FACULTY OF LAW
Lund University

Cajsa Knutsson

A legal minefield created by battlefield contractors –
The status, role and accountability of private security and military service companies in conflict and post-conflict areas

JUR091 Graduate Thesis

Graduate Thesis, Master of Laws programme
30 higher education credits

Supervisor: Radu Mares

Semester: Spring 2013

CONTENTS

SUMMARY 3

PREFACE 6

ABBREVIATIONS 7

1 INTRODUCTION 8

1.1 Subject and purpose 8
1.2 Methods and materials 8
1.3 Delimitations and structure 9

2 THE PRIVATE SECURITY AND MILITARY SERVICE INDUSTRY 11

2.1 Current debate and recent international regulatory initiatives 11
2.2 History, emergence and current scope of the private security and military service industry 15
2.2.1 Reasons behind the emergence of the industry 15
2.2.2 Current scope of the industry 16
2.2.3 Tasks and activities 17
2.2.4 Categorization of companies within the industry 18

3 STATUS OF PRIVATE SECURITY COMPANIES AND THEIR EMPLOYEES UNDER INTERNATIONAL LAW 20

3.1 Background and the prohibition of force 20
3.2 Mercenaries 20
3.2.1 Mercenaries in international humanitarian law 22
3.2.2 The mercenary conventions 23
3.2.3 Private security companies in Iraq and mercenarism 24
3.2.4 Conclusions regarding international law on mercenarism and private security companies 25
3.3 Status of private security company employees under international humanitarian law 26
3.3.1 Background 26
3.3.2 Short notes on international humanitarian law 27
3.3.3 International humanitarian law and the status of private security company employees 28
3.3.4 Private security company employees as civilians 34
3.4 The potential for a special status for private security company employees 40
3.5 Conclusions regarding the legal status of private security company employees 40

4 ACCOUNTABILITY 42

4.1 Background 42

4.2 The importance of contracts 43

4.3 General features of state responsibility 45

4.4 National and international jurisdiction 46

4.5 State responsibility for the actions of private security companies 47

4.5.1 State responsibility where company conduct is attributable to the state 47

4.5.2 State responsibility where company conduct is not attributable to the state 54

4.6 Reparations 63

4.6.1 Reparations where the conduct is attributable to the state 63

4.6.2 Reparations where the conduct is not attributable to the state 63

5 IN-DEPTH DISCUSSION AND CONCLUSIONS 68

5.1 Legal issues related to the status of private security company employees and their presence in theatre 68

5.2 Regulation of private security companies' presence in theatre 69

5.2.1 Material regulation of private security companies present in theatre 71

5.2.2 The exercise of jurisdiction, accountability and reparations 75

5.3 Conclusions, final reflections and a glance towards the future 77

BIBLIOGRAPHY 80

TABLE OF CASES 90

Summary

The private security and military industry has boomed since the early 1990s. Private security and military companies (hereinafter PSCs) perform a variety of tasks, some of which relate to activities regulated by international humanitarian law, human rights law and international criminal law. The purposes of this thesis are (1) to clarify the status of PSCs and their employees under international law, (2) to examine the existing possibilities to hold PSCs, their employees and states accountable for abuses of human rights and humanitarian law involving PSCs, and (3) to analyze the potential of various legal measures with at view to improving existing deficiencies.

Most PSC employees are civilians according to international humanitarian law, which means they are not allowed to participate directly in combat. The involvement of PSCs in hostilities in conflict and post-conflict areas and in other precarious situations has raised a number of legal questions and has prompted the international community to take regulatory steps. Recent international initiatives include the Montreux Document on state responsibility in relation to PSCs, an international code of conduct and a draft UN convention.

One central issue is how to ensure accountability for abuses of human rights or humanitarian law involving PSCs. Individual PSC employees may be held accountable for human rights abuses in accordance with international criminal law, and for violations of humanitarian law. It is unlikely that PSCs *as entities* can be held accountable under international law for violations of human rights or humanitarian law. State responsibility under international law normally requires that the harmful conduct can be attributed to the state. This is likely to be the case only with a state contracting the particular PSC. States may also under certain conditions bear responsibility for omitting to act on harmful conduct of a PSC.

Individual PSC employees found guilty to a crime according to international criminal law are obliged to make reparation to victims. Since PSCs *as entities* cannot be held accountable under international law for violations of human rights or humanitarian law, they are not obliged to make reparations under this set of rules. States are obliged to make reparation for PSCs' violations of human rights or of humanitarian law, if the violations are attributable to the state or if the state has failed to act in accordance with its due diligence obligations. However, it is uncertain whether *individuals* can claim personal reparation from states for violations of humanitarian law.
Legal gaps in international law do exist with regard to PSCs, but there is no "vacuum of law". The most pressing issues are to clarify how international law applies to these companies and to ensure accountability. The main causes behind the current lack of accountability for crimes involving PSCs are of a jurisdictional / procedural, economic or practical nature, coupled with a lack of political will. Gaps in material regulation exist mainly when it comes to holding companies *as entities* accountable, and with regard to crimes other than grave breaches of human rights and humanitarian law. There is need for a number of regulatory and other legal steps at both international and national levels.

The PSC industry is exploring new fields of engagement, including peace support operations. The suitability of such a development is questioned.

Sammanfattning

Den privata säkerhets- och militärbranschen (nedan PSC-branschen) har fått ett starkt uppsving sedan början av 1990-talet. Företag inom denna bransch utför ett antal tjänster, av vilka vissa berör aktiviteter som regleras av internationell humanitär rätt, mänskliga rättigheter och internationell straffrätt. Syftet med denna uppsats är (1) att klargöra vilken status företag och deras anställda inom säkerhets- och militärbranschen har enligt internationell rätt, (2) att undersöka existerande möjligheter att hålla företagen, deras anställda och stater ansvariga för kränkningar av mänskliga rättigheter och humanitär rätt, samt (3) att analysera vilken potential olika rättsliga åtgärder har när det gäller att avhjälpa existerande brister ifråga om reglering och ansvarsutkrävande.

Den stora majoriteten anställda inom PSC-branschen är civila enligt internationell humanitär rätt. Detta innebär att de inte har rätt att delta direkt i strid. Säkerhets- och militärföretags inblandning i stridshandlingar i konflikt- och post-konfliktområden och i andra vanskliga situationer har gett upphov till flera rättsliga frågeställningar och även föranlett nya internationella regleringar. Bland dessa initiativ märks särskilt Montreuxdokumentet rörande staters ansvar i förhållande till privata säkerhetsföretag, en internationell uppförandekod samt ett utkast till en FN-konvention.

En central fråga är att säkerställa ansvarsutkrävande för sådana kränkningar av mänskliga rättigheter och humanitär rätt som involverar företag inom PSC-branschen. Enskilda anställda kan hållas ansvariga för kränkningar av mänskliga rättigheter i enlighet med internationell straffrätt eller för kränkningar av internationell humanitär rätt. Det är däremot osannolikt att företag som sådana kan hållas ansvariga enligt internationell rätt för kränkningar av mänskliga rättigheter eller humanitär rätt. En stat bär normalt sett ansvar för en skadlig handling enligt internationell rätt endast om handlingen ifråga kan tillskrivas staten. Ifråga om säkerhets- och militärföretags handlingar är det sannolikt att sådant statsansvar uppkommer enbart för en stat som har kontrakterat företaget ifråga. Stater kan även, under vissa förutsättningar, bära ansvar för underlåtenhet att agera när privata subjekt, däribland företag, handlar på ett skadligt sätt.

Enskilda anställda vid säkerhets- och militärföretag som falls för brott i enlighet med internationell straffrätt är skyldiga att kompensera brottsoffer. Eftersom företag som sådana inte kan hållas ansvariga enligt internationell rätt för kränkningar av mänskliga rättigheter eller humanitär rätt är företag inte heller skyldiga att kompensera offer enligt nyss nämnda regler. En stat är skyldig att kompensera offer för ett företags kränkningar av mänskliga rättigheter eller humanitär rätt om kränkningarna kan tillskrivas staten eller om staten har underlåtit att agera med vederbörlig aktsamhet, i enlighet med principen om ”due diligence”. Det är dock osäkert om enskilda individer kan kräva personlig kompensation från en stat för kränkning av humanitärrättsliga regler.

Det finns luckor i den internationella regleringen av säkerhets- och militärföretag, men det råder inte något rättsligt vakuum på området. De mest akuta behoven är att klargöra hur internationell rätt är tillämplig när det gäller dessa säkerhets- och militärföretags aktiviteter samt att säkerställa att ansvar kan utkrävas för rättighetskränkningar och brott mot internationell humanitär rätt. Huvudorsakerna till den nuvarande bristen på ansvarsutkrävande vid brott begångna av anställda vid säkerhets- och militärföretag i konflikt

och post-konfliktområden är brister i staters utövande av jurisdiktion, samt omständigheter av ekonomisk eller praktisk natur, blandat med en brist på politisk vilja.

Luckor i den materiella regleringen på internationell nivå existerar främst när det gäller att hålla företag som sådana ansvariga för kränkningar av internationell rätt, samt vad gäller ansvarsutkrävande för andra kränkningar av mänskliga rättigheter och humanitär rätt än de grövsta internationella brotten. Sammantaget finns det behov av ett antal regleringar och andra rättsliga åtgärder på såväl internationell som nationell nivå.

PSC-branschen utforskar nya aktivitetsområden, inklusive fredsstödjande insatser. Lämpligheten av sådant engagemang från företagens sida ifrågasätts i uppsatsen.

Preface

“Frankly, I’d like to see the government get out of war altogether and leave the whole field to private industry.”
(Major Milo Minderbinder in “CATCH-22” by Joseph Heller, 1955, p. 258, Simon & Schuster, reprint June 1990).

When putting, after a long process, the finishing touches to this thesis, my thoughts go to the people who have meant the most to me these past years: My mother, for putting up with me and staying beside me; my sister, who overtook me years ago…; my little ones, without whom all true meaning would be lost; my dearest friends Eleonor, Anna, Mia and Tanja – you have been there in good and bad and I appreciate you tremendously!; my cousin Jenny with family, with whom I have relived happy memories; et l’inspecteur Quijote, qui fait sourire le monde.

And, of course, there would be no thesis without the insight, competence and support of my supervisor, who has shown the most remarkable patience… Thank you Radu!

Abbreviations

ACCORD – African Centre for the Constructive Resolution of Disputes (South Africa)
ATCA – Alien Tort Statute / Alien Tort Claims Act
AU – African Union
BASIC – British American Security Information Council
BBC – British Broadcasting Corporation
CACI – Consolidated Analysis Center, Incorporated (private company)
CIA – Central Intelligence Agency
CPA – Coalition Provisional Authority [In Iraq]
CRS – Congressional Research Service (USA)
CRS – Congressional Research Service (USA)
DCAF – Geneva Centre for the Democratic Control of Armed Forces
DoD – Department of Defense (USA)
DRC – Democratic Republic of the Congo
ECHR – European Court of Human Rights
EO – Executive Outcomes (private company)
EU – European Union
FARC – Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo
HRC – Human Rights Council (United Nations organ)
ICC – International Criminal Court
ICCPR – International Covenant on Civil and Political Rights
ICJ – International Court of Justice
ICRC – International Committee of the Red Cross
ICTR – International Criminal Tribunal for Rwanda
IDIQ – infinite-delivery, infinite-quantity [refers to contracts]
IHL – International Humanitarian Law
ILC – International Law Commission
IPOA – International Peace Operations Association
ISS –Institute for Security Studies (South Africa)
MNF-I – Multi-National Forces in Iraq
NGO – Non-Governmental Organisation
OAU – Organization of African Unity
OECD – Organisation for Economic Co-operation and Development
PMC – Private Military Company
PMSC – Private Military and Security Company
POW – prisoner of war
PSC – Private Security Company
ROE – rules of engagement
SIPRI – Stockholm International Peace Research Institute
UCMJ – Uniform Code of Military Justice (USA)
UK – United Kingdom
UN – United Nations
UNGA – United Nations General Assembly
UNSC – United Nations Security Council
UNTS – United Nations Treaty Series
USA / US – United States of America
WG – Working Group

1 Introduction

1.1 Subject and purpose

Over the past fifteen years, a new category of armed non-state actors has stepped forward in the context of conflict situations and unstable states: the private security and military service industry. Although the rise of this industry significantly affects the handling of conflicts, including the waging of war, the legal side has not yet followed suit. Thus, the legal situation related to private security provision is at present unclear in several respects.

The first aim of this study is to clarify the legal status of private security companies and their employees under international law. Thereafter the existing possibilities to hold these companies and their employees accountable for violations of international humanitarian law and human rights law will be explored. Is the assertion that "these [private military companies] act in a void, virtually free from legal constraints"[1] correct? This issue is integrated with an analysis of the responsibilities of states for the actions of private security and military service firms and their employees. Finally, since the industry is still largely unregulated, the study will present some options for regulation, improved accountability and oversight.

1.2 Methods and materials

The intention with this study, as presented earlier, has led me to choose a combination of a descriptive and an analytical method. The study will begin with a short descriptive introduction to the private security and military service industry, in order to provide the reader with basic knowledge of the industry. Subsequent chapters are of a more analytical character.

The materials used, including facts on the PSC industry, are collected mainly from articles and legal doctrine. The examination of state responsibility is based on the ILC Draft Articles on Responsibility of States and judicial decisions, taking into account recent international initiatives aiming at clarifying state responsibilities in relation to PSCs in particular (notably the so-called Montreux Document[2]). The chapter on possible future regulation will, beside legal articles and official reports, draw from recent regulatory initiatives, such as the just mentioned Montreux Document, the UN-based Draft of a possible Convention on Private

[1] Carney, Heather, Prosecuting the lawless: Human rights abuses and private military firms, George Washington Law Review, Vol. 74 (2006), p. 323.

[2] The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008, last retrieved on 4 September 2011 at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf . The text of the Montreux Document is annexed to UN Doc. A/63/467 – S/2008/636, 6 October 2008 (Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General).

Military and Security Companies[3], and the International Code of Conduct for Private Security Service Providers[4].

1.3 Delimitations and structure

I will start out in chapter 2 by describing the emergence and current scope of the private security and military service industry.

Chapter 3 will be devoted to clarifying the legal status of PSCs and their employees under international law. There seems to be some confusion with regard to their status; governments generally refer to PSC employees as “civilian contractors”, thus implying that they are not perceived as combatants. At the same time, certain employees of PSCs involved in the Abu Ghraib incidents in Iraq have claimed combatant status in an attempt to avoid civilian law suits in the USA[5]. Certain representatives of the international community assert that more or less all PSCs are groupings of criminal mercenaries[6], while many academic commentators have considered and rejected that view[7]. Since there are different ways of attributing PSC conduct to a state, depending on the legal status of the PSC and its employees under international law, the status issue must be determined before moving on to the issue of state responsibility and other issues of accountability. The status must also be clear and widely accepted in order for the international community and states to effectively regulate the PSC industry. Clarifying these companies’ and their employees’ status will establish what their employees are allowed to do in conflict situations. My examination will include the potential application of international laws on mercenaries, followed by a discussion on the status of PSC employees under international humanitarian law.

---

[3] Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, UN Doc. A/HRC/WG.10/1/2, 13 May 2011 (hereinafter Draft Convention on Private Military and Security Companies).

[4] International Code of Conduct for Private Security Service Providers, Geneva, 9 November 2010.

[5] The so-called “Taguba report” on the treatment of Abu Ghraib prisoners in Iraq (Major General Antonio M. Taguba, Article 15-6 investigation of the 800th military police brigade, 4 June 2004, available at http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html#ThR1.13, last retrieved on 5 May 2012). See also the US court cases Ibrahim et. al. v. Titan Corporation et al, United States District Court for the District of Columbia, Civil Action No. 04-1248 (JR), 391 F. Supp. 2d 10, 12 August 2005; and Saleh et al v. Titan Corporation et al, United States District Court for the District of Columbia, Civil Action No. 05-1165 (JR), case 361 F. Supp.2d. 1152 (2005), respectively Saleh et al v. Titan Corporation et al, United States District Court for the Southern District of California, Case No. 04 CV 1143 R (NLS). Updates on the cases’ current status can be found e.g. at the website of the NGO Center for Constitutional rights, http://ccrjustice.org/ . For more on these cases, see further below, chapter 4.6.2.4.

[6] This was the view of the then UN Special Rapporteur on Mercenaries (more accurately the Special Rapporteur on use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination), Enrique B. Ballesteros, see e.g. his Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc. E/CN.4/1997/24, 20 February 1997 [hereinafter the UN Special Rapporteur on Mercenaries Report], paras. 92-111, last retrieved on 20 September 2010 at http://www.globalsecurity.org/military/library/report/1997/e-cn-4-1997-24.htm .

[7] See e.g. Cameron, Lindsey, Private military companies: their status under international humanitarian law and its impact on their regulation, International Review of the Red Cross, Volume 88, Number 863, September 2006, p. 577, last retrieved on 5 January 2011 at http://www.icrc.org/eng/assets/files/other/irrc_863_cameron.pdf ; Swiss Federal Council/Conseil fédéral suisse, Rapport du Conseil fédéral sur les entreprises de sécurité et les entreprises militaries privées, 2 December 2005, p. 45, last retrieved on 23 September 2010 at http://www.admin.ch/ch/f/ff/2006/631.pdf ; cp. also with Zarate, Juan Carlos, The emergence of a new dog of war: Private international security companies, international law, and the new World Disorder, Stanford Journal of International Law, Vol. 34, 1998, p. 117 onwards.

Chapter 4 is focusing on the issue of accountability, largely based on the ILC Draft Articles on Responsibility of States together with the recent so-called Montreux Document (2008), which among other things clarifies state responsibilities in relation to PSCs in particular. After a short outline of relevant regulations, I will examine the responsibilities of states contracting or supporting PSCs (contracting states), of states on whose territory PSCs are based / incorporated (home states), of states on whose territory PSC activities are carried out (host states), and of third states. The chapter includes a number of judicial decisions illustrating instances where the conduct of private actors has been attributed to states under international law. The chapter also examines the possibilities of holding PSCs as entities and their employees as individuals accountable for violations of human rights and humanitarian law. I will refer to a selection of international and national legal instruments and national and international judicial decisions, and touch upon the issue of jurisdiction.

Chapter 5 contains a final discussion and conclusions to be drawn from the foregoing analysis. The chapter glances forward and contemplates the "to be or not to be" of a new regulatory regime related to the PSC industry and which forms such a regime might or should take. It will also present some questions and issues, which might serve as "food for thought" and subject of further analyses.

It is not within the scope of this thesis to discuss policy issues or the "to be or not to be" of the PSC industry. Nor will this thesis treat issues relating to the human rights of PSC employees in their capacity of workers.

The 2003 invasion and occupation of Iraq have fuelled the debate on the role, status, accountability and regulation of PSCs and their employees. Never before have states parties to a conflict relied as heavily on private security contractors as in Iraq and the situation in the country would most certainly be different had it not been for the presence of these companies. I have therefore, where relevant, chosen the example of Iraq to illustrate various situations and legal issues.

A variety of terms are being used in the debate and in international legal instruments, to denote companies within the private security and military service industry: "private security companies", "private military companies", combinations of these two terms, "private security service providers", "private military firms", or simply "contractors" (the latter mainly used by the mainstream media). For the sake of simplicity, I will use the term private security company (abbreviated PSC) with regard to all companies within the private security and military service industry.

2 The private security and military service industry

2.1 Current debate and recent international regulatory initiatives

The initial debate on private security and military service companies was fuelled by two cases of corporate engagement in conflict areas: that of the South African company Executive Outcomes (EO) in Angola and Sierra Leone in 1995-1997 and that of Sandline International (registered in the Bahamas with offices in London and Washington, DC) in Sierra Leone in 1997-1998. Contracted by national governments to provide direct military assistance and participate in combat against rebel forces, these companies were widely viewed more or less as mercenaries, albeit in new shapes[8]. Both Executive Outcomes and Sandline International have now dissolved. Although today's PSCs are typically not hired by national governments to wage war or to participate in direct combat, some companies have been involved in dubious practices, such as assisting in coups d'état[9]. The US Central Intelligence Agency (CIA) is also known to hire private firms for engagement in its "war on drugs" in South America, firms that at times end up fighting the FARC in Colombia[10]. These cases represent the perhaps most controversial examples of PSC engagements. As we shall see, the PSC industry is multifaceted and complex, performing a variety of tasks globally, in many different situations and on behalf of a variety of contract partners, including states, international organisations, NGOs, humanitarian organisations and private companies.

As was mentioned earlier, the debate on the role, status, accountability and regulation of PSCs and their employees was fuelled by the 2003 invasion and subsequent occupation of Iraq by US and coalition forces. Two incidents in particular led to reactions. First, the killing and subsequent mutilation of four employees of the private security company Blackwater Security Consulting (later renamed XE Services) in Fallujah in March 2004, followed by a US military assault on the city, drew attention to the relationship between the national military and security contractors and made many question the accuracy of calling them "civilian" contractors. Second, the involvement of employees of the private security company

[8] See e.g. Cilliers, Jakkie and Mason, Peggy (editors), Peace, profit or plunder? The Privatisation of security on war-torn African societies (South African Institute for Security Studies, ISS, Johannesburg, 1999), available at . Its fifth chapter is entirely devoted to Executive Outcomes. See also Holmqvist, Caroline, Private Security Companies, The case for regulation, SIPRI Policy paper No. 9, SIPRI – Stockholm International Peace Research Institute, January 2005, last retrieved on 20 September 2010 at http://www.sipri.org/contents/conflict/SIPRI_PolicyPaper9.pdf , pp. 2-3, with further references. Executive Outcomes was primarily composed of South African special forces from the former apartheid regime and its human rights and humanitarian law record is questionable, see Singer, Peter W., Corporate Warriors: The rise of the Privatized Military Industry (Cornell University Press, Ithaca, New York, 2003), pp. 9- onwards.

[9] Attention to this issue and calls for international regulation of such companies was renewed after the trial against Mark Thatcher for planning and organizing a coup in Equatorial Guinea in collaboration with a private military company, see Cameron, ibid. footnote 7, p. 577.

[10] See the annual report of the UN Special Rapporteur on Mercenaries, Enrique B. Ballesteros, UN Doc. E/CN.4/2004/15 (Question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination), 24 December 2003, paras. 26 and 32, last retrieved on 20 September 2010 at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/173/13/PDF/G0317313.pdf?OpenElement .

CACI International Inc. in the interrogation and torture of interns at the Abu Ghraib detention facility led to discussions about the qualifications of such contractors, as well as about their accountability for any human rights abuses they commit.[11]

The use of armed civilians to carry out security tasks formerly performed by national militaries has raised a number of questions regarding transparency, accountability and legal issues. The apparent influence of the PSC industry, its involvement in highly dangerous activities, its access to an important logistical apparatus (including small arms and light weapons, as well as heavy war material, such as fighter airplanes, artillery and armoured tanks), and the creation of a situation of diffused responsibility and lack of accountability through contractual and insurance layers and shells have raised numerous concerns. Governments are obliged to uphold discipline within their armed forces. These forces are supposed to be held accountable through the political process, while individual soldiers, commanders and political decision-makers can be held criminally liable in domestic courts and the International Criminal Court (hereinafter the ICC). Like combatants, PSC employees may have the right to carry arms, they operate in areas of conflict, and they sometimes wear uniforms. Unlike combatants, however, PSC's "chain of command" and control structures may be unclear. PSCs are subject to the terms of their contract, but as a rule not to any military legal disciplinary code[12]. In addition, they may be untrained in carrying out tasks in accordance with international humanitarian law. There is also a general lack of formal rules of engagement for PSCs employees[13]. As a result, the basic principles of accountability that are supposed to accompany governments' control of violence are not functioning.

---

[11] Both incidents have been highlighted by the UN Special Rapporteur on Mercenaries, Ms Shaista Shameem, in her annual report (Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination), UN Doc. E/CN.4/2005/14, 8 December 2004, para. 50, last retrieved on 20 September 2010 at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/167/92/PDF/G0416792.pdf?OpenElement . For discussions on these two incidents, see e.g. Bina, Mark, Private military contractor liability and accountability after Abu Ghraib, John Marshall Law Review, Vol. 38 (2005), p. 1237; Carney, Heather, Prosecuting the lawless: Human rights abuses and private military firms, George Washington Law Review, Vol. 74 (2006), p. 317; Dickinson, Laura, Government for hire: Privatizing foreign affairs and the problem of accountability under international law, William and Mary Law Review, Vol 45 (2005), p.135. The two official US reports on the Abu Ghraib case (the Fay report and the Taguba report) both recommended referral to the US Department of Justice for potential criminal prosecution, see Major General George R. Fay, Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 130-34, 23 August 2004, available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf , last retrieved on 5 May 2012. Incidents allegedly involving civilian contractors includes rape (Incident 22), use of "unauthorized stress positions" (Incident 24), use of dogs to aggress detainees (Incidents 25 and 30), and humiliation (Incident 33). For MG Fay's findings regarding the investigated civilians, see the report, pp. 131-134. For the Taguba Report see above, footnote 5.

[12] There are a couple of exceptions; in accordance with the FY 2007 Military Authorization Act, US military contractors operating in combat zones are subject to the US Uniform Code of Military Justice (UCMJ), provided that they are serving with or accompanying the US armed forces (UCMJ, article 2, para. a (10). Also the UK has legislation in place, according to which employees of British PSCs, when serving with the armed forces, are subject to the Service Discipline Acts and Service Regulations.

[13] Some US-based PSCs performing security functions in Iraq have use-of-force rules in their contracts and train their personnel on how to follow them. However, these rules are often not vetted by lawyers of the US Department of Defense, nor are they designed to reflect the levels of force used by the US armed forces; see Schreier, Fred and Caparini, Marina, Privatising Security: Law, practice and governance of private military and security companies, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 6, Geneva, March 2005, pp. 59, available at http://www.smallarmssurvey.org/files/portal/issueareas/security/security_pdf/2005_Schreier_Caparini.pdf , last retrieved on 1 October 2010.

There are, as we shall see, clear indications that many PSCs are not competent to work in conflict areas and that this may result in human rights violations and violations of international humanitarian law. Moreover, since PSCs are accountable to shareholders rather than to voters, ways must be found to make PSCs contribute to the establishment of democratic and accountable security institutions. The capacity of individual states to manage the use of private companies in accordance with good governance may be challenged also in stable democracies. In institutionally weak or unstable states, it is all the more challenging. Recurring security incidents and human rights abuses involving PSCs suggest that, because of the highly specific and dangerous activities of many PSCs, self-regulation is not enough.

The said concerns contributed to the creation, in 2005, of a working group under the then United Nations Commission on Human Rights (now the UN Human Rights Council). The mandate of the Working Group was to study, identify and monitor emerging issues, manifestations and trends regarding mercenaries and activities of private military and security companies and their impact on human rights, in particularly on the right of peoples to self-determination (hereinafter the UN Working Group on mercenaries). The UN Working Group on mercenaries was also requested to elaborate and present concrete proposals on possible new standards, general guidelines or basic principles encouraging the further protection of human rights.[14] Members of the UN Working Group on mercenaries and others have concluded that although norms of international humanitarian and human rights law apply in some situations involving PSCs, theses norms are rarely implemented in practice. In that sense, and in situations not covered by humanitarian law, in particular, there is said to be legal gaps in relation to PSC activities. It has also been pointed out that there is a lack of common standards for the registration and licensing of PSCs, as well as for the vetting and training of their staff and safekeeping of weapons.[15]

The said concerns led the Swiss Government, together with the International Committee of the Red Cross (hereinafter the ICRC), to launch the so-called Swiss Initiative. In September 2008 the Montreux Document was adopted by 17 governments[16]. The document, which is legally non-binding in itself, basically reiterates and clarifies existing international law relevant to state responsibility in relation to PSC activities. It also contains a number of good practices for governments and PSCs. Since its adoption, another 19 governments have expressed support for the document (May 2011).

As a complementary instrument, an International Code of Conduct for Private Security Providers was signed by 58 companies in November 2010[17]. As of August 2011 a total of 166 companies have signed the code. The code includes material rules on human rights and international law relevant to PSCs, rules on the incorporation of the code in company policies, and grievance mechanisms, among other topics. In short, companies signing the code pledge to restrain their use of force, respect human rights, vet and train their personnel and report breaches of the code. Perhaps most importantly, the code calls for the

---

[14] UN Commission on Human Rights, Human Rights resolution 2005/2: The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 7 April 2005, E/CN.4/RES/2005/2, last retrieved 15 September 2011 at http://www.unhcr.org/refworld/docid/45377c39c.html .

[15] See e.g. del Prado, José L. Gómez (member of the UN Working Group on Mercenaries), Why private military and security companies should be regulated, 3 September 2010, available at the website of Business & Human Rights Resource Centre, http://www.reports-and-materials.org/Gomez-del-Prado-article-on-regulation-of-private-and-military-firms-3-Sep-2010.pdf , last retrieved on 26 September 2011.

[16] Ibid. footnote 2.

[17] Ibid. footnote 4.

establishment of independent, external oversight and accountability mechanisms. For this purpose, a Steering Committee was set up in November 2010, with equal representation of companies, governments and civil society. Its task is to conduct consultations throughout 2011, after which initial arrangements for the said mechanism is due to be in place in Spring 2012. The mechanism is supposed to include both objective and measurable standards and institutions able to oversee their practical implementation.[18]

Parallel to the Swiss Initiative, an open-ended working group under the auspices of the UN Human Rights Council has, in May 2011, presented the latest version of a Draft Convention on Private Military and Security Companies, building on earlier drafts elaborated by the above-mentioned UN Working Group on mercenaries[19]. The main aim of the convention is to establish a more homogenous standard for international PSCs, including a regime of licensing, regulation and oversight. In particular, the convention seeks to prevent any outsourcing or privatisation of tasks involving the use of force, in the first hand, but also of a number of other functions and tasks related to security and military activities. State delegations favouring a new convention argue that existing instruments for the regulation of PSCs, including the Montreux Document and the International Code of Conduct, do not adequately address the complexity of the problems associated with PSC activities. State representatives point out that those instruments do not establish proper mechanisms for accountability and for effective remedies for victims. Also the need to establish proper jurisdiction has been pointed out as a reason behind the draft convention.[20]

It should be noted that a majority of western states are not supporting the drafting of a new convention on the subject of PSCs. EU states, as well as the USA, voted against establishing the open-ended Working Group tasked with drafting the convention[21]. African and Latin American states are among those most favourable to a new convention. The EU and the USA instead favour self-regulation and clarification and implementation of existing international law relevant to PSCs, in line with the Swiss Initiative, including the Montreux Document and the International Code of Conduct. Delegations voting against the establishment of the open-ended working group pointed out that a considerable amount of international law in fact already is applicable to the activities of PSCs and their relations with governments: international human rights law, international humanitarian law, international criminal law, and public international law on the use of force. Therefore, those delegations considered that the adoption of a new convention was premature and that further discussion was needed on the potential need for new regulations and, if so, which form such regulation should take. It was also pointed out that there is no state consensus on the material principles incorporated in the draft convention and that some principles seemingly run counter to existing legal principles or principles that are on the agenda of other fora, notably the International Law

[18] For more information on the International Code of Conduct and related documents, see e.g. the website of Business & Human Rights Resource Centre at http://www.business-humanrights.org .

[19] For the May 2011 version of the Draft Convention, see ibid., footnote 3. For the earlier version, see UN Doc. A/HRC/15/25, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 2 July 2010, including a Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council.

[20] Summary of the first session of the open-ended working group, UN Doc. A/HRC/WG.10/1/CRP.2, 5 August 2011.

[21] See the Human Rights Council resolution to establish the working group, UN Doc. A/HRC/RES/15/26, 7 October 2010.

Commission.[22] I will return to the strengths and weaknesses of these three instruments in a later chapter.

There are also other international initiatives relevant to PSCs, for example the recommendation of the Parliamentary Assembly of the Council of Europe to the Committee of Ministers to draw up a Council of Europe instrument regulating state – PSC relations and laying down minimum standards for PSC activities[23]. Reference may also be made to the more general "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", by UN Special Representative to the Secretary-General, John Ruggie[24].

2.2 History, emergence and current scope of the private security and military service industry

The traditional concept of the modern nation state (according to sociologist Max Weber) implies that the state has monopoly on the legitimate use of force. Interestingly, historically this is an exception. In fact, up until the birth of the modern nation state, armies have been dependent on contracted forces. This was the case with ancient Chinese, Greek and Roman armies, as well as with Italian city states during the 13th century and onwards and most of the European armies during the Thirty years' War (1618-48).[25] Contractors have also been a part of American military tradition ever since the American Revolutionary War (1775-83)[26] and the powerful private commercial societies in India and South-East Asia during the 16th century depended on their own, private military. While these private military organizations were quite exceptional, mercenarism[27] was more widely spread up until the 20th century.

2.2.1 Reasons behind the emergence of the industry

A variety of reasons have been presented to explain the boom of the private security and military service industry since the early 1990s. Explanations are related to both demand-side and supply-side factors. Three dynamic forces are most commonly put forward:

[22] UN Doc. A/HRC/WG.10/1/CRP.2, 5 August 2011, ibid. footnote 20, in particular sections 41-43.
[23] See the Council of Europe, Parliamentary Assembly, Documents No. 11787, 22 December 2008 (Report by the Political Affairs Committee), respectively No. 11801, 27 January 2009 (Opinion of the Committee on Legal Affairs and Human Rights), both on the subject "Private military and security firms and the erosion of the state monopoly on the use of force"), last retrieved on 7 October 2011 at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11787.htm, respectively at http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc09/edoc11801.htm .
[24] See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (including Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework), UN Doc. A/HRC/17/31, 21 March 2011.
[25] Singer, Peter W., Corporate Warriors, ibid. footnote 8, pp. 19- onwards. See also Shearer, David, Private armies and Military intervention, International Institute for Strategic Studies, Adelphi Paper 316, (Oxford University Press, Oxford 1998).
[26] Worden, Leon, Downsizing and outsourcing, we've sprung Pandora's box, The Signal, 27 June 2004, last retrieved 23 September 2010 at http://www.scvhistory.com/scvhistory/signal/iraq/sg062704.htm .
[27] There are several definitions of mercenaries and mercenarism, but traditionally a mercenary is a person who offers his or her services as a combatant, according to contract and against remuneration, to a foreign power; I will return to this issue below.

(A) The end of the Cold War brought about dramatic changes in international relations, socio-political and economic systems and in international law. Downsizing of regular armies throughout the world followed, making large numbers of trained military personnel available for recruitment. (B) At the same time, increasing global instability led to a need for more troops. The nature of warfare in the developing world changed and became more chaotic and less professional, involving warlords and the use of child soldiers, while Western powers became more reluctant to intervene. (C) Adding to the above the general trend toward privatization and outsourcing of government functions around the world opened up for private actors to move in and take over security and military tasks traditionally performed by the state.[28]

Also the fact that militaries have grown increasingly reliant on advanced technology, often maintained and operated by private firms has been mentioned as an explanation[29]. The industry itself points to cost-effectiveness, fast reaction cycles and lack of will or ability of governments to send their own troops into peace operations as the main reasons for its growth[30].

2.2.2 Current scope of the industry

How the term "private security contractor" (or other terms used) is defined affects how one counts the number of companies; for example, certain data refer to armed security personnel only, while other data include also unarmed personnel. This, together with the fact that numbers fluctuate, makes it difficult to gain accurate and current data as to the number of PSCs and their employees active worldwide. A majority of PSCs are based in the United States and the United Kingdom. South Africa and Australia are also home states to a large number of PSCs. At the same time, many PSCs operating in conflict and post-conflict areas, such as Iraq or Afghanistan, are local, and both international and local PSCs employ a significant number of local nationals, as opposed to foreigners. Taking the example of Iraq, as of December 2010, there were 100 PSCs registered and licensed (or in the process of renewing their license) with the Iraqi Ministry of Interior. Of these, 72 were Iraqi companies and 28 foreign companies.[31] Worldwide, according to earlier industry projections, revenues from the global international security market were estimated to be over $200 billion in 2010[32].

Long before the start of the Iraqi conflict, the USA and other states used unarmed private contractors to carry out support functions in military operations, such as providing food and laundry services. When the private security industry boomed in the 1990s and established

[28] See e.g. Holmqvist, ibid., footnote 8; see also Singer, Peter W., Outsourcing war, Foreign Affairs, March-April 2005, last retrieved on 23 September 2010 at http://www.foreignaffairs.org/20050301faessay84211/p-w-singer/outsourcing-war.html .

[29] Singer, Outsourcing war, ibid. This implies that firms selling armaments offer accompanying services such as maintenance or training in the use of weapons.

[30] Bunker, Robert J., Combatants or Non-Combatants, Journal of International Peace Operations, International Peace Operations Association (IPOA), 1 July 2006, last retrieved at http://ipoaonline.org/journal/index.php?option=com_content&task=view&id=96&Itemid=28 on 10 April 2007.

[31] Data as of December 2010, provided by Lawrence Peter, Director, Private Security Company Association of Iraq, 3 January 2011, cited by Schwartz, Moshe, in The Department of Defense's use of private security contractors in Afghanistan and Iraq: Background, analysis, and options for Congress, Congressional Research Service, 13 May 2011, p. 3, available at http://www.fas.org/sgp/crs/natsec/R40835.pdf , last retrieved on 22 May 2012.

[32] Avant, Deborah, Privatizing military training, Washinton D.C., Foreign Policy in Focus, 12 October 2005, last retrieved on 22 September 2010 at http://www.fpif.org/reports/privatizing_military_training .

itself as a truly global industry its tasks changed character. For example, PSCs became involved, alongside the regular armed forces, in training military personnel in former Yugoslavia and in building camps for displaced persons during the Kosovo conflict. A large number of PSCs are currently active in Iraq and Afghanistan, although both the Iraqi and the Afghan governments have recently taken steps to reduce the number of PSCs operating on their territories.

The conflict following the 2003 invasion of Iraq has been described as the first privatised war because of the heavy reliance of the USA and their coalition partners on private firms to supply a variety of security tasks. There is no conclusive information on the number of private security contractors active in Iraq, nor a comprehensive overview of past and current PSC activities in the country. The various estimates and numbers are not entirely comparable, since they do not always include the same categories of personnel. In April 2007 there were at least 40 000 private security guards, working for some 160 companies, according to the UN Working Group on the Use of Mercenaries[33]. A US congressional report estimated in June 2007 that 20 000 – 30 000 persons perform protective security functions for private firms under US government contracts[34]. Although most of the private security companies operating in Iraq at that time were from the USA or Great Britain, their personnel had (and still have) a multitude of nationalities, including many local nationals. Today, as was mentioned just above, a majority of firms are Iraqi.

2.2.3 Tasks and activities

Some commentators consider today's PSCs to be a "corporate evolution of the age-old profession of mercenaries", while others disagree, meaning that these companies are a modern means for states, organisations and private firms to manage security problems.[35] At any rate, today's PSCs, unlike traditional mercenaries, are corporate bodies offering a wide

[33] Dagens Nyheter, 4 April 2007, last retrieved on 22 September 2010 at http://www.dn.se/nyheter/sverige/vaktbolag-stoppas-i-krigszon-1.675846 . According to earlier estimates, 15 000 – 20 000 private security contractors were working in Iraq in March 2003, of which at least 6 000 were armed, see The Economist, 29 March 2003, p. 56, "Military-industrial complexities"; and Wilson, Jamie, Private security firms call for more firepower in combat zone, The Guardian, 17 April 2004, last retrieved on 22 September 2010 at http://www.guardian.co.uk/international/story/0,,1193718,00.html#article_continue. The ratio of US troops to PSC personnel in the 2003 war in Iraq was 1:10 (to be compared to the same ratio in the US Gulf war in 1991, which was 1:50), and since the war formally ended in May 2003, the number of PSC personnel has constantly increased, see Isenberg, David, A fistful of Contractors: The case for a pragmatic assessment of private military companies in Iraq, British American Security Information Council (BASIC) Research Report 2004.4 (BASIC, London, September 2004), p.7, last retrieved on 22 September 2010 at http://www.ssrnetwork.net/uploaded_files/3463.pdf via http://www.ssrnetwork.net/document_library/detail/3463/a-fistful-of-contractors-the-case-for-a-pragmatic-assessment-of-private-military-companies-in-iraq .

[34] US Congressional Research Service (CRS) Report for congress: Private security contractors in Iraq: Background, legal status, and other issues, updated 21 June, 2007, by Elsea, Jennifer K., and Serafino, Nina M., p. 2, last retrieved on 23 September 2010 at http://www.fas.org/sgp/crs/natsec/RL32419.pdf . This is just one of many estimates, however; other estimates vary from 20 000 – 50 000 private security contractors, depending on whether the numbers include both armed and unarmed guards, freelance consultants and sub-contractors or only personnel under "direct" contracts etc. For some other estimates, see the just mentioned CRS report, footnotes 4 and 5.

[35] Singer, Peter W., Outsourcing war (ibid., footnote 28). See also the UN Special Rapporteur on the Use of Mercenaries, in UN Doc. E/CN.4/1997/24 (ibid. footnote 6), p. 105, where the Rapporteur argues that certain employees of private security companies fall under the definition of mercenaries in article 47 of the Additional Protocol I to the Geneva Conventions (1949). Others, like Juan Carlos Zarate, argue against this view, see Zarate, ibid. footnote 7, p. 117 onwards. I will return to this issue further below.

range of services, including tasks related to external security (protecting borders) and internal security (maintaining order within borders). Although few contracts refer to direct participation in combat, private security firms offer three broad categories of external security support: operational (including combat operations and strategic planning), military advice and training, and logistical support (e.g. communication services and the housing of troops) and technical assistance (including arms procurement and maintenance). Services related to internal security include site security (armed and unarmed), crime prevention, and intelligence. When providing physical protection of staff and premises, PSCs may also offer risk analysis, staff security training and crisis management advice.[36]

Private security companies often form part of larger corporate conglomerates, typically being subsidiaries to extractive and mining firms, aviation or other transportation companies, weapons and armaments producers, or firms specialising in communication, engineering or manufacturing[37]. This connection between mainstream and security industry has strengthened in recent years as more multinational companies move into the security sector[38]. A growing segment of the industry provides risk analysis combined with complete security solutions; other recent additions to the industry include interpretation and interrogation services[39].

PSCs are contracted by a diversity of clients; by governments in various parts of the world, by international organizations (including the United Nations), NGOs, humanitarian agencies, reconstruction firms, international media agents and multinational companies[40], especially in the extraction industries[41].

2.2.4 Categorization of companies within the industry

Several attempts have been made to categorize and subdivide private actors within the security service sector. One widely used distinction is made between private military companies (PMCs) and private security companies (PSCs). PMCs are described as companies offering *offensive* services, designed to have military impact, while PSCs refer to companies providing *defensive* services, intended to protect individuals and property. However, this categorization meets with two problems: First, activities that are perceived as "defensive" under certain circumstances may well have offensive repercussions. Second, these companies are typically flexible and speedy in accepting new tasks offered by situational demands and

[36] Avant, Deborah, The Market for Force: The Consequences of Privatizing Security (Cambridge University Press, Cambridge, 2005), p. 16, last retrieved on 23 September 2010 at http://books.google.com/books?id=izA-sPwf0GoC&pg=PA12&dq=%22Avant%22+%22The+Market+for+Force:+the+consequences+of+privatizing+...%22+&sig=WGd_gcX2nnklksQRo501822h3fk#PPA16,M1 . See also Holmqvist, ibid. footnote 8, p. 4.

[37] For a more detailed description of the structures of some of these conglomerates see Small, Michelle (The African Centre for the Constructive Resolution of Disputes (ACCORD), South Africa), Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa, Appendix I on pp. 41-43, last retrieved on 23 September 2010 at http://www.accord.org.za/downloads/op/op_2006_2.pdf?phpMyAdmin=ceeda2df659e6d3e35a63d69e93228f1 .

[38] For some examples of mother company – subsidiary relations see Holmqvist, ibid. footnote 8, p. 6.

[39] Holmqvist, ibid. footnote 8, p. 6.

[40] There is no exhaustive list of companies in the private security sector; however the International Consortium of Investigative Journalists maintains a list of PSC contracts in Afghanistan and Iraq, which also contains various reports, see the website of The Center for Public Integrity, Washington, DC, "Windfalls of War: US Contractors in Iraq and Afghanistan", http://projects.publicintegrity.org/wow/ , last visited on 25 September 2010.

[41] In Angola, for example, national legislation requires such companies to bring their own security forces, which not unusually end up fighting off local rebel groups, see Singer, Peter W., Corporate Warriors, ibid. footnote 8, pp. 9- onwards.

business opportunities. Thus the “offensive-defensive” (or “active-passive”) distinction is often irrelevant and at worst misleading.[42] Moreover, international humanitarian law does not distinguish between offensive and defensive attacks[43].

Another system of classification has been presented by Peter W. Singer[44]. He subdivides what he refers to as private military firms (PMFs), into three types of firms, depending on the relationship of their primary tasks to the “tip of the spear” in “battlespace”. Services closest to the front line of battle are also nearer the “tip of the spear”, giving the following categorization, where type (1) firms are closest to the “tip”:

(1) military provider firms, which offer services at the front line of combat, such as implementation and command of forces
(2) military consultant firms, which provide mainly training and advisory services
(3) military support firms, which are contracted to carry out “non-lethal aid and assistance”, including mainly logistical services such as transports and the housing and feeding of troops.[45]

Although Singer’s definition clearly is more useful than the simple categorization security – military or defensive – offensive, most companies defy also Singer’s categorization. In addition, corporate impact on human rights, humanitarian law or the security situation may be significant also for corporate activities carried out farther away from the front line of combat. It is therefore in most cases more relevant to refer to specific corporate activities, tasks or contracts, rather than the type of company. Still, as we shall see further below, PSC employees’ closeness to or even participation in combat may have immediate consequences on human rights and humanitarian law, making it relevant when analysing corporate impact or establishing norms. Along this line, Deborah Avant has suggested a categorization similar to Singer’s, but basing her version on contracts rather than type of company[46].

In recent international instruments, such as the above-mentioned Draft Convention on Private Military and Security Companies, the Montreux Document and the International Code of Conduct for Private Security Providers, an entirely functional approach is used when defining the firms to which the respective instrument applies.[47]

For the purpose of this thesis, the distinction between military and security related tasks is not decisive. As I mentioned in the introduction, I will use the term private security companies (PSCs) to denote all companies within the security and military service industry and, where relevant, refer to specific tasks, functions or contracts.

[42] Holmqvist, ibid. footnote 8, p. 5.
[43] According to article 49.1 of Additional Protocol I to the 1949 Geneva Conventions, “’Attacks’ means acts of violence against the adversary, whether in offence or in defence”. I will return to this issue below.
[44] Singer, Peter W., Outsourcing war, ibid. footnote 28.
[45] Singer, Peter W., Corporate Warriors, ibid. footnote 8, p.93.
[46] Avant, Deborah, The Market for Force, ibid., footnote 36, p. 17.
[47] See Article 2 (a-c) of the Draft Convention; section B of the International Code of Conduct; respectively Preface, section 9 (a) of the Montreux Document.

3 Status of private security companies and their employees under international law

3.1 Background and the prohibition of force

Since public international law does not specifically regulate PSCs in conflict areas, one has to turn to more general rules of public international law, humanitarian law and human rights law in order to establish the status of PSCs and their employees under international law.

According to international customary law, as reflected in article 2 (4) of the UN Charter, states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The sole generally accepted exceptions are the right to individual or collective self-defence (article 51 of the UN Charter) or the use of force in accordance with a Security Council resolution (chapter VII of the UN Charter). In 1970, the UN General Assembly adopted the so-called Friendly Relations Declaration[48], which, although it is not formally binding, is considered as one of the fundamental documents of the UN and for the interpretation of the UN Charter. The first principle of the declaration reiterates the above-mentioned article 2 (4) of the UN Charter. The Friendly Relations Declaration furthermore declares that "every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State." This was the first time international law explicitly treated the subject of mercenarism. However, the declaration does not define the concepts of "irregular forces" or "armed bands", nor have these terms been defined in subsequent UN documents.

3.2 Mercenaries

Employees of PSCs are at times referred to as "mercenaries", a word which evokes strong, mostly negative, reactions. There is, fortunately, also a strictly legal definition of a mercenary. This sub-chapter will examine whether the concept of mercenarism is helpful for regulating PSCs.

Mercenaries are dealt with in two international conventions, specifically aimed at eliminating them through the criminalization of mercenary activities: The International Convention against the Recruitment, Use, Financing and Training of Mercenaries[49] and the (then)

[48] UN General Assembly Resolution 2625 (XXV) on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, 24 October 1970, UN doc. A/RES/25/2625.
[49] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UNGA Res. A/RES/44/34, entry into force 20 October 2001 (hereinafter the UN Convention on Mercenarism).

Organization of African Unity Convention for the Elimination of Mercenarism in Africa[50] (hereinafter the mercenary conventions if not treated separately). Additionally, mercenaries are dealt with in international humanitarian law, namely in article 47 of the 1977 Protocol I additional to the Geneva Conventions[51] (hereinafter Additional Protocol I), which has been ratified by a large number of states.

The two mercenary conventions deploy a definition of mercenaries similar to that of article 47 of Additional Protocol I, which reads:

> 1. A mercenary shall not have the rights to be a combatant or a prisoner of war.
>
> 2. 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 at Party to the conflict on official duty as a member of its armed forces.

Although the definition of a mercenary is similar in the two mercenary conventions and in Additional Protocol I, the consequences of being designated a mercenary are different. In short, under the conventions – if states parties thereto have adopted implementing legislation – persons who fulfil the criteria for a mercenary may be prosecuted for the distinct crime of being just that. On the other hand, it is not a violation of international humanitarian law to be a mercenary and mercenarism as such does not entail international criminal responsibility. The only consequence under this set of rules is that mercenaries are denied the right to prisoner of war status if captured and combatant status during fighting[52]. A person who is defined as a mercenary under Additional Protocol I may consequently be punished under the national laws of the detaining power for having directly participated in hostilities, but he/she may be prosecuted for being a mercenary only if the capturing state also has legislation designating mercenarism as a separate crime. A further difference between the mercenary conventions and Additional Protocol I is that the mercenary status in the latter is relevant only in international armed conflicts (since combatant status and its privileges exist only in those conflicts), while the conventions are applicable also in non-international armed

[50] Convention for the Elimination of Mercenarism in Africa, Organization for African Unity, Libreville, 3 July 1977, CM/817 (XXXIX), Annex II, Rev. 3 (entry into force 22 April 1985 (hereinafter the OAU/AU Convention on Mercenarism). Twenty-seven countries have so far ratified or acceded to the convention (among the ratifying / acceding states are Egypt, Nigeria, Senegal, the Sudan, Tunisia and Libya; among those that have not ratified or acceded to the convention are South Africa, Sierra Leone and Uganda).

[51] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, with annexes, of 8 June 1977, hereinafter Additional Protocol I), entry into force 7 December 1978.

[52] Even a mercenary – as are all persons – is under all circumstances entitled to the minimum protections set out in article 75 of Additional Protocol I (fundamental guarantees), see article 45 of Additional Protocol I. The right to these fundamental guarantees is recognised as customary international law.

conflicts. It is worth noting that it is not a crime under the Statute of the International Criminal Court to be a mercenary[53].

Although attempts have been made[54], there can be no general conclusion that all PSC employees are mercenaries, either under the mercenary conventions or under international humanitarian law. The definition under both of these regimes requires that each case be determined individually. This is one of the main reasons why the mercenary conventions are inadequate to regulate and control the PSC industry as a whole. It is conceivable, however, that certain individuals employed by PSCs meet the criteria in the mercenary definition.

3.2.1 Mercenaries in international humanitarian law

As I mentioned earlier, the two mercenary conventions deploy a definition of mercenaries similar to that of article 47 of Additional Protocol I (see above, p. 28). We shall now examine that definition in more detail.

When prisoner of war status is questioned, the detaining power, represented by a "competent tribunal", determines whether a person falls within the definition of a mercenary and thus is excluded from combatant and prisoner of war status[55]. The consequences of being denied combatant status may be severe, for although it is no crime under international humanitarian law to be a mercenary, a person denied combatant status might be prosecuted merely for partaking directly in hostilities. In addition, he/she may be tried and convicted for acts of violence that would have been lawful had he/she been a combatant. Thus, if he/she has killed a combatant during hostilities he/she may be prosecuted and convicted for murder.[56] This prospect may deter many from putting themselves into such a vulnerable position.

Apart from the above, humanitarian law does not regulate this category of persons. In reality, the definition in article 47 has proven to be more or less "unworkable", due to the six cumulative criteria that a person must fulfil in order to be deemed a mercenary[57]. Nevertheless, the International Committee of the Red Cross (ICRC) has determined that this provision forms part of customary international law[58]. Below I shall examine whether and, if

---

[53] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (2187 UNTS 90), 17 July 1998 (corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002), entry into force 1 July 2002.

[54] See the UN Special Rapporteur on Mercenaries in his annual report in UN Doc. E/CN.4/2004/15, in particular para. 57.

[55] A detaining power is obliged to constitute "a competent tribunal" to determine the status of those persons who claim prisoner of war status, if doubt arises, see article 45 of Additional Protocol I and article 5.2 of the Geneva Convention relative to the treatment of prisoners of war, 12 August 1949 (the third Geneva Convention), entry into force 21 October 1959.

[56] See Sandoz, Yves, Swinarski, Christophe and Zimmerman, Bruno (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross (ICRC)/Martinus Nijhoff, Dordrecht, 1987 (hereinafter the ICRC Commentary on the Additional Protocols), last retrieved on 1 October 2010 at http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=470&t=com. The ICRC Commentary states that the criminal prosecution to which mercenary status may lead includes prosecution for "acts of violence which would be lawful if performed by a combatant, in the sense of the Protocol, and for the sole fact of having taken a direct part in hostilities" (commentary regarding article 47 of Additional Protocol I, para. 1796). The Commentary does not mention any possibility of prosecution for the mere fact of being a mercenary.

[57] See e.g. Hampson, Françoise J., Mercenaries: Diagnosis before prescription, Netherlands Yearbook of International Law, Vol. 22 (1991), pp. 3-38, especially pp. 14-16.

[58] Henckaerts, Jean-Marie, and Doswald-Beck, Louise, Customary International Humanitarian Law, Vol. I, Rules, ICRC and Cambridge University Press, Cambridge, 2005, Rule 108.

so, how the definition is applicable to PSC employees, but first a glance at the two mercenary conventions.

3.2.2 The mercenary conventions

The discussions in international fora regarding mercenarism largely reflect post-colonial experiences. During decolonisation, many of the new or emerging states were threatened by mercenary activities. As a result, the two conventions on mercenarism aim, in the first hand, to eliminate mercenary activities threatening legitimate governments and their self-governance, rather than to prevent human rights abuses.

The definitions of a mercenary in the above-mentioned 1977 OAU/AU Convention and the 1989 UN Convention on mercenarism are almost identical with that of article 47.2 of the Additional Protocol I[59].

The two mercenary conventions subsequently relate the elements of offences: Persons who meet the criteria of a mercenary and who in fact directly participate in hostilities commit an offence[60]. Under the UN Convention on Mercenarism, even the attempt of direct participation constitutes an offence. In addition, the UN Convention on Mercenarism qualifies as offences the recruitment, financing, training and use of mercenaries[61], thus widening the circle of criminally liable persons to individuals who do not personally take part in the fighting. The UN Convention on Mercenarism also has a wider scope than Additional Protocol I in that it includes not only international armed conflicts, but any ”concerted act of violence aimed at … [o]verthrowing a Government or otherwise undermining the constitutional order of a State; or … [u]ndermining the territorial integrity of a State”. Also the OAU/AU Convention on Mercenarism includes an additional definition of “mercenary”, intended to address acts aimed at the overthrow of a government[62]. Interestingly, the OAU/AU Convention on Mercenarism does not prohibit all use of mercenaries by states, for example not the use of mercenaries against dissident groups within the state territory.

The UN Convention on Mercenarism entered into force in 2001 and has so far been ratified or acceded to by thirty-two states only[63]. None of the permanent member of the UN Security Council has ratified it, nor have many other leading states or states that have significant numbers of PSCs operating from or within their territory, and its effectiveness has been questioned[64]. The low number of ratifications and accessions also reflects the fact that the UN Convention on Mercenarism does not form part of customary international law.

---

[59] Article 1, para. 1 of the OAU/AU Convention on Mercenarism simply repeats article 47.2 of the Additional Protocol, while article 1, para. 1 of the UN Convention on Mercenarism leaves out provision 47.2(b), instead including it as an element of the crime.
[60] Article 3 of the UN Convention on Mercenarism and article 1.3 of the OAU/AU Convention on Mercenarism.
[61] Article 2 of the UN Convention on Mercenarism.
[62] Article 5 of the OAU/AU Convention on Mercenarism.
[63] Ratifications and accessions as of 23 September 2010. Among the ratifying/acceding African states are Cameroon, Liberia, Libya, Mali and Senegal; Middle Eastern ratifying/acceding states are Saudi Arabia, Qatar and the Syrian Arab Republic; European ratifying/acceding states are Belarus, Belgium, Croatia, Cyprus, Italy and Ukraine.
[64] Swiss Federal Council/Conseil fédéral suisse, Rapport du Conseil fédéral sur les entreprises de sécurité et les entreprises militaries privées, ibid. footnote 7.

3.2.3 Private security companies in Iraq and mercenarism

To sum up, a mercenary is a person who participates in combat for personal gain without being a member of the armed forces of a party to the conflict. Mercenaries may be authorized to fight by a party to the conflict, but their allegiance to that party is conditioned upon monetary payment rather than obedience and loyalty. Mercenaries are sometimes treated as "unlawful combatants" or "unprivileged belligerents" even though their employment is not, as we have seen above, strictly forbidden by international law. As discussed earlier, mercenaries do not qualify for prisoner of war status under the Geneva Convention relative to the treatment of prisoners of war, and those meeting the criteria for mercenaries in the 1977 Additional Protocol I to the Geneva Conventions are explicitly denied combatant status[65]. Since mercenaries are not entitled to combat immunity, they may be prosecuted and punished for their hostile actions, even if their acts would be lawful under the laws of war if carried out by a soldier.

During the period in 2003 and beginning of 2004 when the conflict in Iraq undoubtedly could be classified as an international armed conflict according to international humanitarian law, certain individuals working for PSCs in Iraq may well have met the definition of a mercenary in article 47 of Additional Protocol I and in the two mercenary conventions. This presupposes that they were not US, coalition allies' or Iraqi citizens and that they were hired to – and in fact did – take part in hostilities.

Let us take the hypothetical example of a South African former special forces member employed by a PSC to provide personal protection for leaders of the Coalition Provisional Authority (hereinafter the CPA). Examining the criteria in the definition one by one, we must first establish whether employment as a bodyguard may constitute recruitment "in order to fight". Now, the phrase "to fight" is not, under international humanitarian law, synonymous with an offensive attack[66]. Consequently, a person hired to defend a (military) person, but who engages in defensive combat may fall under article 47.2(a)[67]. Our bodyguard may also meet the second criterion (article 47.2(b)); however, it is understood that, in order to meet this criterion, the individual must be recruited specifically to fight in one particular conflict, not as a general employee[68]. Besides the possibility that protecting a US or coalition partner commander may in itself constitute direct participation in hostilities, there have also been reports of heavy fighting involving PSCs. One such clash took place in Najaf in 2004, where PSC employees engaged with enemy fighters fired "thousands of rounds of ammunition" and had to call in one of the company's own helicopters, which instead of evacuating the employees dropped more ammunition[69]. Another example is the attack, mentioned in the introduction, on four Blackwater Security Consulting (now renamed Blackwater Worldwide) contractors at Fallujah in March 2004 and the following US response causing the city severe

---

65 Additional Protocol I to the Geneva Conventions, art. 47.

66 According to article 49(1) of the Additional Protocol I, "'[a]ttacks' means acts of violence against the adversary, whether in offense or in defence."

67 Cameron, ibid. footnote 7, p. 581.

68 Ibid.

69 Barstow, David, (Schmitt, Eric, Oppel Jr., Richard A. and Risen, James), The struggle for Iraq: The contractors; Security firm says its workers were lured into Iraqi ambush, New York Times, 9 April 2004, last retrieved on 26 September 2010 at http://query.nytimes.com/gst/fullpage.html?res=9C0DE4DB1238F93AA35757C0A9629C8B63 .

damages.[70] Drawing from these examples, it is clear that some PSC employees fulfil the second criterion (sub-para. (b)) of directly participating in hostilities. As for the third requirement (sub-para. (c)), persons hired as bodyguards for the US occupation commanders earned considerably more than a US private. Our South African bodyguard is not national of a Party to the Iraqi conflict, thus meeting the fourth criterion (sub-para. (d)). The fifth requirement (not being a member of the armed forces of a Party to the conflict) will be discussed more closely below; suffice it to say here that PSC employees are not members of the armed forces. The fulfilment of the sixth and final criterion meets no difficulty, since South Africa did not send their soldiers to Iraq on official duty.

In the light of the above, it is possible that some PSC employees working in Iraq could meet the legal definition of a mercenary.[71] Still, the complexity of the definition makes it an inefficient tool also in these cases. Furthermore, the mercenary definition is not applicable to the scores of Iraqi, US, UK and other coalition partner citizens employed by PSCs in Iraq. Finally, how do we define the majority of PSC employees that do not meet all the six criteria in the definition?

3.2.4 Conclusions regarding international law on mercenarism and private security companies

Neither article 47 of Additional Protocol I to the Geneva Conventions, nor the UN Friendly Relations Declaration (which reflects customary international law) prohibits mercenarism. The two international conventions on mercenaries are not intended to regulate corporate security or military activities in conflict situations, but rather to target activity aimed at the overthrow of legitimate governments or recognised liberation movements. Neither of the conventions are universally accepted documents.

We can thus conclude that customary international law does not prohibit mercenarism. The two conventions on the subject are not applicable to the activities of PSCs as entities[72] and although individual corporate employees taking direct part in hostilities may fall under the mercenary definitions, they are likely to be very few; the definitions of a mercenary used in these conventions are so restrictive that they are rarely applicable in practice, even for the relatively few states that are bound by the conventions. In the light of the above, it is fair to say that the existing mercenary regulations under international law are largely unhelpful for regulating the employees and activities of PSCs.

---

[70] There are numerous other examples, see e.g. Bergner, Daniel, The other army, New York Times, 14 August 2005, (Magazine), p. 29, last retrieved on 25 September 2010 at http://www.nytimes.com/2005/08/14/magazine/14PRIVATI.html .

[71] This is also the conclusion drawn by Cameron, see ibid. footnote 7, p. 582. See also the Rapport du Conseil fédéral sur les entreprises de sécurité et les entreprises militaries privées, ibid. footnote 7, p.43, where it is concluded that few, yet some, PSC employees would meet all the six criteria in the definition. Others, like Juan Carlos Zarate, seems to draw conclusions quite different from those of Cameron (and myself), as regards the application and meaning of the criteria in the mercenary definition, see Zarate, ibid. footnote 7, pp. 120-121.

[72] This is also the conclusion drawn by the former UN Special Rapporteur on Mercenarism, Enrique B. Ballesteros, see Ballesteros, International and Regional Instruments, Paper presented at Wilton Park Conference “The Privatization of Security: Framing a Conflict Prevention and Peace-building Policy Agenda”, 19-21 November 1999, p. 48; conference report available at International Alert’s website http://www.international-alert.org/pdf/wilconf.pdf via http://www.international-alert.org/publications/index.php?id=security , last retrieved on 26 September 2010.

Now, in order to establish what PSC employees are allowed to do in conflict situations, as well as to determine potential state responsibilities for the conduct of PSCs, it is necessary to go beyond analysing whether or not PSC employees qualify as mercenaries and clarify their legal status. Their status is also decisive when considering how these companies are most effectively and properly regulated. Therefore, the next chapter is devoted to an analysis of the status of PSC employees under international law.

3.3 Status of private security company employees under international humanitarian law

This sub-chapter is intended to clarify the status of PSC employees under international humanitarian law. Under this set of rules, a person must be either a combatant or a civilian[73]. Only after establishing whether an individual PSC employee is a combatants or a civilian can one determine his or her legal rights and duties, as well as the responsibilities under international law of other actors, notably the PSC itself, its customer, and its home and host state.

Status determination may be tricky and a large presence in a conflict situation of parties with an unclear status renders the situation more difficult from a legal and security, as well as military and humanitarian, point of view. This issue falls within the current debate on lawful and "unlawful" combatants and the determination of their status may well have consequences for the debate as a whole.

Although most examples in this chapter will be taken from US-based PSCs operating in Iraq, most observations apply to PSCs based in so-called efficient states in general.

3.3.1 Background

The guiding principle of the US government in Iraq has been that as much as possible should be outsourced, with the exception of "core government" or "mission critical" functions, i.e. functions "directly related to war fighting"[74]. However, one might ask whether such a distinction between direct war fighting and post-war reconstruction is possible to uphold in chaotic post-war situations such as the one in Iraq.

International law applicable in armed conflicts, particularly those parts regulating belligerent occupation and non-international armed conflicts, should be relevant in the case of Iraq (at least for conduct that occurred before the handing over of sovereignty to Iraqi authorities on

---

[73] Certain commentators have argued that it is possible with a third category of persons, namely that of "unlawful combatants", who should not benefit from either the Third or the Fourth Geneva Convention, because they have participated directly in hostilities without having combatant status. This assertion is controversial and is not likely to prevail in the near future. At any rate it would not bring any positive consequences for PSC employees, since, according to this theory, "unlawful/unprivileged combatants" enjoy less protection than both civilians and regular combatants. For an overview of this issue, see Dörmann, Knut, The legal situation of "unlawful/unprivileged combatants", International Review of the Red Cross, Vol. 85, No. 849, March 2003, pp. 45-74, last retrieved on 26 September 2010 at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/$File/irrc_849_Dorman.pdf .

[74] US Department of Defense, Quadrennial Defense Review Report, 30 September 2001, pp. 53-54, last retrieved on 30 September 2010 at http://www.defense.gov/pubs/pdfs/qdr2001.pdf . I will discuss these concepts in detail below.

28 June 2004)[75]. However, many aspects concerning the status, rights and duties of armed contracted personnel operating under those circumstances are largely unclear[76].

3.3.2 Short notes on international humanitarian law

International humanitarian law is the international law applicable in armed conflicts (*ius in bello*). Its main purpose is to prevent and minimise the suffering of victims of war and other negative effects of warfare. Among the principal sources of international humanitarian law are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977[77] (the so-called Geneva rules), the Hague Conventions of 1907[78] and several conventions prohibiting or regulating the use of specific types of arms. The vast majority of states have ratified the Geneva Conventions and the additional protocols are also in force for a large majority of states. Also the Hague conventions are generally recognised. In fact, important parts of international humanitarian law emanate from customary public international law. However, it is important to remember that the rules pertaining to international armed conflicts are far more numerous and detailed than the ones regulating internal armed conflicts, the latter being the more common type of conflict nowadays.

One part of international humanitarian law regulates the treatment of persons present on the territory of one of the parties to a conflict (in particular civilians on occupied territory and prisoners-of-war), such as the prohibition of torture and inhumane treatment. In addition, humanitarian law regulates the methods of combat, prohibiting for example attacks on protected persons and objects, such as civilians and civilian property, and certain methods of warfare, such as perfidy. Moreover, humanitarian law prescribes that an attack on a military target is prohibited if expected damages on civilians and civilian property are disproportionate. Furthermore, certain types of arms, such as chemical and biological arms,

[75] The relevance of different sources of international law has varied depending on the status of the Iraqi government, which has changed from an interim government to a permanent one with a permanent constitution. The Multi-National Forces in Iraq (MNF-I) has been fulfilling a UN mandate established by the UN Security Council (UNSC) resolution 1511 (October 16, 2003) and continued by resolution 1546 (June 8, 2004), resolution 1637 (November 8, 2005) and resolution 1723 (November 28, 2006). The resolutions affirm the importance for MNF-I to ”act in accordance with international law, including obligations under international humanitarian law…”, but do not clarify what those obligations entail. UNSC resolutions are available at http://www.un.org/Docs/sc/unsc_resolutions.html , last retrieved on 30 September 2010.

[76] See e.g. Singer, Peter W., War, profits, and the vacuum of law: Privatized military firms and international law, in which the author argues that international law applicable to privatized military firms is either outdated or non-existent; available at http://www.brookings.edu/views/articles/fellows/singer20040122.pdf , last retrieved on 30 September 2010.

[77] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (75 UNTS 31); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (75 UNTS 85); Convention (III) relative to the Treatment of Prisoners of War (75 UNTS 135); Convention (IV) relative to the Protection of Civilian Persons in Time of War (75 UNTS 287); all in Geneva, 12 August 1949, entry into force 21 October 1950. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1125 UNTS 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1125 UNTS 609), both 8 June 1977, entry into force 7 December 1978.

[78] The Final Agreement of the Second Peace Conference in The Hague in 1907 was signed on 18 October 1907 and entered into force on 26 January 1910. It consisted of thirteen sections/conventions, of which twelve were ratified and entered into force, and treated i.e. rules of war and the rights and obligations of neutrals. A majority of the sections dealt with naval warfare. The Final Agreement and the twelve conventions are available i.e. at the ICRC website at http://www.icrc.org/ihl.nsf/INTRO?OpenView, last retrieved on 30 September 2010.

are prohibited. Finally, specific rules regulate the obligations of occupying forces in relation to occupied populations and the administration of occupied territory.

3.3.3 International humanitarian law and the status of private security company employees

International humanitarian law does not only regulate state activities, it also contains several rules that individuals, including civilians, are bound by. The perhaps best-known example is Common article 3 of the four Geneva conventions of 1949, according to which civilians and other persons *hors de combat* are to be treated humanely and not be subjected to torture or other inhuman, cruel or degrading treatment. This implies that all persons who take active part in an international or a national armed conflict, whether they are members of armed forces, spontaneously armed civilians or employees of private security or military firms, are obliged to respect certain minimum rules governing the conduct of war.

There are three main reasons why it is essential to establish whether PSC employees are combatants or not: (1) in order to know whether they may lawfully participate directly in hostilities; (2) in order for enemy forces to know if PSC employees are legitimate military targets that can be lawfully attacked; and (3) – closely connected to the first reason – in order to know if PSC employees who do participate directly in hostilities may be prosecuted for doing so.

The right to prisoner of war (and combatant) status is connected to membership either in the armed forces of a party to a conflict[79], or in a militia or volunteer force that belongs to a party to the conflict, provided that the militia or volunteer force also fulfils certain additional criteria[80]. Under international humanitarian law, "[m]embers of the armed forces of a Party to a conflict … are combatants, that is to say, they have the right to participate directly in hostilities."[81] The first step when determining the status of a PSC's employees is thus to establish whether they are integrated into the armed forces of a party to the conflict in accordance with article 4A(1) of the Third Geneva Convention and article 43.1 of Additional Protocol I. Alternatively they might, *as an entity*, qualify as a militia under article 4A(2) of the same convention (they are less likely to be regarded a volunteer force, in particular considering their pecuniary rewards). Under article 4A(1) of the Third Geneva Convention (and article 43.1 of the Additional Protocol I) it must be established that the individual concerned is integrated into a state's armed forces according to the laws of that state (this corresponds by the way inversely to the fifth criterion of the definition of a mercenary). Under article 4A(2) of the Third Geneva Convention the entity *as a whole* must meet the defining criteria.

3.3.3.1 Integration into the armed forces of a party to the conflict

Since members of the armed forces of a party to a conflict are combatants and as such have the right to participate directly in hostilities, it must first be established whether PSC employees may be integrated into national armed forces in the sense of article 43 of Additional Protocol I and article 4A(1) of the Geneva Convention III.

[79] Article 4A(1) of the Third Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 (hereinafter the Third Geneva Convention), and article 43 of Additional Protocol I.
[80] Article 4A(2) of the Third Geneva Convention.
[81] Article 43.2 of Additional Protocol I (article 4A(1) of the Third Geneva Convention does not expressly state that those who have the right to prisoner of war status also have the right to participate directly in hostilities).

Article 43 of Additional Protocol I reads:

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

International humanitarian law does not regulate how individuals are registered or otherwise incorporated into national armed forces for the purpose of article 4A(1) of the Third Geneva Convention or of article 43 of Additional Protocol I – that is decided by national laws alone.

The central requirement in article 43 of Additional Protocol I is that the group in question is ”under a command responsible” to a Party to the conflict. It has been suggested that the contract between the state and the PSC could specify that the PSC is ”responsible” to the state within the meaning of article 43(1). It is doubtful, however, whether the terms of a contract alone suffice to bring the PSC under a command responsible to the state. The concept of being ”under a command responsible” implies more than belonging to a party to the conflict and exercising elements of governmental authority, even if that authority is sufficient to give rise to state responsibility. The concept of ”under a command” most likely requires the person or group to be included within the military chain of command of the state's regular armed forces.

Moreover, it is reasonable to conclude that a state must somehow enable itself to exercise jurisdiction over PSC employees in order to make them ”subject to an internal disciplinary system”, which is required under article 43(1). The current inability of many states to subject PSC employees to their criminal jurisdiction in theatre thus precludes the applicability of article 43. The United Kingdom, for example, has legislation in place allowing prosecution of civilians committing offences abroad, including trying them on location, but this jurisdiction is limited to civilians employed directly by the government[82].

Also in the light of article 43(3) of Additional Protocol I, it would be strange if a state could simply hire a PSC, thereby making it part of its armed forces. Article 43(3) prescribes that a state, which incorporates paramilitary forces or armed law enforcement agencies into its armed forces, is required to notify the other parties to the conflict of the incorporation. Thus, some form of official incorporation is required, making it clear to all parties to a conflict exactly who constitute each party's armed forces.

Opinions on the above matters vary among commentators, but many experts agree that a PSC may qualify as part of a state's armed forces under article 43(1) and its employees as combatants under article 43(2). This is provided that the ”command” and ”disciplinary

[82] The Standing Civilian Courts Order, 1997, UK Statutory Instruments, No. 172; and The Standing Civilian Courts Order (Amendment), 1997, UK Statutory Instruments, No. 1534, available at http://www.uk-legislation.hmso.gov.uk/stat.htm , last retrieved on 23 October 2010.

system” requirements of article 43(1) and the possible ”incorporation” requirement of article 43(3) are fulfilled.[83]

It is finally worth noting that not only the wording, but also the drafting history of article 43 opens up for the possibility of including PSCs in national armed forces. The Commentary to article 43(1) stresses that article 43 aimed at including among the armed forces all groups, which have some sort of factual link to the regular armed forces. This link exists if the independent force acts on behalf of a party to the conflict in some manner and if that party is responsible for the group’s operations.[84] The purpose of article 43 was, among other things, to broaden and simplify the definition of ”armed forces” within the framework of international humanitarian law. Therefore, it might be argued that where a state hires a certain PSC to engage in an international armed conflict on the state’s behalf, and the PSC is ”responsible to” that state in the above sense, this particular PSC should be considered a part of that state’s armed forces. This interpretation is in line with the functional approach taken by article 43, in the sense that whether or not a group forms part of the armed forces depends primarily on whether the group is fighting on behalf of a party to the conflict. Thus, although the existence of today’s PSC industry was hardly predicted in 1977, article 43 allows for this interpretation. However, in the end this will be decided by state practice.

Whether or not an individual PSC employee is entitled to combatant or prisoner of war status depends on a number of things. First, the individual must be an employee of a PSC having a combatant role in the armed forces, *not* a PSC ”accompanying the armed forces” within the meaning of article 4A(4) of the Third Geneva Convention and article 50 of Additional Protocol I. Second, the PSC itself must be entitled to combatant status under article 43 of Additional Protocol I. For example, if a certain PSC employee complies with international humanitarian law, but the PSC as a group does not, the individual will not be entitled to combatant or prisoner of war status. Third, the individual employee must comply with the fundamental requirements relating to the principle of distinction, i.e. carry his or her weapons openly in accordance with article 44 (3) of Additional Protocol I. In this connection, it should be noted that where a PSC falls under article 43 by constituting the armed forces of a state, its employees may, as combatants, be lawfully targeted solely on the basis of being employees of that PSC. This means that also employees who are not involved in combat, e.g. drivers and kitchen staff, may be targeted at all times.

It is finally worth mentioning that the rules on government agents with legal status as combatants must not be confused with the international rules on attribution of certain acts (performed e.g. by private contractors hired by a government) to states for the purpose of holding states internationally responsible[85]. Although it may be possible, in a specific case, to attribute the acts of a PSC employee to a state, that relationship alone between the employee

[83] Report from the Expert meeting on private military contractors: Status and state responsibility for their actions, University Centre for International Humanitarian Law, Geneva, 29-30 August 2005, pp.10-12, last retrieved on 3 August 2011 at http://www.adh-geneve.ch/docs/expert-meetings/2005/2rapport_compagnies_privees.pdf .

[84] Bothe, Michael; Partsch Karl Josef; and Solf, Waldmar A, New rules for victims of armed conflict: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949, Martinus Nijhoff Publishers, The Hague, 1982, p. 234.

[85] See the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, 53rd session, 2001, UN General Assembly Official Records, 56th session, Supplement No. 10 (A/56/10), especially Draft Articles 5 and 8. I will return to the issue of state responsibility in a subsequent chapter.

and the state, even though sufficient to establish state responsibility, is not enough to make the PSC employee part of the state's armed forces.

In conclusion, it is conceivable – but not very likely – that a PSC may qualify as (part of) a state's armed forces under article 43(1) and its employees as combatants under article 43(2). Generally speaking, it would somewhat go against the whole idea of privatization and outsourcing if a considerable number of PSC employees were in fact considered to be incorporated into national armed forces.

In the case of Iraq, states hiring PSCs have been rather eager to emphasize that PSC employees are civilians. In addition, a Coalition Provisional Authority (CPA) memorandum prescribed that PSC employees, in order to comply with the necessary vetting procedures, "must be willing to respect the law and all human rights and freedoms of all citizens of the country"[86]. This and other formulations in the said memorandum and in a CPA order on the status of the CPA, MNF-Iraq (Multi-National Forces – Iraq), certain missions and personnel in Iraq[87] indicate that the USA did not consider PSC employees to be part of its armed forces.

3.3.3.2 Membership in a militia or volunteer force

Members of a group that is not integrated into the armed forces of a party to a conflict might nevertheless qualify for combatant (and prisoner-of-war) status, namely under article 4A(2) of the Geneva Convention III, which prescribes that the following persons also have the right to prisoner of war status:

> Members 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 … provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (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.

It is not within the scope of this thesis to examine this rather complex article in detail, but a few remarks might help clarifying the picture. To begin with, the provision includes only militias and other groups "belonging to a Party to the conflict" (opening sentence). Furthermore, the following four criteria must all be met by the group *as a whole*. This implies that each PSC must be analysed separately. Although there is nothing odd about that, a company-by-company analysis has the major disadvantage of reducing predictability. If it is more or less impossible for an opposing force to know which PSC employees are accurately counted among the combatants (thus being legitimate military objectives) and which are civilians and possibly protected persons (the killing of whom could constitute a grave breach

---

[86] Coalition Provisional Authority (CPA) Memorandum No. 17 Registration requirements for private security companies (PSC), CPA/MEM/26 June 2004/17, section 2 (6) (c), available at http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf , last retrieved on 30 September 2010.

[87] See Coalition Provisional Authority (CPA) Order No. 17 (revised), CPA/ORD/27 June 2004/17, Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, 27 June 2004, section 4 "Contractors", available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf , last retrieved on 30 September 2010. The order was originally issued in June 2003 and renewed on 27 June 2004 to remain in force for the duration of the mandate of the Multi-National Forces (MNF).

of the Geneva Conventions), the resulting uncertainty might discourage combatants to do their best to comply with humanitarian law. In this connection, one must remember that in Iraq, there are more than one hundred PSCs operating. Many of their employees may wear uniforms and look much like combatants under Article 4A(2), although they are in fact civilians.

One might ask under which circumstances civilian contractors might fulfil all four requirements in the definition of article 4A(2). It has been argued that many contractors lack uniform and are unlikely to be subjected to a responsible command. The additional two requirements – that of being independent from the armed forces yet belonging to a party of the conflict – further diminishes the chances of PSCs qualifying as militias. The PSCs most likely to "belong" to the USA, because they carry out services directly for US forces, namely lack the necessary independence to be considered a separate militia remaining outside the armed forces. Those PSCs that are more independent, for example because they are sub-contracted by a reconstruction agency, are on the other hand less likely to "belong" to a party to the conflict.[88] These arguments seem to be well founded.

Another commentator points out that whether these companies "belong" to a party to the conflict or not also depends on whether the affiliated government would accept responsibility for their actions[89]. The commentator further argues that when a state makes a conscious choice to engage non-military private sector personnel to carry out certain tasks, it seems less logical to qualify those persons as a paramilitary force for the purposes of Article 4A(2).[90]

It is conceivable that some PSC employees would qualify as combatants under Article 4A(2), but the vast majority would not. Considering the multitude of PSCs operating in Iraq, however, and even though some PSCs distinguish themselves from local civilians through their clothing and general appearance, it would be very hard for an enemy to distinguish one PSC from another, whose employees do not fall under Article 4A(2) and whom it would be a crime to target directly.

Also a teleological interpretation of Article 4A(2) militates against using the article to define PSC employees as combatants. The original purpose of the article was to allow partisans and members of resistance movements to be granted prisoner of war status[91], thus giving them an incentive to comply with international humanitarian law. Comparing PSC employees with those resistance movements seems to run counter to that purpose; while the second world war partisans were comparable with the remnants of defeated armies or with groups seeking to

[88] Schmitt, Michael, Humanitarian law and direct participation in hostilities by private contractors or civilian employees, Chicago Journal of International Law, Vol. 5 (January 2005, War, international law, and sovereignty: Re-evaluating the rules of the game in a new century), p. 527 onwards.
[89] For an illustration of this point see the Israel Military Court sitting in Ramallah, Military Prosecutor v. Omar Mahmud Kassem and Others (1969), International Law Reports Vol. 42, 1971, p. 479 (reproduced in Sassòli, Marco and Bouvier, Antoine A. (eds.), How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law, International committee of the Red Cross, Geneva, 1999, pp. 923-943). In the Kassem case, no government would accept responsibility for the fighters' actions, which led the Israeli government to deny them prisoner of war status.
[90] Cameron, Private military companies, ibid. footnote 7, p. 585. According to the Third Geneva Convention, article 4A(4), states may employ civilians to accompany their armed forces and grant them prisoner of war status, but those civilians do not have combatant status.
[91] Pictet, Jean S. (ed.), The Geneva Conventions of 1949, Commentary, III – Geneva Convention relative to the treatment of prisoners of war, ICRC, Geneva, 1960, p. 52 onwards, available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf via the website of the US Library of Congress http://www.loc.gov/rr/frd/Military_Law/Geneva_conventions-1949.html , last retrieved on 1 October 2010.

liberate occupied territory, modern PSC employees in Iraq are quite the opposite – security guards hired to protect the occupying powers. The fact that the definition of mercenaries, established during the 1970s and reiterated later on, intended to withdraw combatant status from similar private military forces indicates that the original purpose of article 4A(2) is still viable. Although international law is evolving and must adapt to new phenomena and circumstances, and although there is no obligation to limit the interpretation of article 4A(2) to its original purpose, that purpose still provides guidance as to the (in-)appropriateness and (in-)adequacy of applying it to today's PSCs.

In this connection, one might also argue that the fact that at least some PSC employees are among those individuals most likely to be designated as mercenaries militates against granting them combatant status under article 4A(2) (although PSCs could avoid this problem by hiring only nationals of parties to the conflict, since such nationals are automatically excluded from mercenary status).

From the above we can conclude that the legal basis for including PSCs and their employees among combatants in Iraq and elsewhere is very limited. The prevailing ambiguity concerning the international legal status of PSCs and their employees is illustrated by the fact that governments involved in the Iraqi conflict, as well as members of the US Congress, are consulting their legal counsel in order to clarify the status issue[92]. Admittedly, it might be tempting to ascribe PSC employees combatant status – in particular because their obligations thereby would be clear and they might also have a greater incentive to comply with international humanitarian law. It has rightfully been asked "whether the criteria for attaining lawful combatant status adequately reflect the nature of warfare and fully account for those who participate in it"[93]. Even so, it seems that too many factors – not least legal ones – speak against granting PSC employees combatant status. It is not likely that such an interpretation of the definition of a combatant will be accepted widely enough to be effective.

As I have mentioned, a person must be either a combatant or a civilian according to international law. The International Committee of the Red Cross (ICRC) is very clear in its conclusion that there is no such thing as "part-time combatants", "quasi-combatants" or other terms sometimes used to denote individuals whose activities are related more or less directly with the war effort. A combatant retains his or her status throughout the duration of hostilities (or until he or she is permanently demobilized by the responsible command), regardless of whether or not he or she is in combat or for the time being armed.[94] Similarly, the ICRC points out that an interpretation of article 43 of Additional Protocol I which would allow combatants to "demobilize" at any time, with the purpose of returning to civilian status and

---

[92] See e.g. letter from a number of US senators requesting the Comptroller General of the United States (i.e. the director of the Government Accountability Office) to do a survey of the use by the DoD and the CPA of private military firms in Iraq: Letter to Comptroller Walker from Senators C. Dodd, R. Feingold, J. Reed, P. Leahy and J. Corzine of 29 April 2004, available at http://dodd.senate.gov/index.php?q=node/3270&pr=press/Releases/04/0429.htm , last retrieved on 1 October 2010. See also Rothwell, Donald R., Legal opinion on the status of non-combatants and contractors under international humanitarian law and Australian law, 24 December 2004, available at http://www.aspi.org.au/pdf/ASPIlegalopinion_contractors.pdf via the website of the Australian Strategic Policy Institute http://www.aspi.org.au , last retrieved on 1 October 2010.
[93] Watkin, Kenneth, Warriors without rights? Combatants, unprivileged belligerents, and the struggle over legitimacy, Harvard University, Program on Humanitarian Policy and Conflict Research (HPCR) Occasional Paper Series, p. 16, available at http://www.hpcr.org/pdfs/OccasionalPaper2.pdf , last retrieved on 1 October 2010. Although the question was originally asked in the context of unlawful combatants in the US "war on terror", it is a relevant question in relation to the evolvement of international humanitarian law in general.
[94] ICRC Commentary on Additional Protocol I, ibid. footnote 56, commentary regarding article 43, para. 1677.

then once again taking up their status as combatants as the situation changes or as military operations may require, would cancel any progress that article 43 has achieved. Neither may a person have the status of a combatant while he or she is in action, and the status of a civilian at other times.[95]

Finally, it should be noted that *civilian* personnel accompanying armed forces in the field are generally entitled to treatment as prisoners-of-war if captured by an enemy state during an armed international conflict[96], but they are nevertheless considered civilians (i.e. non-combatants) who are not authorized to take part in the hostilities[97]. Article 51 (3) of Additional Protocol I prescribes that “civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities".

In conclusion, the vast majority of PSC employees do not fall within the definition of a combatant and consequently have the status of civilians throughout their service. It is now time to examine the consequences of this categorization.

3.3.4 Private security company employees as civilians

It is a basic principle of international humanitarian law that civilians are immune from attack, but may lose this right during such time as they participate directly in hostilities[98]. The ICRC has issued the following official statement on the relevance of international humanitarian law in the context of terrorism: "If civilians directly engage in hostilities, they are considered 'unlawful' or 'unprivileged' combatants or belligerents (the treaties of humanitarian law do not expressly contain these terms). They may be prosecuted under the domestic law of the detaining state for such action"[99]. Even though the statement was issued in the context of the debate on the so-called “War on terror”, the principle is generally applicable.

3.3.4.1 Direct participation in hostilities

In the light of the above, it is clear that any direct participation of PSC employees in hostilities is a serious problem. What may first come to mind is perhaps to explicitly prohibit PSC employees from participating in hostilities. Looking closer, however, such a prohibition

---

[95] Ibid., para. 1678. These questions has up until recently been discussed in relation to guerrilla fighters, whose success depend to a large degree on their mobility and flexibility. The international community considered, however, that this concept of mobility could not be extended into the legal field without falling back into a “presumption of illegality” of potential guerrilla fighters. It is true that Additional Protocol I exceptionally allows guerrilla combatants to wear civilian clothes, if the nature of the hostilities so requires (see Additional Protocol I, article 44 (3)). However, this does not allow such combatants to have the status of a combatant while in action, and the status of a civilian at other times. Thus, all combatants are on an equal legal footing.

[96] The Third Geneva Convention (Convention Relative to the Treatment of Prisoners of War) extends prisoner of war status to ”[p]ersons 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… ”(article 4(A)(4)).

[97] Convention Respecting the Laws and Customs of War on Land, of 18 October 1907 (Hague Convention IV), with Annex of Regulations, ibid. footnote 78. Annex article 3 reads: ”The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.”

[98] Additional Protocol I to the 1949 Geneva Conventions, article 51(3).

[99] ICRC official statement of 21 July 2005, ”The relevance of IHL in the context of terrorism”, available at the ICRC website http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705 , last retrieved on 1 October 2010.

would not be practically applicable, for several reasons. First, the concept of direct participation in hostilities is not clearly defined. Second, humanitarian law does not distinguish between offensive and defensive fighting[100], making it meaningless to prescribe that PSC employees may only defend, not attack. There is not even a clear definition of what constitutes combat fighting. Third, a legal permission for PSC employees only to defend *civilian* objects meets with the problem that the character of an object as civilian or military may change according to the circumstances, thus potentially changing the role of a person guarding it. Let us take a closer look at these three issues.

International humanitarian treaty law does not define the concept of direct participation in hostilities, nor does a clear interpretation emerge from state practice or international jurisprudence.[101] The term "direct" participation necessarily implies a distinction from "indirect" participation. While any interpretation of this concept needs to be narrow enough to protect civilians and make a distinction meaningful, it also has to be broad enough to meet the legitimate need of armed forces to effectively respond to violence by non-combatants. Attempting to balance these opposing interests, the above-mentioned ICRC Commentary on Additional Protocol 1 to the 1949 Geneva Conventions defines direct participation in hostilities as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces". In the case of civilians, their behaviour must constitute a direct and immediate military threat to the adversary to be deemed "direct participation in hostilities".[102]

However, this definition has been challenged by some scholars and, to a certain degree, by state practice in an attempt to enlarge the concept. It has been proposed, for example, that direct participation in hostilities should include not only actual acts of violence, but also acts aimed at protecting personnel, infrastructure or material. It has even been suggested that the decisive criterion should be whether the civilian post in question brings added value to the war effort.[103]

There is little doubt that a civilian carrying out an attack would be directly participating in hostilities. The same applies to civilians preparing for, or returning from, combat. The criteria for when preparation begins and where return ends remain controversial, however. It is also a matter of debate whether and under which circumstances civilians who become involved in fighting automatically become a party to the armed conflict. The discussion has come up in the context of peace support personnel involved in fighting, e.g. when defending civilians under attack. According to one view, peace support personnel involved in fighting become a party to the conflict *if* the fighting is of a certain intensity and duration and the peace support forces actually seek to defeat or weaken a party to the conflict. According to another view, peace support forces become a party to the conflict where one party to the conflict chooses to

---

[100] Additional Protocol I to the 1949 Geneva Conventions, article 49.

[101] For an overview of the legal definition of the concept, see Quéguiner, Jean-François, Direct participation in hostilities under international humanitarian law, Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, November 2003, available at http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf .

[102] ICRC Commentary on Additional Protocol I, ibid. footnote 56, commentary regarding article 51(3), para. 1944.

[103] Schreier, Fred and Caparini, Marina, Privatising Security: Law, practice and governance of private military and security companies, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 6, Geneva, March 2005, pp. 57-58, available at http://www.smallarmssurvey.org/files/portal/issueareas/security/security_pdf/2005_Schreier_Caparini.pdf , last retrieved on 1 October 2010.

regard them as such, regardless of which action the peace support forces take.[104] Other areas of controversy include the qualification of ambiguous situations that do not necessarily include the use of weapons, for example logistical support activities, intelligence and guarding activities[105]. Guarding military bases against attacks from the enemy party and gathering tactical military intelligence clearly count as direct participation in combat, however[106].

All in all, there is far from general agreement as to what constitutes direct participation in hostilities. Clearly, direct participation should not be understood so broadly as to include any act that could be construed as supporting a party to the conflict. In the words of the ICRC Commentary "there should be a clear distinction between direct participation in hostilities and participation in the war effort"[107]. This is important to keep in mind when discussing PSCs; to consider all support activities of PSC employees as participation in hostilities would be inaccurate and would have consequences for the categorization and status of other civilians working in war-related industries. This view is supported by the fact that the Third Geneva Convention foresees civilians performing tasks such as supplying armed forces with food and shelter while retaining their status as civilians (article 4A(4)). Most commentators agree that the same applies to civilians working in industries supporting the overall war effort, for example munitions factories[108]. Consequently, support and logistics activities, such as catering or construction and maintenance of military bases, carried out by PSC employees and other civilians are not considered direct participation in hostilities. Sometimes, however, logistics personnel who are members of the armed forces are called in to support troops finding themselves in a tight battle[109]. It has been reported that, in Iraq, troops have been compelled to leave the guarding of the base in contested areas to kitchen staff, due to shortage of military personnel[110]. In similar situations, the civilians concerned (who may be PSC employees) may find themselves fighting for a legitimate military object, which is likely to mean that they participate directly in hostilities. Even though civilian logistics personnel under certain circumstances enjoy protection as prisoners-of-war, they are not allowed to participate in combat except in personal self-defence.

Now to the second issue mentioned above – offensive respectively defensive fighting. The determination whether a person is participating or not in hostilities does not necessarily depend on whether he/she intended to do so. According to article 49.1 of Additional Protocol I, "'attacks' means acts of violence against the adversary, whether in offence or in defence". The problems associated with the lack of distinction between offensive and defensive attacks can be illustrated by the example of PSC employees working as security guards. A private security guard firing at an attacker is directly participating in hostilities *if* the attacker is a

---

[104] Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 83, p. 62.
[105] See ICRC / Melzer, Nils, Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law, Geneva, 1 July 2009, Part II, chapter B, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.PDF , last retrieved on 1 October 2010. See also Summary Reports from the Expert Meetings co-organized by the ICRC and the TMC Asser Institute during 2003-2008 preceding the Interpretive Guidance. Summary Reports are available at http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-article-020709 , last retrieved on 1 October 2010.
[106] The Montreux Document, The main rules and good practices of the Montreux Document, commentary to statement 25.
[107] ICRC Commentary on Additional Protocol I, ibid. footnote 56, commentary regarding article 51 – Protection of the civilian population, para. 1945.
[108] Cameron, ibid. footnote 7, p. 589.
[109] This is reported to have occurred e.g. in Somalia in the beginning of the 1990s, see ibid. with references.
[110] Ibid., with reference to an article in the New York Times, April 2005 (date unspecified).

member of a party to the conflict. If, on the other hand, the attack is carried out by a common criminal for "ordinary" criminal reasons the firing back does not constitute direct participation in hostilities. However, it may not always be uncomplicated to decide whether this is the case, since occupying powers and states sometimes enact laws criminalizing resistance fighters. If a private security guard fights against a member of such an outlawed resistance group, the mere criminalization of that group does not mean that the security guard is participating in a police operation or is defending him- or herself against criminals rather than directly participating in hostilities. It is the nature of the operation combined with the status of the persons involved (or the capacity in which they fight) that is decisive.

The third and final issue concerns military respectively civilian objects. An object can be military according to its nature, location, purpose or use[111]. A building normally used for civilian purposes may thus change status and become a military object, for example by being turned into housing for troops. The question is then whether a PSC employee guarding such a building as the building changes status thereby is a civilian unlawfully participating in hostilities. If the building is temporarily filled with combatants the PSC employee may even be unaware of its change in status. Furthermore, does the PSC employee cease to participate in hostilities if the status of the object changes back to being civilian? In my view, it is unreasonable to expect that these potentially fast changes in status be known and taken into account by all the parties to a conflict. Although the problem can be reduced through regulations specifying that PSCs must not be used to guard objects of a military nature or in the vicinity of combat zones, etc., regulations cannot eliminate this problem entirely.

In addition to the above issues, contemporary conflicts have given rise to further challenges when it comes to defining and implementing the concept of "direct participation in hostilities". The increased intermingling of civilian and military activities – as illustrated by the use of high-tech warfare and offensive information operations[112], psychological and electronic warfare, the use of PSCs and the "fight against terrorism" – makes it difficult to determine who is directly participating in hostilities and which measures should be taken to protect those who are not participating.

3.3.4.2 Consequences of civilians'direct participation in hostilities

As was mentioned earlier, civilians are immune from attack according to international humanitarian law, but lose their right to such protection during such time as they participate directly in hostilities[113]. This principle remains uncontroversial. There are, however, related issues giving rise to controversy. One such delicate issue is to determine the exact duration of "direct participation", another the question whether the loss of immunity should be treated in the same way in international respectively non-international armed conflicts. The legal regime applicable in case of capture or detention of civilians taking direct part in hostilities has also raised numerous questions[114]. Moreover, although it is not a violation of international humanitarian law for a civilian to fight for his or her country, civilians who do participate directly in hostilities may be prosecuted under domestic law for their acts, whether or not they have violated international humanitarian law. It is not clear, however, whether they may be prosecuted in domestic courts for the mere fact of directly participating in

[111] Additional Protocol I, article 52.
[112] See the US Department's of Defense definition of the term "offensive information operations", US military website at http://usmilitary.about.com/od/glossarytermso/g/o4478.htm , last retrieved on 29 April 2011.
[113] Additional Protocol I, article 51(3); see also ibid. p. 43, footnote 95.
[114] See the above-mentioned ICRC Summary Reports on the subject "Direct participation in hostilities", 2003-2008, ibid. footnote 105.

hostilities or whether such participation must involve an act prohibited under national or international law[115].

It is conceivable that the protection of "ordinary" civilians may be indirectly affected by an increased use of PSC security guards, particularly since such use may have implications for the doctrine on human shields and their direct participation in hostilities. Since the issue of human shields may come up in connection with civilian employees being used to guard (potentially) military objects, it is appropriate to say a few words on the subject. The term "human shield" is a military and political term, not a legal one. It refers to the presence of civilians in or around military targets with the purpose of deterring an enemy from attacking. It also includes the situation where a party to a conflict intentionally positions its military assets amongst a civilian population or close to civilian facilities, such as hospitals or schools, hoping that the enemy will be reluctant to attack them. Finally the term may be used to describe civilians literally shielding combatants during attacks, by being forced to march in front of soldiers during human wave attacks. The use of human shields to protect military targets is considered a war crime under international law; according to the Fourth Geneva Convention "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations."[116]

Since it is extremely difficult to determine whether individuals acting as human shields are doing so voluntarily, no distinction can be made between voluntary and involuntary human shields when applying humanitarian law. Accordingly, all civilians – even those being placed or placing themselves in front of a military object – must be treated as ordinary civilians protected from attack. Consequently, any potential injury to them must be taken into account when assessing the proportionality of an attack. Any widespread use of PSC security guards risk opening up for acceptance of a distinction between voluntary and involuntary human shields, thereby reducing the protection of civilians.

Since PSC personnel have varied background and carry out a wide range of tasks, it is difficult to give one concise answer to questions related to their direct participation in hostilities or their role as human shields. Certain PSC employees do have combat roles, for example strategic planning and target selection, or even participation in combat, thus undoubtedly participating directly in hostilities. The majority, however, are engaged as guards. As we have seen above, guarding tasks fall into a grey area when it comes to assessing direct participation in combat. In some cases guarding duties might even correspond to the use of human shields[117]. At any rate, any civilian tasked to guard a military object could be said to be engaged in combat.

Even persons who would normally reject a distinction between voluntary and involuntary human shields may be more willing to accept such a distinction with regard to PSC employees. It is true that PSC employees with guarding duties seem to stand somewhere between combatants and ordinary civilians, thus appearing more willing to participate in combat than the average civilian does. However, how does one distinguish a PSC guard from a civilian acting voluntary or involuntary as a human shield? Furthermore, if we hold that PSC employees guarding a military object are participating directly in hostilities, then

[115] Presumably, however, most national jurisdictions prohibit civilians from attacking soldiers.
[116] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (75 UNTS 287), (hereinafter the Fourth Geneva Convention), art. 28.
[117] Michael Schmitt mentions that one PSC in Iraq engaged more than 17 000 Iraqis to guard an oil pipeline against looters and possibly against insurgents; see Schmitt, Michael, ibid. footnote 88, p. 541.

follows more easily the conclusion that at least voluntary human shields placing themselves in front of military objects also are directly participating, thereby losing the protection from attack.

In this connection it is also important to note that a party to a conflict, who places private security guards in front of (a significant number of) military objectives, or even likely or possible military objectives, may be in violation of article 51.7 of Additional Protocol I[118].

National armed forces normally have clear mechanisms in place to implement and enforce discipline and compliance with international humanitarian law among their members. First, armed forces have chains of command with potentially severe consequences for those who do not follow orders. Second, states have legislation, such as the US Code of Military Justice (UCMJ), allowing prosecution and conviction of enlisted personnel for violations of the law. The lack of comparable mechanisms for non-enlisted personnel, including PSC employees, implies a potential risk for the civilian population at the hands of PSC personnel. This is not saying that all PSC employees are more likely than regular soldiers to violate humanitarian law; many PSCs hire highly trained and skilled former military personnel who may have an excellent knowledge of humanitarian law. However, PSCs also make profits from hiring large numbers of individuals of mixed background who provide cheap labour and whose level of training and skill most likely is more limited. I will return to the issue of accountability. Suffice it to say here that, as of today, there are no clear and effective mechanisms for holding PSC employees accountable for violations of humanitarian law. In the absence of this, the willingness and ability of most PSCs to ensure that their employees comply with humanitarian law and human rights law must be questioned, especially in the light of abuses already exposed in Iraq and elsewhere[119]. At any rate, voluntary commitments alone from the PSC industry, or from single PSCs, are no guarantee for full and solid accountability of PSCs.

Direct participation in hostilities of PSC employees also carries important consequences for the employees themselves. The consequence of a PSC employee who is a civilian and participates in hostilities is identical with that of being a mercenary: he or she may face prosecution and punishment within the criminal justice system[120]. Not having immunity if they do participate in hostilities may come as surprise for PSC employees, especially if they are employed by a registered company subject to a regulatory scheme and not considered mercenaries by the licensing state.

An Instruction issued by the US Department of Defense shows that the US military is well aware of the above problems and issues. The aim of the Instruction is to regulate the activities of PSC employees and the Instruction contains detailed requirements for those likely to participate directly in hostilities.[121] Although welcome, similar regulations cover only PSCs

---

[118] Cameron, ibid. footnote 7, p. 592.

[119] A number of court cases and legal articles highlight the legal difficulties connected with extraterritorial application of national law (see below, chapter 4).

[120] This does not necessarily mean that he/she can also be punished for the particular crime of mercenarism. However, as with mercenaries, it has been argued that the prospect of criminal prosecution and punishment may entail a lack of incentive for PSC employees to comply with humanitarian law if they do (knowingly) participate in hostilities. Specifically, lawyers for the plaintiffs against the company CACI argued that the company had a positive incentive *not* to abide by international humanitarian law in order to get more lucrative contracts, see Cameron, ibid. footnote 7, p. 592.

[121] US Department of Defense, Instruction No. 3020.41 (3 October 2005): Contractor Personnel Authorized to Accompany the US Armed Forces, available at http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf , last retrieved on 1 October 2010.

hired by the military, while companies hired by other actors remain unregulated. In addition, as is often the case, the main challenge lies in the will and ability of both authorities and PSCs to implement the regulations.

3.4 The potential for a special status for private security company employees

Although there is no category of "quasi-combatants" under international law, it may be tempting to argue that some PSC employees are somehow combatants (at least those who may be classified as persons accompanying armed forces) and, as a result, are accorded prisoner of war status[122]. However, such persons are not classified as combatants and are not allowed to participate in combat. This is clear when reading Additional Protocol I, article 50, in conjunction with the Third Geneva Convention, article 4, since article 50 of Additional Protocol I defines civilians as those persons *not* included in article 4A(1), (2), (3), or (6) of the Third Geneva Convention. Consequently persons included in article 4A(4) of the Third Geneva Convention must be civilians. Since article 43 of Additional Protocol I prescribes that only combatants may participate in hostilities one must conclude that civilians accompanying armed forces may *not* thus participate. In addition, the ICRC Commentary on article 43 clearly specifies that "[a]ll members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of "quasi-combatants", which has sometimes been used on the basis of activities related more or less directly with the war effort."[123]

On a personal note, it is somewhat ironic that the United States, the largest employer of PSC employees with a record of partaking in hostilities, is also the state most vigorously opposing basic protection for those whom US authorities denominate "unlawful combatants" in another context.

3.5 Conclusions regarding the legal status of private security company employees

From the above one may draw the conclusion that very few PSC employees meet all the criteria in the complex definition of a mercenary. Therefore, in a clear majority of cases, international law on mercenarism will not be relevant for the regulation of PSC employees. In addition, very few PSC employees will fulfil the criteria to be classified as combatants. As a result, the vast majority of PSC employees have the status of civilians under international humanitarian law.

---

[122] See the Third Geneva Convention art. 4A(4). This might include e.g. some of Singer's military "support" companies. On some occasions in Iraq, formal authorization was not issued for such personnel, for example for persons engaged by contractors other than the US army. According to the prevailing interpretation of international humanitarian law, such persons do not meet the criteria in article 4A(4), see McCullough, James J., and Edmonds, Courtney J., Contractors on the battlefield revisited: The war in Iraq and its aftermath, Briefing Papers, Second Series, No. 04-6, May 2004, pp. 4 onwards, available at http://www.ffhsj.com/siteFiles/Publications/E538BA09A38282C8AA2843DD3C54ABB2.pdf via the website of the law firm of Fried, Frank, Harris, Shriver & Jacobson, LLP at http://www.ffhsj.com/index.cfm?pageID=25&itemID=5198 , last retrieved on 1 October 2010.

[123] ICRC Commentary on the Additional Protocols, Additional Protocol I, ibid. footnote 56, commentary regarding article 43, para. 1677.

The international legal status of armed contractors remains one of the hardest problems to solve in the field of humanitarian law and its application to private actors. Short of rewriting the laws of war, it seems difficult to establish a clear and widely accepted status for these contractors. At any rate, it is doubtful whether the international community would accept (an extended) legal protection for armed contractors involved in military activity. The only realistic way forward is for governments to regulate, monitor and follow up on the actions of these contractors, thus ensuring necessary transparency and accountability. On an endnote, it is worth stressing that any regular participation in hostilities of PSC employees might compromise the ability of international humanitarian law to protect “ordinary” civilians.

4 Accountability

4.1 Background

As I mentioned in the introduction, some PSC activities, notably those involving the use of force and firearms, have many features in common with those of national armed forces. At the same time, PSCs lack chains of command, institutions and many other control structures used to uphold discipline and control within national armed forces. As a result, the basic principles of accountability that are supposed to accompany governments' control of violence are not functioning.

Transparency is more or less a prerequisite for ensuring accountability. In national armed forces, the chains of command and other control structures are known, thus providing transparency. The PSC industry, on the other hand, has a standard policy of secrecy. In areas of conflict, it is all the more difficult for outsiders to know how PSCs operate.

Various proposals have been put forward as to how PSC activities should be regulated and accountability achieved. One suggestion has been to regulate PSCs by changing the definition of a mercenary[124], another to adopt an international convention on private military and security companies, or on the transfer of military services (similar to the instruments regulating international transfer of military goods)[125]. Various forms of monitoring systems have also been suggested. So far, a convention drafted under the auspices of the UN Human Rights Council has been presented to governments and a code of conduct has been endorsed by a significant number of companies[126]. I will discuss these and other possible legal measures further in chapter 5. Before that, however, I will clarify the respective responsibilities of governments and PSCs and examine the existing legal means of holding PSCs accountable. I will also touch upon the issue of sub-contracting and of PSCs contracted by other commercial entities.

As of today, the international community lacks the means to enforce international law without the help of states. The investigation and prosecution of crimes normally fall under the jurisdiction of the state in which the crime was committed. However, in weak or conflict-prone states there may be no functioning authorities to carry out these tasks. In criminal cases involving PSC employees deployed in those states, one alternative is to refer the task to the PSC's home state or to the home state of the suspected PSC employee. Referring jurisdiction to states other than the one where the crime was committed is unfortunately problematic.

---

[124] See e.g. Frye, Ellen L., Private military firms in the new world order: How redefining ''mercenary'' can tame the ''dogs of war'', Fordham Law Review, Vol. 73, No. 6, May 2005, pp. 2658-, available at http://law2.fordham.edu/publications/articles/500flspub10831.pdf , last retrieved on 5 January 2011.

[125] Milliard, Todd S., Overcoming post-colonial myopia: A call to recognize and regulate private military companies, Military Law Review, Vol. 176, June 2003, Appendix A: A proposed Draft Convention: International Convention to Prevent the Unlawful Transfer of Military Services to Foreign Armed Forces, available at http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/176-06-2003.pdf , last retrieved on 5 January 2011. The proposed draft convention includes a reporting and monitoring system, whereby licensed military service providers should be subjected to reporting requirements and scrutiny by monitoring teams from the Authorizing State, the UN, or the International Committee of the Red Cross (draft Article 1.5). Note, however, that the draft only encompasses transfer of military services to national armed forces, not other forms of deployment of PSC services.

[126] Above, chapter 2.1.

Some states, like South Africa, have relevant laws, but lack the necessary means for enforcing them effectively. Other states have some useful legislation, but with significant gaps – in fact, most states lack laws regulating and defining the jurisdictions under which PSCs operate.[127] Since PSC employees normally are civilians, they are not part of a military chain of command. It is therefore in many cases unclear how, when, where and by whom crimes committed by PSC employees abroad are to be investigated and prosecuted. It is even more difficult to answer how – if at all – a corporate *entity* can be held accountable. Beside material regulation, the issue of jurisdiction is therefore central.

4.2 The importance of contracts

Contract formation and content have direct bearing on legality, legal certainty, accountability and the rule of law. Once a state has privatised a certain task, a carefully written contract between the state and the private actor is central. It enables citizens to check whether the privatisation is within the bounds of the law and corresponds with relevant democratic decisions. It is also a tool for control and steering for the state as well as its citizens when either is discontent with the services provided by the private contractor.

A problem related to the formation of PSC contracts is the use of so-called “umbrella contracts”, also known as ”infinite-delivery, infinite-quantity” (IDIQ) contracts. These contracts imply that a price is set in advance to cover an unspecified number and nature of tasks during the contract period[128]. One example of an IDIQ contract is the one awarded to Kellogg, Brown & Root in 1995 for operations in the Balkans. The work descriptions therein were very broad, giving the company the “freedom to use latest commercial practices and techniques to meet requirements successfully”[129]. This type of contract has been criticized for being particularly open to abuse and over-charging, lowering the level of transparency and rendering corporate accountability more difficult. One example is the critique against DynCorp’s performance under an IDIQ contract for the training and equipping of the new Iraqi police service. According to official US auditors, the performance was tainted by poor contract administration, unauthorised work performed by DynCorp and property and other costs unaccounted for [130]. The unstable situation in Iraq has forced many companies to tackle far more dangerous situations than were initially envisaged. Since many PSCs are flexible and take on new tasks relatively fast, they can often meet these challenges. However, this often leads to an increased lack of control over the precise nature of PCS operations. Even though the basic terms are clear – whether or not contractors will carry arms, for instance – the initial mandates are often insufficiently detailed or not properly updated. Adding to this, the rules of engagement and PSC mandates are further blurred by the subjectivity of interpretation.

---

[127] Schreier and Caparini, ibid. footnote 103, pp. 104- onwards.
[128] Chatterjee, Pratap, Darfur diplomacy: Enter the contractors, CorpWatch, 21 October 2004, available at http://www.corpwatch.org/article.php?id=11598 , last retrieved on 4 October 2010.
[129] Krahmann, Elke, The privatization of security governance: Developments, problems, solutions, Arbeitspapiere zur Internationalen Politik und Aussenpolitik (AIPA), AIPA1/2003, Lehrstuhl Internationale Politik, University of Cologne, Cologne/Köln, 2003, p. 18, available at http://www.jaeger.uni-koeln.de/fileadmin/templates/publikationen/aipa/aipa0103.pdf , last retrieved on 4 October 2010.
[130] See e.g. the statement by Stuart W. Bowen Jr., Special Inspector General for Iraq Reconstruction, Statement before the United States House, Oversight and Government Reform Committee, on the subject of auditing US contracting in Iraq, 15 February 2007, Washington D.C., pp. 9-12, available at http://oversight.house.gov/images/stories/documents/20070215111017-80058.pdf , last retrieved on 4 October 2010.

Unclear mandates have sometimes led to what is called private security “mission creep”. There are numerous reports from Iraq of trigger-happiness on the part of security contractors originally employed for “defensive” guarding tasks. Furthermore, there have been allegations that some PSCs claim powers to detain people, erect checkpoints without further authorisation and confiscate identity cards.[131] One example of companies performing tasks beyond their mandate is the PSC DynCorp, hired by the US State Department to provide 1 000 advisers to help organize Iraqi law enforcement and criminal justice systems. It was later revealed that four DynCorp employees had taken part in an Iraqi police raid against the home and offices of former exile leader Ahmed Chalabi in June 2004. The contractors had not only worn body armour and carried rifles, but were also effectively directing the raids – a task that went well beyond their official mandate.[132]

It is perhaps unavoidable for PSCs operating in areas of great physical insecurity to have some measure of discretion in executing their tasks. Under these circumstances, contractors may well consider it justified to decide for themselves which action is required in order to fulfil their contract. Therefore, it may, at least occasionally, be somewhat unjustified to blame individual companies for acting beyond their mandates. Another example may illustrate the situation. A UK-based PSC, Hart Group Ltd., was contracted to provide protection for Coalition Provisional Authority (CPA) staff in Iraq, a “passive” task according to the contract. The instructions were that company employees were to call on military support from regular coalition forces if they came under direct attack by Iraqi insurgents. The managing director of Hart Group testified that, on numerous occasions, such help was not forthcoming and company employees consequently had to hold positions for considerable periods of time, effectively engaging in strategically sensitive tasks.[133]

Adding to the difficulties of oversight of the contracting process is the extent of subcontracting between PSCs. According to one estimate, the USA has awarded approximately 2 800 contracts in Iraq, but has very little influence over the subcontracting[134]. Of all the companies providing security services in Iraq only a handful are contracted directly by the US government[135]. An unknown number of companies operate under subcontracts with US contractors. Yet another unknown number of security personnel are recruited as “freelance consultants”[136]. Subcontracting is a problem *per se*, leading to further dispersal of authority in policy implementation and even less oversight and control for the original client.

---

[131] Murphy, Clare, Iraq’s mercenaries: Riches for risks, BBC News Online, 4 April 2004, available at http://news.bbc.co.uk/1/hi/world/middle_east/3590887.stm , last retrieved on 22 October 2010.
[132] Merle, Renae, DynCorp took part in Chalabi raid, Washington Post online, 4 June 2004, p. A17, available at http://www.washingtonpost.com/wp-dyn/articles/A13904-2004Jun3.html , last retrieved on 22 October 2010. This is just one of numerous examples; similar problems have been reported from other countries and areas, such as Colombia, Afghanistan and the Balkans.
[133] BBC Radio 4 File on 4 programme (broadcast at 20.00 on 25 May 2004), cited in Holmqvist, ibid. footnote 8, p.26.
[134] Worden, Leon, Downsizing and outsourcing, We’ve sprung Pandora’s Box, The Signal online, 27 June 2004, available at http://www.scvhistory.com/scvhistory/signal/iraq/sg062704.htm , last retrieved on 22 October 2010.
[135] US Congressional Research Service (CRS) Report for congress: Private security contractors in Iraq: Background, legal status, and other issues, updated 25 August 2008, by Elsea, Jennifer K., Schwartz, Moshe, and Nakamura, Kennon H., pp. 2-4, available at http://www.fas.org/sgp/crs/natsec/RL32419.pdf , last retrieved on 22 October 2010.
[136] Mark Whyte from the UK-based private security company Pilgrims Security, cited by Neil Arun in the article Outsourcing the war, BBC News Online, 2 April 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3591701.stm , last retrieved on 22 October 2010. According to Whyte, these ”consultant” contracts are ”usually short-term and responsibility for any risk taken – and for paying taxes – rests with the individual”.

4.3 General features of state responsibility

As a rule, the international responsibility of a state may be invoked in relation to a conduct of an actor not belonging to the state apparatus only if the actor is carrying out the conduct under the instructions of, or under the direction or control of, the state[137]. This rule is based on the distinction between public and private actors. Now, this distinction is partially mooted by the positive obligation on states under international human rights law to accept responsibility not only for the acts of state organs, but also for *omissions* of these organs, where such omissions have resulted in an insufficient protection of individuals whose rights or freedoms have been violated by non-state actors. However, this latter principle has been recognized only in cases where the state exercises jurisdiction, meaning that the state exercises effective control. A state is not presumed to exercise such control outside its territory. Therefore, it is only under exceptional circumstances that the power of the state organs over persons or property located abroad will amount to the exercise of jurisdiction justifying an extension of the *positive* obligations derived from international human rights law binding upon that state.[138]

Before discussing home state responsibilities, a company's home state must be determined. There are at least three possible connections between company and state whereby the state might become "home" to the company, for the purpose of regulating the state's human rights responsibilities:

- incorporation (normally the physical presence of headquarters or directors)[139]
- financing through export credits
- registration on the national stock exchange

If incorporation increasingly loses its traditional, territorial aspect, the two latter (and possibly other levers as well) may become increasingly important as points of control, creating a political responsibility on the home state to regulate those companies.

---

[137] Article 4 of the International Law Commission's Articles on Responsibility of states for internationally wrongful acts (hereinafter the ILC Draft Articles), adopted by the International Law Commission on 9 August 2001. Article 4 is inspired by the position of the International Court of Justice (hereinafter the ICJ) in the case *Military and Paramilitary Activities against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ Report, p. 14. The Draft Articles were adopted by the International Law Commission at its 53rd session, in 2001, and published in the Commission's yearly report to the UN General Assembly (A/56/10). The report also contains commentaries on the draft articles. The Draft Articles can be found in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, and was reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol. I)/Corr.4.

[138] De Schutter, Olivier, Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations (report prepared for a seminar convened under the auspices of the Special Representative to the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, Brussels on 3-4 November 2006). The report is available at http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf , last retrieved on 22 October 2010.

[139] However, two jurisdictions in Canada no longer require such presence in order for incorporation to occur. For a further discussion on incorporation, see the Summary Report from Workshop on attributing corporate responsibility for human rights under international law, convened by the UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, 17 November 2006, p. 6, available at http://www.business-humanrights.org/Documents/Workshop-Corp-Responsibility-under-Intl-Law-17-Nov-2006.pdf , last retrieved on 22 October 2010.

4.4 National and international jurisdiction

Since prosecuting offenders of international crimes forms part of state responsibility, I will make a few, short notes concerning jurisdiction.

National courts traditionally base their competence on one or several of the following principles:

- territorial principle (the crime was committed on the territory of the forum state)
- active personality principle (the crime was committed by a citizen of the forum state)
- passive personality principle (the victim of the crime is / was a citizen of the forum state)
- universality principle (the most serious crimes against international law, for which a direct connection with the forum state is not required[140])

On several occasions during the past decades, states have failed to fulfil their obligation to prosecute and punish crimes against international humanitarian and human rights law. For this reason, the international community has instituted several *ad hoc* tribunals over the years (Tokyo, Nuremberg, the tribunals for the former Yugoslavia and Rwanda) and, most recently, the Special Tribunal for Lebanon, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. The Rome Statute of the International Criminal Court was adopted in 1998, providing the legal basis for establishing the first permanent, treaty based, international criminal court. The Rome Statute entered into force in 2002. The International Criminal Court is competent only if the crime in question was committed on the territory of one of the signatory states or by one of their citizens, or if a case is referred to it by the UN Security Council[141]. Moreover, the International Criminal Court has jurisdiction only with respect to the most serious international crimes, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression[142]. Furthermore, the jurisdiction of the court presupposes that all national means of prosecution have been exhausted[143].

[140] For example war crimes, crimes against humanity and the use of torture.
[141] Articles 12 and 13 of the Rome Statute of the International Criminal Court, ibid. footnote 53.
[142] Article 5 of the Rome Statute, ibid.
[143] Article 17 of the Rome Statute, ibid.

4.5 State responsibility for the actions of private security companies

There are four conceivable bases for state responsibility for PSC actions in the field of human rights and humanitarian law:

- state responsibility where the PSC's conduct is attributable to the state
- state responsibility based on the concept of due diligence under international human rights law, i.e. states' responsibility to respect, protect and fulfil human rights
- state responsibility based on an analogous due diligence concept under international humanitarian law
- international responsibility where a PSC is hired to participate in peace support operations. Those operations may imply a shared responsibility between one or several states and international organisations. I will not analyse this particular situation further, due to my limited space.

4.5.1 State responsibility where company conduct is attributable to the state

An act or omission, which is contrary to international law and which can be attributed to a state, entails state responsibility. Rules governing state responsibility are found in the above-mentioned International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts[144] (hereinafter the ILC Draft Articles), many of which reflect international customary law.

To begin with, state responsibility is a consequence of an internationally wrongful act committed by one of the state organs (ILC Draft Articles 1, 2 and 4). Furthermore, an internationally wrongful act committed by an individual, by a group of individuals or by a moral person, who are not state organs, is also attributed to the state if (1) its law authorises the persons in question to carry out tasks relative to the exercise of state sovereignty or (2) if the said persons act according to directives from or under the direction or control of that state. In addition, the act of a person or a group of persons is considered an act of state when the person or group of persons effectively assumes functions relating to the exercise of state sovereignty in the absence of or replacing official authorities in circumstances that necessitate such functions to be secured (ILC Draft articles 5, 8 and 9).

The consequence of state responsibility is that the responsible state is obliged to compensate injured states and possibly the international community (ILC Draft articles, part II, article 31).

4.5.1.1 State responsibility where company employees are combatants

The distinction between combatants and non-combatants is made only in instruments applicable to international armed conflicts (for an account of regulations applicable in internal conflicts, see chapter 4.5.1.4). The following regulations apply if the PSC employees are considered members of the armed forces under article 43 of Additional Protocol I. They

[144] Ibid. footnote 137.

also apply if PSC employees are members of the armed forces or militias forming part of the armed forces under article 4A(1) of Geneva Convention III, or if employees constitute members of independent, allied militias or ”other volunteer corps” under article 4A(2) of the same convention. I concluded in chapter 3 that although PSC employees rarely would qualify as combatants (and prisoners-of-war) under the above regulations, it is not excluded.

If a PSC constitutes the armed forces or otherwise falls under article 4A(1) of the Third Geneva Convention (or article 43 of Additional Protocol I), that PSC will also constitute a State organ within the meaning of article 4 of the ILC Draft Articles on State Repsonsibility, of which para. 1 reads:

> “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central or of a territorial unit of the State.”

Accordingly the conduct of such a PSC would be attributable to the state for the purposes of state responsibility.

I concluded earlier that it is unlikely that any PSC would fulfil the criteria of constituting an independent militia within the meaning of article 4A(2) of the Third Geneva Convention. Still, if the criteria are fulfilled in a particular case, the PSC in question would not constitute a State organ under article 4 of the ILC Draft Articles, but instead fall under article 5 of the ILC Draft Articles, which reads:

> “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of the State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

A PSC that fulfils the criteria in article 4A(2) of the Third Geneva Convention is necessarily engaged in activities which require the exercise of elements of governmental authority (i.e. fighting an international armed conflict on behalf of the state). This means that the conduct of such a PSC is attributable to the state under article 5 of the ILC Draft Articles. I will make a more thorough examination of the application of article 5 shortly.

4.5.1.2 State responsibility where company employees are civilians

I will now examine state responsibility in cases where PSC employees have the status of civilians under international humanitarian law, but have some connection with the state apparatus. In such cases, state responsibility may be based on articles 5 and 8 of the ILC Draft Articles (conduct of persons or entities exercising elements of governmental authority respectively conduct directed, controlled or instructed by the state). One possible connection, which I will consider, exists when PSC employees constitute "persons who accompany the armed forces" according to article 4A (4) of the Third Geneva Convention. State responsibility in cases involving sub-contracting will also be examined.

State responsibility under article 5 of the ILC Draft Articles

The decisive criterion in article 5 of the ILC Draft (reproduced just above), is that the person or entity engaging in a particular conduct is *empowered by the law of the state to exercise elements of governmental authority*. Provided that the person or entity is acting in that capacity in the particular instance, the conduct is considered an act of the state under international law.

A function entails governmental authority within the meaning of article 5 either because the function is required by the law of occupation or because the function constitutes an *intrinsic state function*. The Third Geneva Convention requires states to fulfil certain obligations, many (but not all) of which presuppose the performance of military functions. Military functions imply the exercise of governmental authority within the meaning of article 5 of the ILC Draft Articles. If a state hires a private company to carry out such functions, the conduct of that company and its employees will thus be attributable to the state and entail international responsibility.

There are different opinions as to what exactly constitutes intrinsic state functions when it comes to activities in a combat zone. Some consider that virtually everything associated with the conduct of hostilities are functions that require governmental authority; others find that definition too broad[145]. Let us take the example of a PSC hired by a private oil company to guard oilfields in Iraq during a period when the country is under foreign occupation. The conduct of that PSC would probably not be attributable to the occupying power based solely on the latter's status as occupant. It might be different if there is a contract between the oil company and the occupying power, but there is no clear answer to this.

However, it is not enough that the private company carries out a function entailing governmental authority. In order for the conduct of a private company to be attributable to the state under article 5, the company must also be "empowered by the law of the State". It is not clear how specific this law must be. It seems unreasonable, however, to require a specific law empowering each PSC to carry out certain functions. Rather, the criterion is probably fulfilled if the law empowers a certain governmental authority to delegate its powers to a private actor.

State responsibility under article 8 of the ILC Draft Articles

Article 8 of the ILC Draft Articles reads:

[145] Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 83, p. 17.

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

Cases involving PSCs may in the first hand give rise to state responsibility on the basis of governmental instructions, rather than direction or control on the part of a state. One might ask whether the formulation "acting on the instructions of … that State in carrying out the conduct" implies that the instructions must refer to the wrongful act itself, considering that also the official Commentary to the ILC Draft Articles, article 8, refers to "instructions of the State in carrying out the wrongful act"[146]. According to the Commentary, it is clear that the instructions (or direction or control) must relate to the conduct that is said to have amounted to an internationally wrongful act. Questions then arise as to state responsibility for actions going beyond the instructions given. PSC employees may, for example, engage in activities which contravenes both the instructions or directions given and the international obligations of the instructing state. According to the Commentary, these cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general, a state giving lawful instructions to persons who are not its organs does *not* assume the risk that the instructions will be carried out in an internationally unlawful way. If, on the other hand, persons or groups have committed acts under the *effective control* of a state, the conditions for attribution will be met even if particular instructions may have been ignored.[147]

The next question is what type of instructions would lead to state responsibility in cases involving PSCs. It is unclear whether a contract in itself would constitute "instructions" within the meaning of article 8. It seems on the other hand clear among many experts that where rules of engagement (ROE) are part of the contract, the contract in question would constitute "instructions" under article 8. Many experts furthermore agree that attribution under article 8 depends on how clearly the state indicates to the PSC how it wants the contract to be performed. The vaguer the instructions are, the more likely is it that the conduct of the PSC, including internationally wrongful acts, fit within the instructions, thus giving rise to state responsibility.[148] If, for example, a contract to guard an oil field does *not* include detailed rules of engagement, it follows that the contracted task is to guard the oil field and take whatever measures the individual guards subjectively consider necessary. As a result, any conduct by a guard amounting to an internationally wrongful act is likely to give rise to state responsibility.

PSC employees as "persons who accompany the armed forces"

Article 4A(4) of the Third Geneva Convention prescribes:

> "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."

The enumeration in this article should not be read as exclusive; the wording "such as" implies that the protection provided for in the article should be granted all contractors who fulfil the

[146] Commentaries to the Draft Articles on Responsibility of States for internationally wrongful acts, ibid. footnote 137, first paragraph of the Commentary to article 8.
[147] Ibid., Commentary to article 8, paras. 7-8.
[148] Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 83, p. 19.

criteria. The phrase "accompany the armed forces" means that there must be a nexus between the armed forces and the contractors; it is not enough that the armed forces have issued the mentioned identification cards. The contractor must at least carry out some sort of service for the armed forces and not only perform a contract for the state. It is not clear, however, whether members of the armed forces must be *physically* present at the location where the PSC is operating.[149]

It is a matter of debate whether civilians, who are granted prisoner of war status under article 4A(4), lose that status if they participate directly in hostilities. According to the dominant position, they do lose their prisoner of war status and may be prosecuted for merely participating in hostilities. Another position, based on a different, systematic interpretation of article 51(3) of Additional Protocol I, claims on the contrary that civilians falling under article 4A(4) of the Third Geneva Convention do not lose their prisoner of war status by participating directly in hostilities. This latter position is not generally accepted, however, nor does it seem to withstand a closer analysis[150].

State responsibility in cases involving subcontracting

The issue here is state responsibility for the conduct of a PSC, subcontracted by another PSC, that in its turn is contracted by a state. In principle, the state is responsible to the same degree for the actions of the subcontractor – provided that the state has permitted its contract partner to subcontract.

There is no reason why there would *not* be attribution under article 5 of the ILC Draft Articles, provided that the sub-contractor exercises governmental authority and is empowered by the law of the state to perform the particular task.

Under article 8, the decisive issue is whether the PSC contracted by the state is allowed to subcontract, either because the contract explicitly allows subcontracting, or because the contract is silent on the issue. In both cases the state would normally incur responsibility were the PSC to subcontract. Where the contract explicitly allows subcontracting, one decisive factor is whether the contract includes a requirement that any subcontract must include the same terms related to the rules of engagement as the original contract between the state and the PSC. The substance of these terms may decide whether the wrongful conduct can be attributed to the state. If, in contrast, the contract does *not* permit subcontracting and the PSC subcontracts anyway, thus exceeding its authority within the meaning of article 7 of the ILC Draft Articles[151], the state would *not* – in contrast to article 5, where there would be attribution under similar circumstances – bear responsibility.

I will return to the question of state responsibility based on the concept of due diligence. It is worth mentioning here, however, that it is plausible that a state, in a case involving subcontracting, can be held responsible because it has failed to exercise due diligence by not explicitly addressing the possibility of subcontracting in the original state – PSC contract.

---

[149] Ibid., p. 15.

[150] For a fuller discussion, see ibid, pp. 14-15.

[151] Article 7 reads: "The conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

Such responsibility is likely to be limited to cases where the harmful conduct takes place within the jurisdiction of the contracting state, however[152].

4.5.1.3 State responsibility where company employees are mercenaries

For the purpose of state responsibility under articles 5 and 8 of the ILC Draft Articles, it makes no difference whether the PSC employees constitute mercenaries according to Additional Protocol I, article 47. The OAU/AU and UN Conventions on mercenarism may create further legal bases for state responsibility. I will not go further into that issue here.

[152] More on this below, chapter 4.5.2. Cp. also with the Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 83, p. 20.

4.5.1.4 State responsibility for company conduct in non-international armed conflicts

Non-international armed conflicts are situations of insurrection within a state. Where a state hires a PSC to help put down the insurrection, articles 4, 5 and 8 of the ILC Draft Articles may be applicable.

With respect to instructions according to article 8, there is no difference between international armed conflicts and non-international armed conflicts, thus reference can be made to what has been said above.

For state responsibility to exist otherwise in non-international armed conflicts, the PSC must either:

a. constitute a state organ under article 4 of the ILC Draft Articles (for example by constituting the state's armed forces under Additional Protocol II to the Geneva Conventions, article 1(1)), *or*
b. exercise elements of governmental authority under article 5 of the ILC Draft Articles.

It has been discussed whether the term "armed forces" is broader under Additional Protocol II (applicable to non-international armed conflicts) than under Additional Protocol I (applicable to international armed conflicts), therefore more likely to include PSCs. This view finds some support in the ICRC Commentary to article 1(1) of Additional Protocol II, which states that "the term 'armed forces' … should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested, such as, for example, 'regular armed forces', in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries."[153]

In most cases relating to non-international armed conflicts, state responsibility for the conduct of PSCs will arise under article 5 of the ILC Draft Articles. It is clear that fighting a civil war constitutes an exercise of elements of governmental authority within the meaning of article 5. Thus, where a state hires a PSC to partake in such a war, the conduct of that PSC will be attributable to the state. In one case involving "village guards", armed and paid by the Turkish state, but not members of the Turkish armed forces, its gendarmerie or otherwise employed by the state, the European Court of Human Rights (hereinafter ECtHR) determined that Turkey was indeed responsible for the guards' conduct[154].

Thus, it seems that the threshold for attributing the conduct of PSCs to states may be lower in non-international armed conflicts than in international armed conflicts. It is worth noting, however, that article 91 of Additional Protocol I makes the state responsible also for *private* acts of members of its armed forces in international armed conflicts, something which is not the case in non-international armed conflicts.

[153] Sandoz, Swinarski, Zimmerman (eds.), Commentary to the Additional Protocols of 1977, ibid. footnote 56, para. 4462.
[154] Acar and Others v. Turkey, European Court of Human Rights, App. Nos. 36088/97 and 38417/97, judgement of 24 May 2005, paras. 68-86.

4.5.2 State responsibility where company conduct is not attributable to the state

4.5.2.1 States' obligation to protect human rights

General features of states' obligation to protect human rights
International human rights law obliges states to protect the human rights of all persons – citizens and foreigners alike – within their jurisdiction. The obligation to protect, including states' duty to act with due diligence, determines in the first hand the duties of states in relation to abuses committed by non-state agents.

International human rights law applies also in situations of armed conflict and exceptions can be made only in accordance with the terms of the respective convention[155]. However, certain rights may under no circumstances be derogated from, notably the right to life and the prohibition against torture and other inhuman or degrading treatment. Humanitarian law often constitutes *lex specialis*, and is as such decisive when it comes to interpreting a specific human right in a conflict situation[156]. As with international humanitarian law, states cannot escape their responsibilities with regard to human rights by transferring tasks to private subjects.

A couple of cases before the ECHR has helped clarify states' duty to protect human rights, including the standard of due diligence. In the case Osman v. UK, which concerned an alleged deprivation of the right to life, the Court determined that:

> "… the right to life under the convention may also imply, in certain defined circumstances, a positive obligation on the authorities to take preventive, operational measures to protect an individual whose life is at risk from the criminal acts of another individual."[157]

With respect to inhuman and degrading treatment, the ECHR has decided a case involving the abuse of children in their home, E. and Others v. UK. The court found that the governmental authority in question should have been aware of the abuse and should have taken measures to protect the children, and further held that:

> "[certain enumerated concrete measures] … would not necessarily have either uncovered the abuse or prevented it. The test under Article 3 however does not require it to be shown that "but for" the failing or omission of the public authority ill-treatment would not have happened. *A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm* is sufficient to engage the responsibility of the State."[158] [My emphasis]

The standard of duty is thus, according to the ECHR, for the state to take reasonably available measures, which have a real prospect of altering the outcome or mitigating the harm. The

[155] This principle has been confirmed by the International Court of Justice (ICJ) in its Advisory Opinion of 9 July 2004, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", ICJ Reports 2004, p. 136. See also UN Human Rights Committee, General Comment 31, Nature of the general legal obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[156] Swiss Federal Council/Conseil fédéral suisse, Rapport du Conseil fédéral sur les entreprises de sécurité et les entreprises militaries privées, ibid. footnote 7, p. 48.
[157] Osman v. UK, European Court of Human Rights, App. No. 87/1997/871/1083, judgement of 28 October 1998, para. 115.
[158] E. and Others v. UK, European Court of Human Rights, App. No. 33218/96, judgement of 26 November 2002, para 98.

Inter-American Court, the Commission on Human Rights and the Human Rights Committee impose similar positive obligations on states[159]. After concluding that a certain conduct by a PSC is not attributable to the hiring state under the ILC Draft Articles, a court can thus apply the above standard. If the state has not itself hired the PSC, the duty to act would most likely be more limited, since the state in such a case could not be expected to have the same insight into the PSC activities. It is likely that state responsibility in those cases presupposes that the harmful conduct took place within the jurisdiction of the state in question.

Three types of states might have obligations to protect human rights in relation to a particular PSC:

- the state which hires the PSC (hereinafter the hiring state)
- the state on whose territory the conduct is carried out (hereinafter the host state)
- the state in which the PSC is incorporated (hereinafter the home state)

States' obligation to protect human rights implies taking different measures depending on the relationship between the PSC and the particular state. The duty to regulate more generally the conduct of PSCs falls primarily on the home state. The hiring state is, in the first hand, obliged to regulate its contract with the individual PSC. The host state (or another state or power exercising jurisdiction and thus control over the territory where the PSC operates) has an obligation to protect the human rights of its citizens and foreigners through various measures. If the territory is under belligerent occupation, the occupying power carries that responsibility (see below, chapter 4.5.2.2, on international humanitarian law). Under human rights law the decisive factor is the exercise of *effective control*, irrespective of whether the state's presence is regarded as belligerent occupation or not. In the case of Iraq, for example, during such time as the CPA was exercising control as the occupying power, the CPA investigated incidents involving PSCs.

The obligation to protect human rights imposes a duty on states to prevent and investigate incidents of violence involving private actors, and to provide jurisdiction with a view to prosecuting offenders and providing reparation to victims.[160]

<u>*The obligation to prevent human rights abuses*</u>
When looking at existing court practice, it seems that there is a rather high threshold for determining that a state has failed in its obligation to protect human rights because it has not taken enough measures to prevent one private person from harming another.

As of today, it is not possible to hold companies *as entities* responsible under international criminal law. It is, on the other hand, possible to hold states responsible under international law for damages caused by private firms, provided that the state has not fulfilled its international obligation to prevent or stop activities within its territory that cause serious damages outside that territory.

[159] See e.g. UN Human Rights Committee, General Comment 31, Nature of the general legal obligation on States Parties to the Covenant, ibid. footnote 155, para. 7.
[160] See e.g. the following court cases, which concerned states' obligation to prevent violence and investigate incidents: Kiliç v. Turkey, European Court of Human Rights, App. No. 22492/93, Judgment of 28 March 2000, paras. 77, 83; Mahmut Kaya v. Turkey, European Court of Human Rights, App. No. 22535/93Judgment of 28 March 2000, paras. 101, 108-109; and Velásquez-Rodríguez v. Honduras, Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C, No. 4, para. 172.

There are two situations giving rise to obligations for states to take *positive* steps to prevent harmful conduct by PSCs. The first situation is where a state has, or should have, reason to believe that a particular PSC is involved in conduct that would constitute a violation of human rights were it carried out by the state. This situation came up in the above-mentioned *Osman* case[161]. It is not necessary for the state to have reason to believe that a particular individual is at risk – rather, the state has an obligation to prevent abuses where it regards, or should regard, the PSC itself as a risk factor.

The second situation is where the PSC is involved in an inherently dangerous situation, for example guarding an oil pipeline in a volatile area. Here, the PSC's use of force is foreseeable and thus there is a real possibility of killings, which would constitute arbitrary killings were they committed by a state. In this situation, a hiring state in particular should be obliged to take measures to prevent such killings.

The enhanced obligation to prevent abuses applies to all three of the above-mentioned type states. Which measures a state can be required to take in the particular case depends primarily on its relation with the company. One measure that obviously comes to mind is regulation. Regulations are one of the basic tools available to states to prevent various forms of misconduct or abuse. With regard to a possible duty to regulate PSCs, however, there is probably a very high threshold for a court to decide that national regulations are deficient to a degree that it constitutes a breach of the state's obligation to protect human rights[162]. Courts would probably be more willing to find that a state has an obligation to regulate in cases where (1) the PSC is more or less closely connected to the state, or (2) where the PSC is conducting an inherently dangerous activity.

The duty to regulate relates to the obligation to prevent abuses, as well as the obligation to investigate abuses and provide remedy. I will return to the two latter stages further below. The obligation to prevent through regulation relates first of all to the individual contract. There are thus strong arguments that a state hiring a PSC to carry out tasks in an area of hostilities has an obligation to regulate the contract carefully.

International human rights law imposes an obligation on states to regulate in a particular area, for example a certain industry or segments of an industry, where necessary. Article 2 (2) of the International Covenant on Civil and Political Rights (hereinafter the ICCPR) provides a basis for such an obligation. The provision reads:

> "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[163]

---

[161] Ibid. footnote 157.

[162] See e.g. the following cases from the European Court of Human Rights, one concerning regulations regarding rape and the state's investigation of a particular rape case, the other concerning legislation regarding child abuse: M.C. v. Bulgaria, European Court of Human Rights, App. No. 39272/98, Judgment of 4 December 2003, especially paras. 169-170, 185, 187, 201; and A. v. United Kingdom, European Court of Human Rights, App. No. 100/1997/884/1096, Judgment of 23 September 1998, paras. 7-14, 23-24, 29-30.

[163] International Covenant on Civil and Political Rights, UN Doc. A/6316, adopted by the UN General Assembly on 16 December 1966, 999 UNTS 171, art. 2 (2), entry into force 23 March 1976.

It can be argued that this provision implies an obligation for home and host states to issue industry-wide regulations that, among other things, allow the state to exercise control and jurisdiction over PSCs and their employees. Such industry-wide regulations might also require PSCs to operate under clear rules of engagement, as well as giving the state a possibility to revoke PSC licenses or take other measures with a view to stopping unaccepted activities.

The European Convention on Human Rights does not contain an explicit requirement similar to the one in the ICCPR[164], but the European Court of Human Rights has held that a state, under certain circumstances, may be obliged to enact legislation in order to prevent systematic violations of human rights[165]. Similarly, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (hereinafter the UN Special Rapporteur on Torture) has called upon states to abolish provisions of domestic law allowing corporal punishment, in order to comply with their obligations under the Convention against Torture[166]. Some more proactive commentators have pointed out that states' duty to respect, protect and fulfil human rights through the regulation of private actors needs to go beyond merely providing for judicial determinations of liability once violations have already occurred[167].

Beyond the earlier mentioned small category of international crimes, there is no general obligation on states under international human rights law to exercise *extraterritorial* jurisdiction (understood here as a combination of adjudicative and prescriptive jurisdiction) with a view to promoting and protecting internationally recognized human rights outside their territory. Due to the inconsistent ratification among states of human rights treaties, it is more useful to consider whether customary international law can shed some light on the issue of home state regulation of PSC activities abroad. Under customary international law, states are obliged to exercise due diligence in protecting foreigners *on their territory*, including actions from non-state actors. It is unlikely, however, that this could be pushed to require states to regulate (and provide remedies for) the extraterritorial activities of multinational companies[168]. Thus, neither the treaty regime nor customary international law imposes an obligation on states to regulate multinational companies abroad; on the other hand, international law *allows* states the freedom to do so, under the active personality principle[169]. It is unclear whether a state that does choose to regulate its multinational companies thereby

---

[164] See article 2 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention on Human Rights), 4 November 1950, 213 UNTS 222, entry into force 3 September 1953.

[165] See e.g. Broniowski v. Poland, European Court of Human Rights, App. No. 31443/96, Judgment of 22 June 2004 (concerning compensation for land expropriation) and the above-mentioned court case A. v. United Kingdom (ibid. footnote 162).

[166] Interim Report of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, UN General Assembly Doc. A/60/316, 30 August 2005, p. 9, para. 28, available at http://www.unhcr.org/refworld/docid/43f30fb40.html , last retrieved on 5 May 2012.

[167] Summary Report from Workshop on Attributing Corporate Responsibility for Human Rights under International Law, convened by the UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, 17 November 2006, p. 3, available at http://www.business-humanrights.org/Documents/Workshop-Corp-Responsibility-under-Intl-Law-17-Nov-2006.pdf , last retrieved on 28 October 2010.

[168] This matter was discussed at the above-mentioned Workshop on Attributing Corporate Responsibility for Human Rights under International Law, where participants generally agreed against such an interpretation, see Summary Report from the workshop (ibid.), p. 6.

[169] The active personality principle in international law means that states are entitled to exercise extraterritorial jurisdiction to regulate the activities of its nationals abroad.

also is required to provide a remedy, and whether that remedy has to be adjudicative in nature[170].

Another question is whether a home state that indirectly, but actively, contributes to extraterritorial human rights abuses by a multinational company, for example by providing finance or support via its embassy in the host state, will be in breach of its international obligations. This is yet to be determined. It might be argued that a state that finances a PSC has some obligation to regulate how that PSC behaves, considering the duty under customary international law not to finance activities aimed at the "violent overthrow of the regime of another State"[171]. It is questionable, though, whether financing alone produces a sufficiently close nexus between the state and the PSC to give rise to such an obligation.

The obligation to investigate, prosecute and provide jurisdiction
The obligation to protect human rights also includes an obligation on the part of states to investigate human rights abuses, prosecute offenders and provide jurisdiction enabling victims of abuse to obtain reparations[172]. In particular, the state where the PSC is incorporated – the home state – must be able to bring criminal procedures against PSC employees who have committed serious crimes abroad. The obligation depends to a certain extent on the crime or activity. For example, the Convention against Torture provides that states parties shall ensure that all acts of torture, as well as attempts to commit torture and complicity or participation in torture, are offences under criminal law and that these offences are punishable. This may be relevant, for example, in a case of systematic ill-treatment of detainees in a detention centre run by a PSC. On the other hand, there may not be a violation of human rights law if the host state fails to investigate and prosecute lesser, non-international crimes or offences, even if they are widespread or systematic.

Where a PSC is incorporated in one state and employs nationals of another state, the state of nationality would also be obliged to investigate and prosecute those of its nationals who have committed serious, international crimes, such as war crimes and crimes against humanity.

The right of access to a court[173] enabling individuals, including foreigners, to bring claims against PSCs is also relevant, primarily with regard to the state where the PSC is incorporated or otherwise has a sufficiently close connection. It is not certain, however, that states have an obligation to provide jurisdiction for claims *against* foreigners who have committed crimes extraterritorially (e.g. foreign employees of a PSC incorporated in the state)[174].

The above principles are also reflected in the earlier mentioned Montreux Document (parts A-D), which reflects existing international law of state responsibilities relevant to PSCs.

---

[170] The issue was discussed at the above-mentioned Workshop on Attributing Corporate Responsibility for Human Rights under International Law, where participants generally agreed against such an interpretation, see the Summary Report from the workshop (ibid. footnote 167), p. 6.
[171] See the UN Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the charter of the United Nations, ibid. footnote 48, para. 26.
[172] See e.g. the two above-mentioned European Court of Human Rights cases against Turkey (Mahmut Kaya v. Turkey and Kiliç v. Turkey, ibid. footnote 160). See also the following cases from the Inter-American Court of Human Rights: the above-mentioned Velásquez-Rodríguez v. Honduras (ibid. footnote 160), paras. 176-178; Godínez-Cruz v. Honduras, Judgment of 20 January 1989, Series C, No. 5, paras. 175, 182, 187-198; Trujillo-Oroza v. Bolivia, Judgment of 27 February 2002, Series C, No. 92, para. 99; and Del Caracazo v. Venezuela, Judgment of 29 August 2002, Series C, No. 95, paras. 115-119.
[173] See e.g. the European Convention on Human Rights, art. 6 (1).
[174] Cp. ibid. p 69 and footnote 169.

4.5.2.2 Obligations of a due diligence nature in international humanitarian law

Unlike violations of human rights law, violations of international humanitarian law can be committed by states and private actors alike. Thus, both states and PSC employees may be in violation of humanitarian law for actions carried out by PSC employees and both may be held legally responsible.

Obligations of the contracting state

Common article 1 of the Geneva Conventions provides that state parties "undertake to respect and ensure respect for the present Convention in all circumstances." This implies that a state contracting a PSC to carry out tasks entailing obligations under the Geneva Conventions is obliged to ensure that the PSC fulfils these obligations. The state is thus responsible for any violations of the Geneva Conventions committed by the PSC while carrying out tasks given by the state.

The concept of due diligence is not explicitly mentioned anywhere in the Geneva Conventions. Nevertheless there are substantive obligations of a due diligence character in these conventions. For example, the ICRC Commentary to the Additional Protocols points out that "legal writings and case-law show that the responsibility of the State is involved [with regard to damages caused by private individuals not members of a state organ] if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place."[175]

Experts have suggested a number of measures which the contracting state may take with a view to complying with its obligation to ensure respect for the Geneva conventions[176]. Measures include steps to ensure that PSC employees are properly trained for the task, including knowledge of international humanitarian law; that PSCs operate under clear rules of engagement and standard operating procedures taking into account international humanitarian law; and that any violations are reported to state organs.

There is unfortunately no room within the scope of this thesis to explore states' obligations flowing from Common Article 1 further[177]. It is worth pointing out, however, that many tasks carried out in conflict situations require the exercise of governmental authority (e.g. functions relating to prisoners of war, as discussed earlier). If that is the case, the conduct of a PSC carrying out these functions falls under article 5 of the ILC Draft Articles and is thus attributable to the state, making the concept of due diligence irrelevant. In those cases, however, the contracting state can be held responsible for the PSC conduct only to the extent that the conduct can be attributed to the state under article 5 or article 8 of the ILC Draft Articles. If, for example, an occupying power contracts a PSC to deliver food to the

[175] ICRC Commentary on the Additional Protocols, ibid. footnote 56, commentary to Additional Protocol I, Article 91, para. 3660.

[176] Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 83, p. 41.

[177] For a fuller discussion, see the 2005 Expert Meeting Report, ibid., pp. 43-44, which mainly refers to the potential obligation to instruct. The experts could not agree whether the obligations of a due diligence nature followed directly from common article 1 or from the substantive provisions of the Geneva Conventions only. The discussion revolved around the following substantive provisions: Article 47 of Geneva Convention I, article 48 of Geneva Convention II, article 127 (2) of Geneva Convention III, article 144 (2) of Geneva Convention IV, and article 86 of Additional Protocol I.

inhabitants of the occupied territory in accordance with article 55 of the Fourth Geneva Convention and the PSC fails to deliver, the state can be held responsible for the failure to deliver food. If, on the other hand, the PSC delivers the food, but an incident occurs during the transport, the state can be held responsible for the incident only to the extent that the conduct of the PSC can be attributed to the state under article 5 or article 8 of the ILC Draft Articles.

Obligations of states other than the contracting state
Beside the contracting state it is, as was discussed earlier, primarily the home state and the state on whose territory the PSC operates that may have obligations under international humanitarian law with regard to the PSC. These states may or may not be parties to the conflict (although the state on whose territory the PSC operates often will be).

Common article 1 of the Geneva Conventions is generally not interpreted as an obligation of *result* for states who are not parties to the conflict[178]. Common Article 1 is therefore of limited practical importance for the state of incorporation and for the state on whose territory the PSC operates. It has been suggested that these two states, by enacting an adequate regulatory framework for PSCs, thereby could discharge their obligation under Common Article 1[179]. On the other hand, it is unlikely that a failure alone by a state to adopt a regulatory framework would constitute a violation of Common Article 1. Any duty for the incorporating state to regulate rather stems from the due diligence concept under *human rights law*. The incorporating state may thus be obliged to ensure that an incorporated PSC respects humanitarian law *as a part of human rights law*. However, such an obligation presupposes that the (potential) abuses are subject to the state's jurisdiction (see above, chapter 4.5.2.1).

The International Court of Justice (ICJ) has addressed the particular issue of a state's duty to exercise due diligence (or "vigilance") where the state is an occupying power (these duties include upholding not only humanitarian law, but also human rights law). In the case Democratic Republic of the Congo v. Uganda (Case Concerning Armed Activities in the Territory of the Congo, 2005) the ICJ found that Uganda was an occupying power in a certain district of the Democratic Republic of the Congo within the meaning of article 42 of the Hague Regulations of 1907. Therefore, the Court concluded, Uganda was obliged, under article 43 of the Hague Regulations, to "take all measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area". The Court subsequently pointed out that article 43 entails a duty to exercise due diligence with regard to the conduct of private actors: "This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by a third party." The Court consequently found that Uganda's responsibility was engaged both for violations of international obligations committed by its military and for any lack of vigilance in preventing violations of human rights and international humanitarian law by

[178] Henckaerts, Jean-Marie, and Doswald-Beck, Louise, Customary International Humanitarian Law, ICRC and Cambridge University Press, Cambridge, 2005, Vol. I, Rules, pp. 509-513, Rule 144; and Vol. II, Practice, pp. 3288-3302.
[179] Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 83, p. 41. Some states have enacted regulatory frameworks, see e.g. the South African Regulation of Foreign Military Assistance Act of 1998 (No. 15 of 1998, G 18912, 20 May 1998), Government Gazette, Vol. 395, No. 729, available at http://www.info.gov.za/view/DownloadFileAction?id=70672 , last retrieved on 15 November 2010. Also Sierra Leone and Iraq have enacted legislation.

other actors present in the occupied territory, including rebel groups acting on their own account.[180]

The above-mentioned Montreux Document (parts A-D), reflecting existing international law, contains the main elements of what has been said above. The responsibilities of states providing finance to PSCs was discussed in chapter 4.5.2.1.

Obligations of all states under the Geneva Conventions
With respect to grave breaches of the Geneva Conventions, states are required to exercise universal jurisdiction over offenders in accordance with common article 49 (2) / 50 (2) / 129 (2) / 146 (2) of the Geneva Conventions and the principle of *erga omnes* obligations. Unfortunately, state practice with regard to the implementation of this duty is inconsistent[181].

Common article 49 (3) / 50 (3) / 129 (3) / 146 (3) of the Geneva Conventions reads:

"Each High Contracting Party shall take the measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article."

According to the Commentary to the Geneva Conventions, the term "suppression" "[…] covers everything a State can do to prevent the commission or the repetition of acts contrary to the Convention." After referring to a number of past national prosecutions for violations other than grave breaches, the Commentary concludes that "… all breaches of the Convention should be repressed by national legislation. The Contracting Parties … should at least insert in their legislation a general clause providing for the punishment of other breaches. Furthermore, … the authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention."[182] The term "should" indicates that the provision of jurisdiction for non-grave breaches of the Geneva Conventions is no obligation, however. In addition, it can be argued that if the drafters of the Geneva Conventions intended the provision of jurisdiction for non-grave breaches to be obligatory for states parties, they would have been explicit about it. Still, commentators do not quite agree on this matter[183].

As humanitarian law stands today, there is no obligation of *result* flowing from Common Article 1 of the Geneva Conventions alone. Common Article 1 does thus not have any *erga omnes* effect. Apart from cases involving grave breaches of the Geneva Conventions, therefore, states having no connection to the PSC in question have, at most, only a general duty to exert what influence they can. This may include bringing complaints against the

[180] Case concerning armed activities in the territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 December 2005, ICJ Reports 2005, paras. 178-179.
[181] Some states require that the alleged offender is a national or that there is another, clear connection between him/her and the state, other states require that the alleged offender be present within the state's jurisdiction.
[182] Pictet, Jean S. (ed.), The Geneva Conventions of 1949, Commentary, I – Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, ICRC, Geneva, 1952, p. 368, available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf via the website of the US Library of Congress http://www.loc.gov/rr/frd/Military_Law/Geneva_conventions-1949.html , last retrieved on 1 October 2010.
[183] Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 83, pp. 46-47.

offending state and working within the UN system toward producing condemnations or otherwise bringing the matter onto the agenda.[184]

[184] Henckaerts, and Doswald-Beck, Customary International Humanitarian Law, ibid. footnote 178, Rule 144, Vol. I, Rules, pp. 509-513, and Vol. II, Practice, pp. 3288-3302.

4.6 Reparations

While there is no room within the scope of this thesis to explore the subject of reparations in detail, I will make a few remarks on the subject, in order to make the picture more complete and point to certain legal gaps.

4.6.1 Reparations where the conduct is attributable to the state

Where *human rights* are violated and the violation can be attributed to a state under articles 4, 5 or 8 of the ILC Draft Articles, that state is obliged to make reparation. Article 13 of the European Convention on Human Rights, for example, provides that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." The International Convention on Civil and Political Rights contains a similar provision (see the ICCPR, article 2 (3)).

Where violations of *humanitarian law* are committed in an international armed conflict and the violations are attributable to a state, that state has an obligation under both written and customary law to make reparation[185]. A key question, however, is whether *an individual* can claim personal reparation for violations of international humanitarian law. State practice is unclear in this regard. States clearly are obliged to make reparation, but this often comes in the form of satisfaction (such as an official excuse) or measures for rehabilitation provided for in a peace treaty.[186]

If violations of humanitarian law, which are attributable to a state, also constitute violations of non-derogable rights under human rights law, individuals have the right to a remedy under the latter set of rules.

4.6.2 Reparations where the conduct is not attributable to the state

4.6.2.1 States' due diligence obligations

In cases where a harmful conduct cannot be attributed to any state, no state is obliged to make reparation. Nevertheless, the state within whose territory abuses have taken place has certain obligations with regard to reparations and other remedies, due to the state's due diligence duties discussed earlier. These duties include investigating crimes and prosecuting offenders, providing access to national courts, enforcing judgements and not allowing PSCs any kinds

[185] See article 3 of the Hague Convention IV of 1907, article 131 of the Third Geneva Convention, article 148 of the Fourth Geneva Convention and article 91 of Additional Protocol I to the Geneva Conventions. Based on these provisions, the ICRC has concluded that the said obligation is part of customary international law, see Henckaerts and Doswald-Beck, ibid. footnote 177, Vol. I, Rules, Rule 150, pp. 537-550, and Vol. II, Practice, pp. 3530-3610.

[186] Henckaerts and Doswald-Beck, ibid. footnote 177, Vol. I, Rules, Rule 150, pp. 537-550, and Vol. II, Practice, pp. 3530-3610. See also Pictet, Jean (ed.), Commentary to Geneva Conventions III and IV, commentaries to article 131 of Geneva Convention III and to article 148 of Geneva Convention IV (Commentary to Geneva Convention III, p.630, and Commentary to Geneva Convention IV, p.603). Cp. with Sandoz, Swinarski, and Zimmerman (eds.), Commentary to the Additional Protocols of 1977, ibid. footnote 53, paras. 3656-3657, noting a tendency to recognize the exercise of rights by individuals.

of exemptions under the law.[187] If the state fails to fulfil these duties, it may, under certain conditions, be obliged to make reparations to victims.

It is worth noting that the Montreux Document – which reflects existing international law – reiterates the right of victims to reparations only with regard to states with a *contractual* relation to the PSC, making reference to attribution according to customary international law of state responsibility. With regard to host states and home states, the Montreux Document mentions only the obligation of states to provide effective remedies (cp. articles 4 and 8 with articles 10 and 15 of the document).

4.6.2.2 Liability of the private security company and its employees under international humanitarian law

Clearly, individual PSC employees can commit violations of humanitarian law. It is not clear, however, whether a PSC *as an entity* can commit such violations[188]. According to customary humanitarian law of non-international armed conflicts, armed opposition groups do not have any obligation to make reparation[189]. In view of this, it is unlikely that PSCs have such an obligation. Moreover, it is doubtful whether customary humanitarian law (of international and non-international armed conflicts) obliges states to allow claims from individuals against PSCs and their employees for violations of humanitarian law[190].

It is worth emphasising that the fact that a PSC employee is a civilian does not prevent him or her from being prosecuted for violations of international humanitarian law. A person's status is not decisive when deciding any criminal responsibility – civilians and combatants are equally capable of committing and being prosecuted for war crimes and grave breaches of the Geneva Conventions, in international as well as non-international armed conflicts[191]. Thus, the apparent impunity with regard to serious crimes committed at the Abu Ghraib detention centre in Iraq, for example, is not a result of an international legal vacuum, but rather of a lacking will to prosecute (some of) the persons implicated, practical difficulties related to the collection of evidence and procedural issues. I will discuss these aspects in more depth in chapter 5.

---

[187] See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly, UN Doc. A/40/43, 1985.

[188] Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 80, p. 55.

[189] Henckaerts and Doswald-Beck, Customary International Humanitarian Law, ibid. footnote 177, Vol. I, Rules, Rule 149, p. 536.

[190] Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 83, pp. 55-56. Given that states are not obliged under international humanitarian law to provide a domestic remedy based on individual claims even for the state's own violations, it would be odd if they would have such an obligation in relation to violations committed by private actors. Moreover, the US piece of legislation Alien Tort Statute (more often called the Alien Tort Claims Act, ATCA), Alien Tort Statute, 28 U.S.C. § 1350. The ATCA is unique in its kind and it is questionable whether its existence can be taken as evidence of an *opinion juris* on the part of the USA that the state is obliged under customary law to allow individual claims or that corporations are obliged to make reparations for violations of humanitarian law (or human rights). More on the ATCA shortly, under the headline *"National legislation and civil law suits"*.

[191] See e.g. the final judgement of the International Criminal Tribunal for Rwanda in Case No. ICTR-96-4-I, Judgement (Appeals Chamber), The Prosecutor v. Jean-Paul Akayesu, 1 June 2001, para. 444; available at http://www.unictr.org/tabid/128/Default.aspx?id=18&mnid=4
(the relevant part of the judgement is available at http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/Arret/4.htm), last retrieved on 18 November 2010.

4.6.2.3 Liability of the private security company and its employees under international human rights law

I concluded earlier that if a harmful conduct is not attributable to the state, the state has not committed a human rights violation, unless it has failed to exercise due diligence under human rights law, e.g. by not preventing abuses.

When it comes to a potential *corporate* responsibility for human rights abuses, the situation is somewhat ambiguous. There is an on-going, broad debate within the international community on corporate social responsibilities, including responsibilities for human rights abuses. That subject is far too vast to dive into here; suffice it to say that, according to the traditional view, states are the primary human rights duty holders. Accordingly, it is the responsibility of states to hold companies and their employees responsible in accordance with national law. In line with this, companies should respect human rights, understood – at a minimum – as those rights expressed in the International Bill of Human Rights. This responsibility is distinct from issues of legal liability and enforcement, which is defined largely by national law.[192] Where a company has caused or contributed to an adverse human rights impact the corporate responsibility to respect human rights requires active engagement in remediation[193].

Where the conduct of a PSC neither can be attributed to a state nor any state has failed in its due diligence obligations, the question arises whether (certain) human rights have *horizontal effect*, i.e. are applicable in relations between private subjects. If so, human rights abuses committed by PSC employees might entail a duty on the part of PSCs or the individual offender to provide reparation to victims. The issue of possible horizontal effect of human rights is controversial, however, and there is no agreement within the international community on this matter. It is, on the other hand, clear that private persons can, in times of war and peace alike, be held individually responsible directly under international criminal law for serious violations of international human rights and humanitarian law.

Relevant sources of international law are on the one hand humanitarian law and human rights conventions, such as the Geneva conventions and the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment, on the other hand customary international law, notably the crimes enumerated in the Statute of the International Criminal Court (hereinafter the ICC)[194]. With regard to private security and military firms in conflict situations, the crimes most likely to be relevant include war crimes[195] and crimes against humanity[196], as well as individual cases of forced disappearances[197] and torture[198]. In those

---

[192] See Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, part II, A, pp. 11-12. The Guiding Principles are annexed to UN Doc. A/HRC/17/31, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 21 March 2011.

[193] Guiding Principles on Business and Human Rights, ibid., part II, A, p. 22.

[194] See e.g. the Rome Statute of the International Criminal Court (ibid. footnote 53), article 7, according to which individuals are punishable for crimes against humanity, for example torture and forced disappearance of persons.

[195] War crimes can be defined as violations of humanitarian law that are considered crimes under international law, for example torture of prisoners in situations of armed conflict, murder of unarmed civilians and pillage.

[196] In short, crimes against humanity are human rights violations that are systematic and on large scale.

[197] For a definition, see the Declaration on the protection of all persons from enforced disappearance, UN General Assembly resolution A/RES/47/133, 18 December 1992; or the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, UN Doc. A/61/488, entry into force 23 December 2010.

cases, victims may also be able to obtain reparations. However, the jurisdiction of the ICC and other international or regional courts and tribunals is normally subsidiary to that of national courts, meaning that all national measures must first be exhausted.

4.6.2.4 National legislation and civil law suits

A PSC may be held liable under national civil law whether or not a state is also responsible. The US Alien Tort Statute (more often called the Alien Tort Claims Act, hereinafter the ATCA)[199] is probably unique in its kind, extending original jurisdiction to US district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". Under the ATCA foreign citizens can thus bring civil law suits based on human rights abuses committed outside the United States directly in US district courts. A couple of cases dealing with PSC activities (more precisely the interrogation methods of certain employees) in Iraq have reached the district courts, but at this point in time no ready conclusions can be drawn regarding the application and effectiveness of the ATCA in these cases[200].

It has been suggested that a convention be concluded, under which states undertake to allow civil or criminal sanctions with respect to abuses committed by PSCs and other private actors abroad[201], the model being the Organisation for Economic Co-operation and Development (hereinafter the OECD) Anti-Bribery Convention[202]. As of today, however, no such

---

[198] UN Convention against torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/39/51, 10 December 1984, entry into force 26 June 1987.

[199] Ibid. footnote 190.

[200] See Ibrahim et. al. v. Titan Corp. et. al, ibid., footnote 5. In this case, the district court dismissed the plaintiffs' claim that Titan employees had used torture during interrogations, holding that private persons cannot commit torture in violation of the law of nations. In his Memorandum, Justice Robertson stated that "the question is whether the law of nations applies to private actors like the defendants in the present case. The Supreme Court has not answered that question … but in the D.C. Circuit the answer is no". However, the court did not dismiss the claims based on the common law torts of assault, battery, wrongful death, intentional infliction of emotional distress and negligence. See also Saleh et. al. v. Titan Corporation et. al, ibid. footnote 5. In September 2009, in a 2-to-1 decision, the Court of Appeals for the District of Columbia found that the plaintiffs' state law claims were pre-empted under either conflict pre-emption (i.e. exemption for combatant activities) or field exemption (battlefield pre-emption). The majority also found that plaintiffs claims under the ATCA, including allegation of torture and war crimes, could not be brought against contractors because they are not state actors. The dissenting judge argued that the claims should not be pre-empted and that there was no legal ground for dismissing the claims. In June 2011, the US Supreme Court denied the plaintiffs' petition for certiorari, thus ending the case. The Court of Appeals decision in Saleh v. Titan is still controversial, however, and should be compared with the- seemingly contradicting – determinations in Kadic v. Karadzic, 70 F. 3d 232 (2nd Cir. 1995) and Presbyterian Church of Sudan v. Talisman, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), that "individuals committing [violations of *ius cogens*] may also be liable under international law". Judgements and decisions in US federal courts of appeal differ when it comes to the application of the ATCA in cases involving corporate defendants. Some courts have accepted corporations and private individuals as defendants in ATCA cases, while others have found that corporations are proper defendants only when it is shown that they were *de facto* state actors. Until the issue has been settled by the US Supreme Court, no ready conclusions can be drawn. The entire issue of corporate liability under the ATCA is not yet settled following the case Kiobel v. Royal Dutch Petroleum Co., which is expected to be decided by the US Supreme Court in autumn 2012. In another recent (2012) case, the US Supreme Court stated that there is no corporate liability under the US federal anti-torture statute of 1994 (18 U.S.C. §§ 2340-2340A), but unlike the ATCA, that statute is explicit about individuals committing torture, excluding companies.

[201] Report from the 2005 Expert Meeting on private military contractors, ibid. footnote 83, p. 54.

[202] Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention), adopted on 21 November 1997, entry into force 15 February 1999, articles 3 and 4. The Convention requires states to put in place either criminal or civil sanctions for bribery committed abroad, as well as to provide for jurisdiction in such bribery cases.

instrument is underway. Moreover, even though legislation such as the ATCA provides the perhaps most effective means of holding PSCs accountable at the national level (at least in theory), the problem of mass violations and peace agreements excluding individual claims remain[203]. Due to limited space, I unfortunately have no possibility to explore this issue further, or to give a more detailed account of the ATCA and other national laws in this field.

From the above chapters one can conclude that there clearly are hindrances of a jurisdictional and practical nature to overcome in order to create an effective regime for holding international companies, including PSCs, accountable. Next, I will dig deeper into and elaborate on the more central legal issues and problems presented earlier.

[203] For example, one case brought under the ATCA against a German company, accused of using slave labour, was dismissed by the US court, holding that the peace treaty ending the second world war provided for a system of reparations, which no judgement could impede upon, see Burger-Fischer v. Degussa AG, District Court for the District of New Jersey, 65 F. Supp.2d 248 (1999), p. 278.

5 In-depth discussion and conclusions

The purpose of this chapter is to elaborate on and discuss the most central legal issues and problems identified in the preceding chapters. Subjects will include existing legal gaps, options for regulation and ways to improve accountability. Are the current international initiatives sufficient and adequate? Finally, I intend to take a glance at the ambitions and possible future roles of PSCs in conflict and post-conflict areas.

5.1 Legal issues related to the status of private security company employees and their presence in theatre

I have established that the absolute majority of PSC employees will be categorized as civilians under international humanitarian law. Very few will qualify as combatants. Furthermore, it is quite clear that, as of today, there is no such category of persons as "quasi-combatants" or "illegal combatants" in international humanitarian law. Nor is such a new category of persons desirable; conferring a special legal status to certain categories of persons involved in fighting, without being combatants according to the definition in Additional Protocol I, would blur the concept of "civilians" and lead to confusion. It would also create a clear danger of misuse of the new concept, as we have seen for example in the case of Guantánamo Bay Naval Base. For these – and further – reasons, it is unlikely that any proposal to establish a similar third category of persons will find general support within the international community.

Any regular participation in hostilities of PSC employees will inevitably lead to confusion as to their legal status under humanitarian law. Worse is that it also risks blurring the concept "civilian", something that might compromise the ability of international humanitarian law to protect "ordinary" civilians. Therefore, any participation in hostilities of PSC employees must be avoided.

Although their status as civilians thus is clear in most cases, the status of PSC employees who defend *civilian objects* (including potentially military objects) in areas of armed conflict is shady in some respects. It is clear that civilians who participate in combat lose their immunity from attack. One question is whether PSC employees who, under the said circumstances, become involved in fighting automatically become a party to the armed conflict. If not, under which circumstances do they become such a party? The intensity and duration of fighting might be decisive, perhaps in combination with the intent of those involved in the fighting. Intent on the part of PSC employees involved in fighting to weaken or defeat a party to the conflict suggests that they become a party to the conflict. Alternatively, the way in which other parties to the conflict regard their status might be decisive, irrespective of the PSC employees' actions or intent. A similar discussion has come up in relation to peace support personnel who become involved in fighting, as mentioned in chapter 3.3.4.1, but has not yet produced a ready answer. Another issue in need of clarification is the notion of what constitutes combat, including its beginning and duration.

Particular attention should also be given to the question of what constitutes "mission-critical activities" or "inherently state functions", requiring direct control of the state. There is

probably a need for some rethinking in this area; how is, for example, the guarding of high-level leaders or the collection of key intelligence to be categorized? The earlier mentioned UN Draft of a possible convention on private military and security companies explicitly prohibits the delegation or outsourcing of inherently state functions (article 4(3)), which is uncontroversial in itself. However, there is substantial disagreement among states when it comes to the definition of this concept (articles 2(i) and 9). The definition namely includes several activities that are in fact already outsourced by a number of governments, such as intelligence and knowledge transfer with military, security and policing application. In reality, the convention only allows PSCs to deal with logistics and other similar services (however leaving a loophole open for capacity building under bilateral agreements). It is unlikely that states already outsourcing many of the tasks prohibited by the draft convention will cease that practice. Since the most central matters, in my opinion, are to prevent excessive use of force by PSCs and to ensure accountability for abuses, including reparation to victims, it is unfortunate that the draft convention has caused controversy on this more peripheral point. I will discuss other controversial aspects of the draft convention further below.

For the reasons discussed in chapter 3 and reiterated just above, it is highly unsuitable to use PSCs to guard *military* or potentially military objects in a situation of armed conflict, or where such a conflict is likely to break out. *If* PSCs are hired in such situations, their employees need to be fully aware of the consequences of their civilian status and of their vulnerable position under humanitarian law. The same applies in other situations where they risk becoming involved in fighting. Also in non-international armed conflicts – where the issue of prisoner of war status does not arise – PSC employees need to be aware that their employer, the PSC, might become a party to the conflict under international law. If that happens, all the PSC's employees lose their immunity from attack and they risk committing war crimes as a result of their participation in the conflict. Next, I will elaborate on the possibility to improve the situation in this and other regards through regulation and other legal measures.

5.2 Regulation of private security companies' presence in theatre

The main legal gaps with regard to PSC activities lie in the inadequacy of national regulatory regimes to exercise control over PSCs. In this regard, material rules and issues related to the exercise of jurisdiction are of equal importance. As pointed out in chapter 4.5, states have an implied duty to regulate in cases where they incur international responsibility for the actions of private actors. Thus, the main legal gaps should arise in cases where there is no state responsibility. However, in many cases involving PSCs, state responsibility is still uncertain. Therefore, clearer regulation is needed to clarify both *when* there is state responsibility for the actions of PSCs and the extent of this responsibility, including due diligence obligations.

To begin with, there are legal gaps with regard to whether and under which conditions PSCs should be allowed in the theatre of operations during armed conflict. Although anti-mercenary norms provide some regulation, they are, as we have seen, inadequate and rarely applicable to PSCs. Voices have been raised proposing that PSCs should be explicitly prohibited from engaging in certain activities – in the first hand combat – altogether. However, PSCs are already prohibited under international law from taking direct part in hostilities, unless they are incorporated into a state's armed forces. Moreover, PSCs are

normally contracted to perform tasks other than combat, nevertheless ending up fighting off attackers in a way comparable to combat. I cannot see how a prohibition could be formulated and be both firm enough and flexible enough to fulfil its purpose.

Now, if a state engages a PSC to guard a military object in a situation of armed conflict, it is a fiction to say that the PSC is not hired to engage in combat. It can therefore be argued that a state engaging a PSC to guard a (potentially) military object – whether there is an ongoing armed conflict or not – should be required to incorporate the guards into the state's armed forces. The same applies to PSCs hired by governments to carry out civilian tasks in conflict areas where the hiring state's armed forces are present. Some states already require civilians with key functions in society to serve in the armed forces as reservists; it is thus easy for states wishing to integrate PSCs employees and other civilians into their armies to do so. Incorporation into the armed forces would serve two purposes: first it would counteract confusion as to the said persons' status and powers, second it would enhance accountability by ensuring that the hiring state can exercise jurisdiction over the incorporated individuals. In these cases, there will be no legal gaps and no need for further regulation.

As mentioned just above, the main legal gaps exist where there is no state responsibility. One case where this is likely to occur is the quite common situation where a PSC is hired by another private company, for example within the extraction industry. These contracts often relate to tasks in areas where humanitarian law does not apply, including areas of low-intensity conflict. In these situations, home states are in a position to follow-up on the conduct of PSCs and prevent misconduct through regulation. By introducing a licensing system or by issuing contract permits (or combining these two methods), home states can contribute to filling out some of the above-mentioned legal gaps, while also fulfilling their due diligence obligations under human rights law. Also the host state is in a position to introduce licensing and monitoring systems. The earlier mentioned UN Draft Convention on private military and security companies contains a rather elaborate article on this subject (article 15). The main problem here lies in a possible lack of motivation or capacity on the part of those states to take effective measures to exercise control over these companies. Even if there is a licensing system, effective monitoring and other follow-up may be impaired by difficult circumstances on the ground in conflict areas. If the host state lacks effective follow-up mechanisms (which is often the case in conflict prone areas), the home state is less likely to be able to achieve successful monitoring.

Another area with significant legal gaps is PSCs that are not incorporated into any state or which otherwise seek to escape regulation (sometimes referred to as "rogue" PSCs). I have not been able to find information on the magnitude of this particular problem within reasonable time, but much would certainly be gained through improved cooperation between states and other international actors.

For PSCs operating in conflict areas without being incorporated into a state's armed forces regulation should focus on rules of engagement, preventing PSCs participation in combat and any excessive use of force, remedies to victims and matters related to jurisdiction. Below follows first a more detailed discussion on possible measures in terms of material regulation of PSCs present in theatre. Thereafter follows a discussion on jurisdictional matters and means to enhance accountability.

5.2.1 Material regulation of private security companies present in theatre

I mentioned earlier a couple of proposals put forward with a view to enhancing accountability of PSCs and their employees through international regulation (see chapter 4.1). One such proposal was to change the definition of a mercenary, another to adopt an international convention on the subject of PSCs, alternatively on the transfer of military services.

Changing the definition of a mercenary is, in my view, neither a realistic, nor an effective way to tackle the problem. As we have seen, the absolute majority of PSC employees fall far short of fulfilling the present criteria of a mercenary. In order to encompass the undesired behaviour of these employees, one would have to use a definition of a mercenary being very far from the traditional meaning of the term. In addition, PSC employees are already prohibited under international law from taking direct part in combat. Moreover, existing international penal law is sufficient to punish serious violations of international human rights and humanitarian law. This said, there are, as I shall discuss shortly, regulatory deficiencies with regard to prosecution of crimes other than grave breaches of human rights and humanitarian law. In addition, existing international and national penal regulations need to be more effectively enforced and problems related to jurisdiction, immunity and other forms of impunity need to be overcome. Many national penal regimes probably also need to be complemented or elaborated with a view to covering human rights abuses committed by PSC employees.

5.2.1.1 The case for an international convention

An international convention, similar to the proposed UN Draft Convention on Private Military and Security Companies, would serve several purposes in terms of clarifying state respectively PSC responsibilities, streamlining regulation and pressing for improved monitoring and remedial arrangements. A convention limited to the transfer of military services, such as the one suggested by Milliard (see above, chapter 4.1), would not be sufficient from a human rights point of view, since it would cover only the transfer of military services to national armed forces, not other forms of deployment of PSCs.

As I mentioned in chapter 2.1, many western states consider the adoption of an international convention on the subject of PSCs premature. Those states instead propose clarification and implementation of existing norms, in line with the Montreux process, in combination with self-regulation by the industry. In my view, the effectiveness of any regulation is not necessarily decided by its form – many binding conventions are ineffectively implemented in practice (in particular in the field of human rights, unfortunately), while other forms of instruments may prove surprisingly forceful. It all comes down to the will and capacity of those tasked to implement it and those set up to follow-up on the implementation.

PSC activities are a difficult area to regulate at the international level, considering the complexity of the issue and the diverse political interests involved. This being said, I want to make a couple of notes on the contents of the proposed UN Draft Convention. First, the convention reflects the fact that there are some unclear issues related to jurisdiction, which the Draft Convention leaves to states to solve (cp. the draft, article 21). Thus, many complicated – and weighty – issues related to jurisdiction remain unsolved also with the proposed Draft Convention. Another, rather curious, point is that the Draft Convention outlaws the outsourcing or privatisation of many functions that several states in fact already outsource (cp. the Draft Convention, article 9). It is not realistic to anticipate that those states

will cease that practice. Moreover, the Draft Convention imposes state responsibilities (on home states) that stretches much further than existing customary international law, by establishing that each state party bears responsibility for the military and security activities of PSCs registered or operating in their jurisdiction, irrespective of any contractual relation between the state and the PSC (article 4 (1)). To impose a responsibility on states for the activities of PSCs, solely based on registration within the state's jurisdiction seems unrealistic and too far-reaching.

In short, whether or not a convention regulating the PSC industry will be a reality probably depends on the states backing the Montreux process. In the light of the objections voiced by many Western governments, in particular, it seems less likely that the proposed convention will be an effective tool in the near future. In the present situation, advances may in fact be easier to achieve unilaterally, bilaterally and regionally. In many cases, new regulations and other measures aimed at improving a situation or otherwise bring about change in a particular field are best tried out on a smaller scale, evaluated and then, in relevant parts, implemented on a larger scale. In my view, many elements of the UN Draft Convention might be implemented by states and intergovernmental organizations, alone or jointly, whether or not the proposed convention is adopted. Thus, the on-going process and work being carried out in various fora have the potential not only to clarify existing law and responsibilities, but also to fill out gaps in the law.

Focus should be on preventing excessive use of force and achieving accountability, including reparation to victims. The Montreux process and the International Code of Conduct for Private Security Service Providers will contribute to clarifying how existing international law – notably human rights law, humanitarian law, international criminal law, and public international law on the use of force – is applicable to the activities of PSCs and their relations with governments. Subsequently, the most pressing issue to deal with is ensuring accountability, including the establishment and exercise of jurisdiction and reparations to victims. This presupposes the establishment of national mechanisms related to licensing, registration, reporting and other means of oversight, such as those mentioned in articles 13-16 in the UN Draft Convention.

5.2.1.2 The Montreux process and the International Code of conduct

The Montreux Document

The Montreux Document is not a proactive document, but reflects existing law on state responsibility relevant to PSCs. Being the result of cooperation between the Swiss government and the ICRC, with input from a large number of governments, NGOs and industry representatives, the Montreux Document contains generally respected and credible standards on which other regulatory initiatives can be built. Endorsing states commit themselves to align their domestic laws and administrative practices with its provisions. The document also foresees that states take other regulatory steps, such as monitoring mechanisms.

On the negative side one might mention that the Montreux Document is somewhat cumbersome as a tool for PSCs themselves (although it is not in the first hand intended as such). In addition, it does not cover all issues and situations relevant to PSCs. However, it provides a basis for states to work with the PSC industry in developing more detailed and practical guidance, such as the recently adopted International Code of Conduct for Private Security Service Providers and further follow-up on that document. The Montreux Document

is also useful as a starting point to clarify the respective due diligence obligations of states and PSCs, although further work is needed in this respect (work that might involve also the insurance industry). One might also have wished for more specific guidance on remedial arrangements – both governmental and corporate ones – in cases of PSC misconduct; the document's provisions on this subject are rather elementary and, in addition, scattered over different parts of the document.

Potentially, the Montreux Document can be developed into an instrument against which to evaluate and criticise (perhaps even litigate, although private litigation has not been particularly effective so far) the conduct of states and PSCs. However, there is need for significant further efforts to create effective implementation mechanisms and follow-up to give the document some teeth. One such measure already taken on the part of PSCs is the recently adopted International Code of Conduct for Private Security Service Providers.

International Code of conduct for Private Security Service Providers

One lesson learned from the examples of PSCs operating in Iraq is that clear and realistic mandates, sufficiently detailed rules of engagement and standards of conduct are necessary both to prevent misconduct and to provide a basis for determining the respective responsibilities of PSCs and states, thus a prerequisite for holding PSCs accountable. In view of this, and considering the difficulties and protracted timeline for establishing an international convention on the subject, real efforts should be made to further implement the International Code of Conduct for Private Security Service Providers as a standard in the PSC industry.

The stated goal of the International Code of Conduct is that clients of PSCs – governments as well as non-governmental clients – include a requirement to adhere to the Code in their contractual arrangements. This would lend the Code some teeth, since contractual commitments can be upheld in a court of law. However, the effectiveness of such a measure will depend on the practical implementation of the Code's principles into such contracts. The same is true with the explicit requirement that companies will make compliance with the Code an integral part of their contracts with personnel and subcontractors (the Code, section 18). In addition, the Code should be incorporated into national regulatory regimes, such as licensing and monitoring schemes.

If effectively and broadly implemented, the Code – although a form of soft law – may contribute both to preventing misconduct and to enhancing accountability. At the same time – with a hint of healthy scepticism – one must bear in mind that industry representatives (whichever industry it may be) generally are proponents of self-regulation, as a means to avoid further, more formal, regulation. Self-regulation is, in my view, not sufficient in the case of PSCs, but the Code is a positive and important complement to existing and possible future regulation. At any rate, states and other actors may capitalize on the good will shown by the PSC industry and its need for positive PR and good working relationships with potential clients, which includes governments, NGOs and international organisations. Being the result of a multi-stakeholder process (including industry representatives, governments, academics and NGOs), and considering its comparably detailed contents, the Code of conduct has probably a greater potential than many other industry codes of conduct. This is provided that the foreseen oversight and compliance mechanism is effectively put in place, however (see section 7 of the Code).

The Code is certainly an improvement compared to earlier proposals, which tended to focus on single issues, such as PSCs under certain types of contracts, a prohibition for PSCs to be involved in certain activities or reporting and monitoring systems. This Code includes all PSCs performing in so-called "complex environments" (a wider term than conflict and post-conflict areas), not only PSCs hired by governments or other official entities. Moreover, the Code contains clear and industry specific principles of conduct, including provisions on the use of force and the management of apprehended or detained persons, general management and governance "translated" from international human rights and international humanitarian law. The Code also contains specific provisions on remedies and meeting liabilities, and an obligation to appoint designated personnel to receive incident reports. The oversight and compliance mechanism – once in place – is also a positive measure, although its effectiveness remains to be seen.

On the negative side, there is a risk that the Code's grievance mechanism will prove insufficient, in that incident reporting focuses on reporting to the PSC's client, rather than to state authorities (although reporting to competent authorities is proscribed to the extent required by law or "where appropriate", see sections 63 and 67(a) of the Code). In cases involving more serious human rights abuses, the Code proscribes obligatory reporting also to competent authorities (see section 24 read together with section 22 of the Code). It is also worth noting that the Code does not explicitly deal with the status issue, i.e. that private security provider personnel normally have the status of civilians in situations of armed conflict. It might have been in place to spell this out, even though one may implicitly read it out from the provisions on the use of force and firearms, detention and apprehending persons (sections 30-34). Moreover, the sections on the selection and vetting of subcontractors are, in my view, too weak and lenient to ensure compliance with the Code. Finally, although the provisions on training of PSC staff are detailed enough and there are provisions on reporting procedures, I am missing a provision on the specific responsibilities of company management, as compared to other staff.

At any rate, the overall effectiveness of the Code will certainly depend on the foreseen external oversight and compliance mechanism. In this context, it is important that any monitoring system does not rely on self-reporting, since such a system has inherent shortcomings. This being said, is perhaps the Code of conduct – together with the Montreaux Document – sufficiently regulating PSCs at the international level? In my view, it is not. The complexity of the legal issues surrounding PSC activities in conflict and post-conflict areas, as well as the seriousness of abuses involving PSCs, make self-regulation inadequate. In addition, by relying solely on self-regulation there is a risk that the law as it actually stands be undermined. At this point in time, however, this is probably the best one can hope for.

Regulation is the easy part, while follow-up – including monitoring, the exercise of jurisdiction and other measures – obviously is extremely challenging in conflict and post-conflict areas. Another basic problem is that the situation on the ground in these areas often is unpredictable. As a result, and irrespective of the existence of regulation, PSCs and their employees may find themselves in unforeseen and dangerous situations, resulting in irregular fighting on their part. This risk can be reduced through regulation, well-formulated contracts and proper training of PSC leadership and employees, but cannot be completely overcome.

5.2.2 The exercise of jurisdiction, accountability and reparations

Chapter 4 above dealt with existing possibilities to hold states respectively PSCs and their employees accountable. From that, we can conclude that, in most cases, international law already contains regulation providing a basis for holding PSC management and employees, as well as states, accountable for grave violations of human rights and humanitarian law involving PSCs (regulatory gaps exist primarily when it comes to the prosecution of crimes other than grave breaches of international law). The main causes behind the current lack of accountability for crimes involving PSCs in conflict and post-conflict areas are of a jurisdictional / procedural, economic or practical nature, coupled with a lack of political will. This applies to both grave breaches of international law and lesser crimes. Gaps also exist when it comes to holding companies *as entities* accountable. We can thus conclude that although material regulation is necessary to reduce impunity, it is useless unless states also are able and willing to exercise jurisdiction, in particular criminal jurisdiction. I will now discuss in more depth some of the problems connected with the (lack of) exercise of jurisdiction.

Most national legal systems have legislation in place, allowing national judicial authorities to prosecute persons who have violated international human rights and humanitarian law *abroad*, at least with regard to perpetrators who have a more or less strong connection with the state (notably the state's own citizens). As a rule, states also exercise jurisdiction with regard to crimes with universal jurisdiction, i.e. the gravest international crimes. On the other hand, many states do not confer competence to their judicial authorities to prosecute other crimes committed abroad by a foreign citizen employed by a private firm established in the state (unless the citizen in some other way is legally established in the state). In fact, on many occasions states do not exercise extraterritorial jurisdiction over crimes such as robbery, theft and less serious cases of assault, even where suspects are citizens. There is need for further discussion on how and by whom these crimes should be prosecuted. Enhanced cooperation between national legal authorities in contracting states, home states and host states is a key issue when it comes to reducing impunity for these crimes. In this connection, the difficulties connected with expanding the competence of national authorities, notably problems related to the compiling and evaluation of evidence, must be dealt with. In this connection, issues related to international relations and the principle of reciprocity in matters of jurisdiction need to be taken into account.

Provided there is legislation in place allowing prosecution, one faces another problem, namely the practical difficulties related to the conduct of trials in the theatre of operations. Local courts may not be able to exercise jurisdiction, because immunity has been granted under a memorandum of understanding or because local, judicial authorities simply are not functioning properly. As a result, cases must be brought in courts in the PSC's or the suspect's home state. This often makes the conduct of proceedings very difficult and costly, since witnesses and other evidence, as a rule, are in the state where the conduct took place. It has been done, but it is less likely that states are willing to carry out similar trials on a regular basis. Under all circumstances, there are a number of arguments why criminal cases should be tried where the crime was committed, if practically feasible and provided that legal certainty and the human rights of the accused can be guaranteed.

One possible solution in these situations is transportable courts able to conduct criminal and civil trials in (or in the proximity of) theatre. Where a PSC is deployed in an area where its

home state's armed forces are present, such as US-based PSCs operating in Iraq a few years back, one idea is to extend that state's jurisdiction to (certain specified) PSC activities. Thus, violations of humanitarian law and human rights could be dealt with immediately and on location. As mentioned earlier, the United Kingdom has a Standing Civilian Court, which is used with UK armed forces abroad[204]. As of today, however, that court has jurisdiction only over individuals employed directly by the United Kingdom government, excluding employees of UK based PSCs. This issue naturally needs further consideration and discussion, but there does not seem to be any reasons of principle against extending the jurisdiction of similar transportable courts. Where a home state's army is present and able to exercise jurisdiction over its troops, the state might thus consider establishing a transportable civilian court, which uses the administrative, logistical and other resources of its military court (there are tenable arguments against trying civilians in military courts) or of other home state authorities present. In areas where the home state is not in a position to exercise jurisdiction – i.e. the majority of cases – this solution is not available, however. In those cases, other solutions must be found to make prosecution in the home state (or a third state) possible.

The purpose of the controversial immunity clauses in contracts between PSCs and host governments, e.g. in Iraq, is to prevent PSC employees from being prosecuted in host state courts. However, there is no reason why these employees should be exempt from prosecution back in the PSC's or the employee's home state. Therefore, independently of the above measures, PSC licensing regimes should explicitly prescribe that immunity clauses in contracts between PSCs and host governments do not prevent prosecution of PSC employees or other legal measures under the jurisdiction of the licensing state. The same applies to licensing regimes regulating licenses awarded to private individuals, such as security guard licenses. Under all circumstances, immunity clauses should be the result of careful consideration and not routinely included in PSC contracts.

As of today, it is not possible to hold companies or other entities criminally responsible under international law. There are, however, other legal means with tangible consequences for companies whose employees have committed crimes. As mentioned earlier, states may be obliged under human rights law to allow access to national courts for criminal and tort claims against PSCs and their employees. Thus, victims should be able to bring civil law suits in national courts not only against the perpetrator, but also against his or her employer, the PSC. However, there are gaps with regard to individual victims' possibilities to obtain reparations from PSCs, making this method less effective than it should be.

The above-mentioned judgements and decisions in United States federal courts of appeal, including cases concerning abuses at the Abu Ghraib detention centre in Iraq, show that the application of the ATCA in cases involving corporate defendants differ. Some courts have accepted corporations and private individuals as defendants in ATCA cases, others have found that corporations are proper defendants only when they were *de facto* state actors. Until the issue has been settled by the US Supreme Court, the legal situation remains unclear. The entire issue of corporate liability under the ATCA is not yet settled following the case Kiobel v. Royal Dutch Petroleum Co., which is expected to be decided by the US Supreme Court in autumn 2012.[205] Some other states have similar, although not quite as elaborate, legislation in

[204] Ibid. footnote 82.
[205] Ibid. footnote 5 and chapter 4.6.2.4.

place. One possible solution is that a treaty, similar to the OECD Anti-Bribery Convention[206], be concluded, requiring states to provide jurisdiction allowing civil law suits, including class actions, against commercial entities. Still, even where national legislation similar to the ATCA is applicable, obstacles of jurisdictional and practical nature often impair its application and need attention, as suggested earlier in this sub-chapter.

The jurisdiction of the International Criminal Court (ICC) is subsidiary to that of national courts and the number of ICC cases involving PSC employees are not likely to be many. Still, it is worth mentioning that the Statute of the Court provides for the possibility of a trust fund and empowers the Court to order that fines be transferred to the fund[207]. One idea is that PSCs, whose employees are convicted by the court, are at least encouraged to contribute to the fund, thus contributing to victims' compensation in cases where the perpetrator is insolvent.

Recent international regulatory initiatives, such as the above-mentioned Montreux Document and the UN Draft Convention on Private Military and Security Companies, contain provisions on the exercise of jurisdiction and on regulatory obligations of states. As I mentioned earlier, the Montreux Document is not a proactive document and is not, by itself, very helpful when it comes to improving the current deficiencies. The UN Draft Convention contains at least some more proactive provisions, which hopefully can inspire further measures, even though the Draft Convention itself is unlikely to enter into force in the near future.

5.3 Conclusions, final reflections and a glance towards the future

This thesis has demonstrated that although there are certain gaps in the international law regulating PSCs, there is no such thing as a vacuum of law. When discussing future regulation one must keep in mind that existing international law already governs the activities of PSCs in many respects. One must also be careful not to let discussions concerning regulation, in particular when revolving around (voluntary) codes of conduct and model regulations, undermine law as it actually stands. Still, this thesis has pointed out a number of areas in need of attention and has suggested certain legal measures, which would serve to prevent misconduct on the part of PSCs and to enhance accountability.

As always where international or multinational actors are involved, national solutions alone are inadequate. First of all, internationally active PSCs are often organised in flexible structures, allowing them to avoid one national legal system by transferring their seat to another state, or by restructuring and moving their activities, re-establishing under another name and structure. Secondly, extraterritorial application of national norms that are not widely recognised internationally will meet with a number of legal and practical difficulties. For these reasons, legal loopholes in the control of the private security sector ideally should be closed at the regional and international levels. International organisations contracting PSCs should take the lead, in particular with regard to preventive and monitoring measures, but also when it comes to providing reparations to victims of abuse. At the same time,

[206] The OECD Anti-Bribery Convention (ibid. footnote 202), articles 3 and 4. The Convention requires states to provide for either criminal or civil sanctions for bribery committed abroad, as well as to provide for jurisdiction in such bribery cases.
[207] Rome Statute of the International Criminal Court (ibid. footnote 53), Article 79 ("Trust Fund").

existing human rights law, humanitarian law and criminal law need to be enforced. National laws related to PSC employees working abroad need to be adopted and enforced, in combination with elaborate licensing regimes, as suggested above. A first step would be to ensure such enforcement with regard to PSC employees working under government contracts or deployed by international organisations.

The use of PSCs in conflict and post-conflict areas has meant an increase in the number of actors legitimately using force, a development with pros and cons. The basic problem is that the delegation of the use of force to private actors renders oversight and (democratic) control, as well as ensuring accountability, more difficult. This is the perhaps most central issue to deal with at present.

It is probably unavoidable that conflict and post-conflict situations are complicated by the presence of more actors. Several actors also means demarcation issues, e.g. in cases of cooperation between PSCs and national armed forces. Experiences from e.g. Iraq and Afghanistan suggest that state military does not always has enough knowledge of and insight into PSCs tasks, organization and working conditions. It is important that political leaders and state military take into account the full consequences of contracting or otherwise cooperating with PSCs in conflict and post-conflict areas. In this connection, it is important to realize that the behaviour of (foreign) PSCs in a conflict-prone country easily spills over on any foreign armed forces present, affecting the view of the local population and leadership of the foreign presence as a whole. We have seen many examples of this in Afghanistan and Iraq.

On the positive side, states, international organizations, NGOs and private actors may hire PSCs in order to be able to carry out work that would otherwise be impossible, due to lacking state capacity to ensure security. It is important to remember that PSC activities are not all about using force; PSCs perform a variety of tasks and one must analyze the specific problems or challenges in any given situation. One should also weigh the risks involved against the need to carry out certain tasks, which states lack the capacity to do. And, although it has happened, it seems unlikely that state military would favour any regular participation of PSCs in military operations or in handling intelligence, questioning prisoners, and similar tasks. It is more likely that state military would favour PSC tasks related to the protection of civilians, certain logistics etc.

As for the future, the PSC industry is eagerly exploring new fields of engagement, including participation in international peace support operations. Now, PSCs are already contracted by the UN, regional organisations and aid agencies. At the same time, it is a founding principle of the UN Charter (article 2) that states, under UN authority, take responsibility for the maintenance of peace and security. To a certain extent, the use of PSCs in UN missions represents a break with this principle. It is a known problem that the UN and other entities within the international community regularly have difficulties finding states willing to deploy their armed forces for international tasks. At the same time, the private security industry expresses a keen interest in partaking in peacekeeping, peace enforcement and humanitarian relief operations. However, peace enforcement operations under the auspices of the UN Security Council are likely to involve combat, which means that PSC participation meets with a number of legal obstacles, as pointed out in the foregoing analysis. Under all circumstances, as when governments transfer tasks to private subjects, the legitimacy and effectiveness of private contributions to peace building depend on the multilateral institutions' ability to manage the transfer of tasks and responsibilities to the contracted firms.

It can be questioned whether the UN and other multinational organisations, as of today, have the structures necessary to ensure high standards of conduct of PSCs.

Opinions among commentators differ as to the likeliness that PSCs will be deployed for these kinds of tasks in the near future. Under all circumstances, the efforts to regulate PSCs must take into account the ambitions of the industry and try to lie ahead. In the present situation, especially considering the flexibility and mobility of many PSCs, regulation can only be effective if it is widely accepted within the international community. Considering the complex issues involved in the application of humanitarian law and human rights law in peace operations, and given the civilian status of most PSC employees, corporate peacekeeping operations are probably not a suitable solution in the near future.

Up until today, individual states and the international community have failed, and continue to fail, to ensure physical security and meet the basic humanitarian needs of civilian populations in conflict and post-conflict situations in various parts of the world. By no means underplaying the serious challenges posed by the use of PSCs in conflict and post-conflict areas, I think that PSCs – ideally – might contribute with skills, innovative ideas and cost-effective thinking in the said situations. By ensuring effective, regulatory control over the PSC industry and its activities, and provided that PSCs are deployed only at appropriate locations and for carefully selected, suitable tasks, the international community and other actors can significantly reduce the risks connected with the deployment of PSCs, while taking advantage of its possibilities.

Bibliography

Books

Avant, Deborah, The Market for Force: The Consequences of Privatizing Security, Cambridge University Press, Cambridge, 2005, available at http://books.google.com/books?id=izA-sPwf0GoC&pg=PA12&dq=%22Avant%22+%22The+Market+for+Force:+the+consequences+of+privatizing+...%22+&sig=WGd_gcX2nnklksQRo501822h3fk#PPA16,M1 , last retrieved on 23 September 2010

Cilliers, Jakkie and Mason, Peggy (eds.), Peace, profit or plunder? The Privatisation of security on war-torn African societies, South African Institute for Security Studies, ISS, Johannesburg, 1999, available at http://www.iss.co.za//Pubs/Books/Blurbppp.html , last retrieved on 5 May 2012

Singer, Peter W., Corporate Warriors: The rise of the Privatized Military Industry, Cornell University Press, Ithaca, New York, 2003

Articles, essays, papers, etc.

Arun, Neil, Outsourcing the war, BBC News Online, 2 April 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3591701.stm , last retrieved on 22 October 2010

Avant, Deborah, Privatizing military training, Washinton D.C., Foreign Policy in Focus, 12 October 2005, available at http://www.fpif.org/reports/privatizing_military_training , last retrieved on 22 September 2010

Barstow, David (with Schmitt, Eric; Oppel Jr., Richard A.; and Risen, James), The struggle for Iraq: The contractors; Security firm says its workers were lured into Iraqi ambush, New York Times, 9 April 2004, available at http://query.nytimes.com/gst/fullpage.html?res=9C0DE4DB1238F93AA35757C0A9629C8B63 , last retrieved on 26 September 2010

Beelman, Maud, Winning contractors – US contractors reap the windfalls of post-war reconstruction, The Center for Public Integrity project Windfalls of war, Washington, 30 October 2003, available at http://projects.publicintegrity.org/wow/report.aspx?aid=65 , last retrieved on 4 October 2010

Bergner, Daniel, The other army, New York Times, 14 August 2005, (Magazine), available at http://www.nytimes.com/2005/08/14/magazine/14PRIVATI.html , last retrieved on 25 September 2010

Bina, Mark, Private military contractor liability and accountability after Abu Ghraib, John Marshall Law Review, Vol. 38 (2005), p. 1237

Bunker, Robert J., Combatants or Non-Combatants, Journal of International Peace Operations, International Peace Operations Association (IPOA), 1 July 2006, available at

http://ipoaonline.org/journal/index.php?option=com_content&task=view&id=96&Itemid=28 , last retrieved on 10 April 2007

Cameron, Lindsey, Private military companies: their status under international humanitarian law and its impact on their regulation, International Review of the Red Cross, Volume 88, Number 863, September 2006, available at http://www.icrc.org/eng/assets/files/other/irrc_863_cameron.pdf , last retrieved on 5 January 2011

Carney, Heather, Prosecuting the lawless: Human rights abuses and private military firms, George Washington Law Review, Vol. 74, 2006

Dagens Nyheter, 4 April 2007, ”Vaktbolag stoppas i krigszon”, available at http://www.dn.se/nyheter/sverige/vaktbolag-stoppas-i-krigszon-1.675846 , last retrieved on 22 September 2010

Dickinson, Laura, Government for hire: Privatizing foreign affairs and the problem of accountability under international law, William and Mary Law Review, Vol 45 (2005), p.135

Dörmann, Knut, The legal situation of ”unlawful/unprivileged combatants”, International Review of the Red cross, Vol. 85, No. 849, March 2003, available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/$File/irrc_849_Dorman.pdf , last retrieved on 26 September 2010

The Economist, 29 March 2003, p. 56, “Military-industrial complexities”

Frye, Ellen L., Private military firms in the new world order: How redefining ‘‘mercenary’’ can tame the ‘‘dogs of war’’, Fordham Law Review, Vol. 73, No. 6, May 2005, pp. 2607-2664, available at http://law2.fordham.edu/publications/articles/500flspub10831.pdf , last retrieved on 5 January 2011

Holmqvist, Caroline, Private security companies – the case for regulation, SIPRI Policy paper No. 9, SIPRI – Stockholm International Peace Research Institute, January 2005, available at http://www.sipri.org/contents/conflict/SIPRI_PolicyPaper9.pdf , last retrieved on 20 September 2010

Isenberg, David, Security for sale in Afghanistan, Asia Times Online, 4 Jan. 2003, available at http://atimes01.atimes.com/atimes/Central_Asia/EA04Ag01.html , last retrieved on 4 October 2010

Krahmann, Elke, The privatization of security governance: Developments, problems, solutions, Arbeitspapiere zur Internationalen Politik und Aussenpolitik (AIPA), AIPA1/2003, Lehrstuhl Internationale Politik, University of Cologne, Cologne/Köln, 2003, available at http://www.jaeger.uni-koeln.de/fileadmin/templates/publikationen/aipa/aipa0103.pdf , last retrieved on 4 October 2010

McCullough, James J., and Edmonds, Courtney J., Contractors on the battlefield revisited: The war in Iraq and its aftermath, Briefing Papers, Second Series, No. 04-6, May 2004, available at
http://www.ffhsj.com/siteFiles/Publications/E538BA09A38282C8AA2843DD3C54ABB2.pd

f via the website of the law firm Fried, Frank, Harris, Shriver & Jacobson, LLP at http://www.ffhsj.com/index.cfm?pageID=25&itemID=5198 , last retrieved on 1 October 2010

Merle, Renae, DynCorp took part in Chalabi raid, Washington Post online, 4 June 2004, p. A17, available at http://www.washingtonpost.com/wp-dyn/articles/A13904-2004Jun3.html , last retrieved on 22 October 2010

Milliard, Todd S., Overcoming post-colonial myopia: A call to recognize and regulate private military companies, Military Law Review, Vol. 176, June 2003, available at http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/176-06-2003.pdf , last retrieved on 5 January 2011

Murphy, Clare, Iraq's mercenaries: Riches for risks, BBC News Online, 4 April 2004, available at http://news.bbc.co.uk/1/hi/world/middle_east/3590887.stm , last retrieved on 22 October 2010

Quéguiner, Jean-François, Direct participation in hostilities under international humanitarian law, Working Paper, Program on Humanitarian Policy and Conflict Research at Harvard University, November 2003, at http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf , last retrieved on 1 October 2010

Rothwell, Donald R., Legal opinion on the status of non-combatants and contractors under international humanitarian law and Australian law, 24 December 2004, available at http://www.aspi.org.au/pdf/ASPIlegalopinion_contractors.pdf via the website of the Australian Strategic Policy Institute http://www.aspi.org.au , last retrieved on 1 October 2010

Schmitt, Michael, Humanitarian law and direct participation in hostilities by private contractors or civilian employees, Chicago Journal of International Law, Vol. 5, January 2005

Schreier, Fred and Caparini, Marina, Privatising Security: Law, practice and governance of private military and security companies, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 6, Geneva, March 2005, available at http://www.smallarmssurvey.org/files/portal/issueareas/security/security_pdf/2005_Schreier_Caparini.pdf , last retrieved on 1 October 2010

Shearer, David, International Institute for Strategic Studies, Private armies and Military intervention, Adelphi Paper 316, (Oxford University Press, Oxford 1998)

Singer, Peter W., Outsourcing war, Foreign Affairs, March-April 2005, available at http://www.foreignaffairs.org/20050301faessay84211/p-w-singer/outsourcing-war.html

Singer, Peter W., War, profits, and the vacuum of law: Privatized military firms and international law, available at http://www.brookings.edu/views/articles/fellows/singer20040122.pdf , last retrieved on 30 September 2010

Small, Michelle, Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa, African Centre for the Constructive Resolution of Disputes

(ACCORD), South Africa, available at http://www.accord.org.za/downloads/op/op_2006_2.pdf?phpMyAdmin=ceeda2df659e6d3e35a63d69e93228f1 , last retrieved on 23 September 2010

Watkin, Kenneth, Warriors without rights? Combatants, unprivileged belligerents, and the struggle over legitimacy, Harvard University, Program on Humanitarian Policy and Conflict Research (HPCR) Occasional Paper Series, p. 16, available at http://www.hpcr.org/pdfs/OccasionalPaper2.pdf last retrieved on 1 October 2010

Wilson, Jamie, Private security firms call for more firepower in combat zone, The Guardian, 17 April 2004, available at http://www.guardian.co.uk/international/story/0,,1193718,00.html#article_continue , last retrieved on 22 September 2010

Worden, Leon, Downsizing and outsourcing, We've sprung Pandora's Box, The Signal online, 27 June 2004, available at http://www.scvhistory.com/scvhistory/signal/iraq/sg062704.htm , last retrieved on 22 October 2010

Zarate, Juan Carlos, The emergence of a new dog of war: Private international security companies, international law, and the new World Disorder, Stanford Journal of International Law, Vol. 34, 1998

Commentaries etc.

Bothe, Michael; Partsch Karl Josef; and Solf, Waldmar A., New rules for victims of armed conflict: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949, Martinus Nijhoff Publishers, The Hague, 1982, p. 234, available at http://books.google.se/books?id=9C1OrmFbA4kC&printsec=frontcover&dq=New+rules+for+victims+of+armed+conflict:+Commentary&source=bl&ots=QhAgEq5Ref&sig=ULyxEJ20BmiNhFlBrHT6SkCJdgE&hl=sv&ei=WGnETMuDKMOSOsSd6c4L&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBYQ6AEwAA#v=onepage&q=New%20rules%20for%20victims%20of%20armed%20conflict%3A%20Commentary&f=false , last retrieved on 22 October 2010

Henckaerts, Jean-Marie; and Doswald-Beck, Louise, Customary International Humanitarian Law, Vol. I, Rules, and Vol. II, Practice, ICRC and Cambridge University Press, Cambridge, 2005

International Law Commission, Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session, Report of the International Law Commission on the work of its Fifty-third session (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), Chap.IV.E.2), available at http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_2001_v2_p2_e.pdf , last retrieved on 25 October 2010

Pictet, Jean S. (ed.), The Geneva Conventions of 1949, Commentary, I – Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, ICRC, Geneva, 1952, available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-

I.pdf via the website of the US Library of Congress http://www.loc.gov/rr/frd/Military_Law/Geneva_conventions-1949.html , last retrieved on 1 October 2010

Pictet, Jean S. (ed.), The Geneva Conventions of 1949, Commentary, III – Geneva Convention relative to the treatment of prisoners of war, ICRC, Geneva, 1960, available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf via the website of the US Library of Congress http://www.loc.gov/rr/frd/Military_Law/Geneva_conventions-1949.html , last retrieved on 1 October 2010

Pictet, Jean S. (ed.), The Geneva Conventions of 1949, Commentary, IV – Geneva Convention Relative to the Protection of Civilian Persons in Time of War, ICRC, Geneva, 1958, available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf , last retrieved 1 October 2010

Sandoz, Yves, Swinarski, Christophe and Zimmerman, Bruno (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC/Martinus Nijhoff, Dordrecht, 1987, available at http://www.icrc.org/ihl.nsf/CONVPRES?OpenView , last retrieved on 1 October 2010

UN Commission on Human Rights, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, 26 August 2003

UN Human Rights Committee, General Comment 31, Nature of the general legal obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004

Reports

Ballesteros, Enrique B., International and Regional Instruments, Paper presented at Wilton Park Conference “The Privatization of Security: Framing a Conflict Prevention and Peace-building Policy Agenda”, 19-21 November 1999, conference report available at International Alert’s website http://www.international-alert.org/pdf/wilconf.pdf via http://www.international-alert.org/publications/index.php?id=security , last retrieved on 26 September 2010

Fay, George R. (Major General), Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 130-34, 23 August 2004 (the so-called “Fay report”), available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf , last retrieved on 5 May 2012

ICRC / Melzer, Nils, Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law, Geneva, 1 July 2009, Part II, chapter B, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.PDF , last retrieved on 1 October 2010

ICRC, Summary Reports from Expert Meetings co-organized by the ICRC and the TMC Asser Institute during 2003-2008 preceding the ICRC Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law. Summary Reports

available at http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-article-020709 , last retrieved on 1 October 2010

Isenberg, David, A fistful of Contractors: The case for a pragmatic assessment of private military companies in Iraq, British American Security Information Council (BASIC) Research Report 2004.4, BASIC, London, September 2004, p.7, available at http://www.ssrnetwork.net/uploaded_files/3463.pdf via http://www.ssrnetwork.net/document_library/detail/3463/a-fistful-of-contractors-the-case-for-a-pragmatic-assessment-of-private-military-companies-in-iraq , last retrieved on 22 September 2010

Sassòli, Marco and Bouvier, Antoine A. (eds.), How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law, International Committee of the Red Cross, Geneva, 1999

de Schutter, Olivier, Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations, report prepared for a seminar convened under the auspices of the Special Representative to the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, Brussels on 3-4 November 2006, available at http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf , last retrieved on 22 October 2010

Schwartz, Moshe, The Department of Defense's use of private security contractors in Afghanistan and Iraq: Background, analysis, and options for Congress, Congressional Research Service, 13 May 2011, available at http://www.fas.org/sgp/crs/natsec/R40835.pdf , last retrieved on 22 May 2012

Swiss Federal Council/Conseil fédéral suisse, Rapport du Conseil fédéral sur les entreprises de sécurité et les entreprises militaries privées, 2 December 2005, available at http://www.admin.ch/ch/f/ff/2006/631.pdf , last retrieved on 23 September 2010

Taguba, Antonio M. (Major General), Article 15-6 investigation of the 800th military police brigade, 4 June 2004 (the so-called "Taguba report" on the treatment of Abu Ghraib prisoners in Iraq), available at http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html#ThR1.13 , last retrieved on 5 May 2012

UN Office of the United Nations High Commissioner for human rights, Summary Report from Workshop on Attributing Corporate Responsibility for Human Rights under International Law, convened by the UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, 17 November 2006, available at http://www.business-humanrights.org/Documents/Workshop-Corp-Responsibility-under-Intl-Law-17-Nov-2006.pdf , last retrieved on 28 October 2010

UN Commission on Human Rights, Report of the Third Meeting of Experts on traditional and new forms of mercenary activity, 18 January 2005, UN Doc. E/CN.4/2005/23, para. 12, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/103/64/PDF/G0510364.pdf?OpenElement via http://www2.ohchr.org/english/bodies/chr/sessions/61/lisdocs.htm , last retrieved on 5 May 2012

UN General Assembly, Interim Report of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, 30 August 2005, UN Doc. A/60/316, available at http://www.unhcr.org/refworld/docid/43f30fb40.html , last retrieved on 5 May 2012

UN Special Rapporteur on Mercenaries, Annual report on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 8 December 2004, UN Doc. E/CN.4/2005/14, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/167/92/PDF/G0416792.pdf?OpenElement , last retrieved on 20 September 2010

UN Special Rapporteur on Mercenaries, Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 20 February 1997, UN Doc. E/CN.4/1997/24, available at http://www.globalsecurity.org/military/library/report/1997/e-cn-4-1997-24.htm , last retrieved on 20 September 2010

UN Special Rapporteur on Mercenaries, Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 24 December 2003, UN Doc. E/CN.4/2004/15, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/173/13/PDF/G0317313.pdf?OpenElement , last retrieved on 20 September 2010

University Centre for International Humanitarian Law in Geneva, Report from the Expert meeting on private military contractors: Status and state responsibility for their actions, Geneva, 29-30 August 2005, available at http://www.adh-geneve.ch/docs/expert-meetings/2005/2rapport_compagnies_privees.pdf , last retrieved on 3 August 2011

US Congressional Research Service (CRS), Report for congress: Private security contractors in Iraq: Background, legal status, and other issues, updated 25 August 2008 by Elsea, Jennifer K.; Schwartz, Moshe, and Nakamura, Kennon H., available at http://www.fas.org/sgp/crs/natsec/RL32419.pdf , last retrieved on 22 October 2010

US Congressional Research Service (CRS), Report for congress: Private security contractors in Iraq: Background, legal status, and other issues (updated 21 June 2007 by Elsea, Jennifer K., and Serafino, Nina M.), available at http://www.fas.org/sgp/crs/natsec/RL32419.pdf , last retrieved on 23 September 2010

US Department of Defense, Quadrennial Defense Review Report, 30 September 2001, available at http://www.defense.gov/pubs/pdfs/qdr2001.pdf , last retrieved on 30 September 2010

National official documents

Coalition Provisional Authority (CPA) Memorandum No. 17 Registration requirements for private security companies (PSC), CPA/MEM/26 June 2004/17, section 2 (6) (c), available at http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf , last retrieved on 30 September 2010

Coalition Provisional Authority (CPA) Memorandum No. 17 Registration requirements for private security companies (PSC), CPA/MEM/26 June 2004/17, section 2 (6) (c), available at http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf , last retrieved on 30 September 2010

Coalition Provisional Authority (CPA) Order No. 17, CPA/ORD/27 June 2004/17 (Revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, June 27, 2004, §4 (Contractors), (originally issued in June 2003 and renewed on 27 June 2004), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf , last retrieved on 30 September 2010

US Department of Defense, Instruction No. 3020.41 (3 October 2005): Contractor Personnel Authorized to Accompany the US Armed Forces, at http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf , last retrieved on 1 October 2010

Websites, pressreleases, official statements, etc.

Center for Public Integrity, Washington, DC, ”Windfalls of War: US Contractors in Iraq and Afghanistan” (list of US contractors in Iraq and Afghanistan), available at http://projects.publicintegrity.org/wow/ , last retrieved on 25 September 2010

ICRC official statement of 21 July 2005, ”The relevance of IHL in the context of terrorism”, at the ICRC website http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705 , last retrieved on 1 October 2010

International Stability Operations Association (ISOA, formerly International Peace Operations Association (IPOA)), Code of Conduct, last retrieved on 6 January 2011 at http://ipoaworld.org/eng/codeofconduct.html

Business & Human Rights Resource Centre, http://www.business-humanrights.org

Conventions, declarations, etc.

Convention against torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/39/51, 10 December 1984, entry into force 26 June 1987

Convention for the Elimination of Mercenarism in Africa, Organization for African Unity, Libreville, 3 July 1977, CM/817 (XXXIX), Annex II, Rev. 3, entry into force 22 April 1985 (AU Convention on Mercenarism)

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950, 213 UNTS 222, entry into force 3 September 1953

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organisation for Economic Co-operation and Development (OECD), adopted November 1997, entry into force 15 February 1999

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly, UN Doc. A/40/43 (1985)

Declaration on the Protection of All Persons from Enforced Disappearance, UN General Assembly resolution A/RES/47/133, 18 December 1992

Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, UN Doc. A/HRC/WG.10/1/2, 13 May 2011, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/131/83/PDF/G1113183.pdf?OpenElement via http://ap.ohchr.org/documents/alldocs.aspx?doc_id=19280 , last retrieved on 5 May 2012

Geneva Conventions of 1949, all in Geneva, 12 August 1949, entry into force 21 October 1950:

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (75 UNTS 31)
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (75 UNTS 85)
- Convention (III) relative to the Treatment of Prisoners of War (75 UNTS 135)
- Convention (IV) relative to the Protection of Civilian Persons in Time of War (75 UNTS 287)

Additional Protocols of 1977 to the Geneva Conventions of 1949, both 8 June 1977, entry into force 7 December 1978:

- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1125 UNTS 3)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1125 UNTS 609)

Hague Conventions of 1907:
Final Agreement of the Second Peace Conference with twelve sections/conventions ratified, The Hague, 1907, signed on 18 October 1907, entry into force 26 January 1910, available at the ICRC website at http://www.icrc.org/ihl.nsf/INTRO?OpenView , last retrieved on 30 September 2010

International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UNGA Res. A/RES/44/34, entered into force 20 October 2001 (UN Convention on Mercenarism)

International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, UN Doc. A/61/488, entry into force 23 December 2010

International Covenant on Civil and Political Rights, UN Doc. A/6316, adopted by the UN General Assembly on 16 December 1966, 999 UNTS 171, entry into force 23 March 1976

International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 53rd session, 2001, vol. II, Part Two, reproduced in the annex to UN General Assembly resolution 56/83 of

12 December 2001, corrected by document A/56/49(Vol. I)/Corr.4, General Assembly Official Records, 56th session

Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008, available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf , last retrieved on 4 September 2011

Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, approved 13 August 2003 by UN Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003)

Resolution 2625 (XXV) on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, UN General Assembly, UN doc. A/RES/25/2625, 24 October 1970

Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (2187 UNTS 90), 17 July 1998 (corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002), entry into force 1 July 2002

National legislation

South Africa

South African Regulation of Foreign Military Assistance Act of 1998 (No. 15 of 1998, G 18912, 20 May 1998), Government Gazette, Vol. 395, No. 729, at http://www.info.gov.za/view/DownloadFileAction?id=70672 , last retrieved on 15 November 2010

United Kingdom

The Standing Civilian Courts Order, UK Statutory Instruments, 1997, No. 172; with Amendment, 1997, UK Statutory Instruments, No. 1534, available at http://www.uk-legislation.hmso.gov.uk/stat.htm , last retrieved on 23 October 2010

USA

Alien Tort Statute (ATS)/Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350

Codes of conduct, etc.

International Code of Conduct for Private Security Service Providers, Geneva, 9 November 2010, available at http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf , last retrieved on 4 September 2011

Table of Cases

International Court of Justice (ICJ)

International Court of Justice, Advisory Opinion of 9 July 2004, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", ICJ Reports 2004, p. 136

Democratic Republic of the Congo v. Uganda (Case concerning armed activities in the territory of the Congo), 19 December 2005, ICJ Reports 2005, paras. 178-179

European Court of Human Rights (ECHR)

Acar and Others v. Turkey, European Court of Human Rights, App. Nos. 36088/97 and 38417/97, judgement of 24 May 2005

Osman v. UK, ECHR, App. No. 87/1997/871/1083, judgement of 28 October 1998

E. and Others v. UK, ECHR, App. No. 33218/96, judgement of 26 November 2002

Kiliç v. Turkey, European Court of Human Rights, App. No. 22492/93, judgement of 28 March 2000

Mahmut Kaya v. Turkey, European Court of Human Rights, App. No. 22535/93, judgement of 28 March 2000

M.C. v. Bulgaria, ECHR, App. No. 39272/98, judgement of 4 December 2003

A. v. United Kingdom, ECHR, App. No. 100/1997/884/1096, judgement of 23 September 1998

Broniowski v. Poland, European Court of Human Rights, App. No. 31443/96, judgement of 22 June 2004

International Criminal Tribunal for Rwanda (ICTR)

International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-I, Judgement (Appeals Chamber), The Prosecutor v. Jean-Paul Akayesu, 1 June 2001

Inter-American Court of Human Rights

Velásquez-Rodríguez v. Honduras, Inter-American Court of Human Rights, judgement of 29 July 1988, Series C, No. 4

Godínez-Cruz v. Honduras, judgement of 20 January 1989, Series C, No. 5

Trujillo-Oroza v. Bolivia, judgement of 27 February 2002, Ceries C, No. 92

Del Caracazo v. Venezuela, judgement of 29 August 2002, Series C, No. 95

USA

Ibrahim et. al. v. Titan Corp., United States District Court for the District of Columbia, Civil Action No. 04-1248 (JR), 391 F. Supp. 2d 10, 12 August 2005

Saleh et al v. Titan Corporation et al, United States District Court for the Southern District of California, Case No. 04 CV 1143 R (NLS)

Saleh et al v. Titan Corporation et al, United States District Court for the District of Columbia, Civil Action No. 05-1165 (JR), case 361 F. Supp.2d. 1152 (2005), with Memorandum Order

Burger-Fischer v. Degussa AG, District Court for the District of New Jersey, 65 F. Supp.2d 248 (1999)

Kadic v. Karadzic, 70 F. 3d 232 (2nd Cir. 1995)

Presbyterian Church of Sudan v. Talisman, 244 F. Supp. 2d 289 (S.D.N.Y. 2003)

Israel

Israel Military Court sitting in Ramallah, Military Prosecutor v. Omar Mahmud Kassem and Others (1969), International Law Reports Vol. 42, 1971, p. 479