



HUMAN RIGHTS COUNCIL 54TH REGULAR SESSION

Legal Action Worldwide (LAW) Side Event

War Criminals for Hire: The Role of Mercenaries in Modern Armed Conflict

20 September 2023, 10:00am – 11:00am

ROOM: XXV, Palais des Nations, Geneva, Switzerland

Agenda

Opening Remarks:

Mr. Chris Kwaja, Member of the UN Working Group on the use of Mercenaries

Moderator:

Antonia Mulvey, Executive Director, Legal Action Worldwide

Panelists:

- Mohammad Al Abdallah, Executive Director, Syria Justice and Accountability Centre
- Dmitry Gurin, Legal Advisor, European Prison Litigation Network
- Jelena Aparac, Head of Advocacy, Policy, and Research, Legal Action Worldwide, Former member and Chair-Rapporteur of the UN Working Group on the use of mercenaries
- Yousuf Syed Khan, Senior Lawyer, Global Rights Compliance
- Mikiko Otani, Member, UN Committee on the Rights of the Child

Closing Remarks:

Mr. Chris Kwaja, Member of the UN Working Group on the use of Mercenaries

Introduction

The proliferation of non-state armed groups (NSAGs) in international and non-international armed conflicts has been well documented and consistently highlighted by experts. NSAGs' participation in hostilities has arguably contributed to their intensification and prolongation, and exacerbated the suffering caused to civilian populations.¹ Increasingly, NSAGs comprise not only paramilitaries, militias, and terrorist groups, but private military and security companies, and mercenary forces, with the most notorious recent example being the Wagner Group. In places like Syria, Central African Republic, Mali,

and Ukraine, mercenaries and private military groups have been associated with some of the most savage fighting and horrific human rights abuses.

Warring parties in Sudan, Mali, and Central African Republic have cut deals with mercenary forces to gain military advantage over their rivals, leading to intense bloodshed as their new allies have gone on to commit atrocities including mass executions and enforced disappearances.² In Syria, there are reports that foreign mercenary forces are plundering the country's oil and gas resources, while in the Northeast an auxiliary army of former opposition groups has been co-opted to effect demographic change with the promise of confiscated land and property.³ In Ukraine, mercenaries have played a major role in fighting a war of aggression.

Despite private military and mercenary forces being implicated in serious crimes on and off the battlefield, they have been able to operate with an alarming degree of impunity, often with formal backing from state actors.

Discussions

Mr. Mohammad Al Abdallah introduced the topic of the recruitment of Syrians to fight abroad.

Mr. Al Abdallah explained that throughout the conflict in Syria, non-state actors were involved in many human rights abuses. Evidence has also emerged that member states have supported, and in some cases commissioned, those non state actors – including by sending them overseas to fight other conflicts, outside Syria. According to Mr. Al Abdallah, Russia and Turkey recruited Syrian fighters, to participate in conflicts in Libya, and in Azerbaijan and Armenia (specifically in the context of the Nagorno Karabagh conflict). It was highlighted that the Wagner Group has perpetrated serious human rights abuses with complete impunity, in the course of its operations to secure resources and infrastructure in Syria. The speaker called on the United Nations and member states to take stronger actions on the recruitment of mercenaries in Syria and to work towards accountability for the Wagner Group's actions in Syria. Mr. Al Abdallah reiterated the need for accountability for the actions that took place in the past from Turkey and Russia.

Mr. Dmitry Gurin focused on the recruitment of prisoners in Russian prisons.

The full-scale Russian invasion of Ukraine in February 2022 gave rise to an unprecedented widespread recruitment of convicted prisoners by the Wagner Group. Following the Wagner Group's February 2023 recruitment campaign, around 40,000 prisoners were enlisted and deployed in Ukraine on the side of Russia - at least 10,000 of them were killed. Another 25,000 were recruited by other semi-private contractors affiliated with the Ministry of Defence between February-August 2023.

The need for the full attention of the international community concerning the recruitment practices of organisations like the Wagner Group, including comprehensive legal assessment, and consistent joint efforts by international bodies, states, and civil society for the implementation of relevant accountability mechanisms, was reinforced by Mr. Gurin. "In this context" he said, "we're most grateful to the Working Group [on the Use of Mercenaries] for reflecting the problem of prisoners' recruitment in the recent report to the HRC, which would hopefully pave way to the subsequent reactions."

Mr Gurin's legal analysis highlighted that the recruitment of prisoners does not clearly fit within the existing legal framework of international humanitarian law (IHL), human rights law, and domestic law, thus it does not constitute a war crime or a crime against humanity.

Furthermore, the Russian government has taken every possible step to legalise the recruitment domestically and to create an impression that prisoners are acting of their own will when joining the Wagner Group and then the Ministry of Defence. This is only half-true. Indeed, many factors, including attractive compensation schemes, expungement of criminal records, threats – plus extremely long prison terms, recidivism, lack of rehabilitation, absence of early release programmes, constant physical and psychological pressure, severance of social ties, poverty, unemployment, lead has significant impact on prisoner mental health and decision making. In some cases prisoners have been coerced into joining; prisoners were forced into a position where they were willing to make an extreme choice, and to put the lives of others and their own life at risk.

Additionally, most of the prisoners do not fall within the legal definition of mercenaries – as they are either nationals of a party to the conflict, or residents of the territory controlled by a party to the conflict. Therefore, they do not satisfy the negative nationality criterion under Additional Protocol to Geneva Conventions or the Convention against the Use of Mercenaries. Art. 47(2) of Additional Protocol I sets out six cumulative criteria to define the contours of the term “mercenary.” Pursuant to AP I, mercenaries can neither be nationals of a Party to the conflict nor a resident of territory controlled by a Party to the conflict. This means that Russian citizens and residents are not technically mercenaries under international law. Nor can it be said conclusively that they are armed forces of a party to the conflict under Art. 43. This leaves us with the citizens of third countries fighting within Ukraine as part of the Wagner Group who can be considered mercenaries (eg, Syrians, Libyans, Afghans, and others).

The situation is different in respect of foreign prisoners and, in particular, Ukrainian nationals who were enlisted from prisons in the occupied territories of Ukraine, or those who were forcefully transferred to Russia (around 2000 people) – their recruitment amounts to compelling a protected person to serve in the forces of the occupying power – which is a grave breach of 3rd and 4th Geneva Conventions (Art 130 and Art. 147).

Gurin concluded that the recruitment in general, taking into account the Russian government's established involvement and the widespread use of prisoners at the frontlines, should be assessed as part of the crime of aggression committed against Ukraine – specifically paragraph 3 (g) of the General Assembly Resolution 3314 (XXIX) (1974) and Article 8bis of the Rome Statute – that is “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State.”

This makes the creation of an effective international criminal mechanism for the current crime of aggression even more necessary.

Mr. Yousuf Khan focused on the on the crimes perpetrated since Russia's full-scale invasion of Ukraine on 24 February 2022.

Mr Khan opened his statement by stating “while it would be premature to determine conclusively the scope and scale of violations attributable to members of the Wagner Group, this past February Ukraine’s Office of the Prosecutor General served a ‘notice of suspicion’ to [Yevgeny] Prigozhin – a procedure under Ukraine’s Criminal Code that puts suspects on notice. Allegations included encroachment on Ukraine’s territorial integrity; and waging an aggressive war.”

Khan explained that a fundamental, preliminary question arising from the Wagner Group’s activities in Ukraine is the qualification of its members as mercenaries or combatants (see above). In respect of modes of liability, Mr. Khan looked into different prospects:

1. Individual criminal responsibility

Under Art. 438(1) of Ukraine’s Criminal Code, charges may be brought for the use of methods of warfare prohibited by international instruments, or any other violations of rules of warfare recognised by international instruments to which the Verkhovna Rada [Parliament] of Ukraine considers itself bound. While this does then not additional criminal conduct covered under customary international law, this would cover a significant majority of crimes documented with respect to Wagner Group members operating in Ukraine.

Individual Wagner Group fighters could also be prosecuted before the ICC, or in third states, for example, through universal or extraterritorial jurisdiction.

2. State responsibility

The legal status of private military and security companies (PMSC), including the Wagner Group, under Russian domestic law is vague. The Russian Constitution stipulates specifically that all matters of security and defence belong solely to the Russian State. Russian legislation explicitly prohibits “illegal armed formations and mercenary groups.” Nonetheless, these provisions have not been used by the Russian state to prosecute relevant actors within the Wagner Group or other PMSC. It has been said that this prohibition does not apply for PMSC “registered abroad.” It is also only alleged that the Wagner Group is registered in Argentina.

This vagueness enables Russia to selectively allow PMSC to operate as needed, while maintaining a sense of plausible deniability for their actions.

Khan added: “Just this past June [2023] however, President Putin – in an apparent attempt to take full credit for some of the earlier battlefield successes – had stated that Russia paid the Wagner Group \$1 billion USD over the previous year, and further acknowledged that the Wagner Group was entirely financed by the Russian State between May 2022 and May 2023. As we explore possible State responsibility, this of course merits further exploration.”

Ms. Mikiko Otani outlined the work of the Committee of the Rights of Child in the context of non-state actors.

According to Ms. Otani, the Committee should look in greater depth at children's rights in the context of armed conflict, in particular, the recruitment and use of children by mercenaries, notwithstanding challenges in linking their mandate to armed conflict contexts.

Ms. Otani cited Article 4 from the Optional Protocol to the Convention on the Rights of the Child (OPAC), which notes that non-State armed groups “should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years” a requires that states parties take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices. This is, however, with significant challenges in practice, namely the state capacity to control the recruitment by non-state actors.

Ms. Otani commended the work of the Working Group on the use of Mercenaries, in particular the report Recruitment of children by non-State armed groups, including mercenaries and private military and security companies (A/HRC/39/49) and expressed the need to continue working on these issues, which are increasingly recurrent in contemporary armed conflicts.

Ms. Jelena Aparac focused on the role and future of the Wagner Group, and its accountability.

On the identification, role and future of the Wagner Group, Ms. Aparac explained that the Wagner Group is a “catch all name” for an entity that does not have a legal existence but it does have strong links with the Russian state. In addition, the lack of legal existence requires the Wagner Group to set up legal entities, often in the sector of private security (Sewa company in Central African Republic, EvroPolis in Syria) or extractive sector (Lobaye Invest in Central African Republic) to enable the Wagner Group to participate in financial transactions and to receive logistical support. Ms. Aparac added that the Wagner Group is composed mostly of Russian citizens but regularly recruits from Syria, Libya and other places experiencing armed conflict using the “combatant black markets”. She noted that some of these dynamics and operations of the Wagner Group may change, but the *raisons d’etre* do not: the group exists to advance Russian interests and to deny Russian involvement in conflicts or criminal activities. Ms. Aparac also added that another fundamental element is the interconnectivity of the Wagner Group military and economic operations between various contexts (Ukraine, Mali, Syria, CAR, Libya, Sudan). “Addressing accountability in one isolated context alone would have a very minor impact on the system itself,” Aparac said.

Ms. Jelena Aparac then explained the legal qualifications and framework applicable to the Wagner Group, by looking into the Wagner Group as PMSC and as mercenaries.

According to Ms. Aparac, “to this day there has been no evidence presented as to any legal or formal commercial register regarding the Wagner Group.” Additionally, existing definitions of PMSCs are not internationally agreed or legally binding. Under the Working Group on the use of Mercenaries qualification, it would seem unlikely that the Wagner Group can be qualified as “company” and cannot be classified as “PMSC”, Ms. Aparac stated. “In the absence of any legal structure, the Wagner Group is likely going to continue under its current *modus operandi* because it is a valuable tool for the Russian state to expand its influence.”

In order to qualify as a mercenary, the Working Group on the Use of Mercenaries can refer to three international legal definitions, namely from the art. 47 of the Addition Protocol I to Geneva Conventions, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and the Organisation of African Unity Convention for the Elimination of Mercenarism in Africa. Regrettably, “in most cases none of these three instruments apply” Ms. Aparac added. “The difficulty arises in trying to identify and prove six cumulative criteria of art. 47. In addition, art. 47, excludes the Wagner Group personnel from the mercenary definition in NIAC (Non-International Armed Conflicts) because it only applies in international armed conflicts (most of the countries are facing NIAC, and in the context of Ukraine, Wagner seem to be operating on behalf of the party to the conflict which would exclude them from the mercenary definition). Art 47 AP1 does not criminalize mercenarism.”

Ms. Aparac also addressed the future of the Wagner group.

Since the death of Mr. Prigozhin in August 2023, there have been many discussions on whether the Wagner Group still exists. According to various reports, Russian senior officials have been visiting Wagner operations to ensure that the group’s operations are still well implemented and continuing on a “business as usual” basis. Moreover, the Russian state has been sending a strong message that the Wagner Group is now under government control.

Ms. Aparac spoke about the different possible countries where the Wagner Group is currently or is likely to expand its military operations: Sudan, because of financial and logistical support to the Rapid Support Forces (RSF); Mali, because of the full isolation of the country (as was the case in the Central African Republic (CAR)) with the most recent rejection of the renewal of the sanction regime early September 2023; Niger, because of its connections with the recently installed military Junta; Gabon, because it is rich in gas and Gazprom is well embedded within the country, Belarus and many others.

Ms. Aparac further addressed the complex question of accountability for crimes committed by the Wagner Group, outlining four key points.

1. *State responsibility: Russia*

Providing support through an intermediary creates distance between the intervening State and the supported party and may therefore obscure the actual role and responsibilities of the former. In the case of Wagner Group, they are being used precisely with the objective of providing “plausible deniability” of direct involvement in a conflict.

Russian denials of the Wagner Group’s existence and, more importantly, denial that the Wagner Group operates at the direction of and under the command of the Russian State, is a relevant factor for the state responsibility. Leaked documents have indicated that the Wagner Group has never been under the control of either the Russian state actors, including the Ministry of Defense, as has often been claimed, but is instead exclusively run by Prigozhin (recent developments, in particular the June 2023 Wagner group rebellion may also lead to this conclusion). On 26 August 2023, following Prigozhin's death in a plane crash, Putin signed a decree ordering Wagner Group fighters to swear an "oath of allegiance" to the Russian state.

While increasing evidence may suggest a factual case linking the Russian state to international crimes and serious human rights violations to the conduct of the Wagner Group, any case seeking to secure state responsibility would face serious practical challenges in relation to jurisdiction. Russia is unlikely to accept the jurisdiction of the International Court of Justice (ICJ) which may be best placed to determine state responsibility in this context, and it is unlikely that other international fora would make such a determination.

2. Individual responsibility

Prospects of securing individual responsibility are slightly higher because domestic courts in a number of jurisdictions may be more inclined to prosecute mid- senior ranking members of the Wagner Group and/or Russian state officials. However, such an approach would also face challenges; notably 1) access to evidence required to establish criminal or civil responsibility (considerable efforts were invested into creating plausible deniability and eliminating any witnesses and evidence), 2) jurisdiction challenges (even in applying universal or extraterritorial jurisdiction, significant legal hurdles exist).

There is also a possibility that the International Criminal Court (ICC) would investigate crimes perpetrated by members of the Wagner Group, but only in relation to the situation in Ukraine. Any other situation (CAR, Mali, Sudan, Libya, Syria) would fall outside of investigative projects of the ICC under the current OTP (Office of the Prosecutor) position.

3. Wagner Group as a terrorist group

Ms. Aparac underscored the lack of a single internationally agreed definition of terrorism “The options for accountability before any international tribunal would not increase by designating Wagner as a terrorist group. In addition, this designation would not impact significantly the financial situation of Wagner because of their complex legal and financial networks built over the years”, Ms. Aparac stated.

4. International tribunal against Russia for aggression

It appears that states are currently discussing the international tribunal against Russia for aggression in Ukraine. If this tribunal would be created one day, most likely it would not have the jurisdiction over the Wagner crimes because of its narrow focus on a crime of aggression and on the situation in Ukraine only.