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The Legal Status of Mercenaries in Armed Conflict

Master Thesis for the Study Program ‘Master of Law’

Submitted by

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“As non-linear battlefields and asymmetrical methods of warfare come to characterize more contemporary armed conflicts, the distinction between combatant and non-combatant has become increasingly blurred.”

JK Wither, ‘European Security and Private Military Companies’
Acknowledgments

The topic of mercenaries (and Private Military Security Companies) in armed conflict is something that reached my attention 2 years ago. It was then when I first came into contact with the laws applicable during wartime, the so called laws of armed conflict. This course, lectured with great enthusiasm by Dr. Prof. An Cliquet, touched upon quite a few aspects of this area of international law. One part of this course focused on the sources and scope of the laws of armed conflict, which was also given as a guest lecture by the promotor of this master thesis, dr. Prof. Tom Ruys. It is during these courses that several hot topics were mentioned. One of them was the question of the legal regime of private military and security employees who are taking part in armed conflict.

Having to pick a topic for my master thesis, I immediately knew which direction I wanted to go. But it wasn't until I encountered quite a few articles about atrocities committed by and against private military and security personnel that I knew this was a topic I wanted to delve deeper into. Thus, I began to read articles and books concerning these actors, not only with attention for the legal aspect of this industry, but also for its political and economic dimension. Pretty soon it became clear that the tasks these actors were executing were part of a billion-dollar industry with an ever increasing influence. Seeing reports of horrible crimes and the recurring question of how to apply international humanitarian law (hereafter IHL) in these cases made me delve deeper into this matter and examine whether one could speak of a legal vacuum.

The research done for this master thesis has been quite a task, but the amount of knowledge gained for in return was immense. First of all, I'd like to thank Prof. Dr. Ruys for being my promotor and for accepting this topic as my research subject. Second of all, I’d like to thank him for always being willing to give advice and for giving great recommendations on sources of information. Thirdly, I would like to show my gratitude for the availability of the course ‘The Laws of Armed Conflict’ which turned out to be my favorite course of the 5-year program of Master of Law at Ghent University. Lastly, I would like to thank my close relatives for supporting me in writing this thesis.
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights. 3 September 1953.</td>
</tr>
<tr>
<td>GC III</td>
<td>Convention (III) relative to the Treatment of Prisoners of War. 12 August 1949.</td>
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<tr>
<td>GC IV</td>
<td>Convention (IV) relative to the Protection of Civilian Persons in Time of War. 12 August 1949.</td>
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<td>HRL</td>
<td>Human Rights Law</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights. 16 December 1966.</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICL</td>
<td>International Criminal Law</td>
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<td>ICoC</td>
<td>International Code of Conduct for Private Security Service Providers</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<tr>
<td>IHL</td>
<td>International Humanitarian Law</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
</tr>
<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
</tr>
<tr>
<td>PMSC</td>
<td>Private Military and Security Company</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNHRC</td>
<td>United Nations Human Rights Council</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>U.S.</td>
<td>United States of America</td>
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<td>UNWG</td>
<td>United Nations Working Group on the Use of Mercenaries</td>
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Introduction

For the past two centuries, the military has been a key element of State control. However, as a consequence of budget cuts and waves of demilitarization, a hybridization of the armed forces started taking place. Nowadays, more and more military operations are being outsourced to private military and security companies (hereafter PMSCs), often involving little to no public debate. These companies offer personnel capable of executing any task desirable in combat, ranging from protection of military personnel, the maintenance of weapons systems and the training of armed forces to interrogating detainees and even fighting in conflicts. Given their low cost, their rapid mobilization capacity and the efficiency of these companies, they are a valuable tool for many states.

However, it must be noted that the use of highly trained actors who are not officially members of the regular armed forces and who engage in warfare is not a new phenomenon. The use of so called mercenaries has been well documented for over 4000 years. Due to rising opposition to these activities, the second half of the 20th century gave rise to several initiatives which tried to put an end to these activities by criminalizing it at the national and international level.

In current times however, one can rarely classify a private military and security actor (also called contractors) as a ‘mercenary’ in the strict legal sense (as defined by the several anti-mercenary conventions and provisions). With this in mind, it is troublesome that there is a significant rise of companies providing services of which some border on ‘mercenarism’ in the traditional meaning of the word. Nonetheless, PMSCs are, contrary to a group of mercenaries, transnational corporations which are considered a legitimate tool and which carry out contracts for governments, private firms, non-governmental organizations and even international organizations like the UN and the NATO.

The status of some of the staff of PMSCs can be ambiguous to say the least. As we will see, the concept of a ‘mercenary’ as defined by International Humanitarian Law (hereafter IHL) and several conventions falls short in dealing with PMSC employees. Moreover, IHL has not yet developed specific rules aimed at PMSCs and their personnel. Important IHL concepts such as civilian or combatant (status) will also prove to be difficult to apply in some scenarios. As we will see, some governments are inclined to treat PMSC personnel as civilian contractors, whereas other governments and organizations at the international level treat these actors as mercenaries. Even the status of combatant can and has been claimed, most notably by contractors aiming to benefit of this status in the scenario of a lawsuit. In this master thesis, it will become clear that their legal status will greatly depend on their relationship with the hiring State and the functions they perform. Lastly, even though anyone can be held liable for violations of IHL, there is often a lack of political will to prosecute individuals.¹

Given the circumstances these forces operate in and their unclear status in armed conflict (which often leads to de facto impunity), it was inevitable that serious objections would rise. The 1976 Angola trial was one of the first notable cases to mark the phenomenon of mercenarism as a global concern, and together with this, it raised some serious questions. Shortly hereafter, the two protocols to the four 1949 Geneva

Conventions relating to the protection of victims of international armed conflicts were adopted, of which Additional Protocol I (hereafter AP I) includes article 47 which deals with mercenaries. This article and several other articles of AP I have been hotly debated and objected by various actors ever since it was created; the U.S. for example has yet to ratify AP I. The severity of the scourges created by mercenaries in post-colonial Africa in the 60’s and 70’s even led to the creation by the United Nations Commission on Human Rights of a Special Rapporteur on the use of mercenaries as a means of violating human rights and of impeding the right of peoples to self-determination.²

A more recent event which brought up the discussion on mercenaries was the invasion and occupation of Iraq, in which the privatization phenomenon took on unprecedented proportions. This conflict, which was made possible by over 60000 private military and security personnel, led to a series of incidents which again resulted in fierce debate on the applicability of international law on these actors. The event in which four Blackwater employees were mutilated and hanged, the resulting Fallujah ambush and the torture of internees at the Abu Ghraib prison by contractors are notable cases which gave rise to questions on the status, accountability and treatment of these actors who are often involved in armed conflicts.

However, although the 2003 Iraq war has often been labeled as the first ‘privatized war’, it must be reminded that all throughout history, foreign personnel were being hired to provide military services in hostilities (this reality was already embedded in the first codifications of IHL such as the Lieber Code in 1863). The notable difference in recent armed conflicts is not only the overwhelming presence of PMSCs (the military campaign of the U.S. in Iraq was made possible by an armed force of which 57% consisted of contractors³), but also the scope of the services these companies are able to provide.

Thus, it comes as no surprise that various actors and institutions are becoming increasingly aware of the need of limiting and regulating the activities of these PMSCs, especially states. Three major reasons can be given for this shift of mindset. First of all, states have a duty to uphold their obligations under international law. Second of all, the impact of the industry on national military policies is enormous. The last major reason consists of the fact that states are not eager to lose control of their monopoly on the use of force.⁴

In this master thesis, it will become clear that the PMSC industry shares a common feature with traditional mercenarism, namely the use of force which has been shifted outside the exclusive realm of the State. However, there are also differences which warrant a new and innovative way to deal with this recent phenomenon. Regulation will be the main instrument, however, this can only be effective if the complex legal situation of these actors is correctly understood. Thus, providing a clear picture on the applicable rules of international law on these actors is the main goal of this master thesis.

Chapter 1 – ‘The legal status of Mercenaries in armed conflict’: Research goal and conceptual framework

Title 1. Research goal

The purpose of this master thesis is to investigate the legal regime of mercenaries in armed conflict and whether one can speak of grey zones (or even of a legal vacuum). This research will not only focus on mercenaries as defined by the so called mercenary conventions, but also on employees of PMSCs who engage in combat zones. As will become clear, there exists much confusion on the latter category. Therefore, the laws on mercenaries, combatants and civilians will be analyzed in order to answer the question whether PMSC personnel can be considered as mercenaries as defined in IHL. Special attention will be given to the rights and duties of these actors, but also to the guidelines offered by various institutions such as the PMSC-industry itself. No attention will be given to the economical and (geo)political aspects of mercenarism and the PMSC industry, as this is a legal analysis first and foremost.

While analyzing the existing framework, inconsistencies and potential obstacles for litigation will be looked at. The question will be asked (given the many notable and dubious cases involving mercenaries) whether and how the current situation can be improved. Therefore, future initiatives to regulate these matters will also be looked at and evaluated.

The final goal of this master thesis is twofold. Firstly, it tries to inform a wide spectrum of readers interested in this topic (be it students, law practitioners or even PMSC personnel). Secondly it tries to clarify the framework applicable to these actors, to evaluate whether it suffices and to offer possible solutions for current issues. Most importantly, the creation of future regulation dealing with PMSCs and their employees will have to start from a comprehensive understanding of these actors in order to ensure optimal respect for IHL and human rights law.

Title 2. Conceptual framework, methodology and delimitations of this research

Section 1. Conceptual framework

This master thesis will deal with the legal status of mercenaries in armed conflict. However, in order to avoid confusion and since there are no universal definitions of these terms, this chapter will briefly touch upon them. The interpretations given here should be kept in mind when reading this paper, which will help to fully comprehend this complicated issue.

A short explanation will be given on how the terms ‘mercenary’ and ‘PMSC’ will be approached all throughout this research. As mentioned before, these terms share common elements. There will also be a few words on the term ‘armed conflict’, since
it has a specific meaning in IHL. However, only chapters three and four will be able to offer a complete view on the notion of ‘mercenaries in armed conflict’.

**A) Mercenaries and PMSC’s**

This master thesis will analyze the legal status of persons actively engaging in armed conflict for private gains, be it financial or material compensation. Therefore, one is inclined to simply use the term mercenary. However, one must be careful to distinguish the generic meaning of this word from its meaning embedded in various treaties. This is further complicated by the existence of PMSCs, since personnel of these companies might be called mercenaries by a layman even though they might not fall under a restrictive legal definition of the term ‘mercenary’. Moreover, there are several other categories of private military forces (volunteers, servicemen enlisted in foreign armies, etc.), but these are less common and distinguishing them from traditional mercenaries is often difficult. Therefore, this master thesis will focus its legal analysis on the activities and status of ‘traditional’ mercenaries and PMSCs. Notwithstanding, the observations done in this analysis might also apply to other categories of private military actors.

Chapter three will deal with the terms ‘mercenary’ and ‘PMSC’ in greater detail. It will already be noted here that, for the latter term, no distinction will be made between private security companies (PSCs) and private military companies (PMCs). The myriad of companies deployed in Iraq have shown to provide a broad spectrum of both military and security services, with the distinction often being blurry. Therefore, the term PMSC will be used to refer to any “corporate entity which provides on a compensatory basis military and/or security services by physical and/or legal entities”.

**B) Armed conflict**

In this paper, ‘armed conflict’ must be understood in the way IHL describes it, with its distinction of international and non-international armed conflicts. This will mean that the conclusions drawn in this research with regards to the legal status of certain individuals will only apply in the case of an armed conflict as described in IHL. In

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6 Note on terminology: although terms like corporate mercenaries, private military companies, private security companies, military contractors, mercenaries and even privatized peace-keepers are often used, this master thesis will use the term PMSC to denote the companies, which is in line with the terminology used by the U.N., see for example: UN Commission on Human Rights, *Addendum to the 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 People to Self-determination on the Resumed First Session*, March 2006, E/CN.4/2006/11/Add.1, available at: [http://www.refworld.org/docid/45377b0e19.html](http://www.refworld.org/docid/45377b0e19.html) and the terms contractors/PMSC employees/PMSC personnel to denote their employees.

chapter four, jurisprudence, doctrine, the Geneva Conventions of 1949 and its Additional Protocols of 1977 will be analyzed in order to get a clear interpretation of 'armed conflict'.

Section 2. Methodology

The research method of this investigation consists of a thorough study of the applicable rules of law embedded in jurisprudence of international courts, conventions, legal doctrine, etc. Agreements, official documents, specialized reports and voluntary codes containing good practices such as the Montreux document will also be examined.

Section 3. Delimitations

This master thesis will put its focus on international law for several reasons. Firstly, it would not be feasible to mention and examine every national regime. Secondly, one has to also consider the fact that the main issues related to the use of mercenaries are situated in the scenario of an armed conflict, where applying national legislation can prove to be difficult. Given the fact that these matters are mainly regulated by international humanitarian law, the focus of this research will thus lay on this framework of rules. The last reason for not including national legislation is the fact that this research aims to reach out to and provide some guidance for people active in the legal and/or actual field all over the globe. After all, providing information on national laws which will rarely be relevant for the average reader would be detrimental to this quest to offer a comprehensive overview.
Chapter 2 – Background

In this chapter, the first title will explore the history of private actors in warfare.\(^8\) Light will also be shed on the recent rise of PMSCs and the scope of services they offer. This will lay the groundwork for title two of this chapter which will point out issues arising from these activities and why an analysis of IHL is needed.

Title 1. Mercenaries and the rise of the PMS industry

Section 1. Overview of traditional mercenarism

The act of fighting for private gains is as old as war itself. The oldest records of mercenaries serving in foreign armies can be dated back to 2000BC, where they supplemented the ranks of King Shulgi of Ur.\(^9\) The first detailed account dates back to 1294BC, when Pharaoh Ramses II hired Numidians in order to beat the Hittites.\(^10\) From these times on, the majority of conflicts have been aided by mercenaries. One can find a multitude of sources on the Persian, Peloponnesian and Punic wars which document the dependence on mercenary troops.\(^11\) Exceptions on this dependence were few. Only certain Greek city-states, of which Sparta might be the most infamous, had armies which didn’t consist of hired specialists (although they did call for mercenaries on some occasions).\(^12\)

Going through the Roman times, the expansion of the empire went hand in hand with an ever increasing use of hired units. These were often found in regions with poor economic prospects. At the height of the empire, the number of Germanic soldiers was greater than the amount of native Roman soldiers.\(^13\)

The middle ages continued this trend of private militarization. With the rise of advanced weapons (crossbow, firearms, canon, …), which often couldn’t be handled by ordinary civilians, the need for specialized soldiers further increased. The increasing availability of these private forces throughout the middle ages was also one of the reasons for the increasing occurrence of wars.\(^14\) This period also saw the emergence of the first organizations of free-lance (the origin of the modern term\(^15\) ) soldiers. The need for

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\(^12\) D., LATZKO, *The market for mercenaries*, Conference Presentations, Wilkes University, available at: [http://www.personal.psu.edu/faculty/d/x/dxl31/research/presentations/mercenary.html](http://www.personal.psu.edu/faculty/d/x/dxl31/research/presentations/mercenary.html).


mutual support and protection was highly needed in these times of instability. Despite rulers being intimidated by these companies, attempts at wiping them out often failed.  

By the 17th century, one could already speak of a highly organized (private military) industry. Wealthy individuals started funding and renting out military units, building factories and depots of weapons, providing governments with armies, etc.  

Ironically, it was during these times trademarked by mighty private military companies that ‘state’ armies began to form. These armies consisted of soldiers loyal to a certain community, not to the person offering the best wage.  

By the turn of the 18th century, advances in the crafting and accessibility of weaponry enabled citizens to engage in wars to defend their nation. The Battle of Waterloo for example consisted of a clash between 3 armies (the French, the Prussian and a multinational coalition) in which 200,000 soldiers fought each other. Although veteran soldiers were preferred, a major part of the armies consisted of conscript civilians.  

The forming of states occurred parallel with this evolution of ‘citizen’ armies.  

The presence of mercenaries kept declining until the 1950-1970 decolonization period, in which private militias exploited the weakness of mostly Latin American and African states. Mercenaries were not only hired by rebel groups who wanted to seize power, but also by states interested in clinging on to certain interests. Thus, it is of no surprise that the biggest opponents of criminalizing mercenarism were decolonized states which longed for independence.  

Although there were moments of increasing mercenary activity in the middle of the 20th century, certain factors resulted in a declining influence on conflicts by mercenaries in the following decades. First of all, there was the increasing opposition which resulted in the mercenary provision embedded in AP I to the Geneva Conventions. Secondly, there is the innate nature of traditional mercenarism: the services were often limited geographically, in time and with respect to the services they could provide (mostly limited to direct combat). One could argue that technological advances are a third reason for the declining presence. After all, dealing with these requires highly specialized and trained soldiers.  

**Section 2. Rise of the PMSC industry**

Recent events which caused a stir on the global scale created a certain niche in the international market. The end of the Cold War started a period of countries trimming down on the size of their armies, as well as disengaging from certain strategic areas. Because of this, many skilled soldiers were left unemployed. These conditions, in times of globalization and liberal movements (which aimed at trimming down on government functions), created the perfect breeding ground for the rise of the PMSC industry. Thus, although traces of primitive firms can be dated back to the 18th century, the industry expanded exponentially only two decades ago. One could point for example to the total expenditure on PMSCs by the US Department of Defense in the Iraq and Afghanistan

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This number reached the staggering sum of 146 billion dollars\(^{20}\), which is higher than the GDP of many countries.

One could rightfully ask the following question: what separates the PMSC industry from mercenarism? Some claim that the former is just an evolved form of the latter, pointing at the economic motivation of both. Others point out that only states are doing the hiring of PMSCs.\(^{21}\) However, this statement has been proven wrong in 2 ways. First of all, states have hired mercenaries in the past.\(^{22}\) Secondly, PMSCs are also being hired by private entities such as corporations, NGO’s, wealthy individuals, etc. Thus, if one aims to differentiate both phenomena, one has to factor in several elements.

SINGER in his Corporate Warriors: The Rise of the Privatised Military Industry has attempted to clarify this matter. He argues that the main difference between PMSCs and traditional mercenarism is the corporatization of the former and the five distinguishing characteristics that follow from this fact.\(^{23}\) Unlike traditional mercenaries, PMSCs are highly organized, they are driven by business profit, they are not outlawed, they can offer close to any service imaginable (consultancy, logistics, support, intel gathering, training, operational support, combat operations, etc.) often to multiple clients at once and they are often interconnected with other industries (which increases their legitimacy).\(^{24}\)

These points prove that PMSCs aren’t just mercenaries in the traditional sense. However, the next title will shed some light on the range of services PMSCs offer. Here, it will become clear that some of the activities overlap with traditional mercenarism. This may in turn have its implications when applying IHL.

Section 3. Scope of PMSC services

In this part, a brief sketch of the activities of PMSCs will be given. This will enable the reader to understand why legal questions (in the sphere of IHL) can arise. No classification of PMSCs will be attempted here since the legal regime applicable on private military forces depends on their activities, not on the formal classification of these entities.

A quick glance at the numerous private military and security firms shows that they provide a myriad of services, some of them considered core military functions. Although these companies also provide security services in non-conflict zones (guarding shopping malls, checking whether parked cars paid for a ticket, etc.), only the ones relevant in armed conflict will be discussed here.

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\(^{22}\) P. SINGER, supra note 15, 45.

\(^{23}\) Ibid., 44-47.

\(^{24}\) Ibid.
TONKIN has identified four categories of services: military support, services involving military and security expertise, armed security and offensive combat. The last 2 categories are generally the most controversial, since the proximity to a conflict as well as the influence on a conflict cause the most issues. The legal consequences of certain services and actions will be discussed in chapter four when the applicable IHL will be analyzed.

**Military support services** are the least questionable. These include non-combat services such as basic intelligence, logistics, building camps, providing meals and providing transportation. This category is the largest sector in the PMSC industry. Although these kind of operations do not take part in the planning or execution of combat, they nonetheless are an essential factor for succeeding in it. Moreover, persons employed in this sector are still prone to combat threats, since they are relatively close to combat.

**Military and security expertise** encompasses a wide variety of activities which do not require the employees who perform these tasks to be armed: the training of units of the client, operating and maintaining weapon systems, intelligence gathering, etc. Although these kinds of tasks require little to no involvement in combat, legal issues can still arise. For example, PMSC personnel responsible for interrogation and translation services have been accused of the inhumane treatment of Abu Ghraib prisoners. This was one of the most famous incidents in the 2003 Iraq war which raised questions on the legal status of PMSC staff (infra, title two).

**Armed security** consists of guarding assets and persons in zones of armed conflict: army bases, convoys, camps, eminent individuals, etc. Although employees who provide these services carry weapons, they are severely restricted on the use of force (situations of self-defense or the defense of targets they ought to protect by their contract). Given that security is mostly warranted for key military targets, these employees often wind up in combat situations as evidenced by reports of the U.S. Department of Labor Defense.

**Offensive combat services** encompass services at the forefront of the theater of war, by either engaging in combat or by direct command of and strategic instructions to units in the field. These services often consist of supplying a supplementary force. However, certain firms such as Executive Outcomes are able to provide standalone battalions of units which can be accompanied by artillery and combat vehicles (helicopters, aircraft, ships, etc.). Given the impact of this category on conflicts, it is of no surprise that the biggest opposition to the PMSC industry can be found here. A consequence of this is that many firms offering these services will claim they offer...
tactical or security services. Regardless of the labels used by PMSCs, it is a fact that these services still take place and that they are one of the biggest sources of controversy and arising legal questions.

This brief sketch summarized the wide variety of services PMSCs can offer. The following title will go over the complex legal questions which can arise when private military forces are involved in armed conflict.

Title 2. Potential threats – Arising questions

There are many issues when it comes to the involvement of private military actors in armed conflict. Topics such as (the lack of) democratic control over the use of force, the hollowing out of states, the possible prolonging effect on conflicts, their influence on the circulation of arms and economic exploitation have been hotly debated. However, examining all these issues is beyond the scope of this master thesis. Only 2 questions of IHL will be discussed here.

The main question is: how should one apply the principle of distinction (between civilians and combatants) to PMSC employees? Related to this are questions on the scope of art 47 AP I and the mercenary conventions, and whether PMS employees meet their definition of ‘mercenary’. A second question asks whether there are legal reasons for the impunity of PMS personnel for war crimes and human rights violations.

Although there have been many serious incidents of unpunished criminal misconduct, human rights abuse and potential war crimes, only two high-profile incidents in Iraq will be cited here to indicate the importance of clarity on the legal status of mercenaries. The first is the abuse of prisoners at Abu Ghraib. In this prison, several cases of physical abuse, sexual assault, torture, rape, sodomy and murder came to light thanks to reports of Amnesty International. According to an investigation of the United States Department of the Army, contractors were involved in 36% of the proven incidents. Although six employees were identified as ‘individually culpable’, none of them faced prosecution. This stands in contrast with the eleven U.S. soldiers who did get

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33 A former command officer of the British Parachute Regiment has said the following: ‘If we do operate in civil wars, we are there as advisers or trainers. But, of course we are on the frontline, and the excuse is that we want to see if our training is working’, quoted in: N. WOODS, Soldiers for Sale, London Times, May 1998.
convicted (albeit they only received minor sentences). The UN Working Group mandated to monitor mercenary activity (infra) emphasized about this case that “(...) the core military functions that were carried out by the employees of the two private military companies concerned were performed without regulatory mechanisms requiring oversight and accountability”. When one also considers the fact that few firms report serious incidents and, even if they do, that such incidents are often misreported (and with little factual information), it is easy to see how situations like this can lead to individuals becoming more prone to commit violations. Furthermore, the contractual relation of PMSCs and the lack of hierarchical command makes the enforcement of these norms more difficult, which leads to situations of impunity.

On the other hand, the vulnerability of contractors has been clear in cases such as the 2004 Fallujah ambush. In this case, Iraqi insurgents attacked a convoy of Blackwater contractors guarding trucks which were delivering food for caterer Eurest Support Services. These guards were going through a high-risk area without armored vehicles and automatic weapons. Four security guards were killed, their bodies burned and mutilated, and two were hung over a bridge on the Euphrates.

Again, the question of the status of private military actors surfaced. Could the persons in this specific situation be considered a civilian (and thus benefit from immunity from attack)? Or could they be considered as integrated into the armed forces (of the U.S.)? Or should they be considered unlawful combatants, which would for example deprive them from prisoner of war status? These and many other questions should be clarified in order to make sure that one of the most important principles of IHL, namely the principle of distinction, gets applied correctly. As CAMERON rightfully remarks,

“It would be a crime for an enemy to target civilian PMC employees directly, but the inability to distinguish the civilian PMCs from combatant PMCs may discourage any attempt to comply with IHL and contribute to an erosion of the principle of distinction.”

Therefore, in every armed conflict it should always be clear which persons can be lawfully attacked (combatants) and which persons should be spared and protected (civilians).

Ultimately, the main issues when it comes to these contemporary mercenaries are the lack of accountability, oversight and transparency, next a blurring of the principle of distinction. Therefore, a clear analysis of the legal status of these individuals is

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43 UN General Assembly, note by the Secretary-General transmitting the report of the UNWG, A/61/341, 13 September 2006, 14.
46 General Court of Justice Superior Court Division, Nordan P. v Blackwater Security Consulting, Wake County, 5 January 2005, 4.
appropriate. This should in turn offer a better foundation for any future attempt which tries to provide an adequate answer to the many issues surrounding mercenarism, especially its contemporary manifestation.
Chapter 3 - Mercenaries and PMSCs in International Law

Title 1. Mercenaries

Section 1. Generic Meaning

The origin of the word mercenary is mercis, which is Latin for merchandise. According to this, mercenaries are merely traders receiving personal gain for selling their skills. However, a narrower definition has always been tied to value judgments and political views. Even in current times, mercenaries are only mercenaries when it suits the political agenda of states.

Critics of the PMS industry often resort to non-legal definitions of mercenaries such as the description in the Oxford English Dictionary: ‘a professional soldier hired to serve in a foreign army’. Even the former U.N. Special Rapporteur of the U.N. Commission on Human Rights on the Effects of the Use of Mercenaries has implied that the only difference between mercenaries and contractors is the fact that only the latter are being hired by States.

However, in order to attempt to solve the complex legal questions arising from private military and security activities in armed conflict, one has to resort to more precise concepts. These can be found in international legal frameworks, which will be reviewed in the next section.

Section 2. Defining mercenaries in International Law

A) Mercenaries in customary international law

As mentioned in the historical overview, the use of mercenaries in warfare can be dated back to ancient civilizations. However, provisions explicitly prohibiting mercenarism only emerged in the post-World War II era. Prior to it, no mention of these actors could be found in The Hague Conventions, nor in the Geneva Conventions of 1949 or in customary international humanitarian law. These actors were thus considered a legitimate means of warfare for a very large period. However, certain provisions of Hague Convention V (dealing with principles of non-interference and non-aggression) have to be taken in account. In this convention, several articles might imply mercenary activities:

50 C. KINSEY, International Law and the Control of Mercenaries and Private Military Companies, Cultures & Conflicts, June 2008.
Art 4. Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

Art 5. A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.

Art 6. The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Art 17 A neutral cannot avail himself of his neutrality
   o (a) If he commits hostile acts against a belligerent;
   o (b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.
   o In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.54

Although there is no explicit mention of mercenaries in these articles, it has been argued that these rules can apply to mercenary activities in specific cases.55 On the one hand, reading art 4 in conjunction with art 6 leads to the conclusion that neutral states have no obligation to prevent individuals from passing through its territory to join the conflict. There is only an obligation for neutral states regarding the formation and recruitment of private fighters in its territory. On the other hand, none of the provisions restrict the possibility for nationals of member states to work for hostile states. This lack of control on the activities of individuals in the military field must be seen in the worldview of that period in which governments and individuals were considered mutually exclusive areas.56

Given that most of the substantive provisions of The Hague Conventions of 1899 and 1907 (especially all the provisions of the two Conventions on Land Warfare) are considered embodying rules of customary international law57, they are binding on any State (even if they are not formal parties to them). Thus, they have to be taken in account in this analysis on the legal status of mercenaries in armed conflict.

As mentioned supra, more and more states and institutions started condemning mercenaries since the creation of the United Nations in 1948 and the following decolonization attempts in the 1950s and 1960s. The recognition of the right to self-determination (embedded in art 1 of the UN Charter and reaffirmed in several other UN Declarations) in an era of states struggling to become independent caused a change in the attitude of the international community towards mercenaries.58

The UN General Assembly for example stated in their 1970 Declaration on Principles of International Law that states,

54 Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907.
56 J. ABRISKETA, Blackwater: mercenaries and international law, University of Deusto, October 2007, 3.
57 As expressed in the Nuremberg International Military Tribunal, see https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in.
“(…) have 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.”

As we can see, norms with regard to mercenarism have been closely linked to protecting territorial sovereignty, political independence and non-interference. One of the most notable examples of this would be the Nicaragua v. United States case in which the court held the US government accountable for violating the principle of non-intervention by arming and training rebels in Nicaragua. In this case, the Court stated that the United States was “in breach of its obligations under customary international law not to use force against another State and not to intervene in its affairs”.

It is important to note here that the large amount of UN resolutions condemning mercenarism do not elevate the opposition to these activities to the level of customary international law. Firstly, the majority of these resolutions have been aimed at specific conflicts. Secondly, the General Assembly does not have the authority to “enact, alter, or (...) terminate rules of international law”. Only in the case of the Mercenary Conventions (infra) reaching a high amount of ratifications one could evaluate whether the practice of opposing mercenarism will constitute a rule of customary international law.

**B) The Additional Protocols of 1977 to the Geneva Conventions**

As mentioned supra, the decolonization period and the widespread use of mercenaries lead to instruments explicitly mentioning mercenaries. The first definition of ‘a mercenary’ was embedded in art 47 of AP I to the Geneva Conventions (relating to the protection of victims of international armed conflicts).

Paragraph one of this article states that mercenaries don’t have the right to be a combatant (which means that they may not participate in hostilities), nor have they the right to be treated as a prisoner of war (which means that they can be treated according to national law and the minimal guarantees of IHL). It has been remarked by commentators that this weakening of protection of persons is unusual for humanitarian law. The negative view on and shameful character of mercenary activities (making

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60 L. GAULTIER, G. HOVSEPIAN, supra note 2, 26.
62 C. KINSEY, supra note 50, 8; see also H. THIERRY, Les résolutions des organes internationaux dans la jurisprudence de la Cour Internationale de Justice, 167 Recueil des Cours, 1980, 385; K. OKWOR, Arguments on the legal significance of resolutions of the united nations general assembly and the vexed question on whether they constitute a source of international law with binding effects, Lagos, Nigerian Law School, 2014, 18.
63 Ibid., 9.
64 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
65 J. ABRISKETA, supra note 56, 5.
66 L. Cameron, supra note 4, 580.
profit from war) probably played a big role in shaping this provision. Given that a person fulfils the requirements of art 47(2) (infra), and thus loses the privileges mentioned in art 47(1), art 45.3 AP I implies that a mercenary can only benefit from the fundamental guarantees listed in art 75 AP I (humane treatment, etc.).

The second paragraph goes on to say that 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.

This definition has been carefully worded in order to exclude several categories of actors such as foreign nationals in the service of the armed forces of another country, foreign military personnel integrated into the armed forces of another State, persons driven by ideological motives and foreigners employed as trainers. Furthermore, art 47 AP I only applies to international armed conflicts. International humanitarian law contains no provisions on mercenaries in non-international armed conflicts. In these conflicts, mercenaries in the sense of art 47(2) have the same rights and obligations as anyone else taking direct part in hostilities. As will be discussed in chapter four, these include the protections of common art 3 to the Geneva conventions, AP II and customary IHL. However, mercenaries may be tried for merely participating in hostilities in both types of armed conflict, even if they respect all the rules of IHL.

Although the definition embedded in art 47 is detailed, it is generally viewed as unworkable and too restrictive given the fact that all six conditions must be met cumulatively. One commentator famously remarked on this that "any mercenary who cannot exclude himself from this definition … deserves to be shot – and his lawyer with him!". For example, in order for a person to be a mercenary, it has to be proven that private gains are his motivation for taking part in the hostilities. However, proving this incentive is extremely difficult as a person's motivation often consists of several

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69 C. KINSEY, supra note 50, 5.
70 E.-C. GILLARD, Business goes to war: private military/security companies and international humanitarian law, ICRC vol. 88 n° 863, September 2006, 564.
71 C. ROUSSEAU, Le droit des conflits armés, Le monde diplomatique, Septembre 1983, 68.
elements (longing for adventure, wanting to practise their skills, etc.). On this, a 1976 report of the United Kingdom’s Committee on the involvement of British mercenaries in Angola noted the following:

“(…) any definition of mercenaries which requires positive proof of motivation would either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.”

Moreover, evidence is required that the material compensation given is greater than those promised or paid to combatants of similar ranks and functions in the armed forces. This objective test can be seen as an attempt to counterbalance the subjective motive requirement. Consequently, given that few actors would meet all the requirements of art 47 AP I, several African States opposed to them (which also resulted in a OAU Convention against Mercenarism which didn’t include the second requirement discussed here). Commentators have pointed out the perverse effect of this quantitative requirement: one is inclined to think that private actors who are paid badly cause more breaches of IHL, yet these are the ones who will not fall within the mercenary scope.

The condition in art 47(2) b AP I of direct participation in hostilities is notoriously difficult to apply. Although it is one of the key concepts of IHL, it hasn’t been defined yet, nor are its limits precise (for a detailed analysis, see chapter four). Moreover, a large part of the persons offering support to belligerents (technicians, consultants, cooks, etc.) will most likely not fulfil this requirement, which further narrows the application of art 47 AP I. Consequently, any person fulfilling all criteria except this one will not be considered a mercenary. If there is no direct participation in hostilities, the person will simply be categorised as a civilian.

It has also been pointed out that the linking of origin to rights and obligations, which occurs in art 47 (2)d AP I, is troublesome. For example, one can think of a non-national residing in an area where hostilities emerge. This person might feel the need to oppose the danger by offering his services for material compensation. This person then runs the risk of being labelled a mercenary and consequently losing certain protections.

Nonetheless, it should be mentioned the legal significance of art 47 AP I should not be overestimated. When read in conjunction with art 43.2 AP I (defining a combatant as a member of the armed forces of a party to the conflict), specifically tying consequences to the status of mercenary (which requires one not to be part of a

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75 K. FALLAH, supra note 47, 605.
76 See section 3(b): The Organization of African Unity Convention.
78 E.C. Gillard, supra note 70, 561.
80 C. KINSEY, supra note 50, 7.
member of the armed forces of a party to the conflict (see art 47(2)e AP I) seems obsolete. After all, all individuals fulfilling the definition of a mercenary are not entitled to combatant status in the first place. Thus, although art 47 AP I appears to be creating a new category of persons who are not entitled to POW-status, it merely repeats the consequences of other provisions. Thus, its biggest added value then appears to be the fact that the definition is used in the mercenary conventions where it is tied to other consequences (infra).

Lastly, it is also important to note that a person can only lose the POW status when a competent tribunal has concluded that the requirements of art 47(2) AP I have been fulfilled. Therefore, any person must be treated and considered as a prisoner of war as described in Geneva Convention III until such judgment occurs.

The 2005 ICRC study on Customary International Law considers art 47 AP I to be part of customary international law. Rule 108 of this study explicitly states that mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status (the wording “shall not benefit” might imply that a detaining power can act, if it chooses so, as if the mercenary has POW status). Given that these concepts only exist in international armed conflict, the mercenary status and its consequences described in art 47 AP I will not apply to non-international armed conflicts (this is one of the points on which the Mercenary Conventions differ from IHL, see section three). This is also the reason why there is no mention of mercenaries in the laws governing NIAC’s. In these conflicts, a captured mercenary will enjoy the same protections as any other person engaged in combat.

Rule 108 of the ICRC Customary International Law study further states that mercenaries may not be convicted or sentenced without trial. Although this right to fair trial (located in art 75 AP I) was not specifically referenced to in art 47, it is generally agreed upon that it also applies to mercenaries.

The ICRC study based their conclusion that art 47 AP I reached the status of CIL on several military manuals, national legislations, official statements and reported practice (even of states who were not, or not at that time, a party to AP I). However, the United States has expressed several times that it does not consider art 47 AP I to be customary. Furthermore, some commentators have questioned the customary status of the deprivation of POW status for mercenaries. They argue that Protocol I “singled

82 K. FALLAH, supra note 47, 606.
85 L. CAMERON, supra note 4, 579; P. WALTHER, The legal status of private contractors under International Humanitarian Law, University of Leiden, 9.
86 L. CAMERON, supra note 4, 578.
out mercenaries based on a seemingly visceral reaction against their use during two decades in post-colonial Africa rather than a codification of customary international law. 90 Moreover, the International Court of Justice pointed out in the North Sea Continental Shelf Case that, in order for a rule to be considered customary, “(...) State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”. 91 Whether this is truly the case remains questionable. 92

In conclusion, although a majority of the community considers art 47 A.P. I part of Customary International Law, it needs to be stressed that this provision or any other provisions of the Geneva Conventions and their Protocols do not criminalize mercenarism, nor do they establish the responsibilities of a mercenary. 93 They merely state that a mercenary cannot directly participate in hostilities, nor can he benefit from prisoner-of-war status if he is captured. Furthermore, given the restrictive definition, few actors will be considered a mercenary (and thus possibly face prosecution for merely participating in hostilities) which might lead to the conclusion that certain private actors are free to do as they please. However, in order to determine whether mercenarism is a crime in a given case, one has to also factor in municipal legislation of a State (which will not be done in this study, see delimitations) and specialized conventions which a State might have ratified.

Section 3. Mercenary specific conventions

Apart from art 47 AP I, mercenaries are dealt with in several other international instruments. There are 2 conventions and 2 draft conventions which aim to criminalize mercenaries and activities related to them. Thus, in these conventions the legal consequences tied to the status of mercenary will be different from those of art 47 AP I. Unfortunately, it will become clear that many of the definitional issues which characterize art 47 AP I will also apply to the definitions embedded in these conventions.

A) The Draft Convention on the Prevention and Suppression of Mercenarism

This draft treaty stems from the Organization of African Unity and precedes the OAU Convention (infra). 94 It is often called the Luanda Convention because it was the product of the International Commission of Inquiry on Mercenaries convened by the

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government of Angola during the infamous Luanda trials. In these trials, 13 mercenaries were accused of atrocities committed during the Angolan civil war such as firing at civilians and conducting summary executions.95 Three of these mercenaries were sentenced to death on the same day the draft treaty was issued.96

The preamble of the draft convention starts with the concern of many states about the “use of mercenaries in armed conflicts with the aim of opposing by armed force the process of national liberation from colonial and neo-colonial domination”. The definition of the crime of mercenarism given in art 1 is largely similar to the one ultimately adopted in art 1.2 of the OAU Convention, with one notable difference. The Luanda definition describes the crime as aimed at “(...) opposing by armed violence a process of self-determination (...”). The OAU Convention eventually copied this formulation and added two more possible aims of mercenarism: opposing the stability or the territorial integrity of another State.

The main purpose of the draft can be found in art 3 which reaffirms the responsibility of states to prevent their nationals (government officials) from participating in mercenary activities. Art 4, which denotes the right of combatant and POW status, was eventually incorporated in the 1977 AP I and the OAU Convention. Furthermore, the draft was also important because it was the first regional effort dealing with mercenaries, because it invented the crime of mercenarism97 and it formed the basis for further efforts and debates.98

B) The Organization of African Unity Convention

The Convention for the Elimination of Mercenarism in Africa, adopted on 3 July 1977 by the Organization of African Unity99 (hereafter OAU Convention), entered into effect on 22 April 1985.100 This instrument, which is the first attempt to tackle the phenomenon of mercenarism through international criminal law, condemns the use of mercenaries and criminalizes both recourse to mercenaries and participation in hostilities as a mercenary.101

It was during the drafting process of Additional Protocol I, where it was declared that wars of national liberation were to be considered international armed conflicts, that certain African states pushed for a provision denying mercenaries combatant and POW status.102 This would then allow States to prosecute these individuals for merely

98 K. FALLAH, supra note 47, 608.
100 Seventeen ratifications were required for the OAU Convention to come into force, see art. 13 §3 OAU Convention.
101 This stands in contrast with the Geneva conventions and their Protocols, which only denies POW and combatant status to mercenaries (supra).
102 J. PALOU-LOVERADOS (Dir.) and L. Armendáriz (Author), The Privatization of Warfare, Violence
participating in hostilities. However, the OAU Convention, which was adopted one month after the Additional Protocols, decided to go one step further. It not only repeats that mercenaries are not entitled to combatant and POW status, it explicitly bans and penalizes mercenarism.\textsuperscript{103}

Art 1.1 of the OAU Convention provides us with a definition of ‘a mercenary’ by listing requirements which must be cumulatively met. Although they are largely similar to the ones listed in art 47 AP I, one requirement has been modified. Art 1.1(c) merely requires a mercenary to be \textit{“(…) 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”}. Contrary to art 47 AP I, the material compensation is not required to be \textit{“substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party”}. This definition, which is less restrictive than the one of art 47 AP I, was clearly aimed at including more private actors.

Requirement (d) of art 1.1 also deserves attention. This article states that only individuals who are \textit{‘neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict’} can be considered a mercenary. This leads to the conclusion that an individual will cease to be a mercenary once he is given the nationality of a party to the conflict or if he gets integrated in the armed forces of a party to the conflict.\textsuperscript{104}

Art 1.2 of the OAU Convention then goes on to define the punishable act of mercenarism:

\begin{quote}
\textit{The crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State, practises any of the following acts:}

\begin{enumerate}
\item a) Shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;
\item b) Enlists, enrols or tries to enrol in the said bands;
\item c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces.
\end{enumerate}
\end{quote}

This provision clearly reflects a broad view on criminal activities, expressed by the extended forms of participation listed. It also tries to encompass any situation of a coup d’état or an overthrow. It is important to note that, according to the OAU Convention, being part of mercenaries does not constitute to the crime of mercenarism. Likewise, persons involved in the crime of mercenarism are not required to be mercenaries.\textsuperscript{105}

\textsuperscript{103} Art. 3 OAU Convention; Similar to art.47 AP I, this does not prevent States from granting POW status to mercenaries.
The third paragraph of art 1 of the OAU Convention then concludes that any person guilty of these activities (natural or juridical), commits an offence considered as a crime against peace and security in Africa and shall be punished as such. The severity of these activities is further stressed by art 7 of the OAU Convention which orders states to punish them ‘by severest penalties under its laws, including capital punishment’.

Furthermore, art 3 of the OAU Convention deals with the status of persons falling within the mercenary definition. Similarly, to art 47 AP I, it states that mercenaries “shall not enjoy the status of combatants and shall not be entitled to the prisoners of war status”. Commentators have pointed to the paradoxical wording of not being ‘entitled’ to the POW status. After all, mainly African states advocated a strict denial of this status in the drafting of AP I.\(^\text{106}\)

In addition, art 6 of the OAU Convention clearly defines States obligations:

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Each contracting State shall undertake to:
  a) Prevent its nationals or foreigners on its territory from engaging in any of the acts mentioned in Article 1 of this Convention;
  b) Prevent entry into or passage through its territory of any mercenary or any equipment destined for mercenary use;
  c) Prohibit on its territory any activities by persons or organisations who use mercenaries against any African State member of the Organization of African Unity or the people of Africa in their struggle for liberation;
  d) Communicate to the other Member States of the Organization of African Unity either directly or through the Secretariat of the OAU any information related to the activities of mercenaries as soon as it comes to its knowledge;
  e) Forbid on its territory the recruitment, training, financing and equipment of mercenaries and any other form of activities likely to promote mercenarism;
  f) Take all the necessary legislative and other measures to ensure the immediate entry into force of this Convention.
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This article was implemented to explicitly oblige all party states to adopt legal measures to prohibit and punish any activity connected with mercenarism.

Viewing these provisions makes clear that, although there are some similarities between the OAU Convention and AP I (a slightly altered mercenary definition and the denial of combatant and POW status), the former also explicitly penalises mercenarism. Consequently, any individual captured in a State where the provisions apply can be prosecuted not only for national crimes such as murder, but also for the distinct crime of mercenarism, even if the individual has not directly participated in hostilities.\(^\text{107}\) Moreover, the OAU Convention also applies to non-international armed conflicts, contrary to art 47 AP I which only applies to international armed conflicts.\(^\text{108}\)

Although the OAU Convention is generally considered as one of the strongest frameworks to deal with private force, it has to be kept mind that it only applies to a slight majority of the African countries.\(^\text{109}\) Moreover, critics have pointed out several

\(^{106}\) E. GILLARD, supra note 70, 565.  
^{107} L. BECK, From Mercenaries to Market, chapter 7: Private military companies under international humanitarian law, Oxford University Press, 2007, 8.  
^{109} As of April 2016, 45 African States have signed the instrument, of which 30 have also ratified it.
major issues with this framework. First of all, the OAU Convention lacks an enforcement mechanism. Second, the definitions did not anticipate governments recruiting mercenaries for the purpose of maintaining security and sovereignty. The framework provided by the provisions does not prohibit non-nationals (falling outside of the scope of a mercenary) to be employed by a government in order to defend its territorial integrity. The convention only criminalizes the use of mercenaries when they oppose “by armed violence a process of self-determination stability or the territorial integrity” of an African State. It does not deal with all uses of mercenaries, nor does it deal with violations of IHL by ‘allowed’ forms of mercenarism. Thirdly, the judicial guarantee of art 11 is generally viewed as substandard since a person on trial for the crime of mercenarism is entitled to all the guarantees normally granted to any ordinary person by the State on whose territory he is being tried. Referring to international human rights as a minimum standard would have been a better choice.

C) The United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries

In 1967, the UN adopted its first resolution condemning the use of mercenaries for overthrowing governments. This was soon followed by several other resolutions in which states were called upon to ensure their territory would not be used for facilitating mercenaries with the aim of overthrowing a government. Given that the threat of mercenarism was still real in the 1980’s, and previous attempts at controlling them could be considered a failure, the international community recognized the need for a multilateral convention. Hence, the UN General Assembly ultimately adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries on 4 December 1989 (hereafter UN Convention). This convention, which took nine years of debate, finally entered into force on 20 October 2001. Lastly, the UN also appointed a Special Rapporteur on the use of mercenaries with a mandate to collect information from governments, to monitor mercenary activity and to encourage the ratification of the convention.

113 Art. 1.2 OAU Convention.
114 L. JUMA, Mercenarism: Looking beyond the current international and regional normative regimes, in Elimination of Mercenarism in Africa: A need for a new continental approach, ISS Monograph Series, n°147, July 2008, 209.
116 UN Doc A/35/366/Add.1, 8.
117 C. KINSEY, supra note 50, 5.
118 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, UN General Assembly Resolution 44/34, 4 December 1989.
119 Art. 19 of the UN convention requires 22 ratifications before it can enter into force.
The UN Convention divides the definition of a mercenary into two parts. The first paragraph of art 1 reproduces all the criteria listed in art 47 AP I, with the exception of one. In the UN convention, in order for an individual to be considered a mercenary, it is not required that he "does, in fact, take a direct part in the hostilities". This broadening of the definition loses its value slightly since the requirement reappears in art 3. In this article, it is stated that a mercenary as defined in art 1 §1 only commits an offence to the UN Convention if he “participates directly in hostilities or in a concerted act of violence”. However, the obligations on State parties not to recruit, use, finance or train mercenaries is related to those actors falling within the scope of art 1 §1. Also, similar to the OAU Convention, art 1 §1 envisages mercenaries operating in both international as non-international armed conflicts.

The second paragraph of art 1 envisages the situation of mercenaries operating outside the scenario of an armed conflict (coup, riots and other events internal in nature). Therefore, this second definition puts an emphasis on the intention of the conduct of a mercenary:

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.

Related to this, art 5 §2 of the UN Convention further adds that states cannot oppose the inalienable right of peoples to self-determination by means of recruiting, using, financing or training mercenaries. Thus, similar to the OAU Convention, the UN Convention views mercenaries as a threat to the territorial integrity of states and the right of peoples to self-determination (supra).

Contrary to art 47 AP I, articles 2-4 of the UN Convention create international offences. Art 2 prohibits any person to recruit, use, finance or train mercenaries. Art 3 explicitly penalizes directly participating in hostilities as a mercenary (this concept is included as a criterion in the mercenary definitions of the OAU convention and art 47 AP I). Art 4 of the OAU Convention even goes as far as penalizing attempts to commit offences set forth in the convention, as well as accomplices of persons committing or attempting any of these offences.

121 Art. 5 UN Convention.
122 A. FAITE, Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law, Defense Studies vol. 4 n°2, 2004, 5; E.-C. GILLARD, supra note 70, 565.
Similar to the provisions in the OAU Convention, art 5 lists several prohibited interactions between States and mercenaries. As mentioned supra, the motivation of opposing a legitimate struggle for self-determination gets an explicit mention here. However, it must be noted that the UN Convention differs from the OAU convention as it does not allow States to hire mercenaries in order to resist rebel groups. In fact, no justification for hiring mercenaries exists at all in the UN convention.\footnote{B. SHEEBY, N. MAOGOTO, Contemporary Private Military Firms under International Law: An Unregulated Gold Rush, Adelaide Law Review 26.245, 2005, 260.}

Furthermore, art 6 of the UN Convention states that State Parties should take “(…) all practicable measures to prevent preparations in their respective territories for the commission of those offences [set forth in the present Convention]\footnote{L. GAULTIER, G. HOVSEPIAN, supra note 2, 18; J. GOMEZ, supra note 104, 12.} (…)”. This can be interpreted as an obligation for states to regulate and prevent any activity linked to mercenary activities.\footnote{L. GAULTIER, G. HOVSEPIAN, supra note 2, 18; see also E. GASTON, supra note 38, 232.}

Four more provisions are worth mentioning here. Art 9 of the UN Convention orders State Parties to implement national legislation in order to establish jurisdiction over offences (those committed in its territory, those committed by its nationals, etc.). Therefore, an individual can only be held criminally responsible at the national level in states which have enacted the relevant legislation.\footnote{E. GILLARD, supra note 70, 566.}

Art 11 of the UN Convention states that all proceedings connected to any of the offences of the Convention should obey the principle of fair treatment. Furthermore, persons regarding whom proceedings are being carried out should benefit from the rights and guarantees provided for in the law of the State in question. Finally, and contrary to art 11 of the OAU convention, the provision of the UN convention also adds that norms of international law “should be taken in account”.\footnote{S. GEOFFREY, D. BRENNER-BECK, M. LEWIS, The War on Terror and the Laws of War: A Military Perspective, Terrorism and Global Justice Series, 29 January 2015, 152; G. SOLIS, The Law of Armed Conflict: International Humanitarian Law in War, Cambridge: Cambridge University Press, 2010, 229.}

Art 16 of the UN Convention does not explicitly state that mercenaries have no right to be a combatant or a prisoner of war. This stands in contrast with art 47 AP I and art 3 of the OAU Convention. The UN Convention merely states that the rules of armed conflict and IHL apply in any case (such as the treatment of captured mercenaries). GILLARD has pointed out the importance of this formulation.\footnote{E. GILLARD, supra note 70, 566.} Firstly, art 5 of Geneva Convention III relative to the treatment of Prisoners of War of 1949 is particularly relevant in the case of a captured mercenary:

“(…) Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

According to some commentators this provision creates the presumption, when read together with the Commentary to GC III, that any person captured in international armed conflict enjoys prisoner of war status until a tribunal has decided otherwise.\footnote{S. GEOFFREY, D. BRENNER-BECK, M. LEWIS, The War on Terror and the Laws of War: A Military Perspective, Terrorism and Global Justice Series, 29 January 2015, 152; G. SOLIS, The Law of Armed Conflict: International Humanitarian Law in War, Cambridge: Cambridge University Press, 2010, 229.} Secondly, the author points out that this clause “to some extent, remedies the UN
Convention’s failure to affirm the application of human rights fair trial standards, as it imports into it the safeguards found or referred to in international humanitarian law.”

Finally, art17 of the UN Convention deals with disputes between two or more State Parties. In case of a disagreement on the interpretation or the application of the convention which has not been settled by negotiation, the issue has to be submitted to arbitration. Only if this attempt fails, recourse can be taken by referring the dispute to the International Court of Justice. Although the promotion of dialogue seems preferable, some commentators consider this limiting of proceeding against an offending State as problematic.

Contrary to the OAU Convention, the UN convention does foresee universal jurisdiction. In practise however, only 34 states have ratified it and none of them have large armies or a significant influence at the international level (such as China, France, India, Japan, Russia, the United Kingdom and the United States). Reasons given for not ratifying the convention often involve the difficulty of proving the criterion of motivation and the fact that the convention does not distinguish between legitimate and illegitimate activities. Furthermore, no monitoring body exists which means that any application of the convention relies on enforcement by individual member states.

Commentators have also pointed out issues related to the scope of the UN convention. Although it exceeds the scopes of both the OAU convention and the one of art 47 AP I, the cumulative criteria still remain notoriously difficult to fulfil. In the case of art 47 AP I, persons not falling within the scope are simply left with the rules of IHL. However, the situation is different in the case of the UN Convention as it criminalizes mercenarism. ‘Mercenaries’ falling outside the restrictive definition cannot be held accountable for the distinct crimes of mercenarism or for being a mercenary, unless national legislation has foreseen this scenario. For this reason, the convention has been called “the best example of useless international law”.

Another flaw of the convention, which it has in common with AP I and the OAU convention, is the exemption of persons “sent by a State other than a party to the conflict on official mission as a member of the armed forces of the said State”. This is particularly relevant in the scenario of PMSCs being hired by states (a possibility

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130 E. GILLARD, supra note 70, 566.
132 J. ABRISKETA, supra note 56, 6.
138 Art. 47 §2(f) AP I.
139 Art. 1 §1(f) OAU Convention.
140 Art. 1 §1(e) UN Convention.
which the conventions did not anticipate), which might undermine the attempt to criminalize mercenarism.\footnote{S. KOCHHEISER, \textit{Silent Partners: Private Forces, Mercenaries, and International Humanitarian Law in the 21st Century}, 2 U. Miami Nat'l Security & Armed Conflict L. Rev. 86, 2012, 103.}

In conclusion, even though both the UN and the OAU convention tie severe consequences to the status of mercenary, in practise they are not the instrument for prosecuting mercenarism. In fact, most of the notable recent trials concerning private actors have been based on national law concerning offences such as murder, manslaughter, attempt at a coup, etc.\footnote{The Telegraph, "Bob Denard", 16 Oct 2007, available at \url{http://www.telegraph.co.uk/news/obituaries/1566272/Bob-Denard.html}; World Socialist Web Site, "Blackwater mercenaries convicted for role in 2007 Iraq massacre", 23 October 2014, available at \url{https://www.wsws.org/en/articles/2014/10/23/blac-o23.html}.}

\textit{D) The International Law Commission’s Draft Code of 1991}

The final initiative which will be discussed, albeit briefly, is the 1991 International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind.\footnote{1991 Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-Third Session, UN Doc. A/46/10, 1991.} The draft contains two articles dealing with mercenaries: art 15 which defines the crime of aggression in a way which includes the use of mercenaries\footnote{Ibid., art. 15 §4(g).} and art 23 which criminalizes the recruitment, use, financing and training of mercenaries by individuals who are an agent or a representative of a State. The latter also contains a definition of a mercenary identical to the one of the UN Convention \textit{(supra)}. However, unlike the UN convention, this article does not deal with the individual criminal responsibility of mercenaries.

Criminal Court and, due to an adopted amendment in 2010, the Court will have jurisdiction over the crime of aggression.\footnote{K. FALLAH, supra note 47, 610; The entry into force of this and any other amendment to articles 5 to 8 of the Statue is regulated by art.121 of the Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.}

Title 2. PMSCs

Section 1. PMSCs and mercenaries in international law

Contrary to the conventions aimed at traditional mercenarism, there are no international provisions or instruments specifically aimed at PMSCs or their employees. The ‘mercenary conventions’ simply didn’t anticipate this modern form of private forces fighting for economical gain. Furthermore, many states (including the most involved ones) are currently reluctant to provide a present-day answer by regulating the conduct of PMSCs. Two major reasons can be given for this. First of all, regulating this industry will limit their use of these entities. Given that resorting to these private actors offers many benefits, governments are not eager to go this route. Secondly, states are responsible for any wrongdoing which can be attributed to them. Therefore, most are not eager to increase the likelihood of attribution of certain unlawful acts, especially by an industry on which oversight and control is difficult. Furthermore, this gets often complicated by legal hurdles such as the fact that investigations have to take place in another sovereign territory in which hostilities take place.

Nonetheless, States have to make sure that PMSCs comply with human rights law and, consequently, they have to hold PMSCs accountable for violations of these norms.\footnote{Common art.1 to the Geneva Conventions of 1949: “(...) to respect and to ensure respect for the present Convention in all circumstances”.} This is the major reason why a regulatory framework has to be established. Given the transnational activity sphere of these entities, it would be optimal if this legal framework is developed the international level. This new instrument should then provide an answer to the two features of the PMSC industry causing the biggest issues: PMSCs operating outside the traditional (military) chain of command and the fact that certain non-combat services they provide might lead to direct participation in hostilities.

In the following three sections, the question will be asked whether and to what extent the mercenary conventions (and art 47 AP I) are relevant in this discussion on PMSCs. In section four, several international initiatives will be discussed, including whether they provide an answer to the aforementioned issues.

Section 2. Legal instruments addressing mercenaries

Chapter two made clear that, although one cannot label every PMSC employee as a mercenary in the generic sense, one can nevertheless find several similarities. Given that a legal analysis should not be based on the labels put on these private actors (but on a case by case, factual basis), determining the status of PMSC employees should
also include evaluating whether these persons can qualify as mercenaries as defined by art 47 AP I and the two mercenary conventions.

As has been discussed supra, once a person meets all requirements, he can be labelled as a mercenary which entails several legal consequences. Firstly, the three mercenary definitions state or imply that mercenaries are not entitled to combatant privilege or the right to be a prisoner of war. Secondly, a person meeting the mercenary criteria can be lawfully attacked if they directly participate in hostilities. Lastly, in the hypothesis that a PMSC employee falls within the scope of the mercenary conventions, he risks a conviction for the distinct crime of being a mercenary. However, this requires an implementation of the conventions at the national level.150 So far, none of the States which are most involved with PMSCs have taken this step.151

The following section will take a closer look at the five requirements needed to be considered a mercenary. These are contained in the three major instruments dealing with mercenaries and, although the UN convention does not initially include the criterion of DPH in its mercenary definition, it is needed to constitute an offence of the UN Convention.

Section 3. Applying mercenary requirements

In this section, the conditions which are shared by art 47 of AP I and by art 1 of both the OAU and the UN Convention will be applied to the specific case of private military and security companies. But, because of the fact that the conventions focus on natural persons, it will be the employees who will have to meet the criteria. As will become clear, this detail can have important consequences. Given that these criteria must be met cumulatively, not fulfilling one condition will mean that contractors cannot be considered as mercenaries in international law. The second mercenary definition embedded in the U.N. Convention will not be dealt with because it covers mercenaries outside the scenario of an armed conflict (such as overthrowing a government). Not only will it be highly unlikely that this element of undermining a government will apply to a certain PMSC, these situations are simply not covered by this research.

A) Recruitment

The first criterion deals with recruitment and is formulated as follows,

“A mercenary is any person who: is specially recruited locally or abroad in order to fight in an armed conflict (…)”. 

The first point of relevance is the fact that nothing is stipulated about the entity doing the recruiting. Therefore, in the case of PMSCs it does not matter whether the hiring party is a State, an international organization or a company.152 Here, one should also ask the question: what does ‘to fight’ mean? This question is especially relevant in the

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150 Art. 7 and 9 UN Convention.
151 L. GAULTIER, supra note 2, 18.
152 In the last decade, a large majority of PMSCs have been hired by States, see M. MANCINI, supra note 92, 7.
discussion of the PMSC industry, with its wide range of services it provides. One can for example think of the service of protecting military convoys. Can this service then be considered as fighting and likewise, being recruited for this service equating being recruited to fight? An argument can be made which affirms this question.

According to art 49 of AP I, attacks do not only include offensive acts of violence, but also defensive ones. One can expect PMSCs to take all necessary precautions in order to bring an escort service to a good end. This should also include being prepared to deal with hostilities, which means that employees often will be armed and trained in order to deal with hostile fire. Based on art 49 AP I, these defensive acts of violence will then also be considered as fighting. In the scenario of contractors protecting military objectives, it has been pointed out that self-defense against ‘common criminals’ would not amount to ‘fighting in an armed conflict’. Ergo, contractors hired for the sole reason of offering protection against these individuals would thus not fulfill the recruitment criterion.

As a counter argument, one could say that for most activities it was not envisaged (or it was unreasonable to envisage) at the moment of hiring that a certain employee should have to resort to the use of force in the execution of his service (deploying tents, cooking, etc.). This view brings us to the conclusion that in the end, the discussion will boil down to whether and to which extent the use of force against enemy forces could have been expected at the time of hiring. To determine this, one should look at the actual activity undertaken, not what has been agreed in a contractual situation.

Furthermore, the provision mentions that the person in question should have been specifically recruited to fight in an armed conflict. This implies that any person who is not specifically recruited for a specific conflict, but does participate in it, will not qualify as a mercenary. Consequently, most PMS employees will not fulfil this requirement as they most often have been employed on a long-term or permanent basis (and consequently perform their services in different locations and conflicts).

B) Direct participation in hostilities

Even if a contractor has been recruited to fight in an armed conflict, he cannot be labeled as a mercenary if he does not engage in direct fighting. DPH is a concept which has yet to be defined or clarified by a treaty. Consequently, it leads to a lot of confusion. However, an extensive analysis on what might constitute ‘direct participation in hostilities’ will not take place here but below in chapter four since it is linked to both combatant and civilian status: while the former status grants the right of DPH, a person enjoying the latter status can lose its protection from being targeted when he directly participates in hostilities.

Roughly speaking, according to a study done by the ICRC an act will amount to DPH if it has a military influence, if there is a causal relation between the act and harm

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153 Ibid., 9.
154 M. SCHEIMER, Separating private military companies from illegal mercenaries in international law: proposing an international convention for legitimate military and security support the reflects customary international law, American University Int’l Law Review, vol. 24 n°3, art. 6, 2009, 324.
caused and if it was aimed to cause harm to the detriment of a party.\textsuperscript{156} Based on this broad interpretation which reflects the reality of modern conflict, many PMS activities will meet the criterion of directly participating in hostilities. One can for example think of the decisive military influence of PMSCs in Angola and Congo.\textsuperscript{157} This view also includes actors not present in a battlefield but who nonetheless cause harm to an enemy in that battlefield, such as people performing drones strikes with Unmanned Aerial Vehicles.\textsuperscript{158}

Despite the fact that most PMSCs will deny offering services which involve offensive combat (the label ‘support’ is often used)\textsuperscript{159} and the fact that some contracting States explicitly prohibit certain contractors to participate in offensive operations\textsuperscript{160}, the reality cannot be ignored that PMSC employees do get caught in heated situations (as evidenced by the many controversial cases).\textsuperscript{161} This should not come as a surprise given the hostile environments they operate in. Additionally, the majority of these employees carry weapons\textsuperscript{162} and are trained to use them as many are former military personnel or policemen.

In this context, it has to be stressed that DPH is not limited to direct combat, nor is it limited to offensive actions; activities such as intelligence gathering, interrogations and the services provided to valid military targets can also amount to DPH.\textsuperscript{163} When it comes to guarding services, a distinction has to be made between the guarding of civilian objects and military objects. Roughly speaking, self-defense in the first scenario would not amount to DPH, while guarding military objectives will often be considered as DPH.\textsuperscript{164}

There are also situations in which PMSC employees will rarely meet this criterion, such as contractors hired by the UN for peacekeeping missions. In this hypothesis, contractors are not hired to take part in the conflict, nor have they been hired by a party to the conflict.\textsuperscript{165} On a final note, the commentary on art 47 AP I remarks that specialists

\textsuperscript{156} N. MELZER, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law, ICRC, May 2009, 46-64.
\textsuperscript{158} J. HEATON, Civilians at war: re-examining the status of civilians accompanying the armed forces, 57 Air Force Law Review, 155, 2005, 179.
\textsuperscript{159} S.R. KOCHHEISER, supra note 110, 90-96.
\textsuperscript{162} 75\% of the PMSC employees who operated in the Iraq war were armed, see: M. SOSSAI, EU Working Papers: Status of PMSC Personnel in the laws of war: the question of direct participation in hostilities, Academy of European Law PRIV-WAR project 6, June 2009, 13.
\textsuperscript{164} Art. 52(2) AP I, see chapter four for a more detailed analysis.
\textsuperscript{165} G.J. MOHAMAD, The legal status of employees of private military/security companies participating in UN peacekeeping operations, 13 Nw. Journal of Int’l Humam Right 82, 2015, 93.
in modern weaponry should be considered as civilians as long as they do not directly participate in hostilities.166

C) Motivation

A mercenary should also be “(...) 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”. This criterion has been slightly trimmed down in the OAU convention as it does not set any quantitative threshold for the material compensation promised or paid.

In the case of Western PMSC employees, even the narrower criteria of the other two instruments will be met. Although many aspects of this industry are shrouded in mystery, it is a public secret that they receive a much higher payment than a person enlisted in a State’s army. When comparing persons of ‘similar rank and function’, many sources speak of 3 to 9 times as much, but even cases of 20 times as much are known.167 The quantitative threshold will probably not be easily met in the case of employees originating from developing countries. Their wages are often much lower than those of Western employees.168

The biggest hurdle for fulfilling the motivation requirement will be providing evidence that the desire for private gain was the main driving force for participating in hostilities.169 Even though this psychological element has been implemented because it was considered as a defining characteristic of mercenaries, it causes the criterion to be unworkable given that determining this motivation is virtually impossible.170 On the other hand, excluding this requirement would unjustly cause many private actors operating in armed conflict to be a mercenary (such as those fighting for political or ideological reasons).

D) Nationality and residence

As for the nationality criterion, it is stipulated that a mercenary cannot be “(...) a national of a party to the conflict nor a resident of territory controlled by a party to the conflict”. This requirement, which was implemented to limit foreign interference, will

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168 J.P. LOVERDOS (Dir.) and L. ARMENDÁRIZ (Author), supra note 102, 60.
170 S. PERCY, Mercenaries: The history of a norm in international relations, 2007, 178.
immediately rule out all British and U.S. PMSC employees carrying out duties in Iraq. In current times, applying this archaic criterion to PMSCs in an era of globalization leads to criticism as it draws a baseless and arbitrary distinction. For example, two employees of a U.S. based PMSC might operate in a hypothetical armed conflict between Canada and the United States. Employee A is a U.S. citizen and will thus not fall within the scope of these conventions, while employee B as an Australian will run the risk of being labeled a mercenary.171 Given that PMSC employees also consist of men from developing countries (attracted to the high wages), this distinction is surely no hypothetical matter. However, according to statistics on the nationality of contractors, no general conclusions can be drawn on the number of people meeting the nationality criterion. For example, in 2009 23% of all contractors operating in Iraq were local nationals or US nationals, while 77% were third country nationals. This stands in contrast with the situation in Afghanistan in the same year. Here, only 9% of the contractors were third-country nationals, while the local nationals alone consisted of 90% of all contractors.172 Thus, depending on the conflict there may or may not be a large amount of PMSC employees who will fulfil this criterion of nationality.173 On a final note, although a third-country national could technically evade the definition of a mercenary by being granted the nationality of a party to the conflict174, a more ideal situation seems to be that the criterion refers to the nationality of companies and not the one of natural persons.

E) Membership of the armed forces

Finally, a person cannot be labelled as a mercenary if he “(…) is a member of the armed forces of a party to the conflict; and [if he] 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.”175

The concept of membership of State armed forces will be extensively discussed in chapter four. Here, it suffices to say that PMS employees will rarely be considered as a member of the armed forces of a party to the conflict (many of them are ex-soldiers though).176 This is because they normally are not “under the command responsible to a party for the conduct of its subordinates” (i.e. taking orders directly from the armed forces).177 One notable exception to this is the incorporation of Executive Outcomes in the armed forces of Sierra Leone.178 Although domestic law can in theory formally

175 Art. 47(2), e-f of AP I.
176 E. GASTON, supra note 38, 237.
177 Article 43(1) of AP I.
178 See A. FAITE, supra note 122, 4.
incorporate certain actors in the armed forces of a State, in practice this does not happen often as states tend to refrain from this.179 Furthermore, connecting contractors to a State would also defeat one of the reasons for outsourcing defense: avoiding responsibility. In this context, it is remarkable that some PMSCs use terminology in their communication which would hint at some sort of membership of the armed forces of their employees.180 Although the purpose of this is to prevent the mercenary status from applying, actual membership of the armed forces would let these persons enjoy prisoner of war status and combatant privilege.

F) Fulfillment: possible, but unlikely

In conclusion, applying the already flawed mercenary criteria to PMSCs and their employees is difficult given their specific characteristics. If a PMSC employee can avoid even one of the aspects of the mercenary definition, they will escape the entire coverage of it. In practice, the recruitment and the (out of touch) nationality criterion will prevent most persons working for private military companies from falling within the scope of the mercenary conventions and art 47 AP 1.181 Thus, although hypothetical cases can be thought of, no PMSC employee has met all the criteria yet and subsequently faced conviction for the crime of mercenarism as defined by international law.182 This can be seen as a result of the fact that the mercenary conventions did not foresee the recent phenomenon of private military and security firms. Additionally, many states show no intention to ban PMSCs operating in armed conflict as they enable them to circumvent political or resource constraints. For this reason, they are generally considered as a legitimate means of force in armed conflict.

The difficulty of applying the mercenary definitions to the PMS industry and the lack of any instrument specifically aimed at PMSCs leads to the conclusion that in most of the cases activities of contractors are not specifically dealt with in international law. This ‘grey zone’ prompted the UN Working Group on the use of mercenaries to work on a Draft Convention, which is one of the three initiatives which will be analyzed in the following section. As we will see, the initiatives all have the intention to make sure that PMSCs and their employees comply with domestic law, Human Rights Law and International Humanitarian Law. These tailor-made approaches are warranted given the enforcement issues of old instruments, the distinct properties of PMSCs and the unique threats this newly rising industry poses (such as the weakening of IHL by outsourcing services).

Section 4. International initiatives dealing with PMSCs

In the previous section it became clear that the conventions addressing mercenaries contain enormous loopholes and obstacles when one wants to apply them to the employees of PMSCs. Given the multitude of cases which showcase issues of accountability, lack of compliance with IHL, gross human rights violations and the lack of oversight and control, there was a need for a regulatory framework aimed at resolving these matters. This framework, preferably established at the international level, should then deal with both the individual actor as well as the corporate entity. Moreover, ideally they should create new obligations and possible prohibitions to ensure maximum respect for IHL and IHRL.

In this section, three international initiatives will be discussed which clearly show that governments have no intention to eradicate the phenomenon of PMSCs, similar to their reluctance to eradicate the use of mercenaries (a phenomenon which in practice gets discouraged at most). These recent instruments, which have been developed by states, non-governmental organizations and the PMSC industry, specifically address private military and security actors and the legal entities overarching them. As we will see, the focus of these documents lays on the setting of standards for PMSCs and common principles for their activities.

Facing image problems and legal insecurity, the private military and security industry adopted two voluntary regulatory initiatives. Those will be discussed first. Afterwards, an initiative proposed by the UN Working Group on the use of mercenaries (hereafter UNWG) will be analyzed which as we will see entails a binding regulatory mechanism.

A) The Montreux document

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, hereafter the Montreux Document, is an initiative launched by the ICRC and Switzerland. The text, which was finalized and adopted by participating States on 17 September 2008, is the first international document which clarifies how international law applies to the activities of PMSCs when operating in armed conflict.\(^\text{183}\) It does so by drawing guidance from a myriad of sources: first and foremost, the Geneva Conventions, but also international studies, national regulations, UN principles, industry practice, etc.\(^\text{184}\) The initiative adopted the form of a practical instrument rather than a treaty because of the reason that the latter would take years to negotiate (especially considering the political positions involved). Moreover, it will become clear that the document is not strictly confined to armed conflicts since many of the practices should ideally be followed in times of peace.

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\(^{183}\) 17 States finalized this document (including countries most involved with PMSCs such as the U.S., South Africa and the U.K.), with input from NGOs, experts and industry representatives. Since its creation, 36 other countries (as well as the E.U., NATO and OSCE) have joined the Montreux Document, see https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html.

In a nutshell, the Montreux document contains a set of good practices which should enable States to take measures in order to uphold their obligations under international law. The document itself consists of two parts and is further supplemented by explanatory comments.

Part one carries the title “Pertinent international legal obligations relating to private military and security companies”. This part, which makes the distinction between Contracting, Territorial and Home States, contains 27 statements recalling international legal obligations of States which are drawn from “various international humanitarian and human rights agreements and customary international law”. As the scope of this part is the operation of PMSCs in armed conflict, it deals with questions such as attributing the conduct of a private person to a Contracting State under customary international law, obligations of PMSCs (and their personnel) and the responsibility of superiors of PMSC personnel. The introduction of this part stresses that none of the statements create new legal obligations. For example, statement 26 simply recalls the personnel of PMSCs that they must always comply with IHL, regardless of their status or the entity hiring them.

Regarding the status of the personnel of PMSCs, the Montreux Document merely states that this must be determined by “international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved”. An elaboration on this can be found in the explanatory comments. Here, the case-by-case approach is repeated by saying that carrying weapons or not being a member of the armed forces will not automatically mean being classified as a combatant, respectively as a civilian. Given that PMSCs usually work outside the chain of command and on a mandate basis only, the conclusion is drawn that a large majority of PMSC employees will qualify as civilians. However, as dictated by IHL, the protections linked to this status can be lost in case they directly participate in hostilities. As discussed supra, operations such as intelligence gathering or guarding military bases can amount to DPH; performing these services may consequently lead to loss of protection against attack. The explanatory comments also briefly touch upon concepts such as “civilians accompanying the armed forces”, and “militias or other volunteer corps belonging to a State party”. These categories will be discussed in chapter four; for now, it suffices to say that especially the latter will apply less frequently in the case of PMSC employees. Finally, during non-international armed conflict PMSC employees who are neither members of organized armed groups nor members of State armed forces will be regarded as civilian. Similar to the situation of

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185 Part 1, statement 7 of the Montreux document.
186 Part 1, E of the Montreux document.
187 Part 1, statement 27 of the Montreux document.
189 See also, Montreux Document, preface, §3.
190 Part 1, statement 24 of the Montreux document.
191 P. 36 of the Montreux document, also part 2, §§ 1, 24 and 53.
192 Art. 51(3) AP I.
an international armed conflict, protection against direct attacks will be lost when they take a direct part in hostilities.\footnote{N. MELZER, Interpretive guidance on the notion of direct participation in hostilities under International Humanitarian Law, ICRC, May 2009, 4a.}

Part two, which has been titled ‘Good practices relating to private military and security companies’, contains 70 ‘good practices’ or recommendations to assist States in complying with their legal obligations. As this is to be achieved by regulating PMSCs, weapons and armed services, the majority of these practices deal with procedures and the selection of PMSCs, criteria for granting authorizations to provide PMS services and guidelines to monitor compliance and to ensure accountability. Of particular relevance are recommendations 1, 24 and 53. These encourage States, in the process of determining which services may or may not be contracted out, to take into account “factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities”. This stands in shrill contrast with the Draft of a Possible Convention on Private Military and Security Companies, which proposes an outright ban on direct participation in hostilities of PMS personnel.\footnote{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, UN Doc. A/HRC/15/25, July 2010, 28.} This clearly shows that the legitimacy of direct participation of PMS employees in hostilities is contested.\footnote{M. MANCINI, supra note 92, 11.}

The general goal of these practices is to provide guidance and assistance to States “in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationships with PMSCs operating in areas of armed conflict”.\footnote{See Part 2 of the Montreux document.} Similar to the statements of part one, the good practices of part two do not have a legally binding effect, nor are they meant to be exhaustive. This means that States can discard practices which they don’t regard as appropriate in certain circumstances. The Document does encourage states to implement the practices in their national law.\footnote{Ibid, §3.} Finally, contrary to the statements of part one, the practices of part two have a more expansive scope since several mentions can be found of applying these practices in situations other than armed conflict.\footnote{Supra note 196.}

**Evaluation**

The Montreux document was created to deal with issues arising from the presence and role of PMSCs in armed conflicts. By presenting a clear view of the applicable (existing) rules it attempts to offer practical guidance. It also stresses that States have the duty to ensure respect for the law, both in a preventive way (e.g. educating employees, ensuring adequate training, performing a background check on companies they want to hire, etc.) as well as in a reactive way (ensuring prosecution in case of violations, ensuring that victims of PMSCs can claim reparation, etc.). As stated in the document, it cannot be viewed as an endorsement for the use of PMSCs, nor does it take a stance on the legitimacy of the presence of these companies in armed conflict.
The Montreux document creates no new obligations; next to establishing good practices for regulating PMSCs, it merely recalls the obligations of States under International Humanitarian Law and Human Rights Law. Despite disagreement about the legitimacy of PMSCs, there seems to be a consensus amongst the participating governments that international law does apply to these entities and, consequently, that one cannot talk of a legal vacuum when it comes to these actors and their activities.  

More specifically, the document acknowledges that international law on mercenaries is largely rendered useless for this modern form of private actors; also, it observes that domestic law has often not yet caught up with the current reality. However, the rules of IHL are deemed more than sufficient by the signatory States to tackle the activities of PMSCs. In this context, it is important to note that States have to keep in mind international agreements prohibiting mercenaries as the Montreux Document does not alter rules of international law. But, as we have seen, these will rarely apply in the case of PMSCs. Furthermore, although the statements mention existing obligations under IHL and IHRL, it does not go into detail which rules have to be applied in a given situation.

Critical concerns have been raised by Amnesty International on several points. For one, they regret the fact that the text of the document does not fully reflect important concepts of international human rights law, such as the standard of due diligence. They also voiced the opinion that the document puts too much focus on the application of IHL in armed conflict, despite the fact that these companies also operate in situations where human rights principles are the standard.  

Moreover, IHRL continues to apply in situations of armed conflict.  

Despite these issues, Amnesty International gives this initiative a positive evaluation as it contains many useful recommendations.

One of the most obvious and prevalent point of criticism deals with the fact that the Montreux Document does not deal with the applicable laws in detail as well as a concrete guidance on how to deal with violations of these laws and thus the accountability of PMSCs. One can for example think of statement 27 which addresses superior responsibility. Here, it is stated that superiors of PMSC personnel “(...) may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law (...).” Unfortunately, the Document does not mention which rules of international law should be applied here. This is problematic given that, in international law, different standards can be found which deal with this concept.  

This lack of clarity consequently diminishes the importance of this document as a guide for actors on the field.

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201 States can derogate from certain human rights during armed conflict. However, rights such as the prohibition of torture apply in every situation, see e.g. art. 4 International Covenant on Civil and Political Rights, 16 December 1966.


Other commentators have praised the clarity of the document and the standardization put forth; as it will assist and provide guidance for PMSCs, it will in turn be beneficial for future operations in conflict zones. Furthermore, it can be expected that the recommendations and good practices put forth create a framework which might tackle the issue of the proliferation of companies providing military and security services.

Lastly, it was initially pointed out that the Document was only supported by 17 States. However, the amount of signatory States pledging their support has currently almost tripled, which, if this trend continues, may lead to the Montreux document becoming soft law. Going further down the timeline, if it would end up reflecting the practice of a large majority of States, it might enter the realm of customary international law.

Given that this document offers no new obligations (and thus, it is not legally binding), the biggest benefit of this document has to be sought in the fact that it provides a basis for better standards and accountability, especially for other forms of enforceable measurements such as regional law, national law and contract. It also raises awareness on a topic which is complex, increasingly relevant and hidden from public opinion by situations of conflict.

B) The International Code of Conduct

The second voluntary regulatory initiative which will be discussed is the International Code of Conduct for Private Security Service Providers (hereafter ICoC). It is a body of standards aimed at PMSCs in order to ensure respect for human rights and humanitarian law. Similar to the Montreux Document, it was launched by the government of Switzerland, in cooperation with private stakeholders and relevant experts and in the need for a more detailed guidance.

Following its launch in 2009, the number of signatory members soon rose over 700. However, the creation of the International Code of Conduct Association in 2013, which establishes an independent mechanism for governance and oversight, caused the amount of fully complying companies to drop. Currently, the document has 123 signatory members which commit themselves to both the ICoC and ICoCA: 16 civil society organizations, 101 private security companies and 6 governments.

204 D. BROOKS, The Swiss show some initiative: Bringing clarity to international legal and regulatory frameworks, Journal of int’l peace operations vol.3 n°6, May-June 2008, 4.
207 The 6 member countries are Australia, Norway, Sweden, Switzerland, the United Kingdom and the United States of America. For a list of all members, see http://icoca.ch/en/membership?private_security_companies=companies&op=Search&view_type=map&form_id=_search_for_members_filter_form.
The ICoC complements the Montreux Document as it not only endorses the principles of the latter, but the ICoC also provides a “commonly-agreed set of principles for PSCs and (...) a foundation to translate those principles into related standards as well as governance and oversight mechanisms”. The code consists of 70 paragraphs, the majority of which deal with two topics.

Part F contains ‘specific principles regarding the conduct of personnel’. These deal with issues such as the use of force, detention and the apprehension of persons by PMS personnel. It also explicitly prohibits crimes such as torture, sexual exploitation, human trafficking and slavery. Furthermore, it also obliges employees to report any acts of these kinds to competent authorities. The paragraphs of part F of the ICoC frequently state that the conduct of PMS employees should be consistent with the applicable legal regime(s). The document does not deal with the legal status of these employees.

Part G lists ‘specific commitments regarding management and governance’. It puts forth obligations regarding the selection, vetting, training and reviewing of personnel, as well as standardizing reports on incidents and the management of weapons according to the ‘applicable laws’. Of interest in the discussion on the legal status of mercenaries are paragraphs 66 to 68. These contain grievance procedures which allow “personnel or third parties” who have become the victim of unlawful behavior of PMSC employees to access additional remedies. The final paragraph of this part obliges signatory companies to ensure that they have “sufficient financial capacity in place at all times to meet reasonably anticipated commercial liabilities for damages to any person in respect of personal injury, death or damage to property”.

As mentioned supra, the ICoC was further institutionalized by the creation of the ICoC Association in 2013, which establishes governance and oversight mechanisms which accompany the principles set forth in the Code. These mechanisms include for example the handling of complaints of alleged violations of the ICoC, the monitoring of member companies and a system of certifying whether a company obeys the ICoC principles and standards. Lastly, States and intergovernmental organizations which wish to be a member of the organization are obliged to support the Montreux Document.

Evaluation

Similar to the Montreux document, the ICoC creates no binding obligations, nor does it alter the application of national and international law. In that sense, it has no legal

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208 See ICoC, A, Preamble.
209 Ibid., F, p.8-10.
210 Ibid., G, p.11-15.
211 Ibid., G §§66-68.
212 See ICoC, G, §69.
significance, which is also why its added value for the issue of the legal status of private actors is limited. Despite this reality, the document does clarify international standards and improves oversight and accountability of this industry. It addresses human rights obligations and further promotes respect for national and international law.

Furthermore, the document provides a solid basis for future (binding) instruments. The fact that a PMSC hired by the U.N. has to be a member company to the ICoC illustrates the relevance of this initiative in the context of private military and security services.\footnote{215 U.N. Department of Safety and Security, \textit{Guidelines on the use of armed security services from private security companies}, 2012, available at: \url{http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf}.} This trend can also be observed in the contracts of many of the major clients of PMSCs, as they often incorporate the ICoC.\footnote{216 Signatory Companies have to adhere to the Code, even when the Code is not included in the contractual agreement with a client, see ICoC, D, §§19-20.} Even States have now begun to incorporate the Code into their national legislation.\footnote{217 S. JERBI et al., \textit{The international Code of Conduct for private security service providers}, Geneva Academy of International Humanitarian Law and Human Rights, Academy briefing n°4, August 2013, 7.}

Because of the fact that the ICoC is a recent initiative, the full impact of it has yet to be seen. Nonetheless, its content provides a solid basis for the quest to ensure respect by the PMS industry for IHL and human rights law.

\section*{C) The draft convention on the use of PMSCs}

The third international initiative which will be discussed is the \textit{Draft of a possible Convention on Private Military and Security Companies}\footnote{218 Annex to the 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 self-determination, 2 July 2010, A/HRC/15/25 available at: \url{http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf}.} (hereafter the Draft Convention). This draft, which has been presented in 2010 by the UN Working Group on the Use of Mercenaries\footnote{219 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, established in 2005.} (hereafter UNWG), is the first international instrument which aims to be a legally binding instrument directed at PMSCs. For this reason, despite being only a draft, the initiative will also be included in this discussion on the legal status of mercenaries in armed conflict.

As of present, the activities of private military and security companies have not yet been the subject of an international binding instrument aimed specifically at these entities (\textit{supra}). Because of the fact that the existing international legal framework is inadequate to tackle this recent phenomenon and other initiatives fail to be sufficient or fail to create binding obligations, voices concerned with respect for international law called out for a binding mechanism. For this reason, the UNWG was requested by the Human Rights Council to work on such an initiative. In 2008, the working group presented key elements which in their opinion should be included in the future
document.\textsuperscript{220} Despite opposition from the E.U. and the U.S.,\textsuperscript{221} the WG was given the mandate to further elaborate on this groundwork, which eventually resulted in the Draft Convention containing an international oversight mechanism on July 2010.

In §91 of the proposed draft the UNWG clarified that “the aim of a proposed new binding legal instrument is not the outright banning of PMSCs but the establishment of minimum international standards for States parties to regulate the activities of PMSCs and their personnel”.\textsuperscript{222} This approach is clearly inspired by practical reasons as it would be neigh impossible to halt the increasing privatization of military and security services, let alone putting an absolute ban on it. Furthermore, a complete ban would also be foolish given the fact that these companies can be valuable in for example peacekeeping operations.

Proposed Content

The Draft Convention starts off by stating its purpose, which consists of five objectives:

- \textit{To reaffirm and strengthen State responsibility for the use of force}
- \textit{To identify those functions which are inherently State functions and which cannot be outsourced under any circumstances}
- \textit{To regulate the activities of PMSCs and sub-contractors}
- \textit{To promote international cooperation between States regarding licensing and regulation of the activities of PMSCs}
- \textit{To establish and implement mechanisms to monitor the activities of PMSCs and violations of international human rights and humanitarian law in particular any illegal or arbitrary use of force committed by PMSCs, to prosecute the perpetrators and to provide effective remedies to the victims}.\textsuperscript{223}

Thus, one of the key elements of the proposed Draft Convention is the prohibition of the outsourcing of ‘inherently State functions’,\textsuperscript{224} services which are particularly troublesome when performed by PMSCs as they blur the distinction principle, create issues of accountability, etc. To provide some guidance on this concept, the Draft Convention proposed to define Inherently State functions as:

\begin{quote}
Functions which are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs
\end{quote}

\textsuperscript{223} Draft Convention, Art.1, 1. (a)-(e); UN Doc. A/65/150, 25 August 2010, §54 includes 3 more purposes of the possible convention. These mainly deal with international cooperation, establishing an international register and establishing a committee on monitoring of PMSCs.
\textsuperscript{224} See also, Elements of a proposed draft convention on private military and security companies, UN Doc. A/65/150, 25 August 2010.
under any circumstances. Among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the power of arrest or detention including the interrogation of detainees and other functions that a State Party considers as inherently State functions.\textsuperscript{225}

One needs no extensive background knowledge on the industry to grasp the scope of this proposed definition, its potential consequences and most importantly the political opposition to be expected. Moreover, this would immediately come in conflict with recent initiatives such as the Montreux Document, a document which only prohibits States to delegate activities which IHL explicitly assigns to a State agent or authority (such as the power of the responsible officer over POW camps).\textsuperscript{226}

The general principles of art 1 are then followed by 51 articles which offer more specified proposals. These make clear that, whereas the Montreux document focusses on IHL and situations of armed conflict (\textit{supra}), the Draft Convention applies to all situations regardless of situations of armed conflict.\textsuperscript{227}

After categorizing States in accordance with their relation to a PMSC, the Draft posits that any State, regardless of the category they belong to, “bears responsibility for the military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the State”.\textsuperscript{228} As GOMEZ DEL PRADO remarks, the Draft does not specify the degree of this responsibility: is it intended for failing to apply the principle of due diligence or does it imply responsibility for the actions themselves?\textsuperscript{229} An answer can be found in the preamble of the Draft. Here, the International Law Commission’s Articles on State Responsibility are recalled, which implies that States can be held accountable for acts by PMSCs in certain scenarios.\textsuperscript{230}

Despite the prohibition of direct participation in hostilities and other ‘inherently state functions’, it is important to note that the Draft does not completely rule out the use of force.\textsuperscript{231} In a nutshell, the Draft only allows the use of force as a last resort, including the use hereof to “defend persons whom he or she is under a contract to protect against what is believed to be an imminent threat”.\textsuperscript{232} This is the result of a balance exercise between a limitation on the use of force and an optimal protection of human rights of civilians in zones of conflict or post-conflict.\textsuperscript{233}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{225} Draft Convention, art. 2, (i); see art. 9 for the prohibition of delegation and/or outsourcing of inherently State functions.
\item \textsuperscript{226} Montreux Document, Part One, A,2.
\item \textsuperscript{227} Ibid., Art.3.3.
\item \textsuperscript{228} Ibid., Art.4.1.
\item \textsuperscript{229} J.L. GÓMEZ DEL PRADO, \textit{A U.N. Convention to Regulate PMSCs?}, Criminal Justice Ethics 2012, 31:3, 273.
\item \textsuperscript{231} Draft Convention, art. 18, 3-4.
\item \textsuperscript{232} Draft Convention, art. 18(4) b.
\item \textsuperscript{233} N.D. WHITE, \textit{The privatization of military and security functions and human rights: comments on the UN Working Group’s Draft Convention}, Human Rights Review vol. 11, n° 1, 2011, 140.
\end{itemize}
\end{footnotesize}
The Draft further obliges States to adopt national legislation which regulates the activities of PMSCs and establishes a regime of oversight.\textsuperscript{234} It also imposes an elaborate system of registering PMSCs, licensing these companies and their employees and the provision of periodic reports to a yet to be established UN body.\textsuperscript{235} The Draft does not go into detail about the regulatory regimes as these are choices which are left to each individual State.

Part IV of the Draft imposes on States many obligations which should make sure that PMSCs and/or their personnel are held accountable for violations of IHL, international criminal law and human rights law. For example, art 21(5) contains the \textit{aut dedere aut judicare} principle which ensures that an alleged offender is the subject of an investigation and, if applicable, prosecution.

Lastly, the final part of the draft contains provisions which envision the establishment of an international Committee on the Regulation, Oversight and Monitoring of PMSCs. This body will consist of “\textit{experts of high moral standing, impartiality and recognized competence in the field covered by the Convention}” and will be responsible for setting up a register of PMSCs and several procedures (such as inquiries, complaints, petitions, etc.).

\textbf{Evaluation}

The Draft convention is a substantial attempt to tackle the prevalent issue of accountability and the lack of oversight and control. However, the proposed ban on the delegation of ‘inherently State functions’ seems to go against the increasing State practice of outsourcing military services to PMSCs. The Chair Person of the Working Group, Mr. Gómez del Prado, has acknowledged that one cannot put aside this reality. He also added that a consensus on the scope of this term will thus be the biggest hurdle which will have to be taken.\textsuperscript{236} Nonetheless, despite the concept of inherently State functions being a sensitive topic\textsuperscript{237}, a future prohibition of these actions would substantially decrease concerns on the use of PMSCs in conflict zones given that States will be severely limited in the amount of services involving the use of force they can delegate.

One seemingly negative point of this Draft is the fact that it only creates obligations for Member States (and intergovernmental organizations\textsuperscript{238}), PMSCs are not addressed directly.\textsuperscript{239} However, this gets counterbalanced by the many obligations on States to implement national legislation. This should in turn impose obligations on PMSCs and should make sure that they can be held liable.\textsuperscript{240} Related to this is the fact that the draft contains several mechanisms of dispute settlement which aim to offer victims of IHL and human rights violations a comprehensive and effective remedy.\textsuperscript{241} However, given

\textsuperscript{234} Art. 12 and 13 Draft Convention.
\textsuperscript{235} Art. 14 and 15 Draft Convention.
\textsuperscript{236} J.P. LOVERDOS (Dir.) and L. ARMENDÁRIZ (Author), supra note 102, 26.
\textsuperscript{237} For example, U.S. law imposes restrictions on outsourcing inherently governmental functions, but not a total ban, see J.P. LOVERDOS (Dir.) and L. ARMENDÁRIZ (Author), supra note 102, 95.
\textsuperscript{238} Art. 40 Draft Convention.
\textsuperscript{239} PMSCs can only communicate their support to the convention, see art. 41 of the Draft Convention.
\textsuperscript{240} See e.g. art. 23 of the Draft Convention.
\textsuperscript{241} Draft Convention, part IV and V.
that these are dependent on the often weak national legal systems, it has been suggested to create an ‘ombudsperson’. This mechanism should be able to guarantee access to justice, next to adding another layer of accountability.

It has also been pointed out that the Draft fails to specify what it means by ‘to delegate’ or ‘to outsource’. One could grasp this as any permission which allows PMSCs to perform services without oversight. However, the Draft seems to imply a prohibition of PMSCs performing ‘inherently State functions’ regardless of a mechanism of steering and oversight. This broad prohibition has been labeled as unnecessary and impractical, which will in turn reduce its approval rate.

On the other hand, as there was an increasing call to put limits on the use of force by these entities with no binding mechanism of control and oversight, the proposal can surely be seen as a step in the right direction. States have an obligation to hold contractors accountable for human rights violations. For this reason, some States have already adopted legislation aimed at these companies. However, given the nature of the activities an international mechanism of registering, licensing, regulating and monitoring these companies and their activities is required. Without this kind of coordination, national legislations would simply create gaps which could be exploited (site relocation, etc.). Currently, the legislations of governments traditionally opposed to mercenaries also display this view in their legislation on PMSCs, which contrasts with the legislation on PMSCs of many Western countries. Lastly, given its potential impact on public life, it seems imperative that at least some level of control over this industry lies at the hands of governments; supervision should not be solely located at the corporate level by means of self-regulation.

In conclusion, although the Draft provides a solid basis to deal with the use of PMSCs and to increase their accountability, its biggest problem lies within the fact that it clashes with the Montreux Document on several aspects as well as with the practice of the U.K., the U.S. and many EU Members. Whether this will eventually result in two different approaches at the world stage is unclear.

244 Ibid.
245 The PRIV-War project has concluded that PMSC services are not regulated at the level of the European Union, see PRIV-WAR Report Summary, Regulating privatisation of ‘war’: the role of the EU in ensuring the compliance with international humanitarian law and human rights, 2012, available at: http://cordis.europa.eu/result/rcn/53529_en.html.
Title 3. Conclusion

In this chapter, international instruments and initiatives have been discussed which either mention mercenaries (either its traditional form or its contemporary form) or are wholly dedicated to them.

Art 47 of AP I does not criminalize mercenarism, it merely posits that mercenaries cannot benefit the status of prisoner of war or combatant privilege. However, few private actors will be considered a mercenary given the restrictive definition. The OAU and UN conventions on mercenaries incorporated this problematic definition (with some minor differences) which in turn diminishes the applicability of these conventions. For this reason, although the mercenary conventions tie severe consequences to the status of mercenary, they are not a suitable instrument for dealing with traditional mercenarism, let alone its contemporary form.

Therefore, a tailor made approach was warranted to deal with PMSCs. In the analysis, it became clear that, as of currently, there are no international instruments containing obligations for PMSCs and their employees. Similar to the political view of many states on mercenaries (an activity which in practice gets discouraged at most), none of the three major initiatives dealing with PMSCs propose a ban: they either offer guidance for States or the industry, recall existing legal obligations or they propose a limitation on the activities for which contractors can be hired. Although the latter can surely be seen as a step in the right direction (after all, DPH by contractors is one of the biggest issues), the text of the Draft, which aims to be a basis for a future conventional instrument, has already caused quite a stir.

The biggest benefits of the three recent initiatives have to be sought in the fact that they set higher standards and provide a basis to increase accountability of these actors. The two voluntary documents (the Montreux Document and the ICoC) create no binding obligations, nor do they alter national or international law. The UN Draft on the other hand intends to add something to the legal framework by proposing a ban of delegating certain State functions. Despite this aspect being a stumbling block, the Draft as a whole might provide a solid basis in the future to deal with PMSCs, both by ensuring respect for IHL and human rights law and by increasing accountability in case of violations. And, despite the differences between the Swiss initiatives and the UN initiative, there also exist many similarities which might make a complementary approach possible in the future. It must also be noted that a voluntary approach could be beneficial in the quest to ensure respect for human rights law. After all, only States and their agents are bound by these, individuals can only be held accountable for the gravest breaches if IHRL.

This chapter made clear that the instruments in force either rarely apply to private actors engaging in hostilities for private gain, or they create no new obligations. However, this does not mean that these actors operate in a legal vacuum. International Humanitarian Law, which applies in situations of armed conflict, dictates the rights and duties of persons present in these kinds of conflicts as well as putting limitations on the methods and means of warfare. Here, it is paramount that belligerents know which persons they are allowed to lawfully attack, and which persons must be protected from harm. This leads us to the question of how one ought to apply the distinction principle on these private actors. This question is important because it determines whether they
can be legitimate targets, whether they can be charged for crimes they commit, what their protection consists of after capture, etc. A clear answer on this question is not only needed for pragmatic purposes, it would also aid future initiatives dealing with PMSCs.

Therefore, the next chapter will deal with the principles of IHL and the categories of persons it describes while keeping in mind the different types of armed conflict. These rules should then be applied on a case-by-case approach, given the wide variety of services these private actors can provide and the different types of possible links between them and the armed forces.
Chapter 4 – Applying key concepts of the laws of war

In chapter three, two things became clear. On the one hand, there are the very restrictive mercenary definitions of art 47 AP I, the UN Convention and the OAU Convention. On the other hand, there are the two Swiss initiatives which provide no binding obligations for PMSC employees or their conduct. Nonetheless, an analysis on the legal status of mercenaries in armed conflict would not be complete without looking at the laws applicable in these situations: International Humanitarian Law (or the *ius in bello*).249 These rules apply to all individuals irrespectively of the lawfulness of the recourse to armed force and aim to regulate what happens during a conflict.

However, just war theory or the laws of war also consists of another subset of rules, namely the *ius ad bellum* (also called *ius contra bellum*).250 These rules aim to limit the resort to force between States.251 As they are particularly relevant in the discussion of the delegation of services to PMSCs and the erosion of the State monopoly on power, they will be discussed in the first title.

Title 1. *Ius ad bellum*

Section 1. Modern source and principles

*Ius ad bellum* deals with the justification for waging war or the legality of resorting to force.252 In its modern foundation, the U.N. Charter, the United Nations puts forth that peace is the fundamental aim of the international community. Art 2, §4 of the charter states that all Members “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State (…)”253 This rule is not only part of customary international law254 (which means that it binds all States regardless of them being a member of the UN), it is also generally viewed as a peremptory norm which attained the status of *jus cogens* (derogation is never allowed).255

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The Charter does permit two exceptions to this rule. These can be found in chapter seven of the UN charter, where it is set forth that the rule does not impair the right of individual or collective self-defense in the scenario of an armed attack. Furthermore, the use of force against other States is also warranted if it emanates from a decision adopted by the UN Security Council.

Ius ad bellum typically consists of several criteria or standards which must be met in order to permit the use of violent force:

**Just cause**

Often regarded as the most important condition, just cause implies that the war must avert ‘the right kind of injury’, namely as self-defense against aggression.

**Being a last resort or necessity**

This principle stipulates that violence can only be justified if no viable peaceful option or less harmful option has been exhausted. Therefore, a State has to exhaust non-violent solutions first (political, etc.).

**Being publicly declared by a just, legitimate or sovereign authority**

This principle suggests that war can only be just if waged by a legitimate authority and is rooted in State sovereignty. A just war can only be initiated by an authority widely recognized, within a political system that allows distinctions of justice. It implies that individuals or groups who do not answer to the vox populi cannot legitimately wage war.

**Possessing right intention**

This principle aims to root out rationales of waging war which would amount to reasons of self-interest. According to it, the only right motivation for waging war is to (re)establish a peace i.e. the just cause. Therefore, acts of

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256 Art. 51 of the UN Charter.
257 Art. 39 of the UN Charter; for a detailed analysis on the prohibition and its exceptions, see S. OYSTEIN, *Should non-state actors have a right to resort to force in self-defence? An assessment of legitimate authority under jus ad bellum*, Oslo university, 2016, 22-26.
262 This concept is sometimes put together with the just cause principle. However, arguments exist to consider it as a separate criterion, see e.g. U. STEINHOFF, *Just Cause and ‘Right Intention’*, Journal of Military Ethics 13(1), 2014, 32.
vengeance, intimidation and indiscriminate violence are not permitted. Furthermore, the just cause must be an end, not a means to achieve a wrongful end. This condition inherently sets a limit to the extent of the use of force.

**Having a reasonable hope of success**

This precept expects the use of force to have a good chance to achieve its desired outcome, its just cause. Violence should not be used in the knowledge that it would not yield a positive result.

**The end being proportional to the means used**

This principle requires that the estimated benefits of engaging a war must outweigh the costs. It serves to determine the intensity and the magnitude of the use of force.

When looking at doctrine on *ius ad bellum*, it becomes clear that the precise number and the exact meaning of these principles are heavily discussed. Dealing with this in greater detail would unfortunately go beyond the scope of this research. The next sections will only elaborate on the State monopoly on the use of force, the privatization of war and their relevance for the criterion of authority.

**Section 2. The State monopoly on the use of violence**

Historically, the power to use force was not (solely) dependent on a military organization, ordinary ‘citizens’ were also prompted to use violence if needed. As rudimentary bureaucratic states began to form, political authorities within a certain territory began to concentrate and centralize this power in an effort to create order and stability. Generally, the consolidation of this monopoly in the Peace of Westphalia of 1648 is seen as a turning point in the history of state formation. From then on, States began to develop “the large-scale capacity for taxation, coercive control of their populations, and advanced bureaucracies”. Currently, this monopoly which guarantees peace and security is not only considered as belonging exclusively to the State, it is also considered as a necessary element to be considered a State.

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264 Ibid., 11.
However, this does not imply that all modern States have complete control over the use of force, especially not when it comes its (external) military aspect. As chapter two made clear, private actors skilled in warfare have been hired by rulers since the dawn of man, a trend which continues to this day. The recent waves of downsizing armies and the need for specific services caused an increasing dependency on Private Military and Security Companies. Can we then conclude that the monopoly on the use of force is at risk? Not necessarily. States are still the ones who decide whether they will use coercive force, not the military or any other agent performing this role. For this reason, the concept of the State monopoly on the use of force does not prevent governments from outsourcing services to private companies. However, it is evident that States cannot evade the prohibition on the use of force between States by employing these companies.

Thus, more problematic is the actual exercise of this monopoly, since the lack of oversight on and accountability of private actors creates a situation that might breach principles of just war theory and weaken aspects of this monopoly. After all, if private actors use violence without public control, the monopoly belonging to States would cease to exist in practice. This is an issue much more prevalent with contractors than with traditional mercenaries; whereas the latter generally only offered manpower, the former can provide a wide variety of services on an unseen scale. These issues not only challenge the paradigm of IHL as a state-centric system founded on this monopoly. It has been even suggested that, without a monopoly on violence, governments and therefore States would cease to exist in the legal sense. Lastly, it is exactly this issue that the previously discussed UNWG Draft Convention tries to resolve. As it focusses on outlawing the outsourcing of inherently State functions, it tries to uphold the principle of the State monopoly on the legitimate use of force.

Section 3. Privatization and the legitimate authority principle

Can it be argued that PMSCs threaten the control over the legitimate use of force? Do they in any way undermine the principle of legitimate authority? One would be inclined to confirm only the first question given the increasing dependency on these firms. However, looking at the underlying rationale of the legitimate authority principle will reveal some issues with it and the privatization of war.

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The principle of legitimate authority, dating back to the 11th century, is central to the just use of force and requires that a war must be declared and controlled by legally authorized persons in order to be just. These persons should be part of an authority legitimized within a political system centered on justice, i.e. a democratic government. According to PATTISON, its underlying rationale is the regulation of warfare by means of accountability. After all, oversight and accountability limit adverse behavior. The authorization to employ force further implies the ability to control and cease the use of force. Exactly these underlying thoughts are under stress by the use of PMSCs.

Traditionally, just war doctrine allowed States to employ force to establish peace. This paradigm is being challenged more and more by non-state actors increasingly engaging in the use of force, causing a breakup of the public monopoly on military force. Chapter two already discussed the alarming amounts of PMSCs present in contemporary conflicts. Although private forces have always been available to rulers and governments to perform military and security functions, the rise of the PMSC industry since the aftermath of the Cold War has taken the privatization of war to unprecedented heights. If some of these actors, such as PMSC employees, escape accountability then they also don’t meet the rationale behind the legitimate authority principle. Indeed, PATTISON has argued that these actors are impermissible within the current framework of just war. According to him, the legitimate authority initiating the war should also be the one governing the troops, including these hired actors. Since PMSC are rarely incorporated in the armed forces of a State, they do not operate in the traditional chain of command of national armies. Indeed, there have been several noteworthy cases during the War in Iraq where contractors were involved in hostilities and where they “essentially operated outside of the command and control of the U.S. military.”

The privatization of war also raises several other issues. By trimming down on military personnel and services, governments can become dependent on private companies and the delegated services they perform. This may cause governments to change their strategies in accordance with this reality. For example, if the military relies too much and too long on a company to make strategic assessments, it might be unable to perform these tasks by itself once the specialized company stops providing these services. Furthermore, by reducing the costs (both political and material) of engaging in conflicts, the availability of PMSCs increases the chance of a State actually engaging

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in one.\textsuperscript{283} It would also be easier to undertake covert missions by assigning contractors to it, after all, the public opinion need not be consulted for these actions. These evasions of domestic political constraints would not only strain the democratic control on the use of force and limit the chance for public debate,\textsuperscript{284} these kind of actions would also further decrease oversight and compliance.\textsuperscript{285} Finally, the rise of the industry also greatly increases the number of actors able to use military force, which in turn has the potential to increase unrest on the global scale.

These findings do not apply to non-state actors in the sense that only States are able to possess legitimate authority. This is a direct consequence from the fact that the rules of \textit{ius ad bellum} are only binding on States.\textsuperscript{286} Therefore, the UN Charters’ prohibition and its exceptions do not apply to individuals (such as wealthy individuals employing private actors\textsuperscript{287}).

In conclusion, the employment of PMSCs in armed conflict by States can be legitimate according to just war theory. However, this assumes that a State has mechanisms in place to control these actors and to hold them accountable if needed, similar to the situation of national soldiers. Since there have been many cases of misconduct, often accompanied by impunity, it is clear that the privatization of war puts traditional just war theory under stress. Furthermore, the increasing dependency on these firms and the lacking legal framework constitutes a challenge to the State monopoly on the use of force, the checks and balances of engaging in war and the laws of war in general.

\textbf{Title 2. \textit{Ius in bello} or International Humanitarian Law}

In the discussion on the legal status of mercenaries in armed conflict, it is important to determine which rights and duties these actors have in conflict situations, as well as determining the legal consequences of their conduct. Especially in the case of PMSC employees, who will rarely fulfil the mercenary criteria (\textit{supra}), it is a far more practical question to evaluate whether they qualify as ordinary civilians or as persons allowed to partake in hostilities. Therefore, it is necessary to look at International Humanitarian Law, or \textit{ius in bello}. While the previously discussed \textit{ius ad bellum} tries to abolish war altogether, \textit{ius in bello} tries to limit negative effects if the use of armed force does occur.\textsuperscript{288}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{283} E. HEINZE, Private Military Companies, Just War, and Humanitarian Intervention, Heinze & Steele, Ethics, 125.
\item \textsuperscript{284} See also J. PATTISON, supra note 280, 8.
\item \textsuperscript{285} See P.W. SINGER, Outsourcing war: understanding the private military industry, Foreign Affairs, March/April 2005, available at: https://www.foreignaffairs.com/articles/2005-03-01/outselling-war.
\item \textsuperscript{286} S. OYSTEIN, Should non-state actors have a right to resort to force in self-defense? An assessment of legitimate authority under \textit{ius ad bellum}, Oslo university, 2016, 6.
\item \textsuperscript{287} M. CARAPINI, Privatizing security: law, practice and governance of private military and security companies, Geneva, Centre for the Democratic Control of Armed Forces, 2005, 7; P.W. SINGER, Corporate warriors, the rise of the privatized military industry, Cornell University Press, 2008, 3-39.
\item \textsuperscript{288} S. HARRIS, Can the I.C.C. consider questions on \textit{ius ad bellum} in a war crimes trial?, 48 Case W. Res. J. Int’l L., 273, 2016, 274.
\end{itemize}
\end{footnotesize}
Section 1. Conception, scope and underlying principles

The development of modern IHL started with Henry Dunant. After witnessing the bloody battle of Solferino, he strived for the creation of an international agreement obliging States to take care for the victims of warfare. This personal quest to mitigate suffering as a result of war set in motion a series of events which eventually resulted in the establishment of the first Geneva Convention in 1864. This in turn not only led to the creation of the International Committee of the Red Cross in the same year, but it also led to the conclusion of several other Geneva Conventions (GC) and additional protocols (AP):

- GC (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949: As an enhanced version of the 1864 GC, it protects soldiers who are hors de combat, as well as medical personnel, wounded and sick civilian support, etc.

- GC (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949: Adapts the protections of GC I to reflect conditions at sea.

- GC (III) relative to the Treatment of Prisoners of War, 1949: Contains specific rules for the treatment of prisoners of war, such as a prohibition on violence, reprisals, etc.

- GC (IV) relative to the Protection of Civilian Persons in Time of War, 1949: Protects civilians in areas of armed conflict and occupied territories.

- AP I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977: Provides specific protection for civilians, as well as military and civilian medical personnel in international armed conflicts.

- AP II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1977: Provides and elaborates on protections for victims of internal conflicts (which have reached certain thresholds). It also expands on the non-international protections of art 3 common to the four Geneva Conventions of 1949.

- AP III to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 2005: Adds the red crystal to the list of universally recognizable symbols of protection, joining the red cross and the red crescent.

The Additional Protocols did not intend to add new obligations, they were created in order to expand on existing articles in the Geneva Conventions in order to reckon with

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291 See https://ihl-databases.icrc.org/ihl for a collection of all IHL treaties and documents.
the changing methods and means of warfare.\textsuperscript{292} Also, while these treaties focus on the victims of armed conflicts, The Hague Conventions of 1899 and 1907 deal with the methods and means of warfare.\textsuperscript{293} As they also deal with issues such as the rights of captured combatants and the duties of occupying States, they too contribute to International Humanitarian Law. Together, the conventions of Geneva and The Hague are generally seen as the primary source of IHL, although many other conventions and treaties also are part of it.\textsuperscript{294}

The first question to be asked is: when does IHL apply? The term \textit{ius in bello} is misleading as it might hint at situations of war. However, the post-World War II era has seen very few official declarations of war. For this reason, International Humanitarian Law applies to all armed conflicts (as described by IHL). Its treaty law establishes a distinction between two types of armed conflicts. On the one hand, there are international armed conflicts (IACs) which involve two or more opposing States. On the other hand, IHL recognizes the existence of non-international armed conflicts (NIACs), i.e. armed conflicts between governmental forces and nongovernmental armed groups, or between such groups only. The four Geneva Conventions are almost wholly dedicated to IACs, as well as AP I. Common art 3 to the Geneva Conventions of 1949, AP II of 1977 and the Martens Clause\textsuperscript{295} are the major sources of rules and principles applicable in NIACs.

The basis for an international armed conflict (IAC) can be found in art 2 common to the Geneva Conventions of 1949. Here, it is stated that,

\begin{quote}
\textit{In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.}

\textit{The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.}
\end{quote}

This article makes it clear that the intensity of or the reasons for a conflict are irrelevant. Any conflict between States where armed force is involved will trigger the application of IHL. Art 1 §4 of AP I broadens this definition by adding that IACs also include situations of “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”.

The other type of armed conflict is a non-international armed conflict (NIAC). This type of situation has its roots in 2 main sources. Art 3 common to the Geneva Conventions of 1949 (considered part of customary international law)\textsuperscript{296} simply describes a NIAC


\textsuperscript{293} Ibid.


\textsuperscript{295} “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”, see art. 1§2 AP I.

\textsuperscript{296} ICJ, Military and Paramilitary Activities in and against Nicaragua (the Republic of Nicaragua vs. the United States of America), Judgment, ICJ Reports 1986, 14.
as an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”. It has been pointed out that the ‘territory’ requirement is now largely superfluous as the 1949 Conventions have been universally ratified.\(^\text{297}\) This essentially leaves us with the result that a NIAC is any armed conflict that isn’t an IAC.

Additional Protocol II applies to more restrictive defined NIACs, as its material field of application contains any armed conflict not covered by art 1 of AP I and which

“take(s) place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”\(^\text{298}\)

It further adds that AP II does not apply to situations of internal disturbance and tensions. The definition of NIACs given here is stricter than the one put forth by common article 3.\(^\text{299}\) It not only adds a requirement of territorial control; it also rules out its application to armed conflicts in which only non-state armed groups are involved. It is important to stress that this narrower definition only applies to the provisions of AP II.

While treaty IHL does refer to different types of armed conflict, it fails to provide a precise definition of the situations falling within the scope of an ‘armed conflict’. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has tried to describe this concept in the Tadic case. According to the Appeals Chamber, “an armed conflict [in the meaning of common article 3] exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”\(^\text{300}\) Building on this, the Trial Chamber has concluded that an armed conflict requires both a minimum level of intensity as well as a degree of organization of the parties (indicated by for example a certain command structure).\(^\text{301}\) This would prevent IHL from applying to “banditry, unorganized and short-lived insurrections, or terrorist activities.”\(^\text{302}\)

IHL even applies in armed conflicts initiated in contradiction with ius ad bellum. It does not discern between right and wrong; any actor caught in these hostilities benefit from the relevant protections.\(^\text{303}\) The underlying thought of this is the fact that individuals are often just a pawn in a game played by states. In the context of PMSCs, it is important to note that these companies don’t have obligations under IHL, as legal

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\(^{298}\) AP II, art. 1, §1.


\(^{300}\) ICTY, Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-I, 1995, §70.


\(^{302}\) ICTY, Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-T, Judgement (Trial Chamber) 10 July 2008 §175-176.

persons are not targeted by these rules. The only exception to this is the unlikely scenario in which a private military and security company becomes an independent non-state party to an armed conflict.\textsuperscript{304} Individuals on the other hand do benefit from these laws: not by means of direct subjective rights, but by enjoying the protections. Lastly, there is no derogation mechanism in IHL: the rules will always apply in any scenario of armed conflict in the sense of the Geneva Conventions and the Additional Protocols. After all, these laws are tailor made for times of great distress, exactly the situations where derogation is often invoked.

To determine the status and obligations of private actors such as PMSC personnel present in armed conflict, the following section will take a look at the categories of persons described by IHL in order determine whether contractors can fulfil any of their requirements. The status of mercenaries in the sense of art 47 AP I will not be focused on, as chapter three already dealt with this. Also, the following section will briefly touch upon so called 'unlawful' combatants, a controversial concept in doctrine which might relate to some mercenaries in the generic sense.

Lastly, there are three key criteria in IHL in order to assess whether behavior in war is justifiable: the principle of distinction, the principle of proportionality and the principle of (military) necessity.\textsuperscript{305} Some authors add a fourth principle: the principle of humanity.\textsuperscript{306}

The principle of \textit{military necessity} can be summarized by quoting art 35§1 AP I: \textit{“The right of the parties to an armed conflict to choose means and methods of warfare is not unlimited.”} It is generally accepted as a rule of international customary law. In practice, it means that violence should only be used to achieve a legitimate purpose in a conflict.\textsuperscript{307} Furthermore, any excessive or lightly used violence is prohibited.\textsuperscript{308}

The purpose of the principle of \textit{humanity} is to ensure the humane treatment of persons in all circumstances. It only allows the infliction of suffering, damage and destruction when necessary to achieve a military purpose.\textsuperscript{309} IHL can be seen as a result of a delicate balance exercise between this principle and the principle of military necessity.

The principle of \textit{proportionality} demands that losses resulting from the use of force don’t exceed the expected advantage resulting from the use of this force.\textsuperscript{310} It can be seen as a link between the principles of humanity and military necessity.

Lastly, there is the principle of \textit{distinction} which consists of two aspects. Firstly, art 48 AP I obliges the parties to the conflict to make at all times a distinction between civilians

\textsuperscript{305} M. DRUMBL, \textit{International Law regarding the conduct of war}, The Role of International Law and Institutions, Encyclopaedia of Life Support Systems, 2003, 3.
and combatants (and between civilian objects and military objects). Secondly, art 44 compels combatants to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. This not only protects civilians; it also permits combatants to benefit from their privilege of POW status. As we will see, a large amount of Geneva provisions will deal with this aspect. Given the crucial consequences tied to the status of both civilian and combatant, it is paramount to evaluate to which category a contractor (or a traditional mercenary) in a given scenario belongs.
Section 2. Combatants

1. (Lawful) combatants

The status of combatant entails several consequences. Firstly, opposing forces can only lawfully attack legitimate military objectives, including combatants (unless and for such time as they are hors de combat or if they have laid down their arms).\(^{311}\) Secondly, only persons with this status may lawfully take a direct part in hostilities, they are thus immune from domestic prosecution for doing so (i.e. activities normally associated with engaging in a conflict, not grave breaches of international law such as war crimes). Thirdly, all combatants are entitled to POW status\(^ {312}\) (except for spies\(^ {313}\)) and benefit from the protection of GC III. This generous status permits belligerents to prevent POWs from taking further part in an armed conflict; it should not be understood as imprisonment for taking part in the hostilities.\(^ {314}\) According to art 118 GC III, “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”. Any unjustifiable delay in doing so constitutes a war crime.\(^ {315}\) Also, in case of doubt, there is a legal presumption that a detainee is entitled to POW status until evidence presented at a Competent Tribunal disproves this.\(^ {316}\) This was implemented given the difficulties of determining the status of an actor, as well as not leaving the decision in the hands of the capturing power. Lastly, persons without this status taking a direct part in hostilities may be prosecuted for merely doing so.

Who?

According to art 4 of the 1949 Third Geneva Convention, combatant status is determined by membership of the armed forces of a party to a conflict or by membership of a militia or volunteer force that belongs to a party to the conflict (as well as certain other members of militias or volunteer corps).\(^ {317}\)

Are contractors combatants?

In order to answer this question, it has to be assessed whether contractors fulfil the requirements of any of the categories of art 4: either being integrated into the armed forces (art 4A (1) GC III) or by qualifying as a militia under art 4A (2) GC III.\(^ {318}\) In the former category, the situation of the individual must be assessed according to the de

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\(^{311}\) Common art. 3 to the Geneva Conventions, §1.

\(^{312}\) Art. 44(1) AP I.

\(^{313}\) Art. 46(1) AP I.

\(^{314}\) N. MELZER supra note 304.

\(^{315}\) Art. 85, §4 (b) AP I.

\(^{316}\) Art. 5 GC III, see also Y. NAQVI, Doubtful prisoner-of-war status, RICR vol. 84 n° 847, September 2002, 571-595.

\(^{317}\) See also art. 43 AP I.

\(^{318}\) The article contains 2 more categories, but they are less relevant in this discussion, see art. 4 A (3) and (6) GC III; also, see the Regulations annexed to the Fourth Hague Conventions of 18 October 1907.
facto situation, regardless of the internal laws of the concerned State. In the latter category, the group as a whole must be assessed.\textsuperscript{319}

It has to be recalled here that the Geneva Conventions contain provisions which assign certain tasks to the regular armed forces of State. For this reason, tasks such as being in command of a place of confinement cannot be executed by contractors.\textsuperscript{320}

Integration into the armed forces?

As GILLARD has pointed out, because of the fact that IACs comprise of two or more opposing States, all PMSC employees hired by other clients than State parties can never be considered combatants. This will in practice exclude many contractors from combatant status.\textsuperscript{321}

Art 43 (1) AP I, complementing art 4(A) GC III, states that this category consists of,

\begin{quote}
“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, \textit{inter alia}, shall enforce compliance with the rules of international law applicable in armed conflict.”
\end{quote}

Thus, a PMSC must be treated as a group or unit incorporated in a national armed force if it is subject to internal disciplinary measures of that armed force.\textsuperscript{322} An ICRC expert meeting has described the concept of an organized armed force/group/unit as “a group that wishes to become involved in a conflict by supporting the military campaign of one of the parties”.\textsuperscript{323} The article further adds that members of the armed forces are combatants, and, that they therefore have the right to participate directly in hostilities.\textsuperscript{324} Lastly, art 43 (3) AP I obliges States which incorporate “paramilitary or armed law enforcement agency into its armed forces” to notify the other Parties to the conflict.

The requirement of integration into the armed forces will rarely be fulfilled by PMSCs. After all, if they were integrated, there wouldn’t be so much discussion on the legal status of these actors. It is generally observed that few States incorporate PMS employees into their armed forces as the State would then be responsible for their acts.\textsuperscript{325} Two notable examples of an exception to this reality are the implementation of Sandline International employees into the armed forces of Papua New Guinea\textsuperscript{326} and

\begin{flushright}
319 L. CAMERON, \textit{supra} note 4, 583.
320 Art. 99 GC IV, see also art. 39 GC III.
321 E.-C. GILLARD, \textit{supra} note 70, 532.
324 Art. 43 (2) AP I.
325 Art. 91 AP I: “A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”
\end{flushright}
the implementation of Executive Outcomes into the armed forces of Sierra Leone.\footnote{H. TONKIN, State control over private military and security companies in armed conflict, 2011, 85.} It has to be noted though that a formal incorporation like the one previously mentioned is arguably not required or decisive. This view is based on the fact that art 43 AP I, read in conjunction with art 4 GC III, intends to assimilate ‘militias and volunteer corps’ with ‘armed forces’ for the purpose of combatant status.\footnote{L. BECK, From Mercenaries to Market, chapter 7: Private military companies under international humanitarian law, Oxford University Press, 2007, 7; J. PICTET (ed.), Commentary on the Geneva Conventions of 12 August 1949, Vol. 3: Geneva Convention relative to the Treatment of Prisoners of War, ICRC, Geneva, 1960, 59.} In essence, it will then boil down to the degree of oversight and supervision; whether the leader of an armed group is responsible to a State. On this, there have been communications by states claiming that the PMSCs they hired operate outside the military chain of command because the State had no direct control over the contractors.\footnote{See J. PALOU-LOVERDOS (Dir.) & L. Armendáris (Author) quoting a U.S. Department of the Army Field Manual in, The Privatization of Warfare, Violence and Private Military & Security Companies: A factual and legal approach to human rights abuses by PMSC in Iraq, 2011, 62.} On a final note, although Protocol I has not been ratified by nations such as the U.S., art 43 of AP I has been considered as a norm of customary international law according to an ICRC study.\footnote{J. HENCKAERTS and L. DOSWALD-BECK (eds.), Customary International Humanitarian Law, 2005, vol. I, Rule 4.}

Members of militias

Art 4A deals with members of organized groups which are autonomous of the armed forces of a State, but nevertheless fight together with them,

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces

2. 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, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill 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.\footnote{Art. 4A (2) GC III, see also Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Regulations art. 1.}

The article contains several points of interest regarding militias. The militia must belong to a party of the conflict. Secondly, conditions (2) (a)-(d) must all be met by the militia or volunteer corps, not by the individual. The first criterion does not require the person
responsible to be a military officer. It is only necessary that he bears responsibility for
the result of his command.\textsuperscript{332}

In practice, the first two criteria of art 4A (2) will often not be met (wearing distinctive
uniforms is sometimes prohibited)\textsuperscript{333}, as well as the general requirement of belonging
to a Party to the conflict. According to the \textit{Interpretative Guidance}, in order for a militia
to belong to a party to the conflict, it must \textit{“conduct hostilities on behalf and with the
agreement of that party”}.\textsuperscript{334} This leads us to the question whether the conduct is
attributable to that State under international law, a topic which will be discussed in
chapter five. After all, contractors will generally not operate from within the armed
forces of a State nor will they be under control by the State party.\textsuperscript{335} It is generally
concluded that few PMSCs will meet all criteria.\textsuperscript{336}

It is pretty evident that this article from 1949 was not created to include contemporary
mercenaries in its scope, but rather to give way for resistance movements.\textsuperscript{337} First of
all, even the 1977 mercenary provision (art 47 AP I) did not anticipate the use of
contractors. Secondly, art 47 AP I denies mercenary the combatant privilege
because it wants to discourage these private forces from entering the battlefield. For
this reason, awarding PMSC employees combatant status according to 4A (2) seems
to go against the purpose of the article, especially because they show so many
similarities with persons fulfilling the mercenary criteria. Aside from theoretical
objections, observing the presence of PMSCs in armed conflict makes clear that
criteria (a) and (b) of art 4 a (2) GC III will rarely be fulfilled.

It is evident that, in practice, determining a persons’ status will be extremely difficult.
This confusion undoubtedly leads to breaches of IHL. Actors in the field must at all
times be able to discern between legitimate targets and civilians. Given the blurry
situation of PMS employees, attacking one who enjoys civilian status can amount to a
grave breach of the Geneva Conventions.

\textbf{Conclusion}

IHL leaves little room for PMSC employees to attain the combatant status. On the
one hand, they are not autonomous enough to be considered a militia, on the other
hand, they are seldom incorporated in the armed forces of a Party to the conflict. In
the unlikely case that they would qualify as combatant, they would have the same
rights and obligations as other members of armed forces.

\textsuperscript{332} Commentary, Vol. III, Geneva Convention relative to the Treatment of Prisoners of War
\textsuperscript{333} U.S. Department of the Army, \textit{Uniform and Insignia: Wear and Appearance of Army Uniforms and
Insignia}, Army Regulation 670-1, April 2015, 1.
\textsuperscript{334} International Committee of the Red Cross (ICRC), Interpretive guidance on the notion of direct
participation in hostilities under international humanitarian law, May 2009, 27.
\textsuperscript{335} ICTY, Appeals Chamber, Prosecutor v. Dusko Tadic, (IT-94-1), Judgment of 15 July 1999, §§
93–94.
\textsuperscript{336} See M. SOSSAI, \textit{EU Working Papers: Status of PMSC Personnel in the laws of war: the question of
direct participation in hostilities}, Academy of European Law PRIV-WAR project 6, June 2009, 4.
\textsuperscript{337} K. GOVERN, E. BALES, Taking Shots at Private Military Firms: International Law Misses Its Mark
2. **Unlawful combatants**

The war on terror has caused this notion to gain much prominence. It is a category of actors which has no foundation in treaty IHL.338 The term ‘unlawful combatant’ has first been used in a judgement by the Supreme Court of the United States in 1942 where it received much criticism from commentators.339 One notable commentator remarked that such a categorization is incorrect; he proposed the term unprivileged combatants, i.e. denoting persons not enjoying POW status but who are not considered as unlawful actors in warfare by states (spies, saboteurs, etc.).340 Ever since, it has been discussed and used in legal literature, martial manuals and case law.341

As it tries to denote actors not foreseen by the foundational IHL treaties, it is used to draw a distinction between the civilian population and combatants; as a descriptive tool denoting any person who doesn’t enjoy combatant privilege but does take part in hostilities (therefor, the concept only exists in IACs).342 Nonetheless, commentators have warned that recognizing this category might deprive actors from the protections of IHL.343

The ‘category’ generally includes two types of actors. On the one hand, it includes actors who are explicitly denied combatant privilege by IHL (spies, saboteurs and mercenaries)344. On the other hand, it includes any actor taking a direct part in hostilities without meeting the criteria to be considered a lawful combatant (e.g. a combatant attacking enemy forces while wearing civilian clothing).345

Normally, civilians enjoy a protected status. However, if they take a direct part in hostilities they are considered unlawful combatants. During the time such participation lasts, they will lose their immunity from attack. However, as this status does not exist in treaty IHL, these actors are technically still civilian (but attackable). When they cease to DPH, they will again enjoy immunity from attack.

Given that unprivileged combatants do not qualify as POW under GC III, some have concluded that these actors fall out of the scope of all the Geneva conventions.346 However, the general consensus is that the protections of GC IV apply to unlawful combatants.

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339 Supreme Court of the United States, Ex parte Quirin, 317 U.S. 1, 37-38, 1942; R. SIEGFRIED, *Wat is de status van onlawful combatants in het internationaal recht?*, Ghent, Faculty of Law Ghent University, 2014, 27.
341 K. DORMANN, supra note 336.
343 R. SIEGFRIED, *Wat is de status van unlawful combatants in het internationaal recht?*, Ghent, Faculty of Law Ghent University, 2014, 7.
344 See GC IV and art. 47 AP I.
345 Ibid., 8.
combatants provided that they meet the nationality criteria of art 4 therein.\textsuperscript{347} It must be noted that these rights are not absolute; according to art 5 of GC IV, derogations are permitted in certain circumstances. Nonetheless, the right to humane treatment (art 27 and 37 GC IV) and the fair trial rights (art 71-76 GC IV) are non derogable. Furthermore, they are the beneficiaries of the minimum guarantees of art 75 of AP I\textsuperscript{348}, the minimal guarantees of common article 3 to the Geneva Conventions and certain non-derogable human rights.\textsuperscript{349} Lastly, they cease to be legitimate targets if they have laid down their arms or if they are placed hors de combat (similar to combatants).\textsuperscript{350}

**Section 3. Civilians**

As there are only two categories of persons in IHL, not meeting the requirements of one category puts you in the other. This would lead to the conclusion that most contractors are civilians. This would in turn mean that these persons have no right to directly participate in hostilities, which is a reality which should be reflected in any regulation dealing with PMS employees. Allowing an exception for contractors might endanger the protections granted by IHL. However, any regulation prohibiting DPH by contractors will face several difficulties. For one, the concept of DPH is adaptive and vague. Furthermore, IHL does not discern between offensive or defensive attacks. It would thus be pointless to only allow defensive attacks. Also, even suggesting that contractors can only defend civilian objects is problematic, as changing conditions can transform these objects in military targets.

\textbf{1. Civilian}

Geneva Convention IV mainly deals with the protection of civilians in the hands of the enemy. Only part two of the convention offers a general protection against certain consequences of war. A definition of ‘civilian’ can be found in AP I. According to art 50 AP I, a civilian is a person who belongs neither to the category of members of the armed forces of a party to the conflict, nor to the one of prisoners of war. DPH or carrying arms are irrelevant to determine whether an individual enjoys civilian or combatant status (although DPH may cause loss of protection in the case of civilians). The protections awarded to civilians can be found in art 48 and art 50-52 of AP I, which includes protection from attack and dangers arising from military operations. Art 51(3) AP I provides for a very important exception as it adds that civilians are granted this


\textsuperscript{348} Despite not being ratified by many States, it is considered to be part of International Customary Law, see J.-M. HENCKAERTS, L. DOSWALD-BECK, \textit{supra} note84; also C. GREENWOOD, \textit{International law and the “war against terrorism”}, International Affairs 2002, 316.

\textsuperscript{349} R. SIEGFRIED, \textit{Wat is de status van unlawfull combatants in het internationaal recht?}, Ghent, Faculty of Law Ghent University, 2014, 60.

\textsuperscript{350} Para. 1 of common art. 3 to the Geneva Conventions, see also Hague Regulations article 23 (c) and (d).
protection “(…) unless and for such time as they take a direct part in hostilities.” This makes clear that the loss of protection can take an end.

An attack on civilians may be prosecuted as a war crime. Any contractor not qualifying for POW status will enjoy the protection of GC IV as a civilian. Any person not qualifying for the protections of GC IV will still benefit from the customary prohibitions of torture, inhumane treatment, etc.

2. Accompanying armed forces

Art 4 of the Third Geneva Convention deals with a category which is particularly relevant in the case of contractors,

A) Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(…)

(4) 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 labor 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 (…).

This category is a testament to the fact that armed forces have always been accompanied by persons fulfilling subsidiary support roles. Many contractors will fall in this category. They will consequently enjoy POW status, but are not allowed to DPH. The U.S. has expressed that it considers PMSC employees as civilians accompanying the armed forces, not as combatants. Whether PMSC staff accompanying armed forces retain their status if they DPH is unclear. Many commentators seem to argue that they should be treated as ordinary civilians directly participating in hostilities, based on an implicit reading of art 4A (4) and the nature of activities enumerated in it.

Any civilian accompanying the armed forces should disqualify for POW status if he DPH in order to discourage DPH and because it blurs the distinction between civilians

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352 See art. 50 GC I, art.51 GC II, art. 130 GC III and art. 147 GC IV.
353 See art. 4 GC IV.
354 Art. 75 AP I.
358 E.C. GILLARD, supra note 70, 538.
Section 4. Direct participation in hostilities

This concept is expressed in art 43(2) (denoting combatant privilege) and in art 51(3) of AP I (indicating when civilians lose their protection). The latter rule, which states that civilians benefit from protection against direct attack unless and for such time as they take a direct part in hostilities, can be viewed as an attempt to address the increasing participation of civilians in hostilities.

Direct participation in hostilities shouldn’t simply be understood as aiding a side in a conflict nor as simply fighting in a conflict. Unfortunately, the Geneva Conventions don’t provide us with a precise description of DPH. However, the commentary on AP I has stated that “direct participation means 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.” How strong this causal link must be is not clear. E.g., could the mere provision of coordinates amount to DPH?

On this lack of a precise definition, the International Criminal Tribunal for the former Yugoslavia (ICTY) commented that “it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time.” Whether this remark adds something to the discussion is unclear.

The ICRC on the other hand has greatly aided the efforts to paint a clear picture of this concept by publishing the Interpretive Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law (hereafter Interpretative Guidance), a document which clarifies the meaning and consequences of DPH. According to the document, the concept of direct participation in hostilities refers to “specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict” and must be interpreted synonymously in IACs and NIACs. To this it adds that an act constitutes to direct participation in hostilities if the following criteria are fulfilled:

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

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359 P. WALTHER, The legal status of private contractors under international humanitarian law, University of Leiden, 22.
364 Ibid., 49.
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). 365

Also, according to the Interpretative Guidance, “measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act”. 366

Nonetheless, art 4A (4) GC III makes it clear that it allows civilians to perform services such as providing supplies while still being able to benefit of their status of civilian. Holding the view that this would not apply to contractors performing support services would also strip any other civilian providing support services from their protections. 367

Because of the fact that art 49.1 AP I states that “‘Attacks’ means acts of violence against the adversary, whether in offence or in defense”, it can be claimed that civilians (such as contractors guarding a power plant) reacting with gunfire to enemy fire coming from a Party to the conflict will be considered as directly participating in hostilities. Furthermore, commentators have pointed out that the resort to armed force by civilians in response to an unlawful attack (by the enemy or by common criminals) should not be considered as DPH if it is proportional. 368

It is also important to note that objects previously not having the label ‘military objective’ may attain it as a result of changing circumstances. A contractor could be guarding a building of historic value while, without his knowing, combatants could be employing it as a strategic vantage point. In this scenario, he will be considered as a civilian (unlawfully) participating in hostilities.

Nonetheless, at first glance a restrictive view on the notion of DPH seems favored in order to maximize protection for civilians, as a broad view would endanger the principle of distinction and make support PMSCs liable to be attacked. It has been suggested that, if this were to result in too much protection for contractors performing military tasks, then these actors must be categorized as combatants instead of weakening the protection of civilians. 369 On the other hand, a broad understanding of DPH would demotivate civilians to be present in a conflict.

Consequence of DPH

According to art 51.3 AP I, civilians lose their protection against “dangers arising from military operations” for such time as they directly participate in hostilities. This includes “measures preparatory to the execution of such an act, as well as the deployment to and return from the location of its execution, where they constitute an integral part of such a specific act or operation”. 370 They are considered ‘unlawful’ combatants in this

365 Ibid., 41-64.
366 Supra note 360.
367 L. CAMERON, supra note 4, 589.
369 L. BECK, From Mercenaries to Market, chapter 7: Private military companies under international humanitarian law, Oxford University Press, 2007, 16.
370 Interpretative Guidance, supra note 360, 65.
scenario. Moreover, in the scenario of a detained civilian who has directly participated in hostilities, art 5 GC IV allows derogation from certain protections granted by GC IV part 3.

As CAMERON has pointed out, the protection of civilians is at risk because of the use of contractors as security guards.\(^{371}\) This practice sows confusion about the doctrine of human shields because it is difficult to determine whether persons are performing these activities by free will. A correct application of IHL would prohibit anyone from making a distinction between voluntary and involuntary human shields given that all civilians enjoy immunity from attack. The use of PMSCs puts this idea under stress.

In addition to losing their protection against attacks, contractors participating in hostilities may be prosecuted and punished for murder, destruction of property, etc. (it is evident that any actor, regardless of status, can be prosecuted for grave violations of international law such as war crimes).

The notion of DPH is also particularly relevant for PMSCs in the scenario of guarding services. Here, FAITE discerns 3 situations.\(^{372}\) Firstly, there is the situation of PMSC staff guarding civilian objects. As these objects are protected by IHL, the use of force by a contractor to defend himself or other civilians will not amount to DPH. Secondly, there is the situation of military facilities (or military personnel) being guarded by contractors. Here, the mere task of guarding arguably amounts to DPH, which in turn leads to loss of immunity from direct attack. Lastly, the author recognizes a whole range of situations in which protection is provided to objects which can become legitimate military targets. Whether an object is a military objective will depend on the circumstances as described in art 52 (2) AP I (such as the nature, location, purpose or use of objects). Here, the defensive use of force should not be seen as DPH, although the author recognizes that the line between defensive and offensive is delicate.

Based on this analysis, the determination whether a certain service carried out by contractors qualifies as DPH will have to happen on a case by case basis. Generally, only offensive combat operations will always qualify for the notion. Activities such as interrogation and guarding services have a reasonable chance to qualify, while support activities will qualify the least often as DPH.

Section 5. The situation in NIACs

Article 3 common to the four Geneva Conventions covers situations of non-international armed conflicts (civil wars, internal conflicts in which third States intervene alongside the government, etc.). The article contains fundamental rules from which no derogation is allowed. It has been dubbed a ‘mini-convention’ as it contains the essential rules of the Geneva Conventions and adapts them to the situation of a NIAC.\(^{373}\) It imposes the obligation to treat all persons taking no active part in the

\(^{371}\) L. CAMERON, supra note 4, 590.

\(^{372}\) A. FAITE, supra note 122, 8-9.

hostilities humanely, including “members of armed forces who have laid down their arms and those placed hors de combat”.

Similar to common art 3 to the Geneva Conventions, AP II contains a basis protective treatment for anyone who is captured or no longer taking part in hostilities. This protocol was created in view of the fact that a large majority of the victims of armed conflicts have been victims of non-international armed conflicts; common art 3 to the Geneva conventions proved to be inadequate to offer sufficient protection. Other possible protections awarded to actors in NIACS can be found in human rights law as well as customary international law.

A large majority of contemporary conflicts are considered to have a non-international character. This is important to know because the status of POW and combatant (and mercenary) does not exist in non-international armed conflicts, thus there is no right to fight nor will parties have to grant each other’s captives POW status. Also, AP II lacks a definition of ‘civilian’ despite referring to this category in several provisions. According to the customary IHL study done by the ICRC, the rule “civilians are persons who are not members of the armed forces” applies in both types of armed conflicts.

Given that there are no provisions preventing PMSCs from being considered as an armed force, a big issue in NIACs is whether members of armed groups may be attacked in any case, regardless of their function. Affirming this view would lead to a wider catching net than the concept of DPH by civilians in IACs. A different interpretation would be to apply the concept of DPH in both types of armed conflict equally. According to this view, any individual who is not a member of State armed forces or organized armed groups of a party to the conflict is a civilian and will thus enjoy protection against attack, unless and for such time he directly participates in hostilities. This view (which is supported by the ICRG Interpretative Guidance) is undoubtedly preferable. It has to be noted thought that the activities of private contractors will expose them in any case to an increased risk of death or injury even if they do not DPH.

In conclusion, the main relevance of a certain status in NIAC is the difference between legitimate military targets and persons protected against attack. Any person captured by an enemy will be granted the same basic protection of humane treatment and judicial guarantees and will be subject to national law.

Section 6. Is there a need for a new category?

As many contractors will be civilians accompanying the armed forces, they enjoy POW status. Despite this status, they are not allowed to participate in hostilities. Art 43 AP

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375 Arts. 13–15 and 17–18 AP II.
377 L. BECK, supra note 107, 16.
378 Art. 13(3) AP II.
380 See art. 43 AP I, art. 50 AP I and art. 4 GC III.
I clearly asserts that only combatants have the right to DPH. On this, the commentary on art 43 remarked that adding another category is unnecessary by stating that, “all 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”. The commentary further added that accepting a third category would “cancel any progress the article has achieved”.

Title 3. Non-derogable human rights

While IHL only applies in times of armed conflict, international human rights law applies in both times of peace and war. This should not be understood as IHL being the lex specialis (at least not always), but as two legal frameworks which can both apply in the same situation. Unlike IHL, which applies to states and non-state actors, applying human rights to PMSCs or their employees is contested. Human rights are generally thought of as rights of an individual in its relation to a State, although some human right treaties oblige States to protect individuals against abuses from other individuals.

It is therefore controversial to posit that human rights law provides protection between private actors. Human rights treaties are signed by states as entities of international law. For this reason, the resulting obligations are only binding for them, they are not thought of as having a direct horizontal effect. Human rights law can only bind individuals through the operation of domestic law. However, any contractor functioning as an element of governmental authority has to comply with the State’s obligations under international human rights law.

COHEN has identified 10 human rights which have to be respected at all times, and thus also in times of armed conflict:

1) prohibition of death penalty without a sentence of a court;

381 ICRC, Commentary on art. 43, available at: https://ihl-databases.icrc.org/applic/ihl.nsf/Comment.xsp?action=openDocument&documentId=0CDB7170225811A0C12563CD00433725.
382 Ibid.
384 R. SIEGFRIED, Wat is de status van onlawful combatants in het internationaal recht?, Ghent, Faculty of Law Ghent University, 2014, 73.
2) prohibition of torture, both mental and physical;
3) prohibition to hold someone in slavery or servitude;
4) prohibition of punishment without law;
5) prohibition of corporal punishment;
6) prohibition of mutilation;
7) prohibition of outrages on the personal dignity, in particular humiliating or degrading treatment, enforced prostitution and any form of indecent assault;
8) prohibition of taking of hostages;
9) prohibition of collective punishments;
10) prohibition to threat to commit any of the foregoing acts.\textsuperscript{390}

Lastly, through international Criminal law the gravest breaches of human rights law can be punished either as war crimes (situations of armed conflict) or as crimes against humanity (see e.g. the Rome Statute)\textsuperscript{391}.

Title 4. Conclusion

Despite the general consensus that PMSCs do not operate in a legal vacuum, actually determining the rules applicable to contractor services is troublesome. As there is no international instrument with binding obligations for PMSC employees, existing legal frameworks must be applied.

In chapter three it became clear that international law on mercenaries rarely applies. As a mercenary, contractors can be attacked lawfully, but unlike combatants they will not enjoy POW status. Although contractors perform combat functions which border on mercenarism in the sense of art 47 AP I, the nationality requirement will often be the biggest hurdle for letting this article apply.

This chapter made clear that, even though IHL provides a legal framework which enables the determination of the status of contractors in armed conflict, applying these rules on a general basis is problematic. The status of PMSC employees operating in armed conflict is determined by several circumstances, including the nature of the functions they are performing and their integration within the military command. There are many possible regimes of protection which might apply: civilians, civilians accompanying the armed forces, civilians directly participating in hostilities, members of the armed forces, combatants, mercenaries, etc. These are categories which must be evaluated on a case-by-case basis.

Few contractors (and definitely ‘traditional’ mercenaries) will fulfil the criteria to benefit from combatant status. The requirements for direct membership in the armed forces (art 4A (1) GC III or art 43 AP I) or belonging to a party/ being under command

\textsuperscript{391} UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.
responsible (art 4A (2) GC III and art 43 AP I) will rarely be met by the employees of PMSCs.

A large majority of contractors will either have the status of civilian or the status of civilian accompanying the armed forces. They are not members of the armed forces or military or volunteer corps. If they do directly participate in hostilities, they will be considered ‘unprivileged’ combatants and will lose their immunity from attack. The biggest issue here is determining in which case a civilian directly participates in hostilities. Contractors authorized to accompany the armed forces will be entitled to POW status.

In the scenario of incorporation into the armed forces of a belligerent party, they become members of the armed forces and thus, they cannot be considered a civilian.

From a practical point of view, the concepts of legitimate (military) targets and more generally the principle of distinction are hard to apply to PMSCs when operating in armed conflict. As GOMEZ put it:

“The activities of private military and security companies often blur: (a) the distinctions between what is public and private; (b) the statute of the individual in situations of armed conflict whether civilian or combatant; (c) whether the activity is military or security; (d) the type of organization the individual is working for whether a non-profit humanitarian or a profit security with a “humanitarian hat”; (e) and what is active and passive security.”

As PMSC staff are often armed and wearing combat clothing, their presence close to civilians may constitute a danger. Enemy forces could jump to the conclusion that the staff are legitimate military targets, risking civilian casualties as collateral damage.

It has been proposed to incorporate all contractors who are likely to engage in hostilities in the armed forces of a State who is a party to the conflict. However, this would not only partly defeat the purpose of privatization, it would also be problematic in armed conflicts where a home/contracting State has withdrawn all its armed forces.

In conclusion IHL contains answers, but the use of PMSC for tasks (either armed or unarmed) amounting to DPH is problematic. It seems advisable that States take steps to ensure that the PMSC employees they hire are protected, for example by incorporating them (which would grant them immunity from prosecution for merely participating in hostilities and POW status when captured) or by preventing that they are used in any role that could endanger their status as civilian (such as being a civilian accompanying the armed forces). As the first option seems to partly defeat the purpose of outsourcing military services to PMSCs, the second option seems more likely.

Chapter 5 - Implementation of the legal framework: responsibility for unlawful conduct

The past chapter made clear that PMSC employees definitely have rights and obligations under IHL as they qualify for either civilian or combatant. However, the circumstances and the particular characteristics of these actors cause severe issues of accountability and responsibility. For this reason, although not at the core of the discussion about their legal status, the following chapter will attempt to provide a comprehensive overview of the legal rules in place which might establish responsibility. After all, providing a link between an offence and the actor/entity responsible is essential to provide recourse for aggrieved parties.

Title 1. Responsibility of individuals

As discussed supra, IHL is binding in on every individual in armed conflict, thus all parties must comply with IHL. In the case of mercenaries and civilians in the context of IHL, they can be prosecuted for merely participating in hostilities according to the municipal judicial system of a State.

It is unclear to which degree contractors can commit violations of IHL, even less so whether they are obliged to make reparation if they violate IHL. Nonetheless, jurisprudence of the Rwanda Tribunal has made it clear that the criminal responsibility of an individual does not depend on his status if they commit grave breaches of the Geneva Conventions (inhumane treatment, wilful killing, etc.); both civilians and combatants can be prosecuted.393 Similarly, art 25 of the Rome Statute does not make a distinction between persons as it establishes jurisdiction over any natural person committing the most serious crimes of concern to the international community.394

Furthermore, the statutes of international criminal courts contain provisions which enable superiors (both military and civilian) to be held accountable for the acts of their subordinates. Superiors will be responsible “if he knew or had reason to know that the subordinate was about to commit [war crimes, crimes against humanity and genocide] or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”.395 This responsibility is a rule of customary law which applies in both IACs and NIACs.396 Lastly, although it will also apply in the case of a PMSC which has been hired by an organization, it is unclear how far up the corporate ladder this responsibility could extend.397

395 Art. 7(3) UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993; See also art. 28 Rome Statute of the International Criminal and art. 86-87 AP I.
397 J. WILLIAMSON, supra note 79, 189.
In the case of human rights violations by individuals, it is harder to demonstrate responsibility as human rights law’s main purpose is to regulate State behaviour. Nonetheless, individual criminal responsibility can occur for gross human rights violations (such as genocide and crimes against humanity, supra). Also, any violation of national or international law can trigger the responsibility of both State and individual. Thus, individuals can not only be held responsible for breaching national laws, they can also be held responsible for an act which already induced State responsibility.398

Given the options in place to hold individuals responsible, the question can be asked why private military and security actors appear to operate in a sphere of impunity. GILLARD has identified four reasons. Firstly, PMSCs and their staff may have been granted immunity from prosecution by the courts of the states where they operate. Secondly, the judicial system may have stopped working in certain conflict ridden countries. Thirdly, third states may be simply incapable to exercise extraterritorial jurisdiction. Finally, given the areas they operate in, evidence of PMSC violations might be hard to acquire.399

In conclusion, individuals such as contractors can be held responsible for violating national and international law. The problem isn’t the supposed existence of a legal vacuum in which PMSC operate, but the lack of political will to deal with these contemporary mercenaries in a way which maximises respect for IHL and IHRL, a situation which is further complicated by the transnational nature of these companies.

Title 2. Responsibility of corporations

Private corporations are not the subject of international law (except for the unlikely case that they would be parties to an armed conflict400).401 Only municipal law can hold PMSCs responsible for breaches.402 For this reason, no international tribunal has been granted jurisdiction over corporations yet; the responsibility of corporations for international crimes has not yet been established. Only indirect, through the implementation of national law, can they be held responsible. For example, statement 22 of the Montreux Document recalls the existing obligation of PMSCs to “comply with international humanitarian law or human rights law imposed upon them by applicable national law”.403

Here also, the lack of political will prevents the existence of an optimal framework which ensures direct responsibility of corporations for violations of international law.404 Several options are available to ensure accountability. Firstly, facilitating transnational litigation against PMSCs in domestic courts could be one possible way to provide

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399 E.-C. GILLARD, supra note 70.
402 L. STENNER, supra note 275, 13.
remedy for aggrieved victims. Secondly, commentators have suggested to impose the obligation on States to add human rights clauses in their contracts with PMSCs.\textsuperscript{405} Thirdly (although an unlikely route), implementing these corporations as State agents would make human rights obligations binding on them.\textsuperscript{406} Lastly, it has been proposed to write human rights obligations in the licensing framework overarching PMSCs.\textsuperscript{407}

Title 3. Responsibility of the hiring State

In order to evaluate to what extent States can be held accountable for violations committed by PMSCs and their employees, several sources will be mentioned here.

Firstly, there is art 1 GC which obliges States to ensure respect for the Conventions (and IHL in general) “in all circumstances”. Thus, as states have undertaken duties in IHL, these duties cannot be avoided by outsourcing them. Art 1 GC implies that PMSCs hired by States have to be instructed in IHL.\textsuperscript{408} Thus, in case of a violation of IHL by a contractor which results from this lack of training, the Hiring State can be held responsible. Also, the Geneva Conventions impose on States the obligations to prosecute war crimes which might have been committed by contractors they have hired.\textsuperscript{409}

Secondly, there is art 3 of the Fourth Hague Convention of 1907 and art 91 of AP I. These articles clearly posit that states are responsible for all violations of IHL committed by their organs (such as their armed forces). Consequently, if a contractor is incorporated in the armed force of a State, then the State will be responsible for his conduct.

Thirdly, there are the International Law Commission’s Draft Articles on State Responsibility for Internationally Wrongful Acts 2001 (hereinafter Draft Articles)\textsuperscript{410}. These articles, which are mainly a codification of customary international law (despite not being adopted yet, it is an authoritative source), are particularly relevant in a discussion of State responsibility for the conduct of PMSCs and/or their employees. The following rules determine in which scenario conduct can be attributed to a State:

\textit{Article 4. Conduct of organs of a State}

1. 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 organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.


\textsuperscript{406} L. CAMERON, \textit{supra} note 4, 574.

\textsuperscript{407} Ibid.

\textsuperscript{408} See also art 127 of GC III and art 144 of GC IV.


Article 5. Conduct of persons or entities exercising elements of governmental authority

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 that State to exercise elements of the 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.

These articles contain a *de jure* test to determine whether a links exists between the State and a private actor. Because of their high degree of formality, they will rarely apply in the case of PMSCs.\(^{411}\) It would require a PMSC constituting the armed forces in the sense of art 43 AP I. A *de facto* test can be found in the following article:

**Article 8. Conduct directed or controlled by a State**

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.

This article offers the possibility to link acts to a State, depending on its factual link with private parties but regardless of the nature of the performed services. The commentary on this article makes it clear that any scenario in which “States organs supplement their own action by recruiting or instigating private persons or groups who act as “auxiliaries”, while remaining outside the official structure of the State” will pass the test of art 8.\(^{412}\) On this, it has been pointed out that in some cases contractors are authorized to “stop, detain and search” civilians.\(^{413}\) Consequently, any violation during these acts will be attributed to the hiring State.\(^{414}\) Whether the conflict is an IAC or a NIAC is irrelevant for the application of articles 4-5 and 8 of the Draft Articles. Once a link has been established according to these Draft Articles, the responsible State is under an obligation “to make full reparation for the injury [material or moral] caused by the internationally wrongful act”.\(^{415}\) Lastly, as the Draft Articles only apply to States, International Organisations are not covered, neither are private organisations. However, the International Law Commission's Draft Articles on the Responsibility of International Organisations 2011 tries to introduce a similar responsibility of international organisations for conduct of an organ or agent of that organization.\(^{416}\)

The last major source on the attribution of conduct to States is the Customary International Humanitarian Law study, which has identified the following rules as norms of international customary law:

**Rule 147**

A State is responsible for violations of humanitarian international law which can be attributed to it, including:

(a) Violations committed by its organs, including its armed forces;

(b) Violations committed by persons or bodies capacitated by the State to exercise government authority;

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\(^{411}\) L. STENNER, *supra* note 275, 5.

\(^{412}\) Draft Articles, 104.

\(^{413}\) A. FAITE, *supra* note 122.

\(^{414}\) See also art. 29 GC IV.

\(^{415}\) Art. 31(1) - (2) Draft Articles.

\(^{416}\) Art. 6(1) Draft Articles on the responsibility of international organizations, International Law Commission, 63rd session, 2001.
(c) Violations committed by persons or groups acting under the instructions of the State, or under its direction or control; and

(d) Violations committed by private persons or groups which it acknowledges and adopts as its own conduct.  

It is worth mentioning here that the Montreux Document also deals with this topic (supra, chapter three) as it contains 27 statements recalling the main international legal obligations of states under IHL, IHRL and rules of State responsibility with respect to operations of PMSCs. For example, statement one reaffirms that states retain their obligations under international law, even if they outsource activities to PMSCs. Statement four on the other hand recalls the obligation of States to take “measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel”.  

Lastly, even if the act which is a breach of IHRL cannot be imputed on a State, State responsibility may be triggered if the harm done is a result from failing its duty to exercise due diligence. Some argue that provisions such as art 1 GC impose on States such a duty.  

Exercising due diligence could for example imply the assurance that the aggrieved person has the right to an effective remedy. Lastly, an expert meeting on private military contractors has observed that the obligation of due diligence rests not only on the Hiring State, but also on the State where the PMSC is operating and the State in which the PMSC is incorporated.  

Title 4. Conclusion

This chapter made clear that there are rules in place to provide victims of violations of IHL and IHRL remedies. Any individual in armed conflict, regardless of his status, has rights and obligations. Furthermore, they can be held accountable for grave breaches of the laws applying in armed conflict. States on the other hand are subject to several provisions which can hold them responsible for the conduct of non-state actors. Whether the act is attributable to the State is not always relevant. Lastly, corporations cannot (yet) be held accountable under international law. To end this deplorable situation, political support must be gathered.

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Conclusion and recommendations

This master thesis investigated the legal status of mercenaries in armed conflict. By analysing the laws applicable to these actors, it attempted to provide an answer to the question whether or to which extent these actors operate in a legal vacuum. Looking at private actors engaging in armed conflict, it soon became clear that a distinction can be made between ‘traditional mercenaries’ and ‘contemporary mercenaries’ (employees of private military and security companies, contractors). While the former category has been active in wars since the dawn of men, the latter only appeared recently on the international stage. Due to the high level of organization of Private Military and Security Companies, their seemingly unlimited resources and their ability to provide a wide variety of services, they have become a major player in armed conflicts.

By analysing the international instruments containing mercenary provisions, it became clear that their restrictive ‘mercenary’ definitions rarely apply to private actors active in armed conflict. In the unlikely scenario in which a private actor meets all the requirements of the definition, he can be denied combatant and prisoner of war privilege. Furthermore, the OAU and UN Mercenary Conventions contain several international offences tied to the act of mercenarism. Given the characteristics of contractors, these actors are even less prone to meet all the (flawed) criteria of the mercenary definition than traditional mercenaries. It has also been observed that the two conventions only have limited support.

After concluding that the weak and incomplete Mercenary Conventions and art 47 AP I are not suited to deal with contractors, this legal analysis also looked at recent initiatives exclusively dealing with Private Military and Security Companies. As a result of the political view of many states, none of the initiatives propose a ban: they either offer guidance for states or the industry, recall existing legal obligations or they propose a limitation on the activities for which contractors can be hired. As the Swiss initiatives contain no new binding obligations, their biggest contribution has to be sought in the facts that they set higher standards for the industry, the fact that they raise awareness about this industry and the fact that they provide a basis for future conventional instruments. Lastly, only the UNWG initiative proposed a ban on the outsourcing of certain State functions. Despite being an excellent proposal (as these activities cause the most breaches of IHL and IHRL), it has faced opposition from many Western States.

After ascertaining the inapplicability of the mercenary provisions and the lack of binding obligations aimed at PMSC-employees, the analysis turned to International Humanitarian Law. After all, these are the laws applicable in situations of armed conflict.

In the scenario of an international armed conflict, several observations can be made. Contractors will enjoy combatant privilege in two scenarios. Either the PMSC constitutes the armed forces of a State by being placed under a command responsible to the State or they can be considered as a militia linked to a State. This would entail several consequences such as enjoying prisoner of war status, the right to participate in hostilities and enjoying immunity from prosecution for merely doing so. However, looking at the criteria and the factual situation of PMSCs reveals that contractors will rarely be entitled combatant status. Thus, they will mostly be considered a ‘civilian’ as
understood in IHL. This means that they are not allowed to directly participate in hostilities; doing so will strip them from their immunity from direct attacks. Also, if the relevant criteria are met, contractors can be considered a ‘civilian accompanying the armed forces’. This category of actors enjoys the privilege of prisoner of war; however, they are not allowed to directly participate in hostilities. Lastly, any actor taking a direct part in hostilities while not enjoying combatant privilege will be considered an ‘unprivileged combatant’. This category also includes ‘mercenaries’ in the sense of art 47 AP I. Unprivileged combatants do not enjoy immunity from attack, nor can they enjoy prisoner of war status. They will be entitled to the protections of GC IV (if they meet the nationality criterion), the minimum guarantees of art 75 AP I, the guarantees of common art 3 to the Geneva Conventions and non-derogable human rights.

In the scenario of a non-international armed conflict the status of combatant and prisoner of war do not exist. Anyone who is not a member of State armed forces or organized armed groups of a party to the conflict enjoys protection against attack, unless he directly participates in hostilities. Art 3 Common to the Geneva Conventions and AP II are applicable in these armed conflicts. While the former contains the essential rules of the Geneva Conventions, the latter contains a basic protective treatment for anyone who is captured or no longer taking part in hostilities. These rules are further supplemented by human rights law and customary international law containing protections awarded to actors in NIACs.

Lastly, a brief look at the rules on responsibility for unlawful conduct revealed that there are gaps, but these are not big enough to speak of a ‘legal vacuum’. There are plenty of rules in place to induce State responsibility (e.g. Draft Articles) or individual responsibility (e.g. war crimes). The biggest gap lies in the sphere of corporations, as these are not the subject of international criminal law.

Based on the above analysis, the following observations can be made:

**Issues:**
- It cannot be said that PMSCs operate in a legal vacuum, there is a legal framework in place. However, it contains grey zones and loopholes; not all rules are straightforward to apply. The UNWG Draft aims to resolve some of these issues. IHL provides plenty of rules governing the activities of contractors and the States hiring them.
- The main issues are the lack of oversight, transparency and accountability. This erodes the State monopoly on violence. Also, victims of violations are often situated in a region without a working government apparatus.
- The outsourcing of functions which might end up in direct participation in hostilities blurs the distinction principle, which in turn undermines IHL.
- Enforcement mechanisms dealing with violations of contractors are lacking.

**Reasons:**
- Over the past decades, PMSCs have been increasingly used by governments as they are a handy tool. Nonetheless, because the privatization of force is a recent phenomenon, the major international instruments have not anticipated it.
- National legislation dealing with these companies is rare.
- Conflicting views of States.
Solutions:

- The concept of DPH can be a valuable tool in the discussion on the State monopoly of violence and the limits of outsourcing. Furthermore, only allowing direct participation in hostilities if the contractor has been incorporated in the armed forces of a State has several benefits: next to being under control of the military apparatus, insight on their status would improve a lot.

- Unlike mercenaries, PMSCs should not be prohibited as they have great potential. For example, they are a valuable tool in peacekeeping operations, especially because governments are not eager to send their own troops.

- While dealing with these issues at the national level (e.g. licensing) is easier and faster, an international approach is also definitely needed given the transnational nature of this industry. Unfortunately, this route is slower and requires consensus.

- A worldwide ban on mercenarism should be in place; countries should ratify the UN 1989 Convention.

- Instruments of self-regulation are not binding. However, they raise industry standards and they require little resources from states.

- Any attempt at a coordinated and tailor-made instrument should occur in dialogue with the industry.

- As war torn states are unable to cope with this new category, Western countries should take the lead in kick-starting initiatives which enhance oversight, transparency and accountability as well as clarifying the status of contractors under IHL.
Dutch summary

Particuliere militaire en beveiligingsbedrijven die zogenaamde ‘contractors’ tewerkstellen zijn sedert de laatste twee decennia steeds meer aanwezig in gewapende conflicten. Desondanks het feit dat huurlingen al millennia in conflicten meevechten, vormen deze moderne strijdkrachten een ongezien probleem op vele vlakken. Elk jaar verschijnen er wel enkele berichten in de media van mensonterende praktijken, het beschieten van burgers, ‘contractors’ die gelyncht worden door de plaatselijke bevolking, enz. Vooral op het vlak van aansprakelijkheid en het statuut van deze actoren rijzen er vele vragen. Hier en daar wordt er zelfs geopperd dat deze personen in een wettelijk vacuüm opereren. Deze masterproef heeft aangetoond dat hiervan geen sprake is. Niettegenstaande zijn er vele onduidelijkheden en aspecten van het recht die verbeterd kunnen worden.


Na vastgesteld te hebben dat de verouderde huurlingen-bepalingen ongeschikt zijn om de rechten en plichten van ‘contractors’ te duiden werd er in hoofdstuk drie naar recente initiatieven gekeken die specifiek gericht zijn op de moderne huurling. Hier werd duidelijk dat de twee Zwitserse initiatieven geen verbod inhouden op het gebruik van ‘contractors’: ze geven richtlijnen aan zowel overheden als de private militaire en beveiligingsindustrie, ze herhalen bestaande wettelijke verplichtingen of ze stellen beperkingen op de soort diensten die uitbesteed kunnen worden. Gezien de Zwitserse initiatieven geen verplichtingen bevatten moet hun grootste meerwaarde onder meer gezocht worden in het feit dat ze de kwaliteit van de industrie bevorderen en dat ze een basis vormen voor toekomstige initiatieven. Enkel het voorstel van de V.N.-werkgroep omtrent huurlingen bevat een verbod op het uitbesteden van bepaalde overheidsfuncties. Jammer genoeg kan het voorstel op niet veel bijval rekenen.

dit wel zouden doen verliezen ze hun bescherming tegen directe aanvallen. Bovendien bestaat er ook nog de mogelijkheid dat ze voldoen aan het statuut van ‘burger die de gewapende troepen vergezelt’. Hoewel personen met dit statuut wel genieten van het krijgsgevangene-privilege hebben ze geen recht om deel te nemen aan vijandigheden. Tenslotte is er de categorie van ‘onwettige strijders’. Deze heeft echter geen basis heeft in het internationaal humanitair verdragsrecht; het is een creatie van de rechtsleer en rechtspraak. Tot deze categorie behoren de traditionele huurlingen, alsook elke persoon die deelneemt aan vijandigheden zonder dat hij het recht hiervoor heeft. Personen die onder deze categorie vallen hebben recht op de beschermingen van de Vierde Conventie van Geneve (indien aan het nationaliteitsvereiste voldaan is), alsook op de minimumbeschermingen van art 75 Eerste Aanvullend Protocol, gemeenschappelijk artikel 3 van de Conventies van Geneve en de onvervreemdbare mensenrechten.

In de situatie van een ‘non-international armed conflict’ bestaan de statuten van krijgsgevangene en strijder niet. Eenieder die geen deel uitmaakt van de gewapende troepen van een land of van een georganiseerde gewapende groep van een partij in het conflict geniet bescherming tegen directe aanvallen. Ook hier vervalt dit recht indien het individu rechtstreeks deelneemt aan de vijandigheden. In deze gewapende conflicten zijn er vier bronnen die rechten en plichten bevatten: gemeenschappelijk artikel 3 van de Conventies van Geneve, het Tweede Aanvullend Protocol bij deze conventies, de mensenrechten en tenslotte internationaal gewoonterecht.

In het laatste hoofdstuk werd gekeken naar de regels omtrent verantwoordelijkheid voor overtredingen van het internationaal humanitair recht en van de internationale mensenrechten. Hier werd duidelijk dat vooral de aansprakelijkheid van bedrijven (zoals particuliere militaire en beveiligingsbedrijven) problematisch is aangezien deze entiteiten niet het onderwerp vormen van het internationale strafrecht.

Tenslotte geeft de masterproef een summier overzicht van de meest pertinente problemen als gevolg van deze privatisering van oorlogsvoering, de oorzaken hiervan en mogelijke oplossingen hiervoor. Uiteindelijk werd er geconcludeerd dat er geen sprake is van een wettelijk vacuüm, maar dat er wel nood is aan een gecoördineerde aanpak op zowel nationaal als internationaal vlak waarbij er een regime van controle en overzicht in het leven geroepen wordt zodat schendingen van het internationale recht minder frequent voorkomen en zodat actoren die aansprakelijk zijn hun straf niet ontlopen.
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