



# RUSSIA, THE WAGNER GROUP, AND THE ISSUE OF ATTRIBUTION

by Jennifer Maddocks | Apr 28, 2021



*Editor's note: This week, the Modern War Institute and the Lieber Institute for Law and Land Warfare hosted a multi-disciplinary panel discussion on proxy warfare. Here, one of the panel participants, British Army Maj. Jennifer Maddocks, analyzes some of the legal issues surrounding the use of proxies.*

*Lieber's partner in hosting this event, MWI, has published [a companion article by Maj. Alex Deep and Yelena Biberman](#). They describe the risks of proxy warfare and delineate the considerations that should be taken into account in crafting U.S. strategy.*

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States' engagement in armed conflict via proxy is not a new phenomenon. Contemporary conflict, however, has seen a revival in States' use of private militia groups—or private military companies (PMCs)—to engage in combat on their behalf. Russia's employment of the [Wagner](#) Group to promote its interests in the conflicts



private entity that would increase the rule's effectiveness in holding States to account.

### Applicable Law

The law of State responsibility determines when States are legally responsible for acts—or failures to act—that violate their international legal obligations. For over five decades, the UN International Law Commission worked to identify these unwritten customary rules of international law. The resulting 2001 [Articles on State Responsibility](#) (ASR) are a comprehensive and authoritative restatement of the law in this area.

Yet, the Articles on State Responsibility fail to address the growing [complexity](#) of the international actors operating on the world stage. States bear responsibility only for conduct that is categorized as public, rather than private. But when States [outsource](#) traditionally public functions like warfighting to private entities, this increasingly blurs the [public-private divide](#).

For example, if members of the Wagner Group indiscriminately placed booby traps and minefields in civilian areas of Libya—as [claimed](#)—does Russia bear international responsibility for that violation of the law of armed conflict? Is Russia responsible for the Wagner Group's failure to properly distinguish between civilians and combatants? The answer is found in the international law rules of attribution.

### Rules of Attribution

Attribution links the human conduct that violates international law with the legal entity of the State. When this “human link” can be established, the State bears international responsibility for the unlawful conduct and certain legal consequences follow. Challenges arise, however, in determining how strong the necessary links between the State and the harmful conduct must be.

Those tensions are particularly evident during armed conflict. On the one hand, humanitarian considerations favor [less stringent](#) rules of attribution to ensure States can be [held accountable](#) when they act through proxies that violate international law. But on the other hand, States should bear responsibility only for conduct that can be properly categorized as their own. This is a pertinent concern in contemporary conflict, given that armed groups often act with considerable autonomy and with varying levels of State support. A delicate balance must therefore be struck. And achieving that balance requires each of the rules of attribution to operate effectively in the different factual scenarios to which they apply.

### Attribution Based on the State's domestic law

The first rule of attribution relates to the conduct of a State's own organs, meaning any entity that forms part of the State and acts on its behalf (Article 4 ASR). Thus, because Russia's domestic law classifies its armed forces as an organ of State, Russia is responsible when its military personnel violate the State's international legal obligations. Members of the Wagner Group, however, do not fall within this category. The PMC is a corporate entity. It is [registered outside](#) of Russia and the State's internal law does not designate it as an organ of State.



Often, States do not designate their proxies as organs of State or authorize them to act under their domestic law. But attribution can also be based upon the factual relationship between the State and the non-State actor. A proxy might qualify as a *de facto* State organ (meaning an entity that *in fact* forms part of the State and acts on its behalf) due to the strength of its broader connections with the State (Article 4 ASR). Alternatively, private conduct may be attributable to a State if it is performed on the State's instructions or under its direction or control (Article 8 ASR).

In both cases, attribution is founded upon the existence of a principal-agent relationship, in which the proxy is subordinate to the State and does its bidding. So, the question arises whether the Wagner Group's conduct is potentially attributable to Russia because, in essence, Moscow is controlling the group. To answer this, it is necessary to understand the law that underlies the control requirements.

#### *Dependence and Control*

The relevant law was articulated most clearly by the International Court of Justice in the [Bosnian Genocide](#) case. The Court stated that an entity becomes a *de facto* State organ only if it exhibits "complete dependence" on the State, and the State exerts "strict control" over the entity's entire range of activities (paras 391-94). This is an extremely stringent test. But if an entity qualifies as a *de facto* State organ, it is treated in the same way as a State organ that is designated as such under the State's domestic law (Article 4 ASR). This means that all its conduct (other than any performed in a private capacity) is attributable to the State. Therefore, only entities that, in fact, possess all the characteristics of a State organ—except for the domestic law designation—should qualify.

It is highly unlikely that the Wagner Group's conduct is attributable to Russia on this basis. Although the PMC may have been [created](#) by the Russian intelligence service, the GRU, and President Putin reportedly awarded medals to the group's members and buried its casualties with military honors, the requisite levels of dependence and control appear to be lacking from the relationship. For example, rather than relying exclusively on the Russian State, the Wagner Group also receives funding via mining and energy [contracts](#) with foreign governments.

And, while this could be a [front](#) to obscure Moscow's true level of involvement in the Wagner Group's operations, demonstrating that the PMC acts solely for Russia, with no real autonomy of its own, is likely to prove challenging.

#### *Effective Control*

The test of "effective control" (Article 8 ASR) is narrower in focus. This addresses the State's level of influence over the particular private behavior that violates the State's international legal obligations. Again, the test is very strict, requiring the State to exert a detailed or tactical level of control over the entity's conduct in potential violation of international law ([Bosnian Genocide](#) paras 396-406). If evidence of that high degree of control exists, only those acts that were performed under the State's control are attributable to the



### Attribution Based on a Delegation of Public Functions

There is, however, one suitable basis on which to attribute the Wagner Group's conduct to Russia that does not require proof of State control. Russia employs the group as a substitute for its armed forces to **promote its national interests** in conflicts across the globe. As such, Moscow has effectively authorized the PMC to perform public functions on the State's behalf. Attribution should, therefore, be founded on the rule relating to States' delegations of governmental authority to private entities (Article 5 ASR).

The presence or absence of State control over an entity's conduct is immaterial to the rule relating to States' outsourcing of public tasks. Relying on this basis of attribution therefore avoids many of the evidential hurdles associated with proving State control. Moreover, the rule may apply when a State delegates public functions to a private entity but fails to properly supervise its proxy's conduct and ensure its compliance with international law.

In practice, however, States frequently empower proxies to act on their behalf by informal means, outside their domestic law. This means that the "empowerment by law" criterion within the International Law Commission's formulation of Article 5 ASR is not satisfied. This is a key **limiting factor**, which reduces the rule's effectiveness in holding States to account. In the context of the Wagner Group's activities, PMCs remain **illegal** under Russia's domestic law. Therefore, notwithstanding the close ties between the entity and the State and the public nature of the functions the Wagner Group performs on Russia's behalf, Moscow effectively bypasses responsibility for any abuses the PMC commits.

The rule would better meet its object and purpose if it required only that the State empowers a non-State actor to exercise elements of its governmental authority. In these circumstances, "empowerment by law" would remain one way to prove that a State authorized its proxy to perform public functions on its behalf, but other forms of State authorization would also be of relevance. In the case of the Wagner Group, pertinent factors might include the group's **intimate association** with Russian military intelligence and the key role the PMC plays in support of Moscow's strategic aims in conflicts across the globe. While neither of these factors, alone, might be sufficient to conclude that Russia authorized the Wagner Group to engage in combat on its behalf, this more relaxed approach would enable the full facts to be taken into account when addressing the issue of attribution.

### Concluding Thoughts

The Wagner Group epitomizes Russia's use of entities outside the structure of the State to achieve its extraterritorial aims while avoiding international responsibility and maintaining plausible deniability. Russia, however, is not the only State that acts through private entities in this manner. Turkey uses militia groups to pursue its aims in **Syria, Libya, and Nagorno-Karabakh**. Likewise, **Iran** extends its sphere of influence through Hezbollah and other Shi'a militia groups, which act to fulfil Iran's strategic goals but are not empowered to do so in accordance with the State's domestic law.



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