

RESEARCH ARTICLE

State Responsibility for Violations of International Humanitarian Law and Human Rights Law by Private Security Companies in Africa: The Case of the Wagner Group and Africa Corps

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(Accepted 3 April 2025)

Abstract

The outsourcing of traditionally military functions in Africa to private military companies (PMCs) such as the Wagner Group and the Africa Corps has been accompanied by violations of international humanitarian law and international human rights law. According to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, state responsibility for these violations can be imputed to the states that employ PMCs to function as their agents, to exercise government authority or to act in the vacuum left by official authorities. States that do not intervene to prevent these abuses fail their obligations of due diligence through persistent non-action and should not be excused from demanding accountability by immunity agreements between the host and hiring states. We explore the possibility of the communitarian invocation of state responsibility by third-party states, on behalf of victims, in order to end impunity, drive accountability and secure effective redress for victims.

Keywords: Africa Corps; Articles on Responsibility of States for Internationally Wrongful Acts; international humanitarian law; international human rights law; PMC Wagner Group

Introduction

Over the past decade it has become increasingly commonplace to find camo-clad Eastern European nationals deployed as private military contractors in Africa. Human Rights Watch stated in 2022 that United Nations experts and special rapporteurs all report significant and proliferating numbers of members of the Russia-backed private military company (PMC) the Wagner Group being operational in central Africa.¹ The Office of the High Commission for Human Rights has also sounded

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1 Human Rights Watch (HRW) "Central African Republic: HRW denounces alleged abuses of Russian mercenary group" (3 May 2022), available at: <https://www.hrw.org/news/2022/05/03/central-african-republic-abuses-russia-linked-forces> (last accessed 25 September 2024).

the alarm to UN peacekeepers about the proximity of these “Russian trainers”.² Wagner PMC is the military arm of an “extensive network of business entities that are owned, operated, or financed” by the late Yevgeny Prigozhin; since 2017, it has provided a full catalogue of military services in Africa.³ According to Human Rights Watch and several foreign policy think tanks, Wagner as well as the Africa Corps have been providing security for senior politicians, guarding oilfields and gold mines, resisting rebel coup attempts and Islamic military groups such as Islamic State of Iraq and the Levant (ISIL), facilitating military coups, suppressing dissent, propping up nascent dictatorships, training and commanding local army units, providing technical support for the repair of military vehicles, participating in combat operations, acting as artillery and air observers, and providing electronic countermeasures, expertise, sniper services and troll factories.⁴ Wagner has partnered with elected leaders, African dictators, rebel groups and military generals, including Bashar al-Assad, Omar al-Bashir, Saif al-Islam Gaddafi, Khalifa Haftar and Mohamed Hamdan Dagalo (Hemedti), and pro-government forces in the Central African Republic (CAR), Mozambique and Mali. When French and Chadian soldiers pulled out of Mali, 2,000 Wagner members were waiting in the wings, and Mali is now “largely dependent on Wagner for its internal security”.⁵ Wagner forces have even been co-opted into the UN Multidimensional Integrated Stabilization Mission in the CAR. The Wagner Group has become so much a part of the landscape that it is immortalized in a statue in the centre of Bangui and was the subject of an action movie, *The Tourist*, that was filmed in the country.

The name Wagner soon became synonymous with serious violations of international humanitarian law (IHL), and also abuses of international human rights law (IHRL) in Africa.⁶ Human Rights Watch (HRW), the International Crisis Group, the UN High Commissioner for Human Rights (OHCHR), the UN Panel of Experts and the European Union (EU) have all raised concerns about numerous acts of brutality and the systematic nature of the grave abuses and war crimes perpetrated by Wagner PMC.⁷ The allegations involve accounts of rape, beating, beheading, dismemberment and burning bodies, forced displacement of civilians, indiscriminate firing on unarmed civilians,

2 Office of the High Commissioner for Human Rights (OHCHR) “CAR: Experts alarmed by government’s use of ‘Russian trainers’, close contacts with UN peacekeepers” (31 March 2021), available at: <<https://www.ohchr.org/en/press-releases/2021/03/car-experts-alarmed-governments-use-russian-trainers-close-contacts-un>> (last accessed 25 September 2024).

3 R Parens, C Clark, C Faulkner and K Wolf “The Wagner Group’s expanding global footprint” (April 2023) *The Foreign Policy Research Institute*, available at: <<https://www.fpri.org/article/2023/04/the-wagner-groups-expanding-global-footprint/>> (last accessed 22 April 2024).

4 K Mohamedou “The Wagner Group, Russia’s foreign policy and sub-Saharan Africa” (Geneva Paper 32/24, March 2024), available at: <<https://www.gcsp.ch/publications/wagner-group-russias-foreign-policy-and-sub-saharan-africa>> (last accessed 25 September 2024); ADF Staff “With new name, same Russian mercenaries plague Africa” (16 January 2024) *African Defense Forum*, available at: <<https://adf-magazine.com/2024/01/with-new-name-same-russian-mercenaries-plague-africa/>> (last accessed 22 April 2024); R Parens “The Wagner Group’s playbook in Africa: Mali” (18 March 2022), available at: <<https://www.fpri.org/article/2022/03/the-wagner-groups-playbook-in-africa-mali/>> (last accessed 25 September 2024). The Geneva Centre for Security Policy is an international foundation supported by the Swiss government and governed by 54 member states. It should, however, be noted that the Africa Defense Forum and the Foreign Policy Research Institute are publications based in the United States.

5 J Inwood and J Tacchi “Wagner in Africa: How the Russian mercenary group has rebranded” (20 February 2024) *BBC News*, available at: <<https://www.bbc.com/news/world-africa-68322230>> (last accessed 22 April 2024).

6 European Parliament “Resolution on human rights violations by private military and security companies, particularly the Wagner Group” (23 November 2021), available at: <https://www.europarl.europa.eu/doceo/document/B-9-2021-0567_EN.html> (last accessed 22 April 2024); MINUSCA “Public report on violations of human rights and international humanitarian law in the Central African Republic during the electoral period July 2020–June 2021”, available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/CF/report_abuses_violations_HR_InternationalHumanitarianLaw_Elections_CAR_EN.pdf> (last accessed 22 April 2024). In response, Russia noted before the UN Security Council on 12 November 2021 “that if there have been violations by Russia-linked forces, then they should be investigated primarily by the national bodies of the CAR”; HRW “Central African Republic”, above at note 1.

7 F Mizra “The Wagner Group is entering its terrorism era” (22 November 2023) *Global Network on Extremism and Technology*, available at: <<https://gnet-research.org/2023/11/22/the-wagner-group-is-entering-its-terrorism-era/>> (last accessed 22 April 2024).

planting unmarked landmines and explosives in civilian areas, the massacre of civilians, arbitrary and inhumane detention, torture during interrogation, disappearances and mass extrajudicial executions.⁸ Research by the Armed Conflict Location and Event Data Project revealed that civilians have been the target of attacks in 52 to 71 per cent of incidents where Wagner used force in the CAR and Mali. In March 2022, 300 women and young boys who were alleged to support the Islamist guerrillas of the Groupe de soutien à l'islam et aux musulmans [Support Group for Islam and Muslims] were pulled out of their houses in the village of Moura, taken to a backyard, put against a wall and shot by two executioners (one a Malian soldier, the other a Wagner operative).⁹ This was the largest massacre on Malian soil in the past decade. Those detained by the Wagner Group were denied access to justice, and victims were reticent to report their abuse.¹⁰ In its report dated 28 March 2024, HRW documented that since December 2023, Malian armed forces and Wagner Group fighters had unlawfully killed and summarily executed several dozen civilians during counterinsurgency operations in central and northern Mali, including at least 14 civilians killed in military drone strikes on 16 and 17 February 2024.¹¹ Since May 2024, Malian armed forces, supported by the Wagner Group, have deliberately killed at least 32 civilians, have forcibly disappeared four others, and have burned down at least 100 homes in central and northern Mali.¹² Wagner has actively disseminated disinformation to shift the blame to other actors, and journalists, aid workers and peacekeepers who have attempted to expose these atrocities have been violently intimidated or silenced.¹³ Three Russian journalists who were in the CAR to investigate Wagner were shot dead by Seleka fighters (rebel forces who toppled the CAR government in 2013) who had allegedly been paid by Wagner to kill them.¹⁴ These atrocities persisted under the Africa Corps banner, evidenced by a five-day massacre in October 2023 which

- 8 BBC "Wagner Group: Why the EU is alarmed by Russian mercenaries in Central Africa" (19 December 2021) *BBC News*, available at: <<https://www.bbc.com/news/world-africa-59699350>> (last accessed 22 April 2024); L Harding and J Burke "Russian mercenaries behind human rights abuses in CAR, say UN experts" (30 March 2021) *The Guardian*, available at: <<https://www.theguardian.com/world/2021/mar/30/russian-mercenaries-accused-of-human-rights-abuses-in-car-un-group-experts-wagner-group-violence-election>> (last accessed 22 April 2024); UN Panel of Experts "Letter from the panel of experts on the Central African Republic extended pursuant to resolution 2536 (2020) addressed to the president of the Security Council" (25 June 2021), available at: <<https://digitallibrary.un.org/record/3930373>> (last accessed 22 April 2024). In August 2021, the CAR and Russian-speaking forces beat 21 civilians detained under inhumane conditions and then executed several of them at the national army base in Alindao; HRW "Central African Republic", above at note 1. In 2019, HRW documented evidence of the arbitrary detention and torture of 14 civilians by Russia-linked forces in Bambari; HRW "Central African Republic", above at note 1. HRW and the UN Working Group on the Use of Mercenaries have credible evidence of an incident on 21 July 2021 where Russian security forces ambushed, beat and executed 13 unarmed civilian men near the town of Bossangoa; OHCHR "AL RUS 5/2021" (24 March 2021), available at: <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26305>> (last accessed 22 April 2024); HRW "Central African Republic", above at note 1. On 15 April 2022, the UN stated it would "investigate the circumstances in which at least 10 people were killed in the northeast region of CAR, with some initial reports alleging Russian forces may have been involved"; B Etahoben "UN probes alleged killings by Russian mercenaries and Central African Republic soldiers" (16 April 2022) *HumAngle Media*, available at: <<https://humanglemedia.com/un-probes-alleged-killings-by-russian-mercenaries-and-central-african-republic-soldier>> (last accessed 22 April 2024).
- 9 HRW "Mali: Massacre by army, foreign soldiers" (5 April 2022), available at: <<https://www.hrw.org/news/2022/04/05/mali-massacre-army-foreign-soldiers>> (last accessed 22 April 2024).
- 10 UN Human Rights Council "CAR: Russian Wagner group harassing and intimidating civilians – UN experts" (27 October 2021), available at: <<https://reliefweb.int/report/central-african-republic/car-russian-wagner-group-harassing-and-intimidating-civilians-un>> (last accessed 22 April 2024).
- 11 HRW "Mali: Army, Wagner Group atrocities against civilians: Investigations needed into indiscriminate drone strikes, summary killings" (28 March 2024), available at: <<https://www.hrw.org/news/2024/03/28/mali-army-wagner-group-atrocities-against-civilians>> (last accessed 25 September 2024).
- 12 HRW "Mali: Atrocities by the army and Wagner Group" (12 December 2024) *Africa.com*, available at: <<https://www.africa.com/mali-atrocities-by-the-army-and-wagner-group/>> (last accessed 25 September 2024).
- 13 HRW "Central African Republic", above at note 1.
- 14 They were Kiril Radchenko, Alexander Rastorguyev and Orkhan Dzhemal. European Parliament "Resolution on human rights violations", above at note 6; L Mudge "The murder of three Russian journalists should not go unsolved" (10 August 2020) *Al Jazeera*, available at: <<https://www.hrw.org/news/2020/08/10/murder-three-russian-journalists-should-not-go-unsolved/>> (last accessed 22 April 2024).

saw the group seize the gold mine in Koki, CAR. The violations of IHL and IHRL were so shocking that the justice minister in the CAR was forced to establish a special commission of inquiry to investigate the allegations, which concluded that Russian instructors had been involved in violations of IHL and repatriated these individuals to be tried in their home country.

Australia, Canada, Japan, the United Kingdom, the United States and the EU have responded by imposing sanctions, travel bans and asset freezes on Wagner PMC and Wagner-linked business entities in Africa, accusing it of executions, torture, human rights abuses and threats to peace and security in Africa.¹⁵ Some countries have suspended military training and aid to states where Wagner has a presence.¹⁶ African states have banned their own forces “from sharing operations, patrols, or barracks with the Wagner fighters because of their repeated violations of human rights”.¹⁷ The EU suspended its training of CAR soldiers, and Rwanda banned its contingent to the UN blue helmet force in the CAR from conducting joint operations or sharing facilities with Wagner personnel due to their persistent human rights violations.¹⁸ Wagner generals Dmitry Utkin and Yevgeny Prigozhin have been named on the US Treasury list of sanctioned Russians, and in 2023 the EU imposed personal sanctions on several individuals with links to Wagner, including the erstwhile member of the Russian state security service Valery Zakharov, who now acts as Wagner’s security adviser to the CAR’s President Touadéra. The United States has designated Wagner as a transnational criminal organization, and the United Kingdom and France have labelled it a foreign terrorist organization and have warned states of the consequences of contracting its services.¹⁹

Initially, Russia denied the legal existence of or its association with the Wagner Group, even though the Wagner training base is located next to the Russian army base in Mol’kino and Wagner openly recruit on billboards across Russia. Such a group is prohibited under article 359 of the Russian Criminal Code. The EU maintains that there are nevertheless secret funding ties and oversight of Wagner by the Kremlin and Russia’s military intelligence, which allow the country to project clandestine force by way of the Wagner Group in conflicts around the globe, but without having to report casualties or bear any responsibility. Until 23 August 2023 the Wagner Group was headed by Putin’s “chef” Prigozhin and enjoyed a high degree of autonomy under him.²⁰ After leading an aborted mutiny against Russia’s army chief and defence minister in June 2023, Prigozhin announced that Wagner would be expanding their operations in Africa; a month later, on 23 August 2023, he and nine other senior Wagner officials, including Utkin, died in a mid-air explosion. Speculation has been rife that the Kremlin was behind the explosion.²¹ Within days, President Putin signed a decree forcing paramilitary fighters like those in Wagner PMC to swear an oath to the Russian flag and

15 Council of the EU “Wagner Group: Council adds 11 individuals and 7 entities to EU sanctions lists” (press release, 25 February 2023), available at: <<https://www.consilium.europa.eu/en/press/press-releases/2023/02/25/wagner-group-council-adds-11-individuals-and-7-entities-to-eu-sanctions-lists/>> (last accessed 25 September 2024); US Department of the Treasury “Press release: Treasury increases pressure on Russian financier” (23 September 2020), available at: <<https://home.treasury.gov/news/press-releases/sm1133>> (last accessed 22 April 2024).

16 P Stronski “Russia’s growing footprint in Africa’s Sahel region” (28 February 2023) *Carnegie Endowment for International Peace*, available at: <<https://carnegieendowment.org/research/2023/02/russias-growing-footprint-in-africas-sahel-region?lang=en>> (last accessed 3 September 2025).

17 P van Niekerk “Wagner Group: Putin’s grim reapers giving mercenaries a bad name, now embedded in Africa” (25 August 2022) *Daily Maverick*, available at: <<https://www.dailymaverick.co.za/article/2022-08-25-wagner-group-putins-grim-reapers-giving-mercenaries-a-bad-name-now-embedded-in-africa/>> (last accessed 22 April 2022).

18 J Flanagan “EU-trained troops under command of Putin mercenaries” (21 December 2021) *The Times*, available at: <<https://archive.ph/1wpw7#selection-173.0-173.52>> (last accessed 22 April 2024); Van Niekerk “Wagner Group”, id.

19 US Treasury “Press release”, above at note 15; Mizra “The Wagner Group”, above at note 7.

20 J Lechner and S Eledinov “Is Africa Corps a rebranded Wagner Group?” (7 February 2024) *Foreign Policy*, available at: <<https://foreignpolicy.com/2024/02/07/africa-corps-wagner-group-russia-africa-burkina-faso/>> (last accessed 31 January 2025).

21 J Margolin *The Wagner Group: Inside Russia’s Mercenary Army* (2024, HarperCollins) at 4; I Barabanov and D Korotkov *Our Business Is Death: The Complete History of the Wagner PMC and Its Founder Yevgeny Prigozhin* (2024, HarperCollins) at 5.

sign indefinite enrolment contracts with the Russian army, without the option to end their contracts and at significantly reduced pay.²² At the same time, African states, including Burkina Faso, the CAR, Libya, Niger and Mali, were visited by Russian deputy defence minister Yunus-bek Yevkurov and the Russian military intelligence agency's General Andrei Averyanov.²³ They were assured that it would be business as usual in Africa and that Wagner's integration in their defence infrastructures would persist under a new branding: the Africa Corps.²⁴ Wagner's personnel, traditions, old insignia and operational strategies were quickly absorbed into the Africa Corps, which offered "regime survival packages", mirroring Wagner's past services but under direct Russian state control.²⁵ The launch of the Africa Corps was intended to reassure African leaders of continued military support and security assistance without the negative reputation of Wagner, which was linked to human rights abuses, resource exploitation, rogue mercenary activities and assassinations.²⁶ Wagner still operates in the CAR and Mali, but the brand persists primarily as a separate entity within the Africa Corps, rather than being completely dissolved.²⁷ In return for this assurance, these African states signed away their exclusive mining rights to gold, diamonds and uranium.²⁸ Mali, Niger and Burkina Faso announced their withdrawal from the Economic Community of West African States and instead created their own Alliance of Sahel States with Moscow's backing.²⁹ Under this new brand, the Africa Corps began recruiting in December 2023 for a proposed force of 20,000, starting with job offers to Wagner members and including local residents in Africa. If attained, these numbers will significantly outstrip the size of the Wagner contingent in Africa up to 2023.

The media often refer to Wagner employees as mercenaries, without appreciating that the term has a specific and exacting legal definition in international law.³⁰ Like many others in the private military and security industry, the status of Wagner employees remains controversial.³¹ Their legal status turns on their relationship with the host state, the type of activities that they are involved in, and the time, location and circumstances of the performance of their activities.³² Where Wagner employees

22 Some reports indicate that between May 2022 and May 2023, contractors could earn as much as USD 10,000 per month; as of March 2023, Russian military personnel made an average of USD 2,535 monthly; Mizra "The Wagner Group", above at note 7.

23 Averyanov is reportedly the head of the secretive unit 29155, which specializes in the destabilization of foreign governments and is proficient in targeted killings.

24 Lechner and Eledinov "Is Africa Corps", above at note 20.

25 Ibid; Inwood and Tacchi "Wagner in Africa", above at note 5; L Serwat "Q&A: The Wagner Group's new life after the death of Yevgeny Prigozhin" *ACLEd* (21 August 2024), available at: <<https://acleddata.com/2024/08/21/qa-the-wagner-groups-new-life-after-the-death-of-yevgeny-prigozhin/>> (last accessed 31 January 2025).

26 B Corcoran "Russian mercenaries more active in Africa since death of Wagner Group leader" (25 August 2024) *The Irish Times*, available at: <<https://www.irishtimes.com/world/europe/2024/08/25/russian-mercenaries-more-active-in-africa-since-death-of-wagner-group-leader/>> (last accessed 31 January 2025); L Klaassen "Its leader is dead, but Wagner Group is thriving in Africa" (1 April 2024) *The Australian Financial Review*, available at: <<https://www.afr.com/policy/foreign-affairs/its-leader-is-dead-but-wagner-group-is-thriving-in-africa-lisa-p5fgiw>> (last accessed 31 January 2025); Serwat "Q&A", above at note 25.

27 N Princewill "Russian influence in Africa is growing. What might Moscow want?" (18 January 2025), *CNN*, available at: <<https://edition.cnn.com/2025/01/18/africa/russia-expanding-influence-in-africa-intl-cmd/index.html>> (last accessed 31 January 2025).

28 ADF Staff "With new name", above at note 4.

29 A Arduino "Wagner group is now Africa Corps. What this means for Russia's operations on the continent" (15 February 2024) *The Conversation*, available at: <<https://theconversation.com/wagner-group-is-now-africa-corps-what-this-means-for-russias-operations-on-the-continent-223253>> (last accessed 22 April 2024).

30 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Additional Protocol I, art 47, remains the international benchmark for determining whether Wagner employees are accurately being labelled as mercenaries.

31 BBC "Wagner Group", above at note 8.

32 S Bosch "Private security contractors in international humanitarian law: A skirmish for recognition in international armed conflicts" (2007) 16/4 *African Security Review* 34 at 52; International Committee of the Red Cross (ICRC) "The Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict" (17 August 2008), available at: <<http://www.icrc.org/web/eng/siteeng0.nsf/html/montreuxdocument-170908>> (last accessed 22 April 2024); ICRC

are officially incorporated into a state's armed forces or even contracted to carry out functions for the state, their contractual link exempts them from mercenary status.³³ Despite the ambiguity of the legal classification of the PMCs, their violation of human rights is not new. Blackwater gained global infamy for the same reason, and in 2004 the US-led Coalition Provisional Authority passed Order 17 to ensure immunity from Iraqi criminal prosecution for US Blackwater contractors. As HRW Middle East director Sarah Whitson has correctly pointed out, “[h]aving shielded contractors from local prosecution, Washington has a responsibility to prosecute contractors in US courts if they are responsible for serious crimes in Iraq”.³⁴ This dilemma led to the development of the 2008 Montreux Document (which has the support of 58 states) and the International Code of Conduct for Private Security Providers, to reaffirm the legal obligations of states where the PMCs originate and of the states that hire them. The “pervasive instability and prevalence for failed states in Africa provides a climate in which PMCs are permitted to operate with relative impunity where the existing international legal regime has not been activated to provide broad accountability for PMCs and personnel”.³⁵ There is clearly a dire need “to prevent and ensure accountability for potential violations of human rights and international humanitarian law” perpetrated by these PMCs.³⁶

In this article, we explore how the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) could be used to hold states responsible when they use the services of these PMCs.³⁷ We begin by exploring how the ARSIWA provides a mechanism for imputing wrongful acts committed by PMCs to the states that employ them. We look at instances where PMCs such as Wagner are acting as a state's agents in Africa, or where Wagner operatives are authorized to exercise government authority or act in a vacuum left by official authorities. We address how violations by Wagner of the fundamental protections found in IHL and the non-derogable IHRL protections attract state responsibility under international law, and explore the issue of how state responsibility arises even where the action of these PMCs is ultra vires and what degree of state control, instruction or adoption of that conduct is required. The second issue we address is how state responsibility can be triggered when the victims of abuses are nationals of the state that is hiring private companies to operate in their territory.³⁸ In response to this challenge, we argue that

“Commentary on Additional Protocol 1” (8 June 1977), para 1812, available at: <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/ffc84b7639b26f93c12563cd00434156>> (last accessed 21 April 2024); S Bosch “Exploring the international humanitarian law status of foreign fighters in the Ukrainian International Legion of Territorial Defence” (2024) 27/1 *Potchefstroom Electronic Review* 1 at 11.

33 P Singer “Humanitarian principles, private military agents: Some implications of the privatised military industry for the humanitarian community” in V Wheeler and A Harmer (eds) *Resetting the Rules of Engagement: Trends and Issues in Military–Humanitarian Relations* (2006), available at: <<https://www.brookings.edu/wp-content/uploads/2016/06/singer20060307.pdf>> (last accessed 22 April 2024) 1 at 24. Incorporation into a state's armed forces can be demonstrated through a piece of domestic legislation stipulating such incorporation, making these PMCs subject to domestic military discipline and command structures; in some instances, PMCs may be issued with domestic military fatigues or an identification card confirming this. An example of Wagner employees being contracted to carry out functions for a state is the Executive Outcomes and Sandline helicopter pilots in Sierra Leone; M Mancini, F Ntoubandi and T Marauhn “Old concepts and new challenges: Are private contractors the mercenaries of the twenty-first century?” in F Francioni and N Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011, Oxford Academic) 321 at 338.

34 HRW “Iraq: Pass new law ending immunity for contractors” (8 January 2008), available at: <<https://www.hrw.org/news/2008/01/08/iraq-pass-new-law-ending-immunity-contractors>> (last accessed 31 January 2025).

35 K Huskey “Accountability for private military and security contractors in the international legal regime” (2012) 31/3 *Criminal Justice Ethics* 193 at 200.

36 BBC “Wagner Group”, above at note 8.

37 Individual PMCs can be held criminally responsible for war crimes and crimes against humanity under the provisions of universal jurisdiction.

38 Individual victims may be able to petition the UN Human Rights Committee, provided that the territorial state is party to the optional protocol of the International Covenant on Civil and Political Rights and the victims have exhausted local remedies. The challenge with this option is that there is no mechanism to force unwilling states to prosecute PMCs or send them home, and Russia has already indicated that it has no interest in pursuing such prosecutions.

there is a dire need for the communitarian invocation of state responsibility by third-party states on behalf of these victims to end impunity, drive accountability and secure effective redress for victims. We argue that the ARSIWA provides such a mechanism and that this approach is reinforced by the regime of protection of IHRL in Africa. We focus on the operations of Wagner and the Africa Corps in Africa, although Wagner has been and still is active elsewhere around the world; the application of these ideas will be transferrable to these environments and can possibly be applied to any states using PMCs that violate IHL and IHRL.

Imputing state responsibility for violations of IHL and IHRL

Private military and security companies have a history of violating IHL and IHRL, and yet accountability remains weak owing to regulatory gaps and the lack of an international binding instrument.³⁹ While initiatives like the Montreux Document and the International Code of Conduct exist, national laws often fail to provide adequate provisions for licensing, oversight and accountability.⁴⁰ The transnational nature of private military and security companies, complex corporate structures and limited extraterritorial jurisdiction hinder victims' access to justice. Holding corporate entities accountable for crimes against humanity at the national judicial level is one avenue for seeking accountability and redress.⁴¹ The UN 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 advocates a legally binding international framework to standardize regulations, ensure accountability and provide effective remedies for victims. Strengthening corporate accountability and expanding universal jurisdiction are essential for addressing impunity and reinforcing human rights protections.⁴²

The International Law Commission adopted its ARSIWA by consensus in 2001, and it is widely accepted that the articles now constitute customary international law.⁴³ Pursuant to ARSIWA article 48(1)(b), "any State can invoke the responsibility of delinquent States when the breached obligation is owed to the international community as a whole".⁴⁴ Consequently, we argue that when the actions of private operatives like the Wagner employees offend the most fundamental IHL and IHRL protections, the international community as a whole can claim to be injured, and can invoke the state responsibility of the delinquent state for the resultant damage or loss.⁴⁵ In what follows, we explore the various ways in which those employing private security contractors might be considered delinquent states. This imputation of state responsibility for abuses of IHL and IHRL perpetrated by private operatives ensures accountability and can provide effective remedies for victims.

Four criteria must be met before state responsibility can be invoked for violations of IHL and IHRL: 1) there must be an obligation under international law between the injured and the delinquent state; 2) an act or omission which violated that international legal obligation was perpetrated by the

39 S Bosch and M Kimble "A new way forward for the regulation of the private military and security industry" (2015) 48/3 *Comparative and International Law Journal of Southern Africa* 431 at 440.

40 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (2008) and the International Code of Conduct for Private Security Service Providers (2010).

41 UN Human Rights Council "Access to justice, accountability and remedies for victims of mercenaries, mercenary-related actors and private military and security companies", UN doc A/HRC/51/25 (31 August 2022), available at: <<https://documents.un.org/doc/undoc/gen/g22/398/17/pdf/g2239817.pdf>>.

42 Ibid.

43 International Law Commission Report A/56 (10 August 2001), available at: <<https://casebook.icrc.org/case-study/international-law-commission-articles-state-responsibility>> (last accessed 24 April 2024); V Engström "Who is responsible for corporate human rights violations" (1 January 2002) *Institute for Human Rights*, available at: <<http://www.abo.fi/institut/imr/norfa/ville.pdf>> (last accessed 22 April 2024).

44 S Bosch "Private security contractors and state responsibility" (2008) 41/4 *Comparative and International Law Journal of Southern Africa* 353 at 372.

45 Ibid.

private operative; 3) the act or omission is attributable to the delinquent state; 4) the violation of the international legal obligation must have resulted in some loss to the injured state.⁴⁶ According to ARSIWA article 42, an injured state is any state:

“if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”

Article 46 then goes on to endorse that “where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act”. Moreover, pursuant to article 48 where “the obligation breached is owed to the international community as a whole, ... or is established for the protection of a collective interest of the group, ... any State other than an injured State is entitled to invoke the responsibility of another State”.

It is not disputed that abuses such as rape, beatings, beheadings, dismemberment and burning of bodies, forced displacement of civilians, indiscriminate firing on unarmed civilians, planting unmarked landmines and explosives in civilian areas, the massacre of civilians, arbitrary and inhumane detention, torture during interrogation, disappearances, and mass extrajudicial executions clearly violate universally recognized IHL and IHRL obligations.⁴⁷ It is also not disputed that when civilians are victims of these abuses, the violations result in damage to the injured state. The evidence gathered by independent bodies like the OHCHR and HRW points to the conclusion that these abuses have been perpetrated by individuals with ties to Wagner / Africa Corps. In these cases, unfortunately, the victims of these abuses are predominantly nationals of the very states that are permitting Wagner / Africa Corps forces to operate on their territory. The fact that these states have not acted to assert their loss on behalf of their civilian population is not material to the fulfilment of ARSIWA article 2(d).

The focus of this article is to address what is perceived to be the greatest hurdle, that of how the actions of Wagner / Africa Corps forces can be imputed to a state from which state responsibility can flow. We explore how the ARSIWA can be used to impute the unlawful actions of those Wagner / Africa Corps members to the territorial states in which they are permitted to operate. We examine the commentaries which accompany ARSIWA articles 4 (on state organs), 5 (on authorized government authority), 7 (on ultra vires actions), 8 (on state control or instruction), 9 (on the absence of official authorities) and 11 (on conduct adopted by the state) to explore their application in these instances. By flagging this possibility for imputing state responsibility, we hope to not only provide a potential avenue for ending impunity, pursuing accountability and ensuring effective remedial action for the victims, but also to sound a warning to states employing Wagner / Africa Corps forces of their responsibilities under IHL and IHRL and the risks that they face when they use these services.

Imputing responsibility based on the actions or omissions of state organs

According to ARSIWA article 4, any violations of international law perpetrated by any part of a state's organs are automatically attributable to the state. The notion that this attribution comes about not only pursuant to acts of the organs of state but also because of “any failure on the part of its organs (or omissions) to carry out the international obligations of the State” dates to the Preparatory

46 Some of this analysis flows from a prior publication (ibid), and we explore here how this may apply to the Wagner group.

47 BBC “Wagner Group”, above at note 8; Harding and Burke “Russian mercenaries”, above at note 8; HRW “Central African Republic”, above at note 1; UN Panel of Experts “Letter from the panel of experts”, above at note 8; OHCHR “AL RUS 5/2021”, above at note 8; Etahoben “UN probes”, above at note 8.

Committee for the 1930 Conference for the Codification of International Law.⁴⁸ The commentary notes further that the International Court of Justice (ICJ) endorsed the idea that it is a principle of customary international law that this attribution encompasses all levels of state authority (from local to national level) and which are legislative, judicial and executive in nature.⁴⁹ It also encompasses the conduct of lower-level officials and minor organs of state, provided that the acts or omissions are carried out in their official capacity. The commentary notes that a state cannot avoid responsibility “for the conduct of a body which does in truth act as one of its organs”,⁵⁰ and the term “person or entity” used in ARSIWA article 4(2) includes any natural or legal person. With that clarification, what remains is the challenge in determining whether a state organ acts in that capacity. Here Crawford argues that “where such a person acts in an apparent official capacity or under the colour of authority, the actions in question will be attributable to the State”, even if those acts are unauthorized (this is explained further in ARSIWA article 7).⁵¹ This is distinguishable from the act of an official of the state who acts in a private capacity and where the act “has no connection with the official function”.⁵²

Wagner / Africa Corps has been deeply involved with the local armed forces in Syria, Libya, the CAR, Sudan, Mali and Mozambique, and has engaged in activities traditionally carried out by the regular armed forces.⁵³ While Wagner / Africa Corps members were not officially or formally incorporated into the traditional armed forces, militias or volunteer corps of these African states, they were invited to provide assistance to the organ of state and were permitted to play an active role in the hostilities. In Syria, Wagner PMC assisted al-Assad’s pro-government forces; in Libya they supported forces loyal to General Haftar; in Sudan they operated under the authority of the interim military regime; in Mali they were invited in by the military council; and in Mozambique they helped the army resist the insurgent Islamist militants Al-Shabaab. In the CAR, Wagner PMC helped pro-government forces, and several Wagner members now hold powerful positions in the CAR government. The apparent official authority with which Wagner / Africa Corps were permitted to act on these states’ territories can serve as a basis to trigger the ARSIWA article 4 attribution of their conduct or omissions to these states. As will be made clear, under ARSIWA article 7, this attribution of state responsibility occurs irrespective of whether Wagner / Africa Corps’ activities were outside of their authorized duties, were prohibited by domestic military regulations or whether delegation to them of this state authority was prohibited under the state’s domestic law.⁵⁴ Provided that their actions or omissions bore a connection to their apparent official function and were not carried out in their private capacity, they can be attributable to the territorial state.

Imputing responsibility when entities exercise government authority

ARSIWA article 5 extends the state’s responsibility to cover those entities that might not fulfil ARSIWA article 4 criteria but which are empowered by state law from the executive, judiciary and by way of contractual arrangements to exercise government functions or carry out a public function

48 J Crawford *The International Law Commission’s Articles on State Responsibility* (2002, Cambridge University Press) at 94–95.

49 Ibid; International Court of Justice *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999) ICJ Reports 62 at 87, para 62, available at: <https://www.worldcourts.com/icj/eng/decisions/1999.04.29_immunity.htm> (last accessed 3 September 2025).

50 Crawford *The International Law Commission’s Articles*, above at note 48 at 98.

51 Id at 99.

52 *Caire (France v Mexico)* [1929] 5 RIAA 516, 531.

53 BBC “Wagner, shadowy Russian military group, ‘fighting in Libya’” (7 May 2020) *BBC News*, available at: <<https://www.bbc.com/news/world-africa-52571777>> (last accessed 22 April 2024).

54 Bosch “Private security contractors and state responsibility”, above at note 44 at 373; Crawford *The International Law Commission’s Articles*, above at note 48 at 96.

in the place of state organs.⁵⁵ State contracts which authorize entities to engage in combat, arrest, detain and interrogate individuals, gather intelligence, maintain law and order and administer judicial processes amount to the exercise of government authority for which state responsibility under article 5 can be triggered. In fact, the commentaries to the ARSIWA mention the state subcontracting prison administration to private security companies as an example.⁵⁶ This applies to all acts and omissions, provided that the entity was engaged in government activity and not in private or commercial activities or self-help actions taken in self-defence. There is no need to show that the entity was acting under the state's control at the time, provided that they were acting in a "government-like capacity".⁵⁷ ARSIWA article 5 precludes states from circumventing their positive duties under IHL and IHRL by outsourcing those functions to a PMC.⁵⁸ The moment that PMCs are authorized to perform the state's functions, all their future actions can be imputed to the state. Moreover, if that authorization is given *ex post facto*, such authorization can be seen to endorse the actions carried out previously.⁵⁹

On this basis, state responsibility may be imputed to Syria, Libya, the CAR, Sudan, Mali and Mozambique, which have contracted out their state functions to Wagner / Africa Corps personnel. In Syria, al-Assad used Wagner forces to defeat ISIL and to guard oilfields.⁶⁰ Wagner forces have been active supporters of the government and army in Libya, Sudan, Mali and Mozambique, offering military training and security services, and in the CAR even assuming influential posts within the government and customs authority.⁶¹ The moment that an African state contracts Wagner / Africa Corps employees to undertake a state function, such as guarding military installations, it bears full state responsibility for any violations of IHL or IHRL that are perpetrated by Wagner / Africa Corps operatives while they are acting or omitting to act in accordance with IHL or IHRL.

Imputing responsibility in instances of ultra vires actions or omissions

ARSIWA article 7 extends the imputed state responsibility discussed under articles 4 and 5 to instances of ultra vires acts. All actions or omissions cloaked with government authority attract state responsibility, even where the specific activities performed "exceed their authority or contravene instructions, and even when the actions are disowned by the state".⁶² This principle of making states responsible for the ultra vires actions of their armed forces is not unique to the ARSIWA; it is also found in Additional Protocol 1 (article 91) and is reiterated in the jurisprudence of several human rights courts.⁶³ The criteria for determining whether state responsibility can be imputed for these

55 Id at 100.

56 Ibid.

57 Id at 102.

58 Centre for International Humanitarian Law "Expert meeting on private military contractors: Status and state responsibility for their actions" (Geneva, 29–30 August 2005), available at: <https://www.ucihr.org/communication/Private_Military_Companies_report.pdf> (last accessed 24 April 2024); F Francesco "The role of the home state in ensuring compliance with human rights by private military contractors" in F Francioni and N Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011, Oxford Academic), available at: <<https://doi.org/10.1093/acprof:oso/9780199604555.003.0006>> (last accessed 7 March 2024).

59 Crawford *The International Law Commission's Articles*, above at note 48 at 102; V Capdevielle and H Cherif *The Regulatory Context of Private Military and Security Services in France* (National Report Series 11/09, 2009) at 24–28, available at: <<https://iow.eui.eu/wp-content/uploads/sites/40/2013/11/nr-11-09-FRA.pdf>> (last accessed 3 September 2025).

60 Van Niekerk "Wagner Group", above at note 17.

61 BBC "What is Russia's Wagner group of mercenaries in Ukraine?" (16 August 2022) *BBC News*, available at: <<https://www.bbc.com/news/world-60947877>> (last accessed 22 April 2024); BBC "Wagner Group", above at note 8; Van Niekerk "Wagner Group", above at note 17.

62 Bosch "Private security contractors and state responsibility", above at note 44 at 375; *Petrolane Inc v Islamic Republic of Iran* [1991] 27 Iran-USCTR 121 at 92; Crawford *The International Law Commission's Articles*, above at note 48 at 10.

63 ICRC "Commentary", above at note 32 at secs 1053–1054; *Caire*, above at note 52 at 531; *Velásquez Rodríguez v Honduras* (merits) [1989] 95 Inter-Am Crt HR Series C No. 4 ILR, para 170; Additional Protocol 1, above at note 30.

ultra vires acts is whether the conduct or omission was performed cloaked with government authority (albeit unauthorized) or if it was private in nature (that is, removed from the ambit of an official function). In the commentaries to ARSIWA article 7, Crawford argues that in instances where the ultra vires acts or omissions are “systematic or recurrent, such that the State ought to know or have known and taken steps to prevent it”, the distinction can be avoided, and the acts can attract state responsibility. When states incorporate Wagner / Africa Corps members into their armed forces, or contract them to carry out governmental duties, they bear state responsibility for all their acts and omissions. They cannot raise the defence that Wagner / Africa Corps employees were acting in contravention of their instructions once they were “cloaked with government authority”.⁶⁴ Any violations of international law linked to action or omission cloaked with government authority committed by Wagner / Africa Corps forces in Syria, Libya, the CAR, Sudan, Mali and Mozambique will attract state responsibility. In instances where Wagner / Africa Corps’ violations of IHL and IHRL are recurrent (as appears to be the case), states that contract their services are put on notice to take steps to prevent these violations and bear state responsibility for these violations, even where Wagner / Africa Corps are acting ultra vires. This means that Wagner / Africa Corps forces engaging in torture or omitting to intervene to prevent acts of torture perpetrated by other state actors will attract state responsibility.

Imputing responsibility for acts or omissions under state control or instructions

ARSIWA article 8 extends state responsibility to cover the actions of non-state “persons or groups who are acting under the instructions or under the direction or control of” a state.⁶⁵ Article 8 specifically includes occasions where the state recruits private individuals and either instructs or directs their acts or omissions. States often supplement their resources by recruiting private individuals (in this case PMCs) without formally incorporating them into the state machinery. Much has been said about the degree of control required before unlawful actions performed by private entities can be attributable to the state through the nexus of control. From *Nicaragua* to *Tadić*, courts have vacillated between “effective control ... in the course of which the alleged violations were committed” and a lesser requirement of “overall control going beyond mere financing, training or equipping”.⁶⁶

Under the *Tadić* test it would be possible to impute the acts of PMCs engaged in torture during interrogation to the territorial state “without having to show that the State instructed the PMC to engage in torture”.⁶⁷ In the Bosnian genocide case, the ICJ adopted the constructive agency approach, stating that, provided that “the person, groups or entities act in ‘complete dependence’ on the State of which they are ultimately an instrument or agent”, their actions can be attributed to the state.⁶⁸ In human rights tribunals, a “continuous and uninterrupted link of responsibility” was sufficient to impute illegal detention by a separatist regime to the state.⁶⁹ The ICJ noted in *Corfu Channel* on the issue of “exclusive territorial control” that “the territorial State need not necessarily know that private

64 *Petrolane*, above at note 62 at 92; *Caire*, above at note 52 at 516.

65 Bosch “Private security contractors and state responsibility”, above at note 44 at 376.

66 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Reports at 14, available at: <<https://www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>> (last accessed 3 September 2025). Seventeen states adopted the *Nicaragua* test in relation to attribution for the wrongful acts of PMCs in the 2008 Montreux Document on PMCs; N White “Institutional responsibility for private military and security companies” in F Francioni and N Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011, Oxford Academic), available at: <<https://doi.org/10.1093/acprof:oso/9780199604555.003.0020>> (last accessed 22 April 2024). *Prosecutor v Tadić* (Case IT-94-1) [1999] 38 ILM 1518 at 1098.

67 Francesco “The role of the home state”, above at note 58.

68 *Ibid.*

69 *Ilaşcu and Others v Moldova and Russia* Application 48787/99 [8 April 2004]) European Crthr; Francesco “The role of the home state”, above at note 58.

actors are likely to commit unlawful acts”, but “the riskier the situation in which PMCs are tolerated, the stronger the due-diligence obligation for the territorial State is”.⁷⁰

Many Wagner / Africa Corps employees are hired by state departments to carry out functions that are traditionally reserved for the armed forces. Where through instructions, directions or control a relationship can be shown between the state and a Wagner / Africa Corps operative’s conduct or omissions, that breach of IHL or IHRL can be imputed to the state.⁷¹ In each situation it will be a factual inquiry to determine whether the Wagner / Africa Corps employees are under the hiring state’s control. Even when Wagner / Africa Corps’ actions “are beyond the scope of military orders”,⁷² those actions can still be attributed to the hiring state – provided that there is state control, direction or instruction. Consequently, where a hiring state fails to give instructions to Wagner / Africa Corps employees on the legal limitations of the laws of war, or the state allows violations to occur and does not intervene and prevent the violations, that behaviour could be attributed to the hiring state.⁷³ In short, when a state uses the services of a PMC, which may not necessarily be an agent of the state but which is under its “sufficient influence and control” and consequently is implementing its policies, any and all wrongful acts committed by that PMC will attract state responsibility.⁷⁴ When one considers that Wagner / Africa Corps have been enlisting convicted criminals directly from prisons, with a promise of commuted sentences or a full pardon and expunged criminal records, this alone constitutes a “serious breach of due diligence” in the vetting process of the hiring and territorial state to allow such individuals to participate directly in hostilities with little or no training on IHRL or IHL.

Imputing responsibility for acts or omissions performed in the absence of official authorities

In times of revolution, foreign occupation or armed conflict, is it possible to find “private individuals exercising government functions, not at the behest or authorization of government, but in the absence of official authorities” and upon their own initiative because of necessity?⁷⁵ According to ARSIWA article 9, state responsibility may be imputed to a state if the circumstances prevailing at the time were such that the public function was being exercised in the absence of official authorities in a time of necessity.⁷⁶ For the attribution of state responsibility under article 9, the conduct must be a government function, must be performed in the absence of any government authority, and circumstances at the time must necessitate such action. A state that fails to perform its policing functions may be liable for offences committed by private operatives performing those functions in the absence of a local police force. The level of involvement of the Wagner / Africa Corps group in the CAR, including that its members hold powerful positions in the CAR government and customs service and issue CAR documents, may be grounds for imputing state responsibility for their acts and omissions to the CAR.

Imputing responsibility based on conduct or omissions adopted by a state

As a rule, the actions of private individuals cannot be attributed to a state for imputing state responsibility. That said, ARSIWA article 11 extends the mantle of state responsibility to cover

70 C Beaucillon, J Fernandez and H Raspail “State responsibility for conduct of private military and security companies violating ius ad bellum” in F Francioni and N Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011, Oxford Academic), available at: <<https://doi.org/10.1093/acprof:oso/9780199604555.003.0021>> (last accessed 22 April 2024).

71 Bosch “Private security contractors and state responsibility”, above at note 44 at 377.

72 Centre for International Humanitarian Law “Expert meeting”, above at note 58.

73 Crawford *The International Law Commission’s Articles*, above at note 48 at 113. If Wagner employees choose to act beyond the scope of their instructions, their violations of IHL could not be attributed to the hiring state; Bosch “Private security contractors and state responsibility”, above at note 44 at 377.

74 White “Institutional responsibility”, above at note 66; Francesco “The role of the home state”, above at note 58.

75 Crawford *The International Law Commission’s Articles*, above at note 48 at 114.

76 Ibid.

instances where the state acknowledges and adopts the particular conduct or omissions, even if the actor is not an authorized state organ or is under the state's control.⁷⁷ For state responsibility to be invoked using article 11, a clear and unequivocal acknowledgement by the state that it "identifies with the conduct in question and makes it its own" needs to be demonstrated.⁷⁸ This is essentially *ex post facto* authorization. When Syria, Libya, the CAR, Sudan, Mali and Mozambique tolerated Wagner / Africa Corps members in their territory performing traditionally military functions and, by their words or conduct, endorsed their activities, this amounted to the state identifying with the conduct of these employees; by so doing, they assumed responsibility for their actions (including any violations of IHL and IHRL law).

Concluding thoughts on the attribution of state responsibility under the ARSIWA

Whether Wagner / Africa Corps employees are officially incorporated into a state's armed forces or not, once they act with an apparently official capacity, the state hiring them bears full state responsibility for their acts and omissions when they violate IHL and IHRL. It does not matter that they are non-state actors, provided that they are carrying out a public function under apparent government authority. They need not even be formally incorporated into official structures to attract state responsibility if they are under the control, direction or instruction of the state. They may act in the absence of government authorities because of necessity; all that is required is that the state identifies with and adopts the conduct. It is insufficient for the state to point to domestic military regulations, domestic limits to Wagner / Africa Corps' authority or contradictory instructions, as all acts and omissions will attract state responsibility – even those that are *ultra vires* acts. When a state contracts Wagner / Africa Corps members to carry out governmental duties or allows them to take on those roles, it bears all state responsibility for their actions – including those that violate IHL and IHRL. This is a warning to states that use the services of Wagner / Africa Corps of the potential attribution of state responsibility that they face.

We would argue that the actions or omissions of private operatives such as Wagner / Africa Corps forces can be imputed to the "delinquent" states that contract their services. With imputation, delinquent states can then be held accountable for the unlawful activities carried out by private operatives. The difficulty which arises in many instances is that the victims of these abuses of IHL and IHRL are nationals of the delinquent state. To access relief, redress or accountability for these abuses, they need an "injured" state to take up their cause. We now turn to exploring how the international community can invoke the state responsibility of these delinquent states on behalf of their injured nationals to end impunity, pursue accountability and ensure effective remedial action for the victims.

The communitarian invocation of state responsibility on behalf of nationals of delinquent states in the African context

According to ARSIWA article 48(1)(b), "any State can invoke the responsibility of delinquent States when the breached obligation is owed to the international community as a whole".⁷⁹ This phrase references what is understood under international law as a breach of peremptory norms (obligations) of general international law (*jus cogens*). This breach has such far-reaching consequences that they give rise to what are called obligations *erga omnes partes* (obligations owed to the international community as a whole). In *Barcelona Traction*, the ICJ endorsed the notion of certain obligations which

77 International Court of Justice *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Reports 3, available at: <<https://www.icj-cij.org/sites/default/files/case-related/64/064-19800524-JUD-01-00-EN.pdf>> (last accessed 3 September 2025); Bosch "Private security contractors and state responsibility", above at note 44 at 379.

78 Crawford *The International Law Commission's Articles*, above at note 48 at 123; *United States Diplomatic and Consular Staff in Tehran*, id.

79 Bosch "Private security contractors and state responsibility", above at note 44 at 372.

“all States can be held to have a legal interest” in the protection of.⁸⁰ These peremptory norms, established in the interest of and owed to the international community as a whole, give rise to multilateral rights and obligations which entail a “recognised legal interest of each of its members to invoke compliance with it”.⁸¹ The legal regime created by these multilateral rights and obligations ensures that no legal black holes exist where perpetrators can find impunity and where victims are deprived of legal protection.⁸²

Which international norms give rise to obligations *erga omnes partes*?

Crawford’s commentary on the ARSIWA notes that the source of these obligations *erga omnes partes* could derive from “multilateral treaties or customary international law”, and he references the ICJ’s declarators that “outlawing acts of aggression and genocide” and “the basic rights of the human person, including the protection from slavery and racial discrimination” and the “right to self-determination” would all fall under this banner.⁸³ In both IHL and IHRL treaties and customary international law, these norms are flagged for special protection.

Common article 3, found in all four of the Geneva Conventions and which has now achieved customary international law status, outlines what are considered the absolute minimum fundamental protections that should be afforded to all individuals (civilians or non-combatants) and in all contexts of armed conflict or internal disturbances, irrespective of the nature or classification of the armed conflict.⁸⁴ Common article 3 prohibits certain acts:

- “(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.”⁸⁵

Forced displacement, torture, extrajudicial killing, arbitrary and inhumane detention of civilians, and the indiscriminate firing on and mining of civilian areas are violations of IHL and IHRL that have risen to the level of customary international law.⁸⁶ These egregious crimes involve a breach of an obligation which is owed to the international community.⁸⁷ Consequently, all states, irrespective

80 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (second phase) [1970] ICJ Reports 3 at 46, para 86, available at: <<https://www.icj-cij.org/sites/default/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>> (last accessed 3 September 2025).

81 Crawford *The International Law Commission’s Articles*, above at note 48 at 229.

82 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Reports, para 34, available at: <<https://www.icj-cij.org/sites/default/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>> (last accessed 3 September 2025).

83 Crawford *The International Law Commission’s Articles*, above at note 48 at 277.

84 ICRC “IHL Databases: Introduction”, available at: <<https://ihl-databases.icrc.org/en/customary-ihl/v1/in>> (last accessed 22 April 2024).

85 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), art 3. For example, all detainees have the right to be informed in a language that they understand of the charges against them, and that they are guaranteed a swift and impartial trial before a judge.

86 J Henckaerts and L Doswald-Beck (eds) *Customary International Humanitarian Law, Volume 1: Rules* (2005, Cambridge University Press), rules at 89, 90, 98, 99 and 81.

87 Bosch “Private security contractors and state responsibility”, above at note 44 at 372.

of whether they or their nationals have been the target of such a breach, would be permitted to invoke “communitarian State responsibility”.⁸⁸

Under IHRL, peremptory norms of general international law can be found in a variety of multi-lateral treaties.⁸⁹ They are often flagged by the fact that they are considered non-derogable human rights; these include the right to life, freedom from torture, freedom from slavery and freedom from retroactive application of criminal law.⁹⁰ Not even the fight against terrorism is a ground for violating these non-derogable rules of *jus cogens*, as per the 1999 Organisation of African Unity Convention on the Prevention and Combating of Terrorism and its 2004 Protocol. These best practices are set out in the UN Draft Convention on Private Military and Security Companies and are reiterated in the Montreux Document as a form of non-binding law.⁹¹ All these obligations on the territorial state are suspended only in a situation of foreign military occupation, and are endorsed by the African Commission on Human and Peoples’ Rights.

How do third-party states enforce due diligence and observance of peremptory norms where private actors are involved?

Under IHRL there is an obligation upon all states to exercise due diligence within the means at their disposal to not only prevent abuses but also to investigate and punish offenders and provide reparations for all individuals in their territory and subject to their jurisdiction, even if these violations are carried out by private individuals. Fulfilling the due diligence standard requires qualified legal expertise to independently investigate, collect evidence and prosecute perpetrators immediately after the acts are committed. Due diligence provision of effective remedies entails bringing the perpetrators to justice and ensuring full reparations for the victims, including financial restitution, rehabilitation, public apologies and memorials, the introduction of remedial laws and policies, and guarantees of non-repetition. Moreover, under the customary principle of concurrent causation which is endorsed by the International Law Commission, any of the individual states responsible can be expected to provide full reparations.

In the context of abuses of non-derogable human rights perpetrated by private actors such as PMCs, the African Commission on Human and Peoples’ Rights demands that a state “must interpose itself between potential perpetrators and victims” to prevent human rights abuses – even if the PMCs concerned may be considered part of the state apparatus. So even when PMCs are not integrated into national armed forces but are working for corporations to provide security, the state nevertheless has obligations to exercise due diligence under IHRL. Moreover, violations of non-derogable rights perpetrated by PMCs would not be protected by any immunity agreements between the host and hiring states; the states from where these PMCs hail, together with the state in whose territory they are active, would bear responsibility to exercise effective control over creation, licensing, and export

88 J Crawford “Responsibility for breaches of communitarian norms: An appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts” in U Fastenrath et al (eds) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011, Oxford University Press) 224 at 233; Bosch “Private security contractors and state responsibility”, above at note 44 at 372.

89 UN “International Covenant on Civil and Political Rights”, art 2(1), available at: <https://treaties.un.org/ats/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> (last accessed 22 April 2024).

90 Id, arts 6–8 and 15; UN “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>> (last accessed 22 April 2024); African Union “African Charter on Human and Peoples’ Rights”, art 5, available at: <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> (last accessed 22 April 2024).

91 UN Human Rights Council “Draft of a possible convention on private military and security companies (PMSCs) for consideration and action by the Human Rights Council / prepared by 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” (2011), available at: <<https://digitallibrary.un.org/record/707162?ln=en&v=pdf>> (last accessed 22 April 2024); ICRC “The Montreux Document”, above at note 32.

authorisations of PMCs and then would follow the obligation to investigate abuses and prosecute perpetrators. This is especially necessary when PMCs are given combat functions, arrest powers, management of detention facilities, interrogation services and law enforcement functions, where it is easy to violate the rights to personal liberty and to judicial protection. The systematic failure of a state to prevent recurring violations by PMCs amounts to an abuse of due diligence through intentional and systematic inaction.

ARSIWA article 48 “give[s] teeth to communitarian norms” because states can use the ICJ to bring an application for judicial remedies in the common interest of the international community against delinquent states.⁹² As Simma J pointed out, “the implementation of a State party’s international legal duty to ensure respect by another State party for the obligations arising under humanitarian treaties by way of raising it before the ICJ is certainly one of the most constructive avenues in this regard”.⁹³ Through the ARSIWA, international law has made it possible for the community of states to put pressure on delinquent states, where the latter have formally incorporated Wagner / Africa Corps forces into their armed forces, or where Wagner / Africa Corps are non-state actors engaged in activities traditionally carried out by the regular armed forces, are acting under the states’ control or instruction, or where the state acknowledges and adopts the conduct (as is the case in Syria, Libya, the CAR, Sudan, Mali and Mozambique).

Once a state clothes Wagner / Africa Corps with an apparent official capacity to carry out a public function, such as activities related to policing, prisons, judicial administration or the armed forces, or there is any treaty obligation, state responsibility is triggered if the state elects not to intervene and prevent violations. When states contract PMCs they are obligated to limit the extent of their activities, vetting individuals for prior violations and monitoring and ensuring compliance with international law. States cannot renounce responsibility for violations of international law committed by Wagner / Africa Corps forces on the grounds that the acts are outside the latter’s authorized duties or are prohibited by domestic military regulations, ultra vires, performed in the absence of any government authorities or are disowned by the state. Where violations occur, states are obligated in domestic legislation to criminalize such behaviour, prosecute those that carry out the violations and provide mechanisms for victims to obtain reparations.

Any state can request before the ICJ “cessation of the internationally wrongful act, and assurances and guarantees of non-repetition”, together with reparations on behalf of the beneficiaries for the obligations breached. Admittedly, the “will and power to make use of the communitarian vehicle remains at the discretion of each member of the international community”.⁹⁴ Historically, non-injured states have been reticent to bring claims against other states based on a violation of some communitarian norm without good reason.⁹⁵ The jurisprudence of the international court is clear that non-injured states enjoy legal standing to enforce communitarian norms and that to bring “a case in the interest of obligations *erga omnes partes* is no longer controversial”.⁹⁶ Most recently, the *erga omnes partes* obligations (this time under the Genocide Convention) have seen non-injured third-party states like The Gambia and South Africa bring cases before the ICJ using this communitarian invocation of state responsibility.

Of course, any state can remind a defaulting state of its international law obligation in terms of treaty law or customary international law through diplomatic measures. Since many of these delinquent states depend on other countries for aid and trade, it may also be effective to impose sanctions on those that make use of Wagner / Africa Corps forces. All these consequences, be it an order from the ICJ, diplomatic pressure or sanctions, depend on being able to link the actions of the Wagner /

92 Crawford “Responsibility for breaches”, above at note 88 at 240. The ICJ is a forum to bring an application for judicial remedies in the common interest of the international community.

93 Id at 235.

94 Id at 240.

95 Id at 225.

96 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Reports 422.

Africa Corps forces to the states that are employing their services, organizing them or allowing them to function on their territory.⁹⁷ However, given the widespread and flagrant violation of many of the prohibitions contained in common article 3 – torture, extrajudicial killing, arbitrary and inhumane detention of civilians, the indiscriminate firing on and mining of civilian areas and the non-derogable IHRs – it behoves any and all states to approach the ICJ and invoke ARSIWA article 48. This would be on behalf of the victims of the violations perpetrated by Wagner / Africa Corps forces in Africa against the states that are hiring those forces and against Russia, which is now claiming some control over the Group and its Africa Corps iteration.⁹⁸ Finally, the responsibility of a PMC's state of origin may arise, particularly because in the real world, such a state may be the only one that is effectively capable of controlling the activity of its own national PMCs.⁹⁹

Conclusion

The deployment of Wagner / Africa Corps in Syria, Libya, the CAR, Sudan, Mali and Mozambique has been synonymous with the indiscriminate targeting of civilians, torture, extrajudicial executions and arbitrary and inhumane detention. Sanctions, travel bans and the freezing of assets have not eradicated these violations of the peremptory norms of IHL and IHRL. African leaders have persisted in their dealings with the Wagner Group, under its new brand of the Africa Corps, and its prevalence on the ground in Africa is predicted to balloon, fuelled by the continent's rich reserve of mineral resources.¹⁰⁰ Against this backdrop, the perpetration of these egregious IHL and IHRL abuses is likely to persist with impunity, in particular when the territorial state has contracted the services of the perpetrators and is unwilling or incapable of gathering the evidence required to pursue individual criminal prosecutions.

The ARSIWA provide a means for the international community to pursue state responsibility on behalf of victims of these sorts of abuse through the invocation of communitarian norms. Through its article 48, delinquent states can be brought before the ICJ for their failure to prevent or prosecute the types of IHL and IHRL violations perpetrated by Wagner forces and now the Africa Corps. These violations are imputable (through ARSIWA articles 4, 5 and 9) to the territorial state when Wagner / Africa Corps acted, or omitted to act, with apparent official capacity. Moreover, any subsequent acknowledgement of actions or toleration of abuse by the state is sufficient to incur state responsibility. The moment that a state allows Wagner / Africa Corps to oversee detention centres or engage in armed encounters with civilians, its due diligence obligations increase: states would be obligated to vet Wagner / Africa Corps employees (especially when they are reported to be recruiting convicted criminals), monitor their activities, and prevent and prosecute violations of IHL and IHRL. The due diligence requirements under IHRL demand that states that contract PMCs ensure that these companies are aware of and comply with the applicable IHL and IHRL regimes. States should be demanding full compliance with the Montreux Document and the UN Draft Convention on Private Military and Security Companies before awarding these lucrative private security contracts.¹⁰¹ A state remains obligated to prevent violations of the peremptory norms of general international law, at the

97 The responsibility of the state of origin of a PMC may also arise; this is now more possible given that Russia has adopted the actions of the Africa Corps.

98 Crawford "Responsibility for breaches", above at note 88 at 225.

99 L Federico and F Francioni "The role of human rights in the regulation of private military and security companies" in F Francioni and N Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011, Oxford Academic), available at: <<https://doi.org/10.1093/acprof:oso/9780199604555.003.0004>> (last accessed 22 April 2024).

100 The Blood Gold report cites Wagner PMC as having extracted USD 2.5bn worth of gold from Africa in the past two years; J Berlin, D Clement, L Elufisan, E Hicks and Z Kész "The blood gold report: How the Kremlin is using Wagner to launder billions in African gold" (December 2023), available at: <<https://bloodgoldreport.com/>> (last accessed 24 April 2024).

101 UN Human Rights Council "Draft of a possible convention", above at note 91.

very minimum; it is no defence (pursuant to ARSIWA articles 7 and 8) for it to argue that the PMCs were acting ultra vires or outside the scope of military orders.

In short, any state employing or supplying PMCs or adopting an indifferent attitude to their violations of IHL and IHRL in its territory should be aware that under the ARSIWA, it can be held to account. When such violations are contrary to the preemptory norms of international law, it behoves all states to use the ARSIWA to invoke the state responsibility of these delinquent states that fail to take their due diligence obligations seriously, or that openly facilitate or permit the violation of these norms on their territory by Wagner / Africa Corps. Recently, we have seen an increase in “altruistic”, non-injured third-party states bringing cases before the ICJ against delinquent states, citing a duty to protect obligations *erga omnes partes* (in these recent cases, pursuant to the Genocide Convention).¹⁰² This trend, which is not without potentially significant economic and political costs for the third-party state, is giving rise to what Simma J envisaged 30 years ago as international law “finally overcoming the legal as well as moral deficiencies of bilateralism and maturing into a much more socially conscious legal order”.¹⁰³ In the words of the International Criminal Tribunal for the former Yugoslavia regarding violations of the prohibition against torture:

“the violation of such an [*erga omnes*] obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.”¹⁰⁴

Those states that continue to use Wagner / Africa Corps should know that they can find themselves before the ICJ to answer questions of state responsibility to victims. Allies of these African states should be using diplomatic channels to discourage the use of Wagner / Africa Corps and encourage adherence to the Montreux Document in this more socially conscious legal order. To end impunity for violations of IHL and IHRL, we need to make unregulated and ill-disciplined PMCs unemployable and isolate the delinquent states that use their services. If we have learned anything from the long history of western PMCs operating in Afghanistan and Iraq, it is that states that employ the services of PMCs must be held accountable for their violations of IHL. Accountability must include access to justice and effective remedies for victims, and may include cessation of continuing violations, compensation, rehabilitation, satisfaction, guarantees of non-repetition and a commitment to take disciplinary or penal action against those responsible for the harm.¹⁰⁵ Contracting out state functions to proxy groups cannot be a licence to turn a blind eye to violations of international criminal law.

Competing interests. None

102 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v Myanmar)* Provisional measures (2020) ICJ Reports GL No 178; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* Provisional measures (2024) ICJ Reports GL 192.

103 Crawford “Responsibility for breaches”, above at note 88 at 234.

104 *Prosecutor v Furundzija* [1998] Case No IT-9517/1-T Judgment, para 151.

105 United Nations General Assembly, “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law”, UN doc A/RES/60/147 (16 December 2005).

Cite this article: Bosch SJ and Kimble M “State Responsibility for Violations of International Humanitarian Law and Human Rights Law by Private Security Companies in Africa: The Case of the Wagner Group and Africa Corps” (2025) *Journal of African Law*. <https://doi.org/10.1017/S002185532510079X>