

Chapter 7 — Private military companies under international humanitarian law

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Private military companies (PMCs) frequently operate in situations of armed conflict, whether international or non-international. They are sometimes hired by a state party to a conflict, less often by a non-state party to an internal armed conflict or by a company seeking to protect its operations in a country where a conflict is taking place. Although PMCs are a relatively new phenomenon, the participation in armed conflicts of persons that are not officially members of the regular armed forces is far from new. International humanitarian law (also known as the “law of war” or the “law of armed conflict”) has extensive rules relating to such persons, whether it be their status and treatment upon capture, the use of force by or against them as well as state or individual responsibility for their actions.

Though there is specific reference to mercenaries in international humanitarian law (IHL), there is no such reference to PMCs either in IHL treaties nor are they specifically regulated in customary international law. It is true, then, to say that there is no discrete regulation of PMCs as such, but not accurate to say that there is no law applicable to them at all. Depending on the circumstances, specific aspects of established law will apply. Some issues, however, remain unclear in the law, which future state practice may resolve.

This chapter will examine existing law and its application to PMCs. Certain issues commonly raised when considering regulation are not actually relevant to IHL. These are, in particular, the name of the company — in particular whether it calls itself a private military or a security company — and whether such companies are involved in so-called “offensive” or “defensive” operations.¹ Any attempt at differentiating between companies on this basis would be counter-productive for IHL. Therefore this chapter will explain the rationale of the relevant parts of IHL in order to have a better sense of how unresolved issues could or should be settled in a way that is coherent with the philosophy of this body of law. First it is necessary to examine the fundamental issue of which persons are entitled to take part in conflict and benefit from certain privileges when captured. In this context the issue of mercenaries will be discussed. The chapter then turns to the situation of PMC employees considered to be civilians and what this means from the point of view of possible attacks on them as well as treatment on capture. Finally the issues of state and individual criminal responsibility that are peculiar to international humanitarian law will be briefly addressed.²

¹ See, e.g., Protocol I of 1977 additional to the 1949 Geneva Conventions (Additional Protocol I) art. 49, which describes “attacks” for the purpose of IHL as “acts of violence against the adversary, whether in offence or defence”.

“Combatants” and “civilians”

International humanitarian law makes a fundamental distinction between members of the armed forces and civilians. The purpose of this distinction is not only to limit civilian casualties, but also to reflect an important facet of traditional interstate relations: members of the army are organs of state and, when captured, are expected to benefit from this official status. Hence, like diplomats, they may not be subjected to prosecution by the capturing state for taking part in the conflict. In particular, they may not be tried for activities normally associated with the conflict — namely killing, inflicting grievous bodily harm, carrying firearms, and so on. This is what “prisoner-of-war status” means. This privilege, which stemmed from being a state official, historically did not apply to any civilians.³ Additionally, the concept is not part of the law governing non-international armed conflicts, because conflicts between a government and rebels or between rebels do not have this interstate character.

Major powers have always sought to keep prisoner-of-war (POW) status limited to the official army as, by definition, they had large powerful armies and did not want to favour guerrilla activities. Smaller countries, however, and others who perceive themselves to be at a military disadvantage, have regularly resisted this. The first significant argument over this occurred during the first attempt, in 1874, to codify in treaty form the rules regulating POW status.⁴ The result of this effort was adopted at a later conference in 1899.⁵ It was a compromise enabling certain groups that do not officially belong to the army, as well as civilians spontaneously resisting an invading army, to benefit from POW status. The argument of the weaker nations was that they had the right to resist invasion and that persons genuinely fighting for their nation should not be tried as common criminals. The rules thus adopted remained with minor adjustments until the negotiation of the first Additional Protocol to the 1949 Geneva Conventions. This conference, which began in 1974, plunged into arguments identical to the ones fought a century earlier, only this time it was newly created states that wished to relax the rules in order to give POW status to persons fighting for independence from colonial powers. The issue was the same: persons at a military disadvantage fighting for their nation should not be treated as common criminals. The rules were further adjusted to enable persons fighting in an occupation-type situation to benefit from this status, primarily by relaxing the requirement that a uniform must be worn. A complication that arose during the Protocol negotiations was the desire by newly-independent African states to outlaw POW status for mercenaries. Their experience

² On state responsibility and PMCs generally see chapter eight in this volume by Chia Lehnardt.

³ This was first changed in 1899, as will be explained below.

⁴ Arts. 9-11 of the Project of an International Declaration concerning the Laws and Customs of War, Brussels conference, 1874. This document did not enter into force as a treaty.

⁵ In arts. 1 and 2 of the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention II of 1899 and repeated in the same Articles of the Regulations annexed to Hague Convention IV of 1907.

was that such persons undermined those fighting for independence and that mercenaries by definition do not fight for their nation but for personal gain. Therefore, in the view of these African states, there was no moral reason why mercenaries should have such status. The result of the discussion was a new provision denying entitlement to POW status to mercenaries, together with a strict definition.

The Third Geneva Convention in 1949 already included extra categories of civilians that are entitled to POW status. These were essentially persons associated with the army in one form or another but who were not actual combatants.⁶ The decision to accord POW status in this context was primarily to ensure decent treatment of persons thus captured — that is, the same treatment as that was hitherto enjoyed by prisoners of war.

In addition to protecting the standing armies of states, an additional purpose of the distinction between the armed forces and civilians was to limit civilian casualties. For this purpose, it was traditionally understood that, with minor exceptions, members of the armed forces are “combatants”. This means that they are entitled to take part in hostilities (with the privilege of POW status) and may also be directly targeted by the adversary. Other persons — civilians — may not be targeted by the adversary, unless they “take a direct part in hostilities”. What this expression means, precisely, and whether certain members of PMCs can be seen as falling into this category, will be discussed further below.

The increasing use of PMCs raises three fundamental questions. First, can they be combatants and therefore both use force and be targeted? Secondly, are they entitled to POW status? Thirdly, even if considered civilians, can they be targeted? The answers to these questions affect not only the treatment of such persons during hostilities and when captured, but also state responsibility for their actions. The legal provisions that developed as a result of the concerns explained above do not articulate those concerns but are written in the form of factual conditions. Many of the discussions that have begun to take place in relation to unclear issues often reflect views that are based not only on the letter of the law but also on doubts as to whether PMCs ought to benefit from provisions that were not developed with such companies in mind.

Prisoner-of-war status

The question of whether PMCs are entitled to prisoner-of-war status is relevant only to PMCs operating in an international armed conflict, including occupation of one state by another’s armed forces. The question of whether PMCs benefit from combatant or POW status is complicated by the fact that those states that have not ratified Additional Protocol I of 1977⁷ are still bound by the rules as they are set out in the Third Geneva Convention of 1949. Both of these treaties’ provisions need to be analysed.

⁶ This is explained further below in the section on “Non-combatants entitled to POW status”.

Combatants

Under Article 4 of the Third Geneva Convention, persons belonging to three categories of groups are entitled to POW status as a result of recognition of their right to use force. The first category embraces “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”.⁸ The same Article makes it clear that armed forces belonging to a government not recognized by the capturing state are nevertheless covered by this provision.⁹ If PMCs are formally incorporated into the army, then there is no doubt they would be covered by this provision. However, this is typically not the case as the purpose of hiring such companies is often to avoid the various employer’s responsibilities that members of armies and their dependents enjoy.

A second category includes “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces”.¹⁰ This is clearly irrelevant for PMCs.

The third and most relevant category is defined as follows:

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, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.¹¹

This provision actually contains five conditions. The first, belonging to a party to the conflict, presupposes some link with the state for which the group is fighting, although it is not part of that state’s army.¹² The sort of link that is required is important when

⁷ 29 states have not yet ratified this treaty; the most significant are Afghanistan, India, Indonesia, Iran, Iraq, Israel, Pakistan, Turkey and the United States.

⁸ Third Geneva Convention 1949, art. 4.A(1).

⁹ *Ibid.* para. 3.

¹⁰ *Ibid.* art. 4.A(6)

¹¹ *Ibid.* art. 4.A(2).

¹² The addition of a specific reference to resistance movements in occupied territory in 1949 was motivated by the contribution of such movements during the Second World War.

establishing whether PMCs could benefit from this provision. The wording of the 1949 text reflects the desire at the negotiating conference to give the benefit of POW status to resistance movements in occupied territory, an important factor in the Second World War. However, the entire provision is not limited to such resistance movements. The International Committee of the Red Cross (ICRC) commentary to the meaning of the words “belonging to a party to the conflict” states that “It is essential that there should be a *de facto* relationship between the resistance organization and the party [to the conflict], but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting”.¹³

It should be noted that this provision is very similar to the one agreed to in 1899 and incorporated into the Hague Regulations of 1899 and 1907, which did not refer to resistance movements. That provision did not specify “belonging to a party to the conflict” but only reproduced the other four conditions.¹⁴ Commentators to these texts have made it clear that the wording was intended to allow the granting of POW status to groups without formal authorization by the government, which had previously been required.¹⁵

This background makes it abundantly clear that a PMC is not precluded from falling within this provision because it is not part of the army or does not have a formal authorization from the state. In practice, many PMCs that are hired by a state do have a card that confers a certain recognition and, in this author’s view, should satisfy the existence of a *de facto* link.¹⁶ Less clear is the case of PMCs that are sub-contracted by another company.

As regards the other conditions, they could in principle be respected by PMCs if they choose to operate in this fashion. Typically, however, they do not. The first condition presupposes that the head of the group both commands and accepts responsibility for wrongdoings of subordinates.¹⁷ The second requires some sort of uniform, although it does

¹³ Jean S. Pictet (ed.) *Commentary, Geneva Convention relative to the treatment of prisoners of war*, (Geneva: ICRC, 1960), p.57.

¹⁴ Hague Regulations, 1899 and 1907, art. 1.

¹⁵ *Ibid.* and L. Oppenheim *International Law Vol. II*, 7th ed. (Harlow: Longman, 1952), para. 80, pp.256-257.

¹⁶ The US Department of Defense has issued cards with its logo on them and a text stating that the individual concerned is a DOD contractor, according to a PMC representative in a meeting convened in 2005 by the University Centre for International Humanitarian Law (renamed in October 2007 “Geneva Academy for International Humanitarian Law and Human Right”) as part of an effort undertaken by the Swiss Foreign Ministry to achieve a suitable regulation of PMCs. The meeting comprised specialists in international humanitarian law, including military legal advisers, as well Foreign Ministry personnel, from several countries. The meeting took place under Chatham House Rules in order to enable free discussion. Report on Expert meeting on private military contractors : status and state responsibility for their actions; organized by the University Centre for International Humanitarian Law, Geneva, 29-30 August 2005, section B.1.a); www.ucihl.org/communication/Private_Military_Companies_report.pdf.

¹⁷ This issue will be looked at more carefully below.

not need to be a full one. The third is self-explanatory. The fourth assumes that the group will normally act in accordance with the basic provisions of international humanitarian law — clearly this would require either some training in this law or general respect of its provisions by the group.¹⁸ It is not at all self-evident that this is the case for most PMCs.

Before moving on to what would be the status of members of PMCs if they do not fall into this category of the Third Geneva Convention, their situation under Additional Protocol I needs considering. At present 164 states are party to this treaty. The Protocol spells out which persons are to be considered combatants and which of these are entitled to POW status. The most significant change from the 1949 Geneva Convention is that there is no longer a difference, for the purposes of combatant status, between the regular armed forces and other armed groups. The relevant provision is Article 43, which reads as follows:

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

Article 44 specifies that any combatant, as defined in Article 43, who falls into the power of an adverse party shall be a prisoner of war. This provision goes on to specify that combatants are required to distinguish themselves from the civilian population with some sort of external sign; where this is not possible, combatants must carry their arms openly during the preparation and commission of each military engagement. If they do not do so, they forfeit their right to POW status.

There is no unanimity amongst specialists in IHL of whether members of PMCs could be entitled to POW status by virtue of these provisions.¹⁹ One view is that the terms “belonging to a Party to the conflict”, or “under a command responsible to [a Party to the conflict]” requires the state concerned to be able to have criminal jurisdiction over such forces. However, this is frequently not the case. An even narrower interpretation of these provisions is that the members of the PMCs need to be within the army’s chain of command. This interpretation would require the state to formally incorporate a PMC into its armed forces by adopting domestic legislation which places the PMC under the command of the state’s armed forces.²⁰ Under such an interpretation PMCs, as presently

¹⁸ See Pictet, *Commentary*, (footnote 13 above), p. 61

¹⁹ This was abundantly clear during a discussion of this issue in the expert meeting on PMCs (footnote 16 above).

²⁰ Michael N. Schmitt, “War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by

used, would not fall within these provisions.

Another view, which this author shares, is that such formal incorporation is not required. This is because Article 43 was intended to be a fusion of Article 4.A(1) and (2) of the Third Geneva Convention — that is, that the “militias and volunteer corps” which do not formally belong to the army are considered to be “armed forces” for the purpose of combatant status. These “militias and volunteer corps” were meant to be groups that are not necessarily officially authorized by the government and are not part of the formal army. A Commentary written by participants at the diplomatic conference states that Article 43 was aimed at including as “armed forces” all groups which have some sort of factual link to the regular armed forces “if the independent force acts on behalf of the party of the conflict in some manner and if that party is responsible for the group’s operations”.²¹

It is clear that if a PMC is hired by a belligerent state, it is acting “on behalf of the party to the conflict”. The crucial issue is whether the group is “responsible” to the state. “Militias and volunteer corps” were not part of the army and not subjected to the normal chain of command. Such a condition would therefore exceed what both the Third Geneva Convention and the Additional Protocol require for combatant (and therefore POW) status. Presumably there would be a form of responsibility to the state in that non-performance of the contract would result in liability in the form of breach of contract. Another issue is whether responsibility needs to include criminal jurisdiction by a state over such groups. This is not clear,²² although the negotiators of both these treaties probably presupposed that this was so because typically such groups would have consisted of persons of their nationality fighting for their country. This is not necessarily the case for PMCs. Not only may its members not be of the hiring state’s nationality, but also the group itself could be incorporated in another state, or in a part of a state enjoying specific jurisdictional exemptions, precisely in order to escape its jurisdiction (primarily for tax avoidance purposes). This could also create difficulties for exercise of jurisdiction for breach of contract. If the hiring state could exercise jurisdiction, whether civil or criminal, then the PMC could be more easily seen as being “responsible” to the party to the conflict.

If the members do fall within the category of combatants, then the remaining condition under the Protocol to benefit from POW status would normally be the wearing of a uniform (unless they happen to be fighting for an occupied state’s forces, in which case carrying arms openly would suffice).

Private Contractors or Civilian Employees”, *Chicago Journal of International Law*, vol. 5, no. 2 (winter 2005), pp. 511.

²¹ Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff Publishers, 1982), p. 234.

²² Commentaries to Additional Protocol I do not address this directly (Bothe et al., *New Rules*, footnote 21 above) and that of the ICRC: Y. Sandoz, C. Swinarski, B. Zimmermann (eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), pp. 511-513.

Mercenaries

Even if PMCs could be seen as part of the “armed forces” (within the meaning of Additional Protocol I) or “militias or volunteer corps” (within the meaning of the Third Geneva Convention), they might still face the problem of falling within the definition of a “mercenary”.

Two international treaties provide that mercenaries are not entitled to POW status, the most significant of which is Additional Protocol I of 1977.²³ Article 47 defines a “mercenary” as 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.

As all these conditions have to be met, the definition is very narrow. Two of these requirements are the most problematic for PMCs.²⁴

The first is the requirement to be “recruited to fight”. It is not necessarily the case that a PMC considers that it is “recruited to fight”, even if its members end up doing so, when the contract specifies that it is to guard a place or installation or to provide military training. A logical approach to this issue, from the point of view of IHL, would be that, whatever the contract might state, PMCs should be seen as being “recruited to fight” if they are to defend a military objective against enemy forces — as opposed to being able to use force merely in self-defence and in defence of the object against common criminals. In this regard, whether the operations are seen as “offensive” or “defensive” makes no difference provided that the activity falls within an armed conflict situation and with sufficient nexus to the conflict itself. The rules of engagement issued to the PMC would be important here. Even if the contract is stated to be merely one of training military personnel, what is important is the actual activity undertaken. It has been stated, for example, that a US company, MPRI, essentially planned and commanded military operations for Croatia

²³ The other one is the OAU Convention for the Elimination of Mercenaries in Africa 1977. Both this convention and the 1989 UN Convention Against the Recruitment, Use, Financing, and Training of Mercenaries make mercenarism a crime.

²⁴ See Report on PMCs, (footnote 16 above), section B.3.(a).

during its war with Serbia, although the contract stated that the firm was to provide training in civil-military relations.²⁵

A second issue is the condition of being “neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict”. It is not at all clear whether this condition applies to the PMC’s state of incorporation (in which case all its members would be treated as having that nationality) or the nationality of the individual member or both. When the Protocol was adopted PMCs were not an issue. A commentary to Article 47 notes that in 1977 it was “implicit in both custom and conventional international law that the combatant’s privilege and entitlement to prisoner-of-war status did not extend to members of armed groups which operate essentially for private ends and do not belong to a Party” to an international armed conflict.²⁶ Although this statement shows that it may be possible to speak of a “mercenary company”, the point made in the commentary does not apply to a situation where a PMC is hired by a Party to the conflict because in this case the link with the state is clear, even if the company is incorporated in another state. Given this difficulty, another approach could be to consider only the individual’s nationality or residence so that certain members of a given PMC may be considered mercenaries and others not. In this hypothesis, a German working for a US PMC during the international conflict in Iraq would fall within Article 47, whereas his American and British co-workers would not.²⁷ Much will depend, therefore, on how states will actually implement this provision.

Finally, if a member of a PMC is captured by a state party to the OAU Convention on the Elimination of Mercenaries in Africa or the UN Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, he or she risks not only being denied POW status and therefore tried for national crimes such as murder and carrying of arms, but also being tried for the specific crime of mercenarism.²⁸

Non-combatants entitled to POW status

The Third Geneva Convention includes two categories of civilians that are entitled to POW status, the relevant one for our purposes being Article 4.A(4). This provision gives such status to:

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

²⁵ *Ibid.* Section B.3. (a) (iii). As one of the participants in this meeting put it: “none of the members of this PMC thought that they were hired to make PowerPoint presentations”!

²⁶ Bothe et al., *New Rules*, (footnote 21 above), p.268.

²⁷ Report on PMCs, (footnote 16 above), section B.3.(a) (i).

²⁸ The same is true for states that have included this crime in their national legislation whether or not they have ratified one of these treaties as the lack of POW status means that they are subject to any national crime.

labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card.

This category of persons reflects the fact that all armies, from time immemorial, have been accompanied by persons to supply its various needs, even though such persons are not part of the army. Typically, such persons did not have any fighting role. It is generally accepted that many PMCs will fall within this category of persons that supply armies with a service but are not expected to fight. Therefore, if members of PMCs are expected to fight, the general view is that they would not benefit from this provision.²⁹

The other issue is that since this provision speaks of “persons accompanying the armed forces”, it is not clear whether this means that members of the armed forces have to be physically present where the PMC is operating. However, if one looks at the purpose of the provision, rather than the literal wording, the better view is that the PMC will fall within this provision if it is providing some sort of service to the army and not merely performing a contract for the state.³⁰

Members of a PMC might, therefore, be entitled to POW status in an international armed conflict either as combatants or as persons accompanying the armed forces, but only if specific conditions are met and, in the case of combatants, if they do not fall within the definition of a mercenary.

Treatment of captured members of “civilian” PMCs

International armed conflicts

Persons that do not fall within the legal classification of “combatants” are “civilians” for the purposes of international humanitarian law, whatever their behaviour. Even if civilians take part in hostilities, they technically remain a “civilian”. This has been made crystal clear by Additional Protocol I which defines “civilians” as persons not members of the armed forces or fighters that have not been specifically listed as being entitled to prisoner-of-war status.³¹ Persons protected by the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War are those persons that are not covered by the

²⁹ There is a view in the US to the effect that PMC members would retain their POW status, provided that they conformed to the conditions in art. 4.A(2). The preponderant view, however, is that there is no basis for this and that this article cannot be interpreted in such a strange fashion. For a full discussion of this see Report on PMC’s (footnote 16 above), Section B.2 (a), and ICRC/Asser Institute Report, (footnote 58 below), Section VI.3.

³⁰ Report on PMCs, (footnote 16 above), Section B.2.(a).

other three Conventions — that is, they are not members of the armed forces or otherwise prisoners of war.³² Article 5 reinforces this interpretation by specifically referring to spies, saboteurs, and other persons undertaking activities hostile to the security of the state.

A major confusion that can occur is to label these persons as “unlawful combatants”, and thereby try to categorize them as falling outside both the Third and Fourth Geneva Conventions. The best study of why such a categorization is historically and legally incorrect remains that written by Richard Baxter back in 1951.³³ He explained why the reference to “unlawful combatants” by the US Supreme Court in *Ex parte Quirin et al*³⁴ (and decades later used by the US government for persons held in Guantánamo Bay after the conflict in Afghanistan) was based on a fundamental misunderstanding by the Court of the law of armed conflict. His analysis in that article is directly relevant today in relation to the debate surrounding whether members of PMCs should be seen as combatants that can benefit from POW status or whether they should be categorized as civilians. He pointed out that certain categories of persons — namely spies, saboteurs, and guerrillas — were not given POW status (for various reasons) even though states used such persons in armed conflict and did not consider this unlawful under international law. Therefore it was inaccurate to label such persons “unlawful” combatants and he preferred the term “unprivileged” — that is, without the privilege of POW status. As regards civilian PMCs, the question remains whether their participation in hostilities (whether in offence or defence) should not only have the effect of their members being “unprivileged” but also be seen as a violation of international law by the state hiring them. Generally-speaking this is not the case at present, except for the limited number of states that have ratified the OAU or UN Conventions.³⁵ However, there is some discussion as to whether states ought to adopt regulations that would make it clear that PMCs cannot be involved in hostilities. Either way, such civilian PMCs would not benefit from POW status.

Those that do not benefit from POW status under the Third Geneva Convention are protected by the Fourth Geneva Convention of 1949³⁶ unless they are nationals of a neutral state or a co-belligerent state that has normal diplomatic representation in the state in whose hands they are.³⁷ Given the number of nationalities found in PMC membership, some may well fall outside those protected by the Fourth Convention. However, such

³¹ Additional Protocol I, art. 50(1), defines as a “civilian” a person who does not belong to one of the categories of persons referred to in art. 4.A(1), (2), (3), and (6) of the Third Geneva Convention nor in art. 43 of Protocol I. These categories are further explained below.

³² Fourth Geneva Convention, art. 4(3).

³³ Richard Baxter “So-called ‘Unprivileged Belligerency: Spies, Guerrillas and Saboteurs”, *British Yearbook of International Law*, vol. 28 (1951), pp.324-345.

³⁴ *Ibid.*, pp. 320-331.

³⁵ OAU treaty (footnote 23 above) arts. 1 (2) and 6; UN treaty (footnote 23 above) art. 5.

³⁶ This is clearly stated in the ICRC Commentary to the Fourth Convention, Pictet (ed) *Commentary Geneva Convention relative to the Protection of Civilian Persons in Time of War*, (Geneva: International Committee of the Red Cross, 1958), pp. 50-51.

persons would still have the benefit of fundamental customary rules relating to the prohibition of torture, inhumane treatment, and hostage-taking, as well as the right to a fair trial.³⁸ Persons covered by the Fourth Geneva Convention are referred to as “protected persons”. The principal advantage is that if they are interned, they have, like POWs, protection stemming from the fact that their details must be registered with the Central Tracing Agency³⁹ and they have the right to be visited by representatives of the ICRC.⁴⁰ This may help prevent forced disappearance, torture, and inhumane treatment. They would similarly benefit from provisions enabling them to correspond with their families.⁴¹

Unlike POWs, they may be tried, of course, for national offences linked with their activities with the PMC and if this involved fighting they may well face charges of murder. In the case of occupation, the Fourth Convention does have certain restrictions on the use of the death penalty — in particular, occupation authorities may not reintroduce the death penalty if the occupied state had abolished it⁴² and should the death penalty be pronounced, it may not be carried out for at least six months.⁴³ However, it is unlikely that a PMC will be fighting for an occupied population and therefore in practice will have to rely on whatever human rights law relating to the death penalty is applicable to the state in question.

Members of PMCs may also be subject to internment without trial if “the security of the Detaining Power makes it absolutely necessary”⁴⁴ and are entitled to have such action reconsidered as soon as possible by “an appropriate court or administrative board designated by the Detaining Power for that purpose”.⁴⁵ It should be noted that reconsideration by a court is consistent with requirements under human rights law, but an administrative board would not be as it does not have the requisite independence. States bound by one of the human rights treaties would therefore have stricter obligations in this regard than those in the Fourth Geneva Convention.

One possible advantage of being a detainee under the Fourth Geneva Convention rather than as a POW is that a detainee “shall be released by the Detaining Power as soon

³⁷ Fourth Geneva Convention 1949, art. 4. Such persons were excluded because participants at the negotiating conference assumed that their country of origin would be able to protect them.

³⁸ These basic rights are codified in art. 75 of Additional Protocol I which applies to all persons in the power of the adversary in an international armed conflict.

³⁹ Fourth Geneva Convention, art. 140.

⁴⁰ *Ibid.* art. 143(5).

⁴¹ *Ibid.* arts. 68-77.

⁴² *Ibid.* art. 68 (2).

⁴³ *Ibid.* art. 75.

⁴⁴ *Ibid.* art. 42.

⁴⁵ *Ibid.* art. 43.

as the reasons which necessitated his internment no longer exist”,⁴⁶ whereas, with narrow exceptions, POWs may be kept until the end of active hostilities.⁴⁷

Non-international conflicts

There is no POW status in non-international conflicts and therefore any captured member of a PMC will be subject to national law unless the company benefits from an agreement with the state conferring on its members immunity from local courts.

International humanitarian law is less detailed as regards treatment of captured persons in non-international conflicts than in international ones. Unlike POWs or protected persons under the Fourth Geneva Convention, the ICRC does not have an absolute right of visit and the detaining state does not have a legal duty to send details of detainees to the Central Tracing Agency. In practice, however, both ICRC visits and such registration do occur as the ICRC has a “right of initiative” under Article 3 common to the Geneva Conventions⁴⁸ and in practice most states do allow it to undertake similar functions to those practised in international conflicts.

Both common Article 3 and Additional Protocol II provide for basic protective treatment of anyone captured or otherwise not or no longer participating in hostilities. This includes a prohibition of murder, torture, inhuman or degrading treatment, the taking of hostages, and the passing of sentences without a fair trial, as well as decent treatment in detention.⁴⁹ Neither document addresses the issue of detention for security purposes without a criminal procedure being envisaged. The applicable law, therefore, is that of human rights, in particular the right to take proceedings to check the lawfulness of detention (*habeas corpus*), in principle by a court or, at a minimum, by an independent body. For states not party to human rights treaties, the view of this author is that all persons are entitled, as a minimum, to an independent supervisory procedure⁵⁰ to ensure that

⁴⁶ *Ibid.* art. 132. Article 133 adds that in any event internment shall cease as soon as possible after the close of hostilities except in the case of persons subject to criminal proceedings or still serving a sentence.

⁴⁷ Third Geneva Convention 1949, art. 118.

⁴⁸ The relevant part of art. 3 reads as follows: “An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”.

⁴⁹ For a fuller description of fundamental guarantees applicable to all civilians and others not or no longer participating in hostilities, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I* (Cambridge: Cambridge University Press, 2005), pp. 299-383.

⁵⁰ See, e.g., the UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment 1988, Principle 11.3.

detention is not arbitrary, such detention being contrary to customary international law.⁵¹

May members of PMCs be attacked?

International armed conflicts

If members of PMC's are combatants in international armed conflicts,⁵² then there is no doubt that they can be specifically targeted for attack (unless they are *hors de combat*⁵³). As we have seen, however, members of PMCs are more likely in practice to be considered civilians under IHL. This does not necessarily mean that they are immune from attack as civilians who "take a direct part in hostilities" lose this immunity.⁵⁴ A difficult issue is to establish in which circumstances a civilian can be considered to be taking "a direct part in hostilities", other than in the simple scenario of the moment during which a person is in the process of using a weapon against the adversary.

In the context of an international armed conflict, it is clear that the persons whose conduct is to be analysed are those that are not "combatants". Article 51(3) of Additional Protocol I provides that: "Civilians shall enjoy protection [from attack] unless and for such time as they take a direct part in hostilities". The ICRC Commentary to this Article states 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. It is only during such participation that a civilian loses his immunity and becomes a legitimate target.⁵⁵

The Commentary also refers to the fact that during the negotiations, several delegations

⁵¹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (footnote 49 above), Rule 99, p. 344. See also the Report of the UN Working Group on Arbitrary Detention on the Situation of Detainees at Guantanamo Bay, 15 February 2006, UN Doc E/CN.4/2006/120.

⁵² I.e. they belong to a group described in art. 4.A(1), (2), or (6) of the Third Geneva Convention or art. 43 of Additional Protocol I.

⁵³ That is, they can no longer fight because they have surrendered, are sick, wounded or shipwrecked, have bailed out of aircraft in distress or have been captured.

⁵⁴ Additional Protocol I, art. 51(3). This is also recognized as a customary rule.

⁵⁵ Sandoz et al., *Commentary on the Additional Protocols*, (footnote 22 above), p. 619, para. 1944.

stated that the expression “hostilities” in this Article included “preparations for combat and return from combat”.⁵⁶

At first sight this might seem straightforward, but on closer inspection the terms are far from clear. Do “acts likely to cause actual harm to personnel and equipment” include loading bombs on aircraft, or providing co-ordinates for an attack? Could the causative link be even weaker? What do “preparations for” or “return from” combat include? What is clear is that mere participation in the war effort is not meant to be included.⁵⁷ During the research process for the study on customary international humanitarian law carried out by the ICRC, it became clear that state practice on these issues did not clarify what states consider “direct participation in hostilities” to include. Most state legislation and military manuals are silent on what behaviour warrants attack under this principle, and those which do give a view reflect differing positions. Some include such activities as acting as guards or intelligence agents or even providing logistical support in some contexts, whereas others limit the concept to acts of violence.⁵⁸ Attempts at arriving at some sort of comprehensive definition have so far proved futile as all possibilities, such as referring to “hostile activity” or “military activity” could be seen as either too broad or too narrow depending on the context.⁵⁹

In addition to the possibility of PMCs engaged in direct fighting in hostilities (which would clearly be considered to be direct participation), they also play a variety of supporting roles. Which of these could be considered “direct participation” becomes critical in evaluating whether members of PMCs can be attacked. If the support role of a PMC is of the nature described in Article 4.A(4) of the Third Geneva Convention (persons accompanying the armed forces), it would be difficult to see such activities as being “direct participation in hostilities” as this group is perceived as being civilian and benefiting from civilian immunity (with the possible exception of “civilian members of military aircraft crews”) although, being near the actual armed forces it risks being subject to collateral death or injury.

It would also be hard to envisage the use of force in personal self-defence or in defence of an object against common criminals as “participation in hostilities”. This is not so clear, however, if the object to be defended is considered to be a military objective. Also

⁵⁶ *Ibid.* at p.618, para. 1943.

⁵⁷ *Ibid.* at p. 619, para. 1945.

⁵⁸ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (footnote 49 above), commentary to Rule 6, pp. 22-23. As a result of this finding, the ICRC and the Asser Institute have begun a series of expert meetings to try to clarify the precise meaning of this notion. A summary of these meetings as well as a copy of the reports are available at the following website address:
www.icrc.org/web/eng/siteeng0.nsf/iwpList575/459B0FF70176F4E5C1256DDE00572DAA.

⁵⁹ For a summary of the difficulties in attempting a general definition beyond the direct use of violence i.e. use of weapons, see the Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, 23-25 October 2005, ICRC and TMC Asser Institute, p.6, available at [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf).

drawing the line between activities against common criminals, on the one hand, and hostilities on the other, would be particularly difficult in the case of defence of an object for an occupying state against persons using force in occupied territory.

This author would prefer the expression “direct participation in hostilities” to be narrowly defined in the context of international armed conflicts — that is, limited to acts of violence, given that combatants can be attacked and the purpose of the law is to avoid deliberate attacks on civilians. Civilians who choose to be in the vicinity of the armed forces take the risk of being “collateral damage” in any event. To widen the definition risks losing the impact of the principle of distinction which was so carefully included in Additional Protocol I.⁶⁰ If this results in an unrealistic protection of PMCs that in practice undertake what is recognizably military work (which is, after all their chosen profession), then, in this author’s view, the solution ought to be to categorize such PMCs as combatants, rather than weakening the protection of regular civilians.

Non-international armed conflicts

Additional Protocol II of 1977 repeats the same formula as Protocol I, namely, that “civilians shall enjoy protection [against attack] unless and for such time as they take a direct part in hostilities”.⁶¹ Yet the situation is far more complicated in non-international conflicts — precisely the sort of conflicts in which many PMCs find themselves. This is because civilians cannot be simply defined as persons that are not “combatants”. There is no official combatant status in non-international conflicts. The issue, therefore, concerns whether “armed groups” may be attacked as such, whatever the functions or activities of each of their members and at any time. If so, then this would certainly be wider than “direct participation” by civilians in international armed conflict situations. The alternative approach is to state that there is no difference between the two types of conflict as regards the meaning of “direct participation”: all persons that are not members of the state’s armed forces are to be considered as civilians and no civilian may be attacked unless he or she is directly taking part in hostilities, narrowly defined.

The theory that all members of armed groups are to be considered as valid targets for attack, whatever their individual function and whatever they are doing at any particular moment, does have a basis for support. Article 3 common to the Geneva Conventions gives specific protection to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*”. Additional Protocol II also refers to armed forces and armed groups, but not in the context of the rules relating to the use of force but rather the need for their existence for there to be a non-international armed conflict within the meaning of the Protocol.⁶² Further, the ICRC Commentary to this Protocol states that persons “who belong to armed forces or armed

⁶⁰ There is a good case to be made that the drafters of the Protocol intended “direct participation” to be narrowly defined; see Schmitt, *Humanitarian Law and Direct Participation*, (footnote 20 above), p.11.

⁶¹ Protocol II of 1977 Additional to the Geneva Conventions of 1949, art. 13(3).

groups may be attacked at any time”.⁶³

There is no provision in these treaties that would make it impossible for a PMC being considered such an “armed group” or even an independent party to a non-international conflict. If one accepts this theory, then all members of PMCs would be subject to attack whatever their individual function or activity (except religious and medical personnel and those *hors de combat*). This would be transposing an exact equivalent into a non-international armed conflict situation of the situation of combatants in an international armed conflict.

However, in the context of non-international armed conflicts, where the IHL *lex specialis* relating to combatant status is inapplicable, human rights law clearly applies. Under this law it would be unlawful to kill someone that could be arrested without risk.⁶⁴ The “armed group” approach presents additional serious difficulties. Attacking on the basis of membership of a group is likely to lead to targeted killings and to wide scale abuses because of inaccurate presumptions as to who is a member of the group, especially given the fluid nature of activities carried out for rebel groups, either willingly or not. Accuracy can only be achieved if attacks are limited to persons who are actually carrying out hostilities, although both this term and the temporal scope still needed to be defined. The motivations for this approach are not really relevant for PMCs which are distinct groups that knowingly put themselves into a hostile and unstable situation. However, in this author’s view, it would be inappropriate to extend the category of who can be attacked, merely in order to be able to include PMCs, given the implications for the rest of the population.

Given that PMCs regularly operate in non-international conflict situations, this lack of clarity places them in a confused legal situation. What is clear is that those members that are in the process of using force against the government forces or against a party to the conflict are subject to attack under either theory. This should come as no surprise and one must assume that PMCs knowingly undertake this risk. What is less obvious, however, is the situation of members of the group that do not have a combat function. The membership of an armed group theory would make them legally subject to attack even when not in the process of using force.

Given that the situation is not clear in IHL applicable to non-international conflicts, it would be unreasonable to interpret this law in a way that is incoherent with existing human

⁶² Additional Protocol II 1977, art. 1(1) refers to “armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups ...”

⁶³ Sandoz *et al.*, *Commentary*, (footnote 22 above), p.1453, para. 4789.

⁶⁴ This is because human rights law prohibits arbitrary deprivation of life and there is extensive case-law from the United Nations and regional human rights treaty bodies specifying that use of force may not be used unless arrest is not reasonably possible. See for a discussion of this practice in an armed conflict context: “Report of the Expert meeting on the right to life in armed conflicts and situations of occupation”, University Centre for International Humanitarian Law, Geneva, 1-2 September 2005, Section F, available at: www.uiclh.org/communication/Right_to_Life_Meeting_Report.pdf.

rights law. Therefore, even if one accepts the theory that in non-international conflicts all members of armed groups can be attacked, an exception should be made for members of the group who are in a situation in which they could easily be arrested.

State responsibility

State responsibility for actions of PMCs, depending on their status, function and authorization is discussed in chapter eight by Chia Lehnardt. The most relevant norms for the purpose of evaluating state responsibility are reflected in Articles 5 and 8 of the Articles on State Responsibility prepared by the International Law Commission⁶⁵ and states will be responsible for many of their actions by virtue of these norms.⁶⁶ For the purposes of this chapter, discussion will be limited to certain aspects of state responsibility that are specifically provided for in IHL.

Obligations and responsibility of the state hiring the PMC

The most important provision is the requirement that states “ensure respect” of international humanitarian law “in all circumstances”. This is laid down in Article 1 common to the Geneva Conventions and is considered to be customary law. As states have undertaken certain duties under humanitarian law, these cannot be avoided by giving them to PMCs. It logically follows, therefore, that states should ensure that PMCs are properly trained and that their contract contains clear rules of engagement.

If PMCs are members of the armed forces, states are required to instruct them in international humanitarian law⁶⁷ and such armed forces are also required to have legal

⁶⁵ Report of the International Law Commission on the work of its fifty-third session, 2001, UN Doc A/56/10, and commended to the attention of governments by the United Nations General Assembly in Resolution 56/83, 12 December 2001.

⁶⁶ This issue was explored in depth during the expert meeting on PMCs, (footnote 16 above), section E. State responsibility on the basis of status, function and due diligence under human rights law are in other sections of the report.

⁶⁷ This requirement is contained in many treaties. See, e.g., Hague Convention IV 1907, art. 1, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, art. 7(1), Additional Protocol I, art. 80(2), Convention on Certain Conventional Weapons 1980 art. 6, as well as in all four of the 1949 Geneva Conventions. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, commentary to Rule 142 (footnote 49 above), pp. 501-505.

advisers available.⁶⁸ If they are not members of the armed forces, a requirement to train them would need to be found in other provisions. Specific provisions relating to persons that are not members of the armed forces do exist in the Third and Fourth Geneva Conventions. Article 127(2) of the Third Convention provides that: “Any military or other authorities, who in time of war assume responsibility in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.” Article 144(2) of the Fourth Convention is similar: “Any civilian, military or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.”

The question as regards these Articles is whether the term “other authorities” implies governmental bodies, or whether one should concentrate on the expression “assume responsibilities”. When these were drafted governments did not have PMCs in mind. On the one hand, governments cannot be responsible for any private person that undertakes some activities that governments are required to do, such as relief shipments. On the other hand, it would be in keeping with the spirit of these provisions to require them to be applied to PMCs hired to undertake these responsibilities.

The Conventions also refer to the civilian population generally. The First and Second Geneva Conventions of 1949 provide that the state must disseminate the Conventions such that “the principles thereof may become known to the entire population, in particular to the fighting forces, the medical personnel and the chaplains”.⁶⁹ The Third and Fourth Conventions provide that states are to include the study of the Conventions “in their programmes of military and, if possible, civil instruction”.⁷⁰ In practice, states do not consider themselves under an obligation to ensure that all persons are instructed in international humanitarian law and tend to leave it to other actors, such as Red Cross societies and specialized academic centres to do so. However, PMCs hired by a state can hardly be considered as generally part of the civilian population. Many governments emphasize the need to train especially relevant personnel such as the judiciary, police and prison personnel.⁷¹ It would be in keeping with this approach to ensure that PMCs hired by states are so trained.

It is probably not necessary to fit the training of PMCs into a specific treaty provision as such training flows from the general requirement of states under Article 1 of the Geneva Conventions to “ensure respect” of the law and that training anyone they hire is inevitably part of this requirement. It is arguable that there is even no need to make reference to Article 1 as obligations under humanitarian law treaties are obligations of result. Therefore, if there is a violation by a PMC hired by the government and the

⁶⁸ Additional Protocol I 1977, art. 82; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Rule 141 (footnote 49 above), p. 500.

⁶⁹ First Geneva Convention 1949, art. 47; Second Geneva Convention 1949, art. 48.

⁷⁰ Third Geneva Convention 1949, art. 127; Fourth Geneva Convention 1949, art. 144.

⁷¹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (footnote 49 above), p. 507.

government did not train it, or ensure that it knew the rules, then it will be responsible for that reason: for its own omission in not properly fulfilling any specific requirement in the treaties.⁷²

Another avenue to explore is a possible duty of due diligence by parties to a conflict so that a lack of such diligence would make them responsible for the actions of private actors. Until recently, obligations and subsequent responsibility of states for violations by private actors have not been directly provided for under IHL. The only reference to such a concept is to be found in the ICRC Commentary to Article 91 of Additional Protocol I. This Article provides that a party to a conflict which violates the Geneva Conventions or Protocol is required to pay compensation. The Commentary provides, but without much authoritative support, that a state will similarly be responsible for the violations of a private actor if the state “has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances”.⁷³

However, in the context of the obligations of an occupying power at least, this dearth of material has recently changed. In the judgement of the International Court of Justice in the Congo against Uganda case, the Court found that Uganda, as an occupying power in the Ituri district, was responsible for actions of private actors. The Court stated that as Uganda had the duty under Article 43 of the Hague Regulations of 1907 to “ensure, as far as possible, public order and safety ... Uganda’s responsibility is engaged ... for any lack of vigilance in preventing violations of ... international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account”.⁷⁴

Such reasoning would clearly also cover the actions of PMCs. It is uncertain, however, whether this statement was made only because of the specific responsibility of occupying states which is very similar to the responsibility of states under human rights law for persons within their jurisdiction.

⁷² Report on PMCs, (footnote 16 above), Section E.1.b)

⁷³ Sandoz *et al. Commentary*, (footnote 22), p. 1057, para. 3660.

⁷⁴ ICJ, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment, 19 December 2005, ICJ Reports 2005, paras. 178-179.

Obligations and responsibility of other states

The interpretation of the term “ensure respect” in Article 1 common to the Geneva Conventions has in practice taken on a meaning that places some duties on states other than the hiring state. This is not an obligation of result, which would be unreasonable for third parties. On the basis of state practice, the study on customary international law has articulated this requirement as prohibiting the encouragement of violations by parties to a conflict and the requirement of third states to “exert their influence, to the degree possible, to stop” such violations.⁷⁵ In practice the latter has taken the form of diplomatic protest and various forms of collective measures.

The question here is whether states of incorporation or states in which there are PMC offices are required to do something by virtue of this legal norm. State practice in the application of this norm thus far does not include a lack of regulation or training amounting to a violation of this norm by such a state. However, such an activity would be a very good means of “ensuring respect” for the law and therefore any future practice regarding PMCs ought to envisage such actions as part of this requirement.

Criminal responsibility

All serious violations of international humanitarian law are war crimes⁷⁶ subject to universal jurisdiction.⁷⁷ This means that any state can give itself jurisdiction over such crimes irrespective of the nationality of the perpetrator or where the crime was committed. Particularly serious war crimes committed in international conflicts, known as grave breaches, are subject to obligatory universal jurisdiction under the Geneva Conventions,⁷⁸ although this is an obligation that has not been well observed.

War crimes can be committed not only by members of the armed forces but also by civilians.⁷⁹ Therefore members of PMCs who commit serious violations of international

⁷⁵ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Rule 144 (footnote 49 above), p. 509.

⁷⁶ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Rule 156 (footnote 49 above), p. 604.

⁷⁷ *Ibid.* Rule 157 at p. 604.

⁷⁸ First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146; Additional Protocol I, art. 85 (1).

⁷⁹ See Knut Doermann, *Elements of War Crimes under the Rome Statute of the*

humanitarian law will be guilty of war crimes, whether such crimes occur in international or non-international armed conflicts. Theoretically, therefore, such persons could be prosecuted in any state or before any international tribunal that has jurisdiction. However, not all states have adopted legislation enabling them to prosecute persons on the basis of universal jurisdiction and even those who have done so have adopted conditions such as residence or some other specific connection with the state.⁸⁰ A political unwillingness to try another state's nationals for activities that took place in another country has in practice had a significant dampening effect. Although there have been some trials on the basis of universal jurisdiction,⁸¹ these are very few and none yet of members of PMCs.

Another difficulty is that even if the legislation allows for prosecution of crimes committed abroad, either on the basis of universal jurisdiction or nationality of the offender, the authorities may not be willing to undertake it because the collection of evidence and hearing of witnesses from another country are both difficult and very expensive. PMCs may have been granted immunity of jurisdiction by the courts of the state where the crime was committed or such local courts may not be functioning in a situation of armed conflict. This can lead to impunity. It has been suggested that one way to overcome this difficulty would be for states of PMC nationals to use transportable courts in the theatre of operations.⁸²

If members of PMCs commit war crimes, there are two aspects peculiar to war crimes trials that may be problematic. The first is the doctrine of command responsibility and the other is the issue of superior orders; both are intimately linked to a regular army's command structure.

Command responsibility

The rule that commanders are responsible for crimes they have ordered to be committed⁸³ may be seen as comparable to incitement to commit a crime. However, there is also a rule that makes commanders and superiors criminally responsible for war crimes committed by their subordinates if such commanders or superiors knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures to prevent them. Commanders are also liable if, once war crimes have been committed by their subordinates, they do nothing to investigate,

International Criminal Court (Cambridge: Cambridge University Press, 2003), pp. 34-37.

⁸⁰ For a description of the legislation and case-law of States relating to the exercise of jurisdiction over war crimes, see: Henckaerts and Doswald-Beck, *Customary International Law*, (footnote 49 above) Vol.II pp. 3894-3931. A continually updated database of such national practice is to be found in the following ICRC website: www.icrc.org/ihl-nat.

⁸¹ *Ibid.*

⁸² Report on PMCs, (footnote 16 above), Section G.1.

⁸³ See, e.g., art. 25.3(b) of the Statute of the International Criminal Court.

report, or punish the persons responsible. It is generally accepted that such superiors can be civilian persons providing that they are effectively acting as a military commander.⁸⁴ The issue that would arise, as regards PMCs, is which person within the organization would be considered to be such a commander. If there were no particular hierarchy then the question would have to be one of fact in the circumstances at the time of the commission of the offence. This has yet to be tested.

The other issue is in which circumstances, if any, an individual state official, whether military or not, might be criminally responsible for war crimes committed by a member of a PMC. Could this be the person organizing the contract, especially if he or she knew that the PMC has committed offences before and is being sent on an assignment where such offences could well occur again? The International Criminal Tribunal for the Former Yugoslavia (ICTY) has identified as crucial the *de facto* control over the actions of subordinates.⁸⁵ Generally speaking, this will not be the case for someone hiring a PMC. If a command relationship exists, then practice also shows that the superior does not actually have to know of the existence of crimes. Constructive knowledge is sufficient — that is, the superior is criminally responsible if he or she should have known or consciously disregarded information that clearly indicated that a crime is about to be committed.⁸⁶ It would be unfortunate in the scenario just described to be able to clear oneself of all criminal responsibility that would normally accrue to a commander, by simply arranging a PMC to carry out certain tasks whilst knowing that violations are likely. For example, it would be a strange result if a commander would be guilty by virtue of command responsibility because he or she put officers known to be sadists in charge of interrogations, whereas a state official who hired a PMC that has allegedly “robust” techniques would not be. However, because of lack of *de facto* control in the latter case, this may well be the situation at present.

Superior orders

The other issue of interest is that of superior orders, which used to be a defence for a soldier, given the military duty to obey orders. This has not been available as a defence for some time, however, and the present rule is that obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act. This means, on the contrary, that if the subordinate did not know that the order was unlawful and its unlawful nature was not manifest, then obeying a superior order would be a

⁸⁴ See, e.g., art. 28 of the Statute of the International Criminal Court. Also, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Rule 153 and commentary, (footnote 49 above), pp.558-563.

⁸⁵ International Criminal Tribunal for the Former Yugoslavia (ICTY), *Delalic and Others Case*, Judgment, 16 November 1998 (IT-96-21-T), para.370.

⁸⁶ Article 28 (b) (i) of the Statute of the International Criminal Court.

defence. In domestic criminal law ignorance of the law is no defence. The issue again arises, therefore, of whether there can be a commander-subordinate relationship within a PMC, or whether this issue is totally irrelevant for any criminal prosecution concerning an employee of a PMC. Does it depend on whether a PMC can be seen as part of the armed forces, as discussed earlier in this chapter? Again, there is no precedent to directly answer this question.

Conclusion

As the legal situation of PMCs under international humanitarian law will depend so much on circumstances, both governments and the companies themselves must consider carefully into which legal categories they would like their activities to fall. It is unlikely that most PMCs are aware of their legal situation, although most must certainly be aware of the dangers associated with being considered a mercenary, especially in certain countries. The first issue to consider is if they wish to benefit from POW status. Although they might technically be considered members of the armed forces of a hiring state that is a party to an international armed conflict, provided that certain conditions are met, the need to ensure that they are subject to the civil and criminal jurisdiction of the state is paramount. Even more effective would be to be brought within the regular army's chain of command, although it is not the universal view that this is strictly necessary for this purpose. It is interesting to note that regular army members generally do not favour PMCs as they are seen as something akin to loose cannons that can cause more trouble than they are worth. A disinclination to perceive them as "combatants" unless they are brought within the chain of command is the natural off-shoot of this view.

The other element to take into account is that the relaxing of the rules, that had originally only granted POW status to members of the army, was undertaken to prevent people fighting for their country from being seen as common criminals. This patriotic sentiment is hardly appropriate for PMCs. Therefore, the question will be whether governmental decision-makers will interpret the treaties' provisions on the basis of the letter of the law or rather whether they will do so on the basis of their feelings of whether such companies have the moral right to benefit from such status. At a minimum, states hiring such companies ought to indicate how they view their legal situation.

A similar unfavourable view of persons not primarily fighting for their country is what lies behind the provisions denying the right to POW status for mercenaries. Although the conditions to be a mercenary are numerous and strict, members of PMCs may well qualify for this dubious status if they are not incorporated into the army and if either the company, or individual members, or both are not of the same nationality as, or resident in, a state party to a conflict. The latter point may be clarified through further state practice, but members with the "wrong" nationality should be aware of the additional danger.

PMCs should also be aware that the predominant view at present is that they may

well benefit from POW status if they are persons that accompany the army, but only provided that they do not fight. If they do so, not only will they be considered as no longer falling within the relevant provision of the Third Geneva Convention but also increase the likelihood of being seen as a mercenary as they were “recruited to fight”. Although they would still be subject to the benefits of the Fourth Geneva Convention, losing immunity from the criminal jurisdiction of the adversary can be serious.

Companies involved in hostilities in a non-international armed conflict also need to be aware that even members not actually having a fighting role may well be lawfully subject to attack. There is not much that such companies can do about this, other than warn persons working for them, as the law itself is not clear.

States that hire PMCs need to be aware that in most situations they will be responsible, under the doctrine of state responsibility, for violations of the law committed by such companies. Certain officials might even be criminally responsible for war crimes committed by PMC members, although this is much more unlikely. States need, therefore, to ensure that PMCs are trained in international humanitarian law or at a minimum insist on strict rules of engagement within the contract that are in conformity with that law. They also need to warn such companies that their members could well be tried as war criminals, in any state that has given itself jurisdiction, for violations committed in international or non-international conflicts.

Whatever position one takes on the morality of PMCs participating in conflict, it is important that the legal position of members of PMCs in any particular situation is clear to them in order to ensure that any risks they take are taken in full awareness of the potential consequences. Basic decency and the rule of law require this, as well as the basic protection of PMC members that all human beings are entitled to under fundamental human rights law and applicable humanitarian law. It is also important that civil and criminal responsibility for war crimes, and any other international crimes, is not lost through a lack of proper regulation and a lack of enforceable jurisdiction. Though it is incorrect, therefore, to suggest that PMCs operate in a legal vacuum, the interpretation of many of the norms as applied to PMCs will be clarified only through practice.

