a third example [of why the Joint Chiefs of Staff judged the 1977 Additional Protocol I too ambiguous and complicated to use as a practical guide for military operations], article 47 of Protocol I provides that: «a mercenary shall not have the right to be a combatant or a prisoner of war». This article was included in the Protocol not for humanitarian reasons, but purely to make the political point that mercenary activity in the Third World is unwelcome. In doing so, this article disregards one of the fundamental principles of international humanitarian law by defining the right to combatant *status*, at least in part, on the basis of the personal or political motivations of the individual in question. This politicizing of the rules of warfare is contrary to Western interests and the interests of humanitarian law itself³⁷.

In re Guantánamo Detainees Cases the US District Court for the District of Columbia (DDC) rules that Geneva Convention (III) relative to the Treatment of Prisoners of War³⁸ does not permit the determination of POW *status* in a political way, as the Convention is «self-executing» and its application does not lie in the hands of the Executive³⁹. Sir Christopher Greenwood, an English judge at the International Court of Justice (ICJ) – the principal judicial organ of the UN competent on general disputes between countries⁴⁰ – notes that, although the US has never ratified Protocol I, it has obtained customary *status*⁴¹.

³⁶ Martin P. Dupuis - John Q. Heywood - Michéle Y.F. Sarko, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, in «American University International Law Review», 1987, vol. 2, pp. 426-427.

³⁷ Martin P. Dupuis et al., *Op. cit.*, p. 469.

³⁸ *The Geneva Convention relative to the Treatment of Prisoners of War* (Convention III) was adopted in 1929. It was replaced by the Third Geneva Convention of 1949. It is no longer in effect following the universal acceptance of the Geneva Conventions of 1949.

³⁹ *In re Guantánamo Detainees Cases*, Case No. 02–299, decided on January 31st 2005, memorandum opinion by Judge Joyce Hens Green, 355 F.Supp.2d 443 (D.D.C. 2005), par. 70.

⁴⁰ The ICJ, set up in 1945 by Chapter XIV of the UN Charter, settles disputes between States in accordance with international law.

⁴¹ Christopher J. Greenwood, «The Customary Law Status of the 1977 Additional Protocols», in Astrid J. M. Delissen - Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflicts*, Dordrecht, Martinus Nijhoff, 1991, p. 109.

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A lexical question

There should be a legal distinction between foreign fighters, foreign volunteers, and private military contractors or private security services contractors, but their categorization rests on the national interest and geopolitical considerations. If we assume that the difference between foreign fighters/foreign volunteers and private military contractors/private security services contractors lies essentially in the ‘material compensation substantially in excess’, we should accordingly infer that foreign fighters who joined the ranks of the Islamic State or al-Qaeda were lawful combatants, not criminals, and therefore should be no difference between them and the *mujahideen* who opposed the Soviets in Afghanistan in 1979-1989⁴² - all of them fight for religious, political or ideological interests. What distinguishes genuine freedom fighters from criminals or terrorists? Down the rabbit hole, a debate about and around terrorists - and/or terrorism - would take too much time and would get us nowhere⁴³. However, the fight against international terrorism provides a different approach to the question of mercenaries.

In the War on Terror, the US government introduced new lexical inventions: enemy combatant; foreign fighter; extraordinary rendition; reinforced interrogation; trans-regional strike; targeting, etc. Addressing the US extraordinary rendition flights on the European soil, the Parliamentary Assembly of the Council of Europe (PACE) finds that to face the threat of terrorism the US introduced new legal concepts, such as ‘enemy combatant’ and ‘rendition’, which were previously unheard of in international law and stand contrary to the basic legal principles⁴⁴. A report of the PACE Committee on Legal Affairs and Human Rights emphasizes that, whatever one calls them, secret prisons, abductions (or extraordinary renditions), and torture (or ‘reinforced interrogation techniques’), negate justice and the rule of law⁴⁵. The *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* report compiled by the US Senate Select Committee on Intelligence (SSCI) addresses the

⁴² Marco Marsili, *The Islamic State: A Clash within the Muslim Civilization for the New Caliphate*, in «Studies in Conflict & Terrorism», 2016, vol. 39, no 2, p. 91, <https://doi.org/10.1080/1057610X.2015.1100010>.

⁴³ Id., *The War on Cyberterrorism*, in «Democracy and Security», 2019, vol. 15, no. 2, p. 172, <https://doi.org/10.1080/17419166.2018.1496826>.

⁴⁴ PACE, *Alleged secret detentions in Council of Europe member states*, par. 4.

⁴⁵ PACE, *Legal remedies for human rights violations in the North-Caucasus Region*, Doc. 12276 of 4 June 2010, rapporteur Dick Marty, par. 51.

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use of various forms of torture - 'enhanced interrogation techniques', in US government communiqués - on detainees between 2001 and 2006⁴⁶. The report was approved on December 13th 2012, updated for release on April 3rd 2014, and then published after declassification revisions on following December 3rd⁴⁷. The PACE Committee on Legal Affairs and Human Rights argues that 'reinforced interrogation techniques' is a euphemism for torture⁴⁸.

In the context of the Russo-Ukrainian war, the confrontation between Moscow and Western powers relies heavily on information campaigns where at least biased news - just not to say false news - are widely spread from both sides. Washington accused Moscow to employ in Ukraine personnel from the Wagner Group, a Russian paramilitary organization which is variously described as a private military company (PMC), a network of mercenaries, or «a *de facto* private army of Russian President Putin»⁴⁹, disregarding that congressional hearings held in 2019 have disclosed to US lawmakers that the Azov Battalion recruits foreign fighters⁵⁰. In 2018, the Federal Bureau of Investigation (FBI) had already reported that white supremacists from Scandinavia, northern Europe, Brazil, Russia, and the US were training as foreign fighters with the Azov paramilitary group in Ukraine. The Azov battalion, incorporated into the Ukrainian armed forces in 2014, was accused by the FBI of training prosecuted US citizens, supporting terrorism, and violating the UN Mercenary Convention which the United States have never ratified⁵¹. These facts are withheld from public opinion by a heavy brainwashing campaign orchestrated by Washington to support Ukraine and its accession to the Atlantic Alliance.

Both the US and Russia are not bound by the Convention which was signed and/or ratified only by 46 UN member States out of 193 - not exactly

⁴⁶ US Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, approved December 13th 2012; updated for release April 3rd 2014; declassification revisions December 3rd 2014, <http://www.intelligence.senate.gov/press/committee-releases-study-cias-detention-and-interrogation-program>.

⁴⁷ *Ibidem*.

⁴⁸ PACE, Doc. 12276, par. 51.

⁴⁹ Marise Payne, Australian Minister for Foreign Affairs, *Further Russia and Belarus Sanctions*, May 18th 2022, <https://www.foreignminister.gov.au/minister/marise-payne/media-release/further-russia-and-belarus-sanctions>.

⁵⁰ Marsili, *Inside and Beyond the Russo-Ukrainian War*, cit., pp. 6-7, 31.

⁵¹ UN, *Status of the Convention*, in «*United Nations Treaty Collection*», status at June 7th 2023, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-6&chapter=18&clang=_en.

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a success. The major powers, including China, France, India, Japan, Russia, and the UK, preferred to keep their hands free thus making of the treaty a useless instrument. An international binding instrument is still the best choice to ensure that perpetrators of human rights violations are held accountable wherever private contractors operate⁵².

Despite both the US and Russia are not bound by the Convention, the successful information campaign allegedly orchestrated by Washington accuses Moscow of not respecting a commitment that neither the Kremlin nor the White House have signed. But there is more than this. The US Department of Defense (DOD) is a large employer of mercenaries branded as 'contractors'. The author of this page thinks that there is no difference, and therefore no distinction can be made between the notorious Russian para-military Wagner Group and Academi, the American private security services contractor formerly known as Blackwater and merged in 2014 with Triple Canopy to form Constellis Holdings. While the turnover of the Russian PMC is unknown, in February 2023, the U.S. company announced that in the previous record-breaking year awarded nearly 5 USD billion in contract, representing a 250% increase, mainly from Department of Energy, Department of State, Department of Defense, Department of Homeland Security, Department of Justice, Intelligence Community, and numerous commercial clients⁵³. Renting private guns is big business that requires big clients, mostly governments. The UN Working Group on mercenaries finds that: «increasingly powerful multinational business entities are taking over traditional State functions that involve potential and actual use of force»⁵⁴.

The US has a long tradition is recruiting mercenaries who had in *Soldier of Fortune* (SoF) their reference⁵⁵ until the publication founded in 1975 by Robert K. Brown evolved into an adventure magazine that focused

⁵² United Nations Human Rights Special Procedures. Special Rapporteurs, Independent Experts & Working Groups, *Mercenarism and private military and security companies*, HRC/NONE/2018/40, Geneva, United Nations, April 2018, p. 28, <https://www.ohchr.org/sites/default/files/MercenarismandPrivateMilitarySecurityCompanies.pdf>.

⁵³ Constellis, *Constellis Awarded Nearly \$5 Billion in Record-breaking Year*, February 3rd 2023, <https://www.constellis.com/press/constellis-awarded-nearly-5b-in-record-breaking-year/>.

⁵⁴ United Nations Human Rights Special Procedures. Special Rapporteurs, Independent Experts & Working Groups, *Op. cit.*, p. 28.

⁵⁵ Ward Churchill, *US Mercenaries in Southern Africa: The Recruiting Network and U.S. Policy*, in «Africa Today», 1980, vol. 27, no. 2, pp. 21-46; James Taulbee, *Soldiers of fortune: A legal leash for the dogs of war?*, in «Defense & Security Analysis», 1985, vol. 1, no. 3, pp. 187-203; Philip Lamy, *Millennialism in the Mass Media: The Case of 'Soldier of Fortune' Magazine*, in «Journal for the Scientific Study of Religion», 1992, vol. 31, no. 4, pp. 408-24, <https://doi.org/10.2307/1386853>.

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on military, professional soldiers, guns, and gear⁵⁶. Soldier of fortune is just another wording for mercenary, sometimes also called a hired gun. «SoF» used to publish advertisement for recruiting mercenaries or killers to be employed in the US or overseas. In 1981 the magazine launched a fundraising campaign «for the purchase of arms and ammunitions» for the «Afghan freedom fighters» engaged against the Soviets. The US government supported the Afghans fight until it later fed into the global *jihad* and finally turned into terrorism⁵⁷.

While many governments and authors have complained the use of PMCs as an instrument in Russia's foreign and security policy⁵⁸, less or nothing is done to denounce the large employment of private military contractors by the DOD.

The Wagner Group has been reported operating in several countries, including Libya, Syria, Mali, Nigeria, Ukraine (Crimea and Donbas), the Central African Republic, Madagascar, Mozambique, Venezuela, with alleged activities conducted in Belarus, Serbia, Burkina Faso, Chad, Moldova, and Nagorno-Karabakh⁵⁹. The privatization of defense - or of security - can also involve risks for the client. With an estimated number of 25.000 members⁶⁰, the Wagner Group can even threaten a State client big and powerful like Russia. In June 2023, during the 'special military

⁵⁶ Soldier of Fortune, *About Soldier of Fortune*, <https://sofmag.com/about-soldier-of-fortune/>.

⁵⁷ Christian Parenti, *America's Jihad: A History of Origins*, in «Social Justice», 2001, vol. 28, no. 3 (85), pp. 31-38, <http://www.jstor.org/stable/29768089>.

⁵⁸ Margarete Klein, *Private military companies – a growing instrument in Russia's foreign and security policy toolbox*, «Hybrid CoE Strategic Analysis», 17, Helsinki, The European Centre of Excellence for Countering Hybrid Threats, 2919, https://www.hybridcoe.fi/wp-content/uploads/2020/07/Strategic-Analysis-3_2019.pdf; Tor Bukkvoll - Åse G. Østensen, *The Emergence of Russian Private Military Companies: A New Tool of Clandestine Warfare*, in «Special Operations Journal», January 2020, vol. 6, no. 1, pp. 1-17.

⁵⁹ Christopher Faulkner, *Undermining Democracy and Exploiting Clients: The Wagner Group's Nefarious Activities in Africa*, in «CTC Sentinel», June 2022, vol. 15, no. 6, pp. 28-37, <https://ctc.westpoint.edu/wp-content/uploads/2022/06/CTC-SENTINEL-062022.pdf>; Sarah Fainberg, *Russian Spetsnaz, Contractors and Volunteers in the Syrian Conflict*, Russie. Nei.Visions 105, Paris, Institut français des relations internationales, December 2017; Council of the European Union, *EU imposes restrictive measures against the Wagner Group*, last reviewed on March 1st 2023, <https://www.consilium.europa.eu/en/press/press-releases/2021/12/13/eu-imposes-restrictive-measures-against-the-wagner-group/>; Kimberly Marten, *Russia's Use of Semi-state Security Forces: The Case of the Wagner Group*, «Post-Soviet Affairs» 2019, vol. 35, no. 3, pp. 181-204, <https://doi.org/10.1080/1060586X.2019.1591142>.

⁶⁰ The White House, *Press Briefing by Press Secretary Karine Jean-Pierre and NSC Coordinator for Strategic Communications John Kirby*, 20 January 2023, <https://www.whitehouse.gov/briefing-room/press-briefings/2023/01/20/press-briefing-by-press-secretary-karine-jean-pierre-and-nsc-coordinator-for-strategic-communications-john-kirby-8/>.

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operation' in Ukraine, the 'personal army' of Yevgeny Prigozhin started an «internal revolt»⁶¹, an «armed mutiny» in Rostov-on-Don against the government of Moscow⁶². This is what can happen when you rely on PMCs instead of regular armed forces.

In his televised speech on the Wagner rebellion, Russian President Putin accused the PMC of «terrorism»⁶³. The European Parliament has recognized Russia as a state sponsor of terrorism - the EU currently cannot officially designate states as sponsors of terrorism - and as a State that «uses means of terrorism», and called on the Council to include the Wagner Group on the EU's terrorist list⁶⁴. The United States sanctioned the Wagner Group and its head, Yevgeniy Prigozhin⁶⁵, but has not designated the para-military group as a Foreign Terrorist Organizations (FTO)⁶⁶. Are there really similarities between the Wagner Group and entities like the Islamic State, an officially proscribed terrorist organizations?⁶⁷.

The day after the death of Prigozhin in a plane crash, President Putin signed an executive order to oblige volunteers engaged in the special military operation - *i.e.*, the Wagner Group - to sign an oath of allegiance to the Russian State⁶⁸. In this way, are fueled conjectures about the close relationship between PCMs and governments, *i.e.* the fact that the former act as *de facto* State militias. It is not just a formal oath, which Azov also took, joining the Ukrainian Army, or the Constellis, hiring its contractors to the US government; is something more and deeper that regards the misconduct in war by military staff trying to circumvent IHL on behalf of legitimate governments.

⁶¹ Vladimir Putin, *Address to citizens of Russia*, June 24th 2023, <http://en.kremlin.ru/events/president/news/71496>.

⁶² The Kremlin, *The President has been updated on the situation with Yevgeny Prigozhin*, June 24th 2023, <http://en.kremlin.ru/events/president/news/71494>.

⁶³ Putin, *Address to citizens of Russia*, *cit.*.

⁶⁴ European Parliament, *European Parliament declares Russia to be a State sponsor of terrorism*, Press Release Ref.: 20221118IPR55707, November 23rd 2022, <https://www.europarl.europa.eu/news/en/press-room/20221118IPR55707/european-parliament-declares-russia-to-be-a-state-sponsor-of-terrorism>.

⁶⁵ Anthony Blinken, *Countering the Wagner Group and Degrading Russia's War Efforts in Ukraine*, January 26th 2023, <https://www.state.gov/countering-the-wagner-group-and-degrading-russias-war-efforts-in-ukraine/>.

⁶⁶ US Department of State, Bureau of Counterterrorisms, *Foreign Terrorist Organizations*, <https://www.state.gov/foreign-terrorist-organizations/>.

⁶⁷ Marsili, *The Islamic State: A Clash within the Muslim Civilization for the New Caliphate*, *cit.*.

⁶⁸ Vladimir Putin, *Executive Order on administering the oath to certain categories of individuals*, August 25th 2023, <http://en.kremlin.ru/acts/news/72106>.

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The *DOD Dictionary of Military and Associated Terms* [Short title: DOD Dictionary], a publication that reflects general and universal terms in joint publication (JP) glossaries and sets forth standard US military and associated terminology to encompass the joint activity of the U.S. Armed Forces, provides the following JP 4-10 definition of contractors authorized to accompany the force: «Contingency contractor employees and all tiers of subcontractor employees who are authorized to accompany the force in applicable contingency operations and have afforded such status through the issuance of a letter of authorization»⁶⁹. These military and associated terms, together with their definitions and constitute approved DOD terminology for general use by all components of the Department of Defense.

When the Nagorno-Karabakh conflict re-flamed in late September 2020, Turkey, a close US ally and NATO member, and candidate for membership of the European Union, openly supported Azerbaijan even militarily⁷⁰. UN experts⁷¹ and the PACE⁷² find that there are «evidences» that Turkey recruited and sent jihadist mercenaries to fight in support to Azerbaijan in Nagorno-Karabakh through the alleged recruitment of Syrian and Lebanese mercenaries as foreign fighters. In an application containing a request for provisional measures filled in September 2021 before the International Court of Justice for the violation of the International Convention on the Elimination of All Forms of Racial Discrimination, Armenia complains the presence of Syrian mercenaries backing Azerbaijani regular troops in Nagorno-Karabakh⁷³.

⁶⁹ Office of the Chairman of the Joint Chiefs of Staff, *DOD Dictionary of Military and Associated Terms*, amended as of November 2021, Washington DC, The Joint Staff, 2001, JP 4-10.

⁷⁰ ECtHR, *Court's decision on the interim measure request introduced by Armenia against Turkey*, October 6th 2020, App. no. 43517/20 (*Armenia v. Turkey*), <https://hudoc.echr.coe.int/rus?i=003-6816855-9120472>; ECtHR, *Court's decision on Turkish authorities' request to lift interim measure indicated in the case of Armenia v. Turkey*, December 2nd 2020, App. no. 43517/20 (*Armenia v. Turkey*), <https://hudoc.echr.coe.int/fre?i=003-6825174-9134722>.

⁷¹ Working Group on the use of mercenaries, *Mercenaries in and around the Nagorno-Karabakh conflict zone must be withdrawn – UN experts*, November 11th 2020, <https://www.ohchr.org/en/press-releases/2020/11/mercenaries-and-around-nagorno-karabakh-conflict-zone-must-be-withdrawn-un>.

⁷² PACE, *Humanitarian consequences of the conflict between Armenia and Azerbaijan/ Nagorno-Karabakh conflict*, Resolution 2391 (2021) of September 27th 2021, par. 8.5, <https://pace.coe.int/en/files/29483/html>.

⁷³ International Court of Justice, *Application Instituting Proceedings Containing a Request for Provisional Measures, 16 September 2021 (Armenia v. Azerbaijan)*, par. 52, 75, 113, <https://www.icj-cij.org/public/files/case-related/180/180-20210916-APP-01-00-EN.pdf>.

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The European Parliament, consistently with the the statement of OSCE Minsk Group Co-Chair countries, firmly condemned: «Turkey’s use of Syrian mercenaries in conflicts in Libya and Nagorno-Karabakh, in violation of international law»⁷⁴. As a matter of fact, by accepting such military aid, the authorities of Baku violated the United Nations Mercenary Convention which Azerbaijan has accessed in 1997⁷⁵. Reportedly, the employment of mercenaries by Azerbaijan dates to the early stage of the conflict in Artsakh (as the region is called by Armenians) 1992-1994⁷⁶. On the other hand, the government of Baku lodged before the European Court of the Human Rights (ECtHR)⁷⁷ a request for interim measures to stop Armenia sending: «so-called ‘volunteers’ - in fact mercenaries» to Nagorno-Karabakh⁷⁸. Here comes the lexical question: volunteers, foreign fighters, *ihadists*, private military contractors or mercenaries? At some extent someone can call them ‘freedom fighters’. Certainly, the use of foreign fighters, or combatants not framed within the regular armed forces is increasing, as reported by the UN Working Group on mercenaries⁷⁹.

Under the law of war, a State may incorporate a paramilitary organization or armed agency (such as a law enforcement agency or a private volunteer militia) into its combatant armed forces. The other parties to a conflict have to be notified thereof⁸⁰. Do the provisions of Protocol I, ratified by the Soviet Union on September 29th 1989 as a reflection of the: «spirit of the new political thought» and aimed at strengthening the international law system⁸¹, apply to a ‘special military operation’? Such

⁷⁴ European Parliament, *Resolution of March 11th 2021 on the Syrian conflict – 10 years after the uprising*, 2021/2576(RSP), P9 TA(2021)0088, par. J, 7.

⁷⁵ *Status of the Convention*.

⁷⁶ Ioannis Charalampidis, *Sponsored to Kill: Mercenaries and Terrorist Networks in Azerbaijan*, Moscow, MIA Publishers, 2013, <https://karabakhfacts.com/wp-content/uploads/2013/02/Ioannis-Charalampidis-Sponsored-to-Kill-ENG.pdf>; Against Xenophobia and Violence, *Brief History of Artsakh (Nagorno-Karabakh)*, Yerevan, MIA Publishers, 2013, pp. 18-19, <http://karabakhfacts.com/wp-content/uploads/2013/09/Brief-History-of-Artsakh-Nagorno-Karabakh-EN.pdf>.

⁷⁷ The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the *European Convention on Human Rights* of 1950.

⁷⁸ ECtHR, *Request for interim measures lodged by Azerbaijan against Armenia concerning the conflict in Nagorno-Karabakh*, Press release ECHR 310 (2020), October 27th 2020, App. No. 47319/20 (*Azerbaijan v. Armenia*).

⁷⁹ United Nations Human Rights Special Procedures. Special Rapporteurs, Independent Experts & Working Groups, *Op. cit.*, p. 28.

⁸⁰ Article 43(3) of Additional Protocol I.

⁸¹ ICRC, *Additional Protocols of June 8th 1977 to the Geneva Conventions of August 12th 1949: Reservations, Declarations and communications made at the time of or in reference to*

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provisions apply in any armed conflict, even a ‘special military operation’. In fact, lexical creativity does not exclude the application of either Protocol I or Article 2 of the Conventions which the Russian Federation intends to apply to combatants of the Wagner Group.

Amid the conflict against Ukraine, Russian President Putin signed an executive order which grants citizenship to: «foreigners who have signed a contract for service in the Russian Armed Forces, other troops or military formations for at least one year, as well as those who are participating (participated) in combat operations in such units for at least six months»⁸². This way, formations such as the Wagner Group are incorporated into official and legitimate armed forces, as happened with the Azov battalion or the *Waffen-SS*, the combat branch of the Nazi Party’s paramilitary Schutzstaffel (SS) organisation⁸³ - both of these formations recruited foreign volunteers⁸⁴.

In Europe, the use of paramilitaries to support or replace legitimate armed forces is nothing new. After the military coup in Spain on 17 July 1936 launched the Spanish Civil War (1936-1939), the Nationalists led by General Francisco Franco requested the support of Nazi Germany and Fascist Italy against the leftist Popular Front government⁸⁵. Both Nazi Germany and Fascist Italy participated in the conflict through the recruitment and deployment of military volunteers organized in the German Condor Legion and the Italian ‘expeditionary force’⁸⁶.

ratification or accession as at June 30th 1992, Geneva, ICRC, July 15th 1992, pp. 36-37, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/RU>.

⁸² Vladimir Putin, *Executive Order on simplified procedure for granting Russian citizenship to foreign nationals who have signed a contract to serve in the Russian Armed Forces*, 30 September 2022, <http://en.kremlin.ru/acts/news/69467>.

⁸³ The *Waffen-SS* tactically under the command of the Wehrmacht, the unified armed forces of Nazi Germany. During the Nuremberg Trials (1945-2946), the *Waffen-SS* was declared a criminal organization for its major involvement in war crimes and for being an «integral part» of the SS. The post-war German government held the SS organization as a whole to be a criminal organization.

⁸⁴ Marsili, *Inside and Beyond the Russo-Ukrainian War*, cit. p. 52; Roger James Bender - Hugh Page Taylor, *Uniforms, organization, and history of the Waffen-SS*, Volume 2, San José, CA, R. J. Bender Publishing, 1971, p. 23; Thomas H. Flaherty, *The SS, The Third Reich*, Fairfax, VA/New York, NY, Time-Life Books, 1988; George H. Stein, *The Waffen-SS: Hitler’s Elite Guard at War 1939-1945*, Bristol, Cerberus Publishing, (2002) [1966], pp. xxiv, xxv, pp. 150, 153.

⁸⁵ Ian Westwell, *Condor Legion: The Wehrmacht’s Training Ground*, «Spearhead», vol. 15, 1st ed., Shepperton, Ian Allan publishing, 2004, p. 10.

⁸⁶ Westwell, *Op. cit.*, p. 13. See also: Stefanie Schüler-Springorum, *Krieg und Fliegen. Die Legion Condor im Spanischen Bürgerkrieg*, 1st ed., Paderborn, Schöningh, 2010, p. 109.

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At the early stage of the intervention, the Italian support was limited to an unofficial participation through the deployment of divisions of soldiers and Blackshirts (Italian: *Camicie Nere*), officially the Voluntary Militia for National Security (Italian: *Milizia Volontaria per la Sicurezza Nazionale*, MVSN), also known as *squadristi*, an all-volunteer militia of the Kingdom of Italy under Fascist rule, which was integrated into the Royal Italian Army after 1923⁸⁷. In December 1936, after the failure of Franco's offensive on Madrid, the Italian Prime Minister Benito Mussolini decided to send regular army forces to complement the 'expeditionary force' which was renamed Corps of Volunteer Troops (Italian: *Corpo Truppe Volontarie*)⁸⁸.

More recently, paramilitary organizations played a pivotal role in the Yugoslav Wars (1991-2001). The International Criminal Tribunal for the former Yugoslavia (ICTY), established by the United Nations dealing with war crimes that took place during the conflicts in the Balkans in the 1990's, sentenced Serbian paramilitary leaders to life imprisonment for crimes against humanity, as well as Serbian ultranationalists, senior army officers and politicians⁸⁹. Therefore, there seems to be a link between paramilitary groups, often militia of a political party or at the service of a government, and politics. Depending on the terms, such formations can be disguised as 'volunteers', a wording that can assume both a negative and a positive meaning. Foreign fighters are the *mujahedeen* who opposed the Soviet intervention in Afghanistan (1979-1989) and the Taliban who fought against the US-led military occupation (2001-2021), but also *jihadists* associated to al-Qaeda and to the Islamic State criminal organizations, all the volunteers who joined the Azov battalion and the Wagner Group, and the combatants on both sides during the Spanish Civil War—just to mention a few. So, I wonder which is the difference between a private military contractor and a mercenary; between a foreign fighter and a 'freedom fighter' or a criminal—even a terrorist.

The UN Working Group on mercenaries concludes that domestic legislation is «inconsistent» and that «many gaps» exist⁹⁰. Private military

⁸⁷ Attilio Teruzzi, *La Milizia delle Camicie Nere e le sue specialità*, Milano, A. Mondadori Editore, 1933.

⁸⁸ Brian R. Sullivan, *Fascist Italy's military involvement in the Spanish Civil War*, in «Journal of Military History», 1995, vol. 59, no. 4, pp. 697-727.

⁸⁹ United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), *Judgement List*, <https://www.icty.org/en/cases/judgement-list>.

⁹⁰ United Nations Human Rights Special Procedures. Special Rapporteurs, Independent Experts & Working Groups, *Op. cit.*, p. 28.

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companies present themselves in disguise of ‘security’ firms, whose activities are permitted under national regulations, despite their real functions or services provided. Private military and security companies result to be often engaged in direct participation in armed conflicts.

Conclusions

There is no grey zone in international law—maybe in morals and ethics. The distinction between just/unjust, right/wrong, or good/evil is based on moral and ethical considerations that leave the door open to different and opposing assessments according to the national interest and geopolitical considerations. The lawfulness of an act cannot be subject to moral and ethical assessment but must be judged under IHL. An action may be unjust, but not unlawful; it may be just, although unlawful. There are no self-declared ‘good guys’ who have a ‘license to kill’ while the ‘bad ones’ are outlaws. It does not matter how you call them, mercenaries, private military contractors or private security services contractors; whatever you call them, although their use is morally and ethically condemnable, for those states not bound by any convention - given that states can withdraw by their legal obligations - their employment is lawful. Everything else is propaganda or brainwashing.