

CHAPTER 7

STATUS AND OBLIGATIONS OF MERCENARIES AND PRIVATE MILITARY/SECURITY COMPANIES UNDER INTERNATIONAL HUMANITARIAN LAW

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Introduction

During times of armed conflict, whether characterised as international or non-international, international humanitarian law (IHL), also known as the law of armed conflict, is applicable. As a body of law, IHL does not question the lawfulness of a conflict (*jus ad bellum*) but seeks to apply humanitarian principles in warfare (*jus in bello*). IHL recognises that even war has its limits, irrespective of its cause, and strives to establish humanitarian parameters to the means and methods of warfare and to alleviate the suffering that conflict so often causes to persons taking no part in the hostilities. The core IHL instruments are the four Geneva Conventions of 1949 and their Additional Protocols of 1977.¹

As this paper will show, despite arguments to the contrary, there is no legal vacuum as such in relation to the activities of non-state actors from the private security industry or mercenaries operating in conflict zones. IHL is applicable, and with it comes certain explicit obligations and rights. Contemporary armed conflicts are vastly different creatures from those prevailing in the early part of the 20th century. The two world wars saw for the most part the armed forces of belligerent states confronting one another. Those actively engaged in the fighting were usually soldiers who were easily distinguishable from civilians and others not in combat. They wore military uniforms and bore their arms openly. By contrast, more recent conflicts such as those in Iraq and Afghanistan have included a greater variety of actors, with soldiers, peacekeepers, humanitarians and private contractors, to name but a few, present in the field of combat. In particular, we have witnessed a greater presence of private contractors, individuals working for private security or military companies (PSCs/PMCs).²

The functions of PSCs/PMCs vary, and have included the provision of logistics, communication and security services, the protection of convoys and personnel

* The views and opinions expressed in this article are those of the author alone and do not necessarily reflect those of the ICRC.

for multinational companies, the staffing of checkpoints, and in some situations, even the interrogation of prisoners, the collection of intelligence, and direct participation in combat operations. Their omnipresence in conflict zones such as Iraq has given rise to numerous issues, be they legal, ethical or practical. One recurring view is that these individuals are merely glorified mercenaries whose activities are contrary to a number of international and regional instruments. Another point of view is that PSCs/PMCs are legitimate corporate entities providing essential security services in conflict and post-conflict zones. Passions aside, mercenaries and persons working for PSCs/PMCs are subject to IHL. As will be reviewed in this paper, IHL is clear as it relates to mercenaries. To be labelled a mercenary in an international armed conflict strips the individual of any combatant status and of the right to be accorded prisoner of war (POW) status.

With regard to PSCs/PMCs, however, there is no clear-cut niche for them under IHL. Personnel of these entities are either civilians or combatants, and much will depend on the nature of their activities and their relationship with the armed forces of one of the belligerents. If seen as combatants, the PSC/PMC personnel will be required to distinguish themselves from civilians. If deemed to be civilians, the selfsame personnel will not be permitted to take a direct part in the hostilities. To do so would deprive them of any protection to which they might be entitled under IHL and may leave them open to prosecution under the relevant domestic law. The paper will review the status and IHL implications of PSCs/PMCs and mercenaries operating in armed conflict zones. A review the relevant provisions of IHL will be presented as well as individual and state obligations in terms of it. It will be underscored that irrespective of functional labels, those operating in international armed conflicts must respect IHL and will be held criminally responsible for any serious violations thereof.

Distinction between civilians and combatants

An underlying IHL principle is that of distinction between civilians and civilian objects and combatants and military objectives. There are two aspects to this principle. First, in carrying out their military actions, the parties to the conflict must at all times make a distinction between the civilian population and combatants and between civilian objects and military objectives (Additional Protocol I, art 48). Second, combatants are to distinguish themselves from the civilian population while they are engaged in an attack or in military operations in preparation of an attack (art 44). This basic rule has been incorporated into numerous military manuals and is considered to form part

of international customary law (see ICRC 2005, paras 93–101). The *raison d'être* of this fundamental principle is to ensure not only that civilians do not bear the brunt of the effects of the hostilities due to the co-mingling of combatants and civilians,³ but also to enable combatants to benefit from the treatment to which they are entitled under IHL when captured by the enemy forces. Unlike civilians, combatants operating in international armed conflicts possess a so-called *combatant's privilege*. They are entitled to take part in the hostilities, to fight the 'enemy forces' and are legitimate targets.

Civilians do not enjoy the same privilege to do battle, and will lose their protection under IHL if they take part in hostilities. Moreover, when captured, they do not benefit from POW status, to which recognised combatants are entitled. Civilians are defined in the negative as persons who are not members of the armed forces of a party to the conflict or members of volunteer corps and resistance movements, not participants in a *levée en masse* and not combatants in general. As persons taking no part in the hostilities, they enjoy protection against the dangers of military operations (Geneva Conventions 1949b; Additional Protocol I, art 50). Civilians cannot be targeted as such, and the parties to the conflict must take the necessary precautions to ensure that no harm comes to civilian persons and objects (see for example Additional Protocol I, arts 57 and 58).

It has been argued that a difficulty in relation to mercenaries and staff of PSCs/PMCs is that they are frequently not distinguishable from civilians, except for the fact that they are often heavily armed and at times wearing military attire. In such situations, this may pose a risk for those civilians who happen to be within their vicinity, as the parties to the conflict may consider the mercenaries and their staff who are taking part in the hostilities to represent valid military targets. The effect therefore is that the presence of non-state actors taking a direct part in hostilities compromises the protection provided by IHL to civilians during hostilities.

Mercenaries under international humanitarian law

The issue of distinction is particularly significant as with regard to mercenaries, who, according to IHL, are civilians taking part in hostilities without being members of the armed forces of parties to the conflict. To speak of mercenaries conjure images of covert privateers profiteering from less than honest enterprise. Whilst the business of military-for-hire, or mercenarism as it is commonly known, has existed and was even condoned for centuries as a form of legitimate military entrepreneurship, vital to advancing the

commercial, political and land interests of noblemen and merchants, it is only in recent times that it has taken on a generic negative meaning.

Whilst mercenaries are specifically mentioned in Additional Protocol I to the Geneva Conventions (Additional Protocol I), IHL does not delve into the legality of mercenaries. Rather, the focus is on the status to be granted to mercenaries if captured during international armed conflicts. Mercenaries do not have a right to a combatant or a POW status and they are in other words seen as 'unprivileged combatants'.⁴ Individuals who fit the definition of article 47 of Additional Protocol I are deemed to be mercenaries:

- 1 A mercenary shall not have the right 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 a Party to the conflict on official duty as a member of its armed forces.

The sub-paragraphs are cumulative, which means that the various elements listed from (a) to (f) must all be met if the person is to be deemed a mercenary. The definition excludes volunteers who enter service on a permanent or long-lasting basis in a foreign army, nationals of one of the belligerents, as well as residents of territory controlled by or members of the armed forces of one of the parties to the conflict. Also excluded are individuals who have been sent by another state to provide one or the other party to the conflict with assistance, as well the likes of foreign advisers and military technicians who do not take a direct part in hostilities.

The crux of the definition lies in part in the motives for joining, with a mercenary seen by many to have been drawn by financial rather than by

humanitarian or altruistic considerations. Oftentimes, mercenaries will receive remuneration that is substantially higher than that of members of similar rank or function in the regular armed forces of the party that has specially recruited them to fight in the armed conflict. It should be noted though that mere recruitment to fight in the armed conflict does not suffice. An individual meeting the above criteria ‘becomes’ a mercenary only if he or she does in fact take a direct part in the hostilities. If such participation is absent, the individual will be categorised as being a civilian not taking part in hostilities (ICRC 1987:1801–1814). Quite often it is argued that personnel of PSCs/PMCs are in fact mercenaries. However, unless they are hired to fight *per se* in the armed conflict, and unless the services they provide consist in taking a direct part in hostilities, they do not fit within the definition of ‘mercenaries’.

The definitions of mercenary found in the 1977 OAU/AU Convention on the Elimination of the Mercenarism in Africa (OAU/AU Mercenary Convention), adopted less than one month after the adoption of the 1977 Additional Protocols to the Geneva Conventions of 1949⁵ and the 1989 United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Mercenary Convention), are derived from article 47 of Additional Protocol I.⁶ The latter Convention goes further by distinguishing between on the one hand situations of armed conflict and, on the other, any other situation involving concerted acts of violence aimed notably at overthrowing a government or undermining the territorial integrity of a state.⁷ In addition, in the same vein as Additional Protocol I, the OAU/AU Convention stipulates that mercenaries shall not enjoy the status of combatants.

However, while the definitions in these two conventions are comparable to that found in Additional Protocol I, this is where the similarities end. Indeed, IHL through Additional Protocol I merely clarifies the status to be given to mercenaries in times of armed conflict and the protections they are to be afforded when captured. By contrast, the UN and OAU/AU conventions serve a different purpose in that they seek to criminalise mercenarism and the use of mercenaries. Under IHL, mercenaries are civilians not entitled to take a direct part in hostilities. To do so may invite criminal prosecution.

The place of PSCs and PMCs

As in the case of mercenaries, certain activities of personnel from PSCs/PMCs operating in international conflict zones also touch upon the principle

of distinction. Unlike mercenaries though, PSCs/PMCs are not expressly covered by IHL, and they can be labelled either as civilians or as combatants in times of international armed conflicts. The status they are to be granted under IHL will depend on a number of factors, including their roles and the nature of their formal relationship with a party to the armed conflict.

At first glance, the majority of private contractors are observably civilians, providing protective security services for civilian and governmental institutions and involved in post-conflict reconstruction efforts. The manifold activities may include guarding key facilities such as water works, escorting food convoys and VIPs, and assisting with logistics and communications. Those in the industry argue that private security companies have a number of competitive advantages over the armed forces of a state, including the minimal built-in costs and streamlined infrastructures (Bearpark 2006). With an estimated 20 000-plus private contractors said to be working in Afghanistan and Iraq, and an industry worth in excess of US\$100 billion, it is undeniable that the services of private security firms are in great demand.

However, recent allegations of improper conduct by certain civilian contractors and images of private security personnel involved in military-type operations and attacks have shed a disquieting light on the role of PSCs/PMCs in conflict zones. Questions abound as to their regulation, their accountability for transgressions of the law, whether domestic or IHL and their position under IHL. In addition, the overlap of roles between civilian contractors and the standing military of a party to conflict, risks blurring the distinction between combatants and civilians during the hostilities, with the latter again in harm's way.

As mentioned above, the rights and obligations of persons taking part in the hostilities depend for the most part on that person's status as either a civilian or a combatant. There being no specific acknowledgment under IHL instruments of PSCs/PMCs, the label to attribute to PSCs/PMCs in international armed conflicts is to be decided on a case-by-case basis. Much will rest on the functions they provide for, and contractual relationships with the armed forces of one of the parties to the conflict. If a state considers a PSC/PMC to form part of its armed forces, then it should take the necessary steps to clarify this, for instance by notifying the other parties to the conflict, as it is obliged to do in relation to paramilitary groups or law enforcement agencies that are incorporated into its armed forces (Additional Protocol I, art 43(3)). If clear integration into the armed forces is absent, any assessment has to be pragmatic with due consideration being given to for instance the nature of their operations, their closeness to core military activities, the existence of chains of command and wearing of recognised uniforms.

A PSC/PMC should consider itself to be on sure legal footing when it asserts its right to take part in hostilities and engage in combat on behalf of a state to the conflict. It does not suffice to contend that it took defensive action when under fire. IHL does not draw a line between offensive or defence action, stipulating in article 49(1) of Additional Protocol I that 'attacks' mean acts of violence against the adversary, whether in offence or defence. Consequently, unless PSC/PMC employees are unmistakably combatants, they are not lawfully entitled to take part in the hostilities and may be prosecuted under the relevant domestic legislation for having done so. Moreover, if captured by the enemy forces, they are not entitled to POW status.

Prisoners of war

The Geneva Conventions and Additional Protocol I list specific categories of individuals who are to be treated as prisoners of war if captured in the context of an international armed conflict (Geneva Convention 1949a, art 4(A); Additional Protocol I, art 43). Generally those entitled to POW status are recognised combatants, namely individuals who take part in the hostilities whilst representing one of the parties to the armed conflict, whether as members of the regular the armed forces or of certain clearly defined groups. Mercenaries do not have the right to POW standing. Personnel of a PMC/PSC could theoretically benefit from this status, if they satisfy the requirements necessary to be recognised as combatants.

The Third Geneva Convention of 1949, spanning 135 articles, delves in quite some detail into the treatment to be afforded to prisoners of war falling into the enemy hands. As recognised combatants, POWs are not prisoners as such. They were entitled to take part in the hostilities and are not to be tried for merely having done so.⁸ Being held 'prisoner' is to be understood to be kept from taking further part in the armed conflict. IHL stipulates that POWs are to be released and repatriated without delay after the cessation of active hostilities (Additional Protocol I, art 118). An unjustifiable delay in doing so constitutes a war crime (art 85).

The Third Geneva Convention (art 4(A)) lists the categories of persons who, if they fall into the hands of the enemy, are to be granted the status of a POW, and to be protected accordingly. Those entitled to the POW label are first and foremost members of the armed forces of a party to a conflict, as well as members of militia or volunteer groups forming part of such armed forces. Members of other militias, volunteer corps and resistance movements

are also to be treated as prisoners of war if captured, provided that they are under responsible command, have fixed a distinctive sign recognisable at a distance, carry arms openly and conduct operations in accordance with the laws and customs of war.

In addition, persons accompanying the armed forces without actually being members thereof, such as supply contractors and members of services responsible for the welfare of the armed forces, if captured, are deemed to be POWs. To be within this category, which is arguably the most applicable to staff from PSCs/PMCs, the concerned individuals must have been authorised by the party to the conflict to accompany its armed forces and are to be issued with the necessary identity cards. Failure to obtain such express authorisation and identification cards to accompany the armed forces may trump the possibility of benefiting from POW status.

Article 43 of Additional Protocol I complements the above by providing a succinct definition of 'armed forces':

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.

Mercenaries, as they are not considered as combatants under IHL, will *ipso facto* not benefit from POW status. Additional Protocol I and the OAU/AU Convention (art 3) are categorical in this regard, stipulating that mercenaries shall not be entitled to POW status. Likewise, personnel of PSCs/PMCs who do not qualify as combatants as defined by the Geneva Conventions and their Protocols will also not be entitled to POW status.

In the midst of battle, and given the myriad of actors operating in combat, it may be difficult to determine whether an individual is a recognised or unprivileged combatant, and, once captured, whether he should be accorded POW status. IHL recognises that, for obvious reasons, such a determination should not be left to the whim of the detaining military personnel who have captured the potential POW. Instead, there is a legal presumption in favour of the 'prisoner' that he is entitled to PoW status. It is up to the detaining authority to adduce evidence to rebut this presumption.

Under IHL a person who has fallen into the hands of the adverse party and claims to be entitled to POW status, shall be entitled to such status and treated accordingly. There may be situations where a combatant has failed to distinguish himself from the civilian population before or during an attack, for instance by failing to don a military uniform due to the nature of the military operations. As long as arms are carried openly during the military engagement or if it is visible to the adverse party prior to the attack, the individuals do not forfeit their POW status. However, in the eyes of the 'enemy', there may be doubts as to whether a person is a *de jure* member of the armed forces in its broad sense or an unprivileged combatant, such as a mercenary. In these cases, article 45 of Additional Protocol I provides that the status is to be determined by a competent tribunal, with the 'prisoner' continuing to benefit from the protections granted to POWs by the Third Geneva Convention pending the tribunal's determination.

When an individual is found to be a mercenary or someone working for a PSC/PMC not recognised as being part of the 'armed forces' of a party in an international armed conflict, entitlement to POW status and protection falls by the wayside. Without such a status and in the absence of the so-called combatant's privilege, the individual can be tried for having taken part in the hostilities. In these situations, the treatment, detention and trial of the individual must respect the minimum fundamental guarantees listed in article 75 of Additional Protocol I.⁹

Individual criminal responsibility

As explained above, mercenaries and members of PSCs/PMCs who are civilians and not combatants can be prosecuted for mere participation in the hostilities, subject to the necessary domestic legislation being in place. In addition, under IHL all individuals, whether combatants or civilians, can be held criminally responsible for the most serious violations of the Geneva Conventions and Additional Protocol I, commonly referred to as grave breaches, which include willful killing, torture or inhumane treatment, and willfully causing great injury.¹⁰ Grave breaches are subject to universal jurisdiction, whereby any state may prosecute any individual of any nationality irrespective of where the offence was committed. States party to the Geneva Conventions and their Protocols are under the obligation to prosecute or to extradite alleged perpetrators of grave breaches.¹¹ Prosecutions for grave breaches and other war crimes may also be held before the permanent International Criminal Court, subject to the relevant jurisdiction requirement being met.

Recent jurisprudence of the various international criminal tribunals has determined that individuals will incur criminal responsibility for the commission of grave breaches of IHL, both as a matter of convention and custom. Mercenaries as well as staff of PSCs/PMCs who commit such offences therefore can be tried. It is irrelevant whether the individual is a civilian or a combatant, or whether the culpable act was committed while operating on behalf of a party to the conflict or working for civilian entities such as multinational companies. As the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) underscored, with reference to common article 3 of the Geneva Conventions, though applicable *mutatis mutandis* to all war crimes:

Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal in particular. The Appeals Chamber is therefore of the opinion that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category.¹²

A key requirement for an act, such as murder of a protected person, to constitute a war crime, is that it must be connected to armed conflict. By 'connected' the UN International Criminal Tribunals have explained that the perpetrator must have acted in furtherance of or under the guise of the armed conflict. Furthermore, the existence of an armed conflict must have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.¹³

In addition to the principle of individual criminal responsibility, superiors of those who have perpetrated the war crime can also be held responsible. The superiors can incur liability for ordering the commission of the offence or failing to prevent or punish subordinates when they had reason to know that the latter were about to commit or have committed war crimes. This responsibility is applicable to both military and other superiors, including civilians.¹⁴ In practice therefore, in the case where a PSC/PMC forms part of the armed forces of a state party to the conflict, responsibility for IHL violations committed by employees can be attributed to not only the direct superior but also further up the military hierarchy of the contracting authorities. The cases against Slobodan Milosevic in The Hague, Jean Kambanda in Arusha and Charles Taylor before the Special Court for Sierra Leone are evidence that those at the very top of the pyramid, including

heads of state and government, can be held accountable for acts of their 'subordinates'.

Even in the case of PSCs/PMCs hired by civilian companies and corporations, if their personnel commit war crimes, the civilian superiors of the offending personnel could also be held accountable under the doctrine of command responsibility.¹⁵ How far up the corporate ladder could this criminal responsibility extend, is yet to be tested before the courts. Theoretically though, both the CEO of a company that has contracted the services of a PSC/PMC in a zone of international armed conflict as well as the manager of the PSC/PMC could be held responsible as 'superiors' for war crimes if they had 'reason to know' that their subordinate employees committed or were about to commit war crimes yet took no preventive action. This would be the case even if the chief executive officer or manager has never have set foot in the conflict zone.

The responsibility of states to ensure respect for IHL

Under common article 1 to the Geneva Conventions, states undertake to respect and ensure respect for the Conventions in all circumstances. This obligation extends to all those over whom the relevant state has authority, which would include members of its armed forces, personnel of PSCs/PMCs it has hired as well as its citizens, including those said to be operating as mercenaries. States must not only themselves respect the provisions of the Conventions, but are also obligated to make sure that all those under their authority or jurisdiction do not foul those provisions, either.¹⁶ It is not sufficient for states merely to give orders and directives to the military and relevant civilian authorities, leaving it to them to implement these as they see fit. In accordance with common article I, a state must supervise not only the execution of the orders and directives but must also ensure that the activities of those under its authority acting in zones of international armed conflict comply with IHL.

With regard to PSCs/PMCs the manner in which this obligation is translated into practice will depend in part on the relationship between the state and the PSC/PMC concerned. States may decide to develop the necessary regulations to cater for incorporation of PSCs/PMCs within their jurisdiction, or to recall the nature of activities in which its citizens are permitted to engage in zones of armed conflict.¹⁷ Where states have PSCs/PMCs operating on their territory, they may also need to adopt relevant domestic legislation to police their activities and determine their liability.¹⁸ The industry itself may also wish to regulate its members to ensure compliance with law and ethics,

as can be seen through the actions of the International Peace Operations Association and the British Association of Private Security Companies (BAPSC). For instance, one of the aims of the BAPSC is to ensure 'compliance with the rules and principles of international humanitarian law and human rights standards' and the Association believes that this can best be achieved through 'effective self-regulation in partnership with the UK Government and International Organisations'.¹⁹

A number of states have recognised the need for regulation in this domain, for instance the United Kingdom, the United States, South Africa and Switzerland. Recently states and representatives from the private security sector have been brought together through an initiative launched by the Federal Department of Foreign Affairs and the ICRC to confirm existing legal obligations and develop non-binding good practices.²⁰ The 'Swiss initiative', as it is commonly referred to, which is primarily a process *between states*, is looking into the role of *states* in promoting respect for IHL and human rights law by PSCs/PMCs. It has set itself three main objectives. The first is to contribute to the intergovernmental discussion on the issues raised by the use of private military and security companies. The second is to reaffirm and clarify existing obligations of states and other actors under international law, in particular under IHL. The third is to study and develop good practices, regulatory models and other appropriate measures at the national and possibly regional or international level, to assist states in respecting IHL and human rights law.

The range of participants at the two governmental and other experts meetings held in 2006 demonstrated that representatives from governments and the private security sector recognised that states could not escape their obligations under international law by hiring/using PMCs/PSCs, and rejected the argument often made that PMCs/PSCs operate in a legal vacuum. Thus for states to meet their IHL obligations to ensure the respect of IHL, requires not only legislation to enable prosecution of war crimes but also to regulate the non-state actors in zones of armed conflict so that their activities comply with IHL. States will as such need to adopt the necessary civil and criminal legislation as well as codes of conduct and regulations that address those PSCs/PMCs over which they have jurisdiction in times of armed conflict.

Conclusion

From an outsider's point of view, modern-day conflict zones are chaotic landscapes, with a multitude of actors, ranging from members of recognised

armed forces to personnel from the private security industry as well as potential mercenaries. Roles of the various actors often overlap, blurring the distinction between legitimate combatants and civilians. Although both have rights and obligations, this mix of actors brings with it the risk that those protected by IHL, namely civilians and others not taking part in the hostilities, will be caught up in the fighting and placed in harm's way. IHL as a body of law defines the protection to be afforded to individuals in the midst of armed conflicts as well as the parameters and aspect to be taken into consideration when conducting hostilities. Combatants are entitled to take part in hostilities, civilians are not. Mercenaries are civilians and not recognised combatants. Personnel of PSCs/PMCs could be either, depending on their relationship with the conflicting parties and nature of their activities.

In the final analysis all persons, whether civilians or combatants, are under an obligation to respect IHL, and it is for states to advocate and ensure this respect. Serious violations of IHL are to be punished. Likewise, participation in hostilities when not permitted to do so may justify prosecution under relevant domestic legislation or international law.

Notes

- 1 At the time of writing, the Geneva Conventions have been universally ratified and 166 states have ratified Additional Protocols I and II.
- 2 For the purposes of the present paper, the terms PMCs and PSCs will be used interchangeably.
- 3 It should be noted that article 50 of Additional Protocol I further safeguards civilians from the effects of the hostilities in that the presence within the civilian population of persons who do not come within the definition of civilians does not deprive the population of its civilian character.
- 4 The task of IHL is not to make distinctions based on the motives which induce a particular person to participate in an armed conflict (see ICRC 1987: Additional Protocol I).
- 5 Signed in Libreville, Gabon, on 3 July 1977 and entered into effect on 22 April 1985.
- 6 Adopted and opened for signature and ratification by UN General Assembly resolution 44/34 of 4 December 1989.
- 7 Article 1 reads: For the purposes of the present Convention, 1.A mercenary is any person who: (a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) 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 rank and functions in the armed forces of that party; (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) Is not a member of the armed forces of a party to the conflict; and (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces. 2. A mercenary is also any person who, in any other situation: (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

- 8 See article 43(2) of Additional Protocol I: '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.'
- 9 The relevant part of article 75 (Fundamental guarantees) of Additional Protocol I reads: '1. In so far as they are affected by a situation referred to in Article 1 of this Additional Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Additional Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons. 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) the taking of hostages; (d) collective punishments; and (e) threats to commit any of the foregoing acts. 3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist. 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed

conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; (c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt; (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure; (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.'

- 10 Grave breaches are listed in articles 50, 51, 130 and 147 of the four Geneva Conventions and in articles 11 and 85 of Additional Protocol I.
- 11 Under the Geneva Conventions and Additional Protocol I, a state must enact national legislation prohibiting and punishing grave breaches, either by adopting a separate law or by amending existing laws. Such legislation must cover all persons, regardless of nationality, committing grave breaches or ordering them to be committed and include instances where violations result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the state
- 12 *The Prosecutor v Jean Paul Akayesu*, Case No ICTR-96-4-A, Judgment, 1 June 2001, para 443.
- 13 See for instance *Prosecutor v Dragoljub Kunarac and others*, Case No IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 delivered by the International Criminal Tribunal for the former Yugoslavia and *The Prosecutor v Georges Rutaganda*, Case Number ICTR-96-3-A, Appeal Judgment 26 May 2003, delivered the ICTR.
- 14 See articles 86 and 87 of Additional Protocol I, as well as article 28 (Responsibility of commanders and other superiors) of the Rome Statute of the International Criminal Court, 17 July 1998.

- 15 See for instance the ICTR case of *The Prosecutor v Alfred Musema*, where with regard to civilian superiors, the director of a tea factory was found to be liable for acts of his employees during the genocide in Rwanda in 1994.
- 16 As explained in the ICRC's Commentary (first published in 1952), the contracting parties do not undertake merely to respect the Convention, but also to *ensure respect for it*. The wording may seem redundant. When a State contracts an engagement, the engagement extends *eo ipso*, to all those over whom it has authority. The use of the words 'and to ensure respect' was intended to emphasise and strengthen the responsibility of the contracting parties.
- 17 See for instance Sierra Leone's regulations in section 19 of the 2002 National Security and Central Intelligence Act and South Africa's 1998 Regulation of Foreign Military Assistance Act.
- 18 For instance in Iraq, the Coalition Provisional Authority Memorandum 17: Registration Requirements for Private Security Companies, 26 June 2004.
- 19 See www.bapsc.org.uk [accessed 1 June 2008].
- 20 See www.dv.admin.ch/content/sub_dipl/e/home/thema/psc.html.

References

- Additional Protocol I 1977. Additional Protocol I to the 1949 Geneva Conventions.
- Bearpark, A 2006. Interview with the Director General of the British Association of Private Security Companies. *International Review of the Red Cross*, 88(863), September 2006, 449-457.
- British Association of Private Security Companies. Available at www.bapsc.org.co.uk [accessed 1 June 2008].
- Geneva Conventions 1949a. Third Geneva Convention of 1949 relative to the Treatment of Prisoners of War.
- Geneva Conventions 1949b. Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of Armed Conflict, 12 August.
- ICRC (International Committee of the Red Cross) 2005. Study on Customary International Law. Vol II. Place of publication: Cambridge University Press.
- ICRC 1987. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Dordrecht: Martinus Nijhoff Publishers.
- Iraq 2004. Coalition Provisional Authority. *Memorandum 17: Registration Requirements for Private Security Companies*, 26 June.
- RSA (Republic of South Africa) 1998. Regulation of Foreign Military Assistance Act of 1998. Pretoria: Government Printer.

Sierra Leone 2002. National Security and Central Intelligence Act of 2002, Supplement to the Sierra Leone Gazette Vol CXXXII, no 42, dated 4 July 2002.

Case law

Prosecutor v Dragoljub Kunarac and others. Case no IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 delivered by the International Criminal Tribunal for the former Yugoslavia.

The Prosecutor v Alfred Musema, Case no ICTR-96-13-A, Judgment, 27 January 2000.

The Prosecutor v Georges Rutaganda. Case no ICTR-96-3-A, Appeal Judgment, 26 May 2003.

The Prosecutor v Jean Paul Akayesu. Case no ICTR-96-4-A, Judgment, 1 June 2001.