SELECTED LEGAL ISSUES RELATED TO THE LEGAL STATUS OF THE INDIVIDUALS PARTICIPATING IN THE INTERNATIONAL ARMED CONFLICT ON THE TERRITORY OF UKRAINE

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INTRODUCTION

Already in 2014, the International Committee of the Red Cross characterized the situation in the east of Ukraine as a "non-international armed conflict," which is defined as "an armed conflict not of an international character, occurring within the territory of one of the High Contracting Parties."[1]

A shift in the perception of this however, in the year 2016, brought about by the conflict, when the situation in Ukraine was also touched upon by the International Criminal Court. In its report dated November 14, 2016, the Office of the State Attorney stated that, "[t]he information available suggests that the situation within the territory of Crimea and Sevastopol amounts to an international armed conflict between Ukraine and the Russian Federation."[2]

This international armed conflict began no later than February 26, 2016, when the Russian Federation deployed members of its armed forces to gain control over part of the territory of Ukraine without the consent of the Ukrainian government.

For the purposes of the Rome Statute, an armed conflict can have an international character if one or more states partially or completely occupies the territory of another state, regardless of whether this occupation was met with armed resistance.[3] Due to the failure to demonstrate the so-called "overall control" (in the sense of the International Court of Justice (ICJ) test from the case of Nicaragua v. US) of the authorities of the Russian Federation over the insurgent units in the east of Ukraine, the conflict can only be characterized as a non-international armed conflict covered by the 1977 Additional Protocol II (AP II).[4] It is an armed conflict of high intensity and thus exceeds the

1. Yoram Dinstein, *Concluding Remarks on Non-International Armed Conflicts*, 88 INT'L LAW STUDS. 399, 400 (2012).

2. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 35 (2016).

3. *See* INT'L COMM. OF THE RED CROSS, GENEVA CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, COMMENTARY OF 2016, 228 (1949) [hereinafter GC(I) COMMENTARY OF 2016].

4. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 75 (June 27); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

horizon of application of only common Article 3 of the Geneva Conventions for the Protection of War Victims of August 12, 1949.

The situation after February 24, 2022, can undoubtedly be classified as a continuation of the international armed conflict between the Russian Federation and Ukraine, since the Russian Federation has evidently violated the mandatory norm of international law prohibiting the threat of force and the use of force.

Even before the start of the Russian invasion, Ukraine prepared itself in order to be able to protect its territory by training its citizens to serve as "resistance in waiting." [5] On the February 26, 2022, the Ukrainian president, Volodymyr Zelensky, called for help of "[all] friends of Ukraine, who want to join the defense."[6]

The Ukrainian authorities were involved in the preparation of the defense of Ukraine by civilian population in various ways—distribution of volunteers and calling upon the civilian population to prepare the "Molotovov cocktail" at home.[7]

Due to the fact, that both, Russian Federation and Ukraine are parties to the Geneva Conventions of 1949 and Additional Protocols of 1977, their means and methods of warfare are not unlimited and are regulated by these treaties as well as the customary rules of the international humanitarian law.[8]

According with Article 4A of Geneva Convention III (GC III), there are distinguished three different groups of individuals "likely to be engaged in Ukraine's defense: (1) members of Ukraine's Armed Forces, (2) members of Ukraine's Resistance Forces, and (3) civilian participants in the *leveé en masse*."[9]

This characteristic raises important legal questions. What obligations of treatment do Russian forces have towards Ukrainian resistance forces under the rules of armed conflict and *vice versa*? This article addresses some general questions regarding the legal status of

5. Ronald Alcala & Steve Szymanski, *Legal Status of Ukraine's Resistance Forces,* LIEBER INST. WESTPOINT (Feb. 28, 2022), https://lieber.westpoint.edu/legal-status-ukraines-resistance-forces/.

6. John L. Dorman, *Volodymyr Zelensky Calls on 'Every Friend of Ukraine' to 'Please Come Over' and Help Defend Against Russian Invasion*, BUS. INSIDER INDIA (Feb. 26, 2022, 10:29 AM),
https://www.businessinsider.in/politics/world/news/volodymyr-zelensky-calls-on-every-friend-of-ukraine-to-please-come-oveWatt/articleshow/89855788.cms.

7. Alcala & Szymanski, *supra* note 5.

8. *Id.*

9. *See id.*

the individuals participating in the above mentioned ongoing international armed conflict defending both of the parties.

I. MEMBERS OF THE UKRAINIAN ARMED FORCES

The importance of the above mentioned 4(A)(1) GC III is significant from another perspective—persons listed therein are entitled to be treated after capture as prisoners of war (POWs).[10] As combatants are considered the members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

Taking into account the wording of the Article 1 of the Hague Conventions of 1907 as well as already mentioned Article 4(A)(2) of the GCIII, according to the second approach the membership in the armed forces is not the only condition that has to be met in order for individual to be enjoy the POW status in the case of capture. The further conditions are that the individual "a) is commanded by a person responsible for subordinates; b) has a fixed distinguishing mark recognizable from a distance; c) carries weapons openly; and (d) conducts its operations in accordance with the laws and customs of war."[11]

According to the another, more reasonable, approach represented by e.g. Professor Sean Watts, the mere membership in a state's armed forces, or in a militia or volunteer corps formally incorporated into a state's armed forces, the only criteria to estimate whether the individual is or is not enjoying the POW status under Article 4(A)(1).[12]

II. MEMBERS OF THE UKRAINIAN RESISTANCE FORCES

The GC III regulates the cases when the individual defending territory of his state and not incorporated into official armed forces enjoying the POW status according to its Article 4(A)(2) as a member of the resistance forces. Article 44 (3) of AP I, is important in relation to the Ukrainian Resistance Forces because stipulates an exception from "the distinction from civilians" requirement (as stipulated in Art. 4 A (2)) and recognize "there are situations in armed conflicts where, ow-

10. *See id.*

11. Geneva Convention relative to the treatment of Prisones of War (III GC), art. 4 A(2), 75 U.N.T.S. 135 [hereinafter GC III].

12. *See id.* Sean Watts & Hitsohi Nasu, *Ukraine Symposium–A War Crimes Primer on the Ukraine-Russian Conflict,* LIEBER INST. WESTPOINT (Apr. 4, 2022), https://lieber.westpoint.edu/war-crimes-primer-ukraine-russia-conflict/.

ing to the nature of the hostilities an armed combatant cannot so distinguish himself" from a civilian.[13] Therefore, members of an organized resistance movement retain their combatant status when they carry their weapons openly "during each military engagement" and when they are visible to the adversary.[14]

The relevance and application of AP I to the armed conflict in Ukraine is undoubtable due to the fact that both Ukraine and Russian Federation had signed the AP I and according to the press news a significant number of the Ukrainians were from the begin of the invasion ready to take up the arms and fight in order to defend Ukraine. The article published in New York Times mentioned "[v]ans and cars with armed men without uniform" roaming the streets and checkpoints manned by "men and women in civilian clothes, carrying rifles."[15] The "newly armed civilians and members of various paramilitary groups" are apparently fighting "under the loose command of the military" as part of Ukraine's Territorial Defense Forces.[16]

While part of the civilian people defending the territory of Ukraine are without the uniforms, the members of the Ukrainian Territorial Defense Forces are distinguished from the rest by wearing the yellow armbands. The purpose of these armbands is dual—firstly, its aim is to distinguished them from the civilians, secondly, to identify them as a members of the Territorial Defense Forces.

III. CIVILIAN PARTICIPANTS IN THE LEVEÉ EN MASSE

We have already discussed the status of the Ukrainian Armed Forces and the Ukrainian Territorial Defense Forces and came to the result that they shall, under the condition that certain criteria are met, be treated after their capture as POWs. But how should civilians defending the Ukraine and not participating in the Territorial Defense Forces nor Ukrainian Armed Forces be treated? The answer to this question provides the Article 4(A)(6) GC III "[i]nhabitants of a non-

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 44, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

14. *Id.*

15. Andrew E. Karmer, *'Everybody in Our Country Needs to Defend'*, N.Y. TIMES (Feb. 26, 2022), https://www.nytimes.com/2022/02/26/world/europe/ukraine-russia-civilian-military.html.

16. Lauren Jackson, *Ukraine's Call to Arms*, N.Y. TIMES (Mar. 4, 2022), https://www.nytimes.com/2022/03/04/podcasts/arms-ukraine-russia.html?adlt=strict&toWww=1&redig=553CA48CB129457B81259EFBE8235F54.

occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war" shall be treated as a prisoner of war.[17]

The roots of the granting of POW status to captured civilians defending their state are found already during the French Revolution and then in first codifications of the international humanitarian law—in the Lieber Code and in the Hague Conventions. The important thing to emphasize is that none of these codes recognize the POW status to the captured civilians *per se*, i.e. without the further conditions. According to the Commentary to the GC III "the existence of the *leveé en masse* is limited to the very short period of time, e.g. during the initial phase of the armed conflict"[18] This fact is supported by the first criteria of the *leveé en masse*—spontaneousness. The 2020 ICRC Commentary on GCIII states that "*spontaneity does not mean that an enemy's invasion or advance must be a surprise."*[19] However, the participants of the *leveé en masse* were not allowed to have time to form into regular armed units. The further criteria are that it must occur in the unoccupied territory and must consists only of inhabitants of the territory. The last but not least, its participants must carry arms openly and obey the law of war

According to the information received, many of Ukraine's newly armed residents are "*fighting under the command of the military in an organization called the Territorial Defense Forces*" call into question the spontaneity.[20] According to the news, a lot of foreigners travel or have already travelled to This is Ukraine to resist Russian forces. These individuals cannot be qualified as a part of the *leveé en masse* since they are not residents of Ukraine.

17. GC III, *supra* note 11, at art. 4(A)(6) (emphasis added).

18. JEAN PICTET, COMMENTARY TO THE THIRD GENEVA CONVENTION 68 (1960).

19. Alcala & Szymanski, *supra* note 5 (commenting on the Geneva Convention Relative to the Treatment of Prisoneers of War) (emphasis added).

20. *Id.*

IV. DIRECT PARTICIPATION IN HOSTILITIES

The term "direct participation in hostilities" is used not only by international humanitarian law, but also by the International Committee of the Red Cross (ICRC) and international teachings.[21]

As is the case with organized armed groups, the term "direct participation in hostility" is not defined by international humanitarian law despite the fact that it is covered, in its various verbal variations, by several international treaties with universal validity. As a correct content definition of this concept is critical for the consistent application of some principles of international humanitarian law in many aspects, the ICRC published the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* in 2009, which set out the ambitious goal of defining an interpretation of the term "direct participation in hostilities."[22]

This interpretation guideline has set three criteria whose cumulative fulfillment results in the party's action as being classified as direct participation in hostility:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[23]

Operating from the conclusions made in this document, direct participation in hostilities may include "action or participation in a military operation, of which such action is an integral part, and which, in connection with hostilities, directly causes damage to the military

21. *See* INT'L COMM. ON THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 5 (2009) [hereinafter ICRC, DIRECT PARTICIPATION IN HOSTILITIES].

22. *Id.* at 6. (In Article 3, common to the Geneva Conventions I-IV, the verbal variations include "direct participation" and "active participation" (in hostility) connections.).

23. *Id.* at 46.

objectives of the opposing party or to protected persons and objects."[24] The commentary to AP I likewise defines direct participation in hostilities according to which it includes "acts of war" which, by its nature and purpose, is likely to cause harm to the personnel and equipment of the enemy's armed forces.[25] At the same time, an ICRC study of international humanitarian law provides examples of actions (done by civilians) that the military manuals of some states associate with direct participation in hostilities: use of weapons or other means to commit violent acts against human or material components and the performance of watch and guard, or intelligence and courier activities in favor of a party in the armed conflict.[26]

As a result of the lack of normative (contractual) definition, international practice is not completely uniform in this respect. The efforts of ICRC to unify features on the basis of which the particular action of a person can be evaluated as an excess causing the loss of the legal protection for the civilian population against the direct consequences of hostilities are quite natural from the point of view of humanization of armed conflicts. However, the restrictive view of the impartial ICRC definition often encounters states with more extensive interpretations, where the boundaries of active participation in hostilities and the variable nature of the activities of specific civilians blur, and in which the ban on direct attack periodically transitions into the ability to neutralize (degrade) it as a legitimate military objective. On the contrary, overly narrow definitions that make it difficult to execute the chosen tactics of conducting combat operations with the aim of eliminating the enemy. The result of the inconsistency of these perspectives is the absence of sufficient stabilization in the content of the definition of "direct participation in hostilities" to the extent that would allow them to call it customary.[27] Recently, the interpretation

24. ONDŘEJ J SVAČEK, MEZINÁRODNÍ HUMANITÁRNÍ PRÁVO [INTERNATIONAL HUMANITARIAN LAW] 166 (2010) (clarifying the term direct participation in hostile actions).

25. HUM. RTS. WATCH, LEGAL ISSUES ARISING FROM THE WAR IN AFGHANISTAN AND RELATED ANTI-TERRORISM EFFORTS 7 (2001) (available at https://www.hrw.org/legacy/campaigns/september11/ihlqna.pdf).

26. *See* JEAN MARIE HENCKAERTS & LOUISE DOSWALS-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES, at 22 (Int'l Comm. of the Red Cross, 2005).

27. For the sake of completeness, it can be added that Additional Protocol I (Article 50 (1)) provides a rule applicable to the environment of international armed conflict, according to which, in case of doubt whether a person is a civilian or not, such a person will be considered a civilian. Thus, unless the particular action of a

of the phrase "direct participation" and "active participation" in hostilities generally accepted in the science of international (humanitarian) law was challenged in part by the International Criminal Court. In the case of *Lubanga*, the court stated that these terms are different and, although it did not provide the definition of any of them, basically accepted without doubt that under the conditions of the Rome Statute of the International Criminal Court,[28] active participation in hostilities can cover a wider range of activities other than direct participation.[29] Direct participation in hostilities, which, in the court's view, should be manifested by real participation in front-line combat should thus, in terms of the nature of the activities performed in favor of one of the fighting parties, constitute a subset of a larger group taking the form of active participation in hostilities.[30] At present, it is difficult to predict to what extent that the legal opinion of the judicial authority in the field of international criminal law may affect the interpretation of both terms for decades to come with respect to the regulation of the law of armed conflict.

V. LEGAL STATUS OF MERCENARIES

The Geneva Conventions did not originally regulate the status of these persons. The legal definition of the position of mercenaries occurred only under the influence of the great expansion and discrediting

person is unable to be sufficiently and justifiably qualified as direct participation in hostilities, they shall continue to enjoy their protected position under international humanitarian law. It is logically difficult to associate "active participation in the combat activity of an organized armed group" with such standing. In an environment of national armed conflict such a rule *de jure* does not exist. *Id.* at 21.

28. Specifically for the purposes of the factual substance Art. 8, ¶ 2(e), point vii., according to which the war crime is also considered to be a levy or recruiting children under the armed forces or groups and their use for active participation in hostile actions. *See* Rome Statute of the International Criminal Court art. 8, ¶ 2(e)(vii), July 17, 1998, 2187 U.N.T.S. 38544.

29. *See* Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Statute, ¶ 621 (Mar. 14, 2012) (quoting U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Addendum to the Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 21, n. 12, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998)).

30. *See id.*

of mercenaries during the period of the struggles for national liberation, or fighting against him.[31] This was done in the API. At the diplomatic conference, it was primarily developing countries who pushed for a global ban on mercenarism.[32]

Mercenaries fall outside the traditional categories of persons excluded from the protection of humanitarian law, because their exclusion is in no way related to the principle of distinction.[33] According to Article 47 (1) of AP I, mercenaries do not have the right to the status of members of the armed forces (combatants) or prisoners of war.[34] Constitutive elements of the definition of a mercenary according to Article 47 (2) of AP I must be fulfilled cumulatively, the consequence of which is that the definition of this term is very restrictive and it is possible to circumvent it (especially in the category "motivation by personal profit"):

> [A] mercenary is any person who:
>
> a) is specially recruited locally or abroad in order to fight in an armed conflict;
>
> b) does, in fact, take a direct part in the hostilities;
>
> c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
>
> d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
>
> e) is not a member of the armed forces of a Party to the conflict; and
>
> f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[35]

The expanded definition of the term mercenary is contained in Article 1 (1) and (2), of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, highlights

31. JAN ONDŘEJ ET AL., MEZINÁRODNÍ HUMANITÁRNÍ PRÁVO [INTERNATIONAL HUMANITARIAN LAW] 158 (2010).

32. INGRID DETTER, THE LAW OF WAR 162 (3d ed. 2013).

33. JIŘÍ FUCHS, MEZINÁRODNÍ HUMANITÁRNI PRÁVO [INTERNATIONAL HUMANITARIAN LAW] 53 (Ministerstvo Obrany – Agentura Vojenských Informací a Služeb [Ministry of Defense –,Military Intelligence and Security Service] 2007).

34. Protocol I, *supra* note 13, at art. 47(1).

35. *Id.* at art. 47(2).

persons who are specially hired to carry out violent acts aimed at overthrowing the government or otherwise threatening the constitutional order of the state or its territorial integrity.[36] The Convention contains commitments to criminalize actions related to the organization and use of mercenaries. The Convention is more an instrument of international criminal law (e.g. it is silent on the types of armed conflicts in which mercenaries may be involved, thereby assuming that it applies to both international armed conflicts and non-international armed conflicts). Article 12 contains the principle of *aut dedere aut iudicare*, and thus it differs significantly from the norms of international humanitarian law, from which it only received the definition of mercenarism (Article 47 of AP I).[37]

Since only thirty-three states have ratified the convention in question, it is rather bold to call it a "universal tool" for suppressing mercenarism. In response to the frequent *coup d'etats* in Africa carried out using mercenaries, the regional Convention for the Elimination of Mercenarism in Africa was also adopted in Libreville on 3 July 1977.[38] This Convention adopted the definitions of mercenarism from the aforementioned legal instruments.

VI. LEGAL STATUS OF EMPLOYEES OF PRIVATE MILITARY AND SECURITY COMPANIES

The development of the privatization of armed conflicts is also related to the emergence of the so-called private military and security companies (PMSCs) that have broken away from classical mercenarism and are emerging as commercial companies with a line of business which is often hard to distinguish from mercenarism, as the motivation for personal profit is quite clear among "employees." The origins of such companies can be traced back to the 1960s, when former British Special Air Services (SAS) veterans founded WatchGuard International.

The boom in this "business" occurred in the early 1990s after the end of the Cold War, when many demobilized former members of the armed forces of antagonistic blocs found themselves without employment. A fairly frequent argument in determining the legal status of PMSCs is that these entities do not have a clearly defined status under

36. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries art. 1, Dec. 4, 1989, 2163 U.N.T.S. 75.

37. *Id.* at art. 12.

38. *See* Organization of African Unity Convention for the Elimination of Mercenarism in Africa, preamble, July 3, 1977, 98 U.N.T.S. 1988.

international humanitarian law, and from which the obligations of the entity itself and its employee are derived.

From the perspective of international humanitarian law, this claim is misleading. The rights and obligations of the companies themselves are not defined by international humanitarian law, as they are legal entities established under private law. However, it does define their employees, even if no international treaty instrument directly mentions it. Identifying the relevant obligations of PMSC employees is mainly conditioned by their relationship to a specific state and the nature of the activities for which they are contracted. Their legal status must therefore be assessed on a case-by-case basis. So, the basic question remains whether they are combatants or civilians. If it were possible to grant them combatant status, then it is possible to use armed force against them at any time (they become a legitimate military target), but at the same time they also have "legal title" to direct participation in hostilities. If captured, they are entitled to prisoner of war status and cannot be prosecuted for participation in hostilities.[39] Vice versa, if they were civilians who directly participate in hostilities, they would not have combatant status (unprivileged belligerents or unlawful combatants), nor would they have the prisoner of war status. They could then be prosecuted for participating in hostilities, even if they had not committed any violations of international humanitarian law.[40]

The term combatant has its own specific meaning in international humanitarian law, which is not synonymous with the very general term "fighter." International humanitarian law recognizes four categories of persons who can be considered combatants,[41] but for the purposes of further argumentation the following two categories are relevant: members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.[42] "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements . . ."[43]

39. *See* AP I, *supra* note 13, at art. 43(2), 44(1).

40. *See* Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants"*, 85 INT'L COMM. RED CROSS 45, 45 (2003).

41. *See* GC III, *supra* note 11, at art 4.

42. *See id*.

43. *Id.* at art. 4(A)(2). The other two categories of combatants listed in Article 4A(3) and (6) are members of the regular armed forces who report to a government

PMSC employees could only be considered members of the state's armed forces on the condition that they were hired to perform their activities directly by the state that is a party to the armed conflict and with its consent. These employees would be incorporated into the state's armed forces. Thus, they would also have the status of combatant. However, the outlined procedure is highly unlikely, as most contracts with PMSCs are concluded by clients other than state entities.

It can be stated that international humanitarian law clearly stipulates that members of the armed forces of a state are entitled to combatant status, but on the other hand, it does not provide guidance on which persons can be considered as members of the armed forces. Whereas Article 4A(1) of the Third Geneva Convention is aimed at persons formally incorporated into the armed forces, Article 4A(2) deals with members of groups that are structurally independent of such forces but nevertheless fight alongside them.[44] This provision was intended to resolve ambiguities regarding the status of partisans during World War II. In order for PMSC personnel to be considered members of the militia and other volunteer corps belonging to a state party to an armed conflict, two conditions must be met: the group as a whole must belong to a party to the international armed conflict and must meet the four conditions established by Article 4A of the Third Geneva Convention from 1949: "*(a)* that of being commanded by a person responsible for his subordinates; *(b)* that of having a fixed distinctive sign recognizable at a distance; *(c)* that of carrying arms openly; *(d)* that of conducting their operations in accordance with the laws and customs of war.[45]

This means that only companies contracted by the state and acting on its behalf during an armed conflict (the state's monopoly on the use

or to a power not recognized by the detaining power and participants in *levée en masse* (inhabitants of unoccupied territory, who, upon the arrival of the enemy, take up arms on their own initiative to fight against the invading army, without having time to form themselves into regular armed forces, if they openly carry weapons and if they observe the laws and customs of war).

44. Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 INT'L REV. RED CROSS 525, 534 (2006).

45. GC III, *supra* note 11, at art. 4(A)(2).

of armed force) are capable of fulfilling these requirements.[46] Professor Schmitt notes that a PMSC hired by a private entity to support one of the parties to an armed conflict would also meet the above criteria.[47]

However, it seems questionable whether only persons who directly carry out combat activities in the area of military operations or persons contracted to perform logistical support should be considered combatants. We are inclined to support the opinion that if they are persons clearly belonging to the state to which they were contracted, then they all have combatant status. That is, they are continuously a legitimate military target, but at the same time they have a legal right to prisoner of war status. PMSC employees who could be considered combatants based on Article 4A (2) of the Third Geneva Convention of 1949, (i.e. those hired by a state party to an international armed conflict to take direct part in hostilities, meeting the four criteria above) are likely to be in the minority in real situations.

The Third Geneva Convention provides an exception to the principle that only combatants are entitled to prisoner of war status in the event of capture. In Article 4A (4), a definition is provided for another category of persons who are entitled to prisoner of war status. They are

> Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.[48]

It can be concluded that PMSC employees would fall under the mentioned category if they were hired to perform non-combat activities and provided with the appropriate document (pass) from the contracting state.[49] PMSC employees not falling into any of the above categories are civilians. Employees hired by entities other than the

46. Gillard, *supra* note 44, at 534.

47. Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 528 (2005).

48. GC III, *supra* note 11, at art. 4(a)(4).

49. For example, the position of the UK Ministry of Defence is that it regards PMSC employees as persons accompanying the armed forces under Article 4A (4) of the Third Geneva Convention of 1949 and only hires them to perform logistics and support activities.

state also have civilian status. The participation of PMSC employees (contractors) with civilian status in areas of armed conflicts should be relatively limited, since from the point of view of international humanitarian law, they are civilians. In case of direct participation in hostilities, they lose protection and become a legitimate military target. Since they do not have the immunities of a combatant, they are also criminally responsible for their actions towards the party to the conflict. The question arises as to what activities constitute direct participation in hostilities. According to the ICRC Commentary, these are acts which, by their nature and purpose, are aimed at causing real damage to the persons and technical equipment of the adversary.[50] Supplying food, providing shelter to combatants and "sympathizing" with them does not constitute direct participation in hostilities. This is a potential "grey area" as international humanitarian law does not define the difference between offensive and defensive operations in the case of direct participation in hostilities. That is, it is not possible to uniformly determine whether the performance of self-defense by PMSC employees can be considered as direct participation in hostilities. In the case of performing guard duty in military facilities, installations, and protecting convoys (such as in Iraq since 2003), this constitutes direct participation in hostilities, since these are legitimate military objectives and the loss of life of PMSC personnel can be considered permitted collateral damages in the event of an attack. In this case, PMSC personnel do not enjoy the privileges of combatants and are not entitled to POW status. However, this does not mean that they are completely without protection according to the standards of international humanitarian law. The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (and Article 75 of AP I) ensures them at least a minimum standard of protection in the event of deprivation of personal liberty, as well as guarantees during criminal prosecution.[51] In the event of an armed conflict of a non-international nature, this protection is provided by common Article 3 of the Geneva Conventions from 1949, AP II and norms of customary international humanitarian law.[52]

PMSCs as a whole are not bound by the norms of international humanitarian law. The only exception is if the PMSC acts in an armed conflict of a non-international nature as a party to the conflict under

50. ICRC, DIRECT PARTICIPATION IN HOSTILITIES, supra note 21, at 46.

51. *See* GC III, *supra* note 11, at art. 4(a)(4); *see also* AP I, *supra* note 13, at art. 75.

52. GC III, *supra* note 11, at art. 3; *see also* AP II, *supra* note 4, at art. 4.

common Article 3 of the Geneva Conventions or as an organized armed group under Article 1 (1) of AP II.[53] In such cases, the PMSC will have the same obligations as any non-state actor in an armed conflict of a non-international nature. In practice, however, the above situation is highly unlikely, as it requires the PMSC to become a party to the conflict itself, rather than merely acting on behalf of an existing party to the conflict. However, there is no doubt that PMSCs have obligations under national law.

Legal entities must comply with the law of the state in which they operate,[54] including criminal, tax, immigration, labor law, as well as the law of the state under which they are incorporated. Applicable national law may also impose obligations under international humanitarian law if they are incorporated into the legal order and thereby become binding for non-state actors as well. For example, violations of humanitarian law are often criminal offences under national law and, in states that have codified the criminal liability of legal entities, apply to PMSCs as well. Likewise, some violations of humanitarian law may be considered illegal behavior according to the regulations of other legal branches and establish a right to compensation for the damage caused. The solution is prevention. PMSC management should ensure training and coaching of employees in international humanitarian law with regular review. Likewise, the company should develop standard operating procedures and rules of engagement that reflect their obligations under international humanitarian law and applicable local law.

There is a soft law initiative, *the International Code of Conduct for Private Security Service Providers* (ICoC),[55] which companies operating in this industry voluntarily sign and commit themselves to in a legally non-enforceable form to respect human rights standards and standards of international humanitarian law rights. The ICoC is the result of a multi-stakeholder initiative led by Switzerland to establish international principles and standards for the responsible provision of private security services, especially when operating in a complex international environment. It was developed in November 2010 with the

53. *See* GC III, *supra* note 11, at art. 3; AP II, *supra* note 4, at art. 4.

54. However, they may not be exempted from local jurisdiction by legal act/contract, as was the case of PMSCs operating in Iraq where Blackwater employees shot seventeen civilians who did not pose a threat to them. Prosecution of those responsible by the Iraqi authorities was precluded due to their jurisdictional immunities.

55. THE SWISS CONFEDERATION, THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS 3 (2021) (available at https://icoca.ch/the-code/) [hereinafter ICOC REPORT].

participation of representatives of PMSCs, states (Australia, United States of America, Great Britain and the Swiss Confederation), civil society organizations and academics.[56] The ICoC was signed by fifty-eight PMSCs at its inception in 2010.[57]

In general, states cannot waive their obligations under international humanitarian law by contracting PMSCs. International humanitarian law does not prevent states from hiring PMSCs for the performance of certain activities (traditionally associated with the exercise of state power) in an armed conflict, but responsibility for violations of international obligations by PMSCs is attributable to the contracting state. The Third and Fourth Geneva Conventions contain exceptions that limit to some extent the possibility of a state to transfer the right to carry out certain activities to a PMSC. It is required that prisoner of war camps and places of internment of protected persons be under the direct authority of an "officer in charge" who is appointed from the regular armed forces or a regular civil administration of the detaining power.[58] This means that the state can only entrust the operation of these facilities to PMSCs if it retains direct control, management and supervision of the facilities in question. For example, if a state entrusts the operation of a POW camp to a PMSC, it must ensure a standard of treatment for detainees in accordance with the provisions of the Third Geneva Convention and cannot absolve itself of responsibility by holding the contracted company responsible for non-compliance.[59] States must further ensure that the companies they hire respect international humanitarian law. This follows from the provision of common Article 1 of the Geneva Conventions (states have a general obligation to ensure respect and compliance with the norms of

56. *See id.* at 18–20.

57. *58 Firms Sign Historic International Code of Conduct for Private Security Services Providers*, BUS. & HUM. RTS. RES. CTR. (Nov. 9, 2010), https://www.business-humanrights.org/en/latest-news/58-firms-sign-historic-international-code-of-conduct-for-private-security-services-providers/.

58. *See* GC III, *supra* note 11, at art 39; *see also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 99, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC IV].

59. *See* GC III, *supra* note 11, at art .12 ("Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.")

international humanitarian law).[60] Expanding knowledge of the norms of international humanitarian law is an obligation that states must fulfil even when they are not participating in an armed conflict. In the case of violations of international humanitarian law by PMSC employees, the responsibility of the commanders of the armed forces and representatives of the state is taken into consideration given their responsibility as the superior authority. However, in practice, PMSC employees do not receive orders from military commanders, but from company managers, and the company itself should have a developed system of disciplinary action against its employees. States have an obligation to investigate and prosecute war crimes suspected of having been committed by PMSC personnel. However, the scope and focus of this publication does not allow us to address this extensive issue. We will only point out that the states have the obligation to either prosecute the crimes in question in their courts or hand over the suspected persons for prosecution to the relevant authorities in the place where the given acts were committed. All states have an obligation to prosecute grave breaches of international humanitarian law.

VII. DIFFERENCES IN THE LEGAL STATUS OF MERCENARIES AND PMSCS

The participation of the Wagner Group in the ongoing armed conflict in the Ukraine shows the importance of the estimation of the legal status of the members of this group. According to the information in the news, the members of Wagner Group represent 25% of the Russian forces present in Ukraine and their relevance is still growing.[61] Their relevance in the combat activities is even bigger that of the regular Russian Armed Forces. Of the 50,000 Wagner Group members, currently 40,000 are ex-prisoners. This fact means that every fifth Russian soldier is in fact a recruited criminal.[62]

60. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 1, Aug. 12, 1946, 75 U.N.T.S. 31 [hereinafter GC I]

61. *See* Liam James, *Who are the Wagner Mercenaries and Why are they so involved in Ukraine*?, YAHOO! NEWS, (Feb. 14, 2023, 3:15 PM), https://news.yahoo.com/wagner-mercenaries-why-involved-ukraine 201506729.html?fr=yhssrp.

62. *See* Vladimír Bednár, *A New Bloody Tactic of the Wagnerites: an Armored Car More Valuable Than a Recruit's Life*, AKTUALITY, (Dec. 26, 2022, 4:00 PM), https://www.aktuality.sk/clanok/6j5ydZV/nova-krvava-taktika-vagnerovcov-obrnene-auto-cennejsie-ako-zivot-regruta-44-tyzden-vojny/.

In connection with the aforementioned legal status of mercenaries according to Article 47 of AP I, it is necessary to analyze more comprehensively some of the conditions of the definition of mercenaries, which must be fulfilled cumulatively. The condition of direct participation in hostilities mentioned in Subsection 2 (b) of the catchall article in question appears to be very problematic, just as in the analysis of the position of the PMSC. Since there is no exact definition of this term in international humanitarian law, the possibility that the conditions of the definition of mercenary will be met is reduced significantly. Furthermore, it is necessary to mention the condition mentioned in the letter (e), which exempts from the definition anyone who is a member of the armed forces of a state party to an armed conflict.[63] A state using the services of mercenaries can easily circumvent this condition by formally incorporating mercenaries into its armed forces.

In our opinion, the entire Article 47 AP I loses any practical and legal sense. It was only adopted for political reasons. It only creates another category of persons, or illegal combatants who do not have prisoner of war status if captured. This does not in any way change the previously existing legal status governing situations where persons who do not enjoy the immunities of combatants participate in hostilities.

The result of the application of Article 47 to persons who cumulatively fulfil the conditions of mercenarism is that they will be subject to the same range of rights and obligations as any civilians who directly participate in hostilities. This means that captured mercenaries are not automatically deprived of any protection under international humanitarian law, but are still entitled to at least the fundamental guarantees contained in Article 75 of AP I. The absence of this modification of basic procedural guarantees has led in the past to "speedy trials" of persons accused of performing mercenarism (persons were sentenced to death and executed).

Finally, Article 47 does not prohibit states from extending prisoner of war status to mercenaries, it only stipulates that mercenaries, unlike members of the state armed forces, are not entitled to invoke prisoner of war status, i.e. they have no legal right to it.[64] Although there is little actual national practice in this area, there are cases where a state has declared that it will grant prisoner of war status to persons falling under the definition of mercenarism. For example, in the report of the UN Secretary General on the Iran-Iraq War from 1988, it was

63. *See* AP I, *supra* note 13, at art. 47(2)(e).

64. *See id.* at art. 47.

reported that Iran had detained third-country nationals suspected of mercenarism during hostilities, but instead of prosecuting them, it recognized them as prisoners of war and treated them accordingly.[65] Article 47 of AP I only applies in international armed conflicts.

In armed conflicts of a non-international nature, the status of a prisoner of war does not exist, and therefore it is unnecessary to deal with the legal status of persons who, even in this type of conflict, fulfill the defining characteristics of mercenarism. They are subject to the same scope of rights under common Article 3 of the Geneva Conventions and AP II as all civilians directly participating in hostilities. There is no doubt that even persons participating in mercenarism are obliged to observe and respect international humanitarian law, and in case of serious violations, they are subject to individual criminal responsibility.

The previous analysis led us to raise the question of whether PMSC employees can be considered mercenaries. It can be concluded that there is no single answer to this. In principle, PMSC employees must also cumulatively fulfil the conditions set out in Article 47 of AP I to be considered mercenaries. We consider it sufficiently proven that the set conditions demonstrate the direct impossibility of their fulfilment, or the possibility to successfully avoid their fulfilment. It seems appropriate to mention the often quoted opinion of Geoffrey Best: "any mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him!"[66] The fundamental fact is that the definitions of mercenary in individual instruments refer only to natural persons and thus exclude PMSCs, which are legal entities.

One of the key factors in determining the status of PMSC employees is the identity of their client. As already mentioned above, there is a possibility that, if certain conditions are met, the employees may be considered as members of the armed forces of the state that hired them and thereby avoid the fulfillment of the condition stated in Article 47(2)(e). With the current trend of downsizing of the armed forces and the policy of contracting services once exclusively provided directly by the armed forces, this situation seems highly unlikely, but not impossible. The condition of motivation for personal profit will probably be the easiest to fulfill, while the conditions in the

65. U.N. Secretary-General, *Report of the Mission Dispatched by the Secretary-General on the Situation of Prisoners of War in the Islamic Republic of Iran and Iraq*, ¶ 65, U.N. Doc. S/20147 (August 24, 1988).

66. GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT 328 n. 83 (1980).

letters (a) and (b) requiring that a person be specifically recruited to fight in an armed conflict and take direct part in hostilities is unlikely to be met by most persons. Most PMSCs operating in Iraq and Afghanistan were hired to provide logistics and "support" activities for the armed forces, which excludes conducting combat operations, but the situation on the ground was often different from the contract provisions.

The condition established in letter (d) that a mercenary is a person who is not a citizen of a party to the conflict or does not have a permanent residence in the territory controlled by a party to the conflict again tends to exclude a significant number of persons, since in practice it has caused (e.g. in Iraq and Afghanistan, all employees of American, British and Iraqi nationality) exclusion due to the participation of their home states in armed conflict.[67]

VIII. THE RELEVANCE OF THE MONTREUX DOCUMENT AS A SOFT LAW REGULATORY TOOL

In the case of PMSCs, their possible incorporation into the armed forces of the conflict party by a contract between a specific "company" and a government entity, which would ensure the transfer of the competence of a state body to a private entity, is also legally questionable, which alludes to the "inalienability" of traditional competences and prerogatives of state units. However, this approach would require a more complex analysis. A separate chapter is also the individual criminal liability of PMSC employees and variants of their eventual criminal prosecution before international judicial institutions, local courts, and the eventual possibility of compensation for damage caused by them in civil court proceedings before the courts of the countries in which the given companies are based (or according to the law of which they were established).

Of the recent attempts to regulate the activities of PMSCs, mostly only soft law initiatives for their regulation are of note, such as the initiative of the Montreux Document of government of the Swiss Confederation and the ICRC of 17 September 2008,[68] which forms a set of practice of states with PMSC regulation and recommends the interpretation of individual norms of international humanitarian law, the

67. Gillard, *supra* note 44, at 569.

68. *See* INT'L COMM. OF THE RED CROSS, THE MONTREUX DOCUMENT ON PERTINENT LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (2008) [hereinafter THE MONTREUX DOCUMENT].

adoption of national legislation in connection with the certification of individual companies, as well as with the criminal liability of legal entities.[69] The document, which can be acceded to by states and international organizations (EU, NATO), is followed by the ICoC Code of Conduct, which can be signed by individual PMSCs that agree to this initiative.[70] The definition of "private military and security companies" (PMSC) in the Montreux Document is rather vague (it is based on two example calculations) and includes not only private security companies and private military companies, but also companies carrying out commercial, service and training activities.[71] Any declaration that this document does not result in any new or changing international legal obligations for the state that accedes to it is significantly inconsistent with the nature of this document. At the very least, there is further specification, if not a direct change in the content of international law, especially customary obligations, when a state accedes. This document must also be understood as an expression of conviction about binding (*opinio iuris*) in the possible future context of assessing the emergence of customary obligations of international law.

The notion that possible support for the Montreux Document does not and will not have an impact on international legal obligations can be considered to be objectively incorrect. In connection with the expression of support for the Montreux Document, one can expect requests for information on measures taken by the state at the legislative level, or what position was taken with respect to recommended best practices. The Montreux Document is an international intergovernmental document that was created to promote compliance with the rules of international humanitarian law and international human rights law in cases where private military and security companies participate in some form of armed conflict. It is also the first attempt to define the obligations that international law sets for states in relation to PMSCs operating in armed conflict.

With regard to the time of application, the Montreux Document is not limited to the period during which the armed conflict is taking place. Most of its recommendations are contained in Part Two, which the document refers to as "best practices of states." These indicate peaceful situations where the presence of armed conflict is absent.[72]

69. *See id.* at 31.
70. *See* ICoC Report, *supra* note 55 at 3.
71. *See* THE MONTREUX DOCUMENT, *supra* note 68, at 7.
72. *See id.* at 16.

An example could be the establishment of a licensing regime for individual *PMSCs* within the framework of the national legal order. It also follows from the nature of these recommendations that some would be practically impossible to allocate in situations of armed conflict.

The very introduction of the Montreux Document states that this document is not legally binding.[73] The purpose of its adoption at the international level is to map the existing relevant provisions of international humanitarian law, and the obligations of the state arising from them. At the same time, the document formulates the best practices of states in the framework of PMSC operations during an armed conflict, and therefore does not create new international legal obligations or limits to existing international laws. The Montreux Document only states the legal framework that regulates the operation of such companies according to the norms of international law.

Despite the initial declarations about the legally non-binding nature of this document, it is necessary to consider its very nature. By acceding to the Montreux Document, a state would at the same time subscribe to the interpretation of the individual international law norms mentioned therein, which would also lead to the specification of individual customary international law obligations. In addition, accession would declare the state's belief of possible binding (*opinio iuris*) in the future context of the emergence of customary norms of international law.

The document also offers a definition of private military and security companies. In this regard, it reflects applied practices because the PSMC experience shows an unfavorable trend where it is impossible to distinguish whether the services they provide are of a military or security nature. At the same time, it follows from the nature of the definition that the type of company involved does not matter. The nature of the company's activities in a specific situation is important.

The definition of PMSC according to the Montreux Document includes security services, and private military companies, as well as companies carrying out commercial, service and training activities.[74]

From the point of view of international law, the Montreux Document is significant for several reasons. It can be seen as positive that based on the relationship, or the role of the state towards a specific private military or security company distinguishes three types of states:

73. *Id.*

74. *See id.* at 9, 38.

a) Contracting States – states who hire services from PMSCs
b) Territorial States – states in which PMSCs operate within their territorial jurisdiction
c) Home States – states in which PMSCs are established or registered to perform their activities, under the rules of their national law.[75]

The Montreux Document also emphasizes that "[c]ontracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities."[76] According to this part, contracting states can transfer the performance of certain activities to private entities. However, in cases of violation of international legal obligations, the state could not refer to the fact that it transferred the given activity to a private company (a similar rule is part of international law, according to which the state cannot refer to its national legal order in case of violation of its international legal obligations).

The document further emphasizes that the prerogatives of states are not unlimited. The freedom of states to transfer the performance of some of their activities is therefore limited, especially by the norms of international humanitarian law. For example, according to Article 39 of the Geneva Convention (III) relative to the Treatment of Prisoners of War: "[e]very prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power."[77] It follows from this that the establishment and supervision of a POW camp is the exclusive prerogative of states.

According to the document, states should also "determine which services may or may not be contracted out to PMSCs."[78]

In addition, the document does not neglect the obligation to respect the standards of humanitarian law. According to it "[c]ontracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract ."[79] Also, states must "take appropriate measures to prevent any violations of international humanitarian law."[80]

75. *See id.* 11–13.
76. THE MONTREUX DOCUMENT, *supra* note 68, at 11.
77. GC III, *supra* note 11, at art. 39.
78. THE MONTREUX DOCUMENT, *supra* note 68, at 16.
79. *Id.* at 11.
80. *Id.*

However, territorial states and home states also have an obligation to ensure compliance with the norms of international humanitarian law (in accordance with the definition of the Montreux Document). The responsibility of territorial states is all the stronger because they have the power, based on their territorial sovereignty, to impose legal restrictions on PMSCs through their national legislation.

The obligation to ensure compliance with international humanitarian law standards is also established in Article 1, common to all four Geneva Conventions, as well as in Article 1, AP I.[81] This rule is also understood as part of customary international law, and specifically in relation to persons acting at the behest of, or under the control or direction of, a state.

Among the best practices that the document mentions in this regard are, for example, the establishment of a selection and contracting procedure for PMSCs, as well as ensuring transparency in the performance of their activities and their supervision.[82]

However, the Montreux document also reflects the sensitive area of PMSC human rights violations, especially by their employees. This is because, while PMSCs and their employees are not bound by international human rights law, which applies only to states, under several provisions of the Montreux Document, states have an obligation to ensure the protection of individuals against the abuse of their rights by PMSCs.[83] States therefore have positive obligations to take all necessary measures to prevent the aforementioned abuse of rights.

This document further clarifies the possibilities of the legal status of PMSC employees according to international humanitarian law. In the past practice of states, it was often not easy to determine the legal status of these employees, especially whether they are civilians or combatants. It is often not clear-cut to distinguish PMSC employees based on the features characterizing a person as a combatant, despite the fact that one of the most important principles of international humanitarian law is precisely the distinction between civilian and military objects and persons. However, according to the provisions of the

81. *See* GC I, *supra* note 60, at art. 1; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 75 U.N.T.S.85 [hereinafter GC II]; *see also* GC III, *supra* note 16, at art. 39; GC IV, *supra* note 56, at art. 1; *see also* AP I, *supra* note 12, at art. 1.

82. *See* THE MONTREUX DOCUMENT, *supra* note 68, at 17–19.

83. *See id.* at 11–14.

document, the status of PMSC employees depends on the type of contract that established their activity and on the services they are authorized to perform.[84] At the same time, the issue of responsibility for their actions, including the responsibility of their superior, is also addressed.[85]

Within the framework of seventy-three practical recommendations, which are part of the second part of the document, then, from the point of view of three categories of states, it establishes three forms of control over PSMC activities, which include contract, license and supervision.[86] At the same time, the document recommends the adoption of national legislation, through which the certification of these companies would take place, as well as the criminal liability of these legal entities, registered according to the rules of national law.[87]

The significance of the Montreux Document therefore lies in several levels. On the one hand, this document provides a framework, thanks to which PMSCs would not operate in a legal vacuum, as is currently the case in many states where the relevant legislation is absent. At the same time, the document clarifies the circumstances under which a state can be responsible for PMSC actions, thus eliminating situations where states refuse to bear responsibility for PMSC actions through jurisdictional immunity, as was the case in the past. If a Status of Forces Agreement (SOFA) were to be concluded, which can establish exemption from criminal liability, according to the recommendations of the Montreux Document, states should formulate them in such a way as to prevent impunity.

PMSCs are currently a worldwide phenomenon. This is also evidenced by the fact that even the United Nations itself largely uses them for its own purposes, including peacekeeping operations. However, this trend of contracting activities primarily performed by the states themselves in the past to private entities cannot be stopped. The only long-term solution is to achieve their regulation at the national as well as international level. The Montreux Document is the first comprehensive summary of rules that seeks to reverse the lack of regulation of these companies. Even though it is not legally binding, the document itself emphasizes that states should critically evaluate the extent to which their legal system regulates the activities of these companies in their own interest. At the same time, however, it also calls on the states

84. *Id.* at 14, 36.
85. *Id.* at 15, 38.
86. *Id.* at 17–18.
87. *See* THE MONTREUX DOCUMENT, *supra* note 68, at 14.

to eliminate these identified shortcomings, precisely through the seventy-three recommendations that are part of the document. Despite its legally non-binding nature, this document can be considered a manifestation of a positive trend aimed at raising awareness of the legal aspects of PMSCs. However, as it is emphasized in the text of the Document, its purpose is in no way to legitimize the activity of PMSCs on the international scene. Nevertheless, the fact that PMSCs are part of armed conflicts must be addressed regardless of whether their activities are legitimate under international law or not.

CONCLUSION

The legal status of the members of the Armed Forces, members of the Resistance Forces as well as the civilians participating in the *leveé en masse* in the ongoing international armed conflict in Ukraine and the regulation of their status under international humanitarian law is clear. Their legal status is clear, although at various times challenged by the Russian Federation who considers the members of the International Legion of Ukraine consisting of the foreigners wishing to participate as well as already participating in resistance against unprovoked Russian aggression as mercenaries. This approach is contrary to the definition of the mercenaries according to the Article 47 AP I.

On the other hand, the legal status of the Wagner Group members is still questionable due to the fact that they are often labeled in the media as mercenaries regardless of the fact they do not meet the requirements stipulated in the Article 47 AP I. If we agree that they cannot be considered as mercenaries, can we conclude that they shall be considered as members of PMC and thus treated as civilians directly participating in the hostilities. According to the available information, they are most likely recruited from the prison facilities and their logistic support and supply is provided by the state bodies of the Russian Federation. These tasks are undoubtedly conducted with knowledge and consent of the Russian Federation and due to all these facts can we conclude that they are probably incorporated into the Armed Forces of the Russian Federation and thus they shall be treated as PoW after capture by an adverse party.

Despite the above mentioned, their possible combatant or PMC member status does not preclude the possibility of the individual international criminal responsibility for war crimes and other violations of the international humanitarian law committed in the area of operations.